XVIII WORLD CONGRESS OF LABOUR AND SECURITY LAW

Paris, September 5th to 8th 2006

TOPIC 1
TRADE LIBERALIZATION & LABOUR LAW

JAPAN

Part I & Part II :
Professor Hiroya NAKAKUBO, Kyushu University
nakakubo@law.kyushu-u.ac.jp

Part III & Part IV:
Professor Shin-ichi AGO, Kyushu University
agos@law.kyushu-u.ac.jp

I. IDEOLOGICAL DEBATES AND THE LABOUR LAW

1. **Does it exist in your country a debate on the reformulation of the labour law in the light of:**
   - (a) **The globalization process;**
   - (b) **Technological change;**
   - (c) **Changes in the organization of work?**

"Globalization" became a common Japanese term in the 1990s and it certainly has relevance to our labor law system. In fact, some labor law scholars collaborated to publish a book in 2003, the title of which may be translated as "Globalization and the Future of Labor

Law" (Fujio Hamada, Kozo Kagawa & Shinya Ouchi eds., Keiso-shobo Publishing Co., Tokyo). Globalization is often mentioned in the context of deregulation. This is represented by the employers' call for deregulation of labor standards so that they may survive in the age of global competition, or competition with low-wage Chinese companies in particular. In a broader sense, however, it involves the reshaping of Japanese economic and social systems, including employment and labor, from the standpoint of "global standards." Gone are the glory days of Japanese model – long-term transactions among 'keiretsu' companies, exclusionary mutual stock-holding of corporations, bureaucratic regulation through administrative guidance, lifetime employment and promotion of managers from within, governmental financing through post office savings, etc. Under the slumping economy, these traits came to be blamed for being inefficient – hindering market competition, oppressive to private initiatives, and against the global standards. It is alleged that government regulation should be minimal and transparent, allowing private parties to thrive or perish at their own risk according to fair rules of the game. This direction has been advocated as "regulatory reform." Labor law is urged not deprive the employers of the ability to cope with increasingly volatile economic circumstances. It should be noted, however, that "reform" may bring about reinforcement of labor law in some cases if it is in line with the notion of fairness and transparency.

As for "technological change" and "changes in the work organization," such phenomena as the progress of computerization and the trend of outsourcing no doubt pose new challenges for labor law. However, I would like to stress a more primitive aspect – the growth of service industry and the increase of white-collar employees. Traditional labor laws were typically designed to deal with factory workers, but they may not be suitable to the realities of service industry and/or white-collar jobs. Moreover, they regarded workers in general to be crude and vulnerable, or, in need of comprehensive protection. This picture has been criticized as obsolete and unfair to the increasing number of employees who are highly intelligent and self-reliant. Don't we depend on their creativity to compete in the economy of the 21st century? Shouldn't they be allowed more leeway to deal with the employer on their own? This line of argument is often combined with the globalization rationale to demand reform of labor law.

2. **If your answer to (1) is affirmative, could you give details on the range of this debate and the interlocutors that take part thereon (for example, if it is of an academic type or if it involves also the government, the social actors, the legislature, the financial operators, others)?**

"Regulatory reform" has been implemented under the direct supervision of the Prime Minister (especially P. M. Junichi Koizumi) through a series of special deregulation advisory

panels, headed by the chairman of a private corporation and comprised of business executives and academics. There has been a tension between such top-down deregulation initiatives and the Ministry of health, Labor and Welfare, the bureau in charge of labor laws. Labor side has a voice at the tripartite deliberative councils of the Ministry. As for the model of intelligent and self-reliant employee, an influential article was written jointly by Professors Kazuo Sugeno and Yasuo Suwa in 1994 (Monthly Journal of Japan Institute of Labor No. 418) which proposed a new paradigm of labor law.

3. **Is this debate at the origin of proposals of legislative reforms, or of recent reforms as regards the labour law? If it is, could you give details of these reforms, for example, those relating to:**
   - (a) **The contract of employment;**
   - (b) **Termination of employment (see also question 5, below);**
   - (c) **Collective bargaining;**
   - (d) **Wage-fixing methods;**
   - (e) **Duration of work and organization of the working time;**
   - (f) **Modification of the terms and conditions of work and employment;**
   - (g) **Labour mobility;**
   - (h) **Other topics?**

(a) The Labor Standards Law of 1947, in Article 14, banned a fixed-term contract of employment whose term is longer than one year. This was designed to prevent employees from being bound by contract for an excessive period of time, which happened frequently in the pre-war Japan. However, this provision became one of the main targets of deregulation, on the theory that it unreasonably limited the employers' flexibility in arranging their workforce. Article 14 was revised in 1998 to permit an exception of three-year contract for certain employees of highly specialized knowledge or skill and for elderly employees of 60 or older. Then, in 2003, the one-year rule was substituted by the general ceiling of three years and the exceptional three-year rule was extended to five years. It may be worth noting that for the time being the employee is free to quit after one year under a three-year contract - a measure adopted by the legislator to compromise with the opposition forces to the deregulation. For more information, see Hiroya Nakakubo, "The 2003 Revisions of the Labor Standards Law: Fixed-term Contracts, Dismissal and Discretionary-work Schemes," Japan Labor Review Vol. 1, p. 4 (2004). <http://www.jil.go.jp/english/JLR.htm>

The other notable fact about employment contract is that there is a movement to enact a comprehensive law on employment contract. Currently, employment contracts are regulated by the Civil Code, the Labor Standards Law, and a variety of court-made theories. For the purpose of making the rules coherent, transparent and easier to understand, a study

committee on the employment contract law (chaired by Professor Kazuo Sugeno) was established by the Ministry of health, Labor and Welfare. Its final report was issued in September 2005. Although there are some steps before a concrete bill is drafted by the government and the management and the labor will surely clash over its contents, Japan may have such a law in a couple of years.

N.B. Although this report uses the word "employment contract" to avoid confusion, please note that the Labor Standards Law and other labor laws of Japan use the term whose literal translation is" labor contract" rather than "employment contract."

(b) As the centerpiece of judicially-made rules of employment contract, Japanese courts established the theory of abusive dismissal. Dismissal is declared to be null and void unless there is objectively reasonable cause. Collective dismissal for economic reasons is also covered by this theory with a special four-prong test, scrutinizing the need for reduction in force, the employer's efforts to avoid dismissal, the criterion for selecting terminated employees, and the employer's dealing with the affected employees and their union(s). There always has been a criticism that courts sometimes require an unreasonably high level of just cause, inhibiting the employers from resorting to dismissal even when it is justified. It was also argued that a judicial rule, by nature, lacks transparency. Then came a series of controversial decisions of the Tokyo District Court in the late 1990s, which substantially relaxed the standards for collective dismissal. If this was an attempt on the part of judiciary to accommodate employers in the age of globalization, its influence has been limited. In 2003 the Labor Standards Law was amended to incorporate the theory of abusive dismissal as Article 18-2 (See Nakakubo, supra). Although there were, and are, some voices for deregulation, the preexisting rule of termination was endorsed by the legislator and made more visible than before.

(c) There has not been any significant reform regarding collective bargaining. The Trade Union Law was amended in 2004, but its purpose was to speed up the handling of unfair labor practice cases by the Labor Relations Commissions.

Japanese enterprise-based unions tend to be cooperative and understanding of the employer's needs, and they had a hard time during the annual spring wage negotiations in the last decade of sluggish economy. Many had to agree to give-up wage-hikes or even to reduce the amount of wages so that the employer may survive and jobs be protected. It is unfortunate that the unionization rate has declined steadily, going below 20 percent in 2004.

(d) In the 1990s, there was a trend among Japanese companies, which were once known for their seniority-based wages, for a merit- or performance-based wage system. It was supposed to enhance efficiency and survive the global competition. In addition, many employers are reluctant to raise the base wages in the spring wage negotiations with unions, preferring instead to raise semi-annual bonuses, probably because it is much easier to reduce them again when the economic conditions worsen. This may also be a tactic to cope

with the new economy.

As for the regulatory scheme, the Minimum Wage Law is under the pressure of reform. Japanese minimum wage system comprises of the prefectural minimum wage as the general floor throughout the prefecture and the industrial minimum wages to set higher standards for certain industries of the prefecture. The latter has been criticized by economists for being redundant. It is currently being reviewed by the deliberative council of the Ministry of Health, Labor and Welfare.

(e) The maximum workweek of the Labor Standards Law was reduced from 48 hours to 40 hours in 1987, to catch up with the international standard. In fact, the problem of long working hours of Japanese workers was debated in the international trade frictions of the 1980s. The number of hours worked annually has declined closer to the target level of 1,800 hours (1,816 hours in 2004) in part because of the prolonged recession, but there are accusations of uncounted (and unpaid) overtime work and cases of "karoshi" (death from overwork).

At the same time, the working hour regulation of the Labor Standards Law has been made more flexible since 1987, adopting such new systems as averaging over the one-year period, flextime, and discretionary-work. This relates to the claim that the traditional regulation presupposed factory workers and therefore was not suitable to modern white-collar/service workplaces. Especially notable is the discretionary-work system for highly intelligent workers who work autonomously without the employer's specific directions. They are deemed to have worked a certain number of hours regardless of their actual working hours, making it practically unnecessary for the employer to pay overtime premiums to them (See Nakakubo, supra). Although there are criticisms that they are unfairly deprived of the right to overtime premiums, advocators claim that such workers should not be compensated for the hours worked but for their achievements. In any event, the discretionary-work system has rather complicated procedural requirements. There is a call for a total exemption of discretionary white-collar workers from the regulation of their working hours, like the "white-collar exemption" of the United States. In fact, a study committee of the Ministry of Health, Labor and Welfare is now examining the possibility of adopting such a system.

(f) Regarding how to change the employment conditions, Japanese Supreme Court has developed a special theory since 1967. When the employer changes the pre-existing work rules, the new provision is legally binding on opposing employees if it is "reasonable." This is characteristically Japanese in that it is a collective method of change because the work rules affect all the employees of the establishment, and that opposing employees are not terminated but simply placed under the new terms. In the last decade, however, a new method attracted wide attention - a notice to terminate the employee if he/she does not agree to the proposed change. (Aenderungskuendigung) A decision of the Tokyo District Court recognized this as a legitimate measure of change conditions in appropriate cases,

and many academics started to discuss it vigorously. This somehow relates to the themes of regulatory reform – individual decision, agreement, and termination if necessary. The new method is yet to be established, but the law of employment contract, if enacted, may include a provision regarding it with some safeguards.

(g) Displacement of workers may well increase in the globalized economy, and the external labor market was one of the important targets of regulatory reform in the field of labor law. The Employment Security Law was amended in 1999 to legalize private placement business, which had been limited to enumerated 29 professions, universally except for longshoremen and construction workers. The Worker Dispatching Law was amended in the same year to allow worker dispatching business, which had been limited to 26 professional duties, universally except for longshoremen, construction workers, and some other specified types of duties. It was also amended in 2003 to extend the maximum period of dispatching. Dispatched workers are employed by the dispatching company to work for the user company, and there are some measures in the Law to encourage the user company to employ the dispatched worker directly in certain situations.

(h) In order to deal with the rapid increase of employment disputes, a new law was adopted in 2001, providing for administrative services of information, advice, and conciliation. Furthermore, in 2004, the Labor Tribunal Law was enacted (to be enforced from April 2005) to set up at each district court a special tribunal for individual employment disputes. The tribunal is comprised of a professional judge and two private experts. A decision will be handed down after three hearing sessions, although the aggrieved party may demand a formal proceeding by filing an exception. This is a part of the broader judicial reform. Regulatory reform emphasizes the importance of rules of law, and it is essential to make the judiciary active and accessible. For more information, please see the next issue of the Japan Labor Review, forthcoming in January 2006.

4. **Did this debate have a bearing on:**
   - (a) **Court decisions;**
   - (b) **Collective bargaining processes and issues?**

See the answer to Question 3.

II.- BUSINESS LAW AND LABOUR LAW

5. **Have it been any modifications in the labour legislation (or the collective agreements) in connection with business law, for example with regard to the following issues:**

(a) **The legal position of employees in the event of the transfer of an undertaking or parts thereof;**

(b) **The inventions of employees;**

(c) **Workers' rights in the event of the insolvency of the employer;**

(d) **Collective redundancy procedures;**

(e) **Freedom of establishment of the workers after the end of their contract of employment (non-competition clauses);**

(f) **Others?**

(a) In 2000, the Commercial Code was amended to introduce provisions for the division of an existing corporation, a new measure of corporate reorganization. Because it inevitably poses a question of how to allocate the employees between the new corporations (termination is not allowed), a new law also was enacted to set out the rules on the succession of employment contracts (and that of collective bargaining agreements). The employees are basically to follow the business in which they engaged mainly before the event, but they have a right to object in certain situations. In addition, procedural requirements to notify and hear from the employees were written down.

On the other hand, a transfer of business from one corporation to another, the traditional method, is not covered by a special law. It is up to the successor whether to take over the employees along with the business or not, although the courts sometimes find such an intention from the surrounding facts. The employee is also free to refuse to move to the successor following the business. There are voices for EU-type legislation obligating the successor to take over the employees as well, but a study committee of the Ministry of Health, Labor and Welfare did not endorse such an idea in its report of 2002.

(b) Employee's invention caused quite a controversy in recent years. The Patent Law allows the employer to make a rule regarding job inventions that the patent rights of the employee-inventor be transferred to the employer. However, the employee has a right to due compensation under Article 34 (3) of the Law. Japanese companies traditionally paid very modestly for such compensation, but they started to be challenged before the court in recent years. The Supreme Court endorsed such a challenge in 2003, holding that the employee may ask for a proper amount regardless of the limit set by the employer. And in a well-publicized case, the Tokyo District Court ordered the employer to pay 20 billion yen to the inventor, although the case was settled later for a substantially lower amount. The Patent Law was amended in 2004 to dictate the court to honor the pre-determined amount of compensation so long as it is reasonable. Still, the employee may challenge one as unreasonably low.

(c) The Corporate Reorganization Law was overhauled in 2002 and the Bankruptcy Law in 2004. The provisions of the Civil Code regarding the priority of various credits were also

amended in 2003. The protection for the employees' wages was somewhat expanded after the amendments. They do not change the situation dramatically but will certainly help the employees of economically troubled companies. It may be worth noting that the Wage Payment Security Law was enacted back in 1976, under which the employee may ask the governmental to pay, in the place of the insolvent employer, a certain part of unpaid wages.

(d) The Employment Measure Law was amended in 2002 to obligate the employer, when 30 or more of its employees of the same establishment are displaced within a month, not only to report the fact to the competent Public Employment Security Office but also to make a plan to assist reemployment of such employees and have the Office approve of it.

(e) Non-competition clauses are not addressed by legislation. The number of court cases has increased in number as the mobility of Japanese workers rose in the last decades. According to court decisions, such an agreement of non-competition after the employment must be reasonably defined in terms of period and location, and there must be fair compensation for the limitation. If the law of employment contract is enacted in the future, it is likely to have a provision on this theme.

When a worker uses trade secrets of the former employer in an abusive manner, the Unfair Competition Law is applicable. It was strengthened repeatedly in recent years, reflecting the growing concern of the business society over trade secrets.

III.- INTERNATIONAL TRADE AND LABOUR LAW

6. Is your country a party to an economic integration agreement? If it is, please indicate which.

Japan has been slow in promoting regional economic integration. For its general policy has always been focused in the promotion of a WTO-centered world-wide free trade scheme. However, in the wake of successful conclusion of various bilateral FT agreements in the Asian region, in particular those initiated by China, the government began negotiating with a number of Asian countries with a view to catching up the delay in this trend. In 2002, the first of such agreement was signed with Singapore. FTA or EPA(Economic Partnership Agreement) negotiations are under way targeting at a number of East Asian countries, such as Thailand, Philippines, Indonesia and it has been agreed to explore such an agreement tri-laterally with Korea and China. Japan is also a member of APEC (if APEC can be perceived as economic integration agreement).

7. If your answer to (6) is affirmative:

(a) Please indicate if the legal system set up by the agreement addresses labour issues. If so, please provide a brief description thereabout.

Japan/Singapore EPA has no such provisions. One of the main issues in the negotiation with other South East Asian countries, on the other hand, is labour migration. Both Thailand and the Philippines are insisting strongly on the liberalization of immigration into Japan for employment of their nurses, care-takers, massageurs etc.

(b) Do the agreement's rules on labour issues have supranational legal effects? If they do, how are they applied? Can one draw an assessment from their implementation?

So far no agreements have set rules related to labour issues and in case when the imminent FTA with Thailand and the Philippines contain provisions on liberalization of certain types of workforce to immigrate to Japan, they will only affect the bilateral parties and not have a supranational effect.

(c) If the agreement's rules on labour issues do not have supranational effects, please give details on their implementation machinery if such a machinery exists.

The implementation of labour provisions in a FTA will be initially ensured by competent national authorities, i.e. the legislature, which is responsible for enacting law and regulations materializing the requirement under the FTA; governmental institutions, which are responsible for enforcing the laws and regulations; and the judiciary, which is the final instance to ensure observance of law, including FTA.

8. In developing a social dimension to trade agreements in which your country participates, was civil society (trade unions, NGOs) consulted during the stage of formulating national policy? If so, what form did the consultation take? Is there a permanent consultative role for civil society organizations in the agreement, and if so, how is the role defined and what has been the experience?

Trade issues have been mainly managed by the Ministry of Economy, Trade and Industry and the relevant departments of the Ministry of Foreign Affairs and to my understanding, there has not been any machinery set up, which has consistently involved NGOs and/or trade unions in the policy making process. The government, however, frequently consults university professors. Many advisory committees set up in the ministries have as their members a great number of academics and it was in this capacity that I was called upon to participate in several advisory committees to prepare policy papers for the government

regarding the issue of the social clause in trade agreements (from 1994 to 1995, from 1995 to 1996, from 1997 to 2000 and from 2001 to 2002 for example.) The Japanese government's negative position towards the social clause has partly been due to the position of the policy papers submitted by those advisory committees.

9. Were there efforts in your country in order to bring the national labour law closer to that of its principal trade partners? If so, what methodology has been followed for the law to be harmonized?

Japan's principal trade partner is USA. However, due to the rapid economic growth of China and the Asian NIES, USA and EU are losing their status of principal trade partners. There does not seem to be a need to harmonize Japanese labour laws with those of USA or EU. On the other hand, China and other Asian countries require a reform in labour law. Japan contributes to their reform by providing "legal technical assistance" in multi-bilateral technical co-operation projects executed by the ILO. Various types of scholarships are offered to Asian students.

10. Does your country's law on international trade include provisions which condition the granting of commercial advantages to third states to the respect by the latter of certain basic rights of the workers? If it does, how are these provisions applied? Has your country already applied commercial sanctions pursuant to these provisions?

Japanese trade laws do not contain "social clause" type provisions. However, according to the general guidelines set out by the ODA policies, some technical co-operation activities require adoption of certain human rights principles on the part of recipient countries. The Japanese government has always opposed to the incorporation of a social clause into trade agreements. The position of Japanese trade unions is different. In a way, RENGO supports the underlying idea of a social clause, but it takes a somewhat nuanced attitude before their brother institutions in Asia, some of which are against the social clause..

11. Is your country's labour law affected or is likely to be affected by provisions on the international trade of other countries with which it maintains important trade relations (for example, if your country's trade partner conditions the granting of trade advantages to third states to the respect by the latter of the internationally recognized workers' rights)?

It is a new perspective, which I need to study further. Theoretically speaking, there seems to be a room for concern for Japan to see USA, for instance, requiring China to observe human

rights principles. Ratification by China of some ILO fundamental rights Conventions, which Japan itself has not ratified, may put Japan in an uncomfortable position. However, this will not directly affect Japanese labour legislation. The problem may become more felt in the expansion of private initiatives, which will be discussed in Part IV of the questionnaire.

12. If your answer to (11) is affirmative, could you indicate if your country has ever been compelled to revise its law or industrial relations practices so as to avoid losing trade advantages granted by other countries.

I think there has not been such an instance. However, it is well known that Japan is under constant pressure from OECD and Bretton Woods institutions to change its industrial relations based on company union system, life-long employment system, seniority system etc.

IV.- *SOFT LAW* AND THE EMERGENCE OF NEW ACTORS

13. If your country is the seat of multinational enterprises (MNEs):

(g) Have MNEs operating from your country adopted codes of practices relating to workers' rights, which the MNEs subcontractors/providers must abide by? If they have:

i. Please provide information on the contents of these codes and their implementation machinery.

There are a few Japanese companies operating world-wide, which have proclaimed some sorts of supply-chain codes of conduct involving workers' rights, child and forced labour, in particular. See for instance:
http://www.sony.co.jp/SonyInfo/Environment/people/supplier/index.html
However, there does not seem to be an implementation machinery attached to it.

ii. Please indicate if it has happened that subcontractors/providers not abiding by a code have been excluded as suppliers from a MNE or have been summoned to respect the code.

To my knowledge, there has no such a case been reported.

iii. Can one draw an assessment on the implementation of these codes?

N.A.

iv. Have MNEs operating from your country signed a world agreement with a trade-union interlocutor, aiming at the respect of the workers' rights? If they have:

There seems to be none.

v. Please give information on the contents of these agreements and their implementation machinery.

N.A.

vi. Please indicate if it has happened that subcontractors who have been held in breach of the agreement have been excluded as suppliers from a MNE or have been summoned to respect the agreement.

N.A.

vii. Can one draw an assessment on the implementation of these agreements?

N.A.

viii. Have MNEs operating from your country adhered to a *social accountability* standard worked out by a NGO? If they have, please give information on these standards and the way in which their application is monitored.

A small number of companies adhere to SA8000, but they are not MNEs in strict sense of the term.

14. If in your country operate subcontractors of MNEs or other export-oriented enterprises:

This question is largely not applicable to Japan, but some Japanese MNE may be subject to a foreign CSR code.

ix. i Were some of these companies obliged or encouraged to adhere to a code of conduct? If so, please indicate the type of code to which they have adhered.

NEC was reported to have been asked by a French buyer to adhere to a code, which prohibits procurement of raw materials from certain socially irresponsible areas.

x. ii Did some of these companies adhere voluntarily to a social accountability standard?

A number of large Japanese firms are now in the Global Compact, but few subject to private initiatives, such as SAI or FLA.

xi. iii. Are there people certified by NGOs so as they can monitor the respect of a social accountability standard? If they are, are audits frequent? How are they carried out?

Non, as far as I know.

15. Is there any evidence in your country that the existence and application of one or more of the following public "soft law" instruments has had any effect on labor law or collective bargaining:

(h) The OECD Guidelines for Multinational Enterprises

(i) The ILO Tripartite Declaration of Principles on Multinational Enterprises and Social Policy;

(j) The ILO Declaration on Fundamental Principles and Rights at Work;

(k) The United Nations' Global Compact

There appears to be little impact of these Codes so far.