

*Part I*

*The Codification of Russian Labour Law:  
Issues and Perspectives*

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**SUMMARY:**

1. The Russian Labour Code – a law under evolution. –
2. The theoretical-conceptual basis for the codification of the new Labour Code dated December 2001.
3. The issue of legislative competence division in the area of labour law between the Russian Federation and the subjects of the Federation.
4. Structure and contents of the new Russian Labour Code. –
  - 4.1 continued: social partnership, the representation of interests, collective bargaining and employee involvement.
  4. 2. continued: the individual employment relationship regulations.
5. Conclusions.

1. Over the past decade, the Russian Federation has undergone radical change that has concerned not only the social and economic fabric of the country, but also its legal and institutional framework<sup>1</sup>. As is well-known, this change has introduced a market liberalisation that has placed greater limitations on central government in relation to economic policy and social relations. Yet, the impact of such a change on the real regulatory set-up is less known. Terms like “democracy”, “transparency”, “pluralism”, “decentralisation”, “privatisation”, “deregulation”, “internationalisation”, which are normally used, assume a highly provocative meaning, with reference to the Russian Federation, as is well illustrated by the Russian term “*perestroika*” (which literally means: “*reconstruction*”). Although these terms help us understand the direction of the ongoing change, they do not enhance our understanding of the actual dynamics that are currently at work in the present economic and social, as well as legal and institutional, systems of the country.

Therefore, the recent codification of the whole of Russian labour law can be a privileged vantage point to observe the deep division between the evolution of law and the actual organisation and production trends characterising the present changes occurring in the Russian Federation.

A merely technical and formal analysis of the new *Trudovoy Kodex Rossiyskoy Federazii* (literally: “*Labour Code of the Russian Federation*”), which became effective as of February 2002, would inevitably lead to a radical change of paradigm in which labour law and industrial relations are viewed in relation to the aforementioned trends<sup>2</sup>. Their governing rules, regulations, and principles - as further illustrated in the following paragraphs - are based on an overall liberalisation of labour relations, which turns the heteronomous hyper-protection employment system under the old *Kodex Zakonov o Trude* on its head (literally: “*Labour Law Code*”, referred to as *KZoT*) dated December 9<sup>th</sup> 1971 (effective from April 1<sup>st</sup> 1972)<sup>3</sup>. In agreement with the doctrine<sup>4</sup>, this Code

<sup>1</sup> With regard to this issue, cf., in general, Sil, *Privatisation, Labour Politics, and the Firm in Post-Soviet Russia: Non-market Norms, Market Institutions and the Soviet Legacy*, in Candland and Sil (eds.), *The Politics of Labour in a Global Age*, Oxford University Press, 2001, 205-232; Gimpelson, *Politicheskaya Ekonomia Rossiyskogo Rinka Truda (Political Economy of The Russian Labour Market)*, 2001, in <http://pubs.carnegie.ru/russian/>; Stiglitz, *Whither Reform? Ten years of transition, Annual Bank Conference on Development Economics*, Washington, April 28-30, 1999, <http://www.worldbank.org/knowledge/chiefecon/stiglitz.htm>; Hughes, Litght (eds.), *Russia Ten years After*, Oxford University Press, Oxford, 2002.

<sup>2</sup> For a thorough analysis of the social security legal-institutional framework cf. the classic essay by Kornai, *The Socialist System – The Political Economy of Communism*, Clarendon Press, Oxford, 1992, spec. 203-227 for the aspects related to the labour market.

<sup>3</sup> On the previous legal framework, cf. Mavrin, *On Some Peculiarities and Problems of Russian Labour Law*, in *IJCLLR*, n. 4/2001, spec. 399-404; Dedov, *Pravoie regulirovanie rinka truda (Labour Market Law)*, Moskwa, Stoglav-H, 2000; Smirnov, *Trudovoe pravo (Labour Law)*, Moskwa, Prospekt, 2001; Krapivin, Vlasov, *Trudovoe korporativnoe pravo (Corporative Labour Law)*, Norma, Moskwa, 2000; Clarke, *Labour in Post-Soviet Russia*, in Hughes, Litght (eds.), *Russia Ten years After*, Oxford University Press, Oxford, 2002; Clarke, *New Forms of Labour*

well reflected the monopsonist character of the industrial relations system and of Russian labour law, characterised until recently by a total denial of market economy principles.

Yet, given closer analysis, the new regulatory framework may reveal deep and radical changes that actually occurred prior to the collapse of the Soviet Union, which happened after the Boris Yeltsin was denominated as President of the Russian Federation (1991)<sup>5</sup>. The changes introduced by the 1992 Labour Code, starting from 1992, have not kept pace with the ongoing process of change, thus leading to a very dangerous deregulation of labour relations, which - also due to the weakness of the trade union movement <sup>6</sup> - has totally undermined the existing legal framework<sup>7</sup>.

One can state that after the collapse of the Soviet Union (1991), labour market legislation has actually been totally disregarded by economic operators<sup>8</sup>. This has led to the development of a hidden and parallel labour market based on labour relations philosophy that was *contra legem* in comparison to the Soviet system characterised by full employment and an absence of illegal work<sup>9</sup>.

**Table 1: Invisible wages**

<i>Invisible wages</i>	<b>1993</b>	<b>1994</b>	<b>1995</b>	<b>1996</b>
In trillions of roubles	9.1	52.0	170	250
In GDP percentages	5	9	10	11

Source: *Ekonomika i zizn*, March 9th 1997

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*Contract and Labour Flexibility in Russia, Economics of Transition* 7, 3, 1999, 563-614; Clarke, *Labour Relations in Transition*, Cheltenham, Edward Elgar, 1996.

<sup>4</sup> at the time of USSR, the State was the only employer. Therefore, labour law and the industrial relations system in general could be regarded as an interesting example of monopsony, which describes a market that consists of only one buyer and does not leave possibilities for others.

<sup>5</sup> For the historical reconstruction of the collapse of the Soviet regime cf., in particular, Caselli, Pastello, *La caduta dell'URSS e il processo pacifico di transizione: un paradosso apparente (The fall of USSR and the peaceful transition process: an apparent paradox)*, Europa Europe IV (1), Edizioni Dedalo, 1997; Clarke (ed.), *Management and Industry in Russia: Formal and Informal Relations in the Period of Transition*, Cheltenham, Edward, Elgar, 1995.

<sup>6</sup> Cf. Ashwin, Clarke, *Russian Trade Unions and the Industrial Relations in Transition*, Basingstonke and New York, Palgrave, 2002; Sil, *Privatisation, Labour Politics, and the Firm in Post-Soviet Russia: Non-market Norms, Market Institutions and the Soviet Legacy*, cit., 206-220; Cook, *Labour and Liberalisation: Trade Unions in the New Russia*, New York, The Twentieth Century Fund Press, 1997; Clarke, Fairbrother, Borisov, *Does Trade Unionism have a Future in Russia*, *Industrial Relations Journal* 25, 1, 1994, 15-25.

<sup>7</sup> On the crisis of legality that has characterised the end of the Soviet system cf., in particular, Kolev, *Labour Supply in the Informal Economy in Russia during the Transition Period*, Discussion paper series, no. 2024, 1998, 3; Sil, *Privatisation, Labour Politics and the Firm in Post-Soviet Russia: Non-market Norms, Market Institutions and the Soviet Legacy*, 231-232.

<sup>8</sup> On the progressive ineffectiveness of the law cf. Mironov, *Analysis of Legal Regulation of Labour in the Russian Federation (memorandum)*, *International Conference on Social and Labour Issues: Overcoming Adverse Consequences of the Transition Period in the Russian Federation*, Moscow, 6 October, 1999, <http://www.hro.org/ngo/duma/35/index.htm>.

<sup>9</sup> Kolev, *op. cit.*, 5.

The consequences of this social and economic situation are well known. The collapse of the regulatory role played by the State and the ineffectiveness of the fiscal system has not only resulted in dramatic wage reduction, but also the onset of an entirely new phenomenon - mass unemployment<sup>10</sup>.

It is also true that the evolution of the Russian labour market is characterised by specific features that distinguish it from the other countries with transition economies, such as those of Central and Eastern European countries.

Experts do not agree on the primary causes of this difference, but observers have noted that shock therapy in Russia has not entailed the all-around sweeping reforms<sup>11</sup> since the early 90s as occurred in Poland, Hungary, the Czech Republic, and Slovakia<sup>12</sup>. With specific reference to the labour market reform, the Russian government has for a long time opted for a *soft*, if not wait-and-see attitude.<sup>13</sup> Only recently has it enacted a new codification of labour law entailing modernisation and adjustment processes for labour relationships to bridge the gap between legal theory and economic reality.

2. The new Labour Code was approved by the Russian Federation Council (*Soviet Federazii*) on 26 December 2001. Upon its ratification by the President, Vladimir Putin, on December 30<sup>th</sup> of the same year, it became effective in February 2002.

Issues surrounding the adoption of the new labour code sparked debate between the Russian government and social partners, which started in 1994 during the Chernomyrdin Government.

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<sup>10</sup> For the assessment of unemployment and job insecurity cf. Standing, *Russian Unemployment and Enterprise Restructuring: Reviving Dead Souls*, Basingstoke, Macmillan, 1996; Ivanov, *Labour Law of Russia in the Transition from the Planned to the Market Economy*, in Blanpain, Nagy (ed.), *Labour Law and Industrial Relations in Central and Eastern Europe (from Planned to Market Economy)*, in *Bulletin of Comparative Labour Relations*, n. 31/1996, 135; Cazes, Nesporova, *Towards excessive job insecurity in transition economies?*, Employment Paper 2001/23, <http://www.oit.org>; Tchertvernina, Moscovskaya, Soboleva, Stepantchikova, *Labour market flexibility and employment security, Russian Federation*, Employment Paper 2001/31, <http://www.oit.org>.

<sup>11</sup> On the reforms and changes that have recently characterised the Central and Eastern European countries, cf. Orenstein, Hale, *Corporatist Renaissance in Post-communist Central Europe?*, in Candland and Sil (eds.), *The Politics of Labour in a Global Age*, Oxford University Press, 2001; Stiglitz, *Whither Reform? Ten years of transition*, Annual Bank Conference on Development Economics, 1999, <http://www.worldbank.org/knowledge/chiefecon/stiglitz.htm>; Belina, *Labour Law and Industrial Relations in the Czech Republic*, in Blanpain, Nagy (ed.), *Labour Law and Industrial Relations in Central and Eastern Europe (from Planned to Market Economy)*, in *Bulletin of Comparative Labour Relations*, n. 31/1996, 53-67; Nagy, *Transformation of Labour Law and industrial relations in Hungary*, *ibidem*, 67-85; Sewerynski, *Changes In Polish Labour Law And Industrial Relations During The Period Of The Post Communist Transformation*, *ibidem*, 85- 109; Barancova, *Labour Law in the Slovak Republic, Present Situation and Future Trends*, *ibidem*, 139-157; Hèthy, *Riconciliazione tripartita degli interessi e (possibile) patto sociale. Il caso ungherese (Tripartite Reconciliation of interests and (possible) social pact. The Hungarian case)*, in this Journal, 141-158; Weiss, *Labour Law In The South-Eastern European Countries: A Restructuring Model*, in this Journal, 145-149.

<sup>12</sup> On this matter cf. J.E. Stiglitz, *Whither Reform*, World Bank, Annual Bank Conference of Development Economics, 3; Burawoy, *Transition without Transformation: Russia's Involutionary Road to Capitalism*, <http://sociology.berkeley.edu/faculty/burawoy/index.html>; Id., *Transition without Transformation: Russia's Descent into capitalism*, *ivi*; Id., *The Great Involution: Russia's Response to the Market*, *ivi*.

<sup>13</sup> Cf. Gimpelson, *op. cit.*, 17

During parliamentary debate, some totally different law bills were proposed<sup>14</sup> and an *ad hoc* specialist committee was set up within the Russian Federation Labour Ministry, including representatives from Government, leading trade unions, and a few labour law experts coming from an Anglo-Saxon background, charged with the task of drafting a single government proposal. Some Western Countries financially supported this initiative.

This element highlights the overall structure of the new code, largely inspired by the deregulation approach applied to labour relations. Special emphasis is placed on the individual labour contract, whereas the regulatory role to be played by the trade unions is clearly outlined, due to the extremely fragmented and fragile trade union movement after the collapse of the Soviet trade union system monopoly. This is characterised by the close link – or better by a true symbiosis – existing between the trade union and the Communist party. Alternative trade unions emerged following *perestroika*. Today the large number of trade unions that mushroomed after the collapse of the Soviet system has been consolidated and the main trade union organisations have joined together to give rise to a single trade union, known as *Federation of Independent Trade Unions of Russia*, which has inherited all the privileges granted by the Soviet State to its predecessor<sup>15</sup>.

Compared to the previous regulations, the stress is placed upon private law, although not losing some of the public law traits<sup>16</sup>; hence the issue has become an independent branch of the legal system<sup>17</sup>. Yet, the spirit underlying labour law has changed, as it is no longer driven by the hegemonic and totalitarian regulation of labour relations by the State. The shift towards private negotiation autonomy is one of the traits characterising the new Labour Code, even though, as already pointed out, the emphasis is on the individual rather than on collective bargaining autonomy. A few experts have, indeed, interpreted the attempt to replace heteronymous rules with private negotiation autonomy rules as a sign of the tendency towards bringing back labour law within the

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<sup>14</sup> The texts of the law bills can be found at the internet site: <http://www.e-xecutive.ru/http://www.brights.ru/laws/law28.htm#1>.

For a critical review cf. Mironov, *Social and Labour Sphere: Overcoming the Negative Consequences of the Transition Period in RF*, International Conference, Moscow, 6 October 1999.

<sup>15</sup> Cf. Rudocvas, *Trade Unions and Labour law in a Modern Russia*, *IJCLLIR*, 4/2001, 407-423 that states how today trade unions are not held in high esteem by employees and by the public.

<sup>16</sup> Cf. Kiselev, *Zarubezhnoe trudovoe pravo (Foreign labour law)*, Mosckwa, Norma-Infra, 1999, 11.

<sup>17</sup> Cf. Mavrin, *On Some Peculiarities and Problems of Russian Labour Law*, in *IJCLLIR*, n. *IJCLLIR*, 4/2001, spec. 399.

framework of civil law<sup>18</sup>. Nevertheless, the mainstream law experts deny such a configuration and state that even though it is theoretically possible to include the employment contract among civil contracts, it will always remain a special contract subject to *special* rules<sup>19</sup>.

3. The division of legislative powers between the Russian Federation and the “*subjectami federazii*” (literally: “the subjects of the Federation”) was one of the most sensitive formulations of labour law, given the fact that the Russian Federation has a relatively recent federal experience.

Before the start of “*perestroika*”, the Soviet Union consisted of fifteen republics (similar to the Italian regions in terms of powers, before the recent federal reform, introduced by constitutional law no. 3/2001), all subject to the central government and thus practically devoid of any law-making powers. Though each republic had its own Labour Code, adopted by the Supreme Council of each republic, they differed from the Labour Code of 1971, however, as they were drafted to suit the needs of a particular region<sup>20</sup>. The lack of sovereignty of each individual republic explains why the division of power between the federal government and its territorial branches has been ineffective.

Presently, after the dismantling of the fifteen former soviet republics, there are no less than 89 “subjects” within the Russian Federation each with their own legislative powers. They include the metropolitan areas of Moscow and St. Petersburg, a few former RSFSR regions now called republics (such as Chechnya, Bashkortostan, Kalmikiya, Dagestan, Komi, & etc.), and a few other territorial areas which are more or less similar to Italian regions and provinces.

With specific regard to the labour issue, article 72 of the Constitution dated December 12th 1993 confines itself to establishing that labour law is a policy *area* shared jointly by the Russian Federation and the “*subjectami federazii*”. Yet, in the Russian Constitution there are no specific provisions regulating the division of legislative powers between the Russian Federation and the individual “*subjects*”, in such a way that the legislative powers in the labour law field remain a moot point in the new legal and institutional framework.

<sup>18</sup> In this sense cf. Pashkov *et al*, *Pravovedenie*, n. 2, 1997, p. 6ff, that refer to “historical justice” owing to the civil law matrix of the Russian labour law.

<sup>19</sup> Mavrin, *Rinok truda e trudovoe pravo*, cit., 135.

<sup>20</sup> For example, the Code of RSFSR contained the provision regulating the labour in extreme Northern regions

In this regard, article 12 of the 1999 federal law, containing the *“Principles and terms for the definition of the areas of competence of the administration and of the powers between the Russian Federation State bodies and the State bodies of the Federation subjects”*, confined itself to stating that all the federal laws and the other legislative provisions issued by the *“subiectami federazii”* must comply with the federal law, but still failed to stipulate how these powers should be allocated <sup>21</sup>. From this point of view, the new Labour Code is a remarkable step forward in the debate on the division of powers within the Russian Federation. Article 6 of the Labour Code clearly defines the areas where the *“subiecti federazii”* can issue laws and the matters that remain exclusively within the remit of the federal Government. Pursuant to the new code, the federal bodies have exclusive powers not only in the area of the general principles of the system, applicable to the whole Federation territory, but also in relation to:

- The general policy guidelines within the labour relations area;
- The minimum protection levels of rights, liberties and guarantees for workers;
- The terms whereby employment contracts are entered into, modified and terminated;
- The issuing and implementation of disciplinary measures;
- The basic principles of social partnership;
- The regulatory framework of collective agreements (terms and contents of bargaining negotiations, entering and modifications to any collective agreements and contracts);
- The resolution of individual and collective employment disputes;
- The State control and monitoring method principles in view of the enforcement of statutory regulations and laws within the area of labour relations;
- Principles of investigation methods regarding industrial accidents and occupation disease;
- The responsibilities of the parties involved in the labour contracts, including civil and industrial accident liability;

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<sup>21</sup> This means that the Federation “subjects” are entrusted with law-making powers in the areas not covered by the federal laws or codes, but they are not allowed to issue new codes. The laws issued by the Federation “subjects” are to be supported by autonomous financial means and, at any rate, they should not be in conflict with federal laws, decrees by the president of the Federation, by the Government and by the other executive bodies at a level federal. On this matter cf., Mironov, *Analysis Of Legal Regulation Of Labour In The Russian Federation (memorandum)*, cit.



- The monitoring and statistical surveys within the area of labour relations;
- The regulation concerning a few specific worker categories.

The “*subiecti federazii*” are competent in all the remaining areas. In all cases, they are allowed to introduce *in melius* regulations to improve the areas of competence of the Federation, provided that the costs entailed by the introduction of the new measures are fully covered. In the event in which a regulation issued by the “*subiectami federazii*” is in conflict with the federal law, especially in situations where it works to the detriment of employees, the federal law or Code regulations shall prevail.

4. The new Labour Code differs not just in terms of its contents, but also in its general form compared to the 1971 Code. It consists of 6 headings, 14 sections, 62 chapters and as many as 424 articles. As it is impossible to carry out a thorough and detailed analysis of such a complex body of laws, in our paper we will merely focus on the major items, reflecting the innovative aspects related to the enhancement of the private individual negotiation autonomy and to the division of legislative powers between the federal legislation and the decentralised one. As far as the latter is concerned, law-makers have made a big step forward by setting forth, for the first time, the main principles underlying the juridical regulation of labour relations, in agreement with the division of powers between the Russian Federation and the territorial authorities, as already mentioned in the previous paragraph.

This matter is specifically covered by Title I of the Code, article 2. With reference to the Constitution and international law regulations, it sets forth, among its fundamental principles, the right to work, the banning of forced labour, protection against unemployment and industrial accidents, the right to fair working conditions and wages, and guarantees the liberty and dignity of employees and of their families<sup>22</sup>.

Title 1 also provides anti-discrimination measures regarding access to employment, career promotion and vocational training. The clause also stipulates that courts have the authority to enforce laws relating to the performance of work, the right to unionise, and the right to strike within limits set by the labour code or other federal guidelines.

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<sup>22</sup> The minimum remuneration thresholds should be set by the federal legislation. For the moment being, there is still a gap in the Russian Federation legal framework on this issue (cf. also *infra*, in the text).

4. 1. Social partners play a special role in the regulation of labour relations that are subject to federal regulation. The main aim pursued by social partnership is to achieve a balance between conflicting interests, in democratic and pluralist forms, by the concertation of the main social groups involved, i.e. employees and employers.

Indeed important precedents for concertation of social dialogue were set prior to the collapse of the Soviet Union by the decree of the President of the Federal Republic dated 15 November 1991 on "*Social partnership and settlement of labour disputes*"<sup>23</sup> and the law dated 11 March 1992 "*On collective agreements and contracts*"<sup>24</sup>, which undoubtedly are the most important acts in the history of social partnership building in Russia.

Yet, for the first time, the new Code provides a clear legal definition of social partnership to be intended, under art. 23, Title II, of the Code, as a "system of relations between the employees (or their representatives), and the employers (or their representatives), state or local authorities<sup>25</sup> aimed at ensuring the balancing of interests within the labour relations framework". It was then followed by:

- a) The statement of the twelve basic principles of social partnership: equal opportunities among partners; mutual respect towards the partners' interests; partners' interest in participating in negotiations; democratic support by the State to social partnership; compliance with the law by the partners and their representatives; the representation of organised groups; freedom of expression and self-determination during the discussion of labour issues; voluntary character of partners in fulfilling their obligations; true and sound commitment undertaken by partners; obligation to fulfil collective agreements and contracts in good faith; the obligation to contribute to the fulfilment of collective agreements and contracts; and the liability of the partners and their representatives for failure to fulfil collective agreements and contracts (art. 24); all these

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<sup>23</sup> Cf. Dedov, *Pravoee regulirovanie rynka truda (Legislative Regulation of the Labour Market)*, Moskva, Stoglav, 2000, 71. Cf. also Vedomosti Siezda narodnih deputatov RSFSR and Verhovnogo Soeta RF (Parliamentary proceedings – Session of the peoples' representatives of the RSFSR and Supreme Council of the FR), 1991, n. 47, art. 1961.

<sup>24</sup> Vedomosti Siezda narodnih deputatov RSFSR e Verhovnogo Soeta RF (Parliamentary proceedings – Session of the peoples' representatives of the RCFCR and Supreme Council of the FR), 1992, n. 47, art. 890. On the social partnership cf. Teague, *Russian Government Seeks "Social Partnership"*, *RFE/RL Research Report 125*, 19 June 1992, 16-22.

<sup>25</sup> It should be specified that, pursuant to paragraph 2 of art. 23, the State and local authorities are regarded as the social partners solely in the event in which they act as employers (namely in the other cases envisaged by the federal laws).

principles are enumerated in the Federal Law "On Collective Agreements and Contracts".

- b) The clear identification of the social partnership levels: at federal, regional, sectorial, area and company level (art. 26).

Chapter IV of Title II is devoted to the representation of employees and employers. Representation now takes place on a voluntary basis whereas under the Soviet regime it was mandated by law. To ensure the proper regulation of relations between social partners – collective bargaining, the drafting and signing of collective contracts<sup>26</sup> and collective agreements<sup>27</sup>, and the running and management of the collective regulations at all levels – shop stewards can set up special representation councils. At the federal level, there is a permanent tripartite commission. Similar commissions can also be set up at the Federation subject level, as well as at a local and sectorial level, etc.; yet in these circumstances no permanent bodies can be set up.

With reference to collective bargaining contents and structure, the Code (art. 37, 40, 41 & 42) significantly highlights the relations between the partners involved, thus fully enhancing their private negotiation autonomy. Apart from a few compulsory provisions, the collective agreements and contracts must include the provisions specifically envisaged by the law or by any other statutory regulation. Unlike the previous Code, however, the legislature no longer establishes a minimum and maximum term of duration for collective contracts.

Pursuant to article 43, a collective contract can be entered into for a period not to exceed three years with the possibility of renewal for an additional amount of time not to exceed three years. Unlike the Italian system collective contracts are not merely private agreements between individuals but are binding on all company employees.

Article 45 stipulates that collective agreements can be established at federal, regional, and sectorial levels. Here too, however, agreements can be made for a period of time not to exceed three years with the possibility of renewal for a further period not to exceed three years. The collective agreement is

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<sup>26</sup> The collective contract is a legal deed entered between the employee representatives and an employer, regulating the social and labour relations at the enterprise level. Cf. art. 45 of the Labour Code. It should be taken into account that the collective contract can be entered both at the enterprise level and at the level of its branches, subsidiaries and production units. Cf. Dedov, *op. cit.*, 81-83; Chetverina *et al.*, *Collective Agreements in Russia: Current Practices*, Moscow, IE RAN, TACIS, ICFTU, 1995.

<sup>27</sup> The collective agreement is a legal deed that sets out the common regulatory principles underlying the social, economic and labour relations entered between the employee representatives and an employer at a federal, regional, sectorial (intersectorial) and area level within the limits of their competences. Cf. art. 45 of the Labour Code; Dedov, *op. cit.*, 83-85; Chetverina *et al.*, *op. cit.*

entered into only between the parties involved and also applies to the employees and employers who have joined these agreements after they have been signed. If the employees are covered by more than one agreement at the same time, the most favourable provisions from each one shall apply. For the agreements made at a federal level, the federal body representative has the right to put forward the proposal to employers to join such an agreement. If after thirty days from the date the proposal was received, the employer does not put forward a reasoned refusal in writing, the agreement shall automatically become binding on the employer.

Finally, along with the labour law general trends at an international and comparative level, regarding employees who are increasingly more frequently entrusted with information, consultation and participation rights, the Russian Labour Code, under chapter VIII, sets out all the forms of employee involvement<sup>28</sup>.

These various forms of employee involvement are defined under article 53 and they provide for:

- The involvement of the employee representation body in the cases set forth by the Code or by a collective agreement;
- An employer obligation to consult employee representative as prescribed by company rules;
- An employer obligation to inform employees in areas in which they have interest;
- The involvement of trade unions regarding questions related to the company operation and organisation changes;
- The involvement of employees or of their representatives in the drafting and/or approval of collective contracts;
- Other forms of involvement envisaged by company rules or by collective contracts or by other company documents at a local level.

Employee representatives have a right to be informed by employers on issues related to the:

- restructuring or dissolution of the company;

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<sup>28</sup> On this issue cf., recent essay by Mavrin, *Legal Aspects of Russian Workers' Participation in an Employers' Business* in Biagi (ed.), *Quality of Work and Employee Involvement in Europe*, Kluwer Law International, 2002, 257-259.

- introduction of technological modifications entailing changes in working conditions;
- vocational training of employees;
- other questions envisaged by the Code in force, federal laws, statutory corporate documents, collective contracts.

The employee representatives have a right to submit proposals in the above mentioned areas to the corporate administrative bodies and to take part in these body's meetings.

**4. 2.** Title III of the Labour Code covers the issue of individual employment relationships, fully endorsing private negotiation autonomy and introduces regulations to fight against any illegal type of work, which is today a very widespread phenomenon.

Access to employment is granted to young people over sixteen years of age, or even to young people over fourteen or fifteen years of age in a few special cases established by law. It is forbidden to limit access to employment on discriminatory grounds related to sex, race, social or professional status, residence or any other condition not related to the employee's professional ability, except in a few cases explicitly permitted by the federal legislation. Every refusal to hire an employee must be justified in writing on the request by the person concerned.

Employment contracts must be entered in written form and made available in two copies. A trial period is allowed, as set forth in writing, for a duration of time not to exceed three months (this period of time may be extended up to six months for managers and staff with particularly onerous tasks).

#### *Types of contracts*

Among the various types of contracts, fixed-term employment contracts must be paid special attention. Article 17, part 2, of the old Labour Code envisaged only three types of fixed-term employment contracts, whereas in all the other cases, only the open-ended employment contract was allowed. Today, pursuant to article 59 of the new Code, the scope of the fixed-term employment contract extends much further, whereas pursuant to article 58, the employment contract can either be fixed-term or open-ended.

The fixed-term employment contract is allowed for a duration normally not to exceed five years, in the following cases:

- to replace an employee who is temporarily absent, and is allowed to keep his/her job;
- to carry out temporary work (for up to two months) and seasonal work;
- for jobs in the extreme Northern regions, in situations where the stipulations of the contract involve employee transfer;
- to carry out extraordinary work in emergency cases (epidemics, breakdowns, catastrophes, etc.);
- in cases of hiring by small-sized enterprises, i.e. with less than forty employees (twenty-five in trade, services and retail businesses) or by individual persons;
- to carry out work abroad;
- to carry out work which is not part of the normal activity of the company (reconstruction, assembly, maintenance, etc.) and to carry out jobs related to the temporary increase in production of the company for a maximum period of one year;
- to carry out jobs or services having a limited time duration;
- to carry out jobs or services, when it is not possible to set a date;
- to carry out work under apprenticeship or vocational training schemes;
- with students engaged in daily study activities;
- with people who have another job within the same company;
- with retired or other people who can work only on a temporary basis for medical reasons;
- with employees in the area of sports and show business, in compliance with the list of professions set out by the Government of the Russian Federation, taking into account the opinion expressed by the tripartite commission regulating social relations;
- with scientists, academics, etc. hired by means of a competition according to the law in force;
- in all the other cases envisaged by the federal laws.

The termination of a fixed-term employment contract is possible after its expiry by prior written notice within at least three days. Whereas, no change has been made to the rule whereby if none of the parties has asked for the termination of the contract after its expiry, the contract shall automatically be regarded as an open-ended employment contract.

Another novelty introduced by the new Code is the regulation of an apprenticeship contract. An employer acquires the right to

enter an apprenticeship contract with a job-seeker or with someone who is already working for him. In this case, the Code makes reference to a professional revocation contract without discontinuity of production. Articles 199 and 200 of the Code set the form and contents of this type of contract. Pursuant to article 205, employees hired on the basis of an apprenticeship contract are covered by rules on health and safety at work. Rights and obligations of apprentices are instead set forth by article 207. In the event of transformation of the apprenticeship contract into another form of contract, no trial period is allowed.

The apprenticeship contract contains a provision (art. 199), whereby, upon the expiry of the apprenticeship contract, the apprentice shall continue to work under an employment contract for the same employer for the period of time already set by apprenticeship contract. In the event in which the apprentice fails to meet this obligation, he/she is required to refund his/her "apprentice scholarship" and the expenses incurred by the employer during his/her apprenticeship period.

*Working time:* Special attention is paid to work time regulation. With reference to overtime work, the 1971 Code referred to any type of work carried out after the working time set by the law. Articles 97 and 98 of the new Code define overtime work "as every task performed beyond the limits of the time set by the law", equal to forty hours a week, yet only if such a working activity is performed by the explicit request of the employer. In lack thereof, this work cannot be classified as overtime, with all the consequences that derive from it. Article 99 of the Code limits such a request by the employer to a maximum of 120 hours a year and to 4 hours in two consecutive days, but it is clear that such a provision is liable to give rise to relevant forms of abuse, as further illustrated in the following paragraph.

The work carried out by the employee on his own initiative after the working time (art. 97-98) is defined as a second job performed for the same employer (*sovmestitelstvo*). To make it legal, two conditions must be met: first of all a written consent of the employee is necessary; secondly, the second task must be different from the first one.

This work shall not be paid at a higher rate and shall not be subject to any such rigid constraints as overtime work. Article 98 merely sets the 16-hour limit per week. In this regard, the first commentators have highlighted the extreme fragility of the current overtime work regulation, susceptible to abusive practices by the employers, who can resort to this so-called *sovmestitelstvo* work contract scheme to avoid paying the higher

wage rates for overtime. In such a case an employee can work up to 56 hours per week, this being perfectly legitimate, since in this case it is not regarded as overtime work <sup>29</sup>.

Article 101 provides that a working day with no time limits can be envisaged for a few employee categories. A detailed list of these tasks is provided for by the collective agreement, contract or company internal regulation. Pursuant to article 190, now the company internal company must make provisions to take the opinions of trade unions into account, whereas prior to the adoption of article 190, trade union involvement could take place only by mutual agreement stipulated by collective agreement and be regarded as an annex to the collective contract. A few critics of the new Code insist on the illegal character of this rule<sup>30</sup>, also given the absence of trade unions in many companies or given their representation weakness. In this case, as well, employers can easily circumvent the overtime regulations.

Finally, pursuant to article 104, part 2, employers can introduce a so-called time bank scheme in the company internal regulation. In this case, employees may work for more than 40 hours a week without this being regarded as overtime. The problem is how the additional hours shall be managed. In most cases, employers themselves manage the related records and it is rather difficult for an employee to prove how many additional hours he has worked, also bearing in mind the fact that there is not a sufficient number of inspectors available to monitor the proper enforcement of the laws, the labour contract or the company internal regulation.

*Remuneration:* Special provisions are provided for by the new Code on the issue of worker remuneration <sup>31</sup>. Article 421, in particular, sets forth that the remuneration cannot be lower than the minimum standard of living threshold. In this case, though, the law-makers have abstained from defining what this "sufficient" minimum level should be in concrete terms, but simply referring the matter over to the federal legislation.

Furthermore, it is important to distinguish the minimum standard of living threshold and the minimum wage. At present, the minimum

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<sup>29</sup> Cf. Mironov, *Zakonotorchesky process v Gosudarstvennoy Dume (Legislative Process of Duma)*, *Bulletin of non-governmental organisations*, Comment by prof. Mironov on the new Labour Code of the Russian Federation, spec. n. 35, 30 January 2002, 5 ss.

<sup>30</sup> *Ibidem*

<sup>31</sup> On the structure of the remuneration system cf., Vedeneva, *Payment Systems and the Restructuring of Production Relations in Russia* in Clarke, *Management and Industry in Russia: Formal and Informal Relations in the Period of Transition*, Cheltenham, Edward Elgar, 1995, 224-239; Erl, Sabirianova, *Ravnoesnie zedertzhi zarabotnoy plati: teoretichesky i empirichesky analis instituzionnoy loushki Rossii (employer insolvency in the payment of wages: theoretical and empirical analysis of the institutional trap in Russia)*, in <http://pubs.carnegie.ru/russian/>; Clarke, *Trade Unions and the Non-payment of Wages in Russia*, *International Journal of Manpower* 19, 1/2, 1998, 68-94.



standard of living threshold is equal to 1185 roubles *per capita*; it becomes 1290 for people fit for work, 894 for retired people and 1182 for children. The problem is that the minimum wage does not correspond to the minimum standard of living threshold. *In fact*, the minimum wage is set by the federal law dated 19 July 2000, whereby, starting from 1 July 2000, the minimum wage should have amounted to 132 roubles a month, in view of their increase to 200 starting from 1 January 2001, to 300 starting from 1 July 2001 and to 450 roubles per month starting from 1 May 2002. According to the early commentators of the new Code, the minimum monthly wage should not be lower than the minimum standard of living threshold and it should be indexed to the cost of living. Indeed, at least according to a few experts<sup>32</sup>, the definition of the minimum monthly wage should not occur at the federal level and, pursuant to the new Code (cf. art. 133), but at the level of the individual members of the Federation, in order to be more closely suited to the specific needs of the different geographical areas of Russia.

The new Code also envisages a mechanism to reimburse employees in the event of delay in the receipt of their wages. If employers fail to pay wages in time they must compensate employees by 1/300 of the refunding rate set by the Central Bank for the daily amount not paid on time (the actual amount is set according to the collective contract and/or individual employment contract). Article 233 envisages that such a liability exists only when evidence is provided that it is the employer's fault, based on a very complicated mechanism<sup>33</sup>. If the delay exceeds 15 days, the employee can stop working until he/she is fully paid, subject to prior written notice.

But law does not clearly stipulate whether or not an employee is paid during periods in which they do not work. Traditionally such cases have been treated as though the employee was on strike (in which case they are not paid) or as if work ceased due to the fault of the employer (in which case employees are entitled to 2/3 of their pay).

*Cessation of the work relationship*: Title III contains a new provision regulating the cessation of employment relations. By pursuing the aim to introduce greater flexibility in to the management of labour relations, the list of reasons for dismissal has been

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<sup>32</sup> Smirnov, *op. cit.*, 250-251.

<sup>33</sup> Cf. Mershina, *Practica – Kritery Istini, (Practice is the criterion of truth)*, 2002, [http://www.akdi.ru/pravo/news/komm7\\_krf.htm](http://www.akdi.ru/pravo/news/komm7_krf.htm).

substantially increased, thus raising a lot of criticism by many experts of the field and by the public<sup>34</sup>.

Article 77 of the Code lists eleven general reasons for the cessation of the work relationship, including mutual consent among partners, expiry of the term, resignation, dismissal, termination of the contract, etc.; yet, it is a non-compulsory list. One cessation provision sets out that "the employment contract can be terminated also for reasons different from those envisaged by the Code or by another federal law". Article 81 lists, in particular, as many as fourteen specific reasons that make the employee dismissal legitimate. Yet, in this case, as well, it is not a compulsory list, the reasons being:

- 1) dissolution of the company or cessation of the activity by the employer (natural person);
- 2) staff reduction;
- 3) employee inadequacy at carrying out his/her task, on the grounds of:
  - a) health status, confirmed by a medical certificate;
  - b) insufficient qualification for doing the job;
- 4) change of ownership (this provision applies to managers, assistant managers and chief accountants);
- 5) failure by the employee to fulfil his/her obligations on more than one occasion, resulting in disciplinary sanctions;
- 6) serious violation, even on one single occasion, by the employee of his/her obligations, such as:
  - a) absence from the workplace for more than 4 consecutive hours without a justified reason,
  - b) presence at the workplace, under the effect of alcohol, substance abuse or any other form of intoxication;
  - c) violation of the confidentiality rules or disclosure of trade secrets, protected by the law (state, trade, corporate law, etc.), learned by the employee on his/her job;
  - d) theft at the workplace (even in the event of petty thefts) of other people's property, destruction or deliberate damage of company property, if this is confirmed by a Court's decision or by any other judgement passed by an authorised competent authority;

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<sup>34</sup> Cf. Mironov, *Zakonotorchesky process v Gosudarstvennoy Dume (Legislative Process of Duma)*, cit.

- e) violation by the employee of the work protection rules in the event in which the conduct of the employee has entailed (even only potential) serious consequences.
- 7) detrimental actions committed by the employee, whose activity is linked to the management of valuable objects, to the extent of engendering a loss of confidence by the employers vis-à-vis the employee;
- 8) immoral actions committed by the employee, who performs an educational activity, such that it makes it impossible for him/her to continue that activity;
- 9) an erroneous or unjustified decision by the manager, assistant manager or chief accountant which has resulted in damage to the corporate property or the inappropriate use of such a property;
- 10) serious violation, even on one single occasion, by the manager or assistant managers of the company (or branch, or subsidiary) of their obligations;
- 11) submission of false documents by the employees when signing the employment contract;
- 12) discontinuation of access to State secrets if necessary for the performance of the activity set by the agreement;
- 13) all those cases envisaged by the employment contract entered into with the manager and with the members of the Board of Directors of the company;
- 14) all the other cases envisaged by the new Code or by other federal laws.

Critics have highlighted that this Code extends the list of reasons for dismissal by employers. Indeed, the Code has not included many new reasons, but it has simply put together the other reasons stated by other federal laws, such as, the law on "State secrets". Unlike the old code, the new Code also envisages the possibility of dismissing the manager, the assistant manager or the chief accountant. It should be clarified that recourse to this provision mainly refers to cases of privatisation or nationalisation of State enterprises, hence it applies to cases that are bound to become ever more rare.

5. The new Code undoubtedly contains many mechanisms intended to make labour relations and industrial relations in Russia much more flexible, so that, at least in rough terms, this process of labour law codification can truly be described as deregulation.

Yet, as has been emphasised in the first paragraph, formal innovations indeed are a true attempt – and not so paradoxically – to regulate the labour market. The labour market is broadly characterised by the adoption of *praeter et contra legem* contractual practices, with unsustainably high law evasion rates which are difficult to keep under control, exacerbated by the chronic weakness of trade unions, merely through a repressive and sanctioning approach.

Worker protection rules provided under the previous law have actually translated themselves into abstract normative policies that are destined to remain ineffective<sup>35</sup>. Only among civil servants working for public administration has a general implementation of the formal statutory rules been maintained. Yet, on the one hand, this has been accompanied by a slow but progressive reduction of wages and, on the other hand, a substantial reduction of efficiency in the system, which has rapidly led to an even greater drop in the quality of public services – which anyway had never been high, even during the Soviet regime.

By making employment contract management rules more flexible, the Russian Government has therefore launched a legislative political platform aimed at recovering the effectiveness and efficiency of statutory rules. The Government is trying to reach a “sustainable” and “realistic” balance between worker protection needs and companies’ needs faced with the new social and market conditions. This attempt has been made in the full awareness that the return to the private law approach to be applied to the labour relations management cannot be the panacea to solve all the serious problems affecting the Russian economy and society<sup>36</sup>.

If a criticism is to be levelled against the new Code approach, it is that of having looked for solutions that, from a formal point of view, are in line with the developments followed by the labour relations in the Western-European countries, especially in the Anglo-Saxon area. A greater attention to the social and economic needs of Russia – which is nevertheless a historically and culturally complex area, half European and half Asiatic<sup>37</sup> – might have better contributed to give rise to a more specific set

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<sup>35</sup> Cf. Sil, *Privatisation, Labour Politics, and the Firm in Post-Soviet Russia: Non-market Norms, Market Institutions and the Soviet Legacy*, cit., spec. 228-231; Clarke, Cabalina, *Employment in the New Private Sector in Russia, Post-Communist Economies* 11, 4, 1999, 421-43; Mironov, *Analysis of Legal Regulation of Labour in the Russian Federation (memorandum)*, cit.

<sup>36</sup> Cf., among others, Mironov, *Analysis of Legal Regulation of labour in the Russian Federation (memorandum)*, cit.

<sup>37</sup> For a thorough analysis of the specificity of the Russian social and economic system cf., in particular, Burawoy, *The Great Involution: Russia's Response to the Market*, cit.

of rules and regulations, thus being more suitable for labour relations.

Comparative studies themselves highlight the danger of a mere transposition of a model from one country to another<sup>38</sup>. To solve the serious problems affecting the economy and the labour market, Russia rapidly needs to find its own model, which will be different from both the continental European and from the Anglo-Saxon model.

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<sup>38</sup> Cf., on the comparative research, Biagi, *Representation and democracy within the enterprise. Comparative Trade Union Law Profiles*, Maggioli, 1990, here 3, which refers to the teachings of Kahn-Freund on *The use and abuse of comparative law*.

*Part II*

*Labour Contract in Japanese Labour  
Law*

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SHINYA OUCHI

**SUMMARY:**

1. Individualization
2. Regulation of labour contract in Japan
3. Present Argument Situation in the Government
4. Conclusive remark

## 1 "Individualization"

The discussion on the labour contract has been provoked by the "individualization" of the labour relation, accompanied by the diversification of the forms and style of employment. The "individual" in the labour law has a complicated implication. No one can deny the primary importance given to the dignity and the development of personality, of an "individual" employee. However, the "sphere" of an individual labour contract, where the parties to the labour contract, employer and employee, are free to determine the terms and conditions of the contract, has been notably restricted. For example, a series of labour legislations have limited the freedom of contract, especially through the mandatory statutory provisions and the collective agreement. The latter has the normative effect, according to which an individual labour contract cannot derogate, to the employees' detriment, from the working conditions established by the collective agreement. These principles apply not only to Japanese law, but also to the law in many European countries. Recently, however, the individual labour contract is becoming more and more important everywhere, which may cause a radical and profound reform of the traditional labour law system based upon the collective regulation which consists of mandatory statutory provisions and collective agreements. Then why is this kind of change appearing? As far as the Japanese situation is concerned, the following four points should be mentioned.

Firstly, the transformation of industrial structure, which has raised the importance of the service sector, and the increasing number of white-collar employees have made obsolete the Japanese labour law system which basically has been constructed for the protection of the workers of the manufactory industry. In particular as regards the white-collar employees, whose working conditions are based upon the ability and result of individual employees, it has become more difficult to realize the collective regulation of their treatment.

Secondly, the matured social life and the improvement of the level of life of citizens have contributed to the diversification of the personal needs of workers in their lives. Such a change causes the individualized needs of each employee for the working conditions and the forms of employment. In addition, taking into account the aging population and the low birthrate, the participation in the labour market of the women and the elderly, who have been underutilized as workforce, will be more required in the future. These new types of working population tend to have



intention to work in the way compatible with personal needs linked with their family responsibility or the physical conditions, while regular full-time employees have devoted much of their time to the work with high loyalty towards their employer.

Thirdly, the more and more fierce international competition in the globalization of market calls for more flexible labour organization in order to maintain and improve the adaptability. In Germany as for the determination of working conditions, the collective agreements (Tarifvertrag) at local and industry level are giving way to the work agreement (Betriebsvereinbarung) at enterprise level. While in Japan collective agreements, which are mainly enterprise one, are originally flexible and adaptable, because the results of the collective bargaining tend to reflect the economic and financial conditions of each enterprise. Certainly, until several years ago, in the "spring offence", collective bargaining at enterprise level was organized and advanced according to the schedule preestablished at industry and national level. But this practice is being transformed, leaving to the enterprise level much room for bargaining. Moreover, enterprises tend to treat their employees in accordance with their ability and results, gradually giving up the collective treatment of working conditions. As nowadays a stable economic growth cannot be expected in the future, the enterprise will not be able to maintain a collective and egalitarian management of working conditions, e.g. seniority-based wage.

In the period in which working conditions tend to be increased, what matters is the distribution of the gained "pie", but the way of distributing is indifferent to workers only if the egalitarian way is kept. On the other hand, when the working conditions go downward, the distribution of the "disadvantage" is at stake. In such a case, the employees are sensitive to the way of distributing. Especially if the disadvantage involves the risk of the employment, it is necessary to justify the way of distributing by demonstrating a difference in individual ability and result or a contribution to the productivity.

Fourthly, we must point out the change of employment practice as a reason proper to Japan. In the past, under the long-term employment security, a sort of community relationship is formed between the enterprises and their employees, so that the employees are rarely conscious of "contractual" relationship. But as recently such an employment practice is gradually collapsing and consequently the mobility of the labour market is advancing, the nature of the relationship between the enterprise and the employees is changing from "status" to "contract".

In this regard, it is appropriate to mention the symptom of the change of the corporate governance of Japanese enterprises from employee's interest oriented model to shareholders' interest oriented model. In this trend the increasing number of the managers will respect the interest of shareholders and be asked to raise the profitability to satisfy the interest of shareholders in the short-term, even if at sacrifice of the interest of employees. It implies the pressure for the employees to raise the productivity in the short-term.

Anyway in such a change the number of the employees who are more conscious of the rights and the duties prescribed in the labour contract is increasing. In the past many employees accepted the authority to manage affairs of the employer in exchange for the long-term employment security.

In fact, the change of the reality is demonstrated by the increase of the number of the individual labour disputes. According to the statistic of Ministry of Health, Labour and Welfare, the matters which the authority coped with under the "system of assistance for the dispute resolution" introduced by the Labour Standards Law revision of 1998, regard dismissal (50%), deterioration of working conditions (19.2 ) farming-out and transfer(9.5 ) employment termination of fixed-term contract (4.7 ) encouragement of designation(3.2 ) and disciplinary measures(2.5 ). This figure shows that the diffused restructuring of enterprise brings about the disputes caused by the downsizing of the enterprise dimension or the cut of labour cost.

Furthermore the sexual harassment and the mobbing, which had not been recognized as an infringement on right, have become a legal problem. This is one of the main reasons for the increase of the number of the individual disputes.

Of course the trade union can cope with these kinds of dispute through the process of collective bargaining. But the purely "individual" disputes are not easily resolved by the collective bargaining. In addition, the rate of unionization is going down to about 20%, and in many small and medium-sized enterprises any trade union is not organized. In these non-unionized sectors, it needs the mechanism of the dispute resolution through outside organs like the tribunal or the labour administration.

As above-mentioned, in Japan, nowadays, the individualization of working conditions is gaining ground and the nature of labour disputes is individualized. This trend seems to be irreversible and cause the reform of the labour law system based upon the collectivistic philosophy. Indeed the Japanese Government thinks it indispensable to arrange the legal basis permitting individual

employees to exert fully their own ability, and begins to study the new concept of the legal system on labour contract. Recently the government made public the basic points on the rules on the labour contract; to arrange the alternatives of the forms of employment or the work styles permitting each employee to exert its own ability and personality, and to widen the possibility for the employees to choose among various work styles; to arrange the legal rules on labour contract that guarantee the working conditions appropriate for the forms of employment and to serve to the resolution of disputes; to involve employers and employees or their representatives in order to control the application and management of the above mentioned legal rules.

## **2. Regulation of labour contract in Japan**

In Japan, the principal law governing the working conditions and the labour contract is the Labour Standards Law. The Labour Standards Law was enacted in 1947 in accordance with the request of the Constitution, Article 27, Paragraph 2, which states that the standards of wage, working hour, rest and the other working conditions shall be set forth by the law. The Labour Standards Law establishes the minimum standard of working conditions and Article 13 of the law states "A labour contract which provides working conditions which do not meet the standards of this law shall be invalid with respect to such portions. In such a case the portions which have become invalid shall be governed by the standards set forth in this law". The labour administration bodies inspect the respect of the Labour Standards Law and the employers who contravene this law can be subject to penal sanctions. The Labour Standards Law is characterized by the strong intervention in the area of labour contract, which have played an decisive role in protecting the workers' interest.

The matters covered by the regulation of the Labour Standards Law are as follows; Equal Treatment, Principle of Equal Wages for Men and Women, Prohibition of Forced Labour, Elimination of Intermediate Exploitation, Guarantee of the Exercise of Civil Rights, Limitation of Period of Contract, Clear Statement of Working Conditions, Ban on Predetermined Indemnity, Ban on Offsets against Advances, Ban on Compulsory Savings, Restrictions on Dismissal of Workers, Notice of Dismissal, Certificate when Leaving Employment, Return of Money and Other Valuables, Payment of Wages (Wages must be paid in cash and

in full directly to the workers), Emergency Payments, Allowance for Business Suspension, Guaranteed Payment under Piece Work System, Working Hours, Monthly or Annual Working Hours Averaging System, Weekly non-regular Working Hours Averaging System, Flextime System, Extra Work at Times of Temporary Necessity, Rest Periods, Rest Days, Overtime Work and Work on Rest Days, Increased Wages for Overtime Work, Work on Rest Days and Night Work, Conclusive Presumption System on the number of the Hours of the Work outside the Workplace and of the Discretionary Work, Annual Leave with Pay, Exclusions from Application of Provisions on Working Hours, Special Provisions for Minors, Special Provisions for Mother Workers, Leave for Menstrual Periods, Training of Skilled Workers, Work Rules, Dormitories, Inspection Bodies, Penal Provisions. And the Minimum Wage Law of 1959, Industrial Safety and Health Law of 1972, Workmen's Accident Compensation Insurance Law of 1947 are considered the law attached to the Labour Standards Law. Furthermore many important laws have integrated the Japanese labour law system; here is made a particular mention to the following laws; Law on Securing, Etc. of Equal Opportunity and Treatment between Men and Women in Employment of 1985; Law for Securing the Proper Operation of Worker Dispatching Undertakings and Improved Working Conditions for Dispatched Workers of 1985, Law Concerning the Welfare of Workers Who Take Care of Children or Other Family Members Including Child Care and Family Care Leave of 1991, Law concerning the Improvement of Employment Management, Etc. of Part-Time Workers of 1993, Law Concerning the Succession of Labour Contracts, Etc. upon the Divisive Reorganization of Company of 2000, and Law on Promoting the Resolution of Individual Labour Disputes of 2001 and so on.

The Labour Standards Law per se has been repeatedly revised. In particular in 1990, legal weekly maximum working hours were reduced from 48 hours to 40 hours, working hours averaging system was extended, and the flextime system and discretionary work system were introduced. In 1998, the reinforcement of the obligation of the clear statement of working conditions, the extension of discretionary work, and the introduction of the system of delivery of the certificate on the reason of dismissals on demand of employees when leaving the company were realized.

On the other hand, many matters remain not to be covered with the regulation of statutory laws. The Labour Standards Law is silent on the important legal problems which happen in the process of

the formation of working conditions, such as the binding effects of work rules established unilaterally by an employer, in particular in the case of the deterioration of working conditions through the revision of work rules, and the substantive requirements of dismissals. The Labour Standards Law doesn't cover many matters of practical relevance on labour contract such as transfer, farming-out, moving-out, disciplinary measure, suspension of employment, duty to refrain from competing and duty to keep secrets, tentative decision to hire probationary employment, employment termination after repeated renewal, conditional dismissals to change working conditions.

Therefore the case law has developed the labour contract rules to fill up the lack of the statutory regulation. For example, as for the dismissal, the judge has established a rule that the exercise of the employer's right to dismiss shall be null and void as abuse of the right if it is not based upon objectively reasonable grounds and thus cannot be socially approved as an appropriate act. This rule is called "the doctrine of the abusive exercise of the right of dismissal" (hereafter, using shortened expression, "the doctrine of abusive dismissal"), whose legal basis the judge finds in the general principle of the Civil Code (Article 1, Paragraph 3) prohibiting abuse of the right. Due to this doctrine, the freedom to dismiss of employer has been considerably restricted. Thanks to this doctrine, in Japan the freedom of dismissal guaranteed by Civil Code is limited even if the statutory law against unjust dismissals as seen in many European countries has not been enacted.

With regard to work rules, the Labour Standards Law (Article 93) states that Labour contracts which stipulate working conditions inferior to the standards established by the work rules shall be invalid with respect to such portions, and that in such a case the portions which have become invalid shall be governed by the standards established by the work rules. This effect of work rules is similar to that of the Labour Standards Law (Article 13; see above). However this effect concerns only the case where the working conditions in the labour contract are inferior to those of work rules. Thus it remains open question whether work rules per se have binding effect or not. It is highly probable that the lawmaker tried to assimilate work rules to law. But theoretically speaking it is very difficult to justify the binding effect of the work rules, which are established or modified "unilaterally" by an employer. According to this theoretical position, work rules are not binding without the consent of an employee. However the Supreme Court attached importance to the collective treatment

of working conditions and recognized the binding effect of work rules, but on the condition that the content of work rules is rational.

As for the transfer, the case law, on one hand, recognized the right of the employer to change job or workplace, on the basis of a general clause included in the work rules or the collective agreements. On the other hand it limited the exercise of the right, taking into consideration the concrete situations. Precisely speaking, the order to transfer is null and void as an abusive exercise of the right if there is not business necessity, if the order is motivated by an improper or illegal reason or if the transfer may bring about the damage which ordinary employees are not usually expected to endure.

As for the farming-out, which means the transfer to the other company while keeping the employee status in the original company, the right to order the farming-out is admitted if you can see a clear statement authorizing such an order in work rules or collective agreement. And the judge tends to determine whether it is an abusive exercise of a right, weighing the business necessity against the disadvantage for the employee. In the case of the moving-out, which involves the termination of a labour contract with the original company, the judge tends to require an individual and specific consent of an employee.

As for disciplinary measure, the Labour Standards Law requires the employer to indicate the grounds for discipline. In addition, disciplinary sanction should be appropriate in the light of the type and degree of the violation of discipline. According to the case law, disciplinary measures will be null and void as an abuse of a right, if they are not based upon reasonable grounds and do not conform to generally accepted social norms.

As regards suspension of employment, courts tend to decide the validity of concrete measures, addressing the objectives, functions, reasonableness and disadvantageous impact upon employees of various types of suspensions. For example, in the case of "prosecution suspension", according to the general trend of judicial decisions, only the fact that an employee was prosecuted is insufficient for authorizing the application of the suspension of employment, and the additional following two conditions should be met. One is that considering the nature of job and the content of misconduct the continuity to work may produce the loss of public confidence of the company or the disturbance of enterprise order. The other is that the performance of the employee's job is rendered impossible or difficult due to the employee's arrest or detention.

As for duty to refrain from competing, a representative judicial decision held that such a duty, which is prescribed in work rules, is binding, only if it does not restrict improperly the freedom of the retired employee to choose an occupation. In this case, the judge should take into consideration the duration and scope of the restriction and the compensation in the light of the business necessity, the interest of enterprise, the disadvantage of the employee and the social interest.

As for the probationary period, the Supreme Court considered it as the period during which the employer reserved the cancellation. But because legally speaking this cancellation can be classified as a dismissal, it raised a question to what extent the reserved cancellation rights are legal. The Supreme Court said, "The exercise of a reserved cancellation right can be approved on the basis of the results of its investigation in making its subsequent hiring decision and during probation, as well as the actual work situation during probation. Where the employer could not know the reason at the beginning, but came to know it later and, therefore, determined that it would be improper to employ the worker continuously in the above-mentioned aims and objectives of a reserved cancellation right".

With regard to employment termination after repeated renewals, the Supreme Court admitted the analogous application of "the doctrine of abusive dismissal" in certain cases. According to the general trend of judicial decisions, when labour contract with fixed term became substantially contract without a fixed term as a result of repeated renewals, or if the words and the conduct of the employer created the expectation of continuous employment for the employee, the employment termination is not permissible only for the reason of the completion of the term.

On the validity of a "conditional dismissal to change working conditions" (using German term, *Änderungskündigung*) there was a lively discussion. In the past, academic opinions said that it was highly difficult to admit the validity of this kind of dismissal under the "the doctrine of abusive dismissal". But in 1995 there appeared a judicial decision of Tokyo District Court explicitly admitting the validity of the "conditional dismissal to change working conditions". According to the court decision, "Where the change in working conditions is essential for the company's operation; and its necessity overrides the worker's disadvantage resulting from the change in working conditions; and the proposal to conclude a new contract that accompanies the change in working conditions will be recognized as justifying a dismissal of

employees who have rejected it; and where the effort to avoid a dismissal has been sufficient, the company may respond by dismissing the worker if the worker has rejected the conclusion of a new contract”.

These are main, not exhaustive, judicial rulings, which constitute the part of the Japanese legal doctrine on labour contract. This shows that in Japan, at least in the area of individual labour relation, the case law plays a more important role than the statutory law. Some academics point to the defects in such a regulation style by case law, asserting that both employers and employees find it difficult to access and understand the case law. They argue that the case law on labour contract should be codified in order to resolve the above-mentioned defect, especially with regard to the abusive doctrine on dismissal.

But there are defects in the codification of the case law on labour contract. For example, as the discussion on the dismissal typically shows, even if a bill is submitted to the Diet, it would be difficult for both labor and management to approve it. Because Labor would like to see legislation similar to, or stricter than, the present doctrine of abusive dismissal, while management desires a looser regulation. Moreover the doctrine of abusive exercise of a right to which the Japanese courts have frequent resort can contribute to a more equitable settlement of disputes. Even if the case law is codified, the lawmaker should make use of a “softer” regulatory measure, e.g. refraining from mandatory provisions as much as possible.

Of course, making clear legal rules serves to clarify the guideline for the conduct of the employer and raise the consciousness of compliance, and at the same time promote the exercise of rights and the defense of the interest from the part of employees. Already in 1998, the system of the assistance in resolving individual disputes between workers and employers was founded as an administrative service for advice and guideline to the parties to an individual labour dispute. In 2001 the Law on Promoting the Resolution of Individual Labour Disputes was enacted to introduce the system of referral of conciliation at Dispute Adjustment Commission. Actually there is a lively argument on the foundation of a comprehensive system for resolution of individual labour disputes. There are some proposals; for example, some propose extension of the functions of the Labour Relations Commissions which are administrative organ, now competent only for the collective labour disputes; some say that the civil conciliation procedure in the tribunal should be



utilized for individual labour disputes; others assert promotion of dispute resolution function at level of municipality or prefecture.

### **3 . Present Argument Situation in the Government**

For the moment, the Council of the Ministry of Health, Labour, and Welfare is examining the perspective of a legal regulation regarding working conditions; in particular, the items discussed are specification of the terms and conditions of the labour contract, term of the contract, termination of labour relations, and working hours.

#### (1) Specification of the terms and conditions of the labour contract

The Article 15 of the Labour Standards Law imposes on the employer to clearly state the worker's working conditions. According to the Enforcement Regulation of the Labour Standards Law, Article 5, Paragraph 1, the working conditions which must be clearly stated are term of contract, working place and job to perform, working hours, wage, retirement, retirement allowance, extraordinary wages, cost of food born by workers, safety and health, vocational training, accident compensation, commendation and sanction, and suspension of employment. In particular term of contract, working place and job to perform, working hours, wage, retirement, and retirement allowance must be rendered clear in writing. However, because these matters subject to the duty of clear statement are almost the same as the matters that must be dealt with in the work rules according to Article 89 of the Labour Standards Law, the duty of Article 15 is considered as carried out if the employer furnishes to its employees copies of the work rules.

Furthermore, the duty of explicit statement of working conditions is prescribed by the employment security law. When engaged in job referral, worker recruitment or labour supply, public employment-security agencies and private employment-service enterprises must specify working conditions to job seekers and persons responding to recruitment, etc.

However, notwithstanding that the law is aware of the importance of the clear statement of working conditions, the situation seems unsatisfactory mainly due to the fact that all the important working conditions need not be indicated in a document. The small enterprises usually make little use of the work rules for the purpose of informing working conditions of the employees. In addition, since the employer's duty of the clear

statement of working conditions is imposed in the time of the stipulation of labour contract, which in the case of hiring of new graduates, is carried out usually many months before the employee begins to work, the employer cannot specify working conditions even if it wants. Though disciplinary reasons and dismissal reasons are of great interest for employees, it may be almost unrealistic to demand employer to indicate precisely such reasons in advance.

Above all it should be mentioned that if the content of labour contract is not clear enough, there is a risk of employers' unilaterally determining the content of the contract at its will, which would prevent a secure work life of employees. Within the Government Tripartite Council, the labour representative requests to oblige employers to clearly state the rules concerning the development of labour relations like those of farming-out etc., which now are not included in the items of the duty of clear statement of working conditions.

The labour disputes, which have been quite frequently caused by termination of labour relations like dismissal, may be able to minimize, or easily lead to satisfactory resolution, if substantive and procedural rules on these matters are clearly individualized. By the revision of the Labour Standards Law of 1998, the provision, which requires employers to certificate the reason of dismissal, was introduced. The employer's side says that this regulation is sufficient to satisfy the needs for the specification of the rules on employment termination. But this regulation doesn't cover the information of the reason of dismissal at the very time when the dismissal is noticed. In this regard, the present legal regulation is not satisfactory.

Anyway under the Labour Standards Law, if employer contravenes the duty of the clear statement of working conditions, the penal sanction is imposed upon the employer. But a penal sanction for the contravention of the civil rules concerning contract is too severe for employers. Of course, now no one can deny the necessity of the correction of information gap between the parties to contract, so that many civil law scholars affirm the duty to furnish information and explain of the party who retains more information, i.e. usually an enterprise (see the Consumer Contract Act of 2000). Taking into account the discussion in the field of civil law, the duty of the clear statement of working conditions should be positioned as a duty in the framework of the civil contract law, which leads only to compensation for damage or nullity of agreement.

## (2) Term of labour contract

There is increasing need for flexibility in setting the term of labour contract. The Civil Code of 1896 prescribes that either party can terminate a contract of employment when five years have passed, which substantially means that the length of the term of fixed-term employment is limited to five years. According to the Labour Standards Law of 1947, Article 14, labour contract, excepting those providing that the period shall be the period necessary for completion of a specified project, shall not be concluded for a period longer than one year. After the revision of the Labour Standards Law of 1998, the maximum of the period is three years only with respect to labour contracts that come under any of the following items; (a) labour contracts concluded with workers who have the professional knowledge, skills and experience that are necessary for developing new products, services or technologies or for scientific research; (b) labour contracts concluded with workers who have the professional knowledge, skills and experience that are necessary for activities to stand up, convert, expand, downsize or close down an enterprise which are expected to be completed within a definite period; (c) labour contracts concluded with workers aged 60 years or older.

The intention of the Labour Standards Law is that long-term period of labour contracts may restrain on freedom to leave the company, especially in view of the past experience that fixed-term contracts used to be utilized as a means of "feudal" labour practice.

But today fears about the evil effects of fixed-term labour contracts diminished. The present legal regulation rather functions as a constraint on freedom of contract. Employers are demanding to restore the maximum of the length of term of 1 or 3 years to 5 years.

From a comparative viewpoint, Japanese legal regulation seems not to be based upon a stable principle against the term. For example, in the Japanese law there is no legal thinking that labour contract without fixed-term is a rule, as opposed to many European countries where labour contract with fixed-term is only an exception. Certainly it may be true that in Japan only regular employees enjoy the stable employment, but such a status of regular employees is not required by law. In addition it should be mentioned that in Japan there is no legal regulation that require a temporary need in order to conclude fixed-term contract as in European countries. Consequently there seems to be no great barrier for loosening the regulation of the term of labour contract.

On the other hand, as for the fixed-term employment, what is more focused on is the legality of employment termination after repeated renewals of fixed-term labour contract. The case law, as above mentioned, have developed a rule that such a termination can be admitted only if there is a rational reason. In this sense, the limitation of the length of the period of contract should be examined not from a viewpoint of evil effects of long-term restriction, but of long-term security of employment. In this regard we must bear in mind that a regulation of dismissal and that of fixed-term labour contract are intimately related. Under a stricter regulation of dismissal, a regulation of fixed-term contract should be the stricter in order to avoid the evasion of the dismissal regulation. On the other hand, under a not strict regulation of dismissal, a regulation of fixed-term contract would not be needed. Thus we must examine a revision of present legal regulation of fixed-term contract, taking into account a revision of present legal regulation of dismissal, in the general perspective, i.e. from a viewpoint of labour market policy.

The principle of freedom of contract requires that the parties to labour contract are free to determine term of contract if the term is not too long. In addition, in principle fixed-term employment relation must end when the term is completed, even if the contract has been renewed many times. Anyway if the judicial ruling, according to which termination after repeated renewal of fixed-term contract should be justified by a reasonable reason, is maintained, the conditions for continuity of fixed-term contract, i.e. criterion of reasonableness, must be rendered clear.

By making clear a rule regarding employment termination, an employer can know in advance in which conditions employment relation can be terminated, and it will reduce a risk that an employer may have to hold unnecessary workforce in a bad economic situation. Consequently it may become an incentive for new hiring and therefore become an effective measure for combating against unemployment.

However, the labour side often indicated a risk that an increase of the number of employees who are hired with fixed term may result in replacing stable employment with unstable one. Similar discussion was made with regard to discussion of temporary or dispatched work. In this regard, it should be pointed out that in the Japanese Law the principle of equal pay for equal work was not clearly recognized. The labour side is afraid that without such a principle an employer may exploit employees with fixed term as cheap workforce. According to the recent discussion, with regard to an equal treatment between part time workers and full time

workers, the wage of part time workers should not be inferior to 80% of the wage paid to the regular full time employees if in a similar working situation. Anyway this question will be able to be dealt on more appropriately, if taken into account the discussion as to what extent the difference of working conditions among various types of employment, especially between regular employees and non-regular employees, can be socially accepted as proper one in Japan.

### (3) Dismissal

As above-mentioned, in Japan the right of dismissal is limited by the case law. Since the legal basis of "the doctrine of abusive exercise of the right of dismissal" is found in the general principle of the Civil Code (Article 1, Paragraph 3), application of this doctrine of abusive dismissal is mostly left to the discretion of the judge. Thus it is difficult for both employer and employee to know in advance whether a dismissal is effective or not. Certainly an analysis of accumulated cases in which judges applied this doctrine shows a general trend that dismissals are justified in the following four reasons: first, where there is a union-shop agreement; second, incompetence or lack of the skills or qualifications required to perform a job; third, violation of disciplinary rules; fourth, business necessity. The last type of dismissal, that is, dismissal for business necessity, is called "adjustment dismissal." In this case, the judge has ruled that, to justify this kind of dismissal under the doctrine of abusive dismissal, it is necessary to satisfy the following four requirements: a need to reduce the number of employees, a need to resort to adjustment dismissals, an appropriate selection of employees to be dismissed, and appropriate procedures such as consultation with the employees' representative. This rule is called the "four requirements of adjustment dismissals" rule.

Among these justifying reasons for dismissal, however, incompetence or lack of the skills or qualifications required to perform a job has been narrowly interpreted. Even if an employee's incompetence is evident, judge tends to take account of the circumstances which are favorable to employees as much as possible. In fact it is quite rare that the validity of dismissal for the reason of incompetence is upheld by judge. For example, the validity of dismissal for the reason that the employee's performance is poor is upheld only if its performance is "notably" poor and if there is no room for improvement even with much assistance from the employer. Consequently it remains unclear in which case an employer can legally dismiss its

incompetent employees. As for adjustment dismissals, likewise, it needs a complex judgement of four requirements, thus it remains unclear in which case in a bad economic situation an employer can legally dismiss its employees.

Some academics are afraid that such legal uncertainty may prevent rational activity by an enterprise and employee. Certainly it may be useful to codify the case law in order to resolve the above mentioned defects. Nevertheless, we should bear in mind the merits of case law: case law can adapt more elastically to socio-economic changes than statute law. Furthermore, the government is currently preparing a series of policies aimed at enhancing the mobility of the labor force. Since restrictions on dismissal are linked closely with the low degree of employee mobility, a policy toward a higher mobility might dispense with strict restrictions of dismissal.

As far as a procedural requirement is concerned, there is a defect in the case law. No one can deny importance of dismissal procedure for defence of the interest of dismissed employees. According to the common interpretation of the case law, this procedural requirement is not indispensable for the validity of dismissal. As for adjustment requirement, an appropriate procedures such as consultation with the employees' representative is merely one of the requirements. In this regard, there can be an option for a legal intervention that requires consultation procedure with employees or their representative. In my opinion, it must be better to urge the judge to change its way of interpretation of "the doctrine of abusive exercise of the right of dismissal" than a legal intervention; precisely speaking, only a lack of consultation with dismissed employee or its representative, in the process of dismissal must lead to nullity of the dismissal. Such an interpretation induces employers to endeavor to get agreement from employees and can lead to a satisfactory termination of employment, e.g. offer of increased payment of retirement allowance or assistance for finding another job.

Another discussion point concerns remedy of an unjustified dismissal. In Japan, according to case law, an unjustified dismissal is null and void and the relationship between employer and employee is considered never to have been severed. In these cases, the judge must order reinstatement and back pay covering the period from dismissal to judicial decision. Thus in Japan, an employee does not have the option of choosing compensation in lieu of reinstatement. The Japanese process of redress is not necessarily suitable to resolving dismissal disputes, as the relationship of trust between employer and employee has

been lost. The judicial order to reinstate cannot recover a relationship of trust even if it can recover a legal relationship. Considering this, some academics say that it should give the employee a choice for compensation in lieu of reinstatement. In my opinion, it is desirable to induce an employer to a resolution by compensation, by adopting an interpretation according to which the circumstance where an employer offers some options lessening the disadvantage the dismissed employee suffered from, mainly pecuniary compensation, is considered favorably to the employer in the decision of validity of dismissal.

#### (4) Working hours

As far as working hours are concerned, what kind of a legal regulation is more suitable to flexible and diversified work styles is now being discussed. With regard to white-collar employees, who increasingly are paid on the basis of the quality and outcome of their work rather than its quantity, the present strict regulation of working hours is ill-suited, particularly taking into consideration the legal provisions that require employer to pay premium wages according to the quantity of overtime work. The management side requests not only extension or the simplification of procedure of the discretionary work system, but also the introduction of exemption system for white-collar employees modelled on US law.

In relation to working hours regulation, it is said that so-called health problem has been caused by excessive work, which is intimately connected with the "non-paid", i.e. illegal overtime work problem. In the past, long working hours of white-collar employees were not taken seriously, but recently a judicial sentence applied strictly the statutory regulation of working hours to the employees in a bank. Certainly a present rigid legal regulation of working hours need be revised, but until such a revision will be realized the legal regulation should be strictly observed.

Already in the area of Workmens Accident Insurance and the damage claims by the contravention of the employer's duty to care for safety and health of employee, there were some cases concerning health damage that was caused by excessive work. Now more and more people request the compliance of the statutory regulation of working hours in order to prevent from health damage, particularly mental health damage such as depression. In this regard, the discretionary work system, which permits to separate a calculation of working hours from performed work, on one hand is expected to respond to the

needs for working hours regulation suitable for white-collar employees, but on the other hand the expansion of the system is being considered dangerous because it may be a promoter of excessive work and consequent health damage.

#### **4. Conclusive remark**

As for the future of legal regulation of labour contract, first of all we must answer the following three questions; who is subject to the legal regulation; what kind of matters are covered by the legal regulation; what kind of methods are used for the regulation.

First, as regards the subject, the Labour Standards Law, Article 9 defines a "worker" to whom the law is applied, stating that worker shall mean one who is employed at an enterprise or place of business and receives wages therefrom, without regard to the kind of occupation. Generally speaking, the worker in the sense of the Labour Standards Law is considered a person who is legally and/or economically subordinated to its employer, and therefore a person, who performs work without such subordinate relationship, has been classified as a self-employed and as such excluded from the legal protection.

However, increasingly the self-employed are dealing only with particular enterprises and as a result are substantially dependent on such enterprises. Moreover some people point out that, in order to evade the labour protective law, some enterprises are employing simulated independent contract workers who are engaged in practically the same job as the regular workers of the same enterprises do.

Anyway the latter illegal case is produced by the striking gap in the protection between dependent workers and independent ones. Now we must try to arrange common rules that apply universally to workers irrespective of dependence on those who utilize the work performed by workers. In this regard, the discussion of "Statuto dei lavori" (Statute of works) in the Italian Law is remarkably interesting.

Second, as for the matters, the "individualization" of working conditions is raising the importance of information and explanation of the content of each labour contract at the time of its stipulation. Additionally when working conditions are modified, there are similar needs, too. In these matters, it needs a legal intervention or a development of case law. On the other hand, today some regulations included in the Labour Standards Law are considered unnecessary; e.g. ban on predetermined



indemnity (Article 16) should be expelled from the labour protective law to trust to the general principle of contract law. Anyway regulations which are attached to penal sanction need to be reduced.

Third, as for the method of regulation, it should be mentioned that a "package" of mandatory provisions, administrative inspection and penal sanction has not to be necessarily maintained. Ironically too strong a sanction has reduced the effectiveness of the law, because the authority is very discreet in applying the provisions. Of course the penal sanction has an intimidating effect that can make smooth the administrative inspection. But since a labour contract is a kind of contract, it is desirable that regulation of labour contract has as much as possible in common with general rules of contract law. Thus a penal sanction should be limited the case where there are extremely high needs for preventing illegal act of employer, e.g. regulation for the protection of the health and safety of employees. In other matters we should advance "depenalization".

As far as civil law principles are concerned, non-mandatory provisions will be more utilized in order to make room for freedom of contract. Non-mandatory or dispositive provisions can function as orienting the parties to contract into a typical content of contract and as such can strengthen the self-determination of employees. In addition, the idea of semi-mandatory provisions is recommendable in some matters; this type of provisions are in principle mandatory, but can be derogated only by an individual agreement that is objectively rational or by a collective workplace agreement stipulated between employer and employees' representative elected by all the employees of the workplace.

Softer regulation methods such as non-mandatory provisions or semi-mandatory provisions can contribute to make legal regulation of labour contract more flexible and adaptable to the "individualization" of working conditions.

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