

Reform without Change
A Sociological Analysis of Employment Legislation
and Dispute Processing in Japan

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Abbreviations and Special Terms

ADR: Alternative Dispute Resolution.

EEOL: Equal Employment Opportunity Law.

EWG: Employment Working Group, advisory council established under the Cabinet to advise the Prime Minister about desirable employment reforms.

HRM: Human Resource Management.

ILO: International Labour Organization.

LCL: Labour Contract Law.

LSL: Labour Standards Law.

MEXT: Ministry of Education, Culture, Sports, Science and Technology.

MHLW: Ministry of Health, Labour and Welfare.

MIC: Ministry of Internal Affairs and Communications.

SME: Small and Medium-sized Enterprises.

TUL: Trade Union Law.

WWIN: Working Women's International Network, women's activist group based in the southern-central region of Japan (Kansai).

Note: all names have been abbreviated according to their English-language translations given in the text.

List of Japanese Terms Frequently Used in the Text

Assen: mediation, a form of ADR.

Chōtei: judicial conciliation.

Doryoku gimu: duty to endeavour.

Gentei seiki koyō: limited regular employment.

Gentei seishain: limited regular workers.

Giji pāto: 'false part-timers', also called full-time part-timers, are workers who have the same amount of working hours and perform the same kind of job as regular employees but are classified as 'part-time' workers by the company in which they are employed.

Haken rōdō: labour dispatching (agency work).

Haken rōdōsha: agency worker.

Hiseiki koyō: non-regular employment.

Mugentei seiki koyō: unlimited regular employment.

Mugentei seishain: unlimited regular workers.

Nenpōsei: annual wage system.

Rōdō ūinkai: Labour Relations Commissions.

Rōdōkyoku: Prefectural bureaux of the MHLW.

Rōdō seisaku shingikai: an advisory council existing under the MHLW whose task is to deliberate and give advice on national labour policy to the Diet.

Rōdō Shinpan Hō: Law on the Procedure for Handling Individual Labour Disputes, enacted in 2004.

Rōdō shinpan seido: a court-annexed, non-contentious ADR procedure for the resolution of employment disputes.

Seikashugi: performance-related pay.

Seiri kaiko: collective dismissals due to economic and organisational reasons.

Soshōjō no wakai: settlement in the course of litigation.

Tanjikan rōdōsha: short-time worker.

Yatoidome: non-renewal of an employment contract.

Note: all Japanese terms are romanized in the Hepburn system, with macrons to show long vowels. Long vowels are not shown in the case of familiar place names such as Tokyo. Unless stated otherwise, all translations of Japanese texts are my own.

Abstract

This thesis sheds new light on the study of law in Japan by exploring legislative interventions and dispute resolution processes in the Japanese field of employment. The academic literature about the legal system of Japan has produced valuable research about various areas of Japanese law, from attempts at explaining patterns of rights assertion in the country to more recent studies about the legal reforms launched by the government of Japan starting from the 2000s. However, it has rarely considered the employment field as a fruitful subject for research. Nonetheless, in the past thirty years, employment has been one of the areas of Japanese law to experience considerable reform. Against the backdrop of the changes in the composition of the Japanese workforce and the bursting of the economic bubble of the beginning of the 1990s, the government of Japan assumed a more prominent role in the regulation of employment relations. In light of these developments, this thesis contributes to the debate on the role of law in Japan by examining this rarely investigated area of the Japanese legal system. Specifically, it focuses on the legislative interventions of the Japanese government to regulate the peripheral workforce of the labour market, namely women and part-time workers, and procedures for the resolution of employment disputes. In doing so, it demonstrates that the efforts of the legislators to enhance the creation of a more inclusive labour market have been fundamentally constrained by ideological and institutional factors, and resulted in an uneven distribution of legal resources among workers which exacerbated existing employment status divisions. This, in turn, has translated into unequal access to justice, affecting the extent to which different categories of workers can obtain redress through the legal apparatus.

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Dedication

Guidami tu, stella variabile, fin che puoi...

Lead me, variable star, as long as you're able...

Vittorio Sereni, *La malattia dell'olmo* [The disease of the elm]

To my friends

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The Author

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Introduction

This thesis is a contribution to the debate on the role of law in Japan, focusing on a specific area of the Japanese legal system: legislative reforms and dispute processing in employment. The literature on the Japanese legal system has produced a considerable amount of valuable research about the role of law in Japan. A much debated issue has been Japan's low formal litigation rates and the preference given to social norms rather than to strict legal rules as the standard governing the regulation of social relations. Some scholars (Kawashima, 1967; Noda, 1976; Rokumoto, 2004) have drawn a link between the cultural predispositions and the legal behaviour of the Japanese people, thereby explaining the avoidance of the formal legal system in terms of a weak 'legal consciousness' (*hō ishiki*).¹ Others have challenged this view by drawing attention to the existence of institutional barriers impeding access to the legal system (Haley, 1978), to economic disincentives discouraging the recourse to formal litigation (Ramseyer, 1988) and the encouragement of informality as a conscious strategy of Japanese governmental *élites* to defuse social conflict and maintain control over the pace of social change (Upham, 1987). More recent scholarship has attempted to move the scope of the debate forward by adopting a more socio-legal approach for explaining the dynamics of rights assertion in the country (Feldman, 2000), by examining the relevance of the legal in everyday settings (West, 2005) and by investigating the 'legal turn' (*hōka*) of Japanese society following the reforms started by the Japanese government in response to the recommendations of the Justice System Reform Council (*Shihō Seido Kaikaku*

¹ Although the expression *hō ishiki* had previously been used in the legal literature on the subject in Japan, the publication in English of the article 'Dispute Resolution in Contemporary Japan' by Takeyoshi Kawashima (1963) marked the starting point of the debate on Japanese legal consciousness. As a matter of fact, Kawashima subsequently expressed dissatisfaction with the translation of the term as 'legal consciousness' showing a preference for the French '*mentalité*' instead, more apt to convey his notion of *hō ishiki* as including both subconscious as well as conscious elements of a broader sociological phenomenon (Miyazawa, 1987). In the present work, the English translation will be followed in recognition of the fact that it has entered the conventional use in the relevant literature.

Shingikai)² in 2001 (Foote, 2007a; Foote, 2013; Vanoverbeke *et al.*, 2014; Vanoverbeke, 2015); whilst some Japanese scholars have in recent years tried to readdress the old question of Japanese legal consciousness through the use of rigorous empirical research (e.g. Matsumura and Murayama, 2010; Kashimura and Bushimata, 2010).

These studies have provided valuable insights into the functioning of the Japanese legal system. However, a substantial body of this literature has been dominated by the tendency to have an externally oriented perspective on the legal system, strikingly focused on the external side of legal reforms or encounters with the law. That is, they have addressed issues such as the role of culture, social norms or institutional constraints in explaining the role of law in Japanese society. In addition, most of these studies have also had the tendency to rely on a notion of law and the legal system as a unitary whole, which often translates into blanket generalisations about law's function in society. Although this kind of analysis has contributed to advancing our understanding of the Japanese legal system in many respects, it tells us only half of the story. Therefore, my study takes an internally oriented perspective on the examination of Japanese legal institutions³ and focuses on how insiders to the legal system or other stakeholders understand them, as well as their own role in relation to the system, so as to shed light on the internal dynamics driving the form, content and reception of legal reforms. Furthermore, instead of assuming the holistic character of law and the legal system, I take a view which posits state legal systems 'as a collection of institutions, each with their own conflicting activities (...) often with conflicting interests and concerns, loosely connected at certain points of intersection and co-

² The Justice System Reform Council was an advisory body established in July 1999 under the Cabinet with the objective of investigating the state of the judicial infrastructure in the country and make recommendations to improve its functioning.

³ In the present work, the term 'legal institutions' will be used to mean 'patterns of official action and expectations of action organised around the creation, application and enforcement of legal precepts or the maintenance of the legal order' (Cotterrell, 1992: 3, nt. 2).

ordination’ (Tamanaha, 1997: 146). This kind of perspective can be illuminating in bringing into focus the way characteristics pertaining to a particular legal sub-system may result in specific legal outcomes and how these may, in turn, have implications for aspects of the macro legal infrastructure. In doing so, this thesis is the first empirical English-language study of Japanese employment law and institutions. Drawing simultaneously on primary legal sources and original empirical material, it explores the legislative efforts of the Japanese government for the enhancement of a more inclusive labour market, and dynamics of dispute processing in the country, with a particular focus on two alternative dispute resolution procedures (hereafter ADR⁴) – an administrative mediation scheme established in 2001 under the Ministry of Health, Labour and Welfare (hereafter MHLW) and a court-annexed ADR procedure known as *rōdō shinpan seido*⁵ which entered into force in 2006 as a result of the recommendations of the Justice System Reform Council.

This introduction first describes the research objectives of the thesis before explaining the significance of the study and outlining the thesis structure.

Why employment: research objectives and questions

Employment law and dispute processing have rarely been a widely researched topic in the academic literature about Japan. Most scholars have investigated the subject of Japanese employment relations by casting the analysis within an industrial relations

⁴ Alternative dispute resolution, or ADR, refers to methods aimed at resolving a disagreement or controversy between two parties alternative to formal litigation in court. As a matter of fact, in recent years, the meaning of the acronym ADR has shifted from ‘alternative’ dispute resolution to ‘amicable’ dispute resolution, so as to indicate all those methods of settling disputes reached through a consensual agreement of the parties (usually with the help of a neutral third party acting as a moderator), thereby excluding methods such as arbitration which, instead, produces a third-party decision legally binding on disputants (a so-called ‘award’). This new definition has been explicitly adopted by both the International Chamber of Commerce (2001) – leading authority in the field of processes for the resolution of international commercial disputes – and also by the EU (2002). In this work, however, I will use the acronym in its original meaning because of the adversarial nature of the *rōdō shinpan* procedure examined in this study, which can result in a decision enforceable at law.

⁵ As we shall see in chapter 4, the *rōdō shinpan seido* is a court-annexed ADR *procedure* for the resolution of employment disputes. In the English language literature, *rōdō shinpan* has often been referred to as ‘labour tribunal’. The expression was translated as such for the first time by the newspaper *Japan Times* and adopted quite uncritically by subsequent scholars and observers. Given the inaccuracy of this translation and in the absence of a better rendering, in the present work the use of the Japanese original will be preferred.

theoretical framework, often focusing on the examination of practices of employment at either national or firm level (Abegglen, 1958; Gordon, 1985; Rebick, 2005; Keizer, 2010; Imai 2011). Similarly, there are very few studies in the English-language literature about the Japanese legal system concerned with employment issues. The few exceptions have mostly debated the extent to which legal rules and judicial decisions can be instrumental in promoting desirable social and legal changes or on those instances where the law is used as a form of social control in the management of conflict (Foote, 1996 and 1997; Upham, 1987). In doing so, however, these studies have failed to problematise the genesis of legislative reforms and judicial creation of norms, and have often placed the focus of interest on issues related to regular employment (*seiki koyō*).⁶

There are several reasons why the dynamics of legislative efforts and dispute processing in employment represent a fruitful topic for research, deserving systematic and thorough examination.

First, the nature of the subject makes it a good illustration of the fragmentary nature of legal institutions, mentioned above, thereby bringing into focus the necessity of paying attention to the competing and conflicting interests of different participants in the legal system when discussing the formulation and reception of legal reforms. Employment law is one of the best exemplifications of this reality as it encompasses at least three different institutional players having a stake in the way employment relations are managed: employers and employers' organisations, workers and trade unions, and the state. As argued by Collins *et al.* (2012: 5), there is a fundamental conflict of interests between these actors which lies in the fact that 'employers seek to maximise the return on their investments, whereas workers seek the highest price available for

⁶ In contrast to other OECD countries, where the defining characteristics of standard employment are the existence of a full-time and permanent contract of employment, the expression 'regular employment' is used in Japan to refer to any employee who is given full membership to the so-called 'life-time employment' system (Sugeno, 2012: 206). For a detailed discussion of the Japanese employment system see *infra*. chapter 2.

their labour, which digs into the employers profits'. On the other hand, the state, in its role as regulator, is engaged in a delicate balancing act of adjusting these competing interests, whilst pursuing its own social goals (*ibid.*).⁷ Therefore, the analysis of employment legislation and dispute processing provides a valuable case study through which to examine the role of law in society because, more than with other subjects, it becomes easier to bring to the surface the processes by which legal rules are negotiated and compromised, the interests which had an influence on their formation and the factors which come into play in shaping perceptions about what constitutes meaningful redress in response to perceived breaches.

Second, there is the fact that Japan, in line with the trends of other OECD countries,⁸ is experiencing a crisis of its system of industrial relations with falling unionisation rates, the decline in the level and importance of collective bargaining, and the consequently diminished influence of trade unions over employment and social policy making (Oh, 2012; Imai, 2011). In addition, the Japanese system of industrial relations which was developed after the Second World War has been resting on a carefully crafted management-labour equilibrium whereby workers are guaranteed job and wage security in exchange for their full commitment to the company's objectives of production and profit (Gordon, 1985 and 1993; Nitta and Hisamoto, 2008). This social contract, however, has found its application only in the Japanese internal labour market. That is, non-regular peripheral workers have been excluded from the scope of its coverage, also given the fact that this sector of the workforce has hardly been at the forefront of unions' organising efforts (Hanami and Komiya, 2011: 169). Starting from the 1990s, however, there was a steady growth in the percentage of non-regular workers, which reached 38% of the workforce in 2012 (Araki, 2009: 410; MIC, 2013:

⁷ As we shall see in the course of this enquiry, this is in many respects an oversimplification given the fragmentary nature of employers' and workers' representative organisations and the existence, within the state apparatus, of different branches each with its own characteristic activities and specific agendas.

⁸ Data relating to trade union density trends in OECD countries are available on the OECD website at the address <https://stats.oecd.org> (last accessed 3 September 2016).

7). Further, the composition of non-regular employment also registered a change, with increasing numbers of young school graduates occupying non-regular positions because of the difficulty of finding permanent, full-time employment (Nitta and Hisamoto, 2008: 69; Tarōmaru, 2009: 13 – 14; MIC, 2016: 6⁹). Against the backdrop of these developments, gaining an understanding of the rationale which has informed the Japanese government’s policies aimed at the inclusion of peripheral workers in the core of the labour market becomes of primary importance. Bringing to light the forces and tensions which have contributed to shape the form and content of Japanese employment reforms can help to better capture the legal and social implications of a given employment policy which, in turn, has the potential to illuminate alternative courses of action.

Lastly, and related to the previous point, the number of individual employment disputes in Japan has been constantly increasing from the mid-1990s as a result of the combination of the falling unionisation rates, and subsequent drop in collective labour disputes, the persistent economic recession leading many firms to restructure, and the diversification of the workforce (Sugeno, 2012: 806 – 807; Yamakawa, 2013: 901). This qualitative shift in the pattern of labour related disputes in the country did not go unnoticed by the Justice System Reform Council, which therefore identified the field of employment related grievances as one of the areas requiring to be reformed, thereby calling for the creation of new specialised and user-friendly procedures tailored to providing solutions to employment problems (Ishizaki *et al.*, 2011: 7 – 8). The first response of the Japanese government to these recommendations was the introduction, in 2001, of a nationwide administrative consultation and mediation scheme managed by the local bureaux of the MHLW. This was followed in 2004 by the creation of the *rōdō*

⁹ According to the last Labour Force Survey conducted by the MIC (2016), 26.9% of males and 12.3% of females stated to be working in non-regular employment because they could not find regular work. However, the figures for the year 2015 have decreased slightly compared to those of 2014.

shinpan seido, a non-contentious procedure for the resolution of employment disputes to be administered by district courts.¹⁰ The recommendations of the Justice System Reform Council, and the implementation process that followed, have represented a real turning point in the development of the Japanese legal system, and have been in recent years one of the foci of the academic legal literature about Japan. Yet, the steps which have been taken in the employment area as part of the justice system reforms have hardly been under the spotlight of scholarly discussion. However, given the changes highlighted above and the importance that work has in Japanese society, the subject of employment grievances and dispute processing deserves close study in its own right.

This thesis will address the aforementioned issues by examining two functions of law in the field of Japanese employment relations. The first is law as an agent of change, considered as a redefinition of an existing normative order to promote desirable reforms at the societal level (Mayhew, 1971: 195). The second is law as a means for processing disputes, with a focus on the extent to which legal rules are amenable to be invoked both strategically to disrupt the established legal order (Friedman, 2005) and instrumentally as a method for obtaining redress (Vago, 2012: 255 – 307). Rather than focusing on issues of legal consciousness, culture or social norms in explaining legal reforms and encounters with the law in Japan, this thesis will investigate the ideological dimensions of law, thereby considering the currents of thought and ideas which have informed legislative and judicial responses to perceived social problems, as well as their reception. In doing so, it will focus specifically on the views and perceptions of insiders to the legal system and other stakeholders in order to explore the processes by which reforms were arrived at. In addressing these issues, I seek to answer several key questions. What is the legal ideology which has informed the legislative reforms in the field of employment in Japan in the last thirty years? What influence did the

¹⁰ In Japan district courts are the courts of first instance.

configuration of the policy making process, and the access that certain institutional actors have in it, have on the affirmation and perpetuation of such an ideology? What other currents of thought have operated in conjunction with the legal ideology in the employment arena? What have been the implications of the form and content of employment reforms for the organisation of Japanese employment relations and distribution of legal capital among different segments of the workforce? What are the factors that constrain the invocation of law in the employment field? And, if formally invoked, how does the judicial apparatus respond to Japanese workers' grievances? To what extent do the ADR procedures recently introduced in the country to manage employment disputes represent a viable route in offering redress and expanding access to justice? Finally, how do institutional actors involved in the process of legal reforms or other stakeholders with a relation to the legal system assess the formation, content and implications of specific reforms? Alongside these questions, I also consider what the examination of the dynamics in employment law and dispute processing can tell us about broader issues of the Japanese legal system, asking what implications this study raises for our understanding of the 'role of law' in Japan more generally.

Significance of the study

My research seeks to capture the dynamics of employment policy and patterns of dispute processing in Japan by adopting an interpretive sociological approach to the study of law. As such, there are three major areas where this study makes an original contribution.

The first and most obvious contribution is to the academic literature about the Japanese legal system. Despite the existence of the previously mentioned studies, the legal aspects of Japanese society continue to be an inadequately explored field. Moreover, with the exclusion of few exceptions (Colombo, 2011; Vanoverbeke *et al.*,

2014), most of the existing research has been conducted from a US common law perspective often rooted in positivist views of law, and making little use of qualitative methods of investigation. This kind of approach, however, tinged by an inherent trust in the potentialities of legal action and legal processes, often fails to problematize the relationship between legal institutions and the social and ideological environment in which they exist, thereby not paying enough attention to the examination of the structural biases which find expression in both legal rules and dispute resolution processes. By contrast, my study takes an approach informed by qualitative sociology which feeds into a conception of law as a form of ideology, and focuses on the examination of a field, employment, where the negotiation and adjustment of conflicting interests that lie behind legal institutions are more visible given the nature of the employment relationship and the unequal bargaining power between the parties. In doing so, the study sheds light on the way the legal apparatus distributes legal resources unevenly among social groups and the way these inequalities are in fact reflected and reproduced in dispute resolution processes. My research can therefore contribute towards creating a new perspective on the study of the role of law in Japan.

Second, my thesis can offer new insights into the functioning of the Japanese employment system. As highlighted in the previous section, the examination of Japanese employment relations has often been locked into a perspective which has placed the focus of interest on practices of employment and on the importance of the interplay between management and labour in shaping them, thereby neglecting the role that legal rules play in lending legitimacy to established employment practices, thus being instrumental in reproducing and reinforcing them. In contrast, by investigating the legislative interventions aimed at regulating peripheral employment relations in Japan and the processes which led to their adoption, my study offers a complementary explanation of the persistent dual nature of the Japanese labour market. In addition, the

analysis of the implications that legislative strategies have for the organisation of employment relations, especially in terms of the exacerbation of employment status divisions and the ensuing weakening of solidarity ties among workers, combined with the examination of the functioning of state agencies' administered procedures tailored to the resolution of employment problems, helps to reveal the challenges presently faced by the Japanese labour movement, pointing to important insights often ignored by the industrial relations literature about Japanese employment relations.

Finally, my study adds an important contribution to the academic literature about Japan by exploring an aspect of Japanese society, law, which has often been neglected or altogether ignored by scholars in the field. The Japanese Studies literature has produced valuable research which has contributed to advance our understanding of Japan in many respects. These studies, however, have been dominated by an interest in the literature, history or economy of the country, and often left unexplored the area related to the functioning of the Japanese legal system and its role in Japanese society. Yet, given that law is a key mechanism for social regulation providing the framework for social action and interaction, the investigation of the legal dimension of society is very important for understanding the complex functioning of a social setting. Further, the legal reforms initiated by the Japanese government at the beginning of the 2000s, aimed at increasing the role played by legal institutions in the country, will likely alter the landscape of the organisation of Japanese social relations, thereby making the operation of Japan's legal system a field of enquiry difficult to ignore. By using a perspective informed by sociology of law on the examination of Japanese employment relations, my thesis seeks to contribute to fill the gap in the Japanese Studies academic literature, helping to draw attention to the importance of investigating legal dynamics for a thorough understanding of Japanese society.

Thesis structure

This thesis is an exploration of Japanese employment law and employment dispute processing from the point of view of interpretive sociology of law. It is composed of four themed chapters. Chapter 1 deals exclusively with a discussion of the thesis' theoretical position and research methodology, explaining the perspective on what kind of institution law is and its function in society. I place my study in the conflict constituency of sociological readings of law, thereby casting law in ideological terms rather than as a neutral agent in society. In this chapter, I also describe the research methods adopted for the collection of data – namely, documentary analysis and in-depth, semi-structured interviews with relevant informants.

Chapter 2 builds on the notion of law as ideology and examines the currents of ideas which operated in conjunction with, and simultaneously bore influence on, the legal ideology which has informed much of the reforms in the field of employment carried out in Japan in the last thirty years. Specifically, I analyse two ideological dimensions. The first pertains to the Japanese employment system, and the consolidation of regular employment as the dominant ideological model of reference for the organisation of employment relations. The second concerns the role of the ideology of the rule of law as a key driver of much of the reforms of the Japanese legal system started from the 2000s.

Chapter 3 investigates the dynamics of employment reforms in Japan, by focusing on how legal strategies can be used as agents of change in expanding the coverage of employment rights. The chapter is thematically divided into two parts. The first is a descriptive overview of the historical development of the discipline in the country, and of the portfolio of overlapping regulatory techniques adopted by the Japanese government at different points in time. The second, analytical part problematizes the emergence and articulation of the employment reforms aimed at

regulating the periphery of the Japanese labour market by considering the views and perceptions of informed actors and the decision-making process which led to the reforms. By doing so, I demonstrate how the attempts of the Japanese government to foster meaningful change in the normative order of employment relations in the country have been fundamentally constrained by a combination of ideological and institutional factors. The chapter also contributes to shedding light on the implications that the use of certain regulatory approaches has had for the organisation of the Japanese labour market.

Chapter 4 is an examination of the processes for the resolution of employment disputes in Japan. In this chapter, I first draw attention to the necessity of a contextualised approach when discussing the dynamics of invocation of law by bringing into focus the factors which constrain Japanese workers' decisions to mobilise the legal apparatus to obtain redress. Subsequently, I challenge the image of the Japanese judiciary's activism, demonstrating how judicial decisions are likely to reproduce the biases embedded in applied legislation, and are conducive to change only inasmuch as the ideological climate of the social environment in which judges operate allows it. The rest of the chapter evaluates the functioning of the two employment ADR methods introduced by the Japanese government in response to the 2001 recommendations of the Justice System Reform Council by examining the views of informed actors interacting in various ways with these procedures. The analysis reveals that the value that relevant actors attach to the introduction of employment ADRs as meaningful mechanisms for dealing with employment grievances is strongly dependant on their ideological position in relation to the 'proper' way of dealing with employment disputes. The examination further highlights the importance of the two procedures in expanding access to justice for Japanese workers, but also calls attention to the existence of patterned disparities affecting different types of grievances which enter the employment ADR system.

'Research requires a theorised objective and
a theorised method of attaining it'
(Sumner, 1979: 59)

Chapter 1

Theoretical Framework and Research Methodology

Introduction

This study takes a sociology of law informed perspective on the examination of the Japanese legal system. The aim of this chapter is therefore to provide an outline of the theoretical and empirical framework adopted in examining the way the system has shaped the legal and judicial arena for employment relations in Japan.

‘The sociology of law employs social theories and applies social scientific methods to the study of law, legal behaviour and legal institutions in order to *describe* and *analyse* legal phenomena in their social, cultural and historical contexts’ (Banakar and Travers, 2013: 2; emphasis added). From this definition, it is possible to identify two basic characteristics of the study of law from a sociologically informed point of view. First, it is a standpoint which implies going beyond purely normative and procedural theories of law and justice. These theories tend to the examination of the legal system in its own terms, detaching it from the social and cultural context in which it exists. They view legal rules merely as elements of pure doctrine (Cotterrell, 1995: 24), and are often tinged by an inherent trust in the fairness of the due process (Rawls, 1971). However, as rightly pointed out by Cotterrell (1992: 2) and Berrey *et al.* (2012: 2 – 3), there are two fundamental shortcomings attached to these approaches to the study of law and justice. On the one hand, normative legal theory tends to neglect considerations of policy which often lie behind particular legal strategies; on the other hand, procedural justice theories may ‘sanitize the conditions in which legal disputes occur’ (Berrey *et al.*: *ibid.*) by forsaking issues such as the unequal distribution of resources among disputants which can effectively hamper access to formal justice (see, e.g., Galanter, 1974).

By contrast, a sociologically rooted approach to the study of law has the potential to overcome these limitations because it gives importance to the social and cultural environment in which legal institutions exist, thereby revealing the structural biases that are often embedded in both legal rules and dispute resolution processes (Galanter, *ibid.*; Bourdieu, 1986). Moreover, precisely because it understands the legal field as one of the fields of social experience, sociology of law makes use of empirical material in order to expose the nature of law as a social phenomenon. However, in contrast to socio-legal studies, which have often been criticised for being nothing more than a ‘jumble of case studies’ (Friedman, 1986), a sociological study of law entails analysing legal phenomena with a ‘sociological imagination’ (Mills, 1959), i.e. understanding law ‘as interacting in complex ways with the social environment it purports to regulate, and try[ing] always to approach these matters *systematically* with a constant sensitivity to the need for specific empirical data and rigorous *theoretical* explanation’ (Cotterrell, 1992: 6; emphasis added).

The sociological perspective adopted here is the one pertaining to the tradition of interpretive sociology. According to Weber (1978: 4), the founder of this approach, ‘sociology (...) is a science concerning itself with the interpretive understanding of social action and thereby with a causal explanation of its course and consequences’. This definition has two implications. First, in contrast to sociological positivism, interpretive sociology refutes the notion that society is an observable object external to the observer. On the contrary, the latter is a social being and, as such, empathically relates to other social beings in order to gain an understanding of the perceptions and meanings guiding social interaction (Deflem, 2008: 37 – 39). It follows that interpretive sociology excludes the possibility of a totally objective attitude on the part of the observer. The second implication stemming from the notion of sociology as posited by Weber is that emphasis is placed on understanding the subjective meaning of social

actors, rather than on measuring regularities of social action (Weber, 1978: 8). That is, ‘to understand social action as *meaningful* to those engaged in it’ (Cotterrell, 1992: 12; emphasis in original).

The use of the aforementioned interpretivist approach is not free of difficulties. According to Tamanaha (1997: 71), one obvious weak point is the tendency of interpretive sociology to concern itself with micro-analysis of meaning-oriented behaviour, thereby neglecting to take into account the broader macro conditions which may stifle social action. However, to counteract this limitation, chapter two is concerned with providing a systematic outline of the broader economic and legal forces which are currently influencing the conditions under which major legal developments in the field of employment in Japan have taken place. Moreover, as argued by Trow (1957: 33): ‘the problem under investigation properly dictates the methods of investigation’. My study seeks to examine the motives, views, and perceptions with regard to legal and dispute resolution processes of various social actors when relating to legal institutions in the Japanese field of employment. This makes the use of interpretive sociology, with its focus on small-scale social interaction, the most appropriate choice to the subject under examination.

Against this backdrop, the following sections will discuss the main theoretical and analytical conceptual models adopted in this study for the examination of the Japanese legal system, as well as the methods employed for the collection and analysis of the empirical data which contributed to inform these theoretical perspectives.

1.1. What is law?

It would be impossible to build an analysis of law as one of the areas of social interaction without first clearly drawing the boundaries of our field of enquiry. The aim

of this section is therefore to outline a concept of law as used in the course of my investigation.

How we define 'law' has been one of the most addressed questions in both the legal and socio-legal field (Cotterrell, 1992: 38 – 43; Tamanaha, 1997: 91 – 93; Vago, 2012: 8 – 10). To date, a clear-cut and unequivocal definition is still missing, and some scholars became so frustrated with the issue as to give up the attempt of conceptualising what law is (Tamanaha, 1997: 91). However, as rightly argued by Tamanaha (*ibid.*: 92), it is impossible to start a sociological investigation of a legal system without first identifying the object to be studied. Therefore, in this section, I will, first, survey some of the definitions of the concepts of law which have characterised normative and sociological theories; and, second, introduce the analytical notion of law which I will use in this study.

According to Cotterrell (1995: 24 – 25), it is possible to distinguish two broad approaches to the conceptualisation of law. The first is the notion pertaining to legal positivism and normative legal theory. In this conceptual framework, law 'is understood to exist only in concepts, rules and other elements of doctrine developed in or implicit in legal practice' (*ibid.*: 24). The origin of this view of law can be traced back to legal positivism theory as developed by John Austin. In this view, 'law' is only that which stems from the legitimate political authority of the state: it is typically expressed through legislation, interpreted by judges within the limits of courts' jurisdiction and backed up by state sanctions. Thus, from this standpoint, law constitutes a distinctive and coherent body of knowledge and practices which functions following an internal logic of its own creation, and exists separately from social, political or historical considerations (Kelsen, 1945).

It was not long before such an understanding of law came to be challenged, and a second sociologically informed and empirically oriented approach developed. In

contrast to the first, which seems to have developed rather advanced definitions of law (Cotterrell, 1995: 27), sociological understandings of law have tended to be eclectic and less refined, producing ‘as many definitions of law as there are theorists’ (Vago, 2012: 8).¹¹

In general terms, we can distinguish two main groups (Tamanaha, 1997: 93). The first group is the one which falls under the label of ‘legal pluralism’ (Merry, 1988; Griffiths, 1986). The term is of relatively recent origin, and encompasses heterogeneous outlooks on law, ‘ranging from the recognition of differing legal orders within the nation-state, to a more far-reaching and open-ended concept of law that does not necessarily depend on state recognition for its validity’ (Griffiths, 2002: 289). The common denominator is, however, the belief that law can take many forms, and the state is the repository of but one of them.

The sociologist Eugen Ehrlich and the social anthropologist Bronislaw Malinowski were among the first scholars to develop a pluralistic conceptualisation of law. Ehrlich, in particular, advanced his theory of the ‘living law’ as an explicit critique of the concept of law central to legal positivism. His starting point was the recognition that formal legal rules do not reflect the ‘rules of conduct’ that regulate actual patterns of behaviour in society. This is because the latter consists of social associations – i.e. a ‘plurality of human beings who, in their relations to one another, recognise certain rules of conduct as binding, and (...) actually regulate their conduct according to them’ (Ehrlich, 1936: 39). These rules of conduct, in turn, constitute the core of Ehrlich’s concept of ‘living law’, ‘the law which dominates life itself even though it has not been posited in legal propositions’ (*ibid.*: 493). From a different research context, Malinowski shared with Ehrlich a similar view of law. As mentioned, Malinowski was a

¹¹ According to Cotterrell (1995: 27) this is to a certain extent understandable since, within the field of the sociological study of law, a concept of law has often represented a starting point around which to organise an empirical enquiry rather than an end in itself as is the case in normative legal theory.

social anthropologist who conducted an ethnographic study of a tribal society in the Pacific Islands of Melanesia. In his search for ‘rules of custom as they function in real life’ (Malinowski, 1926: 125), he found that, among the Trobriand of Melanesia, legal rules reveal themselves as a ‘class of binding rules which control most aspects of tribal life’ (*ibid.*: 66).

Pluralistic theories of law, which gained momentum during the 1980s especially through the work of social scientists such as Sally Falk Moore and Chiba Masaji, can be revealing in so far as they are capable of exposing the cultural diversity of contemporary societies, and challenge the state-centric notion of law as the sole form of social control and normative order (Banakar and Travers, 2002: 285 – 286). However, they also suffer from two important shortcomings. First, early studies such as Ehrlich’s and Malinowski’s, which see law in the actual patterns of behaviour within a social group, have proven unable to distinguish the legal from other forms of social ordering, i.e. to show when and on what basis certain customary practices become legal (Tamanaha, 1997: 95). Second, especially those scholars who understood law as existing at various levels of society (c.f., e.g., Gurvitch, 1947), have been criticised for failing to explain the relationship between these different levels of law (Cotterrell, 1995: 30).

In contrast to the above-mentioned definitions of law, the second group of legal sociologists who attempted to give a definition of law focuses and builds on a paradigm of law as state law. The most influential definition of law within this conceptual framework remains the one elaborated by the German sociologist Max Weber. In his monumental work *Economy and Society*, he characterises law as an order which is ‘externally guaranteed by the probability that coercion (physical or psychological), to bring about conformity or avenge violation, will be applied by a staff of people holding themselves especially ready for that purpose’ (Weber, 1978: 34). Thus, in Weber’s view, law possesses three essential traits that make it distinct from other forms of

normative order such as custom or convention. First, compliance to law is ‘externally guaranteed’, i.e. compelled. Second, there exists a coercive apparatus which pressures people to comply. And third, such coercive apparatus is administered by officials whose role is the enforcement of legal rules.

It is clear that Weber’s definition of law finds a solution to the unresolved issue facing Ehrlich and Malinowski, namely the problem of distinguishing norms which are distinctively legal from those which are not (Tamanaha, 1997: 97 – 98). In Weber’s sociological vision, inasmuch as there is an institutionalised system of norms enforcement, there are legal norms. Other forms of normative ordering are customary or conventional, but they are fundamentally different from a legal order. Weber’s state-centric notion of law has served as a useful analytical tool for many scholars, especially those adopting Marxist approaches to the study of law (Cotterrell, 1995: 28 – 29). However, it has also been criticised on two important scores (Vago, 2012: 9). First, it was argued that the emphasis Weber put on coercion to guarantee compliance tends to overshadow other factors that may induce people to comply. Second, the definition proved particularly impractical for those social scientists, legal anthropologists *in primis*, interested in examining legal phenomena in cross-cultural or historical perspectives.

Another important contribution to the conceptualisation of law within the state law model comes from Donald Black. Black (1976: 2) equates law with ‘governmental social control’. In its original connotation, social control was intended to mean the ‘capacity of a society to regulate itself’ (Janowitz, 1978: 20). This definition, however, was subsequently displaced in favour of a narrower meaning describing social control as ‘the process of developing conformity’ (*ibid.*). This latter notion became the building block of a consistent body of sociological literature on social control, focusing in particular on mechanisms of norm enforcement and societal responses to deviant

behaviour. However illuminating these studies have been, especially in providing valuable insights into the way the state is intruding in civil society through more subtle forms of social control (e.g. Donzelot, 1980; Nissenbaum, 2009), they are characterised by one major drawback. That is, the application of an analytical concept of law as social control often neglects that social control is but one of the functions that law performs (Krygier, 1980: 38 – 39), and that social control can take many different forms besides law (Coser, 1982).

The above review shows that each of the main sociological concepts of law has its merits, as well as its limitations. My enquiry will build on an analytical definition of law based on the state law model. There is one fundamental reason behind this choice. Although recognising that there exist multiple legal orders *within* as well as *outside* the nation-state, my investigation focuses on the legislative strategies adopted *in* Japan for regulating employment relations, the way these have been reflected in enforcement processes via state agencies and how social actors relate to these. From this standpoint, it follows that law is what emanates from the state and will be distinguished ‘from other social rules in terms of the existence of specific institutions and processes for the creation, interpretation, and application of doctrine’ (Cotterrell, 1995: 38).

1.2. What does law do?

Once we have identified a basic working concept of law as an analytical tool of investigation, the question naturally arises: what is the use this tool can be put to?

The relevant literature points to a ‘myriad of functions’¹² (Nader and Yngvesson, 1973: 908) that law would appear to perform in society, although scholars seem still to

¹² It is important to clarify that ‘function’ will not be used here in functionalist terms. Talcott Parsons is one of the major contributors to functional analysis in sociology. According to Parsons (1951), a social system needs to meet certain functional requirements in order to survive. These are: internal integration, goal attainment, pattern maintenance and adaptation. In the legal field, a functionalist approach is exemplified by Llewellyn’s notion of ‘law-jobs’ (1940). In Llewellyn’s theoretical model, law performs certain functions which are independent from the social context of reference. These basic, universal functions of law are what Llewellyn calls ‘law-jobs’.

be in disagreement about the relative importance of each. According to Vago (2012: 18 – 19), however, three main themes tend to recur: social control, dispute settlement¹³ and social change.

The first is concerned, as briefly mentioned in the previous section, with the examination of law as a form of social control, and has represented an important strand of the sociological study of legal phenomena. The work of Donald Black is one of the most prominent examples of this kind of literature. In his seminal study, *The Behaviour of Law* (1976: 4 – 6), which equates, as mentioned, law and governmental social control, Black lists four kinds of social control: penal, compensatory, therapeutic and conciliatory. Both the penal and the compensatory style of control are accusatory. They aim at a clear-cut allocation of a legal right and wrong between two opposing parties: the penal style by punishing those who have infringed a prohibition, and the compensatory style by ensuring that the victim of an unfulfilled contractual obligation receives compensation. By contrast, the therapeutic and conciliatory styles of control are remedial: they are ‘methods of social repair’ (*ibid.*: 4). The aim of therapeutic control is to offer treatment to the ‘deviant’, while the conciliatory style of social control is directed at mediating the conflicting positions of the parties so as to find a solution acceptable to both, thereby restoring ‘social harmony’.

The second theme relates to law as a means for the resolution of disputes, and it has represented a focal point of interest not only for scholars adopting a state law based

¹³ As noted by Vago (2012: 255 – 256), there is still disagreement in the sociological and legal literature about the terminology used to describe the role of law in the process of handling disputes. Whilst some scholars (Bradney and Cownie, 2000; Coltri, 2010; Goldberg *et al.*, 2007) explicitly adopt the expression ‘dispute resolution’, others (Abel, 1973; Menkel-Meadow, 2003; Roberts and Palmer, 2005) hesitate to do so, arguing that law *processes* disputes rather than solving them. That is, law as well as other non legal methods, can deal with the public component of the dispute but they cannot resolve the underlying tensions which led to the emergence of conflict. However, as rightly pointed out by Vago (2012: 256), ‘when disagreement formally enters the legal arena (that is, trial), from the perspective of the law, disputes are authoritatively settled rather than processed through the intervention of third parties (that is, judges), and conflicts are resolved rather than simply managed or regulated. The use of terms *conflict resolution* and *dispute settlement* is thus, in this sense, justified’ (emphasis in original). Drawing from this, I will therefore use terminology such as dispute resolution, dispute settlement and dispute processing interchangeably.

line of enquiry but also for those who posited law in more pluralistic terms. Legal anthropologists, in particular, have contributed much of the work about law as a form of ‘dispute processing’. Interested in cross-cultural comparisons of legal phenomena, works such as *The Cheyenne Way* by Llewellyn and Hoebel (1941) and *Order and Dispute* by Simon Roberts (1979) focused on the way different cultural settings handled conflict in order to reveal dispute settlement as one of the ‘universal’ functions of law. Indeed, while not all societies had formal legal rules and institutions, they all appeared to have methods for dealing with conflict. Hence, the management of controversies across different social environments became a main object of study (Abel, 1973). Indeed, the topic of dispute processing has been also one of the major concerns of the literature on the Japanese legal system, engaged mostly in finding a solution to the puzzle of the Japanese people’s ‘peculiar’ disputing behaviour.

Finally, the last recurring theme concerns the study of law as an agency of social change, where social change is understood to be ‘any non repetitive alteration in the established modes of behaviour in society’ (Friedman and Ladinsky, 1967: 50). This function of law is nicely captured by Friedmann (1972: 513) who argues that: ‘[t]he law – through legislative or administrative responses to new social conditions and ideas, as well as through judicial re-interpretations of constitutions, statutes or precedents – increasingly not only articulates but sets the course for major social changes’.

There are two perspectives from which it is possible to consider the role of law as an instrument of social change. The first focuses on law, as used by the government, to induce change in directions deemed desirable for society as a whole. This can be achieved either directly, by engaging in an explicit activity of ‘social engineering’ (Pound, 1959: 98 – 99) for promoting certain changes in the existing social structure, or indirectly by ‘shaping various social institutions [e.g. education], which in turn have a direct impact on society’ (Dror, 1968: 673). The second perspective looks into the way

legal institutions and law can be lobbied and mobilised to foster the interests of certain segments of society (Friedman, 1973; McCann, 2006).

As mentioned, these are only a fraction of the many functions that law performs in society. Others include law as a method for facilitating private arrangements among citizens (Berman, 1958) as well as symbolic and didactic functions¹⁴ (Cotterrell, 1992: 102 – 106). While acknowledging this, my study will focus on processes of dispute processing and legislative strategies adopted in Japan to pursue change in the field of employment, although an element of social control comes into play when we consider the way the Japanese government responded to the increase in grievances' levels in the aftermath of the economic bubble.

1.3. The consensus vs. the conflict constituency

The previous section has highlighted some of the functions that law has been found to perform in society. However, taking a sociological perspective on the study of law necessarily entails also taking a clear theoretical position about the nature of society which, in turn, influences the way law as a social phenomenon is understood. The point is nicely illustrated by Chambliss (1973: 2): 'Each sociologist carries in his head one or more "models" of society and man which greatly influence what he looks for, what he sees, and what he does with his observations by the way of fitting them along with other facts, into a larger scheme of explanation'.

Against this backdrop, sociological studies of law can be divided along two axes: a consensus versus a conflict oriented view of society (Banakar and Travers, 2013: 4 – 6; Vago, 2012: 22). The consensus oriented body of literature revolves around a Durkheimian imagery of society. In this view, society is described as a cohesive and

¹⁴ These functions are the core of so-called 'educative legislation', i.e. laws which seek to promote new ideals and values in a society rather than equipping individuals with new legally enforceable rights. As we shall see in chapter 3, this has been precisely the approach adopted in Japan to carry out major employment reforms.

relatively stable entity, held together by a set of shared values. This does not mean that conflict is absent. However, groups possessing conflicting interests are seen as coexisting in basic harmony. From this standpoint, law is seen as a neutral agent aimed at realising a social compromise between the different, and sometimes conflicting, claims of diverse social groups (Pound, 1943: 39). Thus, law becomes an integrative mechanism serving to 'mitigate potential elements of conflict and to oil the machinery of social intercourse' (Parsons, 1962: 58).

In contrast to the consensus constituency, the conflict perspective views society as a conflictual arena in which different groups and classes contend against one another in order to gain, and retain, access to scarce commodities (Goldstein, 2005). Within this theoretical framework, which finds its best exemplification in Marx's social theory, society is a patchwork of different social units, held together by coercion, where no social compromise is possible. Rather, culturally and economically dominant groups strive to suppress alternative sets of values in order to maintain their dominant position in society. Against this scenario, law, too, loses its impartiality, and becomes 'implicated in perpetuating hegemonic ideologies and subsequently social inequalities' (Banakar and Travers, 2013: 5). Law, in other words, is seen no longer as an integrative mechanism realising the difficult, and yet possible, balancing of interests of different groups in society. On the contrary, 'law is a *result* of the operation of interests (...) it is in the first place created by interests of specific persons and groups (...) law does not represent a compromise of the diverse interests in society, but supports some interests at the expense of others' (Quinney, 1970: 35).

As rightly argued by Vago (2012: 24), the above mentioned perspectives on society should be taken as ideal types. In Max Weber's social theory, an ideal type is an abstract conceptual model deliberately constructed to investigate a social phenomenon. Thus the consensus and conflict oriented views of society should be understood as

analytical grids for the examination of law in sociological terms. Both views contain elements of truth and, as pointed out by Banakar and Travers (2013: 5), the main trend in recent years has been indeed towards a synthesis of the two approaches. Nonetheless, I will situate my study within the conflict oriented perspective. This is because, although I recognise that legal institutions might not be *per se* structurally biased towards certain social groups, access to decision-making processes and legal institutions is not equally available to *all* social groups (Sumner, 1979: 269 – 270). It follows that ‘many legislative enactments, administrative rulings and judicial decisions reflect the power configuration in society’ (Vago, 2012: 325). On this assumption, taking a theoretical stance which posits a conflict based view of society represent a fruitful starting point from which to examine how legal resources are distributed within a legal system. Therefore, in my analytical framework, law will not be assumed as a neutral agent, but rather as an ideological force.

1.4. Law: ideological dimensions

To take a vision of law as an ideological force does not mean to question the validity of the legal system. Nor does it translate into taking an uncritical view of law as a mere by-product of powerful ruling groups engaged in fostering their own interests in society. Rather, it means to set as a starting point of investigation the acknowledgment that the relationship between law and society is filtered by certain currents of ideas legitimising certain types of social relations. The point is nicely made by Sumner (1979: 268):

‘legal enactments mostly respond to social problems and are not simply unilateral political declarations of ideology (...) what is vital is the recognition that problems only appear in a certain manner depending on the social structural context in which they exist and are only perceived through the ideological grids of the people observing them. Thus the [social] system may require legislative action, but it does not dictate to legislators how they are to see the problem or how to deal with it’.

My aim in this section is therefore to draw a working concept of ideology, and to show how it can serve as an invaluable tool of analysis for the examination of the relationship between legal and social relations in the Japanese legal context.

Studies about the ideological dimension of law have usually taken place against the backcloth of Marxist social theories. As a matter of fact, Marx never developed a systematic theory of ideology (Hunt, 1993a: 118 – 119) nor, in contrast to Weber, of sociology of law (Hunt, 2002: 20 – 24). According to the most common interpretations of Marxist thought (Mephram, 1974; Evans, 1975; McCarney, 1980), ideology is a distorted representation of social reality by which certain modes of production will come to appear as natural, thereby contributing to reproduce certain *relations* of production. In Marx's social theory, law becomes an ideological form because, first, it legitimises the capitalist mode of production (Sumner, 1979: 247) and, second, by creating the principle of equality of the 'legal' subject before the law it contributes to conceal the real state of social relations in society – i.e. that not all classes have equal access to the means of production (Cotterrell, 1992: 109).

An important advancement of Marx's thought about law, and its ideological dimension, was made by the leader of the Italian communist party, Antonio Gramsci (1975). In Gramsci's sparse reflections in *The Prison Notebooks*, law is no longer a mere reflection of the economic structure, but it becomes part of a broader (active) process of building consent among the subordinate classes in society (cultural hegemony). In this sense, law acquires a didactic dimension which is 'vitally important in the construction of conformism [to a certain world view] and the mystique of legal enactments' (Sumner, 1979: 258).

Sociological studies of law adopting the aforementioned Marxist concept of ideology can be divided into two groups: those taking a structuralist approach, whereby the ideological dimension of law is thought of as relatively autonomous from the

economic structure of society; and those taking a class instrumentalist approach, according to which legal ideology is understood as being produced in order to maintain the interests of the dominant class in society (Cotterrell, 1992: 116). Both approaches, however, are constrained by important shortcomings.

The main problem of structuralist approaches is that they fail to problematize the relationship between law and the economic structure, thereby assuming – in advance of empirical analysis – that law operates to meet the needs of capitalist modes of production (*ibid.*). By contrast, class instrumentalist approaches tend to suffer from the difficulty of empirically demonstrating, first, the ability of the ruling class to act as a cohesive unit and, second, the ways by which it is able to generate the relevant ideology for the maintenance of its interests (Collins, 1982: 30 – 34). Moreover, already at the beginning of the 1990s, it was noted that, with the increasing differentiation of social groups not only by occupation but also by other factors such as social status and levels of education, a pure ‘class’ based oriented perspective becomes anachronistic (Cotterrell, 1992: 111 – 112).

In view of these limitations, and drawing on Cotterrell (1992; 1995) and Hunt (1993b), my approach will be to use as an analytical tool for the examination of the Japanese legal system a neutral concept of ideology which rejects Marxists theories of ideology still common among conflict oriented sociological studies of law (Vago, 2012: 62 – 63). This means that, in my theoretical framework, ideology will not be equated with a form of ‘false social consciousness’,¹⁵ purposefully used by a dominant social group to legitimise their interests. Rather, ideology will be used to mean a set of beliefs and currents of thought about the nature of society and of social relations which, in contrast to other systems of thought, tend to appear as ‘common sense’ at a particular historical moment (Cotterrell, 1992: 114 – 117). The main implication here is that the

¹⁵ To some extent, this is a natural corollary of my adoption of a Weberian interpretivist approach which rejects the notion of the existence of universal truths.

concept of ideology will represent the analytical grid for the examination of the way certain sets of ideas ‘help to define acceptable behaviour; to influence individuals’ choices of projects; to colour, to promote, or constrain individuals’ ambitions; to specify the limits of possible or desirable social change; and to measure the relative value of particular social institutions and social practices’ (Cotterrell, 1995: 8). The application of this concept of ideology to the study of the legal field is particularly useful because it helps the observer to look beyond the surface of legal and judicial doctrine, and uncover the rationale leading to the development of certain legal institutions and legal rules which ‘confer rights and powers on certain categories of individuals’ (Hunt, 1993b: 26). An additional corollary to this is also the recognition that different ideologies operate in different sectors of society (Sumner, 1979: 264), which means that a fruitful analysis of the ideological dimensions of law cannot be disentangled from other ideological dimensions existing in society (Hunt, 1993b: 135).

The application of an ideological critique to the sociological study of law has been challenged by Tamanaha (1997: 84 – 89), who argues that the analytical concept of ideology remains foggy. Moreover, specifically for what concerns legal ideology, Tamanaha (*ibid.*) contends that, when disentangled from the Marxist notion of ‘false consciousness’ and articulated in neutral terms (Cotterrell, 1995: 10 – 11), it becomes difficult to distinguish legal ideology from the concept of legal culture as defined by Lawrence Friedman (1969, 1975).¹⁶ Tamanaha’s critique, however, is problematic on two scores. Firstly, because he fails to notice that Cotterrell (1997: 14 – 18) had in fact attacked Friedman’s concept of legal culture for lacking rigour and theoretical coherence. In this respect, Cotterrell suggested replacing legal culture with the notion of legal ideology, a concept he clearly defined as ‘systems of values and cognitive

¹⁶ In his seminal article *Legal Culture and Social Development*, Friedman (1969: 34) articulates the concept of legal culture thus: ‘the network of values and attitudes relating to law, which determines when and why and where people turn to law or government, or turn away’.

assumptions – reflected in and expressed through *legal doctrine*’ (Cotterrell, 1992: 115; emphasis added). Moreover, he acknowledged the transient nature of legal ideologies (Cotterrell, 1997: 22) and, in line with the Weberian sociological tradition, he took an epistemological position whereby the researcher is constantly involved in a process of revision of his or her analytical instruments and re-examination of his or her position in the face of the discovery of new data (Cotterrell, 1992: 13 – 14). Secondly, Tamanaha seems to overlook the distinction that Friedman himself drew between legal culture and legal ideology. Indeed, in his own reply to Cotterrell, Friedman (1997: 38; emphasis in original) argued:

‘[O]ne of the obvious things that separates them is their centre of gravity. Someone who studied legal ideology would pay very close attention to doctrine, to scholarly work theorizing about the nature of law (...). The study of legal culture has its centre of gravity outside the world of doctrine and professional practice. It finds *its* centre of gravity in the thoughts, wishes, ideas – and ideologies – of those members of the public in a particular society’.

In light of the above, in the present work I will consider legal culture and legal ideology as two distinct concepts. Moreover, I will prefer the notion of legal ideology over that of legal culture as more appropriate to a context of analysis which builds on a conceptual model of law as state law; and which is concerned, as will be shown in the following chapters, with the study of the legal doctrine regarding employment relations in Japan and which is particularly fruitful in helping to bring into light many of the tensions and ambiguities which have characterised the development of Japanese employment law in the past thirty years.

1.5. Research methods

As illustrated in the above sections, my study is aimed at revealing the idiosyncrasies of the legal approach adopted in Japan for the regulation of employment relations, and its implications in terms of dispute resolution processes, within a theoretical framework which posits the ideological character of law. This aim, as we have seen, is set against a broader sociological outlook which draws on interpretive sociology of Weberian inspiration. Against this backcloth, I adopted two methods for the collection of the data which have informed my research: documentary analysis; and 25 in-depth semi-structured interviews with legal scholars, trade unionists and workers.

‘No matter how we view the legal system (...) we have to recognise its linguistic make-up’ (Banakar and Travers, 2005: 133). The meaning of this sentence is clear: law is expressed in texts, and an analysis of legal texts can be an important source of empirical data about the institutional facts that lie behind them (Banakar, 2005). This potential, however, is realised if the researcher examines the legal text not only to determine the content of the law, but also to shed light on the way legal texts contain elements of how law is socially organised, i.e. the processes which have informed the enactment of a piece of legislation or the institutionalisation of certain methods of dispute resolution. In this sense, ‘legal texts [are employed] as empirical indicators of various institutional [and] organisational (...) properties of law’ (Banakar and Travers, 2005: 135). Hence the importance of documentary analysis. In my documentary analysis, I have used statutes, ministerial guidelines, administrative agencies’ investigation reports, as well as secondary sources such as digests of court judgements. In analysing these documents, I have relied on text analysis. Unlike discourse analysis, which ‘emphasises the way versions of the world, of society, events and inner psychological worlds are produced in discourse’ (Potter, 1997: 146), text analysis

revolves around the reading and interpreting of texts in order to reveal the rationale behind their creation (Coulon, 1988).

Although documentary analysis can prove illuminating, especially when aimed at uncovering the ideology woven into legal texts, it presents, on its own, a fundamental empirical shortcoming. That is, legal documents are by nature straightjacketed by the legal language and reasoning which necessarily exclude extra-legal factors from their texture.

Thus, to counterbalance this shortcoming and gain an understanding of such factors, I supplemented documentary analysis with empirical data gathered through the use of in-depth qualitative interviews. As with many methods which are subsumed under the label of qualitative research, qualitative interviews are a particularly useful tool to collect data in order to answer research questions dealing with meaning and interpretation (Bryman, 2008: 363 – 369). In the context of a study which is set in the field of interpretive sociology, they are even more so because, in contrast to participant observation or ethnography, they allow the researcher to relate to social actors with an empathic, and yet self-distanced, attitude. Hence, interviews were used as a means to investigate the views and perceptions about the legal and dispute processes of various social actors involved in or interacting with legal institutions. Specifically, I interviewed three groups of actors: legal scholars and experts (8), trade unionists (12) – both from national and local centres – and workers (5). The latter were accessed mostly through the intermediation of local trade union representatives, mainly to have a speedy route to make contact with workers who experienced a grievance in the workplace. The fact that introduction was mediated by a trade unionist whom they knew also helped to avoid issues of mistrust in disclosing sensitive information to a stranger. A total of 25 interviews were conducted over a three-month period of fieldwork in Tokyo in 2013. I

conducted thematic qualitative analysis of the interview transcripts using a deductively developed coding scheme, mostly based on secondary literature.

The combination of documentary analysis and empirical data gathered through interviewing allowed me to reveal the ideological texture of Japanese regulation of employment relations, as well as to gain an understanding of the perceptions that different observers had of both the legal and dispute processing aspects of the system.

Conclusion

This chapter was concerned with outlining the different theoretical perspectives adopted in my study to gain an understanding of the functioning of Japanese legal institutions in employment, and the methods used to collect the empirical data which have informed these perspectives.

As rightly pointed out by Banakar and Travers (2005: 19), theory and method are two faces of the same coin. ‘Methods are not simply techniques that can be used in obtaining facts about the social world, but are always used as part of a commitment to a theoretical perspective’ (*ibid.*). Building on this, we have seen that the broader theoretical framework which has dictated the interpretation of data is the Weberian tradition of interpretive sociology. This means that the empirical data have been analysed by placing emphasis on the subjective meaning of actors involved in legal processes or interacting with legal institutions. It also means that I have taken an epistemological position whereby knowledge is not value free, but rather dependant on the observer’s value judgement about both the selection of the problem of investigation and its analysis (Cotterrell, 1992: 13). In line with this Weberian position, ‘objectivity’ stems from the recognition of the values influencing the researcher’s observations and interpretation, whilst remaining open to the acknowledgment of the existence of different or opposing views (Zeitlin, 2001: 251).

This epistemological position, in turn, has implications for the choice of the conceptual tools applied for the ‘intellectual mastery of the empirical data’ (Weber, 1949: 106). Namely, I have adopted four main analytical categories. The first relates to the analytical definition of law deployed in my investigation, i.e. a concept of law as state law. The second concept draws on the functions that law performs in a certain social setting. My study focuses specifically on two functions, i.e. law as an instrument of social change and dispute resolution. The third analytical instrument I have drawn upon is a concept of society which posits the impossibility of reaching a social compromise among the conflicting interests of different social groups. This translates into a view of society which assumes the uneven distribution of power and resources among different groups, depending on the access they get to legal institutions. Finally, related to this, there is the concept of ideology applied to the study of law, i.e. the idea that the relation between legal interventions and social problems is mediated by certain currents of ideas which have gained legitimacy in a certain historical moment, thereby determining which responses are deemed ‘appropriate’ to deal with certain social issues.

As explained, these concepts will be treated as ideal types – i.e. abstract concept models whose purpose is the investigation of social reality. Of course no analytical concept is perfect and I have tried not to lose sight of the shortcomings of the concepts of my choice. As argued by Zeitlin (2001: 250), ‘insofar as a concept enables us to understand something better than we would have understood it without that concept, it is heuristically valuable’. In line with this view, I have demonstrated that the conceptual models I have adopted in my study were the most adequate for the subject under investigation, thereby justifying their choice over alternative models.

The same rationale guided my selection of the methods for data collection, namely documentary analysis and qualitative interviewing. In this respect, I have argued that documentary analysis is a valuable source of empirical data about the processes

lying underneath the legal text, thereby allowing us to bring into light the rationale underpinning their creation. This yields particularly favourable results within a conceptual framework which posits the ideological nature of law. As it is insufficient on its own, I have complemented documentary analysis with the use of qualitative interviewing. Against the backdrop of interpretive sociology, the use of qualitative interviews for data collection is particularly well suited to deal with issues of meaning and interpretation. In this respect, I have therefore used interview analysis to gain an understanding of the views and subjective meanings attached to legal and dispute resolution processes of various social actors in the Japanese field of employment, as well as to reveal the existence of alternative and competing ideologies in these actors' interaction with employment legal institutions.

The chapters that follow will see the concrete application of these methodological statements to my research project.

‘[I]t seems more accurate and fruitful to see ideologies (...) as complex social processes of “interpellation” or address (...). In these continuous processes ideologies overlap, compete and clash, drown or reinforce each other’
(Therborn, 1980: vii)

Chapter 2

The Warp and the Woof: The ideological fabric of Japanese employment and legal systems

Introduction

In the previous chapter, I have discussed the theoretical and methodological framework of this study. I have set out a working concept of law as state law, and explained that my main focus will be on two core functions of law in the Japanese employment field: law as an instrument of social change; and law as a means of dispute resolution. Moreover, I have also clarified that in my theoretical model law will be considered as ideological. That is, legislative interventions addressing social problems or perceived social needs are assumed to be dependent on currents of ideas and beliefs which legitimise certain kind of responses over existing alternatives.

Ideology, however, functions as a multifaceted entity (Therborn, 1980). This means that, in a given social setting, and at a particular historical moment, ‘different ideologies (...) not only coexist, compete, and clash, but also overlap, affect, and contaminate one another’ (*ibid.*: 79). Starting from this assumption, this chapter is concerned with an examination of those ideologies which have operated in conjunction with the ideological force which has informed the legal reforms in the field of employment carried out in Japan in the last thirty years. Specifically, I will discuss two ideological dimensions. The first relates to the developments which have affected the Japanese employment system, from the institutionalisation of so-called life-time employment to the reforms recently proposed by the Abe administration aimed at fostering a renegotiation of this type of employment relation. The second refers to the broader ideological features of the Japanese legal system, and the ideological shift which seems

to have taken place in the aftermath of the legal reforms carried out in the country during the Heisei period (1989 to present).

2.1. The Japanese employment system

‘The significance of legal ideology lies in its articulation along with other nonlegal ideological bases of legitimation’ (Hurst, 1993b: 135). It follows that, in order to expose the ideological backbone which has sustained the legal regulation of employment relations in Japan, we must first gain an understanding of the ideological formations which have paved the way towards the construction of a certain mode of employment relationship in the country, and the way this type of work arrangement has come to represent the yardstick for desirable employment reforms. To this end, this section will be concerned with the examination of some of the ideologically constituted elements of the Japanese employment system, and the processes which are buttressing the argument in favour of the need to renegotiate them.

According to Nitta and Hisamoto (2008: 10 – 11), there are two approaches to the discussion of the Japanese employment system.¹⁷ The first is to focus on the internal employment practices of firms for the management of the regular workforce. That is, this perspective is mainly concerned with the examination of those strategies of personnel management which have often been referred to as ‘life-time employment’.¹⁸ In contrast, the second approach takes a view aimed at the investigation of the dual nature of the Japanese labour market. This perspective posits the division of the labour market into a core and a periphery. The core consists of regular workers who are

¹⁷ As a matter of fact, the authors distinguish between the ‘Japanese employment system’ (*nihonteki koyō shisutemu*) and the ‘employment system of Japan’ (*Nihon no koyō shisutemu*). In their argumentation, the former refers specifically to the system of employment practices developed by Japanese management in the aftermath of the Second World War, whilst the latter is used to indicate the whole employment apparatus of both practices and formal rules governing the employment relationship in the country (Nitta and Hisamoto, 2008: 9).

¹⁸ As noted by Imai (2011: 29), these strategies are better described as ‘long-term’ rather than ‘life-time’ since the relationship between the employer and the worker will cease to exist upon retirement of the latter. Moreover, although long-term employment is only one of the three constitutive elements of the complex of practices existing in the Japanese internal labour market, the expression life-time employment is used by some observers (cf. Abegglen, 1973; Matanle, 2003) to indicate the whole system of Japanese firms’ HRM practices.

guaranteed both job security and career prospects within the company. By contrast, employees working at the periphery of the system enjoy inferior levels of employment protection as well as of redistribution of organisational resources such as wages and training opportunities.

My study builds on the latter approach, i.e. an approach which posits the duality of the Japanese labour market. On this premise, this section will be divided into three subsections: the first deals with the employment practices existing in the Japanese internal labour system; the second is concerned with the rise of non-regular employment in the country; and the third outlines the employment reforms recently put forward by the second Abe administration in an attempt to bridge the gap between the core and the periphery of the Japanese workforce.

2.1.1. The internal employment system

The internal strategies adopted by Japanese firms for the management of their regular workforce have been considered for a long time the core of the Japanese model of employment relations, and those to first attract attention among Western scholars (e.g. Abegglen, 1958; Dore, 1973). This internal system of employment practices has been said to rest on three main pillars: long-term employment (*chōki antei koyōshugi*), promotion based on seniority (*nenkōshugi*) and a system of industrial relations informed by a cooperative relationship between labour and management (*rōshi kyōgishugi*) (Odagiri, 1994: 48 – 50; Rebick, 2005: 13 – 16; Nitta and Hisamoto, 2008: 13 – 19).

Long-term employment refers to the levels of tenure enjoyed by Japanese regular workers within the company. That is, the practice by which workers are recruited soon after graduation, and trained internally to remain with the same firm until the retirement age (Odagiri, 1994: 48). This practice of guaranteeing stability of employment to the regular workforce has meant that firms have dealt with economic downturns by adopting means alternative to dismissal to cut down labour costs.

Examples of these are adjustment of the business cycle through hours of work, temporary transfers and discharge of non-regular employees (Hashimoto, 1990; Nitta and Hisamoto, 2008: 15).

Promotion based on seniority indicates the practice of pegging pay rises and promotions to workers' length of service within the company. As a matter of fact, seniority has never been the sole component in the determination of wages and promotions. Although representing only a small percentage, elements such as personal competency and ability were usually added to the seniority component to account for differences among workers (Imai, 2011: 19). Indeed, Japanese management started to place growing importance on skills as a criterion for promotion after the 1970s oil shocks which put Japanese firms under pressure to cut labour costs (Keizer, 2010: 34).

Finally, cooperative labour-management relations refers to a system of industrial relations whereby unions are mostly enterprise based, and decisions concerning workers' welfare and management are made through consultation with the employers in a spirit of good faith (Nitta and Hisamoto, 2008: 18). The basic logic underpinning the system is the idea that honest labour-management consultations enhance the company's growth by paying attention in the discussion to both the particular financial situation of the company and the national economy in general. This, in turn, is argued to offer higher returns to workers – in terms of redistribution of profits – than confrontational bargaining techniques (Gordon, 1998: 133).¹⁹

Early observers such as Abegglen (1958; 1973) pointed to these three elements as the core constituents of the Japanese employment system. Subsequent literature, however, has challenged this view on three accounts. First, Dore (1973) argued that this system of employment practices was not the predominant model among Japanese

¹⁹ This characteristic of the Japanese industrial relations system has also been pointed to as the factor leading to a similar treatment enjoyed by blue-collar and white-collar workers in Japanese workplaces (Rebick, 2005: 13; Imai, 2011: 20).

companies, and that their significance was rather dependant on firms' size and the business sector in which they operated. Second, Japanese observers such as Koike (1988) and Odagiri (1994: 50 – 55) demonstrated that, although they might be more pronounced in Japan than elsewhere, practices such as job security and the seniority system of promotion were not unique to the Japanese context. Finally, historians (Taira, 1970; Gordon, 1985) have shown that the system developed from the market conditions of a specific historical moment. Indeed, during the 1910s and 1920s, the Japanese labour market was characterised by high levels of mobility. Firms were confronted with severe labour shortages, whilst workers consciously moved from workplace to workplace in order to accumulate experience and to seek positions offering higher levels of pay (Gordon, *ibid.*). In response to this situation, and in order to retain a skilled labour force, firms started to recruit workers before they entered the labour market, training them internally and tying promotion to seniority (Odagiri, 1994: 51). Moreover, Gordon (1985: 367 – 411; 1998) further demonstrated that the arrangement of cooperative relations between labour and management did not develop naturally. Rather, it was the result of the combined efforts by both the government and Japanese employers to tame the militant labour unions of the early post-war years, and regain control over personnel management in the workplace.²⁰ Be that as it may, following the Second World War, and the labour movement attacks on management prerogatives (Moore, 1983; Gordon, 1993: 378 – 383), this system of employment practices crystallised into a social contract whereby workers were guaranteed job and wage security in exchange for commitment and working hours flexibility to allow the firm to easily adjust the business cycle in periods of economic downturns (Gordon, 1998; Matanle, 2003: 43 – 46; Nitta and Hisamoto, 2008: 27 – 28). The result was the beginning of the construction of a 'company citizenship' ideology (Gordon, 1985), i.e. a

²⁰ In his book *The Wages of Affluence*, Gordon (1998: 131 – 156) explicitly refers to this process as 'fabricating the politics of cooperation'.

company-based model of social integration which socialises workers in a way which ‘encourages a long-term identification of one’s personal growth with company growth’ (Shire, 1999: 88 – 89).

The foundations of this arrangement, however, started to be shaken soon after the oil crises of the 1970s which marked the end of Japanese rapid economic expansion. Although a period of stable growth followed, firms were confronted with the need to reduce costs to compensate for the higher value of resources (Imai, 2011: 22 – 23). Consequently, demands for more flexibility (*danryokuka*) gained momentum (Goka, 1999: 19). These demands took two directions. On the one hand, companies tried to adapt to the business conjuncture by adjusting the amount of overtime required from their regular workforce as well as by resorting to practices such as *shukkō* and *tenseki*²¹ (Imai, 2011: 26). On the other hand, Japanese employers started to expand the use of non-regular workers, especially under *shakaigō* schemes,²² to achieve numerical flexibility (Goka, 1999:19).

Nonetheless, it was not until the bursting of the economic bubble, and the economic recession which followed, that Japanese management started the process of renegotiation of the social contract established in the post-war era. The turning point²³ was signalled in 1995 with the publication of *Japanese Management for a New Era* (*Shin Jidai no Nihonteki Keiei*). This was the report of a study group set up by the Nikkeiren²⁴ with the objective of analysing the changes affecting the Japanese economy and the possible responses in terms of human resource management (Imai, 2011: 51).

²¹ *Shukkō* and *tenseki* are two types of employment transfers which allow for labour mobility among Japanese company networks. Whilst *shukkō* is a form of labour lending which allows the worker to return to his/her company of origin, *tenseki* is a permanent transfer of the employee from a parent to a subsidiary company.

²² Like *shukkō*, *shakaigō* is also a form of labour lending whereby small subsidiaries send their employees to the parent company when the latter needs extra workforce for the completion of a project. Therefore, both *shukkō* and *shakaigō* allow the parent company to expand or reduce its workforce as needed without recourse to dismissal.

²³ As noted by observers such as Nitta and Hisamoto (2008: 46) and Keizer (2010: 47), the shift can hardly be considered a watershed since many firms had already started the renegotiation of some of their employment practices in the 1970s. Yet, the publication of the report by the Nikkeiren represented an official declaration of policy shift concerning HRM, thereby giving these practices a different kind of legitimacy.

²⁴ The Nikkeiren was the Japan Federation of Employers’ Associations. In 2002, the federation was absorbed into the Keidanren (Japan Federation of Economic Organizations).

The report noted that the need to cut labour costs, also in terms of surplus workforce, was an inevitable by-product of the period of slow growth the Japanese economy was experiencing. Moreover, the high appreciation of the yen, combined with the increasing competition of other Asian countries, was causing the hollowing out of those industries, such as manufacturing, trying to save on high production costs (Nikkeiren, 1995: 21 – 22).

Under these circumstances, two measures were called for. First, further liberalisation of labour supply activities to enhance labour mobility across economic sectors. Second, the creation of a new ‘employment portfolio system’ (*koyō pōtoforio shisutemu*) to accommodate companies’ need for numerical and functional flexibility (*ibid.*: 26 – 27; 95 – 96). This new scheme was based on a strategic diversification of employment (*koyō keitai no tayōka*), and premised on the division of the workforce at firm level into three groups (*ibid.*: 35; Nitta and Hisamoto, 2008: 46). The first group is constituted by a core of regular employees under permanent contracts (*chōki chikuseki nōryoku katsuyō kei jinzai*). Workers in this group are also entitled to receive corporate welfare benefits such as retirement allowance and company pension. The second group is represented by high skilled professionals hired on the basis of their expertise (*kōdo senmon nōryoku katsuyō kei jinzai*). These professionals are to be employed under limited term contracts and have no access to corporate welfare programmes. However, they are paid an annual salary. Finally, workers in the third group are hired on the basis of job description to perform routine clerical and technical tasks (*koyō jūnan kei jinzai*). They are employed on a temporary basis, are not entitled to receive fringe benefits and are paid an hourly wage. In contrast to what suggested by Imai (2011: 50 – 53), Nitta and Hisamoto (2008: 46) argue that the employment portfolio system was not conceived as a fundamental renegotiation of the long-term employment pact established in the aftermath of the Second World War. On the contrary, they opine that this new HRM

scheme is rather ‘another subsystem in support of the custom (*kankō*) of life-time employment’ (*ibid.*). This appears to be confirmed by Keizer (2010). In his study of the adaptations of personnel management of Japanese firms, Keizer (*ibid.*: 46 – 49) highlights how a number of environmental changes such as the continuous economic recession, the process of globalisation and the ageing of Japanese population put under pressure the system of existing employment practices in the country, and led to questioning of their efficiency. In order to adapt to these changing circumstances, Japanese companies introduced two main adjustments to their apparatus of personnel management: the introduction of performance-related pay (*seikashugi*) and the expansion of non-regular employment (*hiseiki koyō*).

Seikashugi is a system of employees’ remuneration which pegs wages to the worker’s actual job performance (Sugeno, 2012: 286 – 287).²⁵ This means that pay rises are no longer predominantly determined by the employee’s length of service within the company as in the seniority-based wage system. Rather, wages are tied to the actual contribution workers bring to the firm over a determined period of time (Keizer, 2010: 49). As briefly mentioned, an ability component had already been incorporated among the criteria determining the salary of regular employees. This was the ability qualification system (*shokunō shikaku seido*) introduced at the end of the 1960s. However, the process of evaluation of this system, which was meant to expand the merit part of the wage structure, was still informed by the same long-term perspective which characterised the seniority-based wage system (*ibid.*), thereby acting as complement to the promotion by length of service rule (Holzhausen, 2000). By contrast, the introduction of *seikashugi* implies the shift towards a short-term evaluation of performance based on actual contribution in reaching specific objectives. The

²⁵ A thorough examination of the *seikashugi* scheme and its introduction can be found in the special issue on the topic of the *Nihon Rōdō Kenkyū Zasshi*, vol. 554 (2006).

introduction of *nenpōsei* (annual wage system),²⁶ a component of *seikashugi*, clearly illustrates this. Under the *nenpōsei* scheme, the employee's salary is reassessed on an annual basis depending on his or her performance. The latter is measured by evaluating whether the worker reached certain targets set at the beginning of the year (Keizer, 2010: 50). Be that as it may, as argued by Keizer (*ibid.*: 143), firms introduced *seikashugi* as an adjustment mechanism to their system of internal employment practices. That is, the adoption of *seikashugi* allowed companies to contain rising wage costs of regular employees whilst preserving the practice of life-time employment.

The second development in the process of adjustment of employment practices put in place by Japanese companies has been the increase in the use of non-regular employees. This phenomenon, which will be discussed in detail in the next subsection, originated in the 1960s (Gordon, 1985; Rebick, 2005: 57; Nitta and Hisamoto, 2008: 58) but started to gain prominence during the 1990s (Ishizaki *et al.*, 2012: 37 – 39). Some observers (Chalmers, 1990; Odagiri, 1994) have interpreted this trend by emphasising the role of non-regular workers as an important employment buffer providing firms with numerical flexibility. However, as demonstrated by Keizer (2008; 2010: 165 – 166), the use of the non-regular sector of the workforce has implications in terms of cost savings rather than flexibility – thereby lending support to the fact that non-regular employment is being deployed as a means to compensate for the costs associated with the need to keep the social contract with the regular workforce.

From the above, the following considerations are possible. First, as we have seen, the system of employment practices adopted by Japanese firms in their internal labour market was the result of management's conscious response to specific market conditions. This system rests on an agreement whereby workers are guaranteed secure career paths in exchange for their full commitment to the company's objectives of

²⁶ The *nenpōsei* scheme does not apply to all workers, but only to those employed in a supervisory role or subject to the discretionary work system (*sairyō rōdōsei*) (Araki, 2009: 115).

productivity. As argued by Gordon (1998), however, the formation of this commitment was not accidental, but rather the product of a systematic process of mobilisation which allowed Japanese management to maximise productivity and profit whilst keeping conflict in the workplace at bay through the nurturing of an ideology of company citizenship and cooperative labour-management relations. Second, as demonstrated also by Japanese firms' unwillingness to dismiss the costly employment practices adopted in the post-war era, this carefully crafted social contract has taken roots in the Japanese social imagery, and come to constitute the ideological model of reference of the way the employment relationship *ought* to be, thereby setting the benchmark for any desirable change.

2.1.2. Non-regular employment: an alter-ideology

In the previous subsection, we have seen that one of the most outstanding developments in the Japanese system of employment relations has been the rise in non-regular employment. Following up on this, this subsection will look at some of the causes put forward to explain the expansion of this segment of the workforce, the reasons why this trend started to raise concern in Japanese society and the ideological constraints which are influencing the way the problems associated with non-regular employment are being addressed.

From a legal point of view, there is no clear-cut definition of 'non-regular' worker in Japan. Drawing on the criteria used in governmental statistics, legal observers (c.f., e.g., Araki, 2009: 409 – 410; Sugeno, 2012: 203 – 206) point to the following as the defining characteristics of the types of work arrangement encompassed by non-regular employment: the absence of a permanent and full-time contract (e.g. fixed-term or part-time work) and the absence of a direct employment relationship between the user and the provider of the work performed (e.g. labour dispatching or subcontracting). Ishizaki *et al.* (2012: 8 – 12) add to these the non provision of training and corporate

welfare benefits such as company pension. The latter is a definition matching the one introduced in 1982 in the Employment Status Survey²⁷ which identifies a ‘non-regular’ worker on the basis of the title or job description in the workplace where he or she is employed (*shokuba de no koshō*). This means that the worker may be working full-time under a permanent contract but not be considered as part of the ‘regular’ workforce in the workplace (Asano *et al.*, 2011: 67 – 69; Kanbayashi, 2013: 62).

An old presence in the Japanese labour market (Gordon, 1985; Rebick, 2005: 57; Nitta and Hisamoto, 2008: 56 – 60), observers (Rebick, *ibid.*: 63 – 72; Tarōmaru, 2009: 111 – 131; Asano *et al.*, 2011: 63 – 89) point to the following factors lying behind the expansion of non-regular employment in Japan. First, there is the shift in the structure of the industrial fabric. The decline in manufacturing in favour of industries in the tertiary sector has meant an increased reliance on non-regular workers, especially part-timers, for two reasons. On the one hand, firms operating in retail or the customer service businesses are in greater need of temporal flexibility to match long business hours (Asano *et al.*, *ibid.*: 75 – 79). On the other, these industries show a higher volatility of the business cycle which makes them more dependent on numerical flexibility. Moreover, this shift from the secondary to the tertiary sector was coupled with a decrease in family run businesses which led many older married women to transition into part-time work (Rebick, 2005: 68 – 70).

Second, there is companies’ attempt to save on personnel costs due to increased global competition (Rebick, *ibid.*: 67; Tarōmaru, 2009: 128 – 129; MHLW, 2015a: 11 – 14). This, together with the growing importance of information technology leading firms to lessen their investments in human capital (Asano *et al.*, 2011: 86), has resulted

²⁷ The Employment Status Survey (*Shokugyō Kōzō Kihon Chōsa*) is a household based survey conducted every five years by the statistics bureau of the Ministry of Internal Affairs and Communications (MIC). It provides information on the type of economic activity and occupational structure. The Ministry carries out also a monthly survey, the Labour Force Survey (*Rōdōryoku Chōsa*), which is also household based and provides information on employment and hours of work for different age and gender groups. Employment surveys are provided also by the MHLW, but these are usually conducted through establishments.

in the worsening of labour market conditions for young graduates who, regardless of gender, find increasingly difficult to find positions as regular employees, thereby contributing to the increase of involuntary non-regular employment (Rebick, *ibid.*: 66 – 67, 140 – 155; Tarōmaru, *ibid.*; Sugeno, 2012: 209). The expansion in the use of non-regular workers as part of a conscious strategy to cut labour costs is illustrated also by the fact that it was the ratio of non-regular employees by description in the workplace which grew, rather than the ratio of actual part-timers (Asano *et al.*, 2011: 89). Indeed, this segment of the non-regular workforce allows companies to have a labour force qualitatively similar to regular employment without bearing the personnel costs associated with it (Kanbayashi and Kato, 2012; Kanbayashi, 2013).

Starting from the second half of the 1990s, the growing use of non-regular workers by Japanese companies begun to attract attention and raise concern. This happened for two reasons. First, the proportion of workers employed under non-regular contracts registered a sharp increase, growing from 20 % to 38% of the workforce in the years between 1990 and 2012 (Rebick, 2005: 59 – 60; Araki, 2009: 410; MIC, 2013: 7). Second, there was a qualitative shift in the composition of non-regular employment. Up until the 1980s, non-regular employees, especially the part-time category, were represented mostly by students, middle-aged married women and retired men choosing non-regular work to earn extra income (Sugeno, 2012: 207 – 208). However, the 1997 financial crisis marked a shift from voluntary to involuntary non-regular employment. Firms started to lower the percentage of regular employees recruits, and expand the use of forms of work arrangement such as fixed-term contracts, *haken* (dispatched) workers and *ukeoi* (subcontractors) (*ibid.*). Moreover, young school graduates begun to occupy part-time (*arubaito*) positions because of the difficulty of finding regular, full-time jobs

(Nitta and Hisamoto, 2008: 69; Tarōmaru, 2009: 13 – 14).²⁸ These developments meant an increase of the proportion of workers for whom non-regular employment was the main source of income (Sugeno, 2012: 208 – 210; Araki, 2009: 410).

Against the backdrop of these two developments, the issues associated with non-regular employment came to be recognised as a potential social problem. Namely, these issues are: precariousness of employment, unequal treatment and low unionisation rates (Mizumachi, 2009; 2011). Precariousness and unequal treatment, in particular, begun to be included in the political and legal discourse because of the negative implications they entail in terms of social stratification and impact on family and child rearing behaviour, thereby raising concern against the backdrop of low birth rates and the ageing of the Japanese population (Sugeno, 2012: 209 – 210). This is because non-regular workers have low levels of income, no or inferior access to state and corporate welfare, and fewer opportunities for career development (Imai, 2011: 77 – 89; Sugeno, 2012: 208 – 210). At the end of the 2000s, taking in the seriousness of the situation, the government started to take measures to tackle the problem. First, during the last two years in charge before losing the general elections in the summer of 2009, the LDP-Komeitō led government passed the revision of the Part-time Law to include the principle of equal treatment for part-time workers.²⁹ This was followed by the revision of the Minimum Wage Law to raise the levels of minimum wages. However, it was with the victory of the 2009 elections by the DPJ coalition that the issue of non-regular workers' risk of social exclusion was placed explicitly on the political agenda. Consequently, the *Koyō Hoken Hō* (Employment Insurance Law, no. 116/1974) was revised to broaden the scope of eligibility criteria so as to cover categories of non-regular employment

²⁸ As pointed out by Nitta and Hisamoto (2008: 65 – 68), it is quite difficult to have an exact understanding of the actual reality of non-regular employment in the country. This is mainly due to the fact that different governmental statistics use different definitions of non-regular employment, and that even same statistics have changed the defining criteria over time. Thus, for example, the Employment Status Survey may have miscalculated the extent of the expansion of categories such as *keiyaku shain* (fixed-term contract workers) and *pāto* (part-timers).

²⁹ For an examination of the legal policy concerning part-time work in Japan, see *infra*. chapter 3.

previously excluded. By the same token, also the coverage of the public pension and health insurance was expanded. Moreover, to solve the problem of precariousness, the government revised the *Rōdōsha Haken Hō* (Labour Dispatch Law, no. 88/1985) restoring the ban on dispatching of day labourers and strengthening the regulation on the termination of the contract between agencies and client companies (*haken giri*). Further, the *rōdō seisaku shingikai*, the advisory council for labour policy of the MHLW, was entrusted with starting a discussion over the revision of the Labour Contract Law³⁰ in the direction of a policy proposal which would facilitate the transition from fixed-term to permanent contracts of employment. This period of reforms was abruptly interrupted by the fall of the DPJ-led government and LDP return to power in the 2012 general elections. The political shift that followed meant that policies aimed at ‘the protection of non-regular employees will be on hold for a while’ (Sugeno Kazuo, 19 November 2013, interview).

The dynamics which have informed the formal regulation of non-regular employment in Japan will be examined in the next chapter. However, what emerges from the developments described above is the dialectical relationship between the dominant ideology of regular employment and non-regular employment as a form of alter-ideology (Therborn, 1980: 27 – 28). That is, the establishment of regular employment as the predominant model of the way the employment relationship ought to function has dictated the terms under which non-regular employment developed, and it has acted as a constraint over the attempts to redress the uneven distribution of organisational resources between regular and non-regular employees.

³⁰ See *infra*. section 3.2.2.3.

2.1.3. The Abe administration employment reforms: a ‘change for the worse’?

As a matter of fact, the interdependence between regular and non-regular employment, as well as the need for a more inclusive labour market, has been placed on the legislative agenda of the Japanese government elected in 2012. The LDP administration led by Abe Shinzō inaugurated its return to power with the launch of a ‘new growth strategy’ to revitalise the country’s economy, and bring Japan once again to the forefront of global competitiveness. This new strategy,³¹ elaborated by the Industrial Competitiveness Council (*Sangyō Kyōsōryoku Kaigi*) chaired by Abe himself, is meant to achieve a number of structural reforms on three fronts: a shift in monetary policy in order to put an end to the politics of deflation, a relaxation in fiscal policy and the restoration of Japanese companies’ strength by providing stimuli for private investments. The proposed employment reforms fall under the latter package of legislative interventions. The objective of the reforms is the creation of a working environment ‘supporting people who have aspirations and work actively according to their will’, and favouring a ‘smooth labour mobility without unemployment’ (EWG, 2013: 1). The elaboration of the legislative proposals was delegated to the Employment Working Group (*Koyō Wākingu Gurūpu*, hereafter EWG) of the Cabinet’s Regulatory Reform Council (*Kisei Kaikaku Kaigi*).³² The proposed reform package rests on three pillars.

The first is the reform of regular employment for which the Working Group advanced the establishment of new rules for the regulation of the so-called ‘limited regular employment’ (*gentei seiki koyō*). As mentioned in section 2.1.1, the internal labour market of Japanese companies was made reliant soon after the Second World

³¹ A description of the new strategic plan, as well as an overview of what has been achieved so far, is available on the website of the Prime Minister of Japan at the following URLs https://www.kantei.go.jp/jp/singi/keizaisaisei/pdf/saikou_jpn.pdf, http://www.kantei.go.jp/jp/headline/abenomix_archive.html (accessed 15 February 2016).

³² This is an advisory council (*shingikai*) set up under the Cabinet to advise the Prime Minister about necessary reforms for the country. It comprises different working groups, each for a specific policy area.

War on a system of employment practices guaranteeing employees job security in exchange for full commitment to the firm. The workers under this system are labelled *mugentei seishain* (unlimited regular workers) where the term ‘mugentei’ is indicative of the fact that few boundaries are set in terms of working hours, duties performed and relocation policies. A study conducted by the MHLW in 2011 found that many firms had started to introduce a system of diversification of the regular workforce, whereby *mugentei seishain* came to be flanked by a variety of *gentei seishain* (limited regular workers) (MHLW, 2012b). *Gentei seishain* are employed under a full-time, permanent and direct contract of employment. However, in contrast to *mugentei seishain*, the contract should set limits in terms of working hours, duties or place of employment (MHLW, 2014b: 5). Against this backdrop, the EWG’s report argued that the expansion in the use of this type of regular workers has taken place in a legal vacuum which has exposed them to abuse (EWG, 2013: 4). Thus, the provision of a legal framework for the regulation of this form of employment is called for in view of two aims. On the one hand, it will help to clarify the working conditions of *gentei seishain* by setting forth clear employment rules aimed at regulating issues such as wages and working hours. On the other, it will establish a system of balanced treatment with *mugentei seishain* so as to prevent the abuse of limited regular employment, as well as a channel of communication between the two categories. The latter would also offer workers more flexibility allowing, for example, unlimited regular workers to switch to the limited regular category to adjust to personal circumstances (EWG, 2013: 4 – 6). The ultimate objective is the diffusion of a ‘diversified regular employment’ model as the standard type of employment relationship with fluidity between the *gentei* and *mugentei* categories. According to the EWG (EWG, 2013: 11 – 12), this would present a number of advantages. First, it would enhance stability of employment for non-regular workers by creating a channel into regular employment, thereby redressing the imbalance of the

Japanese labour market. Second, it would allow workers to find a better work-life balance. Finally, it would increase women's participation in the labour market as members of the core workforce. Indeed, the heavy burden placed on *mugentei seishain* in terms of duties, working time and transfers policies has often been pointed to as a hindrance barring access into the internal labour market to Japanese women who are still the main child carers and responsible for domestic work (Kawaguchi, 2013). By lowering the degree of commitment required of workers, whilst providing full participation in the workforce as well as mobility between the limited/unlimited categories, the *gentei seishain seido* is argued to be a solution to this issue.

The second pillar of the employment reforms is the revision of the system regulating private employment agencies (*minkan jinzai bijinesu*). This reform is considered pivotal in realising two objectives: fostering the mobility of the labour market and increasing levels of protection of *haken rōdōsha* (dispatched workers). For what concerns the first objective, the rationale is to strengthen the role played by fee-charging employment agencies (*yūryō shokugyō shōkai jigyō*) in favouring the encounter between offer and demand in the labour market. This, in turn, will facilitate the transition of the workforce from industrial sectors in decline towards those in expansion, thereby contributing to the realisation of a working environment of smooth labour mobility without unemployment which is one of the ultimate aims of the Abe administration employment reforms.

As for the second objective, the strengthening of protection for dispatched workers, the reform proposes a shift from prohibiting the use of labour dispatching to replace regular employees (*jōyō daitai bōshi*) to the principle of protecting dispatched workers from abuse (*haken rōdō no ran'yō bōshi*). The former is based on the premise of preventing *haken* from becoming a substitute for regular employment, thereby setting limits on the periods the same worker can be dispatched to a user company to perform

the same job. However, the EWG's report noted that this principle is aimed at the safeguard of regular employment at the expense of protection for *haken* workers (EWG, 2013: 7 – 8). In view of the fact that *haken* now constitute 40% of non-regular employment, the report argued in favour of changing this rationale by introducing the *haken rōdō no ran'yō bōshi* to clarify working conditions of *haken* workers in terms of equal treatment and stability of employment.

Finally, the third pillar of the employment legislative package involves reinforcing the safety net system available in the country as well as providing new schemes of training and skill development for job seekers. However, the Working Group advanced no specific programme in this respect since this reform is the one most strongly dependent on budget availability.

To date, none of the proposals advanced by the EWG has been implemented. As a matter of fact, the DPJ-led government established in 2009 started discussions for a comprehensive reform of the Social Security and Tax System in October 2010 under the Headquarters of the Government and Ruling Parties. A detailed report was published in July 2011.³³ The report encompassed a plan of reforms in four key areas: support to families for child rearing and measures to promote employment opportunities for young people; reform of the health care system; pension reform; and programmes to combat income inequality and foster social inclusion. However, given the political shift that followed with Abe's return to power in 2012, the reform of the social security system was shelved in favour of policies aimed at boosting Japanese economic competitiveness.

By the same token, the functioning and regulation of the *haken* system in the country has been left largely untouched. The last revision of the Labour Dispatching

³³ The report is available for download from the website of the MHLW at <http://www.mhlw.go.jp/stf/seisakunitsuite/bunya/hokabunya/shakaihoshou/kaikaku.html> (accessed 18 February 2016).

Law entered into force in September 2015. The revision abolished the distinction between specified workers' dispatching (*tokutei rōdōsha haken*) and general workers' dispatching (*ippan rōdōsha haken*), and tied labour dispatching to the release of a licence from the MHLW as a general rule.³⁴ Moreover, more stringent rules were introduced to regulate the time period for which dispatching is allowed, to ensure balanced treatment with respect to regular employees in the same place of business and paths of career development for *haken rōdōsha* (MHLW, 2015b: 2 – 16). The law also provides for economic incentives for client companies offering agency workers direct employment at the end of the labour dispatching period (*ibid.*: 13). Nonetheless, despite these provisions aimed at favouring agency workers' transition from indirect to direct employment, the law did not lift the prohibition of using labour dispatching to replace regular employees as proposed by the EWG, thereby suggesting that priority is still being given to the protection of the core workforce represented by client companies' regular employees.

The EWG's proposal regarding the regulation of the *gentei seishain seido* is the only one for the realisation of which some steps have been taken. These have involved the establishment in 2013 of a commission of experts under the MHLW to discuss the proposed reform. The commission published its report in 2014. Echoing the position of the Cabinet's working group, the report argued in favour of the diffusion of the limited regular employment working scheme (MHLW, 2014b: 3 – 4). This type of work arrangement was presented as a viable option to redress the imbalance between core and periphery of the Japanese labour market, foster the spreading of a stable form of employment as the standard model of employment relationship and enhance the

³⁴ Prior to the amendment, the law allowed for two different arrangements of dispatching: the *tokutei rōdōsha haken* by which the agency directly employed the worker on a regular basis (i.e. under an open-ended contract); and the *ippan rōdōsha haken* which required the worker to register with the agency on the assumption that a contract of employment will be formed only for the actual period of dispatching. Being the most precarious in nature, the latter was the one tied to the issue of a license by the MHLW, in contrast to specified dispatching for which a notification to the Ministry sufficed. The amendment recently introduced has now abolished this distinction.

participation of segments of the workforce, such as women, so far confined to the margins of the labour market. The commission also pointed to the fact that nearly 50% of Japanese firms were already making use of the *gentei seishain* scheme. At the same time, however, it was acknowledged that only a minority of companies clearly specified the working conditions of limited regular employees in either workplace rules or the employment contract (*ibid.*: 7).

Against this backdrop, the commission advanced the following recommendations for the management of limited regular workers. First, it called for a clear specification of the limited (*gentei*) nature of the job in terms of working hours, duties and place of employment (*ibid.*: 15 – 16). Second, it highlighted the need to set forth provisions for a balanced treatment between limited and unlimited regular employees especially with regard to wages and training opportunities (*ibid.*: 23 – 24). In terms of wages, the commission suggested the application of the principle of reasonable justification (*gōritekina riyū*), and the application of specified criteria for determining any differential in wages. Nonetheless, as a general rule, wages of limited regular employees should be comprised of between 80% and 90% of those of their unlimited counterparts – in line with the current practice of firms already making use of the *gentei seishain* work arrangement. In respect of training opportunities, instead, the report stated that these should be the same for both groups so as to safeguard the possibility of career progression. Finally, the commission advised the establishment of a transfer scheme (*tenkan seido*) between career tracks (*ibid.*: 19 – 21). This would be a system whereby, for example, a limited regular employee would be able to apply for an unlimited regular position and vice versa. The scheme should also be open to non-regular workers wishing to become limited regular employees. The combined action on these three levels would foster the fluidity of the labour market, enhance a better work/life balance for regular employees, and help to combat the tendency of female

workers to quit positions as unlimited regular employees due, for example, to child care reasons. Moreover, it would allow firms to make a more effective use of limited regular workforce, thereby also preventing employment disputes from arising.

Despite these argumentations, the commission was cautious in suggesting the introduction of these policy recommendations as imperative legal requirements. As a matter of fact, the report acknowledged that setting forth the rules concerning the *gentei seishain seido* in the Labour Standards Law and those regarding the transfer scheme in the Labour Contract Law would be the more efficacious mode of regulation. This is because the new norms would be established as compulsory legal rules whose infringement would be subject to redress through action in court. At the same time, however, it was argued that the adoption of these kinds of approaches entailed the risk of resulting disruption for companies' existing employment practices, thereby having the potential of causing the negative side effect of hampering, rather than promoting, the diffusion of the *gentei seishain seido* (*ibid.*: 17, 22 – 23). Therefore, the commission suggested that the new norms concerning the regulation of the system be introduced as discretionary rules so as to give employers time to make adjustments gradually.³⁵ The shift towards imperative norms was left as a matter of consideration to be discussed during the next revision of the Labour Standards and the Labour Contract Laws (*ibid.*).

The report of the commission of experts of the MHLW also expressed a different opinion from the one given by the Cabinet's EWG with regard to the application of the principle of the abuse of the right of dismissal for economic reasons to limited regular employees. In its own report, the EWG carried out an examination of courts' judgements about the validity of dismissal of *gentei seishain* in the event the position for which they had been employed expired (EWG, 2013: 15 – 16). On the basis of this analysis, the group reached the conclusion that courts had generally acknowledged the

³⁵ For an in-depth examination of this kind of legislative approach, see chapter 3.

different nature of duties of limited and unlimited regular employees, thereby admitting the dismissal of the former as a justifiable measure in many instances.³⁶ In contrast to this interpretation, the MHLW commission's report reached the opposite conclusion, arguing that the overall jurisprudential trend had been in favour of the application of the four factors taken in consideration when judging cases of dismissal for economic reasons to the limited regular workforce (MHLW, 2014b: 10 – 11). Hence, employers were advised to safeguard employment for this category of workers, and turn to dismissal only as a means of last resort (*ibid.*: 18 – 19).³⁷

If implemented, the reform movement described above is highly significant for two reasons. On the one hand, it represents an important ideological shift towards the necessity of a more inclusive labour market. On the other, it does have the potential to redress the imbalance between the core and the periphery of the Japanese workforce. As noted by Mizumachi (2007), there are two major problems attached to the Japanese employment system. The first is the fact that the core segment of the workforce is burdened with excessive amounts of work (*kajō rōdō*) which lead to issues such as death from overwork (*karōshi*). The second is the gap (*kakusa*) in treatment and redistribution of resources between regular and non-regular workers. Against this backdrop, by promoting the diffusion of a type of (regular) work arrangement in between the two as well as building bridges among categories of workers, the planned reforms could have a major impact on Japanese society in terms of overcoming social exclusion of non-regular employees, and combatting the issues associated with (unlimited) non-regular employment.

³⁶ The analysis carried out by the Cabinet's working group was in fact strongly criticised for being 'incorrect' (*ayamatta*) by the *Nihon Rōdō Bengodan* (Labour Lawyers Association of Japan). On this point, see Umeda (2013) in the special issue dedicated to the subject by the Association's quarterly journal *Rōdōsha no Kenri*, volume 301.

³⁷ The situation was recognised to be different in the case of highly specialised professionals, for whom dismissal was found valid in several instances (MHLW, 2014b: 11, 18). This is because the courts recognised that, on the one hand, it was difficult for companies to reallocate tasks to these workers due to the specific nature of their skills; and on the other, because it was argued that those same skills enhanced their employability in the labour market, thereby making it easier for them to find job opportunities elsewhere.

This view, however, is not shared by leftist groups (Kawazoe, 2013; Minpōkyō, 2013). The Minpōkyō (Democratic Legal Association), in particular, attacked the *gentei seishain* scheme on the basis that it is a means to encourage the diffusion of a second-class model of regular employment whereby workers would still be required the same level of commitment as unlimited regular workers but without the same guarantees in terms of employment stability and career development.

The three National Trade Union Centres of Japan, too, launched on the web and in their general meeting reports a campaign of opposition against both the *gentei seishain seido* and the *haken* reform. The campaign accused the reforms of being an attack on the principle of stability of employment, cornerstone of the Japanese employment system. Therefore, the *gentei seishain seido* was labelled as a manoeuvre to foster ‘freedom of dismissal’, whereas the changes to the *haken* system were criticised for paving the way towards a dead end that would deny agency workers any possibility of progression to regular employment.

These critiques lend support to the idea introduced in the previous sections. That is, that the model of regular employment established in Japan within the boundaries of big companies’ internal labour market after the Second World War continues to represent the ideological hallmark of the Japanese employment system, and acts as a constraint on the process of renegotiation of the normative order concerning employment relations in the country. As mentioned, in this study an ideology is posited as currents of beliefs acting as filters which ‘influence and structure the perception and cognition of social agents’ (Hunt, 1993b: 121). The ideology of the regular worker employed soon after graduation under a full-time, permanent contract and with a stable career path within the firm has come to constitute – especially among trade unionists and leftist groups – the dominant idea which structures the understanding of the way the employment relationship ought to be. On the one hand, as we have seen, this has

implications for the persistence of the duality of the Japanese labour market. Japanese companies have been reluctant to renege on the employment agreement established after the Second World War and, in order to counterbalance the growing costs associated with regular employment, have come to rely increasingly on non-regular employees. The latter, in turn, are paying the price of the maintenance of regular employment in terms of precariousness of employment and lower working conditions, which are seen as justified in light of the lower degree of commitment to the firm required of them. On the other hand, the negative implications for Japanese society associated with the diffusion of non-regular employment are leading to calls for the redress of the imbalance between the core and the periphery of the labour market. However, the attempts to renegotiate the predominant ideological ideal of regular employment, by means of the *gentei seishain seido*, are being met with resistance and assumed to be a 'change for the worse' (*kaiaku*).

2.2. The Japanese legal system

In the previous sections, I have described the matrix of combined elements which are influencing the ideological climate affecting the Japanese employment environment. These are: the model of regular employment (*mugentei seiki koyō*) established in the internal labour market after the Second World War, the rise of non-regular employment and its development as a form of alter-ideology, and lastly the debate over employment reforms which has recently swept the country. As was argued, this matrix pivots around the ideological belief in unlimited regular employment as *the* legitimate form of employment relationship in the country.

In this section, we will turn our attention to the second ideological dimension we are concerned with in this chapter, i.e. the one pertaining to the Japanese legal system as a whole. As argued by Hunt (1993b: 136), various levels of a legal system have

different ideological perspectives which need to be understood in relation to the broader ideology overarching the totality of the legal system in question. Therefore, in order to reveal the rationale which has informed Japanese legal policy in the field of employment, we must first examine the dominant ideological features which belong to the Japanese legal system as a whole, and which have cast their shadow on the form and substance of Japanese employment law. To this end, this section is divided into two subsections. The first will be concerned with retracing the development of the legal system of Japan and with outlining some of its core constituents. Building on this, the second subsection will instead examine more specifically the system's ideological underpinnings.

2.2.1. General overview

Before setting forth to examine the legal ideology of the legal system of Japan, it is necessary to take a step back and look at the historical development of some of its characteristics.

The Japanese legal system can be seen as a successful case of 'legal transplant'. As defined by Alan Watson (1974: 21) in his seminal book *Legal Transplants*, a legal transplant is 'the moving of a rule or a system of law from one country to another'. In the specific case of Japan, this kind of transfer occurred in three waves. The first wave took place in the seventh and eight centuries through the adoption of the *ritsu-ryō* codes³⁸ which introduced in Japan a model of administration based on the Chinese political and legal system (Ishii, 1980: 22 – 29).

The second wave was in the second half of the nineteenth century, after the fall of the Tokugawa Shogunate and the formal 'restoration' of political power to the imperial family. At that time, the main issue that confronted the new governmental *élite*

³⁸ These were two collections of laws, criminal and administrative respectively, which Japan adopted during the Nara period (702 – 810) and which, together, constituted the Taihō code (Ishii, 1980: 22 – 23).

was the revision of the so-called ‘unequal treaties’ (*fubyōdō jōyaku*) that the Tokugawa rulers³⁹ had signed in 1854 first with the United States, and subsequently with other European countries. The *fubyōdō jōyaku*, beside establishing an arrangement for unilateral customs agreements, rested on the principle of extraterritoriality⁴⁰ for the Western nations – to be exercised through consular jurisdiction – which was seen as the major threat to the country’s national authority. A prerequisite set by foreign powers in order to attain the revision of the treaties was that Japan modernised her legal system. Therefore, the new political *élite* declared that ‘evil practices of the past’ should be abandoned and that relevant expertise should ‘be sought all over the world’ (Röhl, 2005; quoting the 1968 Meiji Charter Oath: 167). To this end, different legal systems of the Western world were examined in depth and, eventually, European models of law – namely the codified law systems of Germany and France – were imported into the country (Oda, 2009: 13).

Finally, the third wave of foreign law reception occurred after the Second World War. In this instance, major legal changes were brought about under the direction of the SCAP (Supreme Commander of the Allied Powers) soon after Japan signed the Potsdam Declaration in 1945 which set as the main objective of the Occupation policies the removal of ‘all obstacles to the revival and strengthening of democratic tendencies among the Japanese people’ (art. 10). Thus, in pursuance of this aim, the first step taken by the Occupation powers once they set foot in Japan was to revise the Constitution, supreme law of the country. The Constitution of Japan (*Nihon Koku Kenpō*) came into force on 3 May 1947 and comprises 103 articles whose governing principle is that of the rule of law as set by art. 97. The Constitution rests on three fundamental pillars, popular

³⁹ During the Tokugawa period (1603 – 1868), Japan had entered a period of political isolation virtually closing any intercourse with foreign countries. It is the so called *sakoku* policy started in 1637 by the *shogun* Iemitsu. This period ended with the arrival of the so-called ‘black ships’ under the command of Commodore Perry and the subsequent signing of the Kanagawa treaty by which Japan opened its ports to trade with the United States.

⁴⁰ Extraterritoriality refers to the subtraction of either persons or physical places (e.g. embassies) from the jurisdiction of a host country.

sovereignty (art. 1), pacifism (art. 9) and safeguard of fundamental human rights (art. 11). Moreover, in contrast to the previous Meiji Constitution, all constitutional guarantees are subject to judicial review (art. 81).

Within this new constitutional frame, a set of individual laws followed in order to deal with more specific matters. Namely, these were the concrete realisation of the principle of equality of men and women in social relations, liberalisation of the economy and democratisation of labour relations. Thus, books IV and V of the Civil Code, dealing with family and succession, underwent a complete revision in order to modernise family relationships and ensure gender equality (Oda, 2009: 201 – 202).⁴¹ As for the economic reforms, the SCAP directives to the Japanese government required the dismantling of the great business conglomerates of the pre-war era (*zaibatsu*) and the removal of ‘feudal elements’ from the Japanese economy. These reform measures came to be enshrined in the *Dokusen Kinshi Hō* (Anti-Monopoly Law, no. 54/1947) enacted in 1947, which aimed at the elimination of excessive concentration of economic power and maintenance of fair competition. The *zaibatsu* were dissolved, their shares sold to the public and a Fair Trade Commission established as the main agency entrusted with the application of the new law (*ibid.*: 327 – 330).⁴² The picture of the political reforms under the occupation was virtually completed with the enactment of the main *corpus* of labour legislation which set the stage for a more democratic management of employment relations, also through the encouragement of trade unions

⁴¹ If we exclude the amendments of Family and Inheritance Law and the introduction of some general clauses (*ippan jōkō*) at the beginning of book I on General Provisions, the *Minpō* has not been substantially amended since its enactment in 1898. In 2006, however, the Japanese government started the legislative process to revise book III on Law of Obligations (*saikenhō*).

⁴² As a matter of fact, for many years the enforcement of this piece of legislation has been quite lax (First and Shiraraishi, 2007). Moreover, soon after the end of the occupation, it underwent some substantial amendments so as to ‘adapt’ it to the Japanese situation which made possible the reemergence of business affiliations known as *keiretsu* and a system of cross shareholding which significantly hindered foreign entry to the Japanese market (Oda, 2009: 327 – 328). However, in 2005, a major reform of the Anti-Monopoly Law was carried out as part of the measures to increase the ‘transparency’ of the Japanese economy. For a brief summary, see Oda (*ibid.*: ch. 14).

activities.⁴³ The three main labour laws – the *Rōdō Kumiai Hō* (Trade Union Law, no. 74/1949, hereafter TUL), the *Rōdō Kankei Chōsei Hō* (Labour Relations Adjustment Law, no. 25/1946) and the *Rōdō Kijun Hō* (Labour Standards Law, no. 49/1947, hereafter LSL) – were conceived as the general normative framework for the basic workers’ rights embodied in the Constitution (art. 27 – 28) and represent still today the backbone of Japanese labour law.

Despite the US common law influence of this period, the Japanese legal order remains grounded in the civil law tradition.⁴⁴ This means that the legal system of Japan is primarily founded on codified statutory law, does not in principle recognise the doctrine of *stare decisis*⁴⁵ and posits a clear separation of the judiciary from the two other branches of the state, the legislative and the executive (Merryman, 1985). It also means that, as with other civil law systems, in Japan rules derive their binding force from a variety of legal sources called sources of law. Roughly, it is possible to identify six main sources of law in the Japanese legal system (Oda, 2009: 26 – 52). These are: the Constitution, statutory laws (*hōritsu*), delegated legislation (e.g. cabinet orders and ministerial ordinances), international treaties (*jōyaku*), custom (*kanshū*) and judge made law (*jirei*). The Constitution stands at the top of the hierarchy, being explicitly recognised as the ‘supreme law of the nation’ (*saikō hōki*). This principle is safeguarded by placing on the Supreme Court the authority to review the constitutionality of any

⁴³ In fact, after 1948, a shift in occupation policy in Japan is clearly visible due to growing tensions between the United States and the European Eastern Bloc. This, in the area of employment relations, led to some important amendments to the Trade Union Law in 1949 aimed at ‘rectifying the excesses’ of the initial reform. (Oda, 2009: 21 – 22).

⁴⁴ The term ‘tradition’ is used here as defined by Merryman (1985: 2), i.e. ‘[a legal tradition] is a set of deeply rooted, historically conditioned attitudes about the nature of law, the role of law in the society and polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught’. Different legal systems sharing elements on these aspects are grouped under the same legal tradition. Comparative law scholarship has generally distinguished between two legal traditions: the civil law and the common law. As qualified by Merryman (*ibid.*: 1), the fact that different national legal systems are grouped under the same legal tradition does not mean that they share the same legal institutions, procedures and rules.

⁴⁵ This is the principle of the binding force of legal precedents for courts’ decisions in common law jurisdictions.

other piece of legislation – be it a law, an imperial rescript or act of the government – which might violate it.⁴⁶

These sources of law find application within a system of administration of justice which rests on a three-tiered and unitary court system (*ibid.*: 57 – 63). At the bottom, there are summary courts (*kan'i saibansho*) and district courts (*chihō saibansho*). Both function as courts of first instance, the only difference being in the scope of jurisdiction: summary courts deal with small claim civil cases and minor criminal offences, whilst district courts are vested with the authority over most ordinary civil and criminal cases.⁴⁷ The second tier of the court system is represented by eight high courts (*kōtō saibansho*) which mainly handle appeals against judgements rendered by both summary and district courts, as well as having the jurisdiction to review decisions made by agencies with semi-judicial authority.⁴⁸ Finally, at the top of the judicial hierarchy rests the Supreme Court of Japan (*saikō saibansho*) which acts as court of last resort. In light of a heavy caseload, however, the scope of grounds for appeal to the *saikō saibansho* has been severely limited by the last reform of the Code of Civil Procedure to constitutional grounds only, i.e. instances where an issue over the interpretation of the Constitution is raised.⁴⁹ Beside pure jurisdictional functions, the Supreme Court also has authority over the uniform interpretation and application of law as well as over the ‘administration of judicial affairs’ (Hattori, 1984; Oda, *ibid.*: 59).

2.2.2. The ideology of Japanese law

In the previous subsection, I have sketched a general overview of the Japanese legal system, from the adoption of European models of law to some of the features of Japan’s

⁴⁶ However, in contrast to other civil law jurisdictions, constitutional review in Japan is by way of exception. This entails that the non-constitutionality of a law cannot be questioned in a general way but only if a concrete case is brought about in court proceedings. Second – even when it is acknowledged that a norm is against the Constitution – the provision will be deemed null and void only for the specific case at hand, although the judgment is sent to both the Cabinet and the Diet for due consideration (Noda, 1976: 120 – 122; Oda, 2009: 33 – 35).

⁴⁷ District courts also function as courts of appeal against rulings of summary courts (Oda, 2009: 57 – 58).

⁴⁸ Among these there are, for example, the Labour Relations Commissions. See *infra*. chapter 4.

⁴⁹ *Minji soshō hō*, art. 312. The Supreme Court is also recognised ample discretion over which cases to accept, and needs not to provide any reasoning to justify its decision.

legal institutions. Retracing the historical formation of the legal system of Japan was a necessary step if we are to understand its ideological underpinnings, as well as the ideological shift these are undergoing in recent years. This is because, as argued by Cotterrell (1992: 114 – 117), characteristics of legal institutions are historical occurrences dictated by economic and political necessities and – as such – are inextricably intertwined with a certain kind of legal ideology about the nature of law and its function in society. From this premise, the aim of this subsection is to picture an image of the ideology of Japanese law from an examination of the relevant literature on the subject, and the changes this is undergoing as a result of the reforms of the Heisei period.

The legal institutions that Japan imported largely from Europe are founded on a legal ideology pivoting around the concept of the rule of law. This posits the bounded nature of the authority of the state, the idea that citizens are legal subjects who are subject to and equal under the law, and have access to a system of administration of justice exercised by an impartial and independent judiciary.⁵⁰ In contrast to this model, which Upham (1987: 7 – 16) identified as a rule-centred model of law, the legal ideology of the Japanese legal system differs in that it is founded on the existence of fluid borders among different governmental powers, an aversion for clear-cut rules in favour of the social norms governing social interaction, and a model of social control encouraging the resolution of conflict through informal venues of dispute processing. The dialectic between these two conflicting views about law has shaped much of the literature about the Japanese legal system. Specifically, this means that the role of law in Japan has been analysed from the position of the ideological model of the rule of law,

⁵⁰ The concept has traditionally been spelt out differently in common and civil law. According to the English jurist Dicey (1959), the rule of law comprises three elements: the accountability of government's actions under the law; the equality of all subjects under the law; and rights as based on decisions of courts rather than on abstract constitutional statements. By contrast, in civil law, the concept of the *Rechtsstaat* revolves around the following components: that the state is a political body whose aim is to protect the liberty of each and every individual within its borders, and that this function is exercised through publicly available laws applied evenly by an independent judiciary (Böckenförde, 1991: 49 – 50).

which has represented the yardstick against which the characteristics ‘pertaining’ to the Japanese legal system have been measured. Namely, these are: the low level of litigiousness of Japanese people, legal informality, and consensual governance.

The supposedly low level of formal litigation in Japan has probably been one of the most debated issues in the legal scholarship about the country’s legal system. The debate⁵¹ was stimulated at the beginning of the 1960s with the publication in English of an essay entitled ‘Dispute Resolution in Contemporary Japan’ written by the Japanese sociologist of law Kawashima Takeyoshi (1963).⁵² The basic assumption at the core of Kawashima’s argument was that – in contrast to the ‘West’ – Japanese people lacked not only an understanding but even a notion of individual rights. This led to the natural corollary that, if there was no consciousness of rights, at least in the Western sense of justified claims to a legitimate interest, there could be also no will to assert rights. This, in turn, explained the low litigation rates in the country. Therefore, *ningen kankei* (human relationships) in Japan were governed less by clear-cut rules of rights and duties and more by harmony (*wa*) which basically derived from two features of Japanese ‘traditional’ society: on the one hand, the idea that ‘social status is differentiated in terms of deference and authority’; on the other, the fact that ‘social roles are defined in general and very flexible terms’ (Kawashima, 1963: 44).⁵³ As a consequence, disputes were not expected to arise or – in the unlikely event that they did – the natural course of action to deal with them would have been through amicable and informal methods of dispute resolution such as conciliation (Kawashima, 1967: 162 – 166).

The American legal scholar Frank Upham (1987) offered a different explanation to account for the Japanese people’s inclination towards informal venues of dispute

⁵¹ For a detailed discussion see *infra* chapter 4 of this study.

⁵² As pointed out by Feldman (2007: 73), however, Kawashima brings very few empirical and comparative data to support his argument that the Japanese litigation rate was lower than in other countries.

⁵³ Similar arguments are made also by Noda (1976: 159) in his ‘Introduction to Japanese Law’, although Noda explicitly locates Japanese social relations within the framework of *giri* which he defines as a ‘system of social rules of a non-legal nature which continues to operate side by side with the system of state law’.

processing by putting forward a theory about Japanese law which he defined as legal informality. This refers to the level of control that governmental *élites* in the country are able to exercise over the course of social change through bureaucratic informal processes of decision-making policy, and the manipulation of the legal framework. In Upham's theoretical model, social actors sharing a common objective can unite into organised social movements and demand a renegotiation of the established social order in line with the movement's goals. Although according to the author a successful outcome will be ultimately decided by the movement's ability to mobilise political allies to its cause, the strategic use of formal legal forums is pointed to as pivotal in helping to throw issues into the limelight of political discourse. As Upham's argument goes, it is precisely to defuse the threatening potential of litigation and retain control over the pace of social change that Japan's governmental *élites* have nurtured a legal environment where litigation is discouraged in favour of administrative mediation schemes. This is coupled with bureaucratic attempts at providing effective solutions to the problems which spurred the movement into action so as to make recourse to legal avenues of redress unnecessary. This bureaucratic intervention does not translate into direct control. Rather, 'the bureaucracy tries to gauge the fundamental direction of social change, compares it with the best interests of society from the perspective of the ruling coalition of which it is part, and then attempts to stimulate and facilitate the creation of a national consensus that supports its own vision of correct national policy' (*ibid.*: 21).

Upham's model of legal informality in Japanese law has points of contact with the third defining characteristic pertaining to the Japanese legal system. That is the thesis of consensual governance as put forward by Haley (1991: 166 – 168, 193 – 194). Haley's argument is rooted in the premise that Japanese law rests on a paradox whereby authority and power of enforcement are not linked together. This means that '[in Japan]

the capacity of the state to direct and control (...) becomes principally a function of its ability to persuade, bargain or cajole in order to induce consent' (*ibid.*: 193). This, in turn, translates into the bureaucracy's constant effort to negotiate policies and gain reciprocal consent from interested parties (Samuels, 1987: 260). As emphasised by Haley (1991: 167 – 168), however, the process of building reciprocal consent is hampered when too many actors are allowed into the negotiated policy making process, thereby leading bureaucratic leaders to try and keep the number of participants to a minimum.

From these themes, it is possible to sum up the ideology of the Japanese legal system of the post-war period thus: a legal ordering grounded on broadly worded statutes which leaves ample margin of discretion to bureaucratic action through informal and consensus building processes of policy-making. Moreover, this ordering is reliant on a system of social control which attempts, often successfully, to keep social conflict out of formal venues of dispute resolution against the recognition of litigation as a potential threat to the established social order. Starting from the 1990s, some of these features of the Japanese legal system began to attract some criticism. Specifically, the legal ordering of the country was accused of lacking transparency, of delegating too much power to ministries and of having created a judicial system inaccessible to ordinary citizens (Ginsburg, 2007; Oda, 2009: 22 – 25).

This wave of criticism was initiated by the bursting of the economic bubble which plummeted the Japanese economy into a period of deep recession. Against this backdrop, the protective regulations that had been considered as one of the main supports for Japanese growth during the pre-bubble period came to be seen as obstacles hampering companies' transitions into new sectors of the economy (Kusano, 1999; Oda, *ibid.*). These criticisms led to the rise of a deregulation movement in the country and, for the first time since the end of the war, the government launched a comprehensive set

of measures aimed at paving the way towards an ‘a posteriori-monitoring, redress society based upon clear-cut rules and self-accountability’ (report of the Justice System Reform Council, quoted in Oda, *ibid.*: 55). Among these measures, there was the first Deregulation Promotion Programme started in 1995 whose core target was in the first instance the financial sector, followed by many corporate governance related laws. In the latter area, the pace of the reform has been particularly striking leading to the implementation of many important pieces of legislation such as the New Company Law (*Kaisha Hō*) in 2005 and various interventions in the labour law field, such as the revision of the rules concerning agency work, aimed at fostering a more dynamic external labour market.

The area of the administration of justice has also undergone major reforms. The starting point was the establishment in July 1999 of the Justice System Reform Council which was entrusted with the task of setting forth a comprehensive reform of the justice system which would enhance its accessibility to the public, popular active participation in the administration of justice and expansion of the role and functions of the legal profession (Law 68/1999, art. 2). The Council concluded its operations two years later, publishing its final set of recommendations in June 2001. In November of that same year, the Diet passed the Law for the Promotion of Justice System Reform (no. 68/1999). The reforms were carried out by the special Headquarters set up inside the Cabinet and, pursuant to the opinions of the Council, targeted mainly dispute resolution procedures, the reform of the legal profession and criminal justice. Among the newly enacted laws, there are the new *Chūsai Hō* (Arbitration Law, no. 38/2003), the *Rōdō Shinpan Hō* (Law on the Procedure for Handling Individual Labour Disputes, no. 45/2004), the changes to the system of legal education and the setting up of a system of lay participation in the criminal justice system, the so-called *saiban'in seido*.

The Heisei reform movement signals an important shift in the Japanese ideological environment towards a legal order stressing the importance of statuses based on clear-cut rules enhancing clarity and transparency in legally regulated interactions, and on a justice system accessible to ordinary citizens in order to obtain redress. That is, a legal order centred on the rule of law.

As argued by Cotterrell (1995: 11), the ideology of a particular legal order is subject to change. This happens when the intellectual resources necessary for sustaining certain currents of ideas peter out. In the Japanese case, the fissure occurred with the bursting of the economic bubble which resulted in the legitimation crisis of the model of regulation Japan had relied on in the pre-bubble era. However, as will be clear in the next chapter from the discussion of the reform efforts in the field of employment, the transition from one ideological model to the other is not devoid of conflict and unresolved tensions often transpiring in the pace and scope of desired institutional and legal improvements.

Conclusion

This chapter has engaged in the discussion of the ideological formations operating in the background of, and yet bearing an influence on, the legal reforms in the Japanese field of employment which will be examined in the chapters to follow. As was argued in the methodology chapter, this study takes a view of law as a form of ideology. Legal ideology, however, does not function in isolation. Rather, it relates to concomitant currents of ideas rooted in the social setting under examination (Therborn, 1980; Hunt, 1993b: 131 – 135). Building on this premise, this chapter has highlighted two ideological dimensions overlapping with, and having an influence on, the legal ideology which has informed employment reforms in Japan.

The first is the ideology of regular employment as the legitimate model of employment relationship in the country. As was shown, the establishment of regular employment in the post-war era was the result of a carefully negotiated social contract between management and a section of the Japanese labour movement. Initially a response to specific historic and labour market circumstances, this social contract has taken deep roots in the Japanese employment system, and has come to constitute the recognised and legitimate frame of reference for the way employment relations ought to be organised. The ideological predominance of regular employment has had two main implications. First, it has determined the conditions under which non-regular employment developed, namely in terms of precariousness of employment and an inferior share of organisational resources as a way of safeguarding the existence of the core of the labour market. Second, it has acted as an inhibitory force constraining attempts at redressing the imbalance between regular and non-regular employees because, on the one hand, it legitimises non-regular workers' lower working conditions as a result of the lower level of commitment they are required from the firm; on the other, because reform efforts to change the *status quo* are perceived as an attack to the post-war era social contract, encroaching upon regular workers' entitlements.

The second ideological dimension examined in this chapter pertains to the ideological shift occurring in the Japanese legal system as a result of the Heisei reforms. As we have seen, the shift is in the direction of strengthening the rule of law in the country in response to the bursting of the economic bubble of the beginning of the 1990s, and took the form of a series of legal interventions aimed at nurturing a model of regulation based on principles of transparency and access to justice as opposed to the informalism which characterised many of the administrative and legal processes of the post-war system. The drive towards the legal ideology of the rule of law is also behind some of the employment reforms carried out by the Japanese government. However, as

will be shown, these reform efforts have also been constricted by the remaining legacy of the legal ideology of the pre-reform period.

This chapter has discussed two ideological forces which are operating in the background of the employment reforms implemented in Japan in the last thirty years. These are: the establishment of regular employment as the legitimate model of reference for the organisation of employment relations in the country; and the questioning of the legal ideology of informalism of the post-war era in favour of the consolidation of a mode of regulation based on the rule of law. The next two chapters will build on this, and show how both ideological dimensions have played a crucial part in shaping the pace and breadth of the legal interventions in the employment arena.

'The law, legal prescriptions and legal definitions
are not assumed or accepted,
but their emergence, articulation and purpose
are themselves treated as problematic'
(Campbell and Wiles, 1976: 553)

Chapter 3

Compromised Legislation

The ideology of Japanese employment law

Introduction

A sociological study of law as a form of ideology presupposes analysing legal ideology in its interaction with concurrent ideologies existing in the wider social context of reference. In line with this theoretical framework, in the previous chapter I have outlined the main strands of thought which have informed the employment and legal environment in Japan. As we have seen, these are: on the one hand, the dialectic between regular and non-regular employment coupled with the recent attempts at renegotiating the boundaries of the Japanese employment system; and on the other, the legal reforms launched by the Japanese cabinet starting from 2001 to increase levels of transparency and access to justice in the country. Building on this, this chapter will be concerned specifically with the examination of the legislative strategies chosen by the Japanese government in the regulation of the employment relationship, and an investigation of the decision making process which led to their adoption. As highlighted in the methodology chapter, the focus will be on law as an agent of change, i.e. on the analysis of the legislative interventions in the field of employment carried out by the Japanese state to both respond to and enhance change in the management of the Japanese workforce. There are different ways of looking at the role of law as an instrument to steer social change. In this chapter, I will focus on what Mayhew (1971: 195) defined as ‘extension of formal rights’. That is, I will examine the endeavours of the Japanese government to redefine the normative order concerning employment relations in the country by expanding the coverage of employment rights to sectors of the workforce previously excluded from it. In doing so, my objective is threefold. First,

to reveal the legal ideology that has informed Japanese employment reforms. Second, to examine the internal dynamics of the advisory council responsible for the formulation of employment policy in the country, and show how the access that certain actors in the employment arena have had to it has contributed to the affirmation and perpetuation of such an ideology. And finally, to reveal the implications this has in terms of the structure of the Japanese labour market and distribution of legal resources among different segments of the workforce.

So far, the study of employment relations in Japan has been locked into a perspective which has placed the focus of interest on practices of employment, both at the national and firm level (cf., e.g., Abegglen, 1958; Gordon, 1985; and, among the most recent literature, Rebick, 2005; Keizer, 2010; Imai 2011). As a matter of fact, part of the literature has taken into consideration the legal framework and the legal process as an important variable in the arena of employment practices, but it has done so only in so far as it helped to explain the use made of both regular and non-regular forms of work arrangements in the labour market (Imai, *ibid.*) or particular outcomes at the social and policy making level (Weathers, 2001 and 2004). Seldom has the role of law and of the state – as law-making entity able to exercise strategic choices as an active player in the field of employment relations – been investigated; nor has the discourse on labour relations ever been linked to the broader rationale informing legal processes in the country.

In his insightful study of the changes that are affecting employment relations in Japan, Imai (2011) recognises the importance of the state as an important player in shaping the regulatory framework likely to affect them. He notices that ‘employment relations are actually shaped directly and indirectly by industrial, employment and welfare policies set by the state’. However, he goes on to argue, ‘the style and extent of states’ involvement in the issue differ greatly depending upon the *economic* and

political trajectory of the society' (*ibid.*: 11: emphasis added). This view is revealing for what it suggests about employment relations being social relations existing in a labour market dimension on which economic and political considerations act as constraints. However, there are two limitations to this fruitful line of analysis. On the one hand, Imai's argument fails to appreciate the more subtle dimension of legal ideology and the influence ideology has on the way the legal norms aimed at achieving particular policy goals are formulated. This, in turn, leads to underestimating the role legal rules play in formalising and regularising certain kind of arrangements in employment relations, thereby giving them legitimacy over alternative models.

A further problem with Imai's line of argument relates to the importance placed on the *rōdō seisaku shingikai* based processes of decision making as a form of 'corporatism with labour' (*ibid.*: 168). *Shingikai* are advisory councils whose task is to deliberate and give advice on national policies and administrative measures (Harari, 1988 and 1990). They exist under the executive branch of the government. The *rōdō seisaku shingikai* is the consultative body under the MHLW, and sees the joint participation of workers', employers' and government representatives in discussions relating to employment policies. In the reconstruction of the process of labour market deregulation presented in his book, Imai draws a direct link between the advancement of deregulation policies and the growing influence exercised in the MHLW by the deregulation committees established under the Cabinet from which trade union representatives are excluded. In contrast, Imai argues, the *rōdō seisaku shingikai* allows for labour participation in the policy making process, thereby preventing governmental policies concerning employment from taking an excessive pro-management turn. This assessment, which is shared by other observers (Miura, 2001; Watanabe, 2014), has one main weakness. That is, it treats 'labour' as a monolithic bloc, consistently representing workers' interests. This view has two shortcomings. First, it tends to neglect the fact

that different sections of the trade union movement are representative of different workers' constituencies. Second, it sidelines issues of access to the *rōdō seisaku shingikai*, thereby failing to appreciate that it is the interests of certain segments of the workforce which are given prominence in the decision making process.

The positive assessment of the *rōdō seisaku shingikai* as a policy making forum is not shared by Weathers (2004), who is quite effective in identifying the major drawback of labour policy making based on *shingikai* discussions. That is, the fact that '*shingikai* give rise to compromise-oriented processes poorly suited to dealing with systemic problems' (Weathers, *ibid.*: 424). However, the problem with Weathers' analysis is that it remains unclear how assertive collective bargaining – the alternative he suggests as a more effective regulatory strategy – is better suited to serve workers' rights in general and non-regular workers in particular. Indeed, as feminist labour law literature has convincingly demonstrated, collective bargaining can be criticised precisely for having often neglected the interests of minority groups. Joanne Conaghan (1999: 13) persuasively makes the point as follows: 'the dominant assumption (...) that voluntary collective bargaining is the most effective means of safeguarding workers' interests problematically presupposes that all workers are, or can be, effectively represented by collective bargaining and that workers' interests largely coincide. Yet the history of the trade union movement graphically reveals their persistent failure to embrace certain categories of workers'. Although Conaghan's statement refers to the British tradition of 'legal abstentionism' and collective *laissez faire* ideology,⁵⁴ it also applies well to Japan, where trade unions have traditionally limited their membership to regular employees (Hanami and Komiya, 2011: 169), albeit with some changes in recent years (Hashimoto, 2012).

⁵⁴ A brief summary of the historical development of British labour law is provided by Lewis (1976).

The literature on the Japanese legal system has also largely disregarded Japanese employment law as a fruitful subject for research. One noticeable exception in the English language is Foote's examination (1997) of the decision making process which led to the 1987 revision of the LSL, and the enactment of the related 1992 implementing ordinance directed at achieving a reduction of the annual working hours for regular employees. Foote's analysis deserves attention for his contribution in identifying the two key features of Japanese labour law policy making: gradualism and tripartism. Gradualism (*zenshinshugi*) refers to the preference of Japanese legislators for what Foote perceptively describes as a 'phased implementation approach' (*ibid.*: 271), rather than for the imposition of a set of substantive legal rules. As for tripartism, it is the term normally used to indicate the coordination policy by which representatives of employers, workers, and the state are involved in the formulation of labour related decision making which takes place in the aforementioned *rōdō seisaku shingikai*. In concluding his analysis, Foote (*ibid.*: 294, nt. 191) argues in support of the role that law can play in Japan as an agent of change but also remarks that: 'the legislative efforts [on working hours] follow the classic pattern of seeking to achieve change not through the coercive force of law, but by using law, and governmental persuasion, to change attitudes'.

Foote's view is shared by Japanese observers such as Araki (2000; 2004a; 2004b) and Terayama (2002). Araki (2004a; 2004b), in particular, in his examination of the employment related legislative interventions relying on the use of so-called *doryoku gimu kitei* (duty to endeavour provisions), praises the approach, arguing that the introduction of new normative regimes into an established system of employment practices carries the risk of being counterproductive. Employers would not have either the necessary understanding or the time to adjust their HRM practices to the new legal requirements. In contrast, *doryoku gimu* provisions create room for favouring a gradual

incorporation of new legal rules into an established system of employment practices, thereby diminishing the risk of rejection as well as having a positive effect on levels of compliance.

These studies are illuminating in that they have helped to reveal the way the Japanese government has attempted to use legal rules to promote employment policies deemed socially desirable. However, they are also constrained by their reliance on a narrow normative theory of law which, as mentioned in the methodology chapter, suffers from the tendency to sanitize the context in which legal processes occur. Thus, Foote's (1997) and Araki's (*ibid.*) analyses have focused on the significance of the legal changes being fostered, and have largely left unquestioned the implications that a *doryoku gimu* based legislative approach might have in terms of unequal distribution of legal resources among different segments of the workforce. A further problem with these authors' examinations is their inherent trust in the capacity of law to promote change, which leads them to ignore the extent to which the choice of certain legislative strategies can be instrumental in actually hindering change.

This point is not missed by Upham (1987). In his ground breaking study *Law and Social Change in Postwar Japan*, Upham investigates how governmental *élites* in Japan have been able to use legal rules and institutions to control change at the social level. Specifically, Upham looks at instances of social conflict where particular aggrieved groups attempted to use law to challenge the established social order, and at how the Japanese government responded to these challenges by effectively manipulating the legal environment in such a way as to steer the impetus for change into directions deemed appropriate by the *élite* in power.

By giving attention to the way law can be instrumentally used by different actors in the social arena to pursue either private interests or group goals, Upham's analysis has contributed greatly to advance our understanding of the social implications of law in

Japan. Nonetheless, one major limitation stands out in Upham's work. That is, his failure to problematise the process which led to the Japanese government's legislative response to women's litigation campaigns combined with the lack of specific primary, empirical material in support of his argument that the remedial action offered was largely a result of governmental *élites'* endeavours to retain control over the pace of social change. Upham's (*ibid.*: 17 – 23; 205 – 209) theoretical explanation puts forward a model of Japanese law, legal informality, whose existence is reliant on a certain vision of law and society based on an ideology of harmony and consensus. However, in the absence of an attempt to investigate the process by which legal responses were arrived at by examining the views of relevant actors in the process through the use of empirical data, we are left with an inadequate understanding of the conditions under which such an ideology developed, and of the factors which have contributed to sustain it.

In light of the shortcomings of the aforementioned studies, the aim of this chapter is therefore to offer a systematic examination, on the one hand, of the regulatory strategies adopted by the Japanese government in the field of employment; and on the other, of the decision making process lying behind them. The objective is twofold. First, to reveal the ideological content of Japanese employment rules and its implications at the level of both employment policy and practices. Second, to shed light on the institutional and organisational factors informing *shingikai* discussions, which still remain the essential prelude to policy reforms that reach the Diet. To these ends, I will draw on documentary analysis of three main pieces of Japanese employment legislation, namely the Equal Employment Opportunity Law (hereafter EEOL), the Part-time Law, and the Labour Contract Law (hereafter LCL). These data will be supplemented with empirical data from the interviews I conducted with legal scholars and national centres' trade union representatives so as to gain an understanding of the internal dynamics driving the formation, content and reception of legislative interventions. The chapter is

thematically divided into two parts. The first is concerned with a descriptive overview of the development of employment law, and of the regulatory patterns adopted in this field in Japan. The second part deals more specifically with the legal strategy used by the Japanese government to promote a regulatory change with regard to the management of the periphery of the Japanese labour market, and the decision making process which led to its adoption.

3.1. Drawing the boundaries of labour

Labour law does not have a long history. Of all the branches of the subject, it is probably the one with the most recent origin, which dates back to the 20th century (Hepple, 1986). Some countries, like Germany and Denmark, did show some early concern in dealing with issues relating to contracts of employment while others, such as Great Britain, lagged behind, pursuing a policy of ‘legal abstentionism’ (Lewis, 1976).⁵⁵ Be that as it may, by the time the ILO (International Labour Organization) was founded in 1919, the principle that labour was not ‘just one out of the many marketable and marketed goods’ (Simitis, 1986: 93 – 94)⁵⁶ had established itself, marking the divorce of labour relations from other forms of relationships governed by the rules of contract law. It came to be recognised that, in contrast to other forms of contractual relations, contracts of employment presuppose an agreement between two parties with unequal bargaining power. They generate a ‘relation of power in which the employer has the discretion (...) to direct labour, and the employee has the duty to obey’ (Collins *et al.*, 2012: 6). These distinctive attributes of employment contracts made it necessary to develop a set of special rules to regulate them in order to ‘modify, supplement or replace [those] terms of the contract’ which threatened to be particularly

⁵⁵ Although, in fact, Great Britain in 1833 was one of the first European countries to introduce a law – the Factory Act – to restrict exploitative forms of labour of vulnerable categories of workers such as children and women.

⁵⁶ The underlying notion is that of labour as ‘fictitious commodity’, first theoretically established by Karl Polanyi (1957).

disadvantageous to the weaker party, i.e. the worker (Collins *et al.*, *ibid.*: 7). Consequently, the state intervenes to mandate minimum standards, establish norms aimed at safeguarding workers from abuse of power – such as unfair dismissal provisions – and provide a system of enforcement of norms in order to guarantee their effectiveness.

According to Collins *et al.* (*ibid.*: 16 – 21), it is possible to identify two main types of regulatory patterns to this end. The first is defined as a public law⁵⁷ approach. In this case, the state establishes a set of regulatory standards enforceable by criminal penalties like, for instance, the imposition of a fine. This approach is usually characteristic of the early phases of labour legislation, but survives still today in many industrialized countries, especially in relation to health and safety provisions. The main weakness of this method of regulation lies in the difficulty of putting in place a completely effective monitoring system, due to the scarce resources of the inspectorate. Moreover, penal sanctions often translates into the imposition of a fine, and it might happen that for employers incentives for evasions outweigh the (hypothetical) costs of the sanctions, were the violation to be discovered.

The second approach takes the opposite stance and may be called a private law approach (Collins *et al.*, *ibid.*). The premise on which this model of regulation rests is the delegation of employment relations' norms enforcement to the private parties. In other words, workers are given a set of legal entitlements upon which they can act in court in order to seek redress against those employers who violate them. In contrast to the aforementioned pattern of enforcement, however, in this case the viability of relief will depend on the willingness of the aggrieved party to act. This willingness is – in turn – related to economic considerations for the costs of litigation as well as by the

⁵⁷ Public law is the area of law which regulates the relationship between individual citizens and the government. It comprises branches of law such as constitutional and criminal law. In this context, the expression is used because this regulatory approach to employment relations entails the application of criminal penalties in case of a violation of the labour standards set by the law.

reluctance to start an action that can compromise the employment relationship. In addition, it might be that employees are unaware of the (legal) rights associated with their contracts of employment or given them by statute.⁵⁸

Of course, no country rests exclusively on one paradigm and one is more likely to come across hybrids than pure forms of regulation. It is possible, nonetheless, to see how one regulatory technique may predominate over another in different national contexts, depending on the institutional infrastructure that has been provided for each. In the sections to follow, we are going to look at the legislative approaches which have been adopted in Japan for the regulation of the employment relationship.

3.2. Japanese regulatory approaches to employment relations

In the previous section, I have outlined in general terms the rationale which has informed the development of labour law as a discipline, and described two of the most common patterns of regulation in the field – i.e. the public law and private law approaches. In the sections to follow, I am going to look more specifically at the portfolio of regulatory strategies adopted in Japan in regard to employment relations so as to establish the normative context for the critical discussion of Japanese employment reforms carried out in the second half of the chapter.

3.2.1. Historical development of labour law

The development of Japanese labour law, as a distinctive branch of Japanese law, shows some resemblance with international trends – albeit with some context specific differences.

⁵⁸ These shortcomings can actually be countervailed by the use of a third regulatory strategy which entails the outsourcing of the regulation of employment relations to the autonomy of the social partners through collective bargaining, either at the national/industrial sector level or at the company level. We have already highlighted the limits of collective bargaining as a strategy for fostering workers' interests. Having done so, however, it must be said that the use of collective agreements can be an effective means for providing good terms of employment in the workplace, and trade unions prove to be a valuable tool for workers to pursue their rights.

During the Tokugawa period (1603 – 1868), labour relations were governed essentially by private individual contracts of the duration of ten or twenty years (Hanami and Komiya, 2011: 39), and it was not until 1911 that a piece of legislation concerning labour related matters was enacted.⁵⁹ This was the *Kōjō Hō* (Factory Law, no. 46/1911) which provided for restrictions on the labour of vulnerable workers such as children and women, and applied to all workplaces with more than 15 employees (Araki, 2009: 9). The law also introduced an immature system of labour inspection which was to be maintained in a more refined form in the post-war LSL (Araki, 2002: 206). Moreover, between 1919 and 1931, the Japanese government tried to put in place a regulatory framework for trade unions that had *de facto* existed in Japan since the early stages of industrialization (Gordon, 1985). Several bills were drafted and presented to the Diet with no success, a failure that Hanami and Komiya (2011: 38) explain by the political weakness of both the labour movement and leftist parties. The imperial government was instead able to pass the *Rōdō Sōgi Chōtei Hō* (Labour Disputes Conciliation Law, no. 57/1926) in 1926, only one of the many laws enacted in order to channel the management of conflict into informal venues of dispute resolution and foster a ‘collectivistic ethic’ ideology (Haley, 1982: 125; quoting Dore and Ōuchi).

It was only after the Second World War and during the occupation of the Allied Powers that the country set up a complete legal infrastructure for the regulation of labour and industrial relations. The very first law to be promulgated as early as December 1945, even before the enactment of the Constitution, was the Trade Union Law which eventually legally recognised trade unions. The law, still in force today in its amended version (1949), provides for exemption from criminal and civil liability for

⁵⁹ This came into force in 1916. Hanami and Komiya (2011: 39 – 40) tell us that plans for a protective piece of legislation had begun as early as 1881 and that the government had also started to carry out inspections of factories in order to survey workers’ working conditions; however, due to the opposition of the employers the promulgation of a law had to be postponed.

any proper union activity,⁶⁰ and sets forth a procedural system to deal with unfair labour practices, strongly modelled on the American system (Araki, 2002: 207). The TUL was followed in 1946 by the enactment of the Labour Relations Adjustment Law, which deals with collective labour disputes, and by the Constitution.

The constitutional foundations of Japanese labour law are enshrined in art. 27 and 28.⁶¹ Art. 27 states that ‘all people shall have the right and the obligation to work’, which translates into two policy obligations for the state: the enactment of measures for the establishment of a labour market where people can find job opportunities correspondent to their abilities, and the provision of a minimum level of income for those who are unemployed (Araki, 2009: 22).⁶² Art. 27 para. 2 (‘standards for wages, hours, rest and other working conditions shall be fixed by law’) requires the state to enact regulation to set minimum standards with regard to employment relations. This constitutional provision was the ground for the promulgation of the LSL in 1947, still today the cornerstone of Japanese employment law. As for art. 28, it sets forth the basic constitutional rights for the exercise of trade union activity, i.e. the workers’ rights to organise, bargain and act collectively, which apply to all workers except public officials who – since the enactment of the *Kokkai Shokuin Law* (Public Employees Law, no. 85/1947) and the *Kokka Kōmuin Hō* (National Public Service Law, no. 20/1947)⁶³ in 1947 – have been left outside the coverage of the TUL (Araki, *ibid.*: 23 – 25).

⁶⁰ Although, as pointed out by Hanami and Komiya (2011: 191), it is quite difficult to determine the boundaries of what should be defined as ‘proper’ activity, especially for what concerns criminal responsibility. As for civil liability, the basis for exemption is quite broad, although in some instances the courts have upheld the application of tort law provisions for illegal disputes acts (Hanami and Komiya, *ibid.*)

⁶¹ Art.25, which states that ‘all people shall have the right to maintain the minimum standards of wholesome and cultured living’, is also normally understood as one of the articles providing a constitutional basis for labour law legislation.

⁶² As for the latter, however, rather than recurring to unemployment benefits for the unemployed, the state often preferred pursuing a policy aimed at preventing unemployment (Sugeno, 1994: 98). Especially after the two oil crises, this was usually achieved by providing subsidies to those employers who retained or relocated their workers rather than dismissed them. This kind of policy seems almost to have been mirrored in the 1974 decision of the government to change the name of the law providing unemployment benefits from the Unemployment Insurance Law (*Shitsugyō Hoken Hō*) to the Employment Insurance Law (*Kōyō Hoken Hō*). The amended law established the so-called ‘services for the stabilization of employment’ which supplied assistance to employers facing economic difficulties (Araki, 2002: 216).

⁶³ Art. 18 para. 2 and art. 108 para. 5 respectively. Some public officials, like those engaged in clerical activities, do have the right to bargain collectively but not the right to conclude a collective agreement. Others, like policemen and

With the enforcement of the LSL, Japan laid the foundation of the basic legal infrastructure that was to govern the relations of production between workers and employers for the next sixty years.

3.2.2. Regulatory paradigms

As mentioned, there are different approaches to the regulation of employment relations. In the Japanese context, it is possible to identify three types of regulatory patterns. These are: the public law approach, the *doryoku gimu* approach, and the private law approach.

3.2.2.1. The public law approach

Before the enactment of the LCL (*Rōdō Keiyaku Hō*) in November 2007, the bulk of Japanese employment law legislation fell under the umbrella of administrative and criminal law (Yamakawa, 2009: 5; Araki, 2009: 24, 43). This means that – rather than setting forth substantive provisions establishing the legal boundaries of the rights and duties of the parties to the employment relation – the legislator provides for a set of minimum requirements to be fulfilled for the contract to be deemed valid. Consequently, all employment contracts resting on working conditions inferior to the minimum standards are prohibited as a matter of principle. As for means of redress and enforcement, the underlying assumption is that – were a violation to occur – it will be the state which is in charge of the prosecution of the case and the administration of relevant remedies, either via criminal sanctions (usually a fine) or administrative measures (Araki, *ibid.*). The overarching logic is that, in criminal and administrative law, the state is one of the parties involved (*rigai kankeisha*) and, as such, its

firemen, are denied the three rights altogether. These laws were introduced to tame the restless public sector trade union movement and, for many years, have been two quite contentious pieces of legislation. Their constitutionality has been challenged in court on more than one occasion. At the end of the 1960s, the Supreme Court ruled the unconstitutionality of the norms denying public official trade union rights, reasoning that public officials fell under the notion of ‘workers’ as established by art. 28 (Araki, 2009: 27 – 29). However, in 1973 the court repealed its own judgement – after a change of justices had taken place (Oda, 2009: 45) – admitting the restriction on the ground that civil servants and public employees ‘enjoy’ a special occupational status (Hanami and Komiya, 2011: 196). The matter has become somewhat less of an issue after the privatization of the biggest public corporations, which drastically reduced the number of employees in the public sector (Araki, 2009: 27 – 28). Moreover, the last revision of the *Kokkai Kōmuin Hō* in 2008 has relaxed the restrictions on the right to conclude collective agreements.

intervention is justified by its being a representative of the public interest (Merryman, 1985: 93). For that reason, this paradigm for the management of employment relations has been defined as a public law (*kōhō*) approach (Araki, 2009: 24; Araki, 2004a: 2).

The LSL is the epitome of such a regulatory pattern. This law was for many years the main piece of legislation regulating individual labour relations (Yamakawa, 2009: 5), and the one on which other important employment laws – e.g. the *Saitei Chingin Hō* (Minimum Wage Law, no. 37/1959) – were built (Araki, 2009: 43). The law states that any contract that does not meet the minimum requirements set by the law shall be deemed null and void, and violating clauses shall be replaced by the standards as provided by the law (art. 13). The LSL covers *labour* contracts (*rōdō keiyaku*) and applies to workers who ‘are employed at an enterprise or office and receive wages therefrom’ (art. 9).⁶⁴ This means that all those categories working under an employment contract (*koyō keiyaku*)⁶⁵ or engaged in some other form of labour supply (*rōmu kyōkyū*)⁶⁶ are excluded from its application and the provisions of the Civil Code apply instead (Araki, *ibid.*: 44).

Consistent with its criminal and administrative nature, the LSL contains a number of provisions setting forth penal sanctions for violators. These will apply not only to the formal employer but also to those who act in place of the employer,⁶⁷ provided that they are not juridical persons (*hōjin*).⁶⁸ The actual implementation of the norms is entrusted to the Labour Standards Bureaux (*Rōdō Kijun Kyoku*) established

⁶⁴ The definition of ‘worker’ as set by the TUL (art. 3) is different and somewhat broader in scope, defining as workers all those ‘who live on their wages, salaries, or other equivalent income, regardless of their occupation’.

⁶⁵ Whether ‘*rōdō keiyaku*’ and ‘*koyō keiyaku*’ are two different concepts is actually still debated in Japanese academic circles (Araki, 2009: 45). There is no doubt that, especially after the enactment of the LCL in 2007, the two are quite overlapping and, as one observer suggested (Yamakawa, 2009: 19), the issue should be given due consideration when – and if – an amendment of part III of the Civil Code (Law of Obligations) takes place. This is because it is the type of contract that determines the correspondent legal treatment of the worker, in this case whether the minimum standards of the law shall apply.

⁶⁶ The Civil Code distinguishes three forms of labour supply, namely employment contracts, commission contracts (*ukeoi*) and mandate contract (*itaku*). For an appreciation of the issues relating to *ukeoi* and *itaku* contracts, cf. Kamata (2004).

⁶⁷ Which is, however, quite difficult to determine in some cases. One such an example is the case of *haken rōdō* (agency work).

⁶⁸ It follows that penalties cannot be applied to corporations (Araki, 2009: 66).

under the MHLW. The monitoring of working conditions is carried out through labour inspectors who exercise the duties of judicial police officers under the Code of Criminal Procedure (LSL art. 102).

The fact that the LSL, cornerstone of Japanese employment legislation, has been articulated in public law terms has had a fundamental implication for the regulation of employment relations in the country. That is, the bureaucracy has for a long time retained the authority over the law-enforcing process in labour related matters (Sugeno, 2000: 1960 – 1961). However, starting from the 1990s, the reliance on this regulatory pattern begun to be criticised for two reasons. First, it was argued that the approach was obsolete and ineffective in ensuring compliance (Nakayama, 1995). As mentioned in section 3.1, one major problem of this mechanism of employment regulation is the costs attached to the need for continuous monitoring through administrative agencies. Second, in light of the push towards an ‘a posteriori-monitoring redress society based upon clear-cut rules and self-accountability’(Oda, 2009: 55) which has informed the justice system reforms presented in chapter 2, the mere provision of minimum standards of employment was seen as inadequate (Yamakawa, 2009). It was these criticisms which paved the way for the enactment of the LCL in 2007 (see *infra*. section 3.2.2.3).

3.2.2.2. The *doryoku gimu* approach

Starting from the mid-1980s, a new wave of legislation swept the arena of employment relations in Japan. This took the form of a distinctive regulatory strategy defined by Araki Takashi as the ‘Japanese soft-law approach’ to labour relations (Araki, 2000; 2002; 2004a).⁶⁹ The notion of ‘soft-law’ developed in the field of International Law – as opposed to (national) hard law tools of regulation – to indicate a coordination policy at

⁶⁹ As a matter of fact, this is not peculiar to Japan. Cotterrell (1992: 53) describes the existence of pieces of legislation lacking provisions for securing enforcement also in other national contexts. He calls this kind of legislative intervention ‘educative legislation’, and notices how their ‘significance seems primarily to be to set up or promote ideals through governmental action rather than to provide means by which a litigant can enforce rights’. He mentions the 1965 British Race Relations Act as an example of such an approach. As with *doryoku gimu* provisions, the ultimate rationale of educative legislation is to achieve an attitudinal change.

transnational level which makes use of norms lacking any legally binding force to achieve particular objectives in specific subject areas.⁷⁰ It subsequently came to be used in the European Union context as a means of ‘harmonisation’⁷¹ of the different national laws. Professor Araki uses the expression to refer to the increasing use of so-called *doryoku gimu kitei* (duty to endeavour provisions), which, as we shall see later, represent the shining example of that legislative process that Weathers (2004: 424) so aptly described as ‘compromise-oriented’ policy making. Expressions such as *tsutomenakereba naranai* (‘[the parties] shall strive’) or *hairyo shinakereba naranai* (‘give [due] consideration’) are not rare in Japanese labour law legislation. However, from the enactment of the Equal Employment Opportunity Law (*Kintō Hō*) in 1985, they came often to be associated with contentious pieces of legislation such as the EEOL and the Part-time Law (*Pāto Rōdō Hō*).

In his work, Araki (2004a) distinguishes two kinds of *doryoku gimu* provisions.⁷² He defines the first as ‘didactic and abstract *doryoku gimu* provisions’ (*kunjiteki • chūshōteki doryoku gimu kitei*). These are in no way legally binding and set forth only a general obligation for the parties to strive to meet the goals set by the statute. Their function is mostly symbolic, as the law generally contains substantive provisions for their implementation. An example of this type of *doryoku gimu* is art. 1 para. 2 of the LSL which states that ‘parties to [a] labor relationship (...) should endeavour to raise the working conditions’.

⁷⁰ Indeed, in recent years, soft law regulatory tools seem to have grown in popularity also in the area of international labour law. On this point, cf. Collins *et. al.* (2011: 40) and Blanpain and Colucci (2004).

⁷¹ The concept of law harmonisation is still quite foggy, even in the literature on the subject. Generally, it refers to the formulation of common rules whose implementation at the national level is left to the autonomy of the member states. It should not be confused with law unification, which aims at creating shared *substantive* legal principles for different legal systems. The movement for the unification and harmonisation of law started as early as 1926 with the creation of the UNCITRAL (United Nations International Institute for the Unification of Private Law) and, to date, has produced some important pieces of international regulation. One of the most successful so far has been the Convention on Contracts for the International Sales of Goods (CISG) with 85 adhering states (in 2016).

⁷² In a previous article on the subject, he used a somewhat different terminology, although it is possible to infer that the substantive notions are the same. Araki Takashi is not the only one to have studied issues related to ‘duty to endeavour’ provisions in the field of labour law. Cf. also Yasueda (1998: 26 ff.) and Terayama (2002). In contrast to Araki, Terayama identifies four categories of *doryoku gimu* provisions: abstract and general *doryoku gimu*; semi-legal *doryoku gimu*; targeting *doryoku gimu*; other. Cf. Terayama (*ibid.*: 131 – 132, nt. 39).

The second category of *doryoku gimu* norms are called ‘actual *doryoku gimu* provisions’ (*gutaiteki doryoku gimu kitei*) and, in contrast to the aforementioned *kunjiteki kitei*, set an obligation ‘to endeavour’ which is more specific and concrete in nature, albeit lacking any legally binding force as well. These types of *doryoku gimu* provisions can be found in those pieces of legislation which introduced reforms over which consensus among the social partners had not been reached, the Equal Employment Opportunity Law being the most famous example (Terayama, 2002).

As briefly mentioned, the employment policy making process in Japan takes the form of a complex and long negotiation in the *rōdō seisaku shingikai* between management and labour, mediated by governmental representatives. *Shingikai* discussions are aimed at collecting proposals and building consensus over the reform at hand (*ibid.*). This means that a law proposal may be re-drafted many times before being submitted to the Diet. When the social partners deadlock in confrontation and it proves impossible to reach consensus over a disputed regulation, the ‘unavoidable compromise’⁷³ often takes the shape of *doryoku gimu* norms.

These normally fulfil two functions. The first is to smoothly introduce the new norms into the legal system and allow all the concerned parties to gradually adjust to them. The basic assumption is that policies should assume a long-term perspective and that, if new (imperative) rules are introduced abruptly into a system of long-standing practices, the risk is high that the new legal norms and the embedded social ones will clash and – ultimately – lead to dysfunction in the system (Terayama, *ibid.*: 126). In other words, their main objective should be to bring about an ‘attitudinal change’, to modify ‘fundamental attitudes widely shared by employers (...) in a gradual manner’ (Foote, 1997: 272). The second function of *doryoku gimu* provisions is to ‘test’ new regulation which, after a reasonable ‘period of incubation’, might then be converted into

⁷³ ‘Yamu wo enai dakyō’, Akamatsu Yoshiko with regard to the Equal Employment Opportunity Law, quoted in Araki (2004b: 71).

‘hard law’. In this case, therefore, new norms will first be adopted within a *doryoku gimu* framework; legislators will then periodically ‘assess’ the situation and, when they find a good ‘assimilation’ into the system is taking place, decide whether to start the legislative process to shift from ‘soft-law’ provisions to substantive legal rules (Terayama, *ibid.*: 123 – 124).

According to Araki (2004b: 73), this careful regulatory approach does have its merits. The gradual introduction of new normative instruments into a legal context can help to avoid ‘social disruption’ (*shakaiteki konran*), build up an ‘understanding’ (*ishiki*) regarding the new norms and, therefore, increase the chances of reception so that a high level of voluntary compliance may be expected (Araki, *ibid.*). However, Araki’s view fails to appreciate that the use of *doryoku gimu* provisions as a means to promote change in an established normative order is constrained by two major problems. The first is that, although it is true that these provisions can be a useful acid test to assess the suitability of new legislation and allow the parties to take all the necessary steps to make adjustments, it is also true that the period of incubation can potentially create room for employers to devise new strategies to sidestep the provisions of the law. One example of this is the two track career system (*kobetsu koyō kanri*) introduced by Japanese firms shortly after the passing of the EEOL (Lam, 1992: 18).⁷⁴

The second problem arising from a *doryoku gimu* based piece of legislation is that, during the period of transition from the soft to the hard law regime, the subjects these provisions are supposed to regulate exist in a kind of legal limbo which makes it difficult to seek redress. The main corollary of the non-binding nature of *doryoku gimu*

⁷⁴ Virtually non-existent before the passing of the law, this is a system of personnel management which splits career tracks in the company in different patterns and allows employees (whether male or female) to choose which one they want to follow soon after recruitment. The most common version provides for two-career tracks: ‘managerial’ track (*sōgōshoku*), where employees are involved in high-level work and may be subject to frequent job rotation and transfers (this is the one offering greater possibilities for promotion); and ‘clerical’ track (*ippanshoku*) where workers engage in simple and routine tasks and are not subject to job transfers (Tachibanaki, 2010: 198 – 200). For these reasons, career tracks have been said to merely reproduce old inequalities in different forms (Lam, 1992; Tachibanaki, *ibid.*). Under the current version of the EEOL, the two track career system – unless justified by an ‘objective reason’ (*gōritekina riyū*) – is considered a form of indirect discrimination and prohibited.

norms is that compulsory execution of the ‘duty to endeavour’ through the action of the courts is not viable, an impossibility due mainly to the difficulty of proving when and how the obligation to ‘endeavour’ has been infringed upon (Yasueda, 1998: 26). This does not mean that relief has been completely denied to those aggrieved parties who have decided to resort to formal litigation.⁷⁵ Though it is impossible to declare a juristic act null and void upon infringement of a *doryoku gimu* provision, in some instances Japanese judges have shown their willingness to do so on the basis of the general clauses (*ippan jōkō*) enshrined in the Civil Code – namely art. 90 on public order and good morals (Terayama, 2002: 128, nt. 11).⁷⁶ However, as will be illustrated in the next chapter, this has not always been the case, thereby leading some observers to note that the use of *doryoku gimu* provisions might have unpredictable (*fukakujitsu*) results (Terayama, *ibid.*: 126).

3.2.2.3. The private law approach

As previously mentioned, until 2007 the analytical foundations of Japanese labour law were articulated in public law terms. In fact, the LSL does include some private law notions, namely those contained in art. 13, which provides that any part to a labour contract setting forth conditions of employment inferior to those provided by the law would be deemed null and void and automatically substituted by legal minimum standards (Kojima, 1995: 177; Muranaka, 2008: 43). Apart from that, however, the law delegates the issue of regulation of actual working conditions to the social partners and

⁷⁵ For a fuller discussion of the judicial implications of the *doryoku gimu* regulatory approach see Chapter 4.

⁷⁶ However, in a recent ruling rendered in 2007 (Shōwa Shell Sekiyū Case), the Tokyo High Court actually established a new interpretation with regard to the ‘duty to endeavour’ enshrined in the EEOL. By applying the theory of the rule of private law over employment relationships, the court argued that the duty on the part of the employer to make efforts should be understood in private law terms (*doryoku gimu kitei no shihōjō no kōryoku*), i.e. as a statutory obligation. It follows that the failing to meet the obligation runs counter to the spirit of the law and, consequently, makes the employer subject to administrative guidance by the MHLW and tort law action. For an explanation in detail, cf. Yamada (2011: 6).

is virtually silent with regard to the allocation of the rights and duties of the parties to a labour contract (Muranaka, *ibid.*; Yamakawa, 2009: 5).⁷⁷

At the beginning of the 1990s, however, this approach started to be seen as no longer consistent with the way the Japanese employment system was evolving. The need for such a re-examination was the subject of a report issued by the private advisory council of the Ministry of Labour in 1993, which recognised that – especially against the backdrop of an increasing diversification of employment relationships – it was necessary to establish new ways to deal with the regulation and interpretation of issues attached to *individual* labour contracts (Nakayama, 1995: 163).⁷⁸ Yet, despite the many proposals that were made, it was not until the 2000s that the hypothesis concerning the enactment of a new Labour Contract Law was placed once again on the legislative agenda. The background to the change was, on the one hand, the growing importance assumed by individual labour contracts as a result of the introduction of such schemes as the performance-related pay (*seikashugi*) and annual wage (*nenpōsei*)⁷⁹ systems; on the other, the increase in the number of individual labour disputes that Japan had registered since the bursting of the bubble economy of the 1980s, which urged the need to set up a new legal infrastructure to deal with the situation (Yamakawa, 2009: 4 – 5). In addition, calls for a law enshrining a well defined set of justiciable employment rights came also as a result of the justice system reforms described in the previous chapter, whose main objective was to facilitate Japanese people’s access to legal redress (Muranaka, 2008).

⁷⁷ However, as we shall see in more detail in the next chapter, these legislative *lacunae* came to be filled through the intervention of the courts, which created over the years an extensive corpus of rules regulating matters pertaining to the content of individual labour contracts such as dismissal, probation period etc.

⁷⁸ The report and subsequent proposals advanced by the *rōkiken* (the predecessor of the current *rōdō seisaku shingikai*) were actually strongly criticised, in particular by the lawyers’ community, some members of which argued that too much emphasis was still put on collective bargaining as a means of regulation of labour relations, while scarce importance was placed instead on giving workers new legally enforceable rights to seek redress for their grievances via the judicial system. On this point cf. Tokuzumi (1995: 169 – 171).

⁷⁹ On the introduction of these HRM practices, see Chapter 2.

A first attempt towards a more private law oriented mode of regulation of the employment relationship was made in 2003, when the principle of unfair dismissal was incorporated in the LSL revised that year (ex art. 18, para. 2). The provision, however, was considered to be an anomaly (*irei*) in the corpus of the law (Kanbayashi and Ōuchi, 2008: 67) and indeed the supplementary resolution attached to the amended bill by the Diet stated that ‘a forum for expert investigation and research should be established to actively consider formulation of a comprehensive law on labour contracts (...) and necessary measures, including the enactment of a statute, should be taken based on the results’ (quoted in Yamakawa, 2009: 6). Consequently, a study group (*kenkyūkai*) was established under the MHLW in 2004 to this end. Two years later, the study group submitted a detailed proposal on the new legislative course to adopt.⁸⁰ The issue was then delegated to the *rōdō seisaku shingikai* for formal discussion, during which, however, the employers’ and trade unions’ sides – both strongly critical of the *kenkyūkai* recommendations – deadlocked in confrontation, so much so that the resulting LCL (enacted in December 2007) fell far short of expectations.

Divided into five chapters, the law contains barely 22 articles, and amounts to a mere codification of the existing legal principles established by the courts (Kanbayashi and Ōuchi, 2008: 67; Yamakawa, *ibid.*). The objective of the law is to set forth the basic rights and duties of the parties to an employment contract,⁸¹ thus functioning as a reference and model that can help in both *preventing* disputes from arising and offering clear means for the allocation of responsibility in the case they *do* arise (Yamakawa, *ibid.*: 5 – 6). As a result, it incorporates provisions dealing with issues such as formation of the contract (art. 6), dismissals (art. 16), the role of work rules (art. 7 and 12), and

⁸⁰ A summary of the report can be accessed at <http://www.mhlw.go.jp/shingi/2005/09/s0915-4.html> (accessed 20 June 2013).

⁸¹ The law applies to all fixed-term employment contracts. This means that also workers such as part-timers and agency workers are covered by the provisions of the law as long as they are employed under a fixed-term contract of employment.

farming-outs (art. 14) as well as the introduction of norms for the regulation of the termination of fixed term contracts (art. 17).

Even in this piece of legislation – which is supposed to deal with substantive legal (contract) rules – it is possible to find some abstract principles⁸² which do not give rise to any enforceable right or obligation, but which have rather the function of acting as a theoretical basis for both the interpretation of the contract *per se* (Araki, 2009: 229) as well for the interpretation of the other provisions of the law (Yamakawa, *ibid.*: 9). Found in chapter one (general provisions), these are the principle of agreement on equal basis (*gōi – taitō kettei gensoku*), consideration of balanced treatment (*kinkō kōryō*) and consideration of harmony between work and family life (*shigoto to seikatsu no chōwa he no hairyō gensoku*) (Araki, *ibid.*).

The LCL underwent a partial revision in 2012 which introduced three important amendments. The first is the introduction of an obligation – subject to the request of the employee – for the employer to convert the fixed-term contract into a permanent contract after five years of continuous renewals (art. 18).⁸³ The second concerns the translation in statutory form of the principle of *yatoi dome* (non-renewal of contract) as established by a decision of the Supreme Court of Japan in 1974 (art. 19). The principle states that – in the absence of a reasonable justification – the non-renewal of a fixed-term contract which was subject to repeated renewals is not permitted. The rationale behind the principle of *yatoi dome* is that repeated renewals of an employment contract create an expectation in the continuation of the employment relationship which equals them in substance to permanent contracts. Finally, the third revision extends the coverage of the prohibition of an unreasonable change in working conditions, until now

⁸² Araki (2009: 229) defines them '*rinen kitei*', provisions having an 'ideological' *raison d'être*. Yamakawa (2009: 8) argues that 'the inclusion of provisions of this nature in the Labor Contract Act is thought to be an outcome of the bill's drafting being defined by the limits of the consensus reached between workers and employers in the deliberative council'.

⁸³ The revision is not retroactive. This means that any renewal carried out prior to the date the amendment came into force is not included in the count.

limited to regular employees, to workers employed under fixed-term contracts. The objective of these amendments was to give a prospect of stability to workers employed under temporary contracts, especially in light of the fact that these workers have come to represent one third of the Japanese workforce (MHLW, 2012c: 1).

Even though it did not represent that paradigm shift that was hoped for in some quarters, especially lawyers' circles, the enactment of the LCL was hailed as the forerunner of a new era for the organisation of Japanese employment relations. This is because it is the first piece of legislation which attempts to regulate the employment relationship by equipping workers with a clear set of legal entitlements which they can invoke in court in order to obtain redress against those employers who violate them. In this respect, to some observers (Muranaka, 2008; Yamakawa, 2009), the significance of the law must be read within the broader context of the justice system reforms outlined in the previous chapter, and which are altering the landscape of Japanese legal institutions so as to facilitate citizens' access to justice. According to this view, the LCL is another step towards realizing a civil society based no longer on a 'rule by bureaucrats' (*kanshudō no shakai*) but rather on thoroughly democratic principles (*minshudō no shakai*) with citizens' participation in the governance of the country at its core (Foote, 2007b; Takahashi, 2007). To some extent, this reading is correct – the enactment of the LCL has enhanced the capacity of Japanese (regular) workers to subject employment claims to judicial scrutiny. The reform potential of the law, however, is diminished by the fact that it fails to grant workers any new legally enforceable right beyond those they had already acquired through litigation. This, in turn, is the inevitable by-product of the delegation of the formulation of employment legislation proposals to the *rōdō seisaku shingikai*⁸⁴ which functions according to the logic of the need to find a compromise between the opposing stances of labour and management. In the specific

⁸⁴ For an in-depth discussion about the functioning of the *rōdō seisaku shingikai* see *infra*. section 3.5.

case of the Labour Contract Law, even if all the actors in the negotiation process perceived that a shift towards a more private law oriented regime was desirable, the different degree to which they agreed on the level of desirability needed necessarily curbed the possibility of bringing the reform process to its natural conclusion. The result was that the only compromise which could satisfy all the parties allowed to join the discussion was a piece of legislation which merely gives a statutory form to legal norms already established by the judiciary.

3.3 Compromised legislation: the case of the EEOL and Part-time Law

In the preceding sections, I have given a description of the normative context existing in Japan in connection with the governing of employment relations by outlining the various legislative strategies which have been used to regulate the employment relationship in the country. We have seen that these have evolved from the adoption of a pure public law approach, whereby the state mandates only minimum standards enforceable by criminal penalties, to the attempts at fostering a more private law based model of regulation, which is instead premised on the assumption that the parties to an employment contract are provided with a set of justiciable legal entitlements. In this section, I am going to examine in more detail the *doryoku gimu* approach outlined in section 3.2.2.2, as this has been the preferred method of the Japanese government in using law as an agent of change, specifically in relation to the promotion of an extension of employment rights to workers at the periphery of the country's labour market. The objective of the section is to reveal the legal ideology informing the use of *doryoku gimu* provisions as a means of regulation, and show how the concurrent ideology of regular employment has been consequential to its development. Further, this section will also discuss the implications of the adoption of a *doryoku gimu* based

regulatory approach for the organisation of Japanese employment relations. To these ends, I will analyse as illustrative examples two pieces of legislation which are considered to be the epitome of the *doryoku gimu* regulatory approach, i.e. the EEOL and the Part-time Law.

Enacted in 1985, the EEOL was the first law to be premised on the use of *doryoku gimu* provisions. The enactment was informed by the objective of promoting a change in the management of the female workforce so as to bring it in line with the principle of gender equality in employment.⁸⁵ However, it was argued that this principle clashed with existing ‘employment customs’ in the country (*koyō kankō no henkaku*), thereby calling for the need to introduce the new norms gradually as *doryoku gimu* (Araki, 2004b).

The EEOL was not passed as a new law, but as an amendment to the 1972 Law Concerning the Welfare Measures of Women Workers (*Kinrō Fujin Fukushi Hō*) (Araki, 2009: 86; Yamada, 2009: 201; Iki, 2013: 104).⁸⁶ Its enactment, under the title *Danjo Koyō Kikai Kintō Hō*⁸⁷ (Equal Employment Opportunity Law, no. 113/1972) on 17 May 1985 by the Japanese Diet – in effect from April 1986 – was hailed by the then Ministry of Labour as a ‘great historical moment for all kinds of movements against discrimination in Japan’ (quoted in Lam, 1992: 1).⁸⁸ However, the passed law was in fact quite limited in scope. Following troubled negotiations which saw government,

⁸⁵ This came partly in response to Japan’s ratification of the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1979, although the issue of gender equality in employment was already listed in the domestic legislative agenda (Yamada, 2009: 199).

⁸⁶ This decision was severely criticised in some quarters. The critics argued that encapsulating a law on equality in employment within the framework of a piece of legislation originally conceived to foster women’s welfare – and therefore essentially protective in nature – ran counter to the principle of gender equality (Yamada, 2009: 201).

⁸⁷ The original suggested title for the law – and the one strongly supported by the female labour movement – reported the word ‘byōdō’ instead of ‘kintō’. The two words are both translated as ‘equality’ in English but the latter, as some observers suggest (Lam, 1992: 37, nt. 2; Yamada, 2009: 200, nt. 3; Osawa, 2000: 6), bears less ideological connotations. Thus, they conclude, the avoidance of the word ‘byōdō’ in the corpus of the law would point in the direction of a lack of commitment on the part of the government to foster ‘true’ equality. In fairness, it should be said that this did not appear to be in the intentions of the Japanese legislator (lacking the ‘consensus’ of the social partners in this respect) whose objective at the time was only to increase employment opportunities (i.e. participation) for women regardless of the type of job.

⁸⁸ Ironically, still today, the Ministry does not seem to deem it necessary to apply the principle of anti-discrimination according to sex to its own employees, considering that the EEOL does not cover workers employed in the public sector (Yamada, 2013: 7).

employers' and trade unions' representatives fail to reach consensus over substantial issues concerning women's *equality*⁸⁹ in employment (Araki, 2004a: 12), the law ended up as a blend of a few imperative norms (*kyōkō kitei*)⁹⁰ prohibiting discrimination in relation to basic vocational training, dismissal and (early) retirement – a mere codification of existing case-law (Upham, 1987: 153 – 154; Weathers, 2005: 74)⁹¹ – and a backbone of *doryoku gimu* provisions to provide a pattern of regulation for issues such as discrimination in recruitment, job assignment and promotion (Araki, 2000: 454). The task of defining the substantive content of the 'duty to endeavour' was left to the Ministry, which set forth guidelines clarifying what was to be meant by 'equal treatment'. The notion appeared to be outlined quite narrowly, the concept of 'equal opportunities' being framed as 'not to exclude women' from participation in the labour market (Lam, 1992: 7). Consequently, setting quotas for female workers when recruiting, or advertising only part-time job positions for women did not qualify as discriminatory or unfavourable treatment (Lam, *ibid.*: 8; Yamada, 2011: 5). This was not considered to be in conflict with the objective of the law, which was to open a path towards social change by establishing a standard of (good) conduct, with the state acting as a facilitator (Lam, *ibid.*: 9; Araki, 2000: 465). Consistent with this logic and in order to build the proper environment to achieve material equality, efforts were put into

⁸⁹ The most contentious issue concerned the abolition of protective norms enshrined in other pieces of legislation (such as the LSL) directed at female labour, the employers' side arguing that there could not be true equal treatment as long as women were not to be asked to perform the same kind of work of their male counterparts (Araki, 2004a: 12; Upham, 1987: 150).

⁹⁰ However, no penal sanction was attached to violations and remedies could be applied only within the realm of Tort Law (Araki, 2000: 451) which, as noted by Yamada (2013: 12) in connection with sexual harassment, may weaken the effectiveness of the law since a tort is found when a person 'has *intentionally* or *negligently* infringed any right of others, or [a] legally protected interest of others' (Civil Code, art. 709; emphasis added). Therefore, in order for an action to constitute a tort a causal relationship between the unlawful act and a loss should be established and the burden of proof to determine that the tortfeasor is at fault (i.e. he/she intentionally or negligently caused the loss) rests with the plaintiff (Oda, 2009: 181 – 184). Moreover, relief is limited to the payment of damages (i.e. tort law aims to redress, not to prevent).

⁹¹ To some observers (Upham, 1987; Cook and Hayashi, 1980), the enactment of the EEOL was probably an attempt of the government to deal with a certain legal activism on the part of female workers during the 1960s and 1970s. Indeed, the principle of equal treatment between men and women came to be established as a legal principle (*hōri*) precisely through the action of the courts via the application of art. 14 of the Constitution ('all of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin'), and art. 90 of the Civil Code on public order and good morals ('any juristic act whose purpose runs counter public order and good morals is null and void') (Araki, 2009: 85).

promoting measures which would make women's working patterns more compatible with their family responsibilities.⁹² The enactment of the *Ikuji Kyūgyō Hō* (Child Care Leave Law, no. 76/1991) in 1991⁹³ was such an example. The legislation was based on the premise that – by providing women with the possibility of taking a period of absence from work for childcare reasons – their chances for continuous employment would be increased.⁹⁴

Ten years after its enactment, the dedicated *shingikai* of the MOL was entrusted with starting the discussion for a revision of the EEOL. In line with the rationale of *doryoku gimu* provisions, it was argued that sufficient time had passed to shift the regulatory framework from a soft law to a hard law regime. The conversion took place in July 1997 with no apparent opposition on the employers' side (Araki, 2004b: 71), although substantive legal norms were introduced only in relation to the prohibition of direct discrimination in training, recruitment and promotion.⁹⁵ Moreover, the law still retained some safety norms aimed at safeguarding the female workforce, such as the prohibition of night working hours. This resulted from the inability of the social partners to reach a compromise in connection with the abolition of the protective

⁹² The limitations and also a certain inconsistency of such a position in terms of gender equality and gendered division of labour is noticed by Broadbent (2003: 5) who argues 'the modified expression *otoko wa shigoto, onna wa shigoto to katei to shigoto* (men have a job, women have household and a job) reflects not only changes in women's work lives, but also that there has been no change for men. Despite recent legislation to address access to employment opportunities and equity issues, the existing gender division of labour in both the labour market and the family remains unchanged'.

⁹³ The childcare leave system was also enshrined into a *doryoku gimu* legal framework. A cabinet member is quoted by Terayama (2002: 118) as saying: 'For the moment, these measures (i.e. duty to endeavour to grant women leave of absence for child rearing) are necessary primarily as a means to increase the level of diffusion [of the childcare leave system]. Then, on the basis of the results, it will be possible to consider opening the way towards their solid incorporation into the legislative infrastructure (*hōseika*).' The measures were then converted into 'hard law' in 1999 when it was also renamed the Child and Family Care Leave Law since the revision introduced the possibility for the worker to take leave also to care for a family member (Araki, 2009: 98).

⁹⁴ The assumption is quite questionable. The system did indeed make it possible, for both men and women, to take a period of absence for child rearing. However, during that absence, the worker was eligible only for 40% (now 50%) of the *basic* wage via the employment insurance system (which in turn means that the worker should be eligible for employment insurance in the first place). This means that the parent taking the leave will be economically dependent on his/her spouse before returning to work. Moreover, as shown by Abe (2013: 32), limited availability and uneven distribution of childcare facilities often make return to work difficult for women anyway (also given the still highly gendered distribution of domestic labour). Recent policies such as the Work-Life Balance and the Angel Plan, however, have been introduced with the objective to redress this situation and 'develop systems that enable women to work while doing housework and bringing up children and (...) systems that enable men to participate more in housework and childcare' (Kawaguchi, 2013: 36).

⁹⁵ Given the developments experienced by the Japanese labour market in the meantime (e.g. introduction of career tracking by firms and the legalization of labour dispatching), which allowed employers to sidestep these new 'obligations', however, one might argue that this hardly represented a gain for women workers.

infrastructure still regulating female labour in related pieces of legislation such as the LSL (Weathers, 2005: 76). It was only when Rengō⁹⁶ changed its stance on the issue in 1996 that the concept of promotion of fundamental equality between the two sexes was adopted as the new underlying principle of the law and, consequently, special protection directed at women workers (e.g. limitation of overtime and night work) was abolished with the 1999 amendment to the law (Araki, 2000: 455). The EEOL completed its life cycle as a *doryoku gimu* based piece of legislation in 2006. With this revision, the law lost its ‘one-sided nature’ (*katamen seikaku*), thereby forbidding any kind of unfavourable treatment for *both* men and women (Yamada, 2013).⁹⁷ The 2006 amendment also introduced the concept of indirect discrimination which, however, has been defined quite narrowly (Yamada, 2011: 7 – 8).

The process of enactment and subsequent revisions of the EEOL exemplifies very well the rationale informing the use of *doryoku gimu* provisions as a means to promote change in the established normative order of Japanese employment relations. Confronted with the issue of sex discrimination in the workplace, reformers took steps to advance the principle of gender equality in employment. However, they considered the principle to clash with both ‘female workers’ own work consciousness’ (*joshi rōdōsha jishin no shokugyō ishiki*) as well as with ‘the state of societal consciousness in the country with regard to women’s employment and established employment customs’ (*wagakuni no koyō kankō, joshi no shokugyō ni kansuru shakaiteki ishiki no genjō*) (Yamada, 2011: 5). Thus, it was argued that a change could be fostered only

⁹⁶ Rengō, or Japanese Trade Union Confederation (*Nihon Rōdō Kumiai Sōren Gōkai*), was founded in 1989 from the merging of the Japan Confederation of Labour (*Dōmei*) and the Federation of Independent Labour Unions (*Chūritsu Rōren*). In Japan, there exist two other trade union confederations, Zenrōren (National Confederation of Trade Unions, *Zenkoku Rōdōkumiai Sōrengō*) and Zenrōkyō (National Trade Union Council, *Zenkoku Rōdōkumiai Renraku Kyōgikai*). However, Rengō remains the largest national trade union centre in the country.

⁹⁷ As rightly pointed out by Yamada (2013: 13), this change – made without giving due consideration to issues such as work-life balance and the still gendered division of domestic labour – has ended by making the concept of ‘equality’ (*kindō*) even more ambiguous than it already was. That is, before the 2006 amendment, the targeted level of equality was quite straightforward: it was to bring the treatment of women to the same level as that of their male counterparts. In contrast, in the current version of the law, it would appear to be quite unclear what equality between the sexes is supposed to stand for and what measures for its achievement should be put in place.

incrementally, and without coercion, through the use of a *doryoku gimu* regulatory approach.

Although articulated less explicitly, the same logic has been applied to the Part-time Law whose enactment was aimed at the promotion of an improvement in the working conditions of part-time workers, especially in relation to equal standards of treatment with the regular workforce.

Part-time work became an important feature in the repertoire of recognised work arrangements in the early 1960s, to compensate for the decline of short-term contract workers who had till then been the main means used by firms to save on labour costs (Gordon, 1985: 407).⁹⁸ And yet, to date, the contours which define this category of employment are still quite blurred. Discourses on ‘part-time’ work made their first official appearance in the 1967 White Book of the Ministry of Labour (*ibid.*); two years later, in its ‘Proposal Concerning Female Part-Time Employment Measures’, the Women’s and Young Workers’ Problems Council tried to specify the concept in clearer terms, giving the following definition: ‘in general, this refers to workers whose daily, weekly, or monthly prescribed hours are shorter than those of full-time workers employed at the same place of business (...). It should be clarified that part-time employment refers specifically to employment for shorter hours and is not a status-related category, and steps should be taken to promote thorough awareness of this fact’ (quoted in Iki, 2013: 110). This does not seem to have been the case, though, since different classifications still coexist, making it difficult to draw a clear-cut line between groups of employees *within* the category (Keizer, 2008), and often creating confusion

⁹⁸ Gordon (1985: 407) also noted that, while a high percentage of men could be detected among the ranks of contract workers, part-time based working paths were for women from the beginning.

when trying to assess part-timers' employment situation in the labour market using governmental data and surveys (Rebick, 2005: 61 – 62).⁹⁹

Araki (2009: 423) recognises three different definitions: the one employed by the national 'Labour Force Survey' which describes part-timers as those 'employees working less than 35 hours per week';¹⁰⁰ part-timers by status (*mibun toshite no pāto*), i.e. those workers who are labelled as 'pāto' in the place of business where they are employed but who might not necessarily be working shorter hours than their 'regular' counterparts;¹⁰¹ and finally the pure legal definition, which states that 'the term "short-time worker" (*tanjikan rōdōsha*) as used in this law means a worker whose prescribed weekly working hours are shorter than those of ordinary workers employed at the same place of business'.¹⁰²

The definition *tanjikan rōdōsha* (short-time worker) came to be adopted in 1993, enshrined in art. 2 of the *Tanjikan Rōdōsha no Koyō Kanri no Kaizentō ni kansuru Hōritsu* (Law on Improvement, etc. of Employment Management for Short-Time Workers, no. 76/1993). This law is the first attempt of Japanese legislators to set up a formal legal framework for this type of work arrangement. As clearly indicated by the title, the objective of the legislation was to foster an improvement in the management of the part-time workforce. Consequently, employers were required to give due

⁹⁹ Rebick (*ibid.*: 59 – 60) also notices how, in surveys carried out by governmental agencies, classifications are sometimes tailored to the purpose for which the survey was conducted; on the other hand, the use of terms like 'jōkō' ('ordinary employee') do in some cases extend to part-time workers as well, generating further confusion.

¹⁰⁰ Excluding workers employed in the agricultural and forestry sector.

¹⁰¹ *Giji pāto* (i.e. so called full-time part-timers) fall under this category. In the *futai ketsugi* attached to the revision of the Part-time Law, these workers are defined as 'fixed-term contract workers whose prescribed working hours are the same as ordinary workers' (MHLW, 2008: 66).

¹⁰² In fact, the term used in the legislation to indicate part-timers is '*tanjikan rōdōsha*' (short-time worker). This means that *keiyaku shain* (contract employees) and *haken rōdōsha* (dispatched workers) may fall under the scope of application of the law, as long as they work shorter hours than regular employees. By contrast, *mibun toshite no pāto* are effectively excluded. When the revision of the law was under discussion in the *rōdō seisaku shingikai* of the MHLW, the union side requested that the scope of application of the law be widened so as comprise full-time part-timers as well but the secretariat of the council rejected the demand arguing they did not fit in the definition of '*tanjikan rōdōsha*' as set forth by art. 2 of the law (Hamaguchi and Ogino, 2011: 20). The *futai ketsugi* of May 2007 advanced by the Diet members from the MHLW, however, stated that the government wished it to be known that business operators should give consideration to the 'spirit of the law' (*hō no shushi*) when deciding whether to apply its provision to full-time part-timers (MHLW, 2008: 66). The issue remains unresolved as the latest revision of the Part-time Law carried out in 2015 also excludes full-time part-timers from the scope of its application.

consideration (*kōryo*) to the issue of balanced treatment (*kinkō taigū*)¹⁰³ with respect to ordinary employees and – with this objective in mind – endeavour to put in place the necessary measures for appropriate working conditions (*tekisetsu na rōdō jōken*) as well as training and skill development directed at part-time workers (JILPT, 2011: 49). A number of guidelines and study groups’ proposals followed over the next fourteen years before the law underwent a thorough amendment in 2007. The background to the revision was not only the increase of part-time workers in quantitative terms but also a clear shift in their composition, with growing rates of participation of young people and male breadwinners (MHLW, 2008: 65; Araki, 2009: 410; Morozumi, 2009: 40).

The aim of the amendments was to tighten the regulation on equal treatment of part-time workers by replacing *doryoku gimu* provisions with imperative norms prohibiting discrimination in working conditions for reason of employment status (Araki, *ibid.*: 426). Thus, former art. 8 para. 1 – 2 prohibited discrimination with regard to wages, training and fringe benefits between regular and part-time employees. However, the prohibition was tied to a specific set of requirements, namely: same job content and level of responsibility as regular workers, existence of an open-ended contract or equivalent (e.g. repeated fixed-term contract renewals) and same *jinzai katsuyō no shikumi* (i.e. possibility and scope of change in job content and transfers) as regular employees. For all those part-time workers not meeting these criteria, what applied was only a ‘duty to endeavour’ to set forth measures aiming at a ‘balanced’ treatment with regard to basic wage, training and conversion to regular employees status (former art. 9, 10 and 12).

The law was further revised in 2015. Two important amendments were introduced with this revision. The first concerns the lifting of the requirement relating to the duration of the employment contract as one of the prerequisites for equal treatment

¹⁰³ The expression, absent from the draft proposed by the study group set up under the MHLW, was added when the law came to be discussed in the Diet (Hamaguchi and Ogino, 2011: 19).

(current art. 9). And the second was the introduction of the obligation that any difference in treatment between regular and part-time employees be reasonable and justified (current art. 8).

Part-time workers have long coexisted in the Japanese labour market with the regular workforce (Gordon, 1985; Nitta and Hisamoto, 2008: 58). However, from the beginning, they did not have access to equal treatment rights, as part-time work is considered not to express the same level of commitment to the firm as regular employment. It was precisely the absence of the principle of equality of treatment regardless of the worker's employment status that was the reason why the Part-time Law was framed within a *doryoku gimu* regulatory approach. That is, as the principle was in conflict with existing employment practices in Japanese workplaces, reformers introduced it gradually by requesting employers' voluntary cooperation. However, in contrast to what happened in the case of the EEOL, the reform process to convert the *doryoku gimu* provisions in the Part-time Law into imperative norms has been extremely slow. As we have seen, the first step in this direction was taken only fourteen years after the first enactment of the law. More importantly, the introduction of substantive norms in relation to equal treatment concerns only those part-time workers¹⁰⁴ whose employment status is most similar to regular employment, thereby lending support to Imai's argument (2011: 173) that: 'non-regular [part-time] workers do not deserve the same treatment as regular workers as far as their responsibility (duty) does not meet the conditions of company citizenship'.¹⁰⁵

The use of *doryoku gimu* provisions in pieces of legislation such as the EEOL and the Part-time Law is indicative of a clear attempt by the Japanese government to use law to induce a change in relation to the equal treatment of peripheral workers so as to

¹⁰⁴ According to a study carried out by the JILPT (2011: 13), in the 10,000 firms surveyed (across 16 industrial sectors) only 0.1 % of all part-time workers qualified for the maximum degree of protection.

¹⁰⁵ Imai (2011: 32) uses the expression 'company citizenship', originally adopted by Gordon (1985), to define 'institutions such as company welfare, "lifelong" employment and the fusion of labor representation with company organizations'.

promote the formation of a more inclusive and fair labour market. As this section has shown, however, these attempts have been informed by a legal ideology which stressed the importance of introducing the desired changes gradually and by relying on moral suasion, rather than on the compelling force of legal norms, to secure employers' cooperation. Such an ideology was not born in a vacuum. As highlighted in chapter 1, this study takes an approach whereby governmental responses to social problems are dependant on the ideological grids structuring agents' perceptions of the problem which, in turn, dictates the choice of the appropriate course of action to deal with it (Sumner, 1979: 268). In the case of the legislative efforts seen in this section, the formation of the legal ideology which has driven the attempts to redefine the normative order concerning employment relations in Japan was strongly influenced by the persistence of regular employment as the dominant ideological model of reference of the Japanese employment system. The dominance of this model of employment relation, from which women and non-regular workers have been traditionally excluded, is the element that determined the legislative response in terms of *how* to cause established employment practices to change.

The reform process of the EEOL and Part-time Law clearly illustrates this. In the case of the EEOL, it was argued that female employment was in conflict with the organisation of the Japanese labour market, thereby calling for the use of *doryoku gimu* provisions. However, there are two inconsistencies attached to this argument. First, the possibility granted to employers in the first version of the law to recruit women only for certain types of jobs so as to give them *more* opportunities to participate in the labour market clashed with the fact that the Japanese labour market was already characterised by high rates of women's participation (Saso, 1990: 24). Rather, the problem appeared to be retention rates and sex segregation in the workplace as a consequence of the system of employment practices attached to regular employment (Wakikasa, 2013).

Second, the statement that the notion of equality in employment was unknown to women is contradicted, on the one hand, by the existence of studies carried out at regional level¹⁰⁶ which show that women felt the issue quite keenly; and on the other, by the legal struggles for gender equality carried out by female workers in the twenty years preceding the enactment of the law (Cook and Hayashi, 1980; Upham, 1987).

By the same token, the enactment and amendments of the Part-time Law reveal the inconsistency of a legal ideology aimed at fostering equality of treatment for part-time workers without encroaching upon regular employment. As mentioned in the previous chapter, the use of non-regular employment in general, and of part-time work in particular, has important cost savings implications for firms, allowing them to counterbalance the costs associated with the need to maintain the social contract with the regular workforce. Even after the recent reform carried out in 2015, the Part-time Law allows for the continuation of this *status quo*. This is because, as we have seen, reforms have introduced imperative norms concerning equal treatment only in relation to those part-time workers subject to similar HR practices as regular employees, whilst requiring merely a due consideration for balanced treatment for the other categories of part-timers.

The combination of a legal ideology based on the use of *doryoku gimu* norms to carry out important employment reforms with the ideology of regular employment has important implications on the organisation of Japanese employment relations.

First, there is the fact that the use of a *doryoku gimu* based approach to promote a change in the Japanese employment environment has actually contributed to reproducing and reinforcing the *status quo* of the duality of the Japanese labour market. This is because, by failing to address the issue of equal treatment for non-regular employees in clear-cut terms, it contributes to lending legitimacy to the arrangement

¹⁰⁶ *The lives of office girls* conducted by the Hiroshima Municipal Government in 1926 is such an example. The study is reported in Wakikasa (2013: 58).

whereby the distribution of organisational resources is dependent on the degree of commitment to the firm, and therefore tilted towards regular employees. Moreover, the fact that the conversion from *doryoku gimu* to imperative provisions is carried out unevenly in both these pieces of legislation as well as across related laws can potentially worsen the segregation of Japanese workplaces. For example, the establishment of a two-tiered system of regulation concerning equality of treatment in the Part-time Law raises concern because it reinforces existing status divisions among different categories of part-timers. This is even more so if one considers that the Part-time Law does not apply to so-called full-time part-timers.¹⁰⁷ Similarly, the survival of *doryoku gimu* provisions in relation to the balanced treatment of part-time workers not meeting the eligibility criteria set by art. 9 can have a negative impact on female workers, as women still represent the majority of part-time workers (Weathers, 2001; Broadbent, 2003; Seifert, 2010; MIC, 2016: 2 – 3). In other words, Japanese women are now protected from discrimination by reason of gender through the EEOL. However, they are still exposed to the risk of unequal treatment by reason of employment status because of the limited scope of the Part-time Law.

Second, as was mentioned in section 3.2.2.2, the phased implementation approach expressed by the use of *doryoku gimu* provisions can be a double-edged sword, given the fact that the incubation period granted to employers to adjust their employment practices to the new normative regime can also be used to devise new strategies to sidestep the provisions of the law. The case of the EEOL lends support to this. During the period when the EEOL existed as a soft law piece of legislation, Japanese employers introduced the two-track career system¹⁰⁸ which has been pointed to as a barrier to gender equality for women (Tachibanaki, 2010). Further, as we shall see in more detail in the next chapter, the gradualism enshrined in the *doryoku gimu*

¹⁰⁷ On this, see nt. 101 and 102 above.

¹⁰⁸ On this, see nt. 74 above.

approach can jeopardise the judicial process, as it results in an uneven distribution of legal capital among workers, thereby making more difficult for them to invoke the law.

According to Araki (2004a: 18), *doryoku gimu* norms are a ‘temporary compromise’ (*zanteiteki dakyō*) whose significance must be read in light of their potential to bring change in the long run (Araki, 2000; 2004a; 2004b). However, given the implications outlined above of this regulatory strategy, this compromise runs the risk of compromising the position of the workers it claims to protect.

3.4. *Doryoku gimu* provisions: rationale and effectiveness

The previous section was concerned with an examination of the *doryoku gimu* regulatory approach as a means to foster an extension of employment rights to the Japanese peripheral workforce. In order to reveal the legal ideology of this legislative strategy, I have looked at two important pieces of Japanese employment legislation, i.e. the EEOL and the Part-time Law, and shown the implications of the adoption of this strategy for the organisation of Japanese employment relations. As we have seen, the claimed rationale underpinning the use of *doryoku gimu* provisions is the logic that any substantial change in deeply embedded employment practices and customs can be attained only gradually – by guiding rather than imposing – so as to accumulate small incremental shifts rather than causing abrupt, and therefore potentially dysfunctional, alterations. This view is shared by most observers (Foote, 1997; Schwartz, 1998; Weathers, 2004; Sugeno and Suwa; 1997) and advocates (Parkinson, 1989; Araki, 2000; 2004a; 2004b) of this regulatory approach, the rhetoric of the reformers being quite clear – any legal reform will be to no avail without building the necessary ‘social consensus’ (*shakaiteki konsensasu*)¹⁰⁹ around it *beforehand*.¹¹⁰ In contrast, a scholar

¹⁰⁹ Terayama (2002: 118) defines social consensus as ‘a system [of practices] which is yet not generally diffused among firms’ (*‘kigyō ni oite ippantekini fukyū shiteinai yōna seido’*).

such as Upham (1987) offered a different evaluation, arguing that the use of hortatory rules such as *doryoku gimu* provisions is part of Japanese governmental *élites*' conscious attempt to manipulate the country's legal environment so as to discourage citizens' mobilisation of legal institutions, thereby maintaining control over the pace of change at the social level. Against this backdrop, the aim of this section is to test the readings in the literature by examining the views and perceptions of relevant actors in the employment legal arena so as to gain a better understanding of the conditions which led to the adoption of the gradualist logic behind *doryoku gimu* through the use of empirical data.

In regard to the reasons informing the use of pieces of legislation based on *doryoku gimu*, the views of my interviewees reflected the assessment in the literature. That is, the need to introduce new rules in a gradual manner so as to avoid causing any disruption in the employment system. Mizumachi Yūichirō (16 October 2013, interview), Professor in Labour and Employment Law at the Institute of Social Sciences of the University of Tokyo, made the point as follows: '[D]*doryoku gimu* provisions are a soft tool [of regulation]. [The main idea] is to change reality little by little. (...) It's a quite Japanese approach'.

Sugeno Kazuo (19 November 2013, interview), current president of the Japan Institute for Labour Policy and Training, agreed and stressed the didactic function of *doryoku gimu* provisions:

'Well, at the time [of the introduction of the EEOL] there were still many people having a traditional outlook (*dentōtekina kachikan*) [about female employment]. So it was deemed best to first start from a *doryoku gimu*. So as to change these beliefs, you see'.

¹¹⁰ This would seem to apply not only to the introduction of new pieces of legislation but also to any reform to the system of employment relations in general. Shirai Taishirō (quoted in Schwartz, 1998: 143) with regard to the 1987 revision of the LSL to reduce long working hours makes the point as follows: '(...) if you ignore that situation, and resolve on a *hasty* time reduction by law, that law will have no effect. A *social consensus* on that law's *propriety* will be insufficiently formed and, if there are many violators, it will be impossible to expose and punish them all.' (emphasis added)

The second reason seen as informing the adoption of *doryoku gimu* based pieces of legislation was to avoid opposition from the social partners, a necessity which is partly the by-product of the delegation of the policy making process to the *shingikai* of the MHLW. In this respect, Nakakubo Hiroya (22 October 2013, interview), Professor in Labour and Employment Law at Hitotsubashi University, argued as follows:

‘Initially, the possibility of adopting a public law approach [for the EEOL] was discussed [in the *shingikai*]. But that would have been difficult to enforce. Also, the imposition of a fine [for breach] would have been too great a shock. Employers would have opposed it. That’s the thing [in *shingikai*], it doesn’t allow for the implementation of drastic legislation [*dorasutikku na hōritsu dekinai desu ne*].’

Kamata (26 November 2013, interview), Professor in Labour and Employment Law at Tōyō University and chair of the study group on the Labour Dispatching Law reform, echoed this view:

‘In Japan, you see, when you try and introduce [imperative norms] in labour relations, resistance is quite... there are lot of people who are opposed to it. And so... when making new laws, I think they created this *doryoku gimu* to soften the obligation and at least allow for new rules to be brought [into the system].’

As for the effectiveness of this regulatory approach, my interviewees did not consider the use of *doryoku gimu* provisions as unproblematic, although opinions diverged about the extent to which they could bring about a tangible change in the Japanese employment system.

As previously discussed, these norms lack any legal binding force and rely on willing cooperation to meet the goal of the statute. Among my informants, observers such as A. (17 October 2013, interview), Professor of Labour Law at a major Japanese university, and H. (3 December 2013, interview), lawyer specialising in labour related

matters, were quite sceptical about their potential to foster compliance through persuasion.

H. (*ibid.*) flatly stated that *doryoku gimu* provisions have ‘no effectiveness whatsoever’. A. (*ibid.*) supported this, arguing:

‘[*Doryoku gimu* provisions] have no practical effect. (...) that is why it is important to have rules, clear-cut rules applying equally to all workers and for which redress can be sought [in court]’.

Nakakubo Hiroya (22 October 2013, interview), Mizumachi Yūichirō (16 October 2013, interview) and Sugeno Kazuo (19 November 2013, interview) were more cautious in their evaluations. Nakakubo (*ibid.*) expressed his view as follows:

‘[T]o argue that they [*doryoku gimu* provisions] are not effective is one possible way to evaluate them. Well, maybe it is so. One problem is also how to actually monitor whether employers are putting an effort to comply’.

By the same token, Mizumachi Yūichirō (16 October 2013, interview) opined that the effectiveness of *doryoku gimu* norms largely depends on employers’ goodwill. Thus, as there will be employers making efforts in good faith to implement the new rules, there will also be employers ignoring them. On the other hand, he recognised that the fact that such rules do not equip workers with any legal entitlement upon which they can raise a claim in court does represent a shortcoming.

Sugeno Kazuo (19 November 2013, interview) was more disenchanted with employers’ spirit of cooperation towards meeting the objectives of gender equality and balanced treatment enshrined in the statutes. Specifically with regard to the EEOL, he argued:

‘*Doryoku gimu* provisions are meant to change values. Principles (*tatemaie*). But principles and reality (*jissai*) you know... In theory, firms did make efforts not to discriminate any more for reasons of gender, but the reality

was far from changing because [the previous infrastructure of the law] was only a duty to endeavour. Indeed, many firms just introduced a two-track career system’.

Nonetheless, he did not believe that this meant that *doryoku gimu* provisions had no effectiveness, and pointed to the use of administrative guidance (*gyōsei shidō*) as an enforcement mechanism. Administrative guidance¹¹¹ is an informal – i.e. not binding in any respect – set of administrative actions, such as requests and advice of various kinds, aimed at the implementation of a particular policy goal (Young, 1984: 923; Sato, 2001: 106; Oda, 2009: 46).¹¹² Goodman (2008: 476) sweepingly describes it as follows: ‘[A]dministrative guidance is typically not an act it is a process. It is a process wherein an administrative body attempts, through negotiation, cajoling, and consultation, to affect change in conduct by a company, industry or individual in order to carry out a policy objective of the agency’. According to Araki (2000: 456), administrative guidance, as a means of enforcement, can be ‘more effective than criminal or civil sanctions in the Japanese context’.

Among my legal scholar interviewees, Kamata (26 November 2013, interview) was the only one to explicitly espouse this view. He made the point as follows:

‘If the [administrative] agency issues guidance, it is the “mentality” of the Japanese that this must be complied with (...). If they [the employers] don’t, one possible sanction is the public disclosure of the name of the [non complying] firm. And you know, in Japan... (...) the idea of having the firm’s name published in a newspaper, exposed to criticism... it’s something the Japanese would be really troubled about. [Here] there is such a mentality, you see’.

A. (17 October 2013, interview) and Mizumachi Yūichirō (16 October 2013, interview) disagreed. A. dismissed the usefulness of administrative guidance as a means of

¹¹¹ The term ‘*gyōsei shidō*’ surfaced in media and academic discourses during the years of the first oil shock when, especially in the area of industrial policy, it became common for the administrative branch to offer (and be requested) guidance which would help industries through economic recovery (Nakagawa, 1998: 1 – 2).

¹¹² For a classification of different types of administrative guidance, cf. Matsushita (1993: 61 – 64) and Nakagawa (1998: 5 – 8).

enforcement, arguing it is a tool in the hand of the bureaucracy to promote its vested interests and retain influence. In contrast, Mizumachi expressed a less drastic view, noticing that the efficacy of administrative guidance is dependent on the policy goal pursued. He pointed to the existence of different types of administrative guidance, each with a different degree of leverage, and acknowledged that stronger forms of administrative guidance such as *kankoku* (recommendations) are unlikely to be used in support of *doryoku gimu* provisions whose rationale is the assumption that they rest on efforts to meet the goals of a statute voluntarily taken by the employers. He concluded by arguing that this was probably one of the reasons why administrative guidance had been quite ineffective in fostering compliance with the objectives of the Part-time Law.

This section has examined the views of insiders to legal institutions in employment in relation to the use of *doryoku gimu* provisions as a means to foster a change in the system of established employment practices of Japanese workplaces. Against the backdrop of a theoretical framework placing emphasis on the way ideology has an influence in shaping informed actors' perspectives of possible or desirable change in an established normative order, two considerations emerge about the empirical data presented above. First, in contrast to the argument of Upham (1987: 205 – 209), it is clear that the moral suasion informing the *doryoku gimu* regulatory strategy is not the result of an attempt to promote an ideology of consensus in Japanese law. According to this view, the non-binding *doryoku gimu* provisions enshrined in pieces of legislation such as the EEOL stemmed from a conscious endeavour by governmental *élites* to keep social conflict outside of formal legal forums so as to foster an image of Japanese society as consensual and harmonious (*ibid.*: 206). Conversely, the views of the legal scholars I interviewed sketched a different and more complex picture whereby *doryoku gimu* provisions are seen rather as the by-product of the existence of institutional constraints in the country's legal and employment setting. Namely, these

have been: on the one hand, the necessity of accommodating the pursued reform with the HR practices attached to regular employment; and on the other, the *lack* of consensus between the social partners in the *rōdō seisaku shingikai* which resulted in the compromise of pieces of legislation based on the use of *doryoku gimu*. Second, although to a different extent, the use of this regulatory approach was not seen as unproblematic. As we have seen, even those observers who evaluated *doryoku gimu* provisions positively as a means to promote change, acknowledged that, on their own, they were not effective – thereby calling for the need to complement them with administrative guidance as a means for securing compliance. However, as we have seen, there was disagreement among my interviewees also in relation to this monitoring tool, and the extent to which it could be successfully used to yield employers' cooperation. It follows that, rather than the best strategy to promote change, the views of many of my interviewees converged into considering *doryoku gimu* provisions more as a *faute de mieux*, the only compromise possible in the Japanese institutional setting.

3.5. Behind the scenes: *shingikai* patterns of policy making

In the above sections, I have examined the legal ideology behind the use of *doryoku gimu* provisions as a legislative strategy, and the way this ideology has been constrained by the concurrent ideology of regular employment. I have also exposed the implications of the interaction of these ideologies for employment policy directed at peripheral workers in the Japanese labour market. As mentioned, the casting of desired employment reforms within a *doryoku gimu* regulatory framework is often the result of the need to find a compromise between the opposing stances of labour and management in the *rōdō seisaku shingikai* of the MHLW. Therefore, no explanation of the legal outcomes examined above is complete without some discussion of the processes informing this mechanism of policy making. My aim in this section is to examine the

internal dynamics of this administrative organ, and reveal the implications of the relative access that specific segments of the Japanese employment system have in the *rōdō seisaku shingikai* for the content and form of the resulting policy proposals.

As briefly mentioned in the introduction, *shingikai*¹¹³ are advisory bodies to ministries, whose function is to devise policy proposals to be recommended to the legislative organ. They have a long history in the Japanese political arena, having been in existence since the Meiji period (Schwartz, 1998: 48; Nishikawa, 2007: 60) when they were first established by imperial edicts (or cabinet ordinances) in order to offer ‘advice’ with regard to specific policy issues (Harari, 1988: 147). Although to some extent similar in broad outline,¹¹⁴ the contemporary *shingikai* system is different from its forerunner in the scope of its authority, member composition and legal foundation (Schwartz, 1998: 48). The latter, spread over a variety of statutory provisions, is enshrined mainly in art. 8¹¹⁵ of the *Kokka Gyōsei Soshiki Hō* (National Government Organization Law) first enacted in 1948. A mere appendage of the powerful bureaucratic machinery during the pre-war era, the current system was introduced by the Occupation authorities precisely to narrow the scope of bureaucratic power and broaden the base of participation in the decision-making process (Park, 1972: 435).¹¹⁶

¹¹³ *Shingikai* is the generic name used to indicate a variety of commissions ‘having a council system for taking charge of the study and deliberation of important matters, administrative appeals or other affairs that are considered appropriate to be processed through consultation among persons with the relevant knowledge and experience’ (art. 8, Law no. 120/1948). In this work I will use the term as defined by Ehud Harari (1988; 1990), i.e. as advisory bodies or advisory councils which denote commissions designed to deliberate and give advice on policy and administrative measures, so as to distinguish them from other forms of committee, such as *chōsakai* or *shinsakai*, which are more investigative in nature.

¹¹⁴ As highlighted by Harari (1988: 147 – 148), systematic data concerning early *shingikai* bodies and their functioning are quite scarce. However, he identifies the following characteristics: mainly composed of ministries, cabinet members and bureaucrats; temporary rather than permanent; engaging in consultation about policy issues but lacking substantial independence from the parent bureaucratic agency.

¹¹⁵ Before a revision took place in 1983, *shingikai* could be established only by law as passed by the Diet, a process which was criticized for being too rigid and time-consuming. Acknowledging the recommendations made by the report issued by the Ad Hoc Administrative Reform Council in 1982, art. 8 was amended to allow for the formation of advisory bodies also by means of cabinet ordinances (Schwartz, 1998: 59 – 60).

¹¹⁶ The intent was to democratise the policy making process by allowing for the participation of representatives of interest groups and ‘experts’, functioning as policy analysts. Some, however, argue that this injection of ‘outsiders’ in a government’s decision making process has in fact an adverse effect for democracy. Shapiro (2001: 372) makes the point as follows: ‘As public policy decision-making is diffused among various government and nongovernment actors in an amorphous, non-rule-defined manner, democratic accountability is destroyed’.

The scope of action of *shingikai* is quite broadly conceived, their functions consisting essentially in: engaging in discussions that can allow public opinions to be heard and reflected in governmental policies;¹¹⁷ ensuring the fairness of the process of policy making through the injection of multiple points of view; providing the government with informed opinions by experts; and contributing to smoothing out conflict by ‘adjusting the interests’ (*rigai no chōsei*) of all the involved parties (Harari, 1988: 146; Nishikawa, 2007: 60). Over the years, referral of a specific policy issue to advisory bodies has come to represent the usual preliminary step to any form of legislative or administrative action (Park, 1972: 437; Harari, 1988: 153; Schwartz, 1998), in some instances set as a requirement by specific regulations.¹¹⁸

Consultations are started either by the initiative of *shingikai* members themselves or – as is usually the case – when a formal request to that end is filed by the relevant parent agency (Schwartz, 1998: 77). Once put in operation, the way forward is twofold (Harari, 1988: 146; Schwartz, *ibid.*: 78): either council members will be asked to evaluate the pros and cons of one or more policy proposals, or be given some general guidelines concerning a policy issue on which to conduct a study and elaborate recommendations. With the exclusion of some specific cases,¹¹⁹ reports issued by an advisory body have no legal binding force on the agency (Nishikawa, 2007: 65), which is also what determines the fact that they are not subject to judicial review (Schwartz, 1998: 88).¹²⁰ As a matter of fact, before the enactment of the *Chuō Shōchō to Kaisei*

¹¹⁷ In Nishikawa’s words (2007: 60), ‘kokumin *kakusō* no iken wo han’ei saseru koto’ [reflect the opinions of *all* classes of people] (emphasis added).

¹¹⁸ The LSL was such an example. Art. 98 of the law (now abolished) established the *Chuō Rōdō Kijun Shingikai* (Central Advisory Council on Labour Standards) whose scope of authority was to discuss matters relating to labour standards. This organ was replaced in 2001 by the *rōdō seisaku shingikai* by art. 6 of the law no. 97/1999 establishing what is now the Ministry of Health, Labour and Welfare, born as a result of the restructuring of central government carried out to comply with the administrative reforms enacted to streamline the bureaucratic organization.

¹¹⁹ On this point, cf. Nishikawa (2007: 65, nt. 35).

¹²⁰ Upham (1987: 171) stresses precisely this point with regard to the field of industrial policy: ‘(...) regulations within an agency or even among agencies and public bodies like *shingikai*, no matter how formal or final, are not reviewable because they are considered internal government behaviour that does not directly affect the legal rights or duties of private citizens. (...) even a final *shingikai* report that recommends specific criteria for a production or price cartel would not be reviewable until its provisions were formally implemented, and then only if they legally restrained private action’.

Kankei Hō Shikkō Hō (Law on the Enforcement of the Law Related to the Central Government Reforms, no. 60/1999) there existed a duty to ‘respect’ (*sonchō gimu*) *shingikai* recommendations. However, the new law has changed this expression, replacing it with the phrase ‘*iken wo kikanakereba naranai*’ (‘must listen to the opinion’), by which it is understood that the ultimate authority to decide whether to adopt the recommended course of action rests with the parenting agency (Nishikawa, 2007: 65). Be that as it may, it is a recognised fact that advisory councils’ reports do carry weight in influencing the legislative process in Japan (Nishikawa, *ibid.* ; Schwartz, 1998: 89; Weathers, 2004: 424), although the legislature seems to be acquiring increasing decision making power within the system (Oda, 2009: 36).

Delegating policy formulation to consultation based advisory bodies may prove useful, especially when it comes to securing enactment in the Diet (Weathers, 2004: 424). Harari (1988; 1990) and Schwartz (1998) both stress the role of *shingikai* as forums of representation and coordination of public and private interests, thus contributing to making the policy making process more equitable through the injection of a ‘pluralistic’ component. They do seem to be quite conscious of their shortcomings too, namely a certain lack of transparency and independence. Harari’s assessment of the situation would appear to be more optimistic, stressing the importance of advisory bodies as the ideal places where conflicting interests may be reconciled and pointing in the direction of a greater leeway with respect to the parent agency. In contrast, Schwartz’s analysis is more cautious – acknowledging how the use of advisory bodies may be subject to abuse, especially when trying to shield against responsibility for unpopular decisions by gaining legitimacy through delegation of the issue to *shingikai* consultation, when not actually seeking to postpone decisions over controversial matters by prolonged deliberation sessions (Schwartz, 1998: 55). However, while admitting the weaknesses, they both agree that advisory bodies can be effective means for aligning

conflicting interests and, consequently, reaching concrete policy and legislative outcomes (Schwartz, *ibid.*: 56; Harari, 1988: 157).

Yet, in recent years, the *shingikai*-based paradigm of decision making has been increasingly challenged and critics have emerged, questioning its very legitimacy (Nishikawa, 2007; Kanbayashi and Ōuchi, 2008). So much so that attempts toward a reform were made at the end of the 1990s, in order to attain greater transparency in the proceedings.¹²¹ Consequently, art. 30 of the *Chūō Shōchōtō Kaikaku Kihon Hō* (Basic Law on the Reform of Central Government, no. 103/1998) set forth the principle establishing the divorce of policy-making and the drafting of bills from discussion in *shingikai* as a rule.¹²² Acting on this norm, in 1999, the Cabinet issued the *Shingikaitō no Seiri Gōrika ni kansuru Kihonteki Keikaku* (Basic Plan for the Systematisation and Rationalisation of *Shingikai*) to deal with the main controversial points related to advisory bodies, i.e. membership composition and transparency. As for membership, efforts were put into limiting both the number and years of service of members – so as to avoid the formation of informal networks within the councils – and into increasing the participation women, a category traditionally underrepresented (Nishikawa, 2007: 64).¹²³ For what concerns the enhancement of fairness and accountability, the reform aimed to promote the public disclosure of information as well as discussions. Indeed, among the fiercest criticisms directed at advisory bodies have always been the closed

¹²¹ Incidentally, Japan would not appear to be alone in this respect. The United States started the attempt to regulate advisory bodies as early as the 1970s although with mixed results (Mongan, 2005); while the British government launched its programme to rationalise the system of public bodies in 2010 with the aim to ‘reinvigorate the public’s trust in democracy’ (<https://www.gov.uk/government/news/public-body-review-published>, accessed 20 May 2013).

¹²² Para. 2, lett. (i) – (ii) in particular states that ‘in relation to *shingikai*, conducting discussions relating to the formulation of standards for the drafting of policy plans or implementation of policies, it is established that: (i) as a general rule, they will be abolished (...); (ii) (...) only when required by specific circumstances, their establishment will be allowed provided that issues for discussions will be as concretely specified as possible and – whenever applicable – set within a limited time frame’.

¹²³ The objective of the government was to raise the participation of women among ‘expert’ members to 20% by 2010 and 30% by 2020. Although an increase was indeed registered, data so far would appear discouraging with the percentage of women members still at 19.4% in 2012. See http://www.gender.go.jp/public/kyodosankaku/2012/201303/201303_04.html and <http://www.gender.go.jp/research/ratio/singi240118.pdf> (accessed 20 May 2013).

and secretive nature of the proceedings¹²⁴ (Nishikawa, 2007: 64; Schwartz, 1998: 84, 135) and the accusation that – as a consequence – they functioned as ‘nests’ where interest groups could nurture their vested interests. In this respect, the plan made explicit that at least either the records (*roku*) or the main points (*yōshi*) of the proceedings should be made public (Nishikawa, 2007: 64).¹²⁵

Despite these reform attempts at ameliorating *shingikai* patterns of decision making, the basic institutional arrangement on which the system rests has been left largely untouched. Indeed, while addressing the issue of the appointment and continuation of service of members in order to try and quash the problem of ‘biased reports’ due to the existence of vested interests among councillors, continuity persists in the way membership selection is carried out, with all the consequences this entails in terms of which interest groups get access to representation (Foote, 1997: 287; Schwartz, 1998: 72). Moreover, it would appear that stricter legal requirements on the use of *shingikai* only had the adverse effect of expanding the role played by private advisory bodies (*shimon shiteki kikan*).¹²⁶

¹²⁴ Actually, apart from the publication of meetings’ detailed records, most *shingikai* deliberation sessions are now open to citizens who wish to attend, although on a limited basis.

¹²⁵ In fact, the trend of making public the reports and records of the proceedings has been established for quite a while. As noticed by Schwartz (1998: 85), however, it has also happened that bureaucrats discarded some of the internal documents used during deliberations to avoid the risk of being asked to disclose them. This is particularly so for the bureaucrats of the MHLW (at the time Ministry of Welfare) after the *yakugai eizu jiken* (HIV-tainted blood scandal). For an account of the legal campaign that followed, see Feldman (2000: 112).

¹²⁶ Private advisory bodies, as well, are no newcomers in the Japanese political landscape. The first came to be used in the 1930s (Schwartz, 1998: 105). Although the word ‘private’ might suggest the contrary, they are in fact funded with money coming from the public budget (Nishikawa, 2007: 62). In contrast to advisory bodies, *shimon shiteki kikan* have no statutory basis, their establishment requiring only the ‘approval’ (*kessai*) of the relevant ministry from which advice is sought (Nishikawa, 2007: 61). Their *raison d’être* lies in listening to the opinion of ‘learned and expert individuals’, which is the argument usually brought to justify their existence outside the realm of standard legal procedure (Schwartz, 1998: 107). For these very reasons the use of private advisory bodies has been heavily criticised over the years (Schwartz, *ibid.*). Although this may be true to some extent, it is also true that any legislative proposal coming from private advisory bodies has to pass the screening of *shingikai* discussion in order to reach the Diet. Moreover – as a matter of fact – it has happened that *kenkyūkai* have formulated far more progressive and innovative policy proposals than their ‘formal’ twins or the bureaucracy were ready to approve. In the field of employment, famous examples in this respect might be, for instance, the proposals advanced by the Study Group on Policies for Equal Employment Opportunities (*Danjo Koyō Kikai Kintō Seisaku Kenkyū*) for addressing the issue of indirect discrimination in employment, of which but three were subsequently included in the 2006 revision of the EEOL (Yamada, 2011: 8); or the study group entrusted in 2004 with the formulation of policy proposals concerning labour contracts, whose report was strongly objected to by both employers’ and trade unions’ representatives in the *rōdō seisaku shingikai* with the result that the LCL that passed in 2007 was quite limited in both scope and substance (Kanbayashi and Ōuchi, 2008: 67).

With respect to the *rōdō seisaku shingikai* specifically, observers disagree about its usefulness as a policy making instrument, as well as about the extent to which it allows trade unions to influence the pace and substance of discussions (Miura, 2001; Imai, 2011; Watanabe, 2014).

In contrast to *shingikai* operating under other ministries, the *rōdō seisaku shingikai* is composed of thirty members evenly distributed between labour, management and the government. Discussions between the trade unions and business are usually the basis of the negotiations. Whenever the two sides deadlock over contentious issues, it is usually the representatives of the public interest who take the lead in acting as mediators in order to reach a solution able to align the conflicting interests of the parties (Harari, 1990: 153; Kanbayashi and Ōuchi, 2008: 68). Reports or also legislative proposals to send to the Diet for deliberation are normally agreed upon by consensus (Harari, *ibid.*: 148) so that proposed solutions hardly ever face opposition in the Diet (Kume, 2000; Kanbayashi and Ōuchi, 2008).

Some observers (Schwartz, 1998; Miura, 2001; Weathers, 2004; Imai, 2011; Watanabe, 2014) acknowledge that this tripartite policy making process does allow labour a certain leeway to press its demands on an ‘equal’ footing with employers. Imai (*ibid.*) and Watanabe (*ibid.*), in particular, would appear to suggest a link between the acceleration of the deregulation movement of the labour market and the increasing influence of deregulation committees over the policy making process. Deregulation committees are *shingikai*, in which labour has no representation, established under the Cabinet starting from the mid-1990s to advise the executive on deregulation policies deemed desirable for the Japanese economy (Watanabe, 2014: 69). In the field of employment, their establishment was strongly supported by employers’ associations precisely to avoid the time-consuming discussions taking place in the *rōdō seisaku shingikai*. According to Imai (2011), these committees now function as agenda setters

for the *shingikai*'s consultation process, which is endangered also by the fact that recent years have witnessed the Cabinet's adoption of the deregulation committees' policy proposals without their passing the screening of the *rōdō seisaku shingikai*. The result has been that the policy making function of this administrative organ has been weakened, and that trade unions have lost leverage in the process.

In contrast to these views, Kanbayashi and Ōuchi (2008) question the legitimacy and effectiveness of the *rōdō seisaku shingikai* on two counts. First, as a policy making tool, because of its inability to deal with structural problems, especially in the light of the growing complexity of the social issues being faced by both the government and the bureaucracy. Specifically, they argue that the supposed need to 'adjust interests' that informs the *shingikai*'s discussions is no longer suitable in the context of a diversified labour market where different groups of workers have conflicting interests. They (*ibid.*: 70) insightfully make the point as follows:

'the increase of non-regular employees has meant the appearance of groups of workers, within the labour side, with different [kinds] of interests. The interests of non-regular and regular workers, for example in terms of regulation of dismissal and balanced (equal) treatment, stand in stark opposition'.

Second, Kanbayashi and Ōuchi (*ibid.*: 70) cast doubt on how far the *rōdō seisaku shingikai* acts as a forum broadening social partners' participation in the policy making process, by pointing to the fact that it is only trade unions' and employers' representatives from major associations who get access to representation. Indeed, they highlight how union members come all from trade unions affiliated with Rengō, and note the absence of representation of other national federations such as Zenrōren. Although it is probably true that Rengō is the most important centre at the national level, by no means can it be assumed to represent the majority of workers, since its coverage would appear to extend in fact to no more than the 10% of the total workforce

(*ibid.*). By the same token, business representatives more often than not belong to the powerful Nippon Keidanren or to the Tōkyōto Chūshō Kigyō Dantai Chūōkai (Central Organisation of Tokyo SMEs), with the result that small and medium-sized enterprises – which constitute a good portion of the Japanese industrial fabric – have to rely on proxies from big corporations in order to advance their demands.¹²⁷

The disagreement in the literature about the merits of the *shingikai* process is mirrored in my own empirical data. As a matter of fact, most of my informants maintained a middle position towards *rōdō seisaku shingikai* based patterns of decision making, arguing that there are both strengths and shortcomings to the system.

Among the strengths, there is the fact that *shingikai* discussions allow for a thorough examination of a policy issue, thereby avoiding taking hasty legislative steps without due consideration of all the pros and cons of a policy proposal (Nakakubo Hiroya, 22 October 2013, interview; Sugeno Kazuo, 19 November 2013, interview). Moreover, since the system can be deemed a form of mini-corporatism, my informants agreed that – once a legislative proposal has passed the screening of the *rōdō seisaku shingikai* – the process of enactment will run smoothly in the Diet. This is because *shingikai* proposals are the result of an agreement between social partners who, after in-depth discussions, have reached a compromise over the issue at hand (A., 17 October 2013, interview; Kamata, 26 November 2013, interview). Nonetheless, they did acknowledge that the system was constrained by a number of shortcomings, such as the slowness of the discussions, due to the need to build consensus between the social partners, and the impossibility of fostering radical reforms (Sugeno Kazuo, 19 November 2013, interview; Nakakubo Hiroya, 22 October 2013, interview). Overall, however, my legal scholar informants expressed quite balanced views about the *rōdō*

¹²⁷ Kanbayashi and Ōuchi (2008: 68) do not seem to have much faith in representatives of the public interest either. These are selected from ‘persons of knowledge and expertise’ (*gakushiki naishi keiken wo yūsuru mono*) and are normally scholars or academics. Their role is to act as conciliators and ‘neutral’ members of the council. However, Kanbayashi and Ōuchi (*ibid.*) doubt their impartiality, alleging a ‘cooperative relationship’ (*kyōryoku kankei*) with the ministry.

seisaku shingikai process, recognising that, even if not perfect, the system did have some merits.

Two noticeable exceptions to this balanced evaluation came from Mizumachi Yūichirō (16 October 2013, interview) and Maruta Mitsuru (13 November 2013, interview) who, however, each have different interests at stake in the system.

The youngest among the legal scholars I interviewed and a member of the Cabinet's deregulation committee for labour policy, Mizumachi opined as follows:

‘Personally, I don’t think it’s a very good system. The process of decision making is slow, with the result that very few (employment) reforms manage to reach the Diet every year. Also, since it is necessary to adjust the conflicting interests of labour and management, [the *rōdō seisaku shingikai*] gives way to weird laws – misshapen and incomplete’.

In contrast to this view, Maruta, assistant director of the Department of Non-regular Employment at Rengō, expressed his satisfaction in the functioning of the system because it allows the participation of all the interested parties in the policy making process. He did not consider the need to find a compromise between the opposite positions of labour and management as a major problem, arguing that the intervention of public interest representatives usually helps in overcoming any stalemate; nor did he see as anomalous the fact that other trade union federations were excluded from taking part in the proceedings.

In contrast, the exclusion was resented by Ebana Arata (24 November 2013, interview) and Nakaoka Motoaki (12 November 2013, interview), trade unions representatives of Zenrōren and Zenrōkyō¹²⁸ respectively. Moreover, both some legal scholars as well as trade unionists from community unions¹²⁹ questioned the idea of Rengō as representing the Japanese labour movement, or its ability to foster the

¹²⁸ Together with Rengō, Zenrōren and Zenrōkyō are the two other national trade union centres of Japan.

¹²⁹ Community unions are regional unions which focus their organising efforts on workers who are normally not represented by the mainstream, enterprise-based labour movement. In recent years, some of these unions have started to be involved in the process of individual labour disputes (Oh, 2012).

wellbeing and interests of Japanese workers. For example, Sugeno Kazuo (19 November 2013, interview) expressed his view as follows:

‘You see, Rengō makes wonderful speeches [about equal treatment for non-regular employees]. But when you go and see how things are at the level of company unions, then the truth comes out. Rengō does not actually mean what it says’.

Even more forceful were the views of community unions’ representatives, which are best summarised by the words of Suda Mitsuteru (20 November 2013, interview), general secretary of Tokyo Tōbu Rōdō Kumiai:

‘[Rengō] is at one with management (...) so the opinions and demands reaching the *shingikai* are the wrong ones, in reality they are not meant to be in the workers’ best interest. In fact, they are requests which match those of companies and of the Keidanren’.

This section has explored the functioning of the *rōdō seisaku shingikai* in order to reveal the implications of the delegation of the employment policy making process to this administrative organ. The evidence presented has shed light on two important issues. The first is related to the endurance in the institutional arrangement of the *rōdō seisaku shingikai* of a model of regulation that the Japanese government has been trying to redefine in the aftermath of the bursting of the economic bubble. The previous chapter has highlighted the way the ideological underpinnings of the Japanese legal system are undergoing a transition from a system feeding into informalism to a model emphasising the rule of law. As was mentioned, one of the pillars of the legal ideology of the post-war era was the consensus building process of policy making labelled by Haley (1991: 166 – 169) as consensual governance. As shown in this section, this model survives in the *rōdō seisaku shingikai*, seriously constraining Japanese employment reforms efforts as a result of the inability of the *shingikai*’s policy proposals to address systemic problems, given the need to find a compromise between the conflicting stances

of management and labour. As we have seen in the preceding sections, these compromises have resulted in pieces of legislation both insubstantial in their protection of workers and slow in the pace of implementation, thereby contributing to exacerbate the segmentation of the Japanese labour market.

The second issue which has emerged from the discussion in this section is the implications the composition of the *rōdō seisaku shingikai* has for the employment policy proposals promoted by this policy making forum. In this respect, some observers (Imai 2011; Watanabe, 2014) have argued that the *rōdō seisaku shingikai* gives labour leverage over the decision making process concerning employment reforms, thereby allowing the labour movement to promote workers' interests when discussing legislative proposals. However, as this section has shown, this argument is debatable because of its failure to appreciate that not all segments of the Japanese trade union movement have access to the *rōdō seisaku shingikai*. As a matter of fact, limiting the scope of participants is one of the by-products of consensual governance (Haley, 1991: 167 – 168). What is important to stress here, however, is that the narrow scope of the employment reforms relating to equal treatment for the peripheral workforce of the Japanese labour market is not only the result of the institutional constraint of the need to adjust the conflicting interests of labour and management, but also of Rengō's unwillingness to renege on the cooperative industrial relations pact of the post-war era and the subsequent reluctance to promote reforms which might encroach upon the interests of the regular workforce which still represents the bulk of its constituency.

Conclusion

This chapter has analysed the way the Japanese government has attempted to use law to redefine the legal boundaries concerning employment relations in the country. Specifically, the chapter has focused on the regulatory strategy adopted to bring about

an improvement in working conditions and a more inclusive labour market for peripheral workers such as women and non-regular employees, and the policy making process which led to its adoption. Before the 1980s, the government of Japan maintained a stance of non-intervention in the regulation of employment. This position was expressed by the use of a public law regulatory approach whereby the state mandated only minimum standards of employment, and delegated the regulation of all other issues concerning working conditions to collective bargaining between the social partners. However, starting from the 1980s, the emergence of issues such as gender equality and equal treatment for non-regular employees called for the Japanese government to intervene more proactively in the regulation of employment relations. As we have seen, the bulk of the legislative interventions aimed at fostering a change in established patterns of employment practices took the form of a regulatory strategy based on the use of *doryoku gimu* provisions. The analysis presented in this chapter has shed light on two important issues about the role of employment legislation as an agent of change in Japan.

The first is the role played by the interdependence between the ideology of regular employment and the legal ideology of moral suasion in shaping the form and content of Japanese employment reform efforts. As was explained in the research methodology chapter, this study assumes law to be ideological in the sense that the relationship between the legal and the social is mediated by ideology (Sumner, 1979: 268; Hunt, 1993b: 26). That is, legislative interventions are meant to respond to social problems, but the way social problems are perceived is filtered by certain sets of beliefs about the nature of social practices and relations in a given setting. In this respect, chapter 2 has shown that the predominant ideological model of reference in employment relations in Japan remains the ideal of regular employment as developed in the post-war era. The ideological dominance of regular employment in the Japanese social imaginary

has in turn influenced the development of a legal ideology placing emphasis on the necessity to foster change in relation to issues such as gender equality and equal treatment for non-regular workers by using a gradual implementation approach aimed at changing attitudes in the workplace rather than imposing compulsory legal standards. This legal ideology is enshrined in the *doryoku gimu* regulatory approach. The analysis of the ideological roots informing Japanese employment reform efforts leads to three important insights that have been neglected to date in the existing literature.

First, it helps to explain the persistent duality of the Japanese labour market. As argued by Hunt (1993b: 26): ‘legal rules do not *create* social relations (...) but by stating them as principles and by enforcing them the law operates not only to reinforce these relations but also to legitimise them in their existing form’ (emphasis in original). In this respect, as illustrated by the examination of the EEOL and Part-time Law, the use of the *doryoku gimu* regulatory approach as a means to foster change has resulted in two consequences. On the one hand, the choice not to cast principles such as gender equality and equal treatment for non-regular employees as imperative norms has contributed to disseminating and reinforcing the idea of regular employment as *the* Japanese employment customary practice. On the other hand, by conferring authority upon the logic that full equal treatment applies only in those instances where the duties and responsibilities of non-regular employees can be equalled to those of regular workers, efforts to use legal rules to foster change have in effect strengthened the *status quo* of employment relations in Japan. This suggests that the legal framework governing employment practices in the country, and its ideological apparatus, has had a crucial part in perpetuating and reinforcing employment status divisions in the Japanese labour market. In other words, as argued by observers such as Keizer (2010) and Imai (2011), employment practices matter. But the existence of legal rules formalising and

regularising certain kind of work arrangements over possible alternatives is an essential infrastructure for sustaining them.

Second, my analysis of Japanese employment legislation as a form of ideology has revealed the implications of the use of the *doryoku gimu* regulatory approach in terms of the distribution of legal resources among different segments of the workforce in the Japanese labour market. Previous examinations of the attempts to use legal rules to promote desirable employment reforms in Japan (Foote, 1997; Araki, 2000, 2004a, 2004b) stopped at signalling the significance of the legal changes being fostered, but neglected to consider the existence of possible side-effects attached to the choice of a particular regulatory strategy. By placing emphasis on the process by which the legislation has been arrived at and on the pace and mode of the employment reform efforts, I have shown that the adoption of the gradualist logic enshrined in the use of *doryoku gimu* provisions has resulted in an uneven distribution of legal capital among workers, who are divided into legal classes each of which has access to a different set of legal entitlements. The Part-time Law is a good illustration of this. As we have seen, the Part-time Law does not cover full-time part-timers. In addition, by establishing escalating degrees of protection concerning equal treatment which are in turn tied to the degree of commitment to the firm, the law has resulted in unequal access to legal redress for different categories of part-time workers. The side-effects of gradualism as a strategy to foster change are exemplified also by the process of revision of the EEOL, as the element of time was crucial in undermining the potential of reform of the first version of the law because it gave employers room to devise new strategies to sidestep the new norms. The implications attached to the use of the *doryoku gimu* regulatory approach become even clearer when making cross comparisons between pieces of legislation. In this respect, it is apparent that the current version of the EEOL is weakened by the fact that the Part-time Law has yet to be fully converted into a hard

law regime which means that, if not by reason of gender, the majority of Japanese women are exposed to the risk of having no access to equal treatment by reason of employment status.

The third insight gained from the investigation carried out in this chapter relates to the more nuanced and complex picture of Japanese legislative action which has emerged from the analysis of the views of informed actors in the process with regard to the use of *doryoku gimu* provisions as a regulatory strategy. In his study, Upham (1987: 205 – 221) highlighted the ideological dimension of Japanese law by arguing that it was rooted in an ideology of consensus whose purpose was to nurture a vision of Japanese society as harmonious and conflict-free. However, the examination of the views of the legal scholars and experts presented in this chapter has revealed the tensions and circumstances behind the use of *doryoku gimu* norms as well as the doubts relating to their effectiveness as a legislative strategy to promote change. In this respect, a more complex picture has emerged in relation to the legal ideology of Japanese employment legislation. This picture reveals one important insight about the use of the *doryoku gimu* regulatory approach. That is, this legislative strategy is considered as the result of the necessity of modelling the new normative pattern around a system of employment practices dominated by regular employment, and of accommodating the conflicting stances of the interested parties allowed in the decision making process.

The second issue which surfaced from the discussion in this chapter is the extent to which the existence of institutional constraints attached to the decision making process can effectively reduce the potential of legal rules as a means to promote meaningful social reforms. The case of the *rōdō seisaku shingikai* is illustrative in this respect. As was shown, the delegation of the policy making process to this organ has restrained Japanese legislative efforts on two fronts. The first is the extent to which it has impeded the possibility of advancing systematic and structural reform of the Japanese

employment system. This is because access to the decision making process has been granted to representation groups such as the Keidanren and Rengō which have an interest in maintaining the *status quo*. From this point of view, the analysis of the empirical data has also contributed to shed light on the conflict of interests internal to the Japanese trade union movement, and questioned the argument of a strand of literature (Imai, 2011; Watanabe, 2014) which posited the *rōdō seisaku shingikai* as a form of mini-corporatism allowing labour to influence the employment legislative agenda. In contrast to this view, we have seen that it is the issues pertaining to certain segments of the Japanese workforce which reach the decision making process, thereby limiting the extent to which negotiations on behalf of workers at the periphery of the labour market can be carried out.

The second front on which the delegation of the decision making process to the *rōdō seisaku shingikai* has constrained Japanese employment reform efforts is that the rationale of the need to find a compromise between the conflicting stance of the social partners necessarily curbs the scope and pace of legislative action. In addition to the implications for employment relations which have already been mentioned, this has implications also for the legal process in Japan more generally. As was explained in chapter 2, the legal reforms launched by the country starting from the 2000s were aimed at increasing levels of transparency in and access to justice through the Japanese legal system by fostering a legal model based on clear-cut rules which facilitate the invocation of law. However, the enduring legacy of a legal ideology feeding into a consensual governance model of regulation, of which the compromise oriented policy making of the *rōdō seisaku shingikai* is expression, undermines this objective. The enactment of the LCL is a good example of this. In line with the Heisei legal reform movement seen in the previous chapter, the law aimed at promoting a model of regulation of the employment relationship, the private law approach, whereby the rights

and duties of both parties to the relationship are clearly defined, and redress for breach can be sought through the action of the courts. However, the LCL resulted in a mere codification in statute of principles which had already been established by the judiciary, precisely because the social partners failed to reach a compromise over the enactment of a piece of legislation broader in scope.

This chapter has explored Japanese legislative efforts to use legal rules to promote the creation of a more inclusive and fair labour market. As argued by Vago (2012: 311), when analysing law as an agent of social change, it is essential not to lose sight of the specific circumstances and conditions which shape legislative strategies, and the implications these entails for the organisation of social relations. This chapter has revealed the two main factors which have influenced Japanese employment reform efforts: the legal ideology of moral suasion operating in conjunction with the ideology of regular employment, and the existence of institutional constraints on legislative efforts stemming from the delegation of the policy making process to the *rōdō seisaku shingikai*. The implications, as we have seen, are that reform efforts have brought no substantial changes in the organisation of employment relations in Japan.

‘(...) legal orders create asymmetrical power relations
(...) [T]he legal system does not provide an
impartial arena in which contestants
from all strata of society may meet
to resolve their differences’
(Starr and Collier, 1989: 7)

Chapter 4

Patterns to Unequal Justice?

Employment litigation and employment related ADRs in Japan

Introduction

In the previous chapter, I have examined the legislative strategies adopted by the Japanese government to shape the *contours* of the employment relationship in the country, the process and the ideological make-up behind them, and exposed their implications in terms of employment policies. The focus, as we have seen, was on the government's endeavour to use law as an agent of legal and social change in an attempt to redefine the normative order concerning employment relations, and enhance the development of a labour market more inclusive of the Japanese peripheral workforce. In this chapter, I will explore one of the other main functions that law is said to perform in society – dispute processing – by examining some of the judicial and administrative procedures existing in Japan for the management of employment disputes. The aim of the chapter is threefold. First, to expose the implications of the legislative framework adopted by the Japanese government for the regulation of the employment relationship on court processes for the resolution of employment disputes. Second, to examine the functioning of the employment ADR mechanisms introduced in the country as part of the 2000s justice system reforms, and their role in dealing with employment disputes. And finally, to use dispute processing in the field of employment as a means to reassess some of the existing theories in the legal literature about rights assertion and dispute resolution in Japan.

As mentioned in chapter 2, the capacity to invoke the law or, rather, the (un)willingness of the Japanese people to vent a grievance and seek redress via formal

means of dispute resolution has been one of the most debated issues in the legal literature about Japan. What laid the foundation for the debate was the fact that the Japanese seemed to litigate less than people in other countries did, and they were more prone to resolve the issues that arose among them by recourse to informal rather than formal means of dispute resolution and settle for a compromise instead of a clear-cut allocation of ‘right’ and ‘wrong’ between the parties. The bulk of work on the subject of Japanese supposedly ‘non-litigiousness’ originated¹³⁰ from the legal sociologist Kawashima Takeyoshi’s claim¹³¹ that Japanese people traditionally lacked a notion of ‘rights’, thereby explaining the attitude of avoidance of rights assertion in the country. We also know that Kawashima’s so-called ‘traditionalist’ theory was later challenged by the American legal scholar John Haley, who questioned the assumption that Japanese cultural predispositions were at the root of low litigation rates in the country and explained them by the fact that access to the formal legal system was, in fact, made difficult by institutional factors such as, among others, the dearth of lawyers (Haley, 1978). Since then, whether Japanese society is really such a conflict-free paradise and what the factors are for it being so or not, have been a major scholarly concern in the literature on the Japanese legal system.

Ramseyer and Nakazato (1989), although not disregarding Haley’s institutional theory, seek an additional explanation. Drawing on game theory, in their ‘rational litigant’ model Ramseyer and Nakazato argue that, when considering whether to raise a formal claim, Japanese people will – like any other people – base the decision on rational considerations, i.e. on whether resorting to court procedures will maximise their

¹³⁰ As mentioned, the debate spurred from the publication in English in 1963 of Kawashima’s essay on dispute resolution whose Japanese version was later incorporated in the work he is most renowned for, *Nihonjin no hō ishiki* (1967). Surprisingly, Western scholarship took much less notice of Henderson’s (1965) ground-breaking study on conciliation which sets forth an alternative explanation for the recourse to informal means of dispute resolution in Japan long before John O. Haley did so ten years later.

¹³¹ In recent years there has been some re-reading of Kawashima’s work, suggesting that the Japanese socio-legal scholar was not, in fact, questioning the existence of rights *per se* in Japanese society but rather, and more realistically, the existence of a ‘Western’ concept of rights. On this point, cf. Feldman (2000: 154). An interesting alternative analysis of Kawashima’s legal sociology – through the lenses of modernity and modernisation theories – has been offered more recently also by Tanase Takao (2010: 139 – 154).

(economic) interests. In this respect, they underline how the outcomes of formal litigation in Japan are highly predictable and trace a direct link between this variable and citizens' use of the court system.

Frank Upham (1987), too, in his thought-provoking and influential book *Law and Social Change in Postwar Japan* tries to overcome the cultural/institutional divide by setting forth his theory of 'bureaucratic informalism' (*ibid.*: 17). As we have seen in chapter 2, Upham starts his analysis from the factual premise that law is an important agent of social change, and that rights assertion in the courts might act as a catalyst in this respect.¹³² He interprets the Japanese partiality for informal methods of dispute resolution not as a preference stemming from a cultural predisposition but rather as an induced inclination,¹³³ and the efficient (administrative) ADR machinery provided in the country as a strategy of governmental *élites* to disperse social tension and deflect conflict into more acceptable channels of confrontation so as to maintain 'control over the pace and course, if not the substance, of social change' (*ibid.*). Upham's theory has points of affinity with Tanase's (1990), whose examination of traffic accident cases seeks to explain how the avoidance of formal litigation is a by-product of political and legal factors rather than a cultural artefact.

Recent scholarship (cf. Feldman, 2007; Colombo, 2011) has tended to be more cautious, recognising that each theory is tenable to some extent and that the answer to Japanese 'non-litigiousness' lies probably in the intersection of these theoretical sets, rather than at the extremes. Moreover, as demonstrated by a recent national survey commissioned by the Ministry of Education, Culture, Sports, Science and Technology

¹³² From this point of view, Upham's study is part of that strand of literature which supports the argument that formal litigation in court can be used effectively as a lever of social change.

¹³³ In a later essay, Upham explicitly labelled Japanese 'weak' legal consciousness as an 'invented tradition' arguing that: '(...) not an ineluctable legacy of the distant past, the contemporary strength of this "tradition" (...) is the by-product of a series of conscious political choices by elites beginning in the early twentieth century' (Upham, 1998: 49)

(hereafter MEXT),¹³⁴ the decision whether to seek legal advice and take action via formal avenues is strongly influenced, among other things, by the nature of the dispute (Murayama, 2009 and 2010).¹³⁵

In the literature about the Japanese legal system, however, rights assertion and dispute processing in the field of employment have rarely been a salient feature of research. Upham (1987), in his insightful examination of women's legal battles to combat gender discrimination in the workplace, convincingly demonstrates how women have been willing to use the legal system to push for equal employment opportunities and gender equality in Japanese society. He also notices their failure to move the issue from the particular to the general – i.e. from an individual to a more group based dimension, thereby gaining less political and social support to their cause. In the end, in line with his theory of bureaucratic informalism, he remains sceptical of the chances of women's legal battles' obtaining any meaningful change, arguing that: 'the limitations in popular support and judicial remedies, neither of which will have been strengthened by the passage of the EEOA [Equal Employment Opportunity Act], will mean that the ultimate forum for substantial change will likely remain bureaucratic rather than legislative or judicial' (*ibid.*: 216).

Upham's rigorous analysis is revealing of how law can be strategically mobilised by interest groups to promote meaningful change at the social level. Nonetheless, there are at least two limitations to his study. First, however illuminating Upham's work has been in many regards, we cannot ignore the fact that it needs reconsideration in light of the changes which have been affecting the landscape of

¹³⁴ The 'Disputing Behaviour Survey' (*Funsō Kōdō Chōsa*) was part of the broader survey 'Management of Disputes and Civil Justice Research' (*Funsō Shori to Minji Shihō*). The study was an attempt at revisiting a similar survey conducted in the country in 1976, as well as at replicating similar foreign surveys such as the American *Civil Litigation Research Project* (Trubek *et al.*: 1987) or the English *Paths to Justice: What People Think and Do about Going to Law* (Genn *et al.*: 1999). The survey's findings have been subsequently published in three volumes edited by Matsumura and Murayama (2010), Kashimura and Bushimata (2010) and Foote and Ōta (2010). In the English language, a discussion of the findings is available in Murayama (2007 and 2009) and, for what concerns specifically employment problems, Sugino and Murayama (2006).

¹³⁵ A finding which is in line with those of previous Western scholars. See, e.g., Miller and Sarat (1980 – 1981) and Engel (1984).

processes for the resolution of employment disputes in the country, as a result of the reforms introduced by the Japanese government starting from the 2000s in response to the recommendations of the Justice System Reform Council.¹³⁶ Second, Upham's analysis does not adequately problematise the relationship between law and social change insofar as he neglects to consider the extent to which law, when implicitly legitimising unequal treatment, can in fact act as a constraint on legal and social mobilisation.

A different, and yet related, point is made by Foote (1996) in a penetrating article on the role played by Japanese courts in the development of new legal doctrines which, by explicitly recognising the existence of substantive rights in employment such as the right against dismissal, aimed at filling the gaps of labour legislation in the country. Foote's analysis is masterly: by charting the process of judicial creation of norms in employment, he seems to provide unquestionable evidence of the theory that formal litigation contributes to legal growth and that, even in the absence of judicially enforceable rights, courts can be powerful agents of legal change.

And yet, Foote's analysis is also flawed in that it suffers from a tendency to reify law, i.e. to regard legal rules and judicial doctrine as if they were agents in themselves without an adequate acknowledgement of the forces operating behind their creation and application.¹³⁷ It follows that, whilst making a convincing case of the way Japanese judges have not hesitated to use the interpretative tools at their disposal in the Japanese Civil Code in order to create a consistent body of employment law, Foote's account of employment litigation does not explain why judicial creation of norms has fallen unevenly across different segments of the workforce, and fails to appreciate that the use of standards of interpretation such as the 'common sense of society' (*shakai tsūnen*)

¹³⁶ See chapter 2.

¹³⁷ As noted by Cotterrell (1992: 64), this is a limitation constraining many of the studies which place emphasis on the use of law as an agent of change at the social level.

makes judicial decisions dependant on judges' perception, at a particular moment in time, of the problem underlying the claim raised in court.¹³⁸

Finally, besides those scholars advocating the potential of invoking law in court, there is what Feldman (2000: 4), drawing from Scheingold (1974), identified as the 'strategic assertion of rights' in his study of legal battles over AIDS and brain death legislation. In his examination, Feldman makes a persuasive argument that rights-based rhetoric and rights-based conflict – even when not leading to successful litigation campaigns – can play a significant role in influencing the legislative agenda about social policy issues. He concludes his thorough investigation arguing: 'while the cases I have presented are both in the realm of health care, there is no reason to think that the assertion of rights is limited to cases in which some aspect of the medical system is in dispute. It would not be difficult to examine a number of other prominent areas of conflict (...) as examples of how different groups have used rights as political resources in their quest for social change' (Feldman, 2000: 163 – 164).

Feldman's study made an important contribution in advancing our understanding of how 'rights talk' can be a strong force in mobilising like-minded individuals in pursuit of social reform. Nonetheless, there is one fundamental problem with his line of reasoning. That is, rights-based rhetoric works well only if applied to rights around which people can articulate a discourse made cohesive by the motivation to reach a common objective. As we shall see, this is often not the case in the employment field because 'workers' are not as homogeneous a category as those groups (e.g. Burakumin, victims of environmental pollution, haemophiliacs) examined so far by the literature on rights assertion in Japan. Workers are likely to have contrasting and competing interests, which makes it difficult to establish solidarity ties.

¹³⁸ The danger is not overlooked by Upham who makes the point as follows: 'Japanese courts (...) are sensitive to perceived social needs. If they perceive that women are getting 'fair and reasonable' treatment – and judges' criteria are likely to resemble those of the bureaucracy – their enthusiasm for doctrinal innovation will doubtless weaken' (Upham, 1987: 164).

Within Japanese scholarship, several recent studies have been carried out on ADR mechanisms dealing with employment disputes, namely the *rōdōkyoku assen* and the *rōdō shinpan*. Hamaguchi *et al.* (2009, 2010) conducted valuable quantitative and qualitative research on patterns of employment disputes resolution in the Labour Bureaux of the MHLW which has greatly contributed to advance our understanding about issues such as by which route workers arrive to make use of the *rōdōkyoku assen* service, what kind of employment problems reach the system, and users' evaluation of the procedure. Noda (2011), in his insightful analysis of a hundred *assen* cases he handled in his capacity as mediator at the Fukuoka Labour Bureau, added to this important empirical data about the way grievances are processed and the nature of the solutions suggested to help the parties to reach a compromise. Noda's study, which draws heavily on his own experience as mediator, is also of great value in shedding light upon some of the deficiencies of the *rōdōkyoku assen* service such as mediators' lack of training in mediation techniques or the heavy caseload Labour Bureaux are facing.

The literature on the *rōdō shinpan* has also produced results on similar issues, although it has been more reliant on the methodology of survey research. Sugeno *et al.* (2013) remains one of the most comprehensive studies on users' evaluation of this employment ADR procedure, illuminating issues such as typologies of disputes handled, the extent to which the procedure is perceived to be user-friendly and the impact that the involvement of the legal profession has on users' levels of satisfaction in relation to the system.

The importance of these studies is not to be underestimated because they have provided valuable insights into users' experience with these employment ADR procedures, and their role in providing relief to employment grievances. Nevertheless, one shortcoming of these studies is that they have focused heavily on one side of the

encounter with the *rōdōkyoku assen* and the *rōdō shinpan* procedures, namely that of users, thereby telling us little about the views of insiders or other institutional actors (e.g. trade unionists) who have a stake in the process of employment disputes resolution. Yet, to gain an understanding of these perceptions is important because it helps us to shed light on how the value attached to a reform is strongly influenced by the different concerns and conflicting interests that various institutional stakeholders have in relation to the issues the reform is meant to address.

Given the limitations of the aforementioned studies, and against the backcloth of the introduction by the Japanese government of two new ADR procedures following the increase of employment disputes in the country, the aim of this chapter is to examine the functioning of methods for the management of employment disputes in Japan in order to enrich our understanding of the role of law in Japanese society. Specifically, the main issues I will address are as follows: first, what are the factors which might inhibit both rights assertion and the articulation of a successful rights rhetoric in the employment field; second, what are the limitations of formal litigation both as a forum where aggrieved parties have access to meaningful legal redress as well as a means to be used strategically to bring about social change; third, to what extent the ADR mechanisms recently introduced in the country to manage employment disputes are expanding access to justice for Japanese workers, and function as a viable alternative in offering redress to their grievances; and finally, how the introduction and functioning of these employment ADR procedures is perceived by institutional participants having conflicting interests and concerns about means for the resolution of employment disputes. In order to address these questions, I will draw on documentary analysis of landmark court judgments and empirical data collected over a three-month period of fieldwork in Japan among legal scholars and experts, trade unionists and workers. Following Weber's interpretive sociological framework, the focus will not be on the

assessment of the results¹³⁹ of methods for the management of employment disputes, but rather on the interaction patterns and perspectives that the aforementioned social actors have with and on mechanisms of employment dispute processing existing in Japan. The chapter is structurally divided into two parts. The first part will be concerned with the dynamics of rights assertion in the field of employment, and the issues connected to the use of formal litigation as a means to enhance legal and social innovation. The second part will deal with the operation of ADR procedures for the resolution of employment disputes, with a particular focus on the mediation service provided by the Labour Bureaux of the MHLW and the court-annexed *rōdō shinpan* procedure.

4.1. Employment rights: a mine field

Legal orders are based on the premise that law can be invoked, i.e. that citizens are equipped with a set of entitlements to which they can resort in order to solve either personal or social problems (Cotterrell, 1992: ch. 8; Vago, 2012: ch. 6 and 7). This mobilisation of law can take two forms: rights assertion, understood as pursuing a grievance, either through or outside enforcement agencies, in order to seek relief; and what Scheingold (1974) defined in his seminal study as ‘the politics of rights’, i.e. the possibility social actors have of using rights as political resources to frame policy issues and influence public opinion. As briefly mentioned in the introduction to this chapter, in order to debunk stereotypes about Japanese people’s supposed non-litigiousness, the English literature about the Japanese legal system has been quite vocal about the existence of both dimensions of legal mobilisation in the country (c.f., *inter alia*, Haley, 1978; Upham, 1987; Ramseyer, 1988; Ginsburg and Hoetker, 2006; Feldman, 2000;

¹³⁹ Indeed, as highlighted by previous research (cf., e.g., Lieberman and Henry, 1986), assessing the value of private settlements is difficult due to the confidential nature of ADR proceedings. Moreover, as shown by Berrey *et al.* (2012), perceptions of fairness, even in more formal processes of dispute resolution, tend to be biased and dependant on participants’ subjective evaluation of the proceedings.

Steinhoff, 2014). However, one major drawback of these studies has been the tendency to treat Japanese law as a monolithic whole, and neglect the actual, context-specific circumstances which bring people into contact with legal institutions or other advice agencies. But what more recent socio-legal literature indicates, both in Japan (Murayama, 2007; Murayama, 2010; Sugino, 2010) and elsewhere (Genn *et al.*, 1999; Pleasence, 2006; Pleasence *et al.*, 2011), is instead the fact that advice seeking and disputing behaviour is strongly dependant on the type of problem people experience. Starting from this premise, the objective of this section is to expose the factors that influence workers when seeking redress for a grievance, and the implications of these factors in terms of mobilisation of law.

In order to address the question of what it is that drives rights assertion in the field of employment in Japan, when considered as individual advice seeking and disputing behaviour, a fruitful starting point is the results of the *Disputing Behaviour Survey* conducted in 2005 as part of the broader *Management of Disputes and Civil Justice Research* funded by the MEXT. In his analysis of the survey's findings, Murayama (2010: 105 – 106) observes that problems whose solution is quantifiable through monetary compensation are more likely to find their way to legal channels of dispute processing. Employment problems, however, together with family related issues, do not fall within this category. Moreover, disputes connected with employment show a higher probability of remaining quiescent, i.e. the issues are not voiced *precisely* because the worker is concerned that it might give rise to a dispute (*ibid.*: 107). The survey¹⁴⁰ exposed the following facets of advice seeking and disputing behaviour in employment: most common problems experienced by workers, and what variables are likely to affect the decision to try to solve them – either by making direct contact with

¹⁴⁰ Over a sample of 25,014 randomly chosen people between the age of 20 and 70, the response rate was 49.6%. Sugino and Murayama (2006: 57) acknowledge that the survey is constrained by a number of biases. Specifically, they note that males, young people and full-time workers are underrepresented. In contrast, part-time and self-employed workers are overrepresented.

the other party or by consulting with a third party, either an individual or an agency (Sugino and Murayama, 2006: 54 – 64). The findings show three important trends differentiating employment related problems from other types of issues. First, workers tend to experience problems more than once in comparison with other categories of respondents. Of these, the most common issues are non payment of wages and unfair relocation and dismissal for men; and harassment, especially power harassment, for women. Second, in contrast to what happens for other types of problems, more than a half of the respondents declared they took no steps to try to find a solution. Those who did were often either skilled professionals or self-employed. Finally, among those who decided to seek advice, the first options were consulting with a family member or colleague, and with administrative agencies such as the Labour Bureaux. These were followed by trade unions, municipal offices and, only in the last instance, lawyers. Administrative agencies usually took precedence over legal consultation agencies.¹⁴¹ In driving advice-seeking behaviour, three elements were found to be relevant: relational concern hampered the decision to seek advice, whilst normative concern and cost consciousness appeared to favour it.¹⁴²

To some extent, these results are reflected in my own empirical findings from the interviews with trade unionists engaging in individual employment disputes and with the labour consultants from the Tokyo Labour Consultation Office. From these observers' accounts of the workers' advice seeking and disputing behaviour, the relational concern variable identified by Sugino and Murayama (*ibid.*) seems to be particularly relevant. This, in turn, would appear to be strongly linked to factors such as age and employment status. Indeed, my trade unionist interviewees stressed how older

¹⁴¹ This trend is not peculiar to Japan, and it has been found also in other national contexts. Cf., e.g., Pleasence *et al.* (2011).

¹⁴² Sugino and Murayama (2006: 60) defines the variables as follows: relational concern is the concern shown by the respondent with regard to either the relationship with the other party or concern over how their voicing the issue might appear to others; cost consciousness is the concern about the costs involved in finding a solution to the problem; normative concern refers to the respondent's consciousness about the legal aspects of the problem.

workers with fewer opportunities of a career change are usually more willing to confront the issue, while younger workers show a preference for quitting the workplace where they have been experiencing a problem (Watanabe and Matsumoto, October 2013, interview). Along with age, the fact of being employed under a regular rather than non-regular contract also exerts an influence. Although regular employment status grants a higher degree of protection against retaliatory action¹⁴³ from the employer, regular employees are also more likely to feel the pressure of social norms when facing the decision whether to seek redress against a perceived wrong. Both fear of damaging the continuous (employment) relationship and issues of loyalty stemming from the inculcated ideology of the ‘company citizenship’ act as constraints.¹⁴⁴ Hoshina Hiroichi (11 November 2013, interview), the young general secretary of Shinjuku Ippan Rōdō Kumiai, expressed the point as follows:

‘You come from England and so you [probably] don’t understand the way a Japanese person feels (*nihonjin no kankaku*) [about his job] as I do. Take non-payment of overtime. If a worker likes the firm [where he is working], he won’t complain about not being paid. I think quite a lot of people [in Japan] wouldn’t do that.’

On the other hand, non-regular employees feel more the risks – in terms of damaging future career prospects – they might incur by bringing to light issues of unfair and unequal treatment in the workplace. The view of the executive president of Union Chiyoda, Watanabe Noriaki (16 October 2013, interview), is revealing of this concern workers might feel:

‘One of the worries [non-regular] workers have about [formal] litigation is what happens afterwards, you know, the fact that they will be marked as

¹⁴³ As shown by Marshall (2005) in her study of American women’s legal consciousness about sexual harassment, the fear of retaliation is probably one of the major constraints preventing workers from pursuing a complaint.

¹⁴⁴ From this point of view, it does not come as a surprise that most of the grievances raised by regular employees concern cases of dismissal, i.e. cases when the relationship between the parties has broken down. By the same token, grievances voiced by non-regular workers (usually fixed-term employees) are cases of *yatoi dome* (refusal of contract renewal).

people who went to court (*sono jibun wa saiban shita ningen da*). In particular, they are anxious about the impact this might have on their careers.’

With regard to normative concern and cost consciousness, my empirical data seem to run counter to the *Disputing Behaviour Survey* as discussed by Sugino and Murayama (2006). Indeed, according to a report published in February 2009¹⁴⁵ by one of the study groups operating under the MHLW, more than 80% of Japanese workers have limited legal knowledge of the national employment and industrial relations systems as well as the related laws. In this respect, therefore, Japanese workers would certainly not appear to fall within the category of what Carlin *et al.* (1966: 70) defined as a ‘legally competent person’, i.e. a person who has a ‘sense of himself as a possessor of rights and sees the legal system as a resource for validation of these rights’.¹⁴⁶ This, however, does not seem to prevent workers from seeking advice and, indeed, most of the trade unionists I interviewed recounted having often to deal with workers having no knowledge or only a faint knowledge of their legal entitlements.¹⁴⁷ As a matter of fact, this lack of legal awareness could in one sense have detrimental results and translate into a situation in which the decision to take action to redress a perceived wrong is not based on an objective evaluation of the circumstances but, rather, is driven by more personal feelings of dissatisfaction or resentment.¹⁴⁸ The views of D. (26 November

¹⁴⁵ The report, containing an assessment of the situation as well as measures to tackle it, is available for download on the MHLW website at the following address <http://www.mhlw.go.jp/houdou/2009/02/h0227-8.html> (accessed 4 July 2015). Further independent studies were commissioned also at the local level such as the one carried out in 2012 by the Tokyo Metropolitan Office (Labour Affairs Division) and available at <http://www.hataraku.metro.tokyo.jp/sodan/chousa/houkokusho.pdf> (accessed 4 July 2015). It is partly in response to this situation that Rengō started to run workshops and seminars on employment related issues at the university level (Maruta Mitsuru, 13 November 2013, interview). Similar activities, directed at both workers and employers, are conducted by administrative agencies such as the Labour Consultation Office (C. and D., 26 November 2013, interview). Also initiatives of associations such as the ‘Burakku kigyō purojekuto’ (‘black firms project’) established by a group of activists and lawyers in September 2013 can be read as an attempt to raise awareness, especially among young workers, of the working conditions they are entitled to under the law.

¹⁴⁶ Not only that. According to Carlin *et al.* (1966: 70) the ‘legally competent person’ will also consider this validation as ‘desirable and appropriate’, albeit aware of the limits attached to the use of the legal system.

¹⁴⁷ In the words of Shimizu Naoko, general secretary of the Precariat Union, ‘nantonaku shitteru’.

¹⁴⁸ This is a fact that confirms previous studies on legal consciousness conducted in different national contexts. See, e.g., Merry (1990).

2013, interview), who had been working for many years as a labour consultant in the Tokyo Labour Consultation Office, nicely illustrate the point:

‘maybe they [workers] have a rights consciousness but ‘right’ as they see it is not based on a correct understanding (*tadashii chishiki*) of what you may call a labour problem (*rōdō mondai*). (...) Rather, they come here out of a sense of anger against the perception that what *they think* is their right has been encroached upon’¹⁴⁹ (emphasis added).

In contrast, most of my interviewees agreed that cost consciousness did influence workers’ decision to pursue a grievance, especially when it came to seeking legal advice or going to formal litigation. H. (3 December 2013, interview), a lawyer specialising in labour related matters, noted:

‘it is a fact that, [for example] in the case of non-regular employees, there are many people whose condition of life is quite difficult (*seikatsu ni kurushii*). (...) Their levels of income are low and their jobs precarious. So, instead of seeking advice from a lawyer, they just prefer to look for another job. (...) Sometimes, there are those who do come. But, then, when they hear the case might take up from six to twelve months [to arrive at a conclusion] they don’t feel like going on with it’.

Trade unionists from community unions involved in the process of individual dispute resolution, too, often faced similar constraints. When trying to support workers in obtaining redress, the first means the union chose to adopt was collective bargaining. It was not rare, however, for this to fail to achieve a solution, leaving them with no other option than advising the worker to take legal channels, either litigation or the *rōdō shinpan*, for the resolution of the dispute. All my trade unionists interviewees agreed that, when such options were suggested, workers expressed concern over the costs involved in the process. Although they acknowledged that not all were discouraged by

¹⁴⁹ This evaluation confirms the one reached by Oh (2012) in his study about trade unions’ involvement in the process of individual dispute resolution.

the cost barrier, workers with low levels of income were especially likely to give up rather than pursue redress.

The picture that emerges from the above accounts is one which seems in sharp contrast with the one portrayed by rational choice theories, which picture individuals as rational actors making an informed decision on the strategies best suited to pursue ‘wealth-maximising ploys’ (Ramseyer, 1988: 111). It is an image which would appear, instead, to strike a resonant chord with the law and society literature which has long recognised that people rarely possess the kind of legal knowledge that allows them to make an informed choice about the best pattern to obtain redress (Ellickson, 1989 and 1991) and that the relationship – either continuous or intermittent – existing between the parties does matter (Galanter, 1983) as do the underlying social norms regulating it (Merry and Silbey, 1984).

A point similar to the above can be made also about the strand of scholarship (Feldman, 2000; Steinhoff, 2014) emphasising the strategic dimension of rights assertion in Japan, i.e. the potential enshrined in rights as rhetorical instruments used to mobilise individuals sharing a common interest towards the pursuit of specific social reforms. As argued by Foote (2014: 168), solidarity is often key when social movements engage in rights assertion for achieving shared policy ends. However, the employment area is a field where establishing solidarity ties among different groups of workers proves particularly difficult. This is not only due to the increasing diversification of the workforce that the Japanese labour market is witnessing, but also – as we have seen in the previous chapter – because the employment legislation has implicitly legitimised differential treatment of workers, even when similarly situated.

In this respect, my interviews with trade union activists are quite revealing of the challenges of building a shared platform of policy issues or a shared objective around which ‘rights talk’ can be used as a political resource of mobilisation. For example,

Yashiro Noboru (11 November 2013, interview), executive president of the Shinjuku Ippan Rōdō Kumiai, pointed out that: ‘The thing is, there are loads of divisions [among workers], by employment status, by gender, by company size ... you can’t build solidarity (*danketsu dekinai*)’. Similarly, Okunuki Hifumi (23 October 2013, interview), executive president of Tōzen Union, noted the existence of conflicting and competing interests, when not outright jealousy, among groups of workers. She nicely made the point as follows:

‘We [as a trade union] organise many foreigners employed as English teachers under fixed-term contracts (...) conditions of employment with the admin staff are different, they are regular employees. They work long hours, and the basic wage is not very high. They often resent the fact that teacher’s hourly pay is so high, but they don’t consider that fixed-term contract employees don’t get fringe benefits nor enrolment in social insurance. For us it’s a real problem, building solidarity in the same workplace is rather difficult.’

Moreover, given the logic of differential treatment for regular and non-regular employees embedded in both Japanese employment practices and employment legislation, a further obstacle to workers’ mobilisation appears to be the fact that, non-regular workers especially, might feel they are in no position to advance claims since they perceive it as natural (*atarimae*) that they are subject to inferior working conditions (Hoshina Hiroichi, 11 November 2013, interview).

Two things emerge from the discussion above. The first is the difficulty of generalising about rights assertion and disputing behaviour patterns, and the necessity of paying attention to multiple factors which, when analysed in their specific social context, makes us understand that issues are often related in a more ambiguous manner than we would generally think them to be. In the specific case of Japanese workers, it is clear that the characteristics of the Japanese working environment – namely, a continuous employment relationship under regular employment status and the long-

standing division between regular and non-regular employees – as well as relational concerns such as the possibility of jeopardising one’s job and social image¹⁵⁰ all impact on the decision whether to voice a grievance and seek individual remedies. On the other hand, evidence also shows that legal knowledge is not necessarily linked to issues of seeking advice, whilst cost issues are still a significant barrier especially for those employees with low levels of income. The second point that emerges from the discussion is that rights are not always amenable to being used as rhetorical instruments. Rights talk often presupposes a shared objective which, in turn, is pivotal in forming solidarity ties among the involved social actors. However, as we have seen, both elements are absent in the Japanese employment arena, and workers are likely to have conflicts of interests which hinders the creation of solidarity which could be used for the pursuit of shared social ends.

4.2. Coming out ahead? Judicial creation of norms and its limits in employment litigation

In the previous section, I have examined the dynamics of rights assertion in the field of employment in Japan and highlighted some of the factors which might act as disincentives on workers when invoking law. Of course, this does not mean that rights in employment have not been formally asserted, and both Japanese (Sugeno, 2000) and American (Upham, 1987; Foote, 1996) scholars have emphasised the role played by Japanese courts in promoting workers’ rights by filling the legal vacuum existing in Japanese employment legislation. Against this background, the aim of this section will be to test the theory of judicial creation of norms set forth in the aforementioned literature, and bring to light the limits of the judicial process as a means to enhance legal

¹⁵⁰ Contrary to what the Japanese literature claimed in this respect (cf., e.g., Kawashima, 1963; Noda, 1976), this is not peculiar to Japan. On how ‘dispute behavior, that may give rise to legal action, or may not, reflects community evaluations, moral codes, and cultural notions, learned but not entirely chosen, of the way people of virtue and integrity live’ see Merry and Silbey (1984: 176).

and social innovation. The section will be divided in two subsections. The first will outline some of the existing theories about judicial law-making and courts' potential to act as catalysts of social change by enhancing legal growth;¹⁵¹ the second will be concerned more specifically with the analysis of Japanese judges' judicial activism in creating legal norms to expand the level of protection granted by legislation to Japanese employees.

4.2.1. Judicial law-making as a path towards social change?

One of the substantial attributes that distinguishes legal rules from other types of norms is justiciability, i.e. the ability of the aggrieved party to raise a claim and obtain redress in formal avenues of dispute processing. In this respect, state courts have often been portrayed as the places *par excellence* where legal remedies are administered. Not only that. American legal scholarship in particular (c.f., e.g., Cardozo, 1921; Hurst, 1950; Horowitz, 1977; Horwitz, 1977), has long recognised that the role of the judge is not limited to the performance of a perfunctory function of adjudication of private disputes, and that court decisions are also law-making processes – leading to an incremental legal growth of the national system of norms. In other words, particularly in those cases which transcend the specific interests of private parties,¹⁵² judges are often engaged in more than the mere activity of *ius dicere* ('stating the law'). Rather, 'courts do engage in at least supplementary and interstitial law-making,¹⁵³ filling in the details of the statutory or customary law' (Shapiro, 1981: 28).

Although to a lesser extent – given the binding authority of codes and statutes as a source of law in guiding courts' decisions – the active role of the judge in creating

¹⁵¹ By 'legal growth' I mean either the creation of new rights and legal rules or the expansion of the enjoyment and coverage of existing ones to groups previously excluded from it.

¹⁵² I.e. judicial decisions which set forth a normative framework impacting on groups of people of considerable size or, in Rosenberg's words (2008: 4), 'altering bureaucratic and institutional practice nationwide'. Many of the rules governing the employment relationship in Japan stemmed, as we shall see, from decisions of this kind.

¹⁵³ The extent of judicial law-making power goes in fact far beyond that, revealing itself 'not only within the interstices of statutory codes, but also through the interpretation of statutes, administrative rules, executive orders, and prior judicial decisions' (Gambitta *et al.*, 1981: 10).

new norms has been acknowledged also in civil law jurisdictions. In his comparative study on the subject, Cappelletti (1984: preface, n.p.) defined judicial lawmaking as a ‘commonplace’ (*verità banale*) because any act of adjudication presupposes also an act of interpretation so that the judge – whether consciously or unconsciously – will inevitably be involved in a process of ‘reshaping’ the written legal norm, adapting it to the specific circumstances of the case (Cappelletti, 1984: 11 – 12).¹⁵⁴ Cappelletti (*ibid.*: 30) also noted that the social legislation enacted in continental jurisdictions – mostly programmatic in nature – was bound to expand even further the scope of ‘judiciary law’¹⁵⁵ because ‘the vaguer a law is and the more the *contours* of a right are not clearly drawn, the broader the range of discretion of judicial decisions’. This is a power of discretion that judges might have to exercise by going beyond the written rule or judicial precedent and taking into account, instead, notions of ‘fairness’ and ‘justice’ (Barwick, 1980: 243)¹⁵⁶ or ‘reasonableness’ so as to either remodel existing rules to the specific circumstances of a case or to frame the decision within accepted standards of social conduct.¹⁵⁷

In turn, the idea that judges contribute to making law – thereby enhancing legal growth – has led some scholars to emphasise courts’ capacity to act as agents of social change, i.e. to stress the potential of judicial decisions to alter the course of the established modes of social relations in a society. The literature is still divided about the extent to which this potential can stretch. Some, proponents of what Rosenberg (2008) calls the ‘dynamic court view’, have argued that courts are in the best position to bring

¹⁵⁴ In this respect, Cappelletti draws heavily from the works of Lord Radcliffe (1968).

¹⁵⁵ The first use of this expression is traceable to the works of the British philosopher and jurist Jeremy Bentham, whose harsh critique of judges’ law-making activity was one of the reasons why he advocated the codification of British common law.

¹⁵⁶ Barwick was referring in the specific to the common law tradition understood as the ‘law of the community’ consisting of ‘those rules or principles which are generally accepted by the community as evinced in a custom (...) or as seen in community attitudes commonly experienced or observed.’ (Barwick, 1980: 243). Although to a lesser extent, according to Cappelletti (1984: 87 – 88) this is applicable also to civil law jurisdictions and it is, in a way, what makes courts even more accountable in front of the community than other organs of the state.

¹⁵⁷ Shapiro (1981: 25) considers concepts such as that of ‘reasonable care’ as ‘important impositions of social control’. He argues that ‘in tort law the “reasonable man”, and his equivalent in the civil law of delict [*bonus pater familias*], is a vehicle for importing into personal disputes general social standards of how men should act.’ (*ibid.*)

about social reform because, on the one hand, they operate free from electoral bias and, consequently, are capable of fostering the interests of minorities and those who have no access to political representation (Shapiro, 1966; Sax, 1971). As Rosenberg (*ibid.*: 22) put it: ‘uniquely situated, courts have the capacity to act where other institutions are politically unwilling or structurally unable to proceed’. On the other hand, judicial decisions have the potential to assume a symbolic value, thereby helping to throw issues into the limelight and acting as catalysts for legislative action (Monti, 1980). Conversely, advocates of the opposite ‘constrained court view’ (Rosenberg, 2008), appear to be quite sceptical about the capability of the courts to produce any meaningful change. As early as the eighteenth century, Alexander Hamilton (1788) highlighted the ties which bind the judiciary to the two other arms of the state in terms of implementation of court orders, marking it as the ‘least dangerous branch’ of the government. In addition to the institutional deficiencies of the courts such as the lack of powers of execution, it has also been argued that legal mobilisation may, in fact, be counterproductive as it has a negative impact on *political* mobilisation since ‘legal tactics not only absorb scarce resources that could be used for popular mobilization (...) [but also] make it difficult to develop broadly based, multi-issue grassroots associations of sustained citizen allegiance’ (McCann, quoted in Rosenberg, 2008: 12).

Rosenberg’s (*ibid.*) thought-provoking study on the role of courts in bringing about social change¹⁵⁸ corroborates these points and, although the author does not completely discard courts as irrelevant in the process of social reform, he repeatedly stresses the fact that they are institutions bound by a number of constraints which can be

¹⁵⁸ As a matter of fact, in the epilogue of the second edition of his book, Rosenberg (2008: 430) describes the notion that it is possible to achieve any meaningful social reform through litigation as a ‘historically odd idea’ arguing that ‘until the mid-twentieth century, proponents of significant social reform mostly understood that change would only come through the building and nurturing of social movements and subsequent legislative victories’, rather than by ‘flirtation with litigation’.

overcome only if certain conditions¹⁵⁹ are met. He identifies three constraints and four conditions (*ibid.*: 33 – 35). The constraints restraining judicial action are: the bounded nature of constitutional rights and the judiciary's lack of both independence and power of implementation; while the conditions to be met are: offer of positive incentives and imposition of costs to secure compliance, existence of market mechanisms favouring court decisions' implementation and willingness to act of agents (e.g. administrators and bureaucrats) crucial in the implementation process. It follows that courts have the potential to produce significant change only if backed up by relevant political and social support. Moreover, judiciaries do remain one of the branches of the government (Sumner, 1979: 266) and, as such, they will inevitably contribute to reproducing certain ideologies embedded in the legislation, or more generally in their social context of existence, thereby limiting the boundaries of attainable social change. Shapiro (1981: 67) makes the point as follows:

'[W]here the judge is a political dependent of the government and is employing a legal rule created by that government, he is not independent or impartial toward both parties in those instances where the policy embodied in the law *favors* the class to which one of them belongs' (emphasis added).

It follows that, even if the judicial process is impartial in its procedures, judicial outcomes are not neutral inasmuch as the laws which are applied to a case are biased towards one of the parties (Vago, 2012: 285 – 286).

To conclude, it is important not to forget the role courts play in the redistribution of legal resources and promotion of social reform. However, it is equally important to recognise, first, the constraints acting on courts as governmental institutions; and second, the ideological context in which they operate and to whose reproduction they contribute.

¹⁵⁹ It should be kept in mind, however, that Rosenberg's analytical framework refers specifically to the American context and that some of the constraints (judicial independence in particular) may vary considerably across national contexts.

4.2.2. The Japanese judiciary's activism and the myth of doctrinal innovation

Whether courts can be agents of legislative and social change is not an absent topic in the literature on the Japanese legal system. However, existing studies have tended to be strikingly one-dimensional about the subject. Scholars (Haley, 1995 and 2007; Ramseyer and Rasmusen, 2003) have mostly debated the degree of independence from the political branch the Japanese judiciary enjoys; and the extent to which this is likely to influence its power of judicial review (Ramseyer and Rasmusen, 2001; Haley, 2011; Law, 2011). Indeed in these instances, where the relationship between the judiciary and the other branches of the state is examined, the constraints as well as self-imposed restraints limiting the exercise of judicial power have been acknowledged and Japanese judges found to be quite conservative (Haley, 1995 and 2013) and unwilling to be ‘catalysts of social change’ (Haley, 2011: 1491).¹⁶⁰ But when it comes to the investigation of the role of courts in matters of private ordering, most observers (Foote, 1996; Pardieck, 2008; Upham, 2011) seem to share the view that courts do matter, and the belief in Japanese ‘judicial activism’¹⁶¹ is hardly ever questioned. In other words, it is when deciding cases governing relationships between private parties that Japanese judges – by pivoting on interpretative tools such as the doctrines of ‘good faith’ (*shingi seijitsu*) and ‘abuse of rights’ (*kenri no ran’yō*) – have actively pushed the boundaries of judicial interpretation to create new legal norms affecting the legal ordering in a way deemed socially desirable (Foote, *ibid.*; Upham, *ibid.*). By examining judicial trends in employment case law, this section will challenge the image of the Japanese judiciary’s

¹⁶⁰ A recent study by a Japanese scholar (Mihira, 2014) has found that the judges of the Supreme Court of Japan have indeed recently started to assume a more dynamic and activist stance as a result of the changes in the normative context in which the court operates as well as of a generational shift in the court’s membership. This, however, seems to be limited to the exercise of power of judicial review of the Supreme Court in instances when issues pertaining to the sphere of human rights were at stake.

¹⁶¹ The notion of ‘judicial activism’ has been criticised in recent years for being vague and ‘slippery’. Kmiec (2004: 1443) notices how ‘as the term has become more commonplace, its meaning has become increasingly unclear’. To some extent, the expression can also be misleading. With the exception of those jurisdictions which provide for mandatory prosecution, as much as judges can be creative in the exercise of their functions, courts are, and remain, by nature *reactive* institutions, i.e. – in the words of De Tocqueville (2003 [1835]: 117) – ‘by its nature, judicial power is not active; it has to be triggered into action’. Here I will use the term to mean ‘judicial creativity’ in the interpretation of existing norms, statutes and codes (Cappelletti, 1984: 39).

activism, and it will show that there are major limitations on courts' ability to act as *loci* where innovative legal developments promoting social reform can take place.

The employment area, more than others, has been pointed to as one where 'Japanese courts have actively created an extensive body of law' (Foote, *ibid.*: 637). At face value, this would seem hard to deny. Shortly after the Second World War and often going against explicit provisions of statutory law, Japanese judges started to redraw the boundaries of employment rights by deploying the newly enshrined general clauses of the Civil Code which – in turn – rested on vague notions of reasonableness such as the 'common sense' of society. Judicial developments in the area of dismissal and sex discrimination are usually presented as the epitome of such a paradigmatic example of judicial activism.

As illustrated in the previous chapter, Japanese employment law – whether in the LSL or in the relevant norms of the Civil Code – contained no provisions safeguarding job security. In contrast, art. 627 para. 1 of the Civil Code recognised (and still does) the principle of termination at will of an employment contract, as long as two weeks' notice before termination is provided. The period of notice was subsequently expanded to four weeks by art. 20 of the LSL (Sugeno, 2012: 552 – 556). However, against the backdrop of the recession following the Korean War which led to an increase in the number of dismissals, courts began to limit employers' statutory right of discharge¹⁶² (Yamakawa, 2007: 485 – 486). Initially, they did so by applying a just cause approach, i.e. by recognising the lawfulness of the dismissal 'where there is a sufficient cause to justify dismissal, based on the common sense of society' (court reasoning in *Iwata vs. Tokyo Life Insurance Co.*, quoted in Foote, 1996: 643). Subsequently, however, the courts' line of reasoning shifted, favouring the application of the doctrine of abuse of private

¹⁶² In fact, some of the very first courts' decisions on issues of dismissal upheld the Civil Code principle of termination at will on the implied premise that workers should rely on collective bargaining mechanisms, rather than on courts, to obtain employment protection (Foote, 1996: 641). It was only later that such precedents were reversed.

rights¹⁶³ set forth by art. 1 para. 3 of the Civil Code instead.¹⁶⁴ The doctrine – which was officially sanctioned by a Supreme Court decision in 1975¹⁶⁵ (Sugeno, 2012: 556 – 557) – acknowledges as an abuse of right any dismissal carried out lacking an ‘objectively reasonable cause’ (*kyakkantekini gōritekina riyū*)¹⁶⁶ according to the common sense of society, thereby declaring it null and void. Furthermore, with time, restrictions on dismissal came to be applied not only to individual cases but also to collective dismissals due to economic and organisational reasons (*seiri kaiko*). By setting forth four requirements¹⁶⁷ to be met in order for layoffs to be deemed lawful, Japanese courts have been said to have shown a high degree of interventionism in private business operations, especially when compared to courts’ action in other jurisdictions (Yamakawa, 2007: 488 – 489).

Beside regulation of dismissal, courts’ role in fostering social change has been recognised also in the area of sex discrimination (Cook and Hayashi, 1980; Upham, 1987 and 2011). Litigation campaigns over equal treatment between sexes in the workplace were initiated as early as the late 1950s. The judgement rendered by the Tokyo District Court in the *Sumitomo Cement* case in 1966, later upheld by the Supreme Court, is considered the leading decision in the field. The dispute involved a

¹⁶³ The doctrine of abuse of rights – itself a creation of European jurisdictions’ judges (Bolgár, 1975) – was imported into Japan from France through the works of Makino Eiichi (Foote, 1996: 645) and adapted by Japanese judges to regulate water usage at the beginning of the twentieth century. It made its first (implicit) appearance in a decision over a water dispute rendered in 1916 (Ramseyer, 1996: 36 – 39). The doctrine was codified only in the aftermath of the Second World War, following the revision of the Japanese Civil Code.

¹⁶⁴ Foote (1996: 646, nt. 44) offers an interesting insight to explain the reasons leading Japanese judges to abandon the just cause doctrine, arguing that ‘there seems to have been a sense that the abuse of right doctrine was more flexible and more reactive in nature, whereas the just cause doctrine had the potential to become stricter and more proactive’.

¹⁶⁵ *Nihon Shokuen Seizō Jiken* (Japan Salt Case).

¹⁶⁶ Although a worker’s incompetence, misconduct or failure to fulfil the obligations of the employment contract have normally been accepted as reasonable causes for dismissal, the courts have also tended to stress – whenever possible – all the mitigating circumstances of the case, asking employers to take alternative measures – such as demotions – in order to protect job security (Yamakawa, 2007: 487).

¹⁶⁷ These are: (1) need for a reduction in personnel due to economic reasons; (2) evidence that the company made every effort, in good faith, to take alternative measures – such as transfers, discharge of temporary and non-regular staff etc. – in order to avoid the dismissal of regular employees; (3) adoption of a proper (*datō*) standard for the selection of the workers to be dismissed; (4) due consideration to procedural standards in consulting with the trade union about the need and reasons for the *seiri kaiko* (Sugeno, 2012: 566 – 568). Although it is true that in some cases courts’ judgements have reversed employers’ decisions about personnel management (Yamakawa, 2007: 489), it is also true that – when confronted with a demonstrated need for restructuring – Japanese judges have paid deference to management decisions (Sugeno, 2012: 568).

young female who refused to resign upon marriage, as required by the company's work rules, and who challenged in court the dismissal that followed. Absent any statutory provision regulating sex discrimination,¹⁶⁸ courts once again looked into the provisions of the Civil Code, this time relying on art. 90 which states that 'any juristic act going against public order and good morals (*kōjoryōzoku*) is null and void' (Upham, 1987: 131 – 133). The scope of application of this approach was expanded in the cases that followed, and Japanese working women were incrementally granted higher degrees of protection from discrimination in participation in the labour market through the action of the courts (*ibid.*: 134 – 144). As with dismissal cases, courts' decisions in the arena of sex discrimination seem to disprove the image of the Japanese judiciary's passivity. On the contrary, by seemingly going against the accepted social norms and established employment practices of the time – which wanted women relegated to the roles of wives and mothers – Japanese judges proved to be the forerunners of progressive legislative and social innovation.

There is one area, however, in which this would not appear to be the case. That is, when it comes to setting protections for non-regular employees against unequal treatment. One of the most representative decisions on the issue remains the one rendered in 1996 by the Nagano District Court in the *Maruko Keihōki Jiken*. The case involved a group of temporary employees (*rinji shain*)¹⁶⁹ employed under two-month contracts repeatedly renewed by the employer. These employees were paid wages far below the level of those received by their colleagues employed under a regular contract of employment, despite the same levels of seniority and the fact that they were performing the same job for the same number of hours. As a consequence, they filed for

¹⁶⁸ As a matter of fact, art. 14 of Japanese Constitution does list gender as one of the elements based on which discrimination is prohibited but, since the Constitution applies directly only to state action, Japanese judges could not invoke it to decide a case involving two private parties, although they did set the judgement against the backdrop of the constitutional principle of sex equality (Upham, 1987: 132 – 133).

¹⁶⁹ The workers involved in the *Maruko* case actually fell within the category of *giji pāto*, i.e. having the same amount of working hours and performing the same kind of job as regular employees but classified as 'part-time' workers.

litigation to challenge these wage differentials that resulted from employment status. The Nagano District Court upheld the plaintiffs' claim that the wage gap was not fully justified, awarded them damages, and stated that the salary of temporary employees could not fall beneath the threshold of eighty per cent of that of a regular employee (Rōdō hanrei, 1996: 33 – 42).

In one sense, this verdict did represent a step forward because it set one of the first precedents acknowledging, if only to some extent, non-regular employees' claims to balanced standards of treatment in the payment of wages. Nonetheless, the significance of the decision is diminished by the fact that, even though the plaintiffs were performing the same job and working the same number of hours as regular employees, their right to equal pay was not fully recognised for reasons connected to their employment status, i.e. for their being non-regular employees. Moreover, the Nagano Court decision was criticised two years later in an opinion rendered by the judges of the Supreme Court of Japan who reasoned that:

‘since standards of employment are different between regular and temporary employees (...), and since it is normal (*tsūjō*) that on the employer side there exists a different level of expectation regarding the *continuation* of employment (*keizoku koyō*), (...) even if a [wage] gap is set forth, this does not necessarily translate into a violation of [the principle of] public order’ (quoted in Ishizaki *et al.*, 2012: 314; emphasis added).

Further, the *Maruko* case does not seem to have had an influence on subsequent rulings, which have instead seen Japanese judges' refusal to acknowledge the unlawfulness of the wage gap existing between the regular and non-regular workforce. In the *Naha Gakkō Rinji Chōrin Jiken*, for example, the Fukuoka High Court upheld the wage differential between a cook employed under a regular contract and a cook employed under a temporary contract, arguing that:

‘[the gap] cannot be deemed to be contrary to [the principle of] public order and good morals [in view of the fact that], even if the nature of the job and the number of hours worked are the same, the employment framework [of reference] (*shokusei*) is different. (...) The plaintiff has a duty to work during term time [only], has the possibility to undertake another job on a part-time basis and is under no obligation to undergo training. For these reasons, even if the quality (*shitsu*) and amount (*ryō*) of work is equal, the wage differential, according to the common sense of society, does not exceed socially acceptable levels’ (Rōdō hanrei, 2003: 93)

From the above, two related issues emerge in connection to the Japanese judiciary’s potential for doctrinal innovation and social reform. The first issue is related to Rosenberg’s (2008) thesis concerning the social efficacy of judicial decision: unless certain conditions are met, courts are unlikely to create a favourable climate for social change. A closer look at the alleged judicial formation of norms in dismissal and sex discrimination law clearly illustrates this. That courts repeatedly and consistently restricted employers’ right of discharge despite statutory language to the contrary, is true. And yet, by the time courts’ intervention had taken place, ‘lifetime’ employment had already established itself as a fully recognised practice in the Japanese labour market (Keizer, 2010: 15 – 18; Sugeno and Yamakoshi, 2014). Workers sued within an ideological context which legitimated and even expected the employment relationship to be long term, at least for certain categories of workers; and, although it cannot be denied that Japanese judges did create new employment norms, these did not foster any social change because the change had already occurred and courts’ decisions merely reflected it.

A similar argument is applicable in the area of sex discrimination. Here the action of Japanese courts appears to be even more radical: by seemingly defying existing social norms legitimising women’s exclusion from the core of the labour market, Japanese judges struck down accepted employment practices such as mandatory ‘retirement’ upon marriage, wage differentials and the targeting of women in case of

economic dismissals. However, these were instances in which the courts extended protection to female *regular employees*, but which were not consequential in producing any meaningful change in relation to the position of Japanese women in the labour market. Whilst after the passing of the EEOL some minor changes are visible, especially in terms of increased participation (i.e. increase in employment opportunities), Japan still lags behind when it comes to offering women employment opportunities *equal* to those enjoyed by men (Futagami, 2010; MHLW, 2012a): non-regular employment continues to be allocated disproportionately to women (Futagami, *ibid.*) whilst income inequality and social insurance schemes are tinged by a pronounced gender bias (Osawa, 2012).

As was explained in the previous section, Rosenberg's (2008) theoretical model ties patterns of judicial decisions' efficacy to the existence of at least one of four conditions. These conditions are: offer of positive incentives, imposition of costs to secure compliance, market conditions favouring court decisions' implementation, and the support of actors (e.g. legislators and bureaucrats) crucial in the implementation process. In the Japanese case, the reason why courts' action was effective in the area of dismissal was the existence of a system of employment practices in the labour market which recognised the principle of employment security for regular employees. By contrast, judicial decisions in sex discrimination cases did not translate into any meaningful social innovation because they were delivered into a legal and political environment where none of the conditions necessary for courts' decisions efficacy were present: no positive incentives nor costs were introduced to remove obstacles hampering women's access to equal employment opportunities; and the governmental *élités* in the position to secure actual implementation preferred – as we have seen in the previous chapter – to rely on norms of a programmatic nature (i.e. on a generic *doryoku gimu*) rather than fostering the principle of equal treatment through substantive legal rules.

The second issue which has emerged from the examination of Japanese employment case law is that courts' potential to enhance legal growth by means of doctrinal innovation is severely curtailed in view of the fact that judicial decisions necessarily reflect, and therefore reproduce, the legal ideology embedded in employment legislation and, more generally, the ideological climate of the social environment of which judges are part. Actually, Foote (1996: 663) is not blind to the fact that courts established a graded scale of protections which gave priority to male regular employees. Similarly, Upham (1987: 154, 164) acknowledged that the push towards doctrinal innovation by Japanese judges could be jeopardised by a biased perception of what constitutes fair and reasonable treatment for women, and also speculated that the passing of the EEOL could result in negative judicial outcomes for women plaintiffs. However, both observers' accounts fail to offer a systematic theoretical explanation of such judicial patterns of decision making. However, if we build on an analytical concept of law as ideology, it becomes easier to appreciate, on the one hand, how inequalities in the legislation are bound to be mirrored in the allegedly neutral justice system; on the other, to understand that the use of general clauses and of standards of interpretation such as the common sense of society can lead to a substantial impairment of the judicial process by making courts' judgements dependent on the social structural context in which they operate.

The jurisprudential trends of past years are quite illuminating in this respect. Despite Foote's optimistic belief to the contrary (1996: 706), against the backdrop of the persistent economic recession, courts have indeed started in recent years to relax the standards governing dismissals. Especially in the case of *seiri kaiko*, a number of decisions of the Tokyo District Court,¹⁷⁰ culminating in the Westminster Bank case rendered in 2000, have revised the criteria formerly applied when deciding dismissal

¹⁷⁰ This jurisprudential shift caused an intense debate in Japan. On this issue see generally *Kikan Rōdō Hō* (2000), vol. 196.

cases: though previously considered to be ‘requirements’ (*yōken*), the current interpretation regards them merely as ‘factors’ (*yōso*). This means that now a dismissal can be deemed lawful even in the absence of one (or more) of the four aforementioned conditions (Sugeno, 2012: 568 – 571; Yamakawa, 2007: 503 – 505).

Similarly, over the years, Japanese judges have demonstrated they are not always sympathetic towards women plaintiffs: while taking a clear position in cases of overt discrimination, courts have been far less proactive in tackling the issue of indirect discrimination and equal treatment. As nicely illustrated by Weathers (2005) in his analysis of women’s mobilisation over gender equality, legal battles have not proved a good strategy to pursue. Famous cases such as those of Sumitomo Chemicals and Sumitomo Electric well exemplify this point. The cases were brought in front of the Osaka District Court by the Working Women’s International Network (hereafter WWIN), a women’s activist group based in the Kansai region, to challenge wage differentials and discrimination in promotion stemming from career tracking.¹⁷¹ In the first instance, the plaintiffs filed for conciliation (*chōtei*) procedure¹⁷² in the Osaka Women’s and Young People’s Office. The application, however, was rejected because the Office argued that the practices that were being challenged fell outside the scope of application of the EEOL. Also, the fact that a few women had been promoted in the two companies was taken as a mitigating circumstance (Weathers, 2005: 82). Consequently, a suit was filed to the court of first instance of Osaka city. The judgements, which were rendered in 2000 and 2001 respectively, ruled that the EEOL – which, as we have seen, had been amended in 1997 to explicitly prohibit discrimination in hiring, job assignment and promotion – could not be applied retroactively. The court also refused to apply art. 90 of the Civil Code, arguing that the differential treatment was not in violation of the

¹⁷¹ On this employment practice see nt. 74 above.

¹⁷² The EEOL, together with the *Pāto Hō*, is one of the laws incorporating provisions regulating the use of issue-specific ADR procedures.

‘good morals’ of the time when the alleged discrimination took place (Weathers, 2005).¹⁷³

But it is when it comes to decisions impacting on the regulation of non-regular forms of employment that the combination of blurred and biased legal norms – such as the *doryoku gimu* examined in the previous chapter – with standards as vague as the ‘common sense’ of society reveals all its side effects. Non-regular employment has not been left completely outside the scope of judicial safeguards. Fixed-term contract employees, for example, have been granted a certain degree of employment stability through the judicial codification of the principle of *yatoidome* (non-renewal of contract). Again going against statutory language, courts restricted employers’ right to discharge fixed-term contract employees by interpreting by analogy (*ruisui tekiyō*) the principle of unfair dismissal used to regulate the termination of contracts of permanent employees, thereby regarding as unlawful any refusal to renew a fixed-term contract whenever it was found the worker had reasons to expect the employment relationship would continue (Sugeno, 2012: 228 – 230).¹⁷⁴ However, as we have seen in the examples given above, Japanese judges have proven to give priority to issues concerning the *duration* of the employment relationship and have put the interests of the regular workforce – or workforce similar in nature – at the forefront.¹⁷⁵ In contrast, when facing the issue of setting standards of equal treatment for other categories of workers, the Japanese judiciary seems to have kept at the borderline of doctrinal innovation in its interpretation of *doryoku gimu* provisions as well as of those general clauses which, in other circumstances, were used as tools for filling legislative gaps.

¹⁷³ After almost ten years of litigation, the cases ended in a settlement at the Osaka High Court.

¹⁷⁴ The *yatoidome* principle was formally upheld by a decision rendered by the Supreme Court in 1974 in the Toshiba case which declared null and void the discharge of some temporary employees whose two-month contracts had been continuously renewed over twenty times. Courts have applied it quite flexibly, depending on the specific circumstances of the case, in some instances expanding it to first renewals of fixed-term contracts (Foote, 1996: 660 – 661); in others, upholding the reasons for non-renewal in presence of a just cause (Nakakubo, 2010: 231; and 2011: 257).

¹⁷⁵ This is quite clear if one considers that, in the case of economic dismissals, discharge of non-regular workers has been interpreted by the courts as a legitimate measure employers can take to avoid layoffs of the regular workforce.

The discussion above signals clearly the implications of *doryoku gimu* provisions and standards such as ‘the common sense of society’ for the judicial process. The first is that courts’ potential to foster social innovation is fundamentally constrained by the fact that courts’ decisions are bound to reproduce the biases and flaws embedded in applied legislation. The second is that doctrinal developments are often reflective of the ideological climate of the social context in which judges operate. And, as the judicial trends examined above demonstrate, this happens for both regular employees, as testified by the relaxation of the standards applied to unfair dismissal that we have seen, and non-regular employees whose aspirations to equal treatment are repeatedly dashed by a societal environment that does not recognise it.

These judicial implications have not gone unobserved by Japanese labour law scholars. Noda (2003: 191), while admitting that general clauses can be flexible interpretative tools tying a decision to the specific circumstances of the case, finds that – by making the standards measuring contracts’ validity unclear (*aimai*) – they ‘lead to outcomes which are unpredictable (*yosoku fukanō*) and dependent on the situation of the time (*jidai jōkyō*)’. By the same token, the legal scholars and experts I interviewed shared the view that *doryoku gimu* provisions are not very effective and called for the introduction of clear legal standards guiding courts’ decisions. Sugeno Kazuo (November 2013, interview), one of the major experts in labour law issues and chair of many reform committees, praised the passing of the LCL, highlighting how one of the main reasons behind its enactment was precisely the need to clarify the rules (*‘rūru wo meikakuka’*) governing the employment relationship. However, he also criticised the fact that it still leaves ample margin for judicial discretion, thereby jeopardising the litigation process. He made the point as follows: ‘art. 20 [on equal treatment] of the law is not bad but (...) it is [still] vague. It is unclear. Which means judges will have to define it, and this might cause difficulties’. Similar positions were taken by A. (October

2013, interview), renowned professor of labour law in one major Japanese university, who argued that one way to tackle the issues affecting non-regular employment was the introduction of clear-cut legal rules applying *equally* to all categories of workers so as to minimise the danger of legal inequalities being mirrored in the judicial process.

In this section, I have questioned the theory of the Japanese judiciary's activism drawn by previous authors (Foote, 1996; Upham, 1987 and 2011). By drawing on Rosenberg's (2008) theoretical model, I have shown that the Japanese judiciary's doctrinal developments in the area of dismissal merely sanctioned the practice of long-term employment which had already gained legitimacy in the Japanese labour market. In addition, through the examination of landmark employment cases, I have demonstrated that the process of judicial law-making is not neutral, but rather reflective of the legal ideology embedded in the legislation and, more generally, of the ideological climate of the societal environment in which courts operate, which ultimately limits their ability to act as catalysts of social change. Against this backdrop, Upham's (1987) argument that the efficient administrative ADR machinery existing in Japan is the ad-hoc creation of governmental *élites* aiming at stymieing the threatening potential of courts' action loses some of its force. On this premise, in the sections to follow, I am going to examine the two employment ADR procedures introduced by the Japanese government after 2001 in order to investigate their role in expanding access to justice for Japanese workers and their impact on the system of dispute resolution in employment.

4.3. ADRs in employment in Japan

In the previous section, I have challenged the image of the Japanese judiciary's activism in the field of employment by exposing the constraints which limit the efficacy of judicial decisions in fostering change at the social level. I have shown that the judicial

process is often a mirror of the legal ideology enshrined in employment legislation, thereby restricting the scope of remedial action employees can expect through formal adjudication. Furthermore, I have highlighted how the potential of judicial precedents to foster social change varies quite dramatically depending on the specific issue at hand, and that case law is more likely to reflect changes already taking place in society – with all the ideological apparatus which accompanies them. Given these limits, the question naturally arises what are the available alternatives to formal litigation and whether they are a viable option to respond to Japanese workers’ grievances. The subsections which follow will, first, outline some existing theses about ADR mechanisms of dispute processing; and second, examine the context of introduction and functioning of two employment ADRs, one administrative and one judicial, established in Japan following the 2001 justice system reforms. These are the *rōdōkyoku assen* service operating under the local branches of the MHLW, and the *rōdō shinpan* procedure administered by district courts.

4.3.1. The debate on ADRs

Before setting forth to address the topic of employment ADRs in Japan, it is indispensable to take a step back and offer a brief overview¹⁷⁶ of the on-going debate on methods for alternative dispute¹⁷⁷ resolution. The expression was first used by Sander (1979) and, although there is still no univocal theoretical definition of what it is supposed to encompass, it is generally accepted that it indicates all those ways of processing disputes *alternative* to the ‘traditional’¹⁷⁸ method of formal adjudication in

¹⁷⁶ The scholarship on ADRs is quite extensive and a thorough review of the debates concerning the various methods of dispute processing would fall outside the scope of the present work. As general reference, see Silbey and Sarat (1989) and Roberts and Palmer (2005) and references therein.

¹⁷⁷ The concept of ‘dispute’ as an analytic category was developed in the field of legal anthropology in order to compare the way different societies in different cultural contexts handled situations of conflict (Nader, 1965). As Merry (1990: 91) put it: ‘The study of disputes offered anthropologists a way to bypass the difficult and unresolvable question of the universality of law and provided a new way to compare law-like activities cross-culturally’.

¹⁷⁸ Although even observers such as Sander (1985: 1) referred to court proceedings as ‘the traditional dispute resolution mechanism’, we must be cautious in this respect. As rightly pointed out by Roberts and Palmer (2005: 2), the predominance of the role of courts in conflict resolution went hand in hand with the formation and solidification

state courts. Where formal litigation leads to outcomes which will be decided and imposed by a third allegedly impartial party – the judge – at the end of a strictly regulated process of fact-finding which aims at allocating the legal right and wrong between litigants, ADRs are a set of practices and institutions characterised by the promotion of a consensual agreement between the parties as to the composition of the dispute through a process which is not bound by rigid formal procedures and is more participatory in nature (Roberts and Palmer, 2005: 10 – 11; Cuomo Ulloa, 2008: 10). The label embraces a great variety of dispute processing mechanisms ranging from simple bilateral negotiations to more complex institutions such as mediation, conciliation and arbitration, hybrid forms combining mediation and arbitration such as *med-arb* procedures, and newly established methods such as ODR (on-line dispute resolution). ADRs can be either court-annexed or provided by private bodies existing outside the boundaries of state-administered justice.

The debate on ADRs originated in the United States and gained momentum during the 1980s, mainly as a response to a ‘litigation explosion’ (Galanter, 1986) which was causing high levels of court congestion (Freeman, 1995: xi). This resulted, first, in the proliferation of specialised tribunals and, then, in a search for alternatives which could provide a ‘participatory and individualised justice’ (Silbey and Sarat, 1989: 441). The discourse on the merits of methods of dispute processing such as mediation and conciliation was articulated around two main lines of argument. The first became prominent during the 1970s and is represented by the so-called ‘access to justice’ movement. The movement developed from a concern about ‘legal poverty’, i.e. about the fact that – even though legal systems guaranteed formal access to ‘justice’ – this was *de facto* denied to those groups and individuals who lacked the resources, both economic and temporal, to defend a claim in court – an expensive and time-consuming

of national states, thereby lessening the role and scope of action of other institutionalised forms such as mediation. For a historical reconstruction of the use of ADRs in the American context see, e.g., Auerbach (1983).

process (Cappelletti and Garth, 1978: 7). Moreover, court procedures started to be seen as too inadequate a forum for dealing with claims stemming from the newly established ‘social’ rights such as the right to an adequate standard of living, by nature of small economic value (*ibid.*: ix). Therefore, in this perspective, ADRs were, in Galanter and Krishnan’s words (2004), ‘bread for the poor’: possessing a loose, non-bureaucratic structure and using informal procedures which did not require the assistance of professional lawyers, alternative methods of dispute resolution were advocated as a viable solution for broadening access to justice to ordinary people (Cappelletti and Weisner, 1978).

The second line of argument against formal adjudication was premised, instead, on the incapability of court procedures to deliver judgements which could enhance the *quality* of the ‘justice’ being administered. Indeed, court dispute processing, by its heavy reliance on the evaluation of ‘facts’ and its clear-cut allocation of (legal) rights and wrongs, came to be seen as structurally unable to search for the underlying causes of a dispute and assess it in light of the relationship existing between the parties (Silbey and Sarat, 1989: 452). As pointed out by the pioneering research of Cahn and Cahn (1966: 932), litigation was backward looking and ‘engaged in a quest for fault’ whose net result was the ultimate breakdown of the relationship.¹⁷⁹ By contrast, it was argued that ADRs – by allowing for the parties’ active participation in the resolution process and by going beyond the application of strict legal standards as the parameters for dispute processing – were, on the one hand, more flexible in the administration of remedies (Kojima, 2004: 9) and, on the other, able to deliver solutions representing a

¹⁷⁹ Indeed, in the case studies analysed by Merry (1990) in her ethnographic research among working class Americans, plaintiffs often used the courts precisely as a means to *end* a relationship.

‘win-win’ situation for *both* parties, thereby mending rather than severing the relation existing between them¹⁸⁰ (Sander, 1985: 13; Silbey and Sarat, 1989: 454) .

The enthusiasm about ADRs did not go unchallenged, however. Sceptics such as Abel (1982: 280 – 281) argued that the political shift towards the informal processing of disputes represented an advance, rather than a retreat, of state intervention in society whose ultimate objective was that of suppressing the expression of conflict, which could threaten state power, by channelling it into informal institutions which rely on a rhetoric of consensus for the resolution of disputes. Moreover, by relaxing the procedural safeguards of adjudication, ADRs ‘increase the capacity of those who are already advantaged (socially and legally) to enforce their rights’ (*ibid.*: 295). Rigid and inflexible, procedural rules are nonetheless seen as the equalising lever between inherently unequal contending parties. In this sense, therefore, the displacement of the due process of law in favour of a compromise based on socially recognised standards of composition of conflict such as common sense exposes the weaker party to the risk of being manipulated and forced into the agreement (*ibid.*).

Even more unforgiving was Fiss’ critique (1984) of the ADR movement. In his famous article, ‘Against Settlement’, he dryly stated that settlement-directed approaches to dispute processing ‘should neither be encouraged nor praised’ (*ibid.*: 1075). Fiss fiercely attacked ADRs on four scores. First, echoing Abel, he argued that ADRs were often premised on the false assumption of the equality in bargaining power of the contending parties. In Fiss’ view, instead, far from it being so, parties to a dispute were usually not on an equal footing when bargaining for a settlement, which means that the resulting outcome would be, more often than not, forced on the weaker party rather than agreed upon. Second, settlements are frequently lacking what Fiss defined ‘authoritative consent’ (*ibid.*: 1078): especially in those instances when organizations, such as

¹⁸⁰ Which is one of the reason why ADR processes have been considered particularly suited to handle conflict in continuing relationships such as family (Fuller, 1971: 331) and employment relations (Getman, 1979).

corporations or unions, are one of the parties to the bargaining process, it might happen that settlements do not – and cannot – truly reflect the agreement of all the members, who will therefore find themselves bound by the terms of a settlement reached through a negotiation process from which they were excluded. Third, informal settlements are not subject to the monitoring action of state courts, thereby exposing the parties to the risk of being unable to obtain the enforcement of the agreement. And finally, the movement toward the private resolution of disputes inhibits the social function of litigation, which is to contribute to the interpretation of the law and the clarification of legal issues and democratic values which enhance both social and legal change.

Other observers were more cautious and argued that formal and ADR institutions are two faces of the same coin, existing along a continuum rather than being divided by a radical fissure. The legal anthropologist Laura Nader (1979: 1002), for example, rightly pointed out that formal and informal mechanisms of dispute processing were *both* part of an ‘interrelated system of social control’ because ‘together, they define the availability of solutions to people’s problems’. By the same token, the socio-legal scholar Marc Galanter openly criticised the notion – dear to the paradigm of ‘legal centralism’ – that ‘justice’ could be dispensed only by the state through formal processes of adjudication (1981) and stressed the fact that, while ADRs may operate as an alternative to litigation in court, they do not exist in a completely separate sphere from formal legal forums but rather ‘are situated near legal institutions and dependent upon legal norms and sanctions’ (Galanter, 1989: xiii). He also cast doubts on ADRs’ alleged informalism, contending that the shift from bilateral forms of negotiation to court-annexed ADR institutions had meant that procedures were increasingly being conducted following prescribed forms by an emerging group of professionals (*ibid.*: xiii

– xiv).¹⁸¹ Sander (1979 and 1985), too, opined that the focus of discussion should not be the discourse about alternatives as such but, rather, about how to provide the alternative more appropriate for the dispute being processed. His view rested on the premise, first suggested by Aubert (1963),¹⁸² that disputes are the expression of problems qualitatively different in nature and consequently need to be handled by a corresponding qualitatively different approach. Sander (1985: 17 – 18) was also one of the proponents of the view that the emphasis put on ADRs as non-adversarial processes did not translate into an exclusion of the legal profession from the proceedings. Rather, they required a redefinition of the role of lawyers in dispute processing: from ‘representative of the disputants’ to ‘dispute resolver[s]’.

After almost four decades, these latter visions have clearly been those to prevail. In England, for example, first the Woolf report, ‘Access to Justice’ (1996), and then the 1998 enactment of the new Civil Procedure Rules marked the shift by the British government toward an active sponsorship of a settlement-directed approach to dispute resolution. The overarching logic is that taking the dispute to court should be a measure of last resort, the ultimate step along an almost obligated path of attempts at negotiated settlements (Roberts and Palmer, 2005: 359 – 360). The same year, the Congress of the United States enacted the Alternative Dispute Resolution Act which aimed at modifying title 28 of the U.S. Code so as to institutionalise and favour the use of ADRs in light of their ‘potential to provide a variety of benefits, including greater satisfaction of the parties, innovative methods of resolving disputes, and greater efficiency in achieving settlements’ as well as lifting the caseload burden of federal courts (ADR Act, 1998, sec. 2, para. 1 and 2). The policy shift was, to some extent, less prominent in continental civil law jurisdictions, since many civil law systems already incorporated some ADR

¹⁸¹ The increased ‘institutionalisation’ or ‘legalisation’ (Brooker, 2013: 33) of ADRs has also led scholars such as Feldman (2014: 130) to argue that the definition of mediation and conciliation as methods of dispute processing *alternative* to the court should be abandoned.

¹⁸² Specifically, Aubert drew a distinction between conflict of interests, which are open to negotiation and compromise, and conflict of values, which are far more difficult to solve through bargaining processes.

functions in the judicial administration of cases (Roberts and Palmer, 2005: 6 – 7). Yet, the EU explicitly targeted the active promotion of ADRs as part of its policy with the enactment of the 2008/52 directive on mediation of civil and commercial matters, whose objective is to provide a set of rules applying to cross-border disputes¹⁸³ and aimed at facilitating their amicable settlement. The directive acknowledges ADRs' role in 'securing better access to justice' – a key aspect 'of the policy of the European Union to establish an area of freedom, security and justice' ensuring 'the proper functioning of the internal market' (Directive 2008/52/EC, para. 5).

From these latter developments, it is clear that ADRs are increasingly being seen as methods which *complement*, rather than subtract from, the formal judicial system – thereby contributing to the creation of a comprehensive system of justice which broadens the portfolio of the available solutions for the disposition of conflict. The old praised ideal of public justice is now gone. The era of 'justice in many rooms' (Galanter, 1981) has begun.

4.3.2. ADRs in Japan and the 2001 employment dispute resolution reforms

In contrast to many Western legal systems, Japan has often been regarded as a country having a 'tradition' of ADRs (Funken, 2003: 3) which, as a matter of fact, do play a major role in the management of disputes with respect to ordinary adjudicatory processes¹⁸⁴ (Kojima, 2004: 323). This 'tradition' has also often been overemphasised: litigation and adjudication were not completely absent in pre-modern Japan (Ooms, 1996; Upham, 1998); while conciliation procedures were more often than not coercive in nature and imposed rather than voluntarily sought from the parties (Henderson, 1965).

¹⁸³ The Directive, however, does not exclude applicability also to national mediation processes of member states.

¹⁸⁴ Figures on *chōtei* and *soshōjō no wakai* are available on the website of the Supreme Court of Japan at the following address <http://www.courts.go.jp/app/files/toukei/557/006557.pdf> (accessed 7 March 2014). By comparing data on *chōtei* across different years, it is possible to notice that the number of cases handled through this procedure has been sharply decreasing in recent times. Colombo (2011: 140) explains this trend by the influence law no. 2004/151 is having in channelling disputes into extra-judicial ADRs.

That Japan possesses one of the most comprehensive and efficient systems of ADR procedures among OECD countries is undeniable (Kojima, 2004; Colombo, 2011). As mentioned, however, the fact that their extensive use on the part of the Japanese people can be explained only by a cultural predisposition towards compromise so as to preserve the ‘harmony’ (*wa*) of a relationship (Kawashima, 1967) has been questioned (Haley, 1978; Ramseyer and Nakazato, 1989; Tanase, 1990). A sign of this is, also, that it is court-annexed or administrative bodies-attached ADRs that Japanese citizens make most use of – thereby showing a preference for procedures existing under the authoritative umbrella of the state (Taniguchi and Yamada, 2007; Colombo, 2011). By contrast, procedures administered by private bodies are often ignored; so much so that, as part of the reforms advanced by the Justice System Reform Council at the beginning of the century, a new law was enacted in 2004 precisely to promote the diffusion and use of extra-judicial ADRs¹⁸⁵ (Colombo, *ibid.*: 140 – 141). Not only that. As shown by pioneer research conducted as early as the 1960s, even when using judicial conciliation (*chōtei*), parties often sought a resolution of the dispute founded on principles of substantive law rather than an agreement brought about through the facilitation of a conciliator in the light of social values and common sense (Sasaki, 1974). By the same token, according to more recent research results (Itō *et al.*, 1999), when agreeing on a settlement in the course of litigation (*soshōjō no wakai*),¹⁸⁶ parties tend not to distinguish between the compromise and the sentence. Yamada (2007), drawing on Tanase (1992), adds to this by pointing out that ADR mechanisms – far

¹⁸⁵ This is the law no. 2004/151, *Saibangai Funsō Kaiketsu Tetsuzuki no Riyō no Sokushin ni kansuru Hōritsu* [Law on the Promotion of the use of ADRs], which is also a virtual completion of the new Arbitration Law the Japanese government enacted in 2003 to make arbitration – the least used by Japanese citizens of all ADRs – more attractive an option especially for the resolution of commercial disputes. On the reasons for the scarce use of arbitration in Japan and attempts to amend the situation, see Cole (2007) and Colombo (2011: 117 – 136).

¹⁸⁶ According to art. 136 of the Japanese Code of Civil Procedure, the judge can – at any stage of the litigation process – encourage a settlement (*wakai*), i.e. a contractual agreement, between the disputing parties which, if reached, will have the same binding effect as a sentence (art. 203, c.c.p.). Although some observers have praised it (see, e.g., Kusano, 1991), as pointed out by Funken (2003: 18 – 19), the procedure raises some issues with regard to the propriety of the judicial process. These stem mainly from the fact that both the attempts at mediation involved in the *wakai* and the litigation process would be handled by the same judge who would, were settlement to fail, find him/herself in the position of having to deal with information heard from the parties in the course of *wakai* which is, however, inadmissible for litigation.

from being informally aimed at fulfilling the supposed ideals of the ‘virtuous ways and beautiful customs’¹⁸⁷ of Japanese society – are actually conducted according to well established procedures and are increasingly more individualistic and adversarial in nature. Similarly, Feldman (2014: 131) argues that ‘what one finds in Japan (...) is a conventional legal mindset dominating so-called ADR; legal professionals control many ADR institutions, legal procedures structure their operation, and legal norms govern their outcomes’.

In the field of employment, the adjustment of labour disputes has long been delegated by the Japanese government to the *rōdō iinkai* (Labour Relations Commissions) – administrative agencies with semi-judicial powers (*gyōsei shinpan*) established in 1949 under the TUL and roughly resembling the American National Labor Relations Board (Yamakawa, 2013: 909). The *rōdō iinkai* are tripartite bodies composed of members, in equal numbers, representing employers, labour and the public interest (TUL, art. 19, para. 1); they exist at the local level, in each prefecture of Japan, and at the national level in the form of the Central Labour Commission (*Chūō Rōdō Iinkai*) whose headquarters are located in Tokyo and which functions mainly as an organ of appeal of cases decided by the local labour commissions in the first instance. The scope of jurisdiction of the commissions encompasses cases of unfair labour practices and adjustment of collective labour disputes (*ibid.*, art. 19, para. 2 – 3) through mediation, conciliation and arbitration procedures as regulated under the Labour Relations Adjustment Law (ch. 2, 3 and 4).

Until the beginning of the 2000s, the *rōdō iinkai* system was the only specialised infrastructure in place in the country to deal with labour related disputes. As mentioned, however, the system was explicitly tailored to handle collective disputes – namely

¹⁸⁷ The expression was used in 1919 by the then Prime Minister of Japan, Hara, when announcing the revision of the Japanese Civil Code, modelled after the German BGB, precisely to reflect the ‘virtuous ways and beautiful customs’ of the country (Pardieck, 1997: 31).

disputes arising from so-called conflict of interests (*rieki funsō*), i.e. conflicts arising in the course of collective bargaining over new claims or demands from the labour side (Sugeno, 2012: 796). As for conflicts of rights (*kenri funsō*), that is disputes arising over the interpretation of an existing contract of employment, their number was so small that, in contrast to other legal systems, the need for a special procedure was not felt and employment cases were channelled into ordinary civil procedure (*ibid.*).

However, starting from the mid-1990s, the pattern of labour related disputes in the country registered a qualitative shift. Against the backdrop of a falling unionisation rate, the economic recession which has caused many firms to restructure, and the diversification of the workforce, the number of collective disputes over the past twenty years dropped, while the percentage of individual employment disputes has been constantly increasing – figures actually tripling in less than a decade (Hamaguchi *et al.*, 2009: 4; Sugeno, 2012: 806 – 807; Yamakawa, 2013: 901). Different interrelated factors account for such a sharp escalation. To the already mentioned trade union membership decline and changed economic circumstances, Sugeno (*ibid.*) and Hamaguchi *et al.* (*ibid.*) add also the changes which have altered Japanese workplaces such as the increase and qualitative shift in the composition of the non-regular sector of the workforce as well as the introduction of new HR practices which have increased competition among workers.¹⁸⁸

The views of my informants largely agreed with the accounts in the literature. Especially my trade unionists interviewees explained grievances such as power harassment and bullying by the introduction of HR practices such as performance-related pay which, according to them, have damaged the way human relationships (*ningen kankei*) functioned in the workplace. Matsumoto Hisashi (31 October 2013, interview), the general secretary of Ottagaisama Union, expressed his view as follows:

¹⁸⁸ On the changes affecting the Japanese employment system, see chapter 2.

‘In Japan, there was no such thing as harassment (*iyagarase*) [in the past]. Maybe it was not completely absent, but it was not so palpable as it is now. (...) [The fact is that], in a context where priority is given to keeping [labour] costs down, the human relationship with one superior in the workplace is disappearing and [consequently] workers, including regular workers, accumulate loads of stress. The result is that they vent it against weaker workers, who are often the non-regular employees. (...) All these cases of bullying (*ijime*) are due to all this stress accumulation of regular workers’.

A similar assessment is echoed by C. and D. (26 November 2013, interview). As a matter of fact, given their long experience as consultants and advisers in dealing with individual workers’ grievances at the Tokyo Labour Consultation Office, they are sceptical about Matsumoto’s belief that phenomena such as power harassment and bullying were alien to Japanese workplaces in the past – convinced, rather, that cases have been given more visibility by the creation of specific words to designate them.¹⁸⁹ Nonetheless, C. gave his view that in recent years the working environment, especially for young workers, has considerably worsened. As one of the possible causes, he pointed to the breaking down of the relationship between senior and younger workers (*senpai – kōhai*) on which on-the-job training programmes were based. He noted that employers were increasingly less willing to offer internal training, rather expecting new entrants in the firm to already possess the skills relevant to the job they had been hired for.

Moreover, the aforementioned changes affecting the context of employment disputes also seem to have exposed the shortcomings of internal mechanisms of dispute prevention *within* firms. Indeed, the operation of work councils as well as the mediation function of supervisors had until the mid-1990s acted as, on the one hand, means for increasing workers’ participation and, on the other, as buffers to workers’ discontent

¹⁸⁹ Indeed, in my interview with him, C. pointed out that the Tokyo Labour Consultation Office has been one of the first administrative bodies to start gathering data on issues of harassment, but highlighted how surveys are quite imperfect in this respect because of the difficulty, for workers, to ‘classify’ their problems. For example, he noted that cases of dismissal or forced retirement are often perceived, and labelled, by workers as harassment – thereby leading to an exaggeration of the data on the phenomenon *per se*.

fuman) and grievances (*kujō*). If these means failed, the issue was transferred to and handled by company unions. As a matter of fact, Sugeno (2012: 799) has cast doubts on the effectiveness and fairness of firms' internal systems of grievance control (*kujō shori seido*) – doubts which have often come to represent a reality when the interests of workers at the periphery of the life-time employment system were at stake. Hamaguchi *et al.* (2009), too, in their qualitative analysis of 51 cases of labour disputes brought in front of the mediation services offered by administrative agencies (see *infra.*), showed how – when internal means for handling workers' complaints were made available by companies – workers avoided making use of them out of a sense of distrust. Of those who did use them, some reported having been subject to unfair treatment as a result.

The existence of such a possibility is vividly illustrated by the experience of my interviewee G. (30 November 2013, interview). Employed in a pharmaceutical company under an agency (*haken*) contract, she experienced some problems connected to the evaluation of her performance. After she was suddenly put on a Performance Improvement Programme (PIP, *gyōseki kaizen puroguramu*), she decided to consult with the HR division of the company believing that they 'would be kind and help her'. Having done that, however, she declared not only that the action did not bring any material help, but also that she was 'made a target' as a consequence; and, she concluded, that taught her that 'HR was not a place to seek advice, but rather a place to be afraid of'. Since her supervisor evaluated her performance as not registering any improvement, she was dismissed from her job. This brought her in contact with a community union which advised her to file a claim in court. The dispute was subsequently resolved through a settlement in court.

What emerges from the examination above is that the landscape of employment disputes in Japan is now different from what it used to be, and that the mechanisms so far in place to provide a relief valve for workers' discontent have proven no longer able

to prevent grievances from degenerating into disputes and the latter from overflowing into the formal legal system.

It was precisely against this backdrop that, starting from the beginning of the 2000s, new special procedures tailored to employment problems were introduced by the Japanese government. The reforms came at the end of a long debate (Sugeno, 2012: 810). Initially, both the management and labour sides argued for the expansion of the scope of jurisdiction of *rōdō iinkai* so as to encompass conflicts of rights of individual workers and be resolved through a conciliation procedure. This proposal partly found realisation with the revision, in 1999, of the *Chihō Jichitai Hō* (Local Autonomy Law, no. 67/1947) which granted local administrative bodies self-governing autonomy. Following the revision, the head of each local labour commission can now decide independently whether to handle individual employment disputes.¹⁹⁰ But it was with the enactment of the *Kobetsu Rōdō Kankei Funsō Kaiketsu Sokushin Hō* [Law on the Promotion of the Resolution of Individual Labour Disputes, no. 112/2001] in 2001 and the *Rōdō Shinpan Hō* [Law on the Procedure for Handling Individual Labour Disputes] in 2004 that the Japanese government took the first active steps towards the institutionalisation of a comprehensive set of ADR procedures for the resolution of employment disputes. The objective was to expand workers' access to justice by providing a new set of accessible and user-friendly mechanisms dealing with employment related grievances. Whether the cure is proving successful in treating the disease is what I am going to examine in the following sections.

4.3.3. The *rōdōkyoku* administered system

4.3.3.1. Procedure overview

Initially, the response of the Japanese government to the altered landscape of employment disputes we have seen was no departure from the past. Confronted with the

¹⁹⁰ To 2011, 44 local labour commissions changed the scope of their jurisdiction in this direction (Sugeno, 2012: 822 – 823).

necessity of finding a way to deal with increased levels of conflict in the area of individual employment relations, the Japanese government, at first, stepped in only to delegate the issue to the administrative agencies operating under the MHLW. The result was the enactment, in 2001, of the Law on the Promotion of the Resolution of Individual Labour Disputes.

In one sense, the law merely introduced – across local administration offices – a new national homogeneous system for the management of employment disputes. Indeed, the local branches of the MHLW as well as municipal administrative offices have a history of involvement in labour consultation and dispute resolution which can be traced back to the years immediately after the Second World War (Ishizaki *et al.*, 2011: 3). C., my informant at the Tokyo Labour Consultation Office, opined that local Labour Bureaux and their branches have been handling those employment issues which fell outside of the remit of the *Rōdō Kijun Kantoku Sho* (Labour Standards Bureaux)¹⁹¹ since the 1950s, especially in the Tokyo and Osaka metropolitan areas. As for civil matters (*minjitekina mono*) such as dismissal, instead, ‘Tokyo [administrative agencies] has been dealing with them for years and years (*mukashi kara*). The 2001 law created a system reproducing, at the national level, the one [already] existing in Tokyo metropolitan area’ (C., interview, November 2013).

The objective of the law, as set forth by art. 1, is to foster ‘a speedy (*jinsoku*) and proper (*tekisei*) resolution – in conformity to the specific circumstances of the case (*sono jitsujō ni sokushita*) – of disputes arising between an individual worker and an employer¹⁹² in connection to working conditions and other issues concerning the

¹⁹¹ The *Rōdō Kijun Kantoku Sho* are administrative agencies whose jurisdiction covers the protection of labour standards as set under the LSL. On the LSL see chapter 3, section 3.2.2.1.

¹⁹² The notion of employer (*jigyōnushi*) used in the law is quite broad, in the sense that it is not limited to the formal employer, but extends also to the actual employer with whom the ultimate responsibility for any wrongful conduct rests (LSL art. 10). It follows that claims filed against one direct superior (e.g. a supervisor) fall outside the scope of application of the law; by contrast, in instances such as power and sexual harassment, the client company to an agency contract is covered by the definition of *jigyōnushi* as used in the law (Ishizaki *et al.*, 2011: 21 – 22).

employment relationship (...) through the establishment, among other things, of a mediation¹⁹³ system' (Law 2001/112).

The range of issues encompassed within the scope of application of the law is quite broad. It comprises (Ishizaki *et al.*, 2011: 23 – 24):

- Matters related to the termination of the employment relationship such as dismissal or non-renewal of contract;
- Transfers and promotions;
- Discriminatory treatment and unfair change in working conditions;
- Sexual harassment and bullying.¹⁹⁴

As the name itself suggests, the law's primary aim is the promotion of the *voluntary* resolution of disputes. Consequently, art.2 states a duty to endeavour for the parties to try to settle the issue autonomously and in good faith (*sei wo motte*). In order to favour this outcome and prevent the dispute from arising at all, the head of the local bureau must provide the parties with all the relevant information and necessary support with regard to the regulation of the employment relationship (art. 3). This provision originates from the belief that many grievances and subsequent claims occur because, as illustrated in section 4.1 of this chapter, *both* employers and employees often have

¹⁹³ The translation of the Japanese terms *chōtei* and *assen* in the English literature on the subject is rather confusing and often used inconsistently. In landmark studies on Japanese law such as Henderson (1965), the adopted translation for *chōtei* is 'conciliation'. Conversely, Yamakawa (2013) adopts the term to translate the Japanese term *assen* and states, in fact, that 'mediation is a slightly more formal process than conciliation' (*ibid.*: 918). This, however, is in contrast with the opinion of other Japanese legal scholars (Sugeno Kazuo, 19 November 2013, interview) and legal practitioners (H., 3 December 2013, interview) as well as with established theories in the ADR literature. As a matter of fact, in the latter, the two terms were often used interchangeably (Gaitskell, 2005: 292) but later a divide was thought to exist between mediation as a mere facilitative process and conciliation as providing an evaluative component leading to the recommendation of an agreement from a committee (Menkel-Meadow, 1993: 372; Alexander, 2008: 104). Following also the definition offered by Ishizaki *et al.* (2011: 49), in the present work, I will use 'mediation' to refer to *assen* procedures as managed by the *rōdōkyoku* to indicate a facilitative process whereby mediators try to promote the discussion between the parties in order to reach a solution of the dispute; and 'conciliation' to indicate, instead, a more evaluative process on the basis of which the conciliation committee has the power to propose an agreement if the parties fail to reach one on their own.

¹⁹⁴ Issues connected with the process of recruitment (*boshū*) and appointment (*saiyō*) are also covered by the law, in so far as advice and guidance actions are required from Labour Bureaux. However, in line with the behaviour of courts, which have traditionally refused to review employers' decisions in this area in conformity to the principle of the freedom of contract (Araki, 2009: 4 – 5; Foote, 1996: 671; Yamada, 2011: 10), disputes stemming from workers' dissatisfaction with the recruitment and appointment process are excluded from the application of the mediation procedure. As pointed out by Ishizaki *et al.* (2011: 46), the exclusion is due to the fact that no employment contract between the parties exists in instances such as these.

limited knowledge of the rights and obligations attached to their contractual relation – thereby giving rise to misunderstandings which often degenerate into discontent and then grievances (Ishizaki *et al.*, 2011: 29; Sugeno, 2012: 810 – 811; Yamakawa, 2013: 920). In compliance with art.3, a comprehensive labour consultation service (*sōgō rōdō sōdan kōnā*) was established across the local branches of the MHLW nationwide.

When the information so provided fails to defuse conflict, art.4 gives the head of the bureau the power to issue advice (*jogen*) and guidance (*shidō*) as well as, if necessary, request the opinion of experts in order to provide the parties with the assistance they need to resolve their disagreements. Advice can be given either orally or in writing, while guidance is normally issued in writing. Issues pending in other organs (e.g. district courts) or those covered by provisions in special legislation (e.g. Part-time Law) are excluded from the scope of application of the article.

If these steps fail, either party can file a request to initiate mediation (art. 5). The request is subject to the scrutiny of the head of the bureau. If approved, a Dispute Reconciliation Committee (*Funsō Chōsei Iinkai*) is established. The committee is comprised of three neutral members who work on a part-time basis. They are selected among people of ‘learning and experience’ (*gakushiki keikensha*) and are, usually, legal scholars or practitioners. As a general rule, the three members should be appointed for each filed request. However, it is increasingly becoming the norm for the committee to delegate the handling of cases to one member alone (Noda, 2011: 93 – 94), due to the heavy workloads *rōdōkyoku* are confronted with and the scarce number of mediators available. This discrepancy between formal regulation and actual practice is raising some concern about the quality of dispute processing being administered (*ibid.*). Be that as it may, the *funsō chōsei iinkai* hears the opinion of the parties to the dispute and also has the authority to summon witnesses whose statements might smooth the path towards

the reaching of an agreement between the parties. The committee listens to each part separately, in line with the standard practice in other procedural contexts.¹⁹⁵

In the more than ten years since it started, the use made of this three-tiered system has fluctuated. Although soon after its introduction the number of grievances and cases at all the three levels constantly increased, registering a peak in the year following the 2008 financial crisis, following 2009 the flux started to abate – the decrease sharper in the levels of usage of the *assen* procedure. Still, overall figures remain high (MHLW, 2014a: 1 – 2), with 245,783 cases of labour consultation and 5,712 *assen* requests in 2013.

From these figures, it is clear that the system is living up to expectations in terms of levels of usage. But whether it is responding effectively to the rationale of its creation remains an open question – to which observers who are differently situated offer different answers. In the next section, I will provide an analysis of these diverse positions.

4.3.3.2. Procedure evaluation

Among my informants, it is possible to recognise three different standpoints: insiders to the systems such as the labour consultants in the Tokyo Labour Consultation Office, outsiders such as trade unionists, and neutral observers, i.e. legal scholars.

On one end of the spectrum, experts such as C. and D., constantly involved in labour consultation and conflict management in Tokyo Labour Consultation Office, were more inclined to acknowledge the procedure's merits. As shown in section 4.1 of this chapter, they considered that parties are often unclear about the rights and obligations each one has in the employment contract. In this sense, therefore, they believed that counselling and guidance by administrative agencies could help to reshape the context of the disagreement in such a way as to prevent it from degenerating into a

¹⁹⁵ E.g. judicial conciliation (*soshō jō no wakai*).

dispute. As for the mediation process *per se*, their position is in line with theories suggesting that the suitability of ADR procedures in conflict management is strongly dependant on the nature of the dispute and the specific circumstances of the case. C.'s view nicely illustrates the point:

‘You know, there are cases when, even if you win in court, this does not lead to a real resolution [of the problem]. [In cases of bankruptcy], you might win the case, yes, but the company [you won against] has gone bust and it is difficult to know where its assets are. In cases such as these, it just makes more sense to seek a compromise and try to understand what the other party is willing or can afford to give’ (C., 26 November 2013, interview).

At the same time, however, they expressed some reservations about the *assen* procedure as set *in the law*, especially when contrasted with the mediation practices that had existed in the Tokyo Labour Consultation Office prior to the 2001 law. C., in particular, was critical of the emphasis put on finding a speedy resolution of the dispute which, in his opinion, harmed the quality of the process:

‘[The administrative system recently introduced by the government] is conceived to quickly deal with disagreement. It ends in just three sessions. (...) [And] it might well end with the parties having reached no agreement. In our case, it might take a while, but we try again and again [to mediate] so that some measures (*hōsaku*) can be arranged’.

On the other end of the spectrum, trade unionists evaluated the system very negatively – especially the mediation service. Specifically, they criticised two procedural aspects of *assen*. First, they distrusted the individualisation of the dispute that underlies the process. The *rōdōkyoku* administered mediation is expressly conceived to take place between an individual worker and the employer, thereby excluding any trade union involvement. In this respect, trade unionists considered *assen* as having ‘no particular merit’ in the eye of trade unions (Hoshina Hiroichi, 11 November 2013, interview), and as actually putting workers in a weaker bargaining

position *vis-à-vis* the employer. Secondly, they stressed the shortcoming of the non-mandatory nature of the procedure, which allows either party to refuse to take part in the proceedings, thereby harming workers' chances to obtain redress.

For these reasons, most of my trade unionist interviewees felt that *rōdōkyoku* promoted agreements were 'not very good' (Hoshino Yūichi, 5 November 2013, interview) and that, whenever possible, collective bargaining was to be preferred instead.

For example, Suda Mitsuteru (20 November 2013, interview), general secretary of Tokyo Tōbu Rōdō Kumiai, opined that *assen* is, essentially, a form of mediated negotiation towards an agreed solution, and, as such, what a worker could expect to get was not so much different from what could be gained through collective bargaining.¹⁹⁶ In fact, he argued that collective bargaining was a superior form of negotiation for two reasons: on the one hand, the worker's position is stronger because backed up by the union; and, on the other, the employer is under the obligation to bargain in good faith. As a consequence, the outcomes are less likely to be biased towards employers.

If the problem proves difficult to solve through collective bargaining, trade unionists saw as available alternatives either the *rōdō iinkai* (see 4.3.2 above) or state courts. Of the two, *rōdō iinkai* were perceived as the most authoritative option, and the one providing the better arena for reaching a fair solution of a dispute. They accounted two reasons for this: on the one hand, *rōdō iinkai* allow for labour-management negotiations to be mediated by public interests members; on the other, they handle disputes within the broader frame of labour relations rather than from a strict legalistic point of view (Matsumoto Hisashi, 31 October 2013, interview). When access to *rōdō iinkai* is not available, then the default option is state courts. However, one important aspect to stress here is, how most of my trade unionist interviewees inherently trusted

¹⁹⁶ In Japan, trade unions can bargain on behalf of an individual worker.

ordinary courts to be able to provide meaningful redress for workers' grievances, without an adequate acknowledgement of the potential shortcomings of court procedures. The issue of the enforcement of courts' decisions well exemplifies this point. As we have seen above, insiders to the administrative mediation system such as C. were only too aware of the difficulties which might be associated with obtaining the enforcement of a sentence. By contrast, trade unionists often neglected this aspect. The view of the general secretary of Precariat Union, Shimizu Naoko (2 November 2013, interview) neatly illustrates this. She brought forward an instance similar to the one raised by C., i.e. the safeguarding of workers' interests in the case of business bankruptcy. Only, the response was different: in her view, in such a situation, it is legal action through the courts that can best protect the employees' position. She seemed, however, oblivious of the issues rightly highlighted by C. instead, namely the employer's insolvency difficulties.

Finally, a middle position was taken by legal scholars and experts. Legal scholars judged *assen* positively in so far as it allowed access to dispute resolution means to workers who would otherwise be excluded from it by cost and time barriers. Sugeno Kazuo (19 November 2013, interview) makes the point as follows:

'Well, the workers who decide to apply for *rōdōkyoku assen* do not rely on lawyers (...), also there are no costs whatsoever to sustain. And, it is fast: fast meaning that usually all ends in just one session of more or less three hours. (...) Therefore, they are people who just want to get a bit of money, get over it and then start the search for another job'.

Nonetheless, legal scholars were more willing to stress the deficiencies of the mediation system than the labour consultants C. and D. Particularly, they emphasised that the procedures' low costs were reflected in the extremely low levels of compensation workers might expect from the agreed solution. To some (Sugeno Kazuo, 19 November 2013, interview; A., 17 October 2013, interview), this issue was

exacerbated by the fact that the fairness of the agreements was likely to be affected by the absence of strict procedural rules, and a process of fact finding and evidence collection. H. (3 December 2013, interview), the labour lawyer I interviewed, also noted the shortcoming that the procedure is non-mandatory and that the *rōdōkyoku* lack any enforcement mechanisms – a shortcoming particularly stressed by trade unionists and even acknowledged by C. and D.

Thus, different groups of observers hold sharply different views on the mediation system introduced in 2001 – each group, to some extent, making valid points with regard to it. My interview with Reiga Chang (1 November 2013) proves especially illuminating in revealing these points further and fixing them into a more nuanced picture.

Reiga Chang was a Taiwanese woman of 33 employed as a *seishain* in a company producing CCTV cameras. The company employed a mixed workforce of Japanese workers and foreign workers from East Asian countries. Although they were all employed under a regular permanent employment contract, Reiga noticed that it was common practice that, after one year, before pay and bonus increases were due, contracts were terminated – usually, in her view, under some pretence. However, she added, ‘this never happened to the Japanese’. In line with this pattern, she, too, was fired after one year: the stated reason the employer gave for the dismissal was that she had neglected to arrange for an express delivery. As a matter of fact, things had started to deteriorate a few months before and Reiga, following the advice of a Japanese friend who at the time was training as a lawyer, started to collect some evidence¹⁹⁷ of the unfair treatment she felt herself subject to by her superior. After the dismissal, again on her friend’s advice, she made contact with the *rōdōkyoku* and filed for *assen*. When

¹⁹⁷ She printed some particularly harsh e-mails sent to her by her boss as well as recording the times he omitted to pass her relevant information for the completion of the tasks assigned to her.

asked if she had considered filing a suit in court, she replied that she had thought about it, but that issues of time and cost had discouraged her from doing so. To some extent, her decision was influenced by the advice received from the *rōdōkyoku* mediators. She recalled as follows:

‘Well, they asked me if I did not want to start looking for another job as soon as possible... and, well, they told me that, if I went to court, it might take half a year or even a year... and encouraged me to think if I was really ok with going on like this for all this time (...). And so, being told this, you know...’ (Reiga Chang, 1 November 2013, interview).

The request was filed and the employer agreed to take part in the proceedings. The dispute was resolved with an agreement whereby Reiga obtained a statement declaring the dismissal was due to the state of the business (*kaisha no tsugō*), three months of back pay plus the continuous payment of social insurance until she found another job. Reiga expressed satisfaction about this outcome, the clarification of the reasons for dismissal and the payment of social insurance premiums being the two most important aspects to her. However, when asked if she was satisfied about the *assen* service *per se*, she evaluated it less positively:

‘Why, more or less. While I was waiting for the outcome, I got a bit irritated. Why, there are so many people using this *assen* [service] that the time they [the mediators] dedicate to each case is not much’ (*ibid.*).

Chang’s case is significant in many respects, clearly exposing the strengths and shortcomings of the procedure. On the one hand, the fact that filing for *assen* is free of charge and informal while cases are processed quickly is positive for workers, like Reiga, who are concerned about costly and time consuming court proceedings as well as by considerations of their ‘public’ image as good employees. Moreover, as also shown by the existing literature (Noda, 2011), mediation might be particularly appropriate in instances where evidence is scarce or blurred, the burden of proof heavy and the worker

does not wish for reinstatement. On the other hand, a number of shortcomings emerge. First, as rightly pointed out by Fiss in his famous critique of settlements (1984: 1076), the weaker party in the process might lack, and not be given, all the relevant information he or she needs in order to make a thoroughly informed decision. Secondly, in part as a consequence of considerable workload, cases are often dismissed rather too quickly, at the expense of an in-depth mediation process. Noda (2011: 309 – 310) adds as a corollary point to this mediators' lack of training in relation to mediation techniques as well as relevant employment regulations. And finally, compensation damages tend to be quite low, when compared with levels of monetary compensation awarded in court or by the *rōdō shinpan* procedure. More importantly, however, one cannot fail to notice that a satisfactory outcome is inevitably bound to the willingness of the employer to participate and negotiate. Indeed, as illustrated also by the MHLW (2014a: 10) the percentage of cases which are terminated because of the refusal of one party, usually the employer, to participate in the mediation process is particularly high¹⁹⁸ and considered one of the main shortcomings of the procedure (Hosokawa, 2011; Noda, 2011).

This was one of the reasons brought forward for the introduction of the *rōdō shinpan seido*, to the analysis of which we now turn.

4.3.4. The *rōdō shinpan* system

4.3.4.1. Procedure overview

The *Rōdō Shinpan Hō* was passed in 2004 in response to the recommendations of the Justice System Reform Council,¹⁹⁹ and entered into force starting from 2006. Hailed as an 'epoch-making reform' in the legal environment (A., 17 October 2013, interview), the *rōdō shinpan* is a judicial, non-contentious and specialised procedure for the resolution of employment disputes (Sugeno *et al.*, 2007: 9).

¹⁹⁸ Namely 37%, slightly less than the success rate (39%).

¹⁹⁹ A detailed account of the discussion process behind the enactment of the law can be found in Sugeno *et al.* (2007: 13 – 24).

Kezuka (2004: 59) depicts it as a compromise formula lying in between the conciliation-based German Labour Court and the English Employment Tribunal,²⁰⁰ but which possesses original characteristics not to be found elsewhere. And, indeed, this ‘uniquely Japanese’ procedure (Sugeno *et al.*, 2007: 5) is different from its European cousins in one crucial respect, namely that it is not a tribunal, but rather a court-administered specialised procedure for the resolution of employment disputes. This means that the *rōdō shinpan* has no exclusive jurisdiction over employment cases and that is reliant on the court for enforcement (*ibid.*: 45 – 46).

As set forth by art.1, the rationale of the law is to provide a ‘speedy (*jinsoku*), suitable (*tekisei*) and effective (*jikkōteki*) solution’ to ‘civil disputes between an individual worker and an employer²⁰¹ regarding the existence of the employment contract or other matters concerning the employment relation’. Specifically, this definition covers all disputes of rights on issues such as dismissal, transfers, non-renewal of contract etc. (Sugeno, 2012: 881).

The procedure is administered by district courts: when a petition (*mōshidate*) is filed, the court appoints a panel to which it delegates the court’s authority for the resolution of the case (art. 7). The panel consists of three members: one professional judge (*rōdō shinpankan*) and two lay members (*rōdō shinpan’in*) (art. 8 and 9). The two lay members work on a part-time basis and are appointed from persons of experience and expertise²⁰² in labour and employment relations and practices (art. 9, para. 2 and 3).²⁰³ In practice, the appointment is based on the recommendation of the two main national trade unions centres, Rengō and Zenrōren, and the employers’ association

²⁰⁰ For a brief overview of the functioning of the system for the resolution of employment cases in the UK and Germany see Collins *et al.* (2012: 25 – 33), Employment Tribunal Practice and Procedure (2006), and Kremp and Morgenroth (2010: 315 – 321).

²⁰¹ The notion of employer as defined in the law is the same as in the Law on the Promotion of the Resolution of Individual Labour Disputes. See nt. 191 above.

²⁰² Normally, the assumption is that the two lay members will have developed such expertise as managers in a big company HR department or as trade union officials respectively (Sugeno *et al.*, 2007: 28 – 29).

²⁰³ For a detailed description of the process of appointment see the procedure’s regulation (*rōdō shinpan kisoku*), art. 1 to 6.

Keidanren (Sugeno, 2012: 885). Although they have equal decisional power with the professional judge in the panel (*ibid.*: 884), *rōdō shinpan'in* are not required to have any legal education background (Yamakawa, 2013: 904). However, before taking up their appointment, they are advised to undergo a basic training in employment law and dispute resolution (Sugeno, 2012: 885). They are under the obligation to be impartial (*chūritsu*) and fair (*kōsei*) (art. 9), and are subject to criminal sanctions if they fail to maintain confidentiality (art. 33 and 34).

Parties who wish to apply for the procedure must file their request in writing. In addition to stating the reasons and purpose of the claim (art. 5), the claimant is required to enter all relevant facts, supporting evidence and any previous endeavour at negotiation such as attempted mediation in *rōdōkyoku* (*rōdō shinpan kisoku*, art. 9). There are two reasons behind this requirement (Sugeno, 2012: 882 – 883). First, the *rōdō shinpan* procedure is concluded in a maximum of three sessions over a period usually no longer than three months. It follows that, in order to proceed speedily, the panel must know in advance all the relevant circumstances of the case. Second, unless the panel rejects a request because unsuitable for the procedure (art. 6) or either party files an objection against the panel's decision (art. 21), the case is automatically referred to ordinary civil procedure. To smooth this process, the *rōdō shinpan mōshidate* should, in principle, mirror a lawsuit for ordinary legal action.

Similarly to the *rōdōkyoku assen*, the procedure is confidential and closed to the public (*hikōkai*), although the panel may allow interested parties who request it to attend (art. 16). In contrast to the administrative procedure, the filing of a *rōdō shinpan* request is subject to the payment of a fee.²⁰⁴ In principle, administrative costs are split equally between the parties (art. 21, para. 5), unless they settle otherwise when reaching a

²⁰⁴ The court fee is contingent on the amount claimed. For example, if the compensation demanded does not exceed ¥ 1,200,000 (£ 6500 ca.), the fee for filing a claim is ¥ 5500 (£ 30). The rates are the same as when filing for civil conciliation and a half of those necessary to file a suit in ordinary civil procedure. Data are available on the Japanese judiciary website at the following URL: http://www.courts.go.jp/vcms_lf/315004.pdf (accessed 28 May 2015).

conciliation agreement. If the case ends with a panel decision (see *infra*), the *rōdō shinpan* committee has the power to determine how costs will be allocated between the parties.²⁰⁵

Once the procedure is started, the case is resolved following three standard stages (Sugeno *et al.*, 2007: 249 – 257; Sugeno, 2012: 887 – 890). During the first session, the panel clarifies the circumstances, hears the parties’ positions and weighs any submitted evidence.²⁰⁶ On the second session, after examining supplementary evidence and testimony, the panel engages in a conciliation (*chōtei*) attempt, presenting the parties with an agreement proposal. As shown by Satō (2013: 42),²⁰⁷ the overwhelming majority of cases (almost 80%) finds a conclusion at this stage. Nonetheless, when this is not the case, the panel has the authority to render a ‘decision’ (*shinpan*).²⁰⁸ This normally happens either at the end of the second session or during the third session.

As set forth by art. 1 and further elaborated by art. 20, the decision must be consistent with the legal rights and obligations of the parties, as clarified in the course of the *rōdō shinpan* enquiry, and must conform to the circumstances of the case. However, the panel has a certain amount of leeway in deciding the case by the qualification that the *shinpan* will be determined also by the ‘progression of the case’

²⁰⁵ This is in contrast to what happens in ordinary civil procedure where the basic principle is that court fees shall be borne by the losing party (art. 61, Code of Civil Procedure). The power to decide over costs allocation is awarded to the panel by art. 29 of the *Hishō Jiken Hō* (Non-Contentious Cases Procedure Law) which applies *mutatis mutandis* in accordance with the non-contentious nature of the *rōdō shinpan*. It is important to note that, in Japan, costs shifting never includes lawyers’ fees, for the payment of which each party is responsible. For a brief summary on this debated topic, cf. Wagatsuma (2012).

²⁰⁶ The process for the authentication of evidence resembles the one followed in ordinary civil procedure (art. 17, para. 2) as set by the Code of Civil Procedure.

²⁰⁷ In 2010, a research group of the Institute of Social Science of the University of Tokyo, in collaboration with the Supreme Court of Japan, conducted a survey among the users of the *rōdō shinpan* system in order to measure the functioning of the system and users’ levels of satisfaction. The survey results have been published in Sugeno *et al.* (2013).

²⁰⁸ In some works on the *rōdō shinpan* published in English (cf., e.g., Kezuka, 2006; Yamakawa, 2013) *shinpan* is sometimes translated as ‘award’, while the members of the committee are often called ‘arbitrators’. In the present work, however, this kind of terminology is not adopted because of the confusion it might create between the *rōdō shinpan* and arbitration. Indeed, even if in the event of the parties failing to reach an agreement the *rōdō shinpan* committee has the power to render a ‘decision’, this is not automatically binding on the parties as an arbitration award would be. In other words, in contrast to arbitration, the *rōdō shinpan* remains a non-contentious form of dispute resolution.

(*rōdō shinpan no tetsuzuki no keika*) (art. 20). The main implication here is that the *rōdō shinpan* committee is not bound by legal rules and precedents as judges are in ordinary court procedure. For example, in cases of unfair dismissal, judges would be bound by case law to order the employer to reinstate the employee and pay him/her monetary compensation. By contrast, in the *rōdō shinpan* procedure, the panel can forfeit reinstatement and order only the payment of monetary compensation in lieu.²⁰⁹

Although more adversarial than a *rōdōkyoku assen* (Sugeno *et al.*, 2007: 116), the procedure remains non-contentious in nature (*ibid.*: 30). This means that the decision is not automatically binding, and either party has the right to file an objection²¹⁰ (*igi*) against it within two weeks. In contrast to the process of filing an appeal in court, objections against the decision of the *rōdō shinpan* committee can be submitted without stating a reason (Yamakawa, 2013: 906). If the parties accept the decision, this will have the same value as a settlement in the course of litigation (*saibanjō no wakai*) (art. 21, para. 4), i.e. it will be enforceable (*shikkōryoku*) and make the case subject to the principle of *res judicata*²¹¹ (*kihanryoku*) (Sugeno *et al.*, 2007: 103). Conversely, when either party raises an objection, the *shinpan* loses its effect (art. 21, para. 3) and the case is automatically referred to ordinary civil litigation. The existence of this link is what distinguishes the *rōdō shinpan* from civil conciliation procedure (*minji chōtei tetsuzuki*) (Sugeno, 2012: 880). Art. 17 of the *Minji Chōtei Hō* allows the three-member conciliation committee to render a decision in lieu of conciliation (*chōtei ni kawaru kettei*) when the parties do not agree with the conciliation proposal. However, if the parties object to the decision, the case is terminated. By

²⁰⁹ As we shall see in the next section, the acceptability of this solution is highly criticised in trade unions circles despite the fact that a study conducted by Hamaguchi *et al.* (2010) found that workers rarely press for reinstatement when challenging a dismissal in court. The study was a follow up of a survey conducted by the JILPT in 2004 which showed similar trends.

²¹⁰ Objections must be filed with the district court. The court has the authority to reject it, if the objection is found not to conform to relevant procedural rules (e.g. if the parties filed it after the two weeks term time frame).

²¹¹ It follows that the parties are precluded from raising the same claim again.

contrast, the *rōdō shinpan* procedure, if unsuccessful, avoids the exit of the case from the legal system by tying its resolution to ordinary civil litigation (*ibid.*).

4.3.4.2. Procedure evaluation

From the moment of its introduction, legal observers (Kezuka, 2004; Sugeno *et al.*, 2007: 3 – 12; Sugeno *et al.*, 2013: 13 – 18) stressed the significance of the *rōdō shinpan* procedure in three respects.

First, the establishment of the *rōdō shinpan seido* acquired meaning in the broader context of the justice system reforms promoted by the Japanese government starting from 2001. In the report published in June of the same year, the Justice System Reform Council identified the field of employment related grievances as an area of reform, and advocated the introduction of a new judicial, yet user friendly, system to deal with employment cases in a comprehensive way (Ishizaki *et al.*, 2011: 7 – 8). The enactment of the *Rōdō Shinpan Hō* came as a response to such recommendations: the rationale behind it was to make access to judicial organs easier for workers and employers, thereby expanding the role played by the judiciary in employment relations (Sugeno *et al.*, 2007: 3 – 4). Second, it was argued that the *rōdō shinpan* had significance from the point of view of the resolution of disputes between labour and management. As highlighted in section 4.3.2, against the backdrop of the changes affecting the labour market and the composition of the workforce, the nature of labour disputes in the country underwent a qualitative shift, from collective to individual employment disputes. In this context, the apparatus of *rōdō iinkai* – which had been designed to provide solutions to the former – proved an inadequate channel to address the latter. Thus, the importance of the *rōdō shinpan* was measured in terms of the creation of an official, specialised system which was tailored to the resolution of employment disputes (Sugeno *et al.*, 2007: 9). Finally, legal scholars maintained that the new procedure was likely to produce synergistic effects with the country's system of

industrial relations and HRM practices (*jinji kanri*) (*ibid.*). Indeed, they posited that the introduction of the *rōdō shinpan* would help to bring to the surface those grievances which had so far been dealt with informally within the company, by providing a more official route where legal norms apply instead. This, in turn, would help to foster a so-called ‘law feedback’ (Sugeno, 2001: 88) in the workplace, i.e. to increase awareness of legal rules within the corporate environment. Arguably, the law feedback effect is yielded by the participation of lay members, because the assumption is that the *rōdō shinpan*’in will take back the legal expertise acquired in the course of the procedure into the business community, thereby acting as a bridge in the process of aligning employment and management practices with legal requirements (Sugeno *et al.*, 2007: 11). The ultimate expectation of this positive interplay is that grievances in the workplace will decrease, and employment disputes will be prevented as a result (*ibid.*).

The rest of the section will examine the extent to which the literature assessment of the *rōdō shinpan* is reflected in my interviewees’ views. As happened in the case of the *rōdōkyoku assen*, we will see that sharp differences exist between different observers of the system depending, on the one hand, on their ideological position with respect to governmental mechanisms of dispute processing and, on the other, on the stake that each group of observers has in the *rōdō shinpan* system.

As was to be expected, the views of the legal scholars and experts I interviewed largely reflected the literature’s evaluation of the *shinpan*. Sugeno Kazuo (19 November 2013, interview), one of the key figures behind the crafting of the *rōdō shinpan* procedure, praised it for providing a fast and flexible route to the resolution of employment cases which is, however, formal and legal in nature. Specifically, he contrasted the *rōdō shinpan seido* with the *assen* system administered by Labour Bureaux, and highlighted a number of features which – in his view – made the former a superior method of dispute resolution. These features are, among others: the

involvement of lawyers in the process, the fact that the proceedings are based on an ascertainment of facts, the rendering of a decision in the event that attempts at conciliation fail, and the referral of the case to ordinary procedure when the parties object to the *rōdō shinpan* decision. Further, he evaluated in a positive light the flexibility offered by the procedure, i.e. the fact that the *rōdō shinpan* committee, when deciding a case, is not strictly bound to follow legal rules and precedents as judges are, especially in unfair dismissal cases:

‘[In the *rōdō shinpan* procedure] evidence is collected, and let’s say that such evidence proves that a dismissal, for instance, is unlawful. That will be stated clearly. But [*rōdō shinpan*’in] can point out [to the worker] the fact that, even if the dismissal was unreasonable, going back [to the same workplace] would be difficult. And so they can suggest a monetary compensation [instead of reinstatement]’.²¹²

Thus, Sugeno opined that the combination of these aspects is what ensures, on the one hand, that the dispute is brought to closure and, on the other, that the solution provided is substantive in nature. He also noted that monetary compensation for claimants tends to be higher in the *rōdō shinpan* than in the *rōdōkyoku assen*, and that the same is true in terms of success rates (i.e. the number of cases reaching a conclusion). He concluded that these are signs that the system is healthy and responding to the rationale of its creation.

A. (17 October 2013, interview) expressed similar views. He described the creation of the *rōdō shinpan* as an ‘epoch-making’ reform because, for the first time after the Second World War, it created a judicial system of employment disputes resolution accessible to ‘ordinary citizens’ (*ippan kokumin*). He agreed with Sugeno that *rōdō shinpan* administered solutions tend to be of a higher standard than those reached through the *assen* procedure. However, more important than that, A. stressed the

²¹² As seen in section 4.3.4.1, Japanese case law establishes that, in unfair dismissal cases, judges are under the obligation to order the reinstatement of the worker, in addition to monetary compensation.

significance of the *rōdō shinpan seido* within the broader context of labour-management relations, and in the light of the ‘law feedback’²¹³ effect mentioned above. He made the point as follows:

‘In one sense, this system of dispute resolution [i.e. the *rōdō shinpan seido*] becomes an extension of the industrial relations system. (...) Trade unions and employers, you know, they bear the social responsibility (*shakaiteki sekimu*) of resolving disputes. (...) And then, there is what is called a law feedback function. Take, for example, a manager who is selected as a *rōdō shinpan’in* (...). After undertaking this function, he/she can’t go back and allow weird stuff (*henna koto*) to happen in his/her own workplace, right? Especially in the context of Japanese society which is based on this *honnetatemae* tension’.

By the same token, Nakakubo Hiroya (22 October 2013, interview) commended the expertise the *rōdō shinpan* brings to the process of resolution of employment disputes. Nakakubo stressed the dearth of judges possessing specific knowledge of the employment practices existing in the Japanese corporate environment as one of the main issues attached to raising an employment claim in ordinary civil procedure. In his view, the participation of lay members filling such a knowledge gap was one of the most innovative aspects of the procedure. Moreover, he deemed that the non-contentious nature of the *rōdō shinpan* was extremely valuable in relation to the life-time employment system, especially in cases such as non payment of wages or overtime. Indeed, as shown by previous seminal studies (e.g. Macaulay, 1963; Merry, 1990), people tend to use contentious methods of dispute resolution such as formal litigation when the relationship with the other party has either already broken down or when there is no expectation that it will continue. In line with this view, Nakakubo stressed the

²¹³ The issue of the ‘law feedback’ is in fact controversial in at least one respect. We have seen that, as a matter of practice, it is managers selected by the Keidanren who normally act as lay members in the *rōdō shinpan* procedure. The Keidanren, however, does not include small and medium-sized companies (SMEs) in its membership. This is potentially an issue for the ‘law feedback’ function of the *rōdō shinpan* because, as argued by Sugeno and Yamakoshi (2014), unlawful dismissals and other forms of non-compliance with employment rules is quite rare among big companies. By contrast, the ratio of non-compliant firms is rather high among SMEs as a consequence of poor knowledge of relevant laws and judicial precedents. In the absence of substantial empirical data, however, issues related to the ‘law feedback’ function of the *rōdō shinpan* remain a matter of speculation.

continuous nature of the employment relationship (*keizokuteki kankei*) in the context of the life-time employment system, and therefore praised the *rōdō shinpan* as a non-contentious method of dispute resolution, allowing workers to find a solution to their grievances without putting that relationship in danger.

Interestingly, the confidential nature of the procedure was not considered as a minus, but rather as one of its strengths. As we have seen in section 4.3.1, one of the main critiques made against the ADR movement was that the informality attached to processes of dispute resolution such as conciliation and mediation exposed the weaker party in the bargaining process to the risk of being forced into a disadvantageous settlement. In contrast to this, my legal informants argued that confidentiality and informality in the *rōdō shinpan* procedure was the key element allowing workers to take part in the dispute resolution process, thereby leading to solutions they would not feel alien to their interests. Mizumachi Yūichirō (16 October 2013, interview) and Sugeno Kazuo (19 November 2013, interview), for example, argued that court rulings, which need to conform to legal rules and precedents, are often not amenable to offering flexible solutions which take into consideration issues of substantive justice. Moreover, there is the risk that the legal strategy pursued by lawyers does not always reflect workers' demands. In other words, in court proceedings, lawyers 'build a story' in order to win the case (Mizumachi Yūichirō, 16 October 2013, interview). By contrast, the fact that the *rōdō shinpan* is kept confidential creates a space for both parties to truly speak their minds, thereby helping them to reach a compromise suitable for both.

Despite these positive assessments, the legal scholars and experts whom I interviewed appeared conscious that a number of issues remained.

Firstly, some of my interviewees highlighted the risk that qualitative informed solutions might be displaced in favour of the need of finding an expeditious exit of the dispute from the system. A. (17 October 2013, interview), for example, stressed the fact

that the process of resolution, which follows the three standard steps highlighted in the previous section, has tended to become quite routinised, thereby running against the aim of the procedure of reaching solutions which must be equitable and in accordance with the rights and interests of the workers. Mizumachi Yūichirō (16 October 2013, interview) elaborated on the same point:

‘If you think you want to settle the matter quickly, then you go to the [*rōdō shinpan*] (...). But the thing is, that it happens that the return for a resolution at an early stage is seeing your right partially reduced (...) This is one of the biggest problems, that to resolve the dispute speedily in the end monetary compensations are the overwhelming majority’.

Secondly, there is the issue that complex legal cases will be excluded from the procedure. Again, Sugeno’s view neatly illustrates this point:

‘There are cases when [using the *rōdō shinpan*] is not possible. (...) In workplace accident claims, cases of *karōshi* or *karō jisatsu*.²¹⁴ gathering and examining evidence in these instances take time. Transfer related cases are the same (...). [Therefore] conciliation or a *shinpan* are not suitable’.

Although he still defended the strength of the procedure in providing specialised solutions to routine labour cases, as did all of my legal informants, data also suggests that concern is felt about the aforementioned exclusion which creates a fundamental double standard between complex and ordinary disputes. In other words, the *rōdō shinpan* is arguably a valuable procedure because it brings into the process of dispute resolution the necessary expertise for dealing with employment grievances. However, the grievances that could potentially benefit from it the most, such as ambiguous cases of harassment or bullying, do not enter the system because they are too complex to find a solution in only three sessions.

²¹⁴ Respectively, death and suicide from overwork.

Finally, some of my interviewees acknowledged that the costs attached to the procedure might raise some concern about access to justice. As we have seen in the previous section, in contrast to the *rōdōkyoku* administered mediation, bringing a case to the *rōdō shinpan* is subject to the payment of a fee. Moreover, there is the additional cost of hiring a lawyer. Similarly to the ordinary civil procedure process, legal representation in the *rōdō shinpan seido* is not compulsory. However, workers are normally advised that self-representation is not desirable because of the complexity of the legal issues attached to the preparation of a case (Satō, 2013). The fact that the *rōdō shinpan* is a *judicial* procedure presupposing the involvement of lawyers was one of the reasons for its positive reception by both the legal community and the Japanese bar (Sugeno *et al.*, 2007). Yet, as found by Satō (2013: 35 – 36), the procedure is perceived by both workers and employers as being expensive; and this perception is negatively related to users' level of satisfaction. Sugeno Kazuo (19 November 2013, interview) recognised that issues of costs might hinder workers' access to the *rōdō shinpan*, and pointed out that the problem had been thoroughly debated in the council responsible for the drafting of the law. Nonetheless, he defended the council's decision by stressing the fact that court fees and legal assistance costs were to be seen as a necessary evil which ultimately pays off in terms of qualitative informed solutions to workers' grievances. Whilst my other legal scholars interviewees largely agreed with this assessment, H. (3 December 2013, interview), my labour lawyer informant, offered a partially different view. Indeed, he considered costs, especially those attached to legal representation, as an issue only to a certain extent. This was for two reasons: on the one hand, he highlighted the fact that legal fees are normally covered for workers by the monetary compensation they receive once the procedure is concluded; on the other hand, he noted the increasingly common practice among Japanese lawyers of drafting no-win-no-fee agreements with their clients, which make lawyers' compensation conditional on the

outcome of the case. He further added that, even when admitting costs as a significant institutional barrier to the procedure, the issue should not be addressed in terms of cost-cutting. Rather, the solution lay to him in the promotion of a fundamental principle of resources redistribution through legal aid mechanisms which could enhance workers' access to the justice system.

The picture that emerges from the above is one which shows legal scholars and experts fully aware that the system has not achieved its full potential. The *rōdō shinpan* was born out of the necessity to reconcile the need to provide suitable and flexible solutions to employment disputes, while ensuring a quick route into, and exit from, the legal system. My informants, some of whom had been involved in the crafting process of the new procedure, recognised that this inevitably had an impact on the type of disputes the system could handle. Yet, they defended its significance in light of the fact that the *rōdō shinpan* provides an access to justice for those workers whose claims would otherwise not enter the system due to the social and institutional barriers to filing a civil suit. Moreover, they saw the procedure as a stepping stone towards the development of more sophisticated mechanisms of employment dispute resolution in the future.

Trade unionists drew a different picture, however. Indeed, when it comes to trade unions' reception of the *rōdō shinpan*, data suggests that the system is evaluated far less positively, as was also the case with the *rōdōkyoku* administered *assen*. Nonetheless, trade unionists' views can be divided along two axes.

On the one hand, representatives from National Centres, such as Rengō and Zenrōren, attached some value to the procedure in so far as the expansion of workers' access to redress mechanisms for their grievances was concerned. For example, Maruta Mitsuru (13 November 2013, interview), assistant director of the Department of Non-Regular Employment at Rengō, acknowledged that court proceedings could be

economically and emotionally taxing for workers due to the costs and time investment they involved. From this point of view, therefore, he praised the *rōdō shinpan* for providing workers with a route to dispute resolution which is faster and less expensive. At the same time, however, he opined that, what workers gained in time, they lost in terms of the suitability of the solutions reached. He noted the tendency of the *rōdō shinpan* procedure to end with settlements granting monetary compensation, and concluded that ‘the *rōdō shinpan* seems to be based on the assumption of the worker leaving the workplace where he/she experienced a problem’.

Ebana Arata (24 October 2013, interview) and Nakaoka Motoaki (interview, November 2013), respectively the director of the Zenrōren Contingent Labour Bureau and Zenrōkyō general secretary, agreed. They commended the objective of the law, but they could not help feeling concern about the fact that the solutions proposed were far from ideal, especially when harming workers’ chances to obtain reinstatement in cases of unfair dismissal.

These evaluations are far from being uncritical. And yet, trade unions representatives from National Centres, although cautiously voicing concern, did not appear as ideologically set against the procedure as was the case of trade unionists from small community unions. As a matter of fact, the latter did recognise in some cases the value of the new procedure to the extent that it offered workers a means of redress alternative to ordinary civil procedure. Nonetheless, they ultimately criticised it for two reasons.

First, they considered *rōdō shinpan* administered decisions, especially when replacing reinstatement in cases of unfair dismissal with monetary compensation, as encroaching upon workers’ rights. The words of Matsumoto Hisashi (31 October 2013, interview), the general secretary of the Otagaisama Union, were the most disparaging in this respect:

‘I don’t trust [the *rōdō shinpan*] very much. In cases of dismissal, you know, usually workers can be reinstated in their former job. Not so in the *rōdō shinpan* [where], even if workers have the right to go back to their workplace, that right is not acknowledged. That is why we don’t go to the *rōdō shinpan*. We go to court, no matter how long it will take’.

Watanabe Noriaki disagreed (16 October 2013, interview). General secretary of a union dedicated only to the process of individual dispute resolution, he evaluated the *rōdō shinpan* procedure as a valuable forum where workers can vent their grievances and obtain redress. Furthermore, he recognised that workers might actually not wish for reinstatement, thereby making monetary compensation a more suitable solution. He phrased the issue as follows:

‘Workers [who come here]... many of them have often suffered damage, mental damage (*seishintekina damēji*) (...). And they do not wish to go back [in their former workplace]. Therefore, on this premise, the best solution is to negotiate for some monetary compensation that will guarantee them a living until they find another job’.

Watanabe’s view, however, was the only exception to the general feeling shared by all of my other trade unionists informants that the *rōdō shinpan* is not in the workers’ best interests, and that it may in fact have the adverse effect of eroding their existing legal entitlements.

Second, observing the new procedure from an industrial relations perspective, trade unionists considered the *rōdō shinpan* as a dead end when it came to fostering an actual improvement of working conditions in the Japanese working environment. In other words, my informants opined that the reliance on lawyers and a procedure such as the *rōdō shinpan* makes it possible to address specific individual problems. However, in contrast to legal scholars who believed in the educational effect the procedure could have on the business community, they doubted this legal route could have any preventive function, thereby exposing workers to the risk of being confronted with

similar issues in the future. Hoshina Hiroichi's position (11 November 2013, interview) best illustrates this point:

'It's not a bad thing, having such a means of redress [as the *rōdō shinpan*]. But the thing is, workers should each be conscious of their rights. Having that consciousness, they should establish unions and strive for problems not to arise in their workplaces. The *rōdō shinpan* does not encourage that. That is why I think that it does not offer substantive solutions to [workers'] problems'.

From the above, it is clear that, once again, one of the main factors in influencing observers' view of the *rōdō shinpan* was their point of observation. Legal scholars and experts, viewing it from a legal perspective, measured its worth by reference to legal criteria and to the extent the system is able to respond to individual workers' claims. By contrast, trade unions representatives gave weight to the industrial relations context of the dispute. This led them to stress, on the one hand, the deficiencies of the procedure in terms of improving collective working conditions in the workplace; and, on the other, the evil of monetarising solutions to workers' grievances with the consequence of lessening the legal capital at their disposal. Nonetheless, the two opposite views have one point in common. That is, both tend to take regular workers' rights, especially the right to reinstatement in cases of unfair dismissal, as the benchmark against which the strengths and shortcomings of the *rōdō shinpan seido* can be measured. By contrast, the potential advantages and disadvantages of the procedure for the interests of non-regular employees would still appear not to be at the forefront of either legal scholars or trade unionists' discourses.

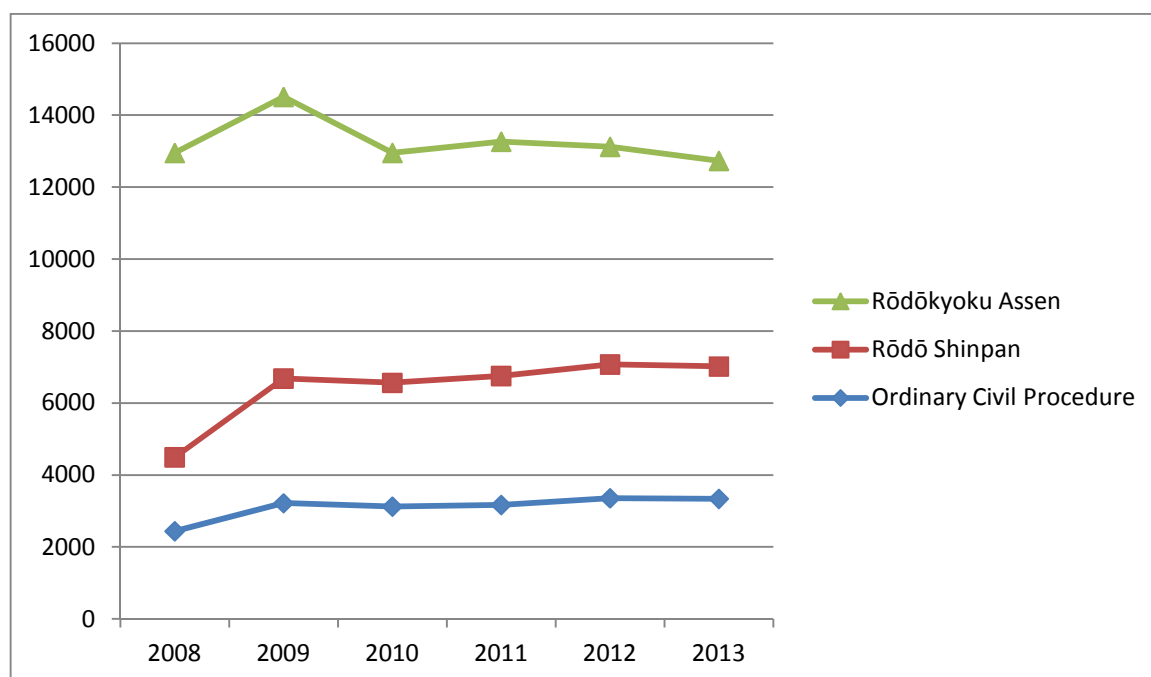
4.4. The *rōdōkyoku* and the *rōdō shinpan*: complementing systems?

In the previous sections, I have examined the two procedures – the *rōdōkyoku* administered *assen* and the *rōdō shinpan* – which have been the main milestones in the

process of employment reforms started by the Japanese government in response to the recommendations of the Justice System Reform Council. I have described the functioning of the two procedures as set in the provisions of the respective laws; and analysed their strengths and shortcomings as emerging from my informants' views. The objective of this section is to test these views by looking into the actual operation of the the *rōdōkyoku assen* and the *rōdō shinpan* as reflected in levels of usage and redress offered, typologies of disputes handled and the implications in terms of access to justice these factors entail.

In the reformers' intentions, the administrative *assen* and the judicial *rōdō shinpan* were to be integrated and complementary parts of a comprehensive, official system of employment dispute resolution (Sugeno *et al.*, 2007: 9). The declared aim was, as mentioned, to expand the portfolio of means of redress available to both parties of the employment relationship. As a matter of fact, the introduction of the new procedures for the resolution of work related grievances does seem to have expanded Japanese workers' access to justice. As shown in figure 1.1, ordinary courts' caseload was not impacted negatively by the availability of ADR means of employment dispute resolution. On the contrary, the latter appear to have brought to surface grievances which would have not otherwise reached the system.

Figure 1.1



Sources: Saikō Saibansho Jimu Sōkyoku Gyōseikyoku (2014) and MHLW (2014a)

Nonetheless, statistical data show that the two procedures vary considerably in levels of usage, typologies of disputes handled and levels of redress offered. As can be seen in table 1.1, the use made of the *rōdōkyoku* mediation service has fluctuated over the years and, especially after 2009, sharply decreased. By contrast, the caseload of the *rōdō shinpan* has remained fairly stable across the same period of time.

Table 1.1

Year	<i>Rōdōkyoku Assen</i>	<i>Rōdō Shinpan</i>
2008	8457	2052
2009	7821	3468
2010	6390	3436
2011	6510	3586
2012	6047	3719
2013	5712	3678

Sources: Saikō Saibansho Jimu Sōkyoku Gyōseikyoku (2014) and MHLW (2014a)

As for the type of disputes entering the two systems, according to Satō (2013: 27 – 28) the most common cases handled through the *rōdō shinpan* are cases of dismissal,

issues concerning the payment of wages or other allowances, and cases of transfer. Grievances about dismissal are also among those more often reaching the *rōdōkyoku* mediation service. However, in contrast to the *rōdō shinpan*, these are followed by cases of bullying and harassment, and non-renewal of contract (MHLW, 2014a: 7 – 8) – all problems more likely to affect (young) workers in non-regular employment (Noda, 2011: 25, 29). This pattern is confirmed also by Hamaguchi and Takahashi (2015) who, in a recent study comparing the *rōdōkyoku assen*, the *rōdō shinpan* and the *soshōjō no wakai* (see 4.3.2 above), have shown that, in contrast to non-regular employees, the great majority of regular workers uses either the *rōdō shinpan* or the *soshōjō no wakai* rather than the *rōdōkyoku assen*.

In terms of redress, as noted by Takahashi (2013: 102), there are noted methodological difficulties in comparing and assessing levels of compensation, as a result of the confidential nature of the two procedures. Nonetheless, in the study conducted as part of the aforementioned University of Tokyo survey on users' experience of the *rōdō shinpan*, Takahashi managed to collect data about damages levels in cases of termination of employment in *rōdōkyoku* mediation and *rōdō shinpan*. Her findings are summarised in table 1.2.

Table 1.2

Procedure	Compensation levels	Fee	Time span to the reaching of a solution
<i>Rōdōkyoku assen</i>	175,000 ¥	-	1 to 2 months
<i>Rōdō shinpan</i>	1,000,000 ¥	131,800 ¥	6 months

Sources: Takahashi (2013: 103), MHLW (2014), Saikō Saibansho Jimu Sōkyoku Gyōseikyoku (2014).

As it is clear from the table, the *rōdō shinpan* scores better than the *rōdōkyoku assen* in terms of the monetary amount of compensation workers are likely to expect. On the other hand, however, the *rōdōkyoku* mediation service is less time-consuming as well as less financially taxing than the *rōdō shinpan* procedure.

From the above, it is possible to make the following observations about issues of access to justice.

First, there is the issue of accessibility. As illustrated by Satō (2013) and Takahashi (2013), factors such as evaluation of evidence and the involvement of lawyers in the process enhance the quality of redress offered through the *rōdō shinpan*, at least in terms of levels of compensation workers might expect to obtain. However, as noted by Satō (*ibid.*: 47 – 49), the same factors do represent an institutional barrier to the procedure for workers. Indeed, by examining trends in legal representation, Satō found that employers are more likely than workers to use a lawyer. In addition, issues of legal fees translate into unequal access to legal representation for different groups of workers: i.e. workers in non-regular employment are less likely to have the financial resources that allow them to have access to representation by a lawyer. Related to this, there is the problem that legal services are still not thoroughly available nationwide which means that, in regions where lawyers are few, access to the *rōdō shinpan* is more difficult (Noda, 2011: 310). Moreover, the administration fees required for initiating the *rōdō shinpan* procedure remain an institutional barrier for workers with limited financial resources (*ibid.*). In order to address these kinds of issues, in 2000 the Japanese government passed the Civil Legal Aid Law (law 55/2000), and also increased the budget allocated to people lacking the necessary financial resources for covering the legal expenses to use the legal system. This was followed in 2004 by the Comprehensive Legal Assistance Law (law 74/2004) which was enacted as part of the justice system reforms. The law established a nationwide legal assistance network, known as the *Hō Terasu* (Law Terrace), with the objective of providing the ‘necessary information and services required for legal dispute resolution’ (art. 2). The legal assistance centres set up by the law are also under the obligation to mediate and facilitate access to legal aid mechanisms for indigent individuals. Although these reform

efforts have had some positive effects, the problem of access to legal services has yet to be overcome (Wagatsuma, 2014; Hamano, 2014). It follows that more vulnerable workers have often to rely on the more accessible administrative mediation service. The latter, however, as shown, offers lower levels of compensation than the *rōdō shinpan*, it has no means of guaranteeing the enforcement of the agreement and – being a voluntary means of dispute resolution – it leaves workers exposed to the risk of employers’ refusal to negotiate.

The second issue concerning access to justice is related to the typology of disputes which enter the two employment ADR mechanisms examined. As seen above, grievances stemming from episodes of bullying and harassment seem to be more likely to go through the *rōdōkyoku assen* than through the *rōdō shinpan*. This is because, as highlighted by Noda (2011: 25 – 26), these problems affect more those segments of the workforce, such as young and non-regular employees, which are unlikely to possess the financial resources to make use of the judicial system. Also, even in the event they are brought into the system, the very nature of these grievances makes it difficult for workers, on whom the burden of proof rests, to collect solid evidence to sustain their claim (Nemoto, 2007). In addition, as stressed by my legal informants, the weighing of such evidence in complex cases such as harassment and bullying requires a quite time-consuming process of fact finding which runs against the rationale of the *rōdō shinpan*. The natural corollary to this is the structural inability of the procedure to deal with grievances which could potentially benefit more from the informed expertise and flexibility it offers.

By providing substantive relief for employment grievances without the emotional and financial costs which formal litigation entails, employment ADR mechanisms such as the *rōdōkyoku assen* and the *rōdō shinpan* are of great importance in expanding access to justice for Japanese workers. However, as we have seen, a

number of issues remain, thereby potentially harming workers' prospects of having equal access to redress via ADR means.

Conclusion

This chapter was concerned with analysing the dynamics of employment dispute processing in Japan. Specifically, I examined the factors that constrain the invocation of rights in the employment field, both as enforceable legal entitlements and as rhetorical tools for social mobilisation; the extent to which judicial remedies can function as a lever of social change by providing meaningful and innovative redress to Japanese workers' grievances; and the role of the recently introduced employment ADR mechanisms in solving disputes and expanding access to justice. The analysis of the evidence presented suggests the following key findings.

The first is related to the factors which hinder the invocation of rights, both as justiciable claims and rhetorical tools, in the Japanese employment field. One of the problems of previous research about rights assertion and disputing patterns in Japan (e.g. Haley, 1978; Ramseyer, 1988) has been the tendency to analyse law as a structured and monolithic whole. However, law is not always amenable to be invoked and, as demonstrated by law-and-society studies (Matsumura and Murayama, 2010; Pleasence, 2006; Genn *et al.*, 1999), disputing patterns are strongly dependent on the type of problem for which aggrieved parties are seeking redress. From this point of view, I have shown that the employment arena is a minefield, and that there are a number of factors which act as constraints on the invocation of employment rights. Specifically, two elements are of particular relevance. The first is the relational concern regarding the consequences that raising an employment claim might entail for either the continuation of the employment relationship or for future career prospects. As the data have illustrated, relational concern is of remarkable importance for young workers and

regular employees. The second element which inhibits rights assertion in employment is cost consciousness about the costs associated with finding a solution to the problem. Cost consciousness is felt especially among non-regular employees who are more likely to be exposed to issues such as low levels of income and job insecurity. A line of reasoning similar to the one applied for patterns of rights assertion has relevance also to counter the argument made by Feldman (2000) in favour of the strategic dimension of rights assertion, i.e. of the use of 'rights talk' as a rhetorical tool in pursue of desired social reforms. In this respect, the analysis presented in this chapter has revealed that the articulation of a rights rhetoric in the field of employment is fundamentally constrained by the difficulty of establishing solidarity ties between different categories of workers given the existence of employment status divisions which exacerbate conflict of interests among different segments of the workforce. Moreover, the fact that employment legislation has implicitly legitimised unequal treatment of certain types of work arrangement also contributes to defusing the potential to engage workers in 'rights talk', as it reinforces the perception that the *status quo* is in some important respects the way things are supposed to be. As pointed out by some of my trade unionist interviewees, this is especially so for non-regular employees who find it hard to dispute being subject to inferior working conditions because they view it as normal.

Secondly, this chapter has challenged the argument made by earlier authors (Upham, 1987; Foote, 1996) that Japanese courts have the potential to act, and have acted, as catalysts of doctrinal and social innovation. By adopting a conflict perspective positing law as an ideological force interacting with other ideologies in society, I have shown that there are major constraints limiting the role of courts as advocates of innovative legal and social developments. This is for three reasons. First, as argued by Rosenberg (2008), judicial decisions can be consequential in affecting change at the social level only if certain conditions are met. Second, even if such favourable

conditions are present, courts, as institutions bound to apply the law, will necessarily tend to reproduce the structural biases and deficiencies embedded in the legislation. Finally, when judicial reasoning is dependent on standards of interpretation such as the ‘common sense’ of society, the dominant ideologies of the social context in which judges operate will inevitably influence and transpire in courts’ decisions. As illustrated by the examined employment case law, the legislative framework adopted by the Japanese government for the regulation of the employment relationship has played a significant role in determining judicial decisions’ uneven distribution of legal redress to different groups of workers. Particularly, we have seen that the *doryoku gimu* approach adopted in the EEOL has jeopardised the judicial process in the area of sex discrimination, and translated into unequal access to justice for women seeking redress against discriminatory practices in the workplace. Furthermore, Japanese legal and social discourse has not adequately problematized the issue of equal treatment for non-regular employees. That is, courts have operated within a social context which is still strongly dominated by the ideology of life-time employment, whilst the issue of equal treatment for non-regular workers is not yet considered of equal importance. Responsive to the social environment in which they exist, Japanese courts’ decisions have sanctioned legal innovation only in those instances where employment stability for regular workers – or workers qualitatively similar in nature, i.e. fixed-term contract employees – was at stake. The same protection has been applied to women inasmuch as they were employed as regular employees. By contrast, Japanese judges have been far less progressive in their interpretation of legal norms with regard to issues of equal pay and treatment of non-regular workers.

Given the limitations of the judicial process, this chapter has subsequently examined the two employment ADR procedures introduced by the Japanese government following the recommendations of the Justice System Reform Council, and

their potential to expand workers' access to justice. These are the *rōdōkyoku assen* provided by the Labour Bureaux of the MHLW, and the court-annexed *rōdō shinpan* procedure. In this respect, this chapter has shown that these new mechanisms of employment disputes resolution have opened new routes for Japanese workers to find a solution to employment problems, thereby expanding access to justice. However, the analysis of the data has also revealed that two important issues remain. The first is the problem of unequal access to the qualitatively superior form of redress offered by the *rōdō shinpan*. As we have seen, this judicial procedure strongly resembles ordinary court procedures in so far as it is premised on the payment of a fee for its initiation, and as it presupposes lawyers' involvement in the proceedings. Although the returns workers might expect in terms of compensation are higher than those offered by the *rōdōkyoku assen*, the costs involved in making use of the *rōdō shinpan* are also higher. This translates into an institutional barrier to the procedure for those vulnerable workers who lack the financial resources to make the initial investment the *rōdō shinpan* entails. As a result, for instance, regular employees – who are already in the best position to benefit from the judicial process – would appear to be also those more likely to interact with the *rōdō shinpan* procedure which, although more expensive and time-consuming than the administrative *assen*, offers a better return on the original investment in the process of dispute resolution. Related to this, the second issue attached to the use of the employment ADR mechanisms examined in this chapter is the fact that grievances such as bullying and harassment show the tendency to be processed by means of the *rōdōkyoku assen* rather than the *rōdō shinpan*. This is because these problems are more often experienced by vulnerable workers for whom costs represent an institutional barrier to the procedure. In addition, complex cases such as bullying and harassment require a time-consuming process of fact finding which runs counter the rationale of the *rōdō shinpan* of providing specialised, and yet speedy, responses to employment

grievances. The main implication that follows is that the *rōdōkyoku assen* and the *rōdō shinpan* are able to expand access to justice only inasmuch as routine, simple employment cases are concerned. In contrast, the more complex grievances which reach the system either find their way in the *rōdōkyoku assen*, which is more often than not a dead end, or are processed through the *rōdō shinpan* which ensures that a solution is delivered but at the expense of a qualitative informed process of fact finding. The *rōdōkyoku assen* and the *rōdō shinpan* were introduced as part of the justice system reforms to serve as two integrated parts of a comprehensive system of employment disputes resolution aimed at expanding the portfolio of responses available to workers to obtain redress to their grievances. However, it is clear that the new routes are not equally open to all workers, thereby undermining the potential of bringing the results the reformers had hoped for.

Finally, the last finding of this chapter is informed by the application of a modified situated justice approach (Berrey *et al.*, 2012) to the examination of employment dispute processing in Japan. This approach places emphasis on the importance of investigating legal processes by focusing on contextualised conceptions of law and legal institutions, and it is particularly fruitful in the examination of relevant observers' views of the *rōdōkyoku assen* and *rōdō shinpan* procedures because it sheds light on the fact that the impact of a reform acquires different meaning and importance for actors coming from different institutional backgrounds within the legal system and often having conflicting interests and concerns in relation to the issues the reform is attempting to address. From this point of view, this chapter has shown that social actors' evaluation of ADR methods of employment dispute processing introduced as part of the justice system reform is relational. That is, the effectiveness in delivering redress that each particular group of observers' attaches to the procedures is contingent on two elements. The first is the ideological position observers have in relation to the 'proper'

way of dealing with employment disputes. The second element is the access to and knowledge of the two systems they possess. Therefore, insiders to the *rōdōkyoku* agency such as C. and D. tended to belittle the importance of judicial alternatives when compared to the administrative service of mediation because of judicial reliance on ‘black and white’ parameters of decision-making which led, in their view, to an oversimplification of the context in which employment disputes occur. By contrast, legal scholars and experts, as interested parties having a stake in the *rōdō shinpan* procedure, considered the *rōdō shinpan* as a valuable addition to the Japanese system of dispute resolution because of the procedure’s capability of offering specialised solutions to employment cases. Finally, trade unionists’ views of both procedures were instead informed by their ideological opposition to legal(istic) and individualised methods of employment dispute resolution, which they saw as a threat to their traditional role as representatives of workers’ interests, as well as to the country’s system of industrial relations.

Further, data also suggest that regular employment remains the benchmark against which most of my informants measured the worth of the *rōdōkyoku assen* and *rōdō shinpan*. Though my informants evaluated these systems differently, the concern they shared was about how far the systems can offer redress to and/or encroach upon interests of regular employees. This, in turn, often led my observers to ignore or downplay the existing structural asymmetries – in terms of time, financial and psychological resources – between different legal classes of workers. In other words, they did not adequately acknowledge the fact that the unequal distribution of organisational resources between different segments of the workforce is likely to push different categories of workers towards different methods of dispute resolution.

This chapter has examined the processes for the resolution of employment disputes in Japan. The evidence presented points to two important insights about the

function of law as a means for the settlement of disputes in the employment arena. The first relates to the structural inequality interwoven into patterns of dispute resolution which means that access to justice, legal or otherwise, is not equally available to all segments of the Japanese workforce. The second builds on Weberian interpretivist approaches positing the dependency of parameters of evaluation on relative points of observation, and reveals the conflicting interests and concerns driving different institutional actors in their interaction with mechanisms dealing with employment grievances. These insights, in turn, raise two important issues. On the one hand, there is the need for a fairer redistribution of both legal capital and organisational resources so as to even out the inequality of access to redress for different categories of workers. On the other, there is the value of adopting a contextualised, 'relational model' approach when discussing dynamics of dispute processing as it sheds light on the way 'people's assessments of a "resolution" are crucially shaped by their evaluation of the competence, interests, and power of other actors involved' (Berrey *et al.*, 2012: 30).

Conclusion

This thesis has analysed the dynamics of legislative reforms and dispute processing in relation to employment in Japan in order to offer new insights into the study of the role of law in Japanese society. This concluding chapter revisits my theoretical and methodological approach before addressing the core research questions raised in the course of my enquiry and the implications for the existing literature.

The study has taken a sociologically rooted approach to the examination of law and legal institutions in Japan. Specifically, the chosen sociological perspective draws on the Weberian tradition of interpretive sociology, thereby placing the focus of interest on the interpretation of the subjective meanings of relevant actors involved in legal processes or interacting in various ways with legal institutions. In contrast to previous studies, this thesis has shifted the focus of discussion from variables such as culture, social norms and institutional constraints for the interpretation of Japanese law to the examination of the contextual factors lying behind the formation, content and interpretation of legal rules. Firstly, my analysis has placed emphasis on the specific conditions which determine the adoption of particular legislative strategies and influence processes for the resolution of disputes. Secondly, it has brought to the fore the subjective understandings of insiders to the legal system and other stakeholders in relation to legal and dispute resolution processes. In line with this internally oriented perspective on the Japanese legal system, my enquiry has built on an analytical notion of law as state law whereby law is equalled with rules formulated, interpreted and enforced by state institutions (Cotterrell, 1992: 38). In addition, it has fed into a theoretical stance which postulates a conflict based view of society which assumes law not as a neutral agent but as an ideological force operating in society in conjunction with other ideologies. Prior to this study, Upham (1987) had investigated the ideological

nature of Japanese law. In contrast to his approach, however, this thesis takes the view that law's ideological dimension is not the end of the analysis, but the beginning. Building on these premises, two functions of law have been examined: law as an agent of change and law as a means for processing disputes.

Law as an agent of change

The first theme this thesis has investigated has been the Japanese government's attempt to use legal rules to redefine the normative order concerning employment relations in the country in order to create a more inclusive labour market by expanding the coverage of employment rights to peripheral workers. The analysis has focused on revealing the legal ideology which has informed employment legislative efforts in Japan, the factors leading to its formation and the implications for the organisation of Japanese employment relations. In doing so, it has demonstrated that the reform endeavours to foster meaningful legal and social change have been fundamentally constrained by a combination of external ideological and institutional forces, and that this has translated into an uneven distribution of legal resources in the employment system thereby exacerbating employment status divisions among different segments of the Japanese workforce.

'The task of an analysis of legal ideology is to explain its nature, sources and effects in particular societies' (Cotterrell, 1992: 115). As discussed in chapter 1, ideology is used as an analytical tool to indicate the currents of ideas which, having acquired legitimacy at a particular historical moment, mediate the relationship between legal interventions and social problems, thereby dictating which legal responses are considered more suitable for dealing with certain social issues. Originally having maintained a non-interventionist stance in the regulation of employment relations, from the mid-1980s the Japanese government began to intervene more proactively in

response to the emergence of issues such as demands for gender equality and equal treatment for non-regular employees. As highlighted in chapter 3, the legal ideology informing the Japanese government's legislative efforts has been the logic of gradualism and reliance on voluntary compliance (moral suasion) enshrined in the *doryoku gimu* regulatory approach used in pieces of legislation such as the EEOL and the Part-time Law. *Doryoku gimu* provisions are non-binding legal rules whose adoption as a means of regulation was justified by the perceived desirability of introducing new employment norms into a system of embedded employment practices without causing abrupt and potentially dysfunctional changes. The examination of the empirical data has highlighted the existence of two factors which have operated in conjunction with the legal ideology of *doryoku gimu* – one ideological and one institutional.

The first is the ideology of regular employment as the legitimate model of reference of employment relationship in Japan. The persistence of this ideological model has been a key driver behind the formation of the legal ideology of *doryoku gimu* for three reasons. First, the idea that regular employment was a deeply embedded practice in Japanese workplaces, highly resistant to change, was the main justification for introducing new employment rules gradually and by relying on voluntary compliance rather than legal compulsion. Second, the dominance of regular employment as a benchmark setter of the way the employment relationship ought to function has been the element constraining the conversion of *doryoku gimu* provisions to imperative norms in the Part-time Law in light of the fact that part-time work does not entail the same degree of commitment to the firm as regular employment, thereby justifying any differential treatment of part-time employees. Finally, because the ideology of regular employment is the one which finds representation in the *rōdō seisaku shingikai*, the administrative organ in charge of employment policy making in

Japan, through the participation granted in the process to representation groups such as the Keidanren and Rengō, both unwilling to change the *status quo* of the organisation of employment relations in the Japanese labour market.

The second factor which has influenced the formation of the legal ideology of *doryoku gimu* is the delegation of employment policy making to the *rōdō seisaku shingikai* mentioned above. An advisory council operating under the MHLW, the *rōdō seisaku shingikai* is in charge of discussing the employment legislative proposals which reach the Diet. The council is composed of representatives from the state, employers' organisations and trade unions in equal numbers. The discussion is premised on the assumption that the proposed legislative actions are an agreed compromise between the differing stances and interests of the social partners. The fact that employment policy making goes through this process, combined with the internal composition of the *rōdō seisaku shingikai* highlighted above, is what determined in my legal informants' views the impossibility of carrying out any drastic employment reform, thereby paving the way towards reforms that are either based on the legal ideology of *doryoku gimu* or else necessarily limited in scope, as in the case of the enactment of the LCL.

Finally, for what concerns the effects of the legal ideology of *doryoku gimu*, the analysis carried out in chapter 3 has shed light on two implications – one existing at the legal level and one existing at the organisational level of Japanese employment relations. In relation to the first level, the examination of the EEOL and Part-time Law has revealed that the gradualist logic associated with the use of *doryoku gimu* has translated into an uneven distribution of legal capital, thereby creating different 'legal classes' of workers each with a different set of legal entitlements. This, in turn, has implications for the extent to which each class has access to legal redress.

The second implication of the legal ideology of *doryoku gimu* is the one pertaining to the organisation of employment relations at the workplace and labour

market level. In this respect, as demonstrated by the examination of the Part-time Law, the reliance on a legal strategy placing emphasis on causing the desired changes gradually and by resting on employers' voluntary compliance has resulted in the exacerbation of employment status divisions among workers, thereby worsening the segmentation of the Japanese labour market. In addition, as exemplified by the case of the EEOL, the gradualist logic of *doryoku gimu* represents a risk in so far as it offers employers time to devise new strategies to sidestep the new rules being introduced.

Law as a means for processing disputes

The second theme that this thesis has explored has been law as a means for processing disputes. Specifically, the analysis has considered two dimensions of the invocation of law. The first is the extent to which the mobilisation of law via litigation in state courts is conducive to a redefinition of the established normative order in society. The second is the invocation of law as a way for obtaining redress for a grievance. Before addressing these issues, I have first considered what factors, if any, may impede the mobilisation of law in the field of employment. In this respect, the analysis carried out in chapter 4 has revealed that employment rights, both as justiciable claims as well as rhetoric tools for pursuing social goals, are not easily amenable to invocation. This is for two reasons. The first is that any worker has competing interests which may deter them from mobilising the legal claims at their disposal. It follows that, even when experiencing a grievance, workers may hesitate to seek redress because of a concern about the implications this might entail for their work life and career prospects. This is coupled with the issue of the costs of raising a claim, which still represent a significant barrier to the assertion of rights in formal venues. The second reason explaining the difficulty of mobilising law in employment is the existence of conflicts of interest among workers due to employment status divisions. This weakens solidarity ties

between workers, thereby making difficult the creation of a shared platform of coordinated action for pursuing a common objective.

After addressing this issue, my analysis has moved to considering whether formal litigation can enhance legal growth²¹⁵ in a system of law. The existing literature about the Japanese legal system has emphasised the capacity of Japanese courts to act as catalysts of social change through the creation of new legal rules, and often pointed to the employment field as the area of law where this judicial activism has been more prominent. However, the examination of landmark employment cases carried out in chapter 4 has challenged this view, and demonstrated that Japanese courts have been far less innovative in their creation of judicial norms than existing scholarship credits them with being. In particular, my analysis has brought into light two issues which have so far not been adequately acknowledged by academic literature. The first is the fact that the creation of employment norms by the Japanese judiciary, rather than an expression of doctrinal innovation, has been a mere sanctioning of employment practices already existing in the Japanese labour market. The second is the recognition that judicial law-making is not in itself value-free. Rather, as demonstrated by the examination of relevant cases concerning the regulation of non-regular employment, judicial sentences are likely to reflect the legal ideology enshrined in the applied legislation and, more generally, the currents of ideas which have gained legitimacy in the social setting of which judges are part.

Finally, my investigation of law as a means for processing disputes has explored the functioning of two ADR mechanisms for the resolution of employment grievances. These are: an administrative mediation scheme, the *rōdōkyoku assen*, created in 2001 and managed by the Labour Bureaux of the MHLW; and a court-annexed procedure, the *rōdō shinpan seido*, established in 2004 and administered by district courts. The

²¹⁵ As explained in chapter 4, legal growth is understood as either the creation of new rules or the expansion of the coverage of existing ones to groups previously excluded from it.

objective of the analysis of these ADR schemes was twofold. First, in light of the limitations of formal litigation highlighted above, to examine the extent to which these procedures have expanded access to justice for Japanese workers. Second, to shed light on how their introduction was perceived by institutional actors having a stake in the way employment grievances are managed.

With regard to the first point, my analysis has shown that the establishment of these two ADR mechanisms has expanded the portfolio of solutions available to workers to obtain redress, but that serious issues remain in terms of patterned disparities among the kind of employment grievances which enter the ADR system. In addition, the judicial nature of the *rōdō shinpan* procedure tends to recreate at the ADR level the cost barrier existing in formal litigation, thereby making access to the scheme more difficult for workers having limited financial resources.

In relation to my second objective, the examination of the empirical data has brought into focus the conflicting interests and concerns of different institutional actors in connection to the employment ADR system. That is, there was no shared understanding of what constitutes the resolution of an employment problem. Rather, each group of observers evaluated the procedures by measuring their worth against their own ideological position about what represented meaningful redress. Therefore, whilst legal scholars placed importance on the finding of a solution of the legal aspect of a dispute, insiders to the *rōdōkyoku assen* of the MHLW gave priority to addressing the underlying issues of employment controversies and acknowledged that not all grievances are amenable to being solved. By contrast, trade unionists often expressed a negative view of employment ADR schemes in light of their belief in the collective dimension of the management of employment relations.

Implications for the study of Japanese law and beyond

The findings highlighted above have implications which go beyond the legal field of employment. The first set of implications is related to the study of Japanese law in general. In this respect, my enquiry points to an important insight which has often been downplayed by the existing literature on the subject. That is, my contextualised approach based on interpretive sociology draws attention to the need to avoid treating law as a unitary entity, thereby generalising about the role of law in society. Instead, it calls for the importance of shifting our focus to the analysis of the contextual factors and the specific conditions which shape the form, content and reception of particular legal reforms. This, in turn, helps to throw into the limelight the social and economic interests which find expression in legal and dispute resolution processes, thereby preventing us from falling into the trap of considering law as an agency in itself rather than an instrument of human actors operating in a specific social setting.

From this point of view, the examination of the employment field has been a valuable case study. The analysis of employment legislative strategies, of the context in which legal rules have been formed, and of the views of informed insiders to legal institutions, has shed light on the dynamics, tensions and negotiated compromises which lie behind the adoption of a chosen regulatory approach. This resulted in challenging a reading of Japanese law (Upham, 1987) which saw in the ideology of moral suasion a voluntary attempt by governmental *élites* to deny citizens justiciable entitlements so as to keep social conflict outside of formal dispute resolution venues. Rather, my in-depth examination of the *doryoku gimu* regulatory approach has demonstrated that the efforts of the Japanese government to foster a change in the normative order of employment relations in the country has been fundamentally inhibited by the existence of important ideological and institutional constraints. Namely, these constraints have been the resilience of regular employment as the ideological model of reference for the

organisation of the employment relationship, and the delegation of employment policy making to the *rōdō seisaku shingikai* where participation is limited to sections of the Japanese employment system having a stake in the maintenance of the *status quo*. Similarly, contrary to the arguments of previous studies (Haley, 1978; Ramseyer, 1988; Foote, 1996; Feldman, 2000; Pardieck, 2008), my investigation of dispute processing in employment has revealed that litigation is not necessarily conducive to legal growth and doctrinal development, that a broader constellation of factors and circumstances should be taken into consideration when examining people's choice to invoke the law, and that different interests and concerns come into play in shaping various institutional actors' perceptions about the value of particular dispute resolution processes. In other words, the findings of my investigation caution against overgeneralising about the role of law in society and call for a more context specific approach, which recognises the need to pay attention to the way competing, and sometimes conflicting, interests from different actors interacting with the legal system come into play in shaping the formulation and reception of legal reforms.

The experience of employment reforms has implications also for understanding the dynamics of the justice system reforms advanced in the Heisei period. As argued in chapter 2, one key objective of the reforms was to increase levels of transparency and accountability in the country in order to enhance citizens' access to justice. However, in the field of employment, this objective is undermined by the resilience of the legal ideology of *doryoku gimu*, of whose formation the ideology of regular employment has been a key driver, and the delegation of the employment policy making to the *rōdō seisaku shingikai*, institutional legacy of the pre-reform period, with the resulting uneven distribution of legal capital among workers.

Second, the findings of this thesis have implications for the field of Japanese industrial relations. As we have seen, the casting of important employment norms

concerning gender equality and equal treatment in *doryoku gimu* terms has been a key element in exacerbating employment status divisions among workers, worsening inequality in the Japanese labour market. Inequality lessens cooperation and loosens solidarity ties (Smith *et al.*, 2003; Fung and Au, 2014). In addition, as highlighted in chapter 4, Japan has experienced a steady growth in the level of individual employment disputes which is being met with an increased role for state agencies in their resolution. These trends raise important issues for Japanese trade unions, which are confronted with the challenge of renewing themselves and finding new organising strategies in the changing landscape of Japanese employment relations.

Finally, the issues which have been addressed in this thesis illuminate an important and too often overlooked dimension of Japanese society by scholars in the field of Japanese Studies. That is, the role that legal rules play in organising social life in Japan. In the specific field of employment, recent years have seen some valuable studies trying to grapple with the reality of employment dynamics in Japanese society from a variety of methodological perspectives (see, e.g., Turner, 1995; Matanle, 2003; Carlile, 2005; Brinton, 2011; Sugimoto, 2014). The findings of this thesis add a significant contribution to this strand of literature by shedding light on how legal rules and institutions have had a crucial part in shaping the arena of employment relations in contemporary Japan, and help to throw into the limelight the importance of examining law and the legal system for a complete understanding of the functioning of Japanese society.

From here to where?

This thesis has explored the dynamics of employment legislative reforms and dispute processing during the last thirty years in Japan. In doing so, it has highlighted some important issues in relation to the regulation of employment relations in the country.

Namely, these are the unequal distribution of legal and organisational resources among different segments of the Japanese workforce and the implications for access to legal redress. The findings suggest that action is required in order to remedy these imbalances. From this point of view, a possible measure is the introduction of a single contract of employment²¹⁶ applied evenly to all segments of the workforce. This would enhance a fairer redistribution of resources in the labour market and lessen inequality, thereby also contributing to the revitalisation of the labour movement by favouring unions' organising efforts. This measure has been suggested in other dual labour markets such as Italy (Boeri and Garibaldi, 2008) with the objective of evening out the inequalities in the distribution of employment and social protections among different groups of workers. In some respects, the introduction of the *gentei seishain seido*²¹⁷ proposed by the Employment Working Group represents a step forward in this direction, although the scope of application is for the moment limited only to the regular category of employment. However, given the limitations of the *doryoku gimu* legislative approach highlighted in the course of this investigation, caution is required about the suggestion of the MHLW's commission of experts that the scheme be regulated through the use of *doryoku gimu* provisions. Related to this, there is the limited access that certain sections of the Japanese employment system have to the employment policy making process. In this respect, it would be beneficial if participation in the *rōdō seisaku shingikai* was broadened so as to include segments currently excluded from discussion, such as representatives from other union federations as Zenrōren and Zenrōkyō, as well as small and medium size enterprises' organisations. Finally, there remains the problem of access to justice. In this respect, a more even redistribution of legal capital among workers through the introduction of a single contract of

²¹⁶ That is, the introduction of a contract of employment establishing working conditions *equal* for all segments of the workforce in the labour market.

²¹⁷ See chapter 2.

employment applied to all could already contribute to redress the inequality in access to legal relief. This, however, should be complemented with the strengthening of legal aid measures so as to ensure access to the dispute processing system for those workers lacking the financial resources to mobilise the law. Of course, these suggestions are unable to offer comprehensive solutions to the complexity of issues that have been affecting the Japanese working environment. However, they can be a step forward toward the creation of a society which puts social justice at the fore.

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Interviews

Note: All interviews were conducted in Japanese with the exception of the interview with Mr. Louis Carlet, executive president of Tōzen Union, which was held in English.

Oh Hak-soo, senior researcher (Industrial Relations and HRM Department), Japan Institute for Labour Policy and Training, 10 October 2013, 2hrs. ca.

Mizumachi Yūichirō, Professor in Labour and Employment Law, Institute of Social Science, University of Tokyo, 16 October 2013, 1 hr.

Watanabe Noriaki, executive president of Union Chiyoda, 16 October 2013, 1 hr.

A., Professor of Labour Law, 17 October 2013, 1 hr.

Nakakubo Hiroya, Professor in Labour and Employment Law, Graduate School of International and Corporate Strategy, Hitotsubashi University, 22 October 2013, 1 hr. and a half.

Louis Carlet and Okunuki Hifumi, respectively general secretary and executive president of Tōzen Union, 23 October 2013, 1 hr ca. (I afterwards requested a second interview with Mr Carlet alone, and this was held on 25 November 2013, also lasting for about 1 hr).

Ebana Arata, director of the Contingent Labour Bureau, Zenrōren (National Confederation of Trade Unions), 24 October 2013, 1 hr.

Matsumoto Hisashi, general secretary of Otagaisama Union, 31 October 2013, 1 hr 10 min ca. (this meeting was attended by six other members of the union, three of them actively participating in the interview).

Tashima Yasutoshi, general secretary of Nihon Rōdōsha Kyōdō Kumiai (Japan Workers Cooperative Union, i.e. a federation of workers cooperatives), 1 November 2013, 1 hr.

Reiga Chang, regular employee (aged 33, Taiwanese), 1 November 2013, 40 min.

Shimizu Naoko, general secretary of the Precariat Union, 2 November 2013, 1 hr.

Hoshino Yūichi, general secretary of Haken Union, 5 November 2013, 40 min.

Hoshina Hiroichi, general secretary of Shinjuku Ippan Rōdō Kumiai, 11 November 2013, 1 hr ca. (during the last 15 minutes, the interview took place with the executive president of the union, Mr. Yashiro Noboru)

Nakaoka Motoaki, general secretary, Zenrōkyō (National Trade Union Council), 12 November 2013, 1 hr.

Maruta Mitsuru, assistant director of the Department of Non-regular Employment, Rengō (Japanese Trade Union Confederation), 13 November 2013, 1hr.

Sugeno Kazuo, current president of the Japan Institute for Labour Policy and Training, 19 November 2013, 1 hr.

Suda Mitsuteru, general secretary of Tokyo Tōbu Rōdō Kumiai, 20 November 2013, 1 hr. and 20 min.

B., part-time employee (aged 39, Japanese), 21 November 2013, 40 min.

C. and D., Tokyo Labour Consultation Office, 26 November 2013, 1 hr and a half ca.

Kamata Kōichi, Professor in Labour and Employment Law at Tōyō University and chair of the study group on Labour Dispatching Law reform, Tōyō University, 26 November 2013, 1 hr ca.

E., formerly part-time (*arubaito*) employee now working under a dispatch labour contract (aged 44, Japanese), 29 November 2013, 1 hr. ca.

F., subcontractor (*ukeoi shain*) (aged 50, Japanese), 30 November 2013, 40 min.

G., formerly agency worker afterwards hired as a regular employee (aged 48, Japanese), 30 November 2013, 1 hr.

H., Lawyer specialising in labour related matters, 3 December 2013, 45 min.

Appendices

Appendix 1 The development of interview questions

This addendum describes how the interview questions (appendix two) used for the collection of the empirical data employed in this thesis have been developed. It is divided into two parts. The first part recaps the theoretical framework underpinning the interview questions, as well as the overarching aim and specific topics which have inspired the questions. The second part is the research ethics declaration form submitted as part of the Ethical Approval process of the University's Research Ethics committee. The form contains relevant information about the interviewees' recruitment process, data anonymization and data handling.

1. The theoretical foundation of the interview questions

As discussed in chapter one, my thesis adopts a theoretical perspective rooted in the Weberian tradition of interpretive sociology. In contrast to positivist sociological approaches, strongly focused on the pursue of quantifiable measurements of attitudes about social phenomena, the aim of interpretive sociology is to gain an understanding of the subjective meaning that actors involved in social processes attach to situations and social actions and interactions. This theoretical framework has influenced the development of the interview questions in one crucial respect. That is, the interviews were not aimed at capturing observable regularities of behaviour or attitudes. Rather, they were devised to deal with questions of *meaning* and, by engaging the interviewees in an open discussion, of the subjective interpretations of the issues examined in the thesis.

The most important issues have been those examined in chapters three and four. That is, Japanese legal approach and decision making process about employment, methods for the resolution of employment grievances, the current employment situation and prospects for the future. Although I created an interview sample for each group of interviewees (see appendix two) in order to address these topics in the course of the interview, in line with my interpretivist approach, I kept the interview process as flexible as possible so that their personal views and understandings could emerge an open dialogue with the researcher. This means that, in many respects, each interview is unique and not an exact replica of the interview template.

2. Research Ethics Declaration Form

The methodology of my research can be described as socio-legal, and will involve the use of both documentary study and qualitative research methods. In contrast to a pure legal approach to the issue of employment relations, a socio-legal perspective on the subject starts from the understanding of law as a social phenomenon, ‘an aspect of social relationships in general’ (Cotterrell, 1998: 183). Consequently, empirically-based research becomes crucial in order to gear legal studies to the reality of law, i.e. the way legal rules and social practices interact.

The project will be divided into two stages. At the first stage, I will be concerned mainly with a review of the relevant literature on the subject as well as data collection such as available statistics on the extent and structure of non-standard employment in Japan, litigation and conciliation rates etc. in order to build up my theoretical framework. The second stage will involve the use of case-study method, with the use of qualitative interviews as the main source for the collection of empirical data. Interviews will be used mainly as an explorative device in order to infer information about issues concerning the legal inclusion of non-standard employees into the mainstream of the core workforce, the decision making process which led to the employment reforms under investigation, methods for the resolution of employment grievances and, more importantly, the understanding and interpretations that insiders to the Japanese legal system and other stakeholders have about these topics. Specifically, I will approach four groups of informed actors: legal scholars and experts, labour consultants based in administrative agencies involved in the process of employment disputes resolution, trade unionists, and workers. It is foreseen that interviewees will be recruited either directly by e-mail or by proxies through the contacts made during my previous stay in Japan at the Japan Institute of Labour Policy and Training. The process of selection of the interviewees is based on the purposive sampling method. As pointed out by Bryman (2008: 415):

‘[T]he goal of purposive sampling is to sample cases/participants in a *strategic way* (...) sites, like organisations, and people (...) within sites are selected *because of* their relevance to understanding a social phenomenon’ (emphasis added).

Linked to sampling, there is the issue of representativeness. In line with the interpretivist qualitative nature of my enquiry, representativeness is not considered of primary importance as the focus of the research is on the subjective understandings about

Japanese employment reforms of insiders to the legal system and other stakeholders. As argued by Bernard (1995: 72):

‘Scientific samples are not needed in research where the study of enquiry is homogeneous. (...) And there is no need for scientific sampling in phenomenological research, where the object is to understand the *meaning* of expressive behaviour or to understand *how* things work’ (emphasis added).

Therefore, rather than looking for a representative sample, I will give priority to gaining access to a small number of key informants.

The type of interview I intend to use is a semi-structured interview with a core of interview questions to address some particular topics but otherwise leaving it as an open process with further questions developing in the course of the interviewing. The qualitative data so obtained will be disaggregated and analysed by theme so as to make it easier to draw comparisons between the views of different actors on a particular issue. To this end, I will transcribe interviews only partially and only in so far as it will help me to broaden my understanding on the issue. In making use of this research method, I am aware of the ethical requirements associated with it. Therefore, I will give participants all the necessary information about the research topic, procedure and dissemination in the native language (Japanese) and obtain informed consent. Translation of interview questions, information sheet and informed consent forms will be checked by a native speaker, though I anticipate conducting the interview in Japanese myself. No risk of harm or distress to the research participants is foreseen. Data collected will be used only for the limited purposes of the research and within the time frame of the researcher’s academic life. Subject to the participant’s request, no personal information concerning the identity of the informants will be disclosed. However, I appreciate that some participants - e.g. legal scholars and/or activists - might wish their identities to be known and, therefore, in this case anonymity will not apply.

Issues concerning confidentiality will be kept in mind when dealing with data storage. Confidential data will be stored securely and protected through the use of encryption software. In addition, I will use identifier codes on data files and ensure that private data will not emerge in any transcripts.

Appendix 2 Interview questions templates

As explained in Appendix 1, four groups of stakeholders were approached in the course of the research process. This addendum comprises the interview questions templates which were used for the collection of data. The informed actors I approached are: legal scholars and experts, labour consultants based in administrative agencies involved in the process of employment disputes resolution, trade unionists, and workers.

1. Interview with legal scholars and experts

I Legal approach and legal process

1. In its post-war history, Japan has often relied on criminal and administrative rules for the regulation of employment relations. In pieces of legislation such as the Equal Employment Opportunity Law, Parental Leave Law, Part Time Law however a different approach was adopted, strongly relying on *doryoku gimu* provisions.
 - a) Why was such an approach adopted, instead of the usual criminal sanctions based one?
 - b) Do you think it is effective? What makes it so? What regulative advantages it offers in comparison to the public law approach?
 - c) Do you think that the use of *doryoku gimu kitei*, especially with regard to issues such as equal treatment of part-time and dispatched workers, might risk to exacerbate the disparities between regular and non-regular employees? If not, why?
 - d) In your opinion, why has still no agreement been reached with regard to the issue of equal treatment for non-regular employees? What are the obstacles which hinder the introduction of equality principles for non-regular employees in the Japanese regulatory framework?
 - e) Do you think that such an approach carries the potential risk of jeopardizing the judicial process? (e.g. EEOL: different version of the law, not retroactive, with escalating degrees of protection/ how to interpret *doryoku gimu* provisions?)
 - f) Administrative guidance is usually one of the main regulatory technique used to secure compliance with pieces of legislation based on ‘duty of endeavour’ provisions.
 - i. Would you say it to be effective?
 - ii. Considering that administrative guidance is based on voluntary compliance, has the MHLW the authority and the means to monitor firms with regard to the content of the guidance?
 - iii. If so, what penalties – if any – might a firm incur for non compliance?
2. In 2007, Japanese government enforced the Labour Contract Law which rests on private law rules for the regulation of labour relations.

- a) What are the advantages and disadvantages of such an approach to labour relations?
 - b) Substantive rules which state clearly the rights and duties of the parties to a labour contract are looked favourably as a means which help to prevent disputes from arising. Would you agree? If so, why there was such a strong opposition when the law draft was being discussed in the *Rōdō Seisaku Shingikai* both from the labour and employer sides?
 - c) Do you think Japanese labour law is likely to evolve towards a more private law based approach in the future?
3. I would like now to talk a bit about the legal process, in particular about the decision-making processes which take place in *shingikai*.
 - a) In your opinion, what are the main advantages associated to *shingikai* based policy making? And the main disadvantages?
 - b) Would you agree with the statement that *shingikai* based policy making allows and indeed broaden trade unions' participation in the policy making process, thereby resulting in policies more attentive to workers' interests?
 - c) Do you think the *rōdō seisaku shingikai* have been weakened by the emergence of the Deregulation Committees.

II Labour Disputes Resolution Methods

4. Japan is considered to be a country with low litigation rates and, indeed, in the field of employment the number of individual labour disputes has never been high.
 - a) Which are the factors which induce Japanese people to make scarce use of the judicial system?
 - b) In the field of employment in particular, which are the factors that discourage workers from venting their grievances against employers via the judicial system?
5. Starting from the burst of the bubble onward, Japan experienced a steady increase of the number of individual labour disputes.
 - a) Can you tell me which were the causes of such an increase?
 - b) Would you link the increase of individual labour disputes to the increase of non-regular employment? Would you say non-regular employees are more likely to engage in disputes?
6. Although the number of individual labour disputes increased in Japan, it is still quite low in comparison with countries like Germany or France. Nonetheless, Japan has introduced new procedures for the management of such disputes.
 - a) Why was the need for a special procedure felt?
 - b) What are the objectives of their introduction?
7. Before the introduction of the *Rōdō Shinpan*, in 2001 Japan introduced a statutory scheme to provide counselling and mediation (*assen*) services via the local offices of the MHLW.
 - a) How does this system works?

8. Notwithstanding the existence of this special administrative service, in 2004 the *Rōdō Shinpan* was introduced.
 - a) In what way does the *Rōdō Shinpan* procedural approach differ from the measures of the Labour Consultation Centers? What are the advantages for the workers in using the Labour Tribunal rather than the Centers' mediation services?
 - b) The *Rōdō Shinpan* is based on a conciliation (*chōtei*) procedure. In what does this scheme differ from that of civil conciliation (*minji chōtei*)?
 - c) What is the scope of jurisdiction?
 - d) Is the process confidential?
 - e) Are the decisions of the tribunal published? Are they equalled to court sentences? (i.e. setting precedents for future cases to be followed by both courts and labour tribunals alike)
 - f) The decision of the labour tribunal is not binding on the parties. What happens if both the parties accept it but then one of them does not comply? Are there any means in place to secure compliance? (e.g. as in the case of arbitration awards)
 - g) Are the parties free to withdraw from the procedure at any stage?
 - h) Who appoints the members of the tribunal? Can the parties choose the members of the panel (in particular with regard to the selection of the two lay judges)?
 - i) Is legal assistance (representation by a lawyer) deemed necessary? If so, is there not the risk that the procedure will suffer from the same shortcomings of the judicial process? (e.g. lawyers shortage, costs)
 - j) Do you evaluate the introduction of the *Rōdō Shinpan* positively? What advantages does it offer in comparison to normal civil procedure?
 - k) What implications does the establishment of the *Rōdō Shinpan* have for the judicial process? (e.g. hindering doctrinal development and legal growth)

III Employment situation and expectations for the future

I would like to conclude with some questions about the future of labour and labour law in Japan.

9. In the last years, the Japanese employment system has undergone major changes.
In your opinion, what have been the most relevant changes? What implications do they bear for the future development of Japanese society?
10. a) What are the main disadvantages associated with non-regular employment?
 - a) What could be possible solutions to them?
 - b) What is currently being done in Japan to ameliorate the condition of non-regular employees?
 - c) In 2009, the *Minshutō* openly declared in its manifesto that one of its objective was to tackle the problem of inequality in treatment of non-regular

employees, specifically for what concerns wage differentials. Now, however, the political climate is quite different. What is the position of the new political coalition with regard to these issues?

- d) The 'Regulatory Reform Council' of the new Abe administration submitted a report last June where it advanced a number of further deregulatory measures in the field of employment and of the labour market. One of these is the use of the so-called 'limited regular full-time employees scheme'.
 - i. How do you evaluate it? What are its advantages and what its shortcomings?
 - ii. Do you think its introduction will help to make Japanese labour market more open and fluid increasing employment opportunities?
 - iii. What could be the risks associated with the introduction of this system in terms of workers' working conditions (e.g. heavy workloads, precariousness of employment, income inequalities)?
 - e) Another proposal concerns the further liberalization of the temporary industry, specifically the removal of the prohibition on the use of temps to replace regular workers. How do you evaluate this policy proposal? Do you foresee some risk if this prohibition was indeed lifted (e.g. precariousness of employment)? Or any positive development (e.g. more employment opportunities for dispatched workers)
 - f) What implications does the rise of non-regular employment bears for employers (e.g. lack of cooperation, loyalty issues, increases of disputes etc.)
11. What future do you see for Japanese labour market? Do you think we will assist to an increased participation of women, for example? If so, in what position (e.g. core/periphery)?
12. Do you think Japan will finally come to confront the issue of equal treatment and equal working conditions for non-regular workers (part-timer/dispatched workers/fixed-term workers), given their steady increase in the labour market? If so, how?
13. What do you think might be a possible solution to the problem of labour shortage Japan is likely to face in future years? What political steps should be taken in this respect?

2. Interview with labour consultants based in administrative agencies involved in the process of employment disputes resolution

I History of the organisation

- 1) The first thing I would like to ask is, could you tell me more about the history of the Tokyo Labour Consultation Office?
 - a) When was it established? Is it a branch of the Labour Bureaux of the MHLW?
 - b) What kind of services do you offer?
 - c) How long have you been working here? Can you tell me more in detail what you do as part of your job as a labour consultant here at the Tokyo Labour Consultation Office?

II Involvement in the process of resolution of labour related grievances

- 2) Could you give me some general information about the workers who make use of your services? For example, about characteristics as gender, age group and employment status.
- 3) Are workers more often employed in big firms or in small/medium-sized enterprises?
- 4) Generally speaking, what are the most common reported grievances?
- 5) Which are the most common routes by which workers come to know about the services offered by the Tokyo Labour Consultation Office? Does the Office have a plan/strategy to disseminate information among workers/employers about the services on offer?
- 6) I understand that each case is different, but could you please tell me what course of action you would normally suggest to the worker in order to address his/her grievance? For example, referral to the company HR department or to a lawyer/trade union.
- 7) You mentioned before that you have been working in this capacity for the past 20 years. Would you say there has been a change in the type of employment problems experienced by workers? If so, what kind of employment grievances were more common 10 years ago compared to now?
- 8) Other than consultation and advice, what kind of support does the Tokyo Labour Consultation Office offer to workers who experience a grievance in the workplace?
- 9) Could you please comment on the knowledge and consciousness that people [both workers and employers] who make use of the services you offer have? Would you define it as weak/incomplete? If so, why do you think that is the case?
- 10) In the event the grievance is not solved to the satisfaction of the worker, what course of action do you suggest him/her? What other options are open to him/her?

- 11) What are your views in relation to the mediation (*assen*) service introduced by the government in 2001? Could you please highlight any strengths or shortcomings?
- 12) Recent years have seen an increasing participation of trade unions, specifically of community and general unions, in the process of resolution of individual labour disputes. They are increasingly becoming established centres offering advise, support and material support to workers in relation to the resolution of employment grievances. Do you see this as a positive development? Why yes/not?

3. Interview with trade unionists

I Present Situation of Trade Unions

- 1) In recent years, the unionization rate of Japanese trade unions has experienced a steady decrease.
 - a) In your opinion, which are the causes of this trend?
 - b) What actions have you taken to remedy this situation? Are these efforts bearing some results?
 - c) Are you trying to combine your efforts with other trade unions (Rengō/Zenrōren)?
 - d) In the current employment situation, it appears clear that trade unions will have to rely more and more on non-regulars workers for survival. What measures are being taken to unionize these workers? Are you focusing on a particular group (part-time²¹⁸/haken/contract workers)?
 - e) What are your objectives with regard to non-regular employment? What improvements do you aim to achieve?
 - f) What actions are you taking to balance the different interests of regular and non-regular employees?
 - g) What are the reasons usually given by workers for joining the union? (In case of general and community unions) Do they usually join after the dispute has arisen or are there many cases involving workers who were already members?
 - h) The current Abe administration has recently launched another reform of the labour market and employment system.
 - i. What do you think of these reform efforts?
 - ii. What are its strengths? And its shortcomings?
 - iii. One of the measures proposed by the 'Regulatory Reform Council' concerns the use of the so-called 'limited regular full-time employees scheme'. How do you evaluate it? Do you think its introduction will help to make Japanese labour market more open and fluid increasing employment opportunities? What could be the risks associated with the introduction of this system in terms of workers' working

²¹⁸ What is meant by 'part-time' worker?

- conditions (e.g. heavy workloads, precariousness of employment, income inequalities)?
- iv. Another proposal concerns the further liberalization of the temporary industry, specifically the removal of the prohibition on the use of temps to replace regular workers. How do you evaluate this policy proposal? Do you foresee some risk if this prohibition was indeed lifted (e.g. precariousness of employment)? Or any positive development (e.g. more employment opportunities for dispatched workers)?
 - v. What challenges does it pose to trade unions?

II. General and Community Unions

- 2) I should like now to talk a bit about General and Community Unions and their role in the process of the resolution of labour disputes.
 - a) First of all, a clarification. In what are general and community unions different?
 - b) Which are the reasons/causes which led to their establishment?
 - c) To what category of workers is membership open?
 - d) Which strategies do they adopt in order to foster an improvement of their members' working conditions? (e.g. collective bargaining for pay rises/equal treatment)

- 3) General and community unions are quite active in the process of resolution of individual labour disputes.
 - a) Are there cases where enterprise based unions perform a similar role? If not, why?
 - b) What kind of employees are more prone to complain about a grievance? (e.g. regular/non-regular; male/female; young/middle age/older; among non-regular workers? part-time/haken/contract)
 - c) What are the main objects of disputes/reasons workers complain about?
 - d) When a worker makes a complaint and a dispute arises, what are the first steps taken by the union to resolve it?
 - e) What happens if bargaining fails in reaching its objectives?
 - f) If all other methods fail, do you assist workers in seeking alternatives (e.g. mediation service provided by administrative bodies/*Rōdō Shinpan*)
 - g) Were case be, do you provide members with legal assistance (e.g. economic assistance in paying legal fees/free legal assistance from a lawyer)?
 - h) If the attempts to resolve the dispute amicably or through alternative means of dispute resolution fail, do you encourage workers to go to court? If yes, are they willing to go?
 - i) Are workers generally satisfied of the intervention of the union?
 - j) Do workers remain in the union also after the resolution of the dispute? If they leave, why do they?

- k) Do you think that the role played by community and general unions in the resolution of individual labour disputes may prove significant also for the improvement of employees' working conditions in general at firm level?
- 4) Apart from their role in dispute resolution, what is in your opinion the significance of general and community unions in the context of Japanese industrial relations and society?

III Expectations for the future

- 5) In your opinion, how will the Japanese system of employment evolve in the future? (e.g. further diversification of the workforce/decrease of regular employment/increase of unemployment)
- 6) What new challenges will trade unions have to face and what is expected of them?
- 7) Do you think that, within the context of individualization of labour relations, general and community union are bound to play a major role in the future?
- 8) Do you think that with the decrease of regular employment, the importance of enterprise based unions will wane and pose a threat to the cooperative labour-management relations Japan experienced in the past?
 - a) Do you expect Japanese industrial relations to become more adversarial with the increase of the diversification of Japanese workforce?

4. Interview with workers

I Worker's characteristics

- 1) Which is your category of employment? (regular/non regular; if non-regular: *pāto, haken, keiyaku shain*)
- 2) How old are you?
- 3) What education degree do you have? (high school/bachelor/master)
- 4) Have you changed many jobs so far? If so, how many? Have you ever experienced any problem to find a job?
- 5) For what kind of firm were you working? Was it a big firm? Or more small-medium sized?

II Grievance

- 6) Can you tell me a bit about the problems you experienced at work?
- 7) How long have these problems been going on before you decided to tell someone about them?
- 8) Who did you talk to in the first place?
- 9) How long did you wait before seeking help? (if a long period lapsed since the occurrence of the problem) Why did you wait so long?
- 10) Why did you decide to seek help in the end?

- 11) When making your decision, did you decide to go to a trade union as a first option?

III Dispute Resolution Measures

- 12) Did your firm have in place internal procedures for handling grievances?
- a) If so, did you try them before seeking help outside?
 - b) If yes, why did they not work?
 - c) Were you a member of an enterprise based trade union at your workplace?
- 13) Did you avail yourself of the counselling services of Labour Consultation Centers? If so, how did you know of their existence?
- 14) Do you know about the mediation (*assen*) services provided by the *funsō chōsei iinkai*? If yes, from what source did you know about them? Did you try to resolve the dispute via this route?
- 15) Do you know about the *Rōdō Shinpan*? If yes, from what source did you know about it? Did you try to resolve the dispute via this route?
- 16) Had the dispute not been resolved otherwise, would you have been willing to go to court? If not, why?

IV Outcome of the dispute

- 17) How was the dispute resolved?
- 18) Are you happy with the way the trade union handled the process?
- a) Did you feel supported by the union?
 - b) If so, was this support important for you?
- 19) After the resolution of the dispute, did you resume your position in the firm?
- a) If not, why?
 - b) What are you currently doing now?