Chapter 4 - I

History and Future of the Legal System that Governs Labor

: Transcending the Platform Economy

Sho Mizubayashi*

The Labor Standards Act, which has formed the backbone of Japan's labor laws since the Second World War, defines a worker as "a person who is employed at a business or office (hereinafter referred to as a "business") and to whom wages are paid, regardless of the type of occupation." Whether an individual qualifies as a worker depends on ① employment, i.e., whether they work under the direction and supervision of an employer, and ② payment, or whether they receive compensation in return for their labor.[1] In this way, the post-war system of labor laws has primarily protected "workers" who are employed and working under the direction of an employer, ensuring their autonomy.[2]

But in recent years, the expansion of the platform economy[3] along with an accompanying surge in the gig economy has been advancing at scale as a powerful social phenomenon. From a legal perspective, this phenomenon has led to an increase in the "self-employed," [4] which is a different employment relationship than that assumed by post-war system of labor laws and social norms. This in turn has created serious issues with how to protect the rights of workers.

The protections afforded by labor laws do not extend to individuals engaged in this sort of "work that does not require employment." Precisely how to resolve the conflicts and troubles that arise from this is a pressing issue for the countries of the world, which are responding in diverse ways that depend on their unique cultural backgrounds and legal systems.[5] For example, the scope of France's labor and social-security laws has traditionally been based on the concept of the "labor contract," which is built around a type of personal subordination consisting of direction, supervision, and punishment. A 2020 court decision in a case

* **Sho MIZUBAYASHI:** Associate professor at Meiji University Law school, sh11mz30@hotmail.com

1 See Shinpei Ishida, Hisashi (Okuno) Takeuchi, Yoko Hashimoto, and Yuichiro Mizumachi's "Digital platforms and labor law—Creation and development of the worker concept" (University of Tokyo Press, 2022), chapter 1 (the part written by Mizumachi).

2 Satoshi Nishitani, *Labor Law: Third Edition* (Nippon Hyoron sha, 2020), p.6.

3 The remark that it should be called the "platform economy" rather than the "sharing economy" is from Yoshihito Kawakami's "ICT and working without employment—What it means to be a worker is changing" in *Annual Report of the Japanese Association of Labor Sociology No. 29* (2018), p.46.

4 Alain Supiot, Au-delà de l'emploi-Transformations du travail et devenir du droit du travail en Europe, Flammarion, 2016, p.19 et suiv.

5 For more about each country's response, see the aforementioned chapter from Ishida et al.

that questioned whether Uber drivers and other gig workers qualify as employees recognized that platform workers are employees. The country has also developed a number of new laws recently, including one that defines the responsibility of platforms with regard to independent contract workers (known as law no. 2016-1088, or the "El Khomri" law after the labor minister). In the E.U. more broadly, a proposed directive in 2021 aimed to improve the working conditions of platform workers. It stipulated requirements such as properly determining whether a worker is self-employed or an employee of the company as well as enhancements for making the legislation that governs platforms more effective.

But when we look to Japan, we see that the nation is currently trailing the pack in figuring out where these platform companies fit in,[6] so how to handle them from a legal perspective is a big question mark.

Incidentally, this "work that doesn't require employment" could eventually escape the confines of the platform economy and become more generalized. This is because we are now seeing a trend in which powerful companies are replacing the traditional employment contract with a system in which their workers are self-employed. Tanita is one such example. In an interview, CEO Senri Tanida stated: "How can we release people from the feeling that they are being forced to work? The idea we came up with was to liberate people from the status of employee, making them self-employed instead. This was an attempt to let people to have power over their decisions, acting as their own managers rather than employees." [7] This concept of the worker is typical of the rhetoric that "workers should be autonomous agents that manage themselves," [8] an idea which became widely known in Japan previously when the works of author Peter Drucker were popular.

If this trend continues to accelerate, our existing system of labor laws which protects the rights of workers engaged in subordinate labor will more and more inadequate to the society in which self-employed workers are augment. The current situation thus compels us to restructure or rebuild our legal framework for labor, and some knowledge of how labor laws have evolved over time will be beneficial to achieving that. This article will therefore develop a general outline of how the modern system of labor has shifted, referencing France's first-of-its-kind modern civil code. Through this lens, we will then discuss how the current labor situation fits into the historical background and offer some brief considerations regarding future prospects.

6 Ishida et al., same as above, p.270 (written by Mizumachi).

7 "Five years on, Tanita's sole-proprietorship experiment has grown from 8 to 31" https://www.nikkei.com/article/DGXMZO75686850T10C21A9000000/ (Last accessed on September 6, 2024); "Dentsu aims to generate new business by making 230 employees sole proprietors" https://www.nikkei.com/article/DGXMZO66103760R11C20A1916M00/ (Last accessed on September 6, 2024)
The data suggests that traditional self-employment is on the decline, while the number of people engaged in this sort of "hired self-employment" is steadily increasing. https://www.cao.go.jp/zei-cho/content/20150902_27zen18kai6.pdf (Last accessed on September 6, 2024)

8 Alain Supiot, La Gouvernance par les nombres, Fayard, 2015, p.217 et suiv.

1 Labor in French Civil Code

(1) Rental of labor

Following the French Revolution, multiple drafts of the civil code were considered before the law was finally established in 1804. But the story of France's modernization cannot be told without recalling the end of the privileges and guilds that existed under the feudal system at the time of the revolution. The French Revolution was grappling with how to liberate the individual from the various groups and institutions that bound them. Regarding labor, the aim was to give people more freedom in terms of their work by abolishing the guilds that had severely restricted the ability to choose one's occupation in the Middle Ages.

So, what sort of labor regulations are included in the French Civil Code established in 1804? The French Civil Code adopts the concept of *louage d'ouvrage*(rental of labor) in its provisions related to labor. Article 1710 defines it thus: "*louage d'ouvrage* is a contract whereby one of the parties undertakes to do something for the other, subject to a price agreed between them." It further divides this "rental of labor" into three sub-categories that include ① the hiring of servants and workers and ② the hiring of contractors (article 1779).

Type ① includes two types of workers namely the so-called "domestic worker" and the typical form of employment. As indicated in the debate that arose when the civil code was being drafted,[9] one of the main goals of this article was to realize more personal freedom by releasing domestic workers from the traditional slavish relationship. The other type is people who work under the employment of others, which features some variation such as daily, monthly, and yearly contracts, as well as different occupations: those who harvest grain or grapes; stonemasons and earthwork laborers; factory workers; the employees of banks, shops, etc.; and the managers of production plants.[10] According to a leading civil-code scholar of the time, these jobs were fundamentally unstable in their social standing, and working conditions were poor. Also, workers who are paid an hourly wage are not responsible for the results of their work, so they become extremely indifferent to those results. Therefore, the drafters of the civil code placed them lower in standing than other forms of employment.[11] Also known as *louage d'service*, this rental of labor as an employee contrasts with the contractual form discussed later.

With contracting that amounts to the rental of labor in the narrow sense of the definition in article 1779.3 (Type ②), the purpose of the contract is to "achieve the results that are agreed upon in advance," not the labor itself.[12] Moreover, the scope of these results can be large or small—it could be an entire building or production, for example, or just a part of one.

A textbook published at the time said this about the advantages of this type of work:

"Contract workers are increasing in number daily within every geographic area and business sector. The reason for that is very simple. No other occupation is as competitive and progressive as this type of labor.

9 P. Antoine Fenet, Recueil complet des travaux préparatoires du Code civil, Tome 14, Au Dépot, p.339.

10 Troplong, Le droit civil expliqué suivant l'ordre des articles du Code, Tome 18, 3e éd, Charles Hingray, 1859, p.278. Duranton, Cours de droit français suivant le Code civil. Tome 17, 4e éd, G. Thorel, 1844, p.228.

11 Troplong, op.cit., p.279.

12 Troplong, op.cit., p.363.

Allowing skilled and industrious workers to operate more freely will give them the most benefit from their labor while also greatly increasing productivity for the company by reducing the degree of supervision required, which advantages both parties." [13] As we can surmise from this statement, contract work has assumed that the worker is skilled.

For the features of how the Civil Code handles labor, then, we can say that ① all provisions related to labor use the term "rental of labor," ② it is divided into two types, one involving domestic workers and those who work under contracts of a fixed duration (rental of service), and one involving contracts (rental of labor in the narrow sense), and ③ the idea of protecting workers essentially does not exist with regard to capital.

Rental of service matches the current form of employment that we are all familiar with, while rental of labor in the narrow sense matches self-employment; but for this article, the important thing is which was likely to have been the more fundamental form of labor under the socioeconomic conditions of the time.

(2) The socioeconomic situation in 19th century France

To answer this question, let's first look briefly at what's been going on with France's economy and society since the 18th century. Although France in the 18th century was still an agrarian nation, this was the period when its industrial production began to expand noticeably. Nevertheless, the country's industrial framework did not undergo any drastic changes until around the middle of the 19th century. Until the transportation system had gradually developed into a rail network in the latter half of the 19th century, many areas stayed fundamentally unchanged from the prior century, with different regions remaining isolated economic blocs for many years. Even viewed by industry, the economy still revolved around agriculture, with over 60% of the population directly engaged in farming. As revealed through a statistical analysis by French historian Gérard Noiriel,[14] a wage-earning working class concentrated in urban centers did not fully establish itself in 19th century France.

The economic structure was also reflected in the form that labor took. The development of France's industrial production in the 18th century basically materialized as the expansion of a system under which wholesalers who were located in the cities worked with cottage industries in rural areas.[15] In this system, privileged merchants would supply raw materials to home producers in rural areas, pay them for their labor, and have them produce items. And even in the cities, the fact that merchant guilds controlled the manufacturing guilds meant that this same direction over the production process occurred there as well.[16] A good example of this is the industry of silk goods in Lyon. Wholesale textile manufacturers would provide raw materials in advance to master craftsmen, who would then produce the products along with their families and workers and receive wages for that work. In other words, the master craftsmen were engaged in labor as subcontracted producers, which corresponds to the renting of labor in the narrow sense that would be defined in the Civil Code. While

13 Etienne Mollot, Le contrat de louage d'ouvrage et d'industrie, expliqué aux ouvriers et à ceux qui les emploient, selon les lois, règlements et usages, et la jurisprudence des conseils de prud'hommes, Napoléon Chaix et Cie., 1846, p.29.

14 Gérard Noiriel, Les Ouvriers Dans La Société Française, Points, 2016.

15 Michio Shibata et al., Eds., "World History: France Volume 2 (Yamakawa Shuppansha, 1996), p.58.

16 Shibata, same as above, p.30.

larger factories would eventually appear in the 19th century, subcontracted labor still played a key role in manufacturing processes that required skilled workers.[17]

Drawing on this history, researcher Alain Cottereau has published studies identifying the importance of this form of subcontracted labor during this period of France's history.[18] Cottereau is critical of the idea that the primary form taken by labor since the establishment of the Civil Code is the "rental of service" corresponding to the current employment relationship, stating that "the situation of nearly all workers at the time, from large factories to small workshops, was in fact not one of 'rental of service' but rather the 'rental of labor.' That is, the relationship of most workers at the time was that described in the thirteen articles of the civil code dealing with subcontracting (articles 1787–1799), not those related to domestic workers etc." [19]

Although the previously mentioned Civil Code names three subcategories for the rental of labor in the broad sense of the term, Cottereau divides it into subcontracting that is the "true rental of labor" and the rental of service that deviates from this (domestic workers etc.). Therefore, "true workers" in the Civil Code are those who subcontract their labor and work independently from the direction and supervision of the person placing the order, while domestic workers were thought of as a subordinate, dependent relationship under the old regime.

However, because contracted workers at the time were able to set their working hours etc. at their own discretion, this was also a frequent source of stress for employers in terms of maintaining discipline. And as industrial capitalism continued to expand in the latter half of the 19th century, demand for more discipline among the workers in large-scale factories led to the popularization of employment contracts.

2 Reconstructing the labor system

(1) Review

Summarizing again, we can say that at the time the modern law was established, it reflected the prior state of the capitalist economy and thus positioned subcontracting (the rental of labor in the narrow sense) as the primary form of labor. In other words, workers acted independently (although there were a few restrictions) and completed the work at their discretion and using their own expertise, which paralleled the situation with the factory workers. This is much different than the subordinate relationship that arises from the current form of employment we are all familiar with. From a legal perspective, this form of labor was codified by the Civil Code as a contract that exists between parties of equal standing.

As industrial capitalism expanded in the latter part of the 19th century, however, the state of labor

17 Katsuhiro Shimizu, "Industrial structure and factory systems of France's cotton industry in the 1830s," *Economic Review Vol.127 No.6* (1981); Daijiro Fujimura, "Structure of factory workers in France's iron industry during the Industrial Revolution: Focusing on a factory in central France," *The Keizai Ronkyu No.35* (1975).

18 Alain Cottereau, « Droit et bon droit. Un droit des ouvriers instauré, puis évincé par le droit du travail (France, XIXe siècle)», Annales, 2002.

19 Cottereau, op.cit., p.1525.

underwent a definitive transformation. The investment of industrial capital into building massive labor sites meant that workers were increasingly regulated, which eventually led to the labor relationship that is typically seen in employment today. In addition to being the time when the subordination of the worker to the employer became a widely recognized feature of labor contracts in France, this period was also marked by the steady establishment of unique labor and social legislation that differed from the general private law of the civil code in order to ensure worker autonomy.[20]

In terms of ascertaining the historical trends behind the modern transition of the worker to self-employment, two critical aspects are:

① the refocus on highly independent forms of labor, i.e., switching from rental of service to rental of labor or simply adding the latter to the prior; and

②the shift from the employment relationships described in labor laws to the contractual relationships between equal parties described in the general private law of the civil code, from a legal perspective.

Still, there are significant differences between the current and former systems. First, the highly independent form of labor in place right now is not necessarily based on the worker being skilled. Food delivery and other gig work is a perfect example of that, as is the fact that some companies "recruit" fresh graduates via subcontractor agreements. Another important point here is that modern labor laws have placed heavy responsibilities and obligations on employers in response to the social problems created by capitalism, and thus employers are promoting this transition to self-employment as a way of avoiding costs related to developing the skills of workers.

(2) Image of the worker

As mentioned at the outset, this movement toward self-employment was accompanied by the rise of a certain type of worker. Under the former system of Fordism, each worker was expected to reliably execute the task that was assigned to them as part of the compartmentalized division of labor. No importance was attached to the free will or discretionary judgment of the worker; rather, the focus was on faithfully following the employer's instructions. But as pointed out by French legal scholar Alain Supiot, discourse about the ideal worker began to shift by the middle of the 20th century. That's when people began to suggest that workers should labor independently as entities that manage themselves, rather than ones that blindly obey the instructions of their employers. Some claimed that the key is for workers to engage in labor independently as a way of exercising their own freedom.

Such remarks denote a criticism of the traditional system of labor laws. This is because protecting workers (by restricting employers) through labor laws etc. in order to increase their productivity has actually had the opposite effect, which means that making workers responsible for the results of their own work (or for improving their job skills to achieve a certain result) is paramount. Market forces should also be applied to

20 Many important labor and social-security laws were enacted in France during the end of the 19th century and the early part of the 20th century, including the legalization of labor unions in 1884, the creation of a worker's compensation law in 1898, and the systemic implementation of pension and insurance systems for workers. The creation of these legal frameworks may have been spurred by the popularity of Durkheim's concept of social solidarity.

the area of labor, driving each worker to maximize their own market value.

Ultimately, this means that the effort expended by workers (regardless of if it is driven by market-based mechanisms) is an expression of their exercising freedom as autonomous entities.[21] Put another way, a worker who is dismissed from a worksite because their market value is insufficient must accept the responsibility for that outcome, because it results from the exercising of their own freedom.

It is a great irony of history that this movement toward worker "freedom" that we see now is being promoted as a way of hiding the fact that workers are being stripped of various protections. The purpose of liberating workers from the guilds at the start of the modern era was to allow people to achieve real value in the form of personal freedom, and this goal may now lead us to reconsider how we can build the legal system that protects the workers who are in the diverse situation.

(3) Conclusion and future prospects

Now then, what is conceivable? While I believe that we must recognize the major role that labor laws, which mainly protect the worker, will continue to play in the future, I also feel that we need to construct an inclusive system capable of containing a broad range of labor forms. This is because it will be difficult to respond to the current situation with a legal system that was created to match the customary form of labor that had developed in Japan.

Taro Miyamoto outlined the features of Japan's labor and social-security systems as follows: [22]

① Low expenditure on social security

② Employment has taken the place of social security (particularly for males); in addition to long-term employment at major companies, the government creates and maintains jobs through policies that protect small- and medium-sized businesses, supported by the civil engineering and construction industries via public works

③ Social security is more for the elderly than for the working-age population

④ A low-wage labor market for irregular employment has formed due to the upper limits imposed by the tax system on the earnings of wives, who should be helping with the household finances

For a long time in Japan, the function of social security—which is supposed to be driven by governmental authority—has been replaced by employment, mostly at private companies. New college graduates (primarily males) were able to secure stable long-term employment right away and thus enjoyed a consistent livelihood, which allowed social-security programs to focus primarily on retirement-age individuals. This meant that benefits for the working generation were at best limited to exceptional circumstances like illness or job loss, and there wasn't enough focus on things like changing careers, learning new skills, or retraining. Therefore, one of the main characteristics of Japan's legislative framework is that is separates the social-security laws that mostly protect retired individuals and the labor laws that primarily apply to the working class.

21 Sho Mizubayashi (this author), "Controlling with freedom: Modern society and the form of entities that regulate themselves," *Journal of the Faculty of Law, Ryutsu Keizai University Vol.22, No.1* (2022).

22 Taro Miyamoto, *Guaranteeing Livelihood: Toward A Society Without Exclusion* (Iwanami Shoten, 2009), chapter 2.

But the economic and industrial structure that enabled this sort of system is now being shaken to the core. As the service industry looked to expand even further,[23] the customary long-term employment (mostly for men) that had long been a feature of the Japanese job market crumbled, government policies focused more on irregular employment, and disparity grew as breadwinners began to enter this low-wage arena of labor. It is now apparent that this has eliminated the premise of "employment is a substitute for social security," which has in turn weakened the social-security system. If these new platform economies continue to expand and the trend of self-employment discussed in this article advances at even more drastic pace, there is a risk that society could destabilize further.

These circumstances will likely lead not only to revisions in the labor laws themselves, but also to a complete overhaul of the entire legal system so that the labor and social-welfare laws work together in a coordinated fashion.

For the former, we should probably figure out how to protect the workers who are not being protected sufficiently by the current labor laws. Namely, we must search for a way to transition irregular employees to a more stable form of employment while taking other steps such as extending the notion of "worker" as protected by the Labor Standards Act to gig workers and other people who work for such platforms.[24]

In the case of the latter, considering that the expand the number of opportunities to work without being employed and rapidly accelerating societal changes will continue to force people to retrain quickly so that they can perform a new job when their industry suddenly hits a slump, we will probably also need to develop a social-security system that supports the working class by linking to labor in the form of things like systems that allow people to switch to completely different careers, assistance programs that help people with career-building activities like job training and reskilling, and mechanisms that guarantee people's wages while they are job hunting.[25]

When determining what this support should look like, it will be useful to reference the French idea of "social inclusion." This concept involves focusing on the various processes that exclude people from society and result in their being in poverty (rather than emphasizing the static idea of "poverty" itself), aiming to reintegrate people into society by creating and restoring human connections.[26] The workers being discussed here—those who are becoming self-employed—are also facing a form of exclusion in the sense of being cut

23 Mitsuru Yamashita and Shin'ichi Ogawa, "Working styles and changes in the structure of industry," *Japanese Journal of the Japan Labour Studies No.743* (2022).

24 Takashi Araki, "General examination of the legal protections for platform workers," *Jurist No.1572* (2022). After outlining several possible directions to take, Araki adopts the position that we should establish special legal protections for gig workers and other various categories as necessary.

25 Alain Supiot notes the need to establish legal systems that inclusively cover many different forms of labor, integrating employment and social security while maintaining the worker protections that existed under the traditional wage-labor relationship and responding to new trends in worker behavior and employment categories. Supiot, Au-delà de l'emploi., p.81.et suiv.

Along those same lines, Miyamoto advocates for a four-pronged approach to unifying labor and social security within the labor market. It involves □ supporting participation (continuing education, higher education, job training), □ increasing the compensation for working, □ temporary leaves of absence and reducing working hours, and □ creating sustainable employment opportunities. Miyamoto, same as above, pp.143–168. However, we must be careful that this sort of support does not drive job applicants toward (low-wage and unstable) paid labor.

26 For a primer on social inclusion and exclusion, see Masami Iwata's *Social Exclusion: A Return To Absence And Irregular Attendance* (Yuhikaku Publishing, 2008).

off from stable employment and a worker community, growing financially and socially isolated to the point that they are exposed to occupational instability and placed in a situation where they have to adapt to even more market forces. Thus, we must now construct a new legal system that can resist exclusion while creating and maintaining diverse connections between society and the workers.