Law of Dismissal in Japan
"Reciprocity" or *"Verhältnismäßigkeit"* as Background?

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I. LEGISLATIVE REGULATION OF DISMISSAL

The Japanese Civil Code[1], whose interpretation and application developed under the significant influence of German law, provides in its article 627 that if the parties have not specified the term of employment, either party may request to terminate it at any time. This so-called "freedom of dismissal" principle was dominant until the middle of the 20th century, namely the first stage of industrial development in Japan, although the employer did not easily dismiss an ordinary employee for ethical reasons.

The Labor Standard Act (LSA),[2] which was enacted after WWII and has become the most important piece of legislation in the field of individual labor law in Japan, prohibits dismissal in the following cases:

- during a period of impossibility for work caused by a work-related accident (Art. 19 Labor Standard Act, LSA),
- during a period of childbirth leave (Art. 19 LSA),
- on the grounds of nationality, creed or social status (Art. 3 LSA).

The LSA also stipulates the requirement of notice by the employer 30 days before the discharge of an employee. This requirement of notice is not extended according to the

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1 *Minpō,* Law. No.89/1896.
2 *Rōdō kijun-hō*, Law No. 49/1947.

tenure of the employee with the company as under German law. For the dismissal of an employee, there is no requirement of prior permission by an administrative institution or the courts. It is only when an employee challenges the lawfulness of the dismissal that it will be examined afterwards.

On the other hand, though, there was no legislative restriction of dismissal by reason of the employee's misconduct or incapability or by reason of the firm's economic necessity. These kinds of dismissals tended, however, to be restricted from the 1950s onward by judge-made law, namely through the so-called "doctrine of abusive dismissal". In the 1950s, lower courts came to nullify "abusive" dismissals using general clauses in the Civil Code which restrict the abuse of rights. Such decisions continued to accumulate and further developed the judge-made law, which says that a dismissal without an objective and appropriate reason is null and void. The Supreme Court confirmed these decisions of the lower courts, so that it became established case law in Japan.[3]

This established case law, which prohibits abusive dismissal more recently became written law when the Japanese LSA was revised in 2003. This legislative restriction in the LSA was then transferred to the Labor Contract Act (LCA) when it was enacted in 2007.[4] The LCA provides that "a dismissal shall, if it lacks objective reasonable grounds and is not considered to be appropriate in general societal terms, be treated as an abuse of right and be invalid" (Art. 16). This provision applies to all kinds of dismissals, namely dismissal due to an employee's misconduct, due to an employee's incapacity or due to job redundancy. It applies not only to individual dismissal but also to collective redundancy.

In addition to these rules, there are also some legislative regulations restricting dismissal:

- on the grounds of sex, marriage or pregnancy,[5]
- on the grounds of labor union membership or participation in labor union activities,[6]
- by reason of applying for statutory maternity/paternity leave, sick/injured child care leave or nursing care leave,[7]
- by reason of whistleblowing.[8]

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3 *The Kōchi Hōsō Co.* case, Supreme Court, 31 January 1977, Rōdō Hanrei 268, 17.
4 *Rōdō keiyaku-hō*, Law No. 128/2007.
5 *Danjo koyō kikai kintō-hō*, Act on Securing Equal Opportunity and Treatment between Men and Women in Employment, Law No. 113/1972.
6 *Rōdō kumiai-hō*, Labor Union Act (LUA), Law No. 174/1949.
7 *Ikuji kyūgyō, kaigo kyūgyō-tō ikuji matawa kazoku kaigo okonau rōdōsha no fukushi ni kan suru hōritsu,* Act on the Welfare of Workers Who Take Care of Children or Other Family Members Including Child Care and Family Care Leave, Law No.76/1991.
8 Whistleblower Protection Act, *Kōeki tsūhō-sha hogo-hō,* Law No. 122/2004.

II. Doctrine of Abusive Dismissal (Art. 16 LCA)

The doctrine of abusive dismissal is applied to cases of dismissal by reason of misconduct or the incapability of the employee and by economic reasons of the employer. The employer is required to prove the facts to substantiate his reasons for dismissal. Once the employer discharges his burden, the employee takes on the burden of proving that under the circumstances of the case the dismissal is still impermissible with regard to the common sense of society.

1. Misconduct of Employer

In judging whether the dismissal of an employee has objective reasonable grounds and is considered to be appropriate in general societal terms, the following elements are to be taken into consideration:

- size and type of the company,
- position which the company occupies in the business community,
- nature and extent of the employee's misconduct and the damage caused thereby,
- history of misconduct or work performance of the employee in question,
- extent of the employee's repentance after committing the misconduct,
- comparison with disciplinary measures taken against other employees for the same and similar misconduct.

If the dismissal was done as a disciplinary sanction, the gravity of the employee's misconduct must be more significant in order to hold such disciplinary dismissal objective, reasonable and appropriate in general social terms. The reason is that the disciplinary dismissal measure deprives the employee of his or her retirement allowance. The amount of retirement allowance for an ordinary employee – but not for a typical employee on a fixed-term contract or a temporary dispatched worker – increases according to the length of duration of the employment relation. In judging whether a dismissal as disciplinary sanction is abusive and unlawful, the due process principle plays an important role. The court is to take into consideration whether the employee was given an opportunity to give an explanation in his/her defense and whether he/she had received a proper warning upon committing similar misconduct in the past.

2. Dismissal by Reason of Employee's Incapability

The second category of dismissal is the one by reason of the employee's incapability. If the employee loses his occupational capability as a result of injury or illness, the nature and extent of such incapability is to be considered, and the court judges whether the employee became unable to fulfill the requirement of occupation for an unforeseeable period.

Insufficient job performance can also be a reason for dismissal. The court will examine the nature and degree of insufficient performance to see if the employer has no other measure than to dismiss the employee. If the employer makes only insufficient efforts to

match the employee to a job more fitting to the employee's ability, the court tends to judge that the dismissal is not objective and reasonable and thus not permissible with regard to the common sense of society. The court examines very carefully whether the inability of an ordinary employee in long-term employment is so significant that the employer cannot find an alternative function in the company. The employer is expected to give the employee additional vocational education as long as this does not go beyond the capacity of employer.

In Japan, a large portion of the workers are hired immediately after their graduation from school or college. The employer usually does not expect specific job-related knowledge or skills or other occupational qualification from students. The labor contract also usually has no precise description about the function of the workers, if a written contract is made at all.

In the process of hiring, a Japanese company examines, first of all, the personality of applicants and their potential ability to adapt with the changing environment in the company. Employers think that the most important quality of an employee is being cooperative, not only towards the employer but also towards his or her co-workers.

As mentioned above, an employment contract with students contains usually no description of their occupational function. Young employees do not usually know what function they will take over after the introductory training in the company. It is also common in Japan that after some practice at a department, three or four years later, employees move to another division. For example, an employee will transfer from the personnel department to the accounting department with a promotion and pay increase. It is also usual that the employer orders the employee to move from one workplace to another, for example, from Tōkyō to Ōsaka. So, for a Japanese employee, a flexible adapting ability is more important than the specific occupational qualifications acquired outside of the company. Concerning the specific business knowledge required to fulfill a specific occupational function, the Japanese workers are expected to acquire that on-the-job through (in-house) training in the company.

In this context, the employer may not easily put the responsibility on the employee when the employee makes a mistake or fails to manifest a sufficient performance. Companies have been dominant influences in Japanese society and in the Japanese social system. There was and still is a relatively strong expectation among Japanese people that companies have a role similar to a family or an educational institution for the ordinary employee with long-term employment. As to the middle-aged and older workers, the employer may also not easily dismiss them for the reason of their incapacity or bad performance. These older workers have been working for many years and have contributed to the development of the company. So companies owe the elder workers a kind of debt. Also, it is not appropriate in general societal terms that the company discharges them only because they cannot manifest sufficient performance. Of course, companies are not legally bound to keep employment positions beyond their capacity. If the company is small or does not have enough financial resources, it is not expected to retain the work-

force. This is the reason why the Japanese courts very carefully examine the already mentioned elements in each case.

On the other side, there is no such common sense understanding for high-skilled employees with high remuneration who are recruited in mid-career from other companies and who take over specified functions at a specific department of the company. The same thing can also be said as to an atypical employee, namely fixed-term employees or temporary workers or part-time workers. They are not treated as "family" or "community members" in Japanese companies. So the courts are more likely to approve the dismissal of high-skilled staff or atypical employees in Japan.

3. Dismissal for Economic Reasons

The restrictions of Art. 16 of LCA on abusive dismissals are also applied to dismissals by reason of the firm's economic necessity. Since the latter half of the 1970s, the courts have developed four criteria for determining whether the dismissal for economic reasons is objectively reasonable and appropriate in general societal terms. The four criteria are as follows:[9]

1. Whether there was sufficient economic necessity for a reduction of personnel;
2. Whether the employer made reasonable efforts to avoid the dismissal;
3. Whether the selection was done fairly on the basis of objective criteria;
4. Whether the employee in question and/or the union was sufficiently informed and consulted by the employer.

Regarding criterion (1), in the 1970s and 1980s the courts demanded severe financial difficulty for a dismissal to be valid. But nowadays the courts tend to be more flexible about economic or financial necessity. Many judicial decisions no longer demand financial difficulty and affirm that criterion (1) is satisfied by the fact that excess personnel exists in the company. As to criterion (2), the courts examine whether the employer implemented measures such as voluntary retirement, transfer or reductions of temporary workers or part-time workers. As to criterion (3), there is no rigid rule such as the American seniority rule or the German rule of social selection. The courts tend to approve the criteria for selection when they are the result of collective bargaining between the employer and the union. Criterion (4) has its grounds also in the Japanese Labor Union Act. Pursuant to Art. 7 LUA the employer is required to bargain with the union representing the concerned employees. The employer will usually engage in extensive negotiation with the union to work out the scale and procedure of a reduction. But in Japan, labor unions are usually organized within big companies. The labor unions organized outside the company constitute the minority in Japanese labor organizations. The employees of small companies are often not organized in a union. Japanese labor legislation does not

9 For a critical assessment of the four criteria see S. NISHITANI, Vergleichende Einführung in das japanische Arbeitsrecht (Carl Heymanns 2003) 339 ff.

impose on the employer the requirement to create a social plan to reduce the hardship of a collective dismissal. That is why the dismissed workers in a small company can receive only a small amount of compensation for a discharge.

4. Doctrine of Abusive Dismissal as a Reflection of the "Proportionality Principle" (Verhältnismäßigkeitsprinzip) and its Characteristics

As we have seen, we can find a kind of "ultima ratio principle" and "balancing of interests *(Interessenausgleich)*" in the doctrine of abusive dismissal, similar to German law. So, we could say that the Japanese dismissal law is based on a kind of "proportionality principle" *(Verhältnismäßigkeitsprinzip)*, although in Japan the systematic classification of the "principle of necessity" *(Erforderlichkeitsprinzip)* is more ambiguous and the "principle of anticipation" *(Prognoseprinzip)* is not sufficiently developed compared to German law. We could find this as one of the reasons for the difference in the characteristics of the Japanese employment relationship, which tends to be more reciprocal and stresses the mutual trust relationship.

In European countries, the employment and dismissal of employees is mandated by the job itself. A company employs a worker if there is a job vacancy. Dismissal or the firing of an employee happens when he/she is not capable of doing the job. But in Japan, employment and dismissal is not dependent on the job itself. Companies serve as a community for ordinary Japanese workers. A Japanese company usually does not fire or dismiss an employee even if there is excess manpower. In earlier times, employers in Japan were ethically, but not legally, obliged to retain employees even if an employee was no longer capable of doing his/her job.

It is considered a disgrace to the company to dismiss an ordinary employee. Therefore companies try to retain employees as much as possible. This kind of corporate ethic became embodied in case law as the doctrine of abusive dismissal beginning in the 1950s and 1960s, and this case law has been recently incorporated in Japanese labor legislation. The Japanese employment law system is, so to speak, constructed on the membership orientation of employment, while European or Anglo-American employment law system is rather based on the job orientation of employment. In other words, the development "from status to contract" (Sir Henry Maine) in Japanese employment law remains incomplete, and Japanese employment law has retained its normative characteristic as a law of status.

This Japanese employment system with a reciprocal relationship character functioned relatively well up until the end of 1980s. On the basis of this reciprocal relationship between employees and their employer, employees were willing to adjust their working conditions to the employers' demands. Ordinary Japanese employees usually do not complain about changing work conditions, meaning, for example, changing the work place or the position within the company and even accepting a reduction of wages where the company faces a difficult economic situation. In exchange for their flexible attitude, ordinary Japanese workers expect a guarantee of employment from the employer. Japa-

nese employment law reflects this reciprocal exchange relation between the employer and the employees. "Flexibility in the internal labor market and rigidity of the external labor market"[10] has its ground in this reciprocal employment relationship in a Japanese company.

Japanese industrial relations or collective labor relations are also based on this reciprocal employment relationship. Therefore, collective labor disputes, especially strikes, have been relatively rare for the last three to four decades in Japan. But if a Japanese employee or the labor union organized in that company feels mistreated by the employer, they react very harshly; therefore labor disputes take on an emotional character.

The Japanese remuneration system also reflects this kind of reciprocal characteristic as found in Japanese employment. The retirement allowance plays a very important role in Japan. The amount of a retirement allowance increases according to the length of the employment relation with the company. The biggest part of this allowance is considered as a reward for the intangible and meritorious contribution of an employee to the development of the company. If an employee is dismissed as a result of misconduct causing serious harm to the employer's interest and the intangible contribution of the employee is to be seen as negated forfeiture or reduction of the retirement allowance is legally justified. The law of retirement allowances is an important device for maintaining the reciprocal and trust-based relationship.

III. Remedies

When the dismissal is not objectively reasonable or not appropriate in general societal terms, it is declared to be unlawful and void. The courts usually deliver a judgment affirming the status as an employee in the defendant's company and order the employer to pay the unpaid wages plus interest from the time of the attempted dismissal until the restoration of such status.[11]

The amount of any income from other employment in the discharged period will be deducted from the payment by the employer; however, any reduction for these interim earnings from other employment is limited to 40% of the unpaid wages (cf. Art. 26 LSA). When the courts judges the dismissal as unlawful and invalid and orders the payment of unpaid wages, the additional payment for damages based on tort is usually not allowed.

On the other hand, there is a discussion in Japan as to whether the employee should be able to claim damages without demanding reinstatement as an employee of the defendant company. In recent years, the number of lawsuits has been increasing in which

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10 T. Araki, Labor and Employment Law in Japan (Japan Institute of Labor 2002) 225.

11 For details as to legal procedures for resolving dismissal disputes, see K. Sugeno/K. Yamakoshi, Part One: Dismissals in Japan – How Strict Is Japanese Law on Employers?, in: Japan Labor Review 11/2 (Spring 2014) 88.

the dismissed employee does not allege the invalidity of the dismissal and his status as an employee of the company. The discharged employee instead insists that the dismissal is unlawful and constitutes a tort. Since the wage is remuneration for work, theoretically speaking, if the employee is not ready to work for his/her employer, the tortious dismissal does not constitute the cause of the non- payment of wages. Until recently, the courts and academic authors had followed this stance. But as mentioned already, confronting an increasing number of such lawsuits claiming tortuous damages, the courts and commentators are now tending to show a positive attitude to this question.

These new tendencies seem understandable. It is sometimes very difficult to judge whether a dismissal is lawful or not in a manner of a "black and white" approach. Such a "null and void" practice for cases of dismissal forces the judge in some instances to an extremely artificial decision and consequently fails to deliver the appropriate or proportionally adequate justice to both parties. And in addition to that, many dismissed Japanese workers show a hesitation in demanding reinstatement with the defendant company, and it is something the employer definitely wants to avoid at any cost. So instead of a "null and void" approach with reinstatement of the employee, a pecuniary solution with tortious damages is sometimes needed and is more appropriate considering the nature of the dismissal dispute. We may add the fact that a severance pay is not required by any legislation in Japan.

IV. Application of the Doctrine of Abusive Dismissal by Analogy to a Refusal to Renew Fixed-term Employment

As regards fixed-term employment, the termination of a contract comes with its expiration. In many countries, above all in European countries, using fixed-term employment contracts is restricted in many ways. Typical regulations on fixed-term contracts are restrictions on the reasons for fixing a term for a contract or limitations on the number of renewals and/or the length of the fixed term. In Japan, the courts have developed case law which restricts the rejection of renewing the fixed-term contract by way of an analogous application of the doctrine of abusive dismissal.[12] Where an employee with a fixed-term contract has a reasonable expectation of renewal of the contract and this expectation is worthy of protection, the employer cannot easily reject the renewal. The legal doctrine of abusive dismissal is analogously applied. In the decision whether the expectation of a fixed-term employee is reasonable and should be legally protected or not, the courts take into account elements such as the number of renewals, the length of continuation of employment, the nature of the job (constant or temporary), the manner of renewal by the employer (whether the employee is well informed or not), and the usual practice of renewal in the company. When the rejection of a renewal is unlawful, the fixed term will be

12 T. Hanami/F. Komiya, Labour Law in Japan (Kluwer Law International 2011) 122.

renewed under the same conditions as before. That means that the renewal of the fixed-term contract does not convert the contract into one of an unlimited period.

In 2013, this case law was codified in the Labor Contract Law (Art. 19). In addition to this rule, the amendment of the Labor Contract Act in 2013 also added new regulations on fixed-term employment. According to Art. 18 LCA, fixed-term employees with a contract period of over five years in total are allowed to convert their employment contract into a permanent employment contract. Unless otherwise provided, the conditions of the converted employment contract (wages, function, working hours etc.) of an indefinite period are to be the same as that of the pre-existing fixed-term employment contract.

This kind of regulation limiting the length of a fixed-term contract is well known in European countries, but it is new for Japanese labor law. We will see what will happen in 2018.

As we saw, apart from discriminatory dismissal, the reasons for dismissal were not restricted by legislation. From around the 1950s, judge-made law developed and was afterwards incorporated into the statutes. There is a kind of segregation in the Japanese labor market between ordinary employees with permanent employment, on the one side, and both atypical employees with fixed-term contracts as well as highly skilled staff with relatively short-term employment on the other side.

This kind of separation between so-called "membership oriented employees" and "job oriented employees" has, from an economic perspective, functioned relatively well in the past. In confronting globalization and the ICT revolution in the socio-economic society, though, the system of the Japanese labor market is declining in its functionality. Transparency and fairness in employment and in the labor market become increasingly necessary for efficient business. The principle of equal treatment of employees plays an essential role in this context. The recent legislation in the Labor Contract Act which restricts a refusal to renew fixed-term employment and demands conversion into permanent employment as well as equal treatment between fixed-term and permanent workers is one of the inevitable steps in this development.

V. Conclusion

There is an opinion in Japan that the Japanese law on dismissal or the termination of employment is too rigorous, constitutes a legal obstacle for doing business, and should therefore be deregulated. These critics are also opposed to the already mentioned legislation in the LCA. As I have observed, there are some points in the Japanese law of dismissal that need to be reformed, especially in the field of remedies. But the Japanese law of dismissal is in principle flexible enough for doing business and plays an important role in maintaining the mutual trust relationship that is based on the principle of reciprocity between the employer and employee, which is a most essential thing for doing long-term business. The law of dismissal is the "central nervous system" *(Nerven-*

zentrum) of employment law.[13] The law of dismissal is, so to speak, the keystone for balancing the security and flexibility of employment and an indispensable device for cultivating a creative workforce in the post-industrial society.

SUMMARY

The article outlines and critically assesses the Japanese law on dismissals. While the Civil Code provides for unrestricted dismissal and for many decades only fragmentary statutory protection against dismissals existed, the Japanese courts have established elaborate case law on abusive dismissals which more recently has been codified. The author highlights the characteristics of Japanese employment relations, which form the backdrop for these developments. Finally, the application of the abusive dismissal principle to a refusal to renew a fixed-term contrast is discussed.

(The editors)

ZUSAMMENFASSUNG

Der Beitrag skizziert die Grundzüge des japanischen Kündigungsschutzrechts und unterzieht diese einer kritischen Würdigung. Während das Zivilgesetz vom Grundsatz der freien Kündbarkeit ausgeht und lange nur ein fragmentarischer gesetzlicher Kündigungsschutz bestand, haben die Gerichte ein elaboriertes Richterrecht zu missbräuchlichen Kündigungen geschaffen, welches in jüngerer Zeit auch kodifiziert wurde. Der Autor zeigt auf, dass diese Entwicklungen nur vor dem Hintergrund der Besonderheiten der japanischen Arbeitsbeziehungen zu verstehen sind. Abschließend wird auf die analoge Anwendung der Grundsätze über missbräuchliche Kündigungen auf die Verweigerung der Verlängerung von befristeten Arbeitsverträgen eingegangen.

(Die Redaktion)

13 U. PREIS, Prinzipien des Kündigungsrechts bei Arbeitsverhältnissen (Beck 1987) 1.