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The regulation of non-standard forms of employment in China, Japan and The Republic of Korea

Fang Lee Cooke,
Ronald Brown

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and Working Conditions Branch

***The regulation of non-standard forms of employment in
China, Japan and the Republic of Korea***

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INTERNATIONAL LABOUR OFFICE - GENEVA

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List of abbreviations

ACFIC	All-China Federation of Industry and Commerce
ACFTU	All-China Federation of Trade Unions
APR	Act for Partial Revision of the Act on Improvement in Management of Employment of Part-Time Workers
CEC	China Enterprise Confederation
CEDA	China Enterprise Directors Association
FKI	Federation of Korean Industry
FKTU	Federation of Korean Trade Union
ILO	International Labour Organization
IMF	International Monetary Fund
ITUC	International Trade Union Confederation
JILPT	Japan Institute for Labour Policy and Training
KCTU	Korean Confederation of Trade Unions
KEF	Korean Employers Federation
LCL	Labour Contract Law
LDA	Labour dispatch agencies
LDMAL	Labour Disputes Mediation and Arbitration Law
LSA	Labour Standards Act
NGO	Non-government organizations
NLRC	National Labour Relations Commission
OECD	Organization for Economic Co-operation and Development
PTWL	Part-Time Work Law
SOE	State-owned enterprises
TUL	Trade Union Law
WDL	Worker Dispatching Law
WLT	Without-limit-of-time

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1. Introduction

1.1 Background

This study, commissioned by the International Labour Office (ILO), examines the growth and regulation of non-standard employment in three East Asian countries – the People’s Republic of China (hereafter China), Japan, and the Republic of Korea (hereafter Korea).¹ A common feature amongst these three major economies is the deregulation of the labour market and the dramatic growth of the use of non-standard employment in the form of, for example, part-time work, temporary work, labour dispatch via employment agencies, and subcontract work (e.g. Coe et al., 2011; Kim and Park, 2006; Kuroki, 2012; Meng, 2012). And the globalizing economy of the three countries adds further dynamics to the restructuring of their labour market since the 1980s, including the employment of foreign migrant labour (for Japan and Korea) and rural migrant labour *en mass* (for China).

In spite of significant differences in their contemporary political systems, these three nations share geographical and cultural proximities, relatively similar economic growth stages, and the profound historical influence they have had on each other. In particular, Japan and Korea are developed countries, whereas China is an emerging economy with rising economic power globally. Japan and Korea are small countries in terms of geographical and population size and have different industrial structures compared to China. China is a socialist country that has been under the control of the Communist Party since 1949. It began its economic transformation in the late 1970s. Japan is a modernised imperial country with western influences, whereas the modern Republic of Korea, established in 1948, had been under the control of authoritarian governments until the 1980s. There has been a growing level of democracy since then, largely as a result of mass public demonstrations and changing economic conditions (Cooke, 2010).

Japan and Korea were two major driving forces of the Asian economy in the 1970s and 80s, but were both heavily hit by the Asia financial crisis in 1997 and the global financial crisis in 2008 (e.g. Lee and Lee 2003; Magoshi and Chang 2009). Japan’s economy was further hit by its 1992 asset bubble burst and the 2011 earthquake, tsunami and nuclear disaster. Meanwhile, China has emerged as a major power house in the economic development of Asia since the 1990s (Khanna 2007). The governments of Japan, Korea and China have all pursued an export-oriented economic growth path one after another. These developments have been accompanied by a substantial fertility decline since the 1980s in all three countries. While the low birth rate in China is a result of the government’s ‘one child’ policy coercively enforced in the 1980s, the low birth rate in Japan and Korea is largely an outcome of family preference (the Korean government is providing incentives to encourage women to have more children). Declining fertility is affecting the labour market structure and women’s role in it in Japan and Korea (Cooke, 2010). After a period of labour market deregulation in response to economic pressure and global competition that has resulted in the rapid growth of non-standard employment with worsening workers’ wellbeing in the 1980s, 1990s and 2000s, the governments of these three countries have been making attempts to re-regulate the labour market.

¹ The listing of these three countries is in alphabetical order. For consistency purpose, this paper will generally follow this order in its discussion.

1.2 Objectives

This study seeks to evaluate the impact of the rise in non-standard forms of employment on workers' protection, labour market development, and the effective access of non-standard workers to fundamental labour principles and rights at work. In particular, the study aims to address the following sets of questions:

- In what ways has non-standard employment, in its various forms, evolved in the last three decades in China, Japan and Korea? What are the main categories of workers in non-standard employment? Has non-standard employment provided them job opportunities as an alternative to unemployment? What opportunities, if any, do they have in transitioning into standard employment? Or, will the experience of non-standard employment serve as a blemishing effect for upgrading to standard employment?
- How is the growth or reduction of particular forms of non-standard employment underpinned by the government's economic, labour market and social policy reforms on the one hand, and employers' strategy to remain competitive on the other?
- What may be the main differences in the major rights and protections between workers in standard employment and in various categories of non-standard employment, in principle and in reality? What have been the legal trends of labour regulations? And how may the regulation of one category of workers impinge on the nature of work and employment terms and conditions of the other?
- What may be the role of traditional and emerging institutional actors in shaping the state/condition of non-standard employment? For example, how may actors, such as employment agencies and subcontracting firms, emerge to fulfil user firms' needs that may muddle employer's responsibilities/liabilities (i.e. who are the employers) and undermine workers' wellbeing? And how may other actors, such as civil society, emerge to fill part of the institutional void when the traditional actors, such as the labour unions, fail to represent workers in non-standard employment?

While we use the term non-standard employment, non-regular employment and irregular employment interchangeably throughout the study, we tend to use the term 'non-standard employment' in general discussion. We use 'irregular employment' when discussing the Korean situation because existing literature tends to use this term in describing Korea's non-standard employment, whereas the term 'non-regular employment' is more often used in the Japanese case. Occasionally, we use the term precarious employment when we intend to highlight the inferiority of non-standard employment, measured by job security, wage level, social security protection and labour rights, compared to standard employment. Since non-standard employment in China, Japan and Korea takes different forms, as discussed in the study, we do not restrict our discussion to common categories of non-standard employment. Instead, we focus on the distinct features of non-standard employment in each country while drawing out common trends and practices among them. We do not claim to be exhaustive in our coverage of the types of non-standard employment and, for that matter, the labour regulations that govern them.

1.3 Research methods

This study is based on a systematic examination of the regulation of non-standard employment in the three countries included in this study: China, Japan and Korea. It draws upon three principal sources of data:

-
- 1) Primary legal/regulatory material – including legislation and subordinate legislation, case law, administrative regulations issued by relevant ministries at the national level (this is particularly relevant in China), and, as far as possible, other sources of regulations such as trade agreements and collective agreements. Where applicable, ILO conventions are included;
 - 2) Academic literature from university library database – including journal articles, books and book chapters from a range of disciplines such as law, industrial relations, employment studies, and labour market studies;
 - 3) Grey literature – including, for example, on-line newspaper articles, media and non—government organizations (NGO) (e.g. ILO, OECD, World Bank and United Nations) material on the subject, as well as organizational websites, such as the webpages of employer associations and trade unions.

To meet the objectives of the project, three inclusion principles guided the literature search strategy.² ‘Relevant literature’ was defined as literature that:

- Focused on *non-standard employment* in all its recognized forms and/or the groups of workers typically engaged in or affected by non-standard employment; *and*
- Yielded insight into the *regulation (both formal and informal)* of non-standard employment; *and*
- Concerned at least one of the *geographic areas* of interest (Japan, China, and Korea).

It is important to note that, despite all efforts to be thorough, our approach contains two potential major limitations. One is that we rely primarily on literature published in the English language and, to a lesser extent, Chinese language. Due to language constraints, we have not been able to access literature published in the Japanese and Korean languages. This may, to some extent, limit the richness of our study, giving less voice to indigenous studies. However,

² The selection of key search terms and appropriate synonyms was guided by the expertise of the authors and preliminary sweeps of the literature. To conduct the search, both the ‘subject’ and ‘key word’ search functions of the university catalogues were used. Terms (and variants, as appropriate) incorporated into the search to ensure that the study captured all manners of *non-standard employment* included: ‘non-standard employment’; ‘temporary employment’; ‘contract employment’; ‘part-time employment’; ‘seasonal employment’; ‘informal employment’; ‘irregular employment’; ‘non-regular employment’; ‘atypical employment’; ‘agency employment’; ‘self-employment’; ‘day labour’; ‘casual labour’; ‘migrant labour’; ‘dispatch worker’; ‘foreign labour’; ‘provincial labour’; ‘child labour’; ‘forced labour’; ‘labour dispatch’; ‘labour mobility’; ‘labour market segmentation’; and, ‘employment agencies’. This element of the search also incorporated key terms that reflect the vulnerable nature of many groups of workers engaged in non-standard work, to ensure that relevant literature that focuses on several types of non-standard employment, or several groups of workers, was not overlooked. In this regard, terms such as ‘precarious employment’; ‘employment insecurity’; ‘triangular employment’; ‘discrimination’; ‘vulnerable workers’; and so on, were also included in the search. Terms (and variants, as appropriate) incorporated into the search to capture both the informal and formal *regulatory aspects* of non-standard employment included: ‘regulation’; ‘labour law’; ‘legislation’; ‘labour market policy’; ‘licensing’; ‘government policy’; ‘public administration’; ‘social policy’; ‘employment policy’; ‘employee rights’; ‘industrial relations’, and so on. In addition to searching the university catalogues, multi-disciplinary university databases were targeted in order to access the academic literature, including *Business Source Complete* (containing more than 2,300 business and economics journals), *Proquest* (a multi-discipline collection of databases), and *Legaltrac* (a database that includes law reviews). Specific industrial relations and law journals were also targeted, including: *Economic and Labour Relations Review*; *Employment Law Bulletin*; *International Employment Relations Review*; *British Journal of Industrial Relations*; *Industrial Relations*; *Journal of Industrial Relations*; and *Labour & Industry*. To access industry and consultant reports, the OECD iLibrary and the World Bank e-library were searched. The Social Science Research Network (SSRN) database was also searched. The search was restricted to literature published since 1995, based on the rationale that insights from germinal, older studies would be incorporated into more recent works, and indeed extended.

given that many of the academic studies published in English on Japan and Korea (and indeed China for that matter) were conducted by scholars from these countries, we are confident that a relatively balanced view has been captured in our study.

A second limitation is that the dependence on secondary literature means that what we have reviewed and reported here is a comprehensive survey of data that is available and not necessarily a full picture of the reality. An added challenge is the lack of comprehensive national statistics on non-standard employment that will enable us to present a more precise picture and a nuanced understanding of the extent non-standard employment and labour market outcomes of those involved, with policy implications. While we try our best to cite statistics from the most reliable sources, variations/contradictions exist between different sources that are beyond our capacity to reconcile. These figures nonetheless provide an informative indication to facilitate our discussion.

We also wish to note that our study focuses primarily, though not exclusively, on the national level regulations. This high level focus may obscure some of the local regulatory norms, traditions and practices, which may at times and in places matter more than the national jurisdictions. In particular, provincial and municipal governments in China have much scope (and power) to formulate and implement local regulations (both legal and administrative) to supplement or substantiate the legal framework outlined in the national legislative blueprint. As far as possible, we draw on sector/industrial/occupation-specific examples for illustration to highlight phenomena that are relevant to particular sectors, industries, occupations and social groups.

1.4 Structure of the study

This study contains seven sections including this introduction section. Section 2 provides an overview of the labour market of China, Japan and Korea in terms of their workforce profile and labour market reforms since the 1980s. We draw attention to women's labour market position particularly in Japan and Korea. We also highlight how economic and labour market reforms have led to the growth of non-standard employment in all three countries. In Section 3, we examine the respective and interactive role of traditional and emerging institutional actors, namely the state, employers/employer associations, trade unions, employment agencies and NGOs, in shaping the labour market environment and, for some, supporting non-standard workers. In Section 4, we investigate the nature and extent of non-standard employment in China, Japan and Korea, drawing attention to major types of non-regular workers that are particularly relevant to the specific country. These include, for example, the mass employment of rural migrant workers in China, and the growing use of subcontract workers and foreign workers through industrial trainee/intern programmes in Japan and Korea. The substantial growth and largely inferior employment conditions of these workers not only reflect the rising level of labour market flexibility through state/legislative intervention, but also indicates the limits of regulatory coverage and power in protecting those who are disadvantaged in non-standard employment. Section 5 contains a detailed analysis of labour laws and administrative regulations. We trace how these laws and regulations have been developed and applied to specific categories of workers in China, Japan and Korea respectively. As far as possible, we also highlight legislative gaps and inefficiency. Section 6 contains a brief summary of regulatory responses to the growth of non-standard employment. This is followed by Section 7, which discusses the impact of non-standard employment, both for individuals engaging in this form of employment and for the labour market more generally. In Section 8, we summarize the study by identifying a number of policy implications.

2. Overview of the labour market of China, Japan and Korea

In this section, we outline the workforce profile and labour market reforms since the 1980s in all three countries to provide a context for subsequent discussion of non-standard employment. We highlight the level of education and the level of labour force participation between men and women. We draw particular attention to patterns of women's labour market participation in all three countries, because women constitute a large proportion of those in non-standard employment, particularly in Japan and Korea.

2.1 Workforce profile

According to the human capital theory (e.g. Becker, 1964), education level is an important determinant of a person's employability and earning power. Lower educational attainment has often been cited as one of the reasons for particular social groups, such as women and rural workers, being disadvantaged in the labour market. In all three countries, the workforce's education levels are relatively high for both genders. As we can see in Table 1, at the primary and secondary school level, the female education level is very close to that of the male. At the tertiary level, women's participation levels in Japan and Korea have been high in the last two decades and are getting close to that of men. In China, while a lower proportion of men and women have received tertiary education compared with that in Japan and Korea, the proportion of Chinese women enrolling in tertiary education is now higher than that of their male counterparts.

However, the improved educational attainment by women, or increased level of human capital, is not necessarily translated into economic empowerment through their increased participation in the industrial labour force (Brinton et al., 1995; Lantican et al., 1996). This is particularly the case in Japan and Korea. It has been noted that the continuous growth in higher education among women in Japan has not led to 'improvements in women's wages or the greater participation of educated women' (Shimada and Higuchi, 1985, p.S372; also see Nakata and Takehiro, 2002; Yuasa, 2005). This reflects to some extent 'the unique features of the Japanese society, such as strong family cohesiveness and integrity [and] limited promotion opportunities for female workers in employment systems' (Shimada and Higuchi, 1985, p.S372).

China, Japan and Korea have witnessed an increasing, or steady, proportion of women in employment since the 1980s, with women making up 40-45 per cent of the total workforce (see Table 1). However, women are over-represented in firms of certain ownership forms (e.g. private sector in China) and in non-regular employment (Japan and Korea) marked by lower levels of job security and terms and conditions (Cooke, 2010).

China has an above world-average record of women's labour force participation. The vast majority of them are in full-time employment as part-time work is uncommon and those who work part-time often need to do more than one job to make up a living wage. Compared with Japan and Korea, gender segregation is perhaps the least pronounced in China. In comparison, China has a relatively stronger internal labour market for women than Japan and Korea in that the majority of women have continuous employment with limited career breaks. However, women in China generally have to, as stipulated by law, retire five years earlier than their male counterparts in similar occupational category (Cooke, 2010).

Compared to China, Japan's integration of women into the workforce has been more moderate, although the increasing labour shortage of the country due to declining fertility has provided opportunities for mothers to re-enter the labour market for their 'second career'

(Worthley et al., 2009). In general, women's employment in Japan takes an M shape by age and marital status (Houseman and Osawa, 1998; Gelb, 2000). It has a high employment participation rate from young women until they get married and pregnant. Married women who return to the labour force after an employment break usually find themselves in lower-status positions than they had prior to their break (Steinhoff and Tanaka 1993). They are generally classified as part-time workers, not because of the slightly reduced number of hours they work compared with full-time workers, but because of the absence of job security, career progression opportunities and other benefits that are enjoyed by their full-time counterparts (Steinhoff and Tanaka, 1993; Wakisaka and Bae, 1998; also see next sections).

In Korea, women's economic status in the labour market has been significantly improved throughout Korea's economic development process since the early 1960s (Jung and Choi, 2004). Since the 1980s, the Korean tertiary sector has been absorbing large numbers of women workers as the sector expanded significantly (Yoon, 2003). However, like their counterparts in Japan, a large proportion of Korean (married) women have inferior employment status mainly because of their marital status (Kang and Rowley 2005; Chun, 2009). According to OECD (2012), 42 per cent of female employees were in irregular employment compared to 28 per cent of males in Korea in the early 2000s. Cultural prejudice against women is believed to be the main reason for the widespread gender discrimination in Korean labour laws and the Korean labour market (Kong, 2009). As a result, the majority of (married and older) women are stuck in irregular employment with little prospect of moving up the job market ladder. In addition, 'women in all types of atypical employment earned less than their male counterparts' in the 2000s (Chun, 2009, p.539, also see Table 11), a situation that does not seem to have changed in the 2010s.³

³ See Kim (1996) for more detailed discussion on Korean employers' discrimination against married women; also see Chun (2009) for more detailed discussion on gender and labour politics of irregular women workers' struggles in Korea.

Table 1. A summary of gender profile of China, Japan and South Korea

Items	China				Japan				Republic of Korea			
	1980	1990	2000	2013	1980	1990	2000	2013	1980	1990	2000	2013
GNI per capita (US\$)	220	320	930	6,560	10,430	26,960	35,140	46,330	1,810	6,000	9,800	25,920
Population												
Total (millions)	981.2	1,135.2	1,262.6	1,357.38	116.8	123.5	126.9	127.338	38.1	42.9	47.0	50,219
Female (% of total)	48.5	48.4	48.6	48.2	50.8	50.9	51.1	51.3	49.5	49.7	49.7	50.3
Participation in education												
Female pupils (% of total)												
Primary	--	--	48	46.2*	--	--	49	48.7*	--	--	47	47.8*
Secondary	--	--	47	47.2*	--	--	49	48.9*	--	--	48	47.4*
Gross enrolment rate in tertiary (% of age group)												
Male	--	4	--	25.2*	--	36	51	64.5*	--	51	92	111.5*
Female	--	2	--	28.4*	--	23	44	58.2*	--	25	53	83.6*
Labour force participation												
Total labour force (millions)	503	650	739	793.307	56	64	68	65.54	15	19	23	26.07
Labour force female (% of total labour force)	43	45	45	43.6	39	41	41	42.7	37	39	40	41.6
Unemployment												
Total (% of total labour force)	4.9	2.5	3.1	4.6	2.0	2.1	4.8	4.0	5.2	2.5	4.1	3.2
Female (% of female labour force)	--	--	--	3.8	2.0	2.2	4.5	3.7	3.5	1.8	3.3	3.0
Employment (%)												
Share of women in total employment	43	44	44	45#	39	41	41	42#	37	39	40	42#
Share of women in agricultural employment	--	49	--	--	13	9	6	4.20#	39	20	12	7.90#
Share of women in wage employment in the non-agricultural sector	--	38	39	--	--	38	40	41.80#	--	38	40	42.10#
Participation in the labour force (Access to economic and productive resources dimension)												
Ratio of female to male labour force participation (%)	81.2	86	84.8	81.6	59.6	64.7	64.5	81.6	57.1	64.2	66.6	69.5

Sources: The World Bank Group (2015) and United Nations Development Programme (2011); *data in 2012; #data in 2008.

2.2 Labour market reforms since the 1980s

Labour market reform is often led by the state, driven by the need to respond to changes in the politico-economic condition of a nation. Such has been the case for China, Japan and Korea respectively as a result of economic crisis (for Japan and Korea) and state-driven marketization (for China) since the 1980s.

In China, major labour market reform started in mid-1980s when the government began to lay off state-owned enterprise (SOE) workers and encourage the growth of the private sector, along with the beginning of the replacement of the ‘iron rice bowl’ (i.e. job for life) and the regulation of the employment relationship with labour contracts, following the opening up of the country’s economy in the late 1970s.⁴ The state sector downsizing was at its deepest during 1997-2000 when millions of SOE employees were displaced either through early retirement or redundancy (c.f. Hassard et al., 2007; Kuruvilla et al., 2011). According to the National Bureau of Statistics of China (2012), state-owned unit employment consisted of 59 per cent of the total urban employment in 1995; this figure declined to 35 per cent in 2000 and 19 per cent in 2010. The majority of the displaced workers have ended up in the peripheral labour market due to the lack of job market experience, desirable human capital needed for premium jobs in the growing private sector, and relatively older age profile. In the meantime, over 160 million of rural migrant workers have been attracted to urban industrial employment, who make up the bulk of those in non-standard employment in China (see Section 4.1 for more discussion).

In Japan, the employment system witnessed a series of regulatory reforms from the late 1980s throughout the 1990s. The main purpose of these reforms is to reduce the rigidity of the internal labour market by establishing an external labour market and bringing in more staffing flexibility (Imai, 2004). According to Imai (2004, p.1), the ‘establishment of the active external labour market was believed to revitalize the struggling Japanese economy after the bubble burst’. A key component of the external labour market is the ‘establishment of the temporary dispatching work (hereafter, TDW) system’ (Imai, 2004, p.1).⁵ ‘The TDW system was first established in 1986 by the enactment of the TDW Law’. The TDW system was liberalized in 1999 following the revisions of the TDW Law in 1997 and 1999 as the private job placement expanded substantially (Imai, 2004, p.1). Prior to the 1990s, Japan operated in a unique Japanese employment system that was characterised by permanent employment, high levels of training and reward, and cooperative industrial relations. It is believed that the radical downsizing amongst publicly listed companies in Japan between 1990 and 1997 played a significant role in the deinstitutionalisation of employment security that was once the hallmark of the Japanese employment system and which was believed to have contributed to its economic wonder in the 1970s and 1980s (c.f. Araki, 2007; Ahmadjian and Robinson, 2011). Unable to resist economic pressure and in order to remain internationally competitive, employers opted to cut labour cost by contracting permanent employment and turning their older standard workers into dispatch workers via subsidiary companies (Peng, 2012). In addition, employers started to draw on foreign labour to contain cost and increase labour flexibility (c.f. Tsuda, 1999). As a result, ‘the proportion of non-standard employees among

⁴ The concept of ‘iron rice bowl’ refers to the cradle to grave employment system in effect from 1949 to the 1980s where the employment policy made it extremely unlikely a worker could be terminated from employment, even for incompetency, as their job was tied in to its work unit for housing, school, food, etc. This entitlement of a worker’s daily bowl of rice continued until its gradual replacement by labor contracts which allowed termination and other performance-based management policies and regulations (see, Brown, 2010).

⁵ See Imai (2004) for a more detailed discussion of the development of the legal system and labour market development of the temporary dispatching work system in Japan.

total employees increased from 23.8 per cent in 1990 to 34.1 per cent in 2008' (Peng, 2012, p.13).

Similarly, the rapid casualization of the Korean labour market took place in the 1990s following the Asian financial crisis in 1997. The dramatic increase in various forms of precarious employment (e.g. irregular employment and self-employment in the formal sector) was a direct consequence of the 'neoliberal economic reform implemented by the new democratic government...under the guidance of the International Monetary Fund' (IMF) as a condition for the financial bailout programme (Shin, 2013, p.335). This reform programme included: enhancement of flexibility in the labour market, restructuring of the financial market, and reforms of the public sector and corporate governance (Shin, 2013). Like employers in Japan, employers in Korea began to replace regular workers with non-regular workers and hire non-regular workers for most new positions. As a result, only 30 per cent of Korean workers had a regular job in 1999 (OECD, 2000, p.33). The 'absolute number of precarious workers has continuously increased from about 3.8 million in 2002 to about 6 million in 2011' (Shin, 2013, p.336). The number of dispatched and temporary workers jumped from 449,000 in 2001 to 767,000 in 2007 and these figures did not even include a considerable number of in-company (also referred to as in-house by some authors) subcontract workers (Jeon, 2014b). In the meantime, the wage gap between precarious workers and standard workers widened from 33.9 per cent in 2002 to 44.6 per cent in 2011 (Korea Labour Institute, 2011, pp. 4-36)' (cited in Shin, 2013, p.336). The transformation of the Korean labour market and the 'proliferation of new types of non-regular employment in the 2000s' has resulted in deepening inequality and poverty and long strings of fierce labour struggle of non-regular workers in attempts to better their employment terms and conditions (Shin, 2013, p.335).

In comparison, the Korean labour market reform may be politically more contentious than that in Japan, but the outcomes are similar – while efforts were made, often through unions' militant actions in the case of Korea, to protect the employment terms and conditions of the core workers, employers have been increasingly relying on non-standard employment to reduce labour costs (Peng, 2012) before new laws sought to reign them in (see Section 5). As a result, both Japan and Korea have increased their labour market flexibility considerably since the late 1990s. For China, the labour market duality emerged since the mid-1980s, mainly as a result of the rural migrant workers. While many standard workers have experienced erosion in their employment terms and conditions not least in Japan and Korea, a common labour market outcome for the majority of non-standard workers in all three countries has been the relatively poor employment terms and conditions. This is a direct result of their inadequate regulatory protection underpinned by the relative roles of key institutional actors.

3. Role of key institutional actors in the labour market

The understanding of the causes and outcomes of non-standard employment requires the examination of the respective and interactive role of key institutional actors in shaping the labour market. In this section, we explore the role of traditional actors such as the state, employers/employer associations and trade unions, and the role of emerging actors (Heery and Frege, 2006) such as employment agencies/subcontractors, and NGOs (see Table 2).

Table 2. Roles of key institutional actors in the (non-standard) labour market of China, Japan and Korea

Institutional actors	China	Japan	Korea
State	Labour market regulations Controlling unions and other NGOs Sanctioning employment agencies	Labour regulations reform to facilitate business survival and competitiveness by creating labour market flexibility Direct role in shaping the gendered labour market resulting in the majority of women workers trapped in part-time (i.e. non-regular) employment Introduce and organize temporary labour immigration schemes (e.g. trainees and interns) to alleviate labour shortages	Labour regulations reform to facilitate business survival and competitiveness by creating labour market flexibility Direct role in shaping the gendered labour market resulting in the majority of women workers trapped in irregular employment Introduction of the ‘Industrial Trainee’ programme to attract foreign workers to fill labour shortage
Employers/employer association	Growing use of non-standard employment to avoid legal responsibilities/reduce cost and increase labour flexibility Lobbying government to make regulatory changes favourable to businesses	Growing use of non-standard employment to avoid legal responsibilities/reduce cost and increase labour flexibility Lobbying government to make regulatory changes favourable to businesses Categorizing jobs to create a gendered labour market that disadvantages women in their career and employment packages	Growing use of non-standard employment to avoid legal responsibilities/reduce cost and increase labour flexibility Lobbying government to make regulatory changes favourable to businesses Categorizing jobs to create a gendered labour market that disadvantages women in their career and employment packages
Trade unions/ professional associations (e.g. in Japan)	Largely playing a welfare role and facilitating productivity enhancement Organizing and representing workers Weak organizing power and low credibility amongst workers in defending rights and interests Lobby government to make labour laws to strengthen labour protection Emerging collaboration with NGOs to gain credibility amongst workers by supporting them and to monitor NGOs’ activities	Campaigning against the expansion of part-time employment* Campaigning for labour standards and labour rights for immigrant workers Campaigning for training for immigrant workers to maintain professional standard (e.g. in the care sector) Organizing non-regular workers through community unions Networking with NGOs to re-establish union power through involvement in social causes	Organizing and representing mainly regular workers who are predominantly men Opposition to labour laws that undermine terms and conditions of regular workers Organizing strikes often in militant and protracted manner Generally opposing the use of non-standard employment Key unions generally not proactive /interested in representing /organizing irregular workers
Employment agencies	Labour market intermediary Notional ‘employer’ of agency workers	Job information dissemination Job placement/ labour intermediaries,	Job information dissemination Job placement/ labour intermediaries

Subcontractors (in the case of Japan and Korea)	Closely associated with local government (government agency role) Not well regulated and causing labour market disorder	especially for immigrant workers Notional ‘employer’ of the agency workers Serving as the labour dispatching agency subsidiary for the parent company Acting as the employer of subcontract workers who may work alongside regular workers on the production site	Notional ‘employer’ of the agency workers Acting as line managers for the subcontract workers who may work alongside regular workers on the production site Unwilling to represent irregular workers on collective bargaining and lack collective bargaining power
NGOs (including civil society and religious organizations such as church)	Organizing workers outside of workplace Representing workers in labour disputes Service support to workers in hardship Weak position due to government control/sanction	Advocating for immigrant workers’ rights Providing welfare support (e.g. shelter) Providing outsourcing services to the government in information dissemination and educating/counselling foreigner workers in Japan	Providing social assistance such as welfare support, medical service, and counselling to unemployed/ under-employed workers, and foreign (illegal) workers Advocacy on policy decision-making process for the vulnerable groups including for example, immigration policy and foreign trainee programmes Organizing protests to pressurise government to reform regulatory policies (e.g. foreign trainees) to improve labour standard and protection Women’s self-organizing in irregular employment (e.g. the Korean Women Workers Association that promotes women’s rights through advocacy and education)

* ‘Part-time’ job in Japan implies (an inferior) employment status, rather than the number of work hours and many part-time workers work nearly full-time hours (see Section 4.2).

3.1 The state

As intimated in the previous section, the governments of all three countries have initiated labour market reform programmes via regulatory changes that have led to the dismantling of a solid internal labour market informed by Confucian (paternalistic) and socialist values (for China) and marked the end of state commitment to protecting long-term employment.

In China, state sector employment made up 78 per cent of the urban employment prior to its economic reform that commenced in 1978 (National Bureau of Statistics of China, 2012). In the first two decades of its economic and social reform, the government adopted an efficiency-driven economic development policy at the expense of the welfare and wellbeing of millions of rural migrant workers whose rural household registration status held them down firmly at the bottom of the urban labour market with little protection. On the one hand, the state has created employment opportunities for millions of surplus rural labour. On the other hand, these jobs were dirty, dangerous and demeaning.⁶ The change of government leadership to Premier Wen Jiabao and Chairman Hu Jintao in 2003 marked the beginning of the pursuit of an economic development policy that puts emphasis on social justice, social harmony and environmental protection. As part of the reform, visible changes can be seen in the role of the Chinese state in the employment sphere, for example, from a dominant employer to a regulator. Its intervention approach is also becoming more sophisticated, from the heavy dependence on administrative regulations towards a regulatory system with combined mechanisms of legislation, standard setting, best practice sharing and the promotion of ‘progressive’ human resource management practices and corporate social responsibility (Cooke, 2012). However, the state continues to exert tight control over other institutional actors such as the trade union and NGOs, leaving them with limited autonomy and resources to represent and organize the workers (see below).

If the changing role of the Chinese state is self-initiated for its economic development needs, then the changing role of state in Japan and Korea was, to various degrees, imposed externally by international organizations. For example, it was reported that the OECD strongly promoted the American-style flexible labour market policies and recommended Japan deregulate its labour market and continued to assess Japan’s labour market deregulation via a list of specific measure through OECD’s bi-annual Economic Surveys. In particular, OECD recommended that Japan deregulate its temporary work and improve ‘the availability of firm external training and skill certification to enhance labour market mobility’ (Shire, 2002, p.27). Since the mid-1990s, the Ministry of Labour began to undertake systematic reforms of employment legislation to deregulate the Japanese labour market (Peng, 2012). For example, the Ministry of Labour was instrumental in the amendment of the Labour Standard Law and the Worker Dispatching Law to activate the secondary labour market (Peng, 2012). Another reported source of external pressure for change came from the ratification of ILO’s Convention C181 – Private Employment Agencies Convention, 1997 (No.181) by Japan in 1999 (Shire, 2002).

⁶ The term is said to have originated from the Japanese expression 3K: *kitanai*, *kiken*, *kitsui*^[1] (respectively 汚い, 危険, きつい), and has subsequently gained widespread use, particularly regarding labour done by migrant workers, http://en.wikipedia.org/wiki/Dirty,_dangerous_and_demeaning, citing, J. Connell, 1993, *Kitanai, Kitsui and Kiken: The Rise of Labour Migration to Japan*, Economic & Regional Restructuring Research Unit, University of Sydney, at <http://trove.nla.gov.au/work/10087036?selectedversion=NBD10160254>. Also see, Duncan McCargo, *Contemporary Japan* 95, at: <https://books.google.com/books?id=wy0dBQAAQBAJ&pg=PA95&lpg=PA95&dq=japan+dirty+difficultand+dangerous+jobs&source=bl&ots=0usPbDDZrJ&sig=QpuMQpMJBv5MVVIHWoK97mqFgXI&hl=e&sa=X&ei=u3A1VdKpDo6zogSfgoEI&ved=0CEEQ6AEwBg#v=onepage&q=japan%20dirty%20difficul%20and%20dangerous%20jobs&f=false>.

In Korea, the government's role in industrial relations 'changed with the onset of the democratisation process in 1987' (OECD, 2000, p.48). However, 'between 1987 and 1997, the progress towards a comprehensive labour law reform was slow and social consensus-building was hampered by the continuing prohibition of trade union pluralism, *i.e.* the refusal to legalise new trade union organizations outside the FKTU monopoly' (OECD, 2000, p.48). Labour law reform only gathered momentum at the end of 1997 when a Tripartite Commission was created to help overcome the crisis (OECD, 2000). As mentioned above, the labour market and relatedly labour law reform was conditional to the IMF bailout. If the Chinese dual labour market was structured along the divide of urban-rural workers, then the Korean labour market segmentation is largely based on the gendered logics in which the state has, according to Chun (2009, p.537), channelled women 'into downgraded forms of irregular employment'.

All three governments have played an important role in designing migration programmes to attract migrant workers to fill the labour shortage. In China, labour migration takes the form of rural-urban mobility; whereas for Japan and Korea, migrant workers are mainly drawn from other Asian countries through industrial trainee programmes and hiring through intermediary agencies into several distinct industries, such as construction and entertainment. The social and immigration policies enforced by these governments also have a direct impact on the nature of work and employment and social outcomes of these migrant workers (see below for further discussion).

3.2 Employer associations

Employer associations are a key institutional actor in shaping industrial relations and labour market environment. Unlike western economies, where employers' associations are developed and provide a range of services to their member employers and form pressure groups to influence government policy and legislation, employer associations in China are much less well established. The China Enterprise Confederation (CEC)/China Enterprise Directors Association (CEDA) and the All-China Federation of Industry and Commerce (ACFIC) are the two main official employer/business associations that the state recognizes at the national level as the representatives of employers' interests. Like other major NGOs recognized by the Chinese government, both operate under the leadership of the Chinese Communist Party. CEC was established in 1979 and CEDA in 1983. The two NGOs merged into one institution in 1988. The subordination to state control means that CEC/CEDA has limited autonomy beyond state-sanctioned activities (see Unger 2008 on the relationships between associations and the state). Nevertheless, the lobbying power of Chinese employers is rising. They are able to form pressure groups rapidly to exert pressure on the government if forthcoming regulations and policies are likely to have significant negative impact on their business environment. The drafting of the Labour Contract Law (2008) is a good example—the final version was watered down from the draft version as a result of employer lobbying to maintain flexibility in hiring and firing (Cooke, 2015).

In Japan, the main employer association is the Japan Business Federation founded in 2002 through the amalgamation of the Japan Federation of Economic Organizations (established in 1946) and the Japan Federation of Employers' Associations (established in 1948).⁷ This is in addition to two other major economic organizations: the Japan Chamber of Commerce and Industry and the Japan Committee for Economic Development. According to Watanabe (2014), the Japanese employer associations have been relatively united in

⁷ See <https://www.keidanren.or.jp/en/profile/pro001.html> for more information about the association.

demanding extensive labour market deregulations despite the existence of conflict of interests within some sectors. Employers and employer associations have worked with the Japanese Government in the partial liberalization of the Japanese labour market (Peng, 2012).

By comparison, the Korean employer associations have a longer history and stronger political presence in the national economy than their counterparts in China and Japan. Employers are organized and represented by several associations. The Korean Chamber of Commerce and Industry is the oldest one (established in 1884). It acts as a political and economic pressure group as well as operating a number of vocational training centres (OECD, 2000). The Federation of Korean Industry (FKI) is ‘the representative of the large conglomerates (*chaebols*) and represents its members’ interests, above all, in matters of economic policy’ (OECD, 2000, p.46). The Korean Employers Federation (KEF), established in 1970, is the main employer association focusing on labour employment and industrial relations. It is ‘a nation-wide umbrella organization which integrates numerous sectoral and regional employer and trade associations, as well as about 4 000 major enterprises’ (OECD, 2000, p.46). Unlike FKI, KEF represents the interests of both large and small businesses and participates in a number of tripartite organizations, including as the Labour Relations Commission and the Minimum Wage Council (OECD, 2000). KEF positions itself as a forward looking and progressive organization that represents not just the employers’ interest, but the broader economic interest of all parties. It seeks to be a key player, amongst other things, in the restructuring of the labour market to be ‘future oriented’ and in the development of cooperative industrial relations that departs from a confrontational approach to industrial relations characteristic of the Korean industrial relations in recent decades (http://www.kefplaza.com/kef/kef_eng_intro_1.jsp, accessed on 30th March 2015). Like their Japanese counterparts, the Korean employer associations have been lobbying for regulatory change to deregulate the labour market since the early 1990s, though their attempts only became more successful since 1997 on occasions (Peng, 2012).

3.3 Trade unions

Only one trade union is recognized by the Chinese government – All-China Federation of Trade Unions (ACFTU).⁸ Founded in 1925, the ACFTU is one of the eight ‘mass organizations’ (or known as ‘NGOs’)⁹ in China that operate under the leadership of the Chinese Communist Party. Representing workers in collective negotiation, among other tasks, is one of the key responsibilities of the union, as stipulated in the labour regulations (Cooke, 2011). However, existing studies on the Chinese trade unions have mostly been critical of their institutionally incapacitated position and operational inefficacy (e.g. Clarke, 2005).¹⁰ In particular, they suffer from low legitimacy amongst workers for representation in wage negotiations and labour disputes. In spite of institutional and resource constraints, the ACFTU has played an active role, at the senior level, in lobbying for legislative changes to offer greater protection to the workers, for example, in the drafting of the Labour Contract Law (LCL) and in its intervention into the dispatch labour debate (Cairns, 2015). At the grassroots level, ACFTU organizations are seeking new ways to organize and represent workers who

⁸ See Brown (2012).

⁹ Another ‘NGO’ or quasi-governmental organization that deals with female workers’ issues is the All-China Women’s Federation. But it does not operate at the enterprise level to avoid confusion and doubling institutional structure. Instead women workers’ issues at the enterprise level are dealt with by the Women Workers’ Section of the ACFTU (also see Cooke, 2008 for more discussion).

¹⁰ See Cooke (2011c) for a more detailed discussion.

have traditionally fallen outside their scope, such as rural migrant workers, to improve their labour rights protection (Taylor and Li, 2010). Nevertheless, the ACFTU does not have the right to organize strikes in China, and without the right to organize strikes and other forms of industrial action, the power of the trade union is limited in representing workers on collective negotiation (Chang and Cooke, 2015). As such, ACFTU grassroots organizations mainly play a welfare role in the state sector with limited presence and strength in the private sector where the bulk of non-standard employment is found.

In Japan, more than 90 per cent of the labour unions are enterprise-based (Araki, 2007). Since the early 1990s, Japanese unions have pulled back from large wage increases demands in order to protect jobs (Peng, 2012). The Japanese unions have traditionally focused on organizing employees of large enterprises and dealing with the government. They have been largely disinterested, and at times, critical of the deployment of other categories of workers, particularly foreign migrant workers, because they see the latter as a threat to wage increases of the Japanese workers and public order and peace (Shin, 2001). Since the 2000s, however, the Japanese Trade Union Confederation (RENGO) has pushed for law reforms regarding non-regular work in order to improve wages and reduce working hours (also see Section 5.3 for more discussion). Unions have also sought to reconstitute their social influence on civil society and the state by allocating more financial resources to build connections and advocate for equal treatment of dispatched and part-time workers (Urano and Stewart, 2007). In more recent years, some Japanese trade unions started to play a service and advocacy role for foreign migrant workers.¹¹ For example, Ford and Kawashima's (2013, p.440) study of foreign migrant workers in the care sector in Japan found that the trade unions 'have had some impact on the form and function of temporary labour migration in the care sector, including guarantees regarding occupational health and safety, superannuation, and labour rights. Importantly, also, the scheme's emphasis on training was driven by pressure from Japanese professional associations and trade unions'. It should be noted that, this involvement has been 'largely motivated by unions' continuing perception that temporary migrant workers constitute a threat to the domestic labour market' (Ford and Kawashima, 2013, p.440).

In contrast, the Korean trade unions have been far more formidable in their approach to organizing and defending their members' rights and interests against a context of economic globalisation.¹² Since 1987, the militant resistance of Korean labour unions has impeded several legislative attempts at labour and employment reform in favour of businesses, particularly legislative changes that would lead to a higher level of labour flexibility (OECD, 2000). Indeed, employment deregulation in Korea has been a considerably more politically contentious process than that in Japan (e.g. Peng, 2012). The two main labour unions in Korea are the Korean Confederation of Trade Unions (KCTU) and the Federation of Korean Trade Unions (FKTU). The former is said to be more radical than the latter (Peng, 2012). However, the Korean unions have been mainly interested in representing their workers in standard employment, i.e. the regular workers who are predominantly male. Some categories of non-

¹¹ See Urano and Stewart (2007) for a detailed review of foreign migrant labour in Japan and the role of community unions in organising them.

¹² See Chang (2011) for an overview of union responses towards the economic reform that was influenced by neo-liberalism and the transformation of labour movement in Korea.

regular workers are not permitted by law to join the main unions (Shin, 2013).¹³ According to a survey conducted by the Korean Ministry of Labour in 2008, ‘only 2.5 per cent of irregular workers are represented by a union in comparison with 15.1 per cent of regular workers’ (cited in Chun, 2009, p.536). Attempts have been made to organize the expanding category of irregular workers by new labour movement bodies, often covering specific segment of the workforce at the grassroots level (e.g. Yun, 2011; Shin, 2013). For example, in 2003, subcontracted workers employed by subcontractors via ‘in-company subcontracting’ arrangements in the auto industry formed their own trade unions in many large automakers. While main unions have since shown signs of willingness to represent irregular workers since the 2000s, these efforts appear to be moderate in general and often fall short of full representation in the same way as for those in regular employment. Yun’s (2011, p.155) study identifies ‘four main types of responses from the regular employees’ unions to subcontracted workers’ (see Table 3).¹⁴ According to Yun (pp.171-172):

In the case of *exclusion*, ‘regular employees’ unions neither accepted subcontracted workers into the union nor represented their interests. Moreover, unions acquiesced to the use of subcontracted workers and their discriminatory employment conditions... *Proxy* involves an attempt by the regular employees’ unions to negotiate with a subcontracting company on behalf of subcontracted workers, but not an acceptance of precarious workers into the union... *Inclusion*, by contrast, occurs when regular employees’ unions open the door to subcontracted workers while maintaining the gap in employment conditions between the two categories of workers... With *integration*, the regular employees’ unions not only accept subcontracted workers but also strive to represent their interests. Here, the attitude to sharing existing union resources with subcontracted workers is more important than the formal inclusion itself.

These varying responses reflect differences in work organization, collective power and union strategies in organizing precarious workers (Yun, 2011). It has been argued that the masculinised forms of labour militancy characteristic of the Korean union movement have disincentivized the mainstream unions to represent those in irregular employment where 70 per cent of women are employed (Chun, 2009).

¹³ In Korea, the law allows only employees ‘working for the same employer’ or ‘in the same description of work’ to form a union, which limits the ability of contract workers to join unions. Noncitizen migrant workers, whether registered or working illegally, do not have the right to form unions or serve as union officials. Registered migrants may be members of unions organized and led by citizens. Additionally, the law requires that union officials be full-time employees of the company or state enterprise and prohibits permanent union staff. Legal definitions of who may join a union (‘employees working for the same employer’ or ‘employees in the same description of work’) and requirements that the union represent a certain percentage of the workforce could combine to hamper collective bargaining efforts if contract workers, who made up a substantial portion of the workforce, were not considered part of the potential bargaining unit. Because the law classifies contract workers as working in the ‘service industry’, as opposed to the ‘manufacturing industry’, they may not join an industrial union. This restriction on joining with full-time employees of industries often diminishes the ability to bargain collectively as a larger group. Despite limitations on the rights of migrant workers to form or join unions, there were reports of protests by migrant workers. 2013 Human Rights Reports: Thailand, Section 7 a. Worker Rights, at, <http://www.state.gov/j/drl/rls/hrrpt/2013/eap/220234.htm>.

¹⁴ According to Yun (2011, p.171), ‘With *proxy*, regular employees’ unions attempt to improve employment conditions of precarious workers in so far as they would not harm the employment security of regular employees... In this respect, the attitude of proxy is regarded as closer to legitimizing a division between the two types of employment rather than to building a common community between workers’.

Table 3. Union responses to subcontracted workers

	Non-organizing	Organizing
Non-representation	Exclusion	Inclusion
Representation	Proxy	Integration

Source: Yun (2011, p.171)

3.4 Employment agencies

In China, employment agencies (initially known as labour service company) first emerged in the late 1970s following the opening up of the Chinese economy, initially to facilitate foreign firms to hire staff in China and to help unemployed youth for job placement. In the 1980s and 1990s, the number of employment agencies (in their various forms) grew under the auspices of the local governments to provide services at the lower end of the labour market.¹⁵ As of 2001, 70 per cent of the employment agencies were funded by the local governments at various levels as part of the multi-level employment services network. The growth of employment agencies was in response to the large scale downsizing in the state sector, the continuous inflow of rural migrant workers to urban areas to seek employment and the growing number of unemployed school leavers and college graduates (Li et al., 2006, Cooke, 2012).¹⁶ In the early 2000s, ‘SOEs set up labour dispatch companies of their own to dispatch workers laid-off from their own operations’ following the large scale downsizing programme of the state sector that started in 1997 (Xu, 2008-9, p.52). Since the mid-2000s, state-affiliated employment agencies have been required to work more independently and private employment agencies have mushroomed. For more than two decades, the employment agency industry has been highly unregulated (Li et al., 2006). They are governed mainly by administrative regulations issued at the local level and implemented with considerable discretion. Despite attempts by the government to regulate the employment agency industry and curb the growth of agency employment in the 2000s (see below for more discussion of recent changes), agency employment continues to grow in China and forms part of the employers’ staffing strategy to contain labour cost. For example, an unintended consequence of the LCL enacted in 2008 aimed at providing more protection to non-standard workers has been that employers dismissed their long-serving employees and rehired them as agency workers or replaced them by other temporary workers. As a result, instead of curbing non-standard employment, the number of employed via employment agencies has grown. Aided by local governments’ administrative flexibility, both formally and informally, employers continue to find ways to bypass legal constraints, including forming alliances with employment agencies (Cooke, 2011a).¹⁷ The amendment of the LCL (enacted in 2013) and the issue of the Provisional Regulations on Labour Dispatch in 2014 are measures to curb the abuse of labour dispatching (see below for further discussion).¹⁸

¹⁵ See Xu (2008-9) for an overview of the origin of various forms of employment agencies in China; also see Chan (2014) for discussion of constraints of labour agencies in south China in recent years.

¹⁶ There is also a type of employment agencies that specialize in recruiting and dispatching workers abroad. Who is the employer then becomes more complicated in reality.

¹⁷ ‘Labor dispatch’, ‘talent dispatch’, ‘human resources outsourcing’ are ‘some of the names used in China to describe the temporary staffing industry’ (Xu, 2008-9, p.431).

¹⁸ Also see Cairns (2015) for a more detailed discussion.

In Japan, the temporary service industry, initially banned by the Employment Security Law enacted in 1947 and operated in a semi-illegal manner providing restricted services to white-collar and service sector businesses from the 1960s, was only partially legalised by the Worker Dispatching Law (also translated as ‘Temporary Worker Law’) in 1986 and fully legalised in 1999 (Weathers, 2002; Coe et al., 2011). Since the 1990s, Japan’s temporary services industry has transformed the nation’s white-collar workplaces as firms increasingly use agency temps instead of full-time employees to reduce labour costs and increase staffing flexibility. While employers and government leaders in Japan have hailed the temporary service industry as a vital means of promoting labour mobility, the reality is that dispatched workers from the temporary service firms may suffer from gender and age discrimination since the majority of registered temps are women and companies may set an age bar when hiring temporary workers (Weathers, 2002). Coe et al. (2011, p.1091) argue, a distinct Japanese temporary staffing industry has been produced in which the ‘government deregulation has been the key shaper of the industry’s emergence, [and] other actors, including labour unions, transnational agencies, and domestic agencies, have played important roles at various times’.

In Korea, both public and private employment services exist.¹⁹ The former emerged after the Korean War in the early 1950s as industrialisation was about to take off. However, the role of the Korean public employment services has been seen as modest (OECD, 2000). By contrast, their private counterparts, legalized in the 1960s, have been more important players. For example, throughout the 1990s, private employment services agencies ‘managed to fill over 80 per cent of their vacancies, as well as to place a similarly large share of their registered job seekers’ (OECD, 2000, p.103).

3.5 NGOs and civil society

In all three countries, NGOs have played a role as emerging actors in the labour market to provide material and spiritual support to disadvantaged workers and form pressure groups in advocacy of workers’ rights and protection. In China, international NGOs and domestic ones under international patronage have been playing an important role in monitoring the compliance of labour standards and regulations, particularly in the export-oriented manufacturing sector. They also provide financial, medical, legal, educational and emotional support to the workers in sweatshop plants through some forms of organizing primarily outside the workplaces (Cooke, 2011a).²⁰ They fill the gaps where the unions have not reached. However, these NGOs are not institutionalised and operate within immense political and resource constraints and in limited locations where the local authority has a relaxed approach to their existence (e.g. the Pearl River Delta area in Guangdong Province, southeast China). According to the government regulations, civil organizations are required to have a supervising body within the government which oversees their decision-making and has the authority to close down the organization. This high level of government intervention makes it difficult for NGOs, some of whom are criticised by the ACFTU officials as the representatives of foreign interests, to register as a non-profit organization. To overcome the legal and political constraints, many NGOs register as a commercial undertaking (Wang, 2008). Nonetheless, the existence of labour NGOs indicates a new form of activism based on

¹⁹ There are broadly two types of employment agencies or the same employment agency may play two functions. One is to act as a recruitment agency to help employer to recruit workers. The other is to dispatch workers to user firms and act as the legal employer of the dispatch worker.

²⁰ See Froissart (2011) for a more detailed account of NGOs’ role in organising rural migrant workers in China.

their pragmatic positioning and technical competence to provide voice and support to those most needed (Froissart, 2011; Lee and Shen, 2011).

In Japan, labour NGOs have also emerged, particularly in support of vulnerable foreign workers and in sex harassment cases. However, 'it is the small, issue-oriented support groups for illegal foreigners, rather than large, identity-producing ethnic associations for legal foreigners that are increasingly having a greater policy impact on foreigners' rights' (Shipper, 2011, p.540).

By contrast, Korea has 'one of the most vibrant networks of "social" NGOs among OECD countries' (OECD, 2000, p.124). In the mid-1990s, Korea's civil society started to turn their attention to the Industrial Trainee system that was launched in 1991. The programme was aimed at attracting foreign workers to fill labour shortage and reduce cost (see next section for further discussion). Labour activists, religious leaders and other social justice advocates 'led the first public protest in 1994' and the number of advocacy and support organizations for foreign workers have grown substantially since then (Kim, 2003, p.248). In spite of differing goals, orientations and strategies across a number of civil society groups in their campaign against foreign worker exploitation, they 'formed an alliance based on two interrelated issues: protecting foreign worker human rights and revamping the industrial trainee system' (Kim, 2003, p.252). Even the trade unions were joining force with the civil society to 'not only support efforts to protect foreign workers, but also try to educate them about the importance of labour solidarity' (Kim, 2003, p.255). A collective outcome of the advocacy role played by these NGOs has been slowing down the race to the bottom in Korea (Kim, 2003).

4. The nature and extent of non-standard employment in China, Japan and Korea

In this section, we identify: (1) *what* types of non-standard forms of employment exist in China, Japan and Korea; (2) *who* are taking up these types of employment; (3) *where* these jobs are found in terms of occupations, sectors and labour market segments; and (4) what may be the main reasons, i.e. *why*, non-standard employment trends exhibit themselves as they do. The examination of these issues is essential to establishing the context against which we can assess what labour regulations cover non-standard employment in these three countries respectively; and importantly, whether these forms of non-standard employment emerge as an unintended effect of the enactment of labour laws that aim at regulating employer behaviours.

4.1 Non-standard employment in China

In China, non-standard employment is often referred to as 'informal employment'. The use of 'informal employment' in the form of temporary, seasonal, casual, part-time (or more precisely hourly-paid) work has long existed in China albeit on a much smaller scale until the late 1990s (Cooke, 2011d). The term 'informal employment', however, is a relatively new concept in China that was first introduced by the labour authority of Shanghai in 1996. 'Informal employment' (also known as 'non-standard employment' or 'flexible employment') as a flexible labour strategy has been gaining increasing attention in China since the late 1990s as a result of the massive downsizing in the state sector, the rapid expansion of the private economy, and the migration of surplus rural labour *en mass* to urban areas (Huang, 2009; Cooke, 2011d; Park and Cai, 2011).²¹ In fact, 'informal employment' has been

²¹ See Huang (2009) for an overview of 'informal employment' in China; also see Cooke (2011d) for a more detailed review of 'informal employment' in China, labour regulations and workers' representations.

advocated by both academics (e.g. Chen, 2000; Ding et al., 2001) and policy makers as a way forward to absorb unemployed workers since the late 1990s (Cooke 2011d). As such, developing ‘informal employment’, particularly through the development of community services, was a main strategy adopted by the Chinese government to relieve the pressure of rising urban unemployment in the late 1990s and early 2000s (Zhu, 2001).

Workers engaging in ‘informal employment’ can be found in three types of organizations: 1) organizations operating in the formal sector; 2) organizations operating in the informal sector; and 3) loosely formed ‘informal employment’ organizations (Hu and Yang, 2001; Gao et al., 2007). ‘Informal employment’ includes temporary, fixed-term, seasonal, casual work, hourly work, semi-self-employment in the form of subcontracting work, self-employment and those employed by self-employed businesses. There are no national statistics to accurately capture the size of ‘informal employment’ and the spread of its sub-categories. Existing figures are estimations calculated in different ways. For example, according to Zhou (2012), over 60 per cent of the workforce was engaged in ‘informal employment’ by the mid-2000s. A survey carried out by the ACFTU on the re-employment of laid-off workers in selected cities found that 80-90 per cent of the laid-off workers who regained employment in 1999 were engaged in ‘informal employment’ (Jiang, 2003). By the end of 2013, 61.42 million workers were employed in the self-employed businesses (National Bureau of Statistics of China, 2014, see Section 5.2 for more details).

Existing studies on terms and conditions of workers in ‘informal employment’ have revealed a similar picture: low level of job security, extremely low wage (often with delays in wage payment), poor working conditions, long working hours with few or no rest days, lack of training opportunities, and lack of labour rights and social security protection (e.g. Chan 1998; Lee 2007; Cooke, 2011d). Prior to the enactment of the Labour Contract Law in 2008, the majority of workers in ‘informal employment’ did not have an employment contract with their employer, and despite the enactment of LCL, this has not led to a major increase in contract signing (c.f. Cooke, 2011a; Cairns, 2015). According to the statistics from labour inspections, less than 20 per cent of the small and medium-sized private firms had signed contracts with their workers. This figure was much lower in the self-employed business sector (cited in Chang, 2008). Some contracts included unlawful clauses that allow the employers to evade responsibilities on sickness and work-related injuries (Qiao, 2008). A survey conducted by the labour authority in April 2005 found that nearly 13 per cent of the workers were paid below the local minimum wage level. Some firms reduced the real wage by unilaterally reducing the unit price of production or raising the production targets which forced workers to work unpaid overtime to complete their tasks. Wage arrears and unlawful deduction of wage were the most common violation cases revealed in the labour inspections (cited in Chang, 2008).

Rural migrant workers constitute the bulk of those in informal employment. According to the ‘2012 National rural Migrant Workers Monitoring Report’ published by the National Bureau of Statistics of China (cited in Qiao, 2013), there were 163.36 million rural migrant workers working away from home as of 2012, representing an increase of 3 per cent from the previous year. By the end of 2012, the average monthly wage of rural migrant workers was 2,290 yuan (cited in Qiao, 2013), compared to the national average of 3,897 yuan for formal employees in urban units (calculated from National Bureau of Statistics of China, 2013). In addition, the same report shows that while there has been a modest increase in the proportion of rural migrant workers participating in the social security schemes, the proportion of employers or employing units contributing to rural migrant workers’ pension, work compensation (work injury insurance), medical insurance, unemployment insurance, and maternity insurance remained relatively low at 14.3 per cent, 24 per cent, 16.9 per cent, 8.4 per cent and 6.1 per cent respectively (cited in Qiao, 2013). In 2013, there were 166 million rural migrant workers, an increase of 1.7 per cent from 2012. Rural migrant workers’ monthly average wage was 2,609 yuan, an increase of 13.9 per cent from 2012. However, only 41.3

per cent of the rural migrant workers had an employment contract with their employer. The number of wage arrears cases increased in 2013, so did the rise of collective industrial actions as a result of that (Qiao, 2014).

From the 2000s, labour dispatching has become a growing form of non-standard employment in China, in part due to user firms' intention to evade employers' obligation and keep labour cost down. It was anticipated (by the state) that the enactment of the LCL would see the reduction of those hired by employment agencies, promoting a more direct and stable employment relationship between the worker and the firm. The reality had been starkly to the contrary. To pre-empt the negative impact of the new law on employment cost, many employers dismissed their employees with long tenure and rehired them as temporary employees under new temporary contracts. Others dismissed their employees and rehired them as agency workers through employment agencies. As a result, employment agencies prospered and the number of workers registered with employment agencies grew (Cooke, 2011a).

According to a survey conducted by the ACFTU in 2010, there were some 60 million dispatched workers in China. In addition, The China Labour Dispatch Industry In-depth Research and Investment Strategy Report 2013-2017 suggested that there are roughly 26,000 labour dispatch companies in China, employing approximately 27 million people (cited in Cairns, 2015). Dispatched workers are more concentrated in some industries than others. For example, it was reported that 20 per cent of the workers in the Bank of China, a major state-owned bank, were dispatched (Cairns, 2015). Many of these workers are young university graduates.

Agency workers often receive lower wages and much less social security protection than employees of the user firms. It was reported that employment agency firms have some sort of agreement with the local labour authority and the social security insurance company which allows them to provide only partial social security coverage to a certain number of workers. This is how they drive down the employment cost and make a profit (Cooke, 2011a). In order to stem the abuse of labour dispatching, the Chinese government tightened the regulation of agency employment and the agency industry in 2013 and 2014 (see Section 5 for more detailed discussion).²² In particular, after an initial grace period dispatched workers must not comprise more than 10 per cent of a company's total workforce. Dispatched workers can only be used in temporary positions (defined as 6 months or less), auxiliary positions and substitute positions (e.g. to cover maternity leave, long-term sick leave, and study leave). A tougher penalty is prescribed for violations, with a fine between 5,000 yuan and 10,000 yuan per employee (Cairns, 2015).

Since the enactment of the amended LCL and the Provisional Regulations on Labour Dispatch, labour strategy displayed new characteristics in 2014, revealing employers' strategic responses to the new regulations (Qiao, 2014). More specifically, firms adopted more diverse labour deployment practices including turning non-standard positions into permanent positions, outsourcing, part-time work, intern placement, volunteer work. In particular, business outsourcing has been a popular strategy for large SOEs and foreign firms to cope with the new labour regulations (Qiao, 2014). As a result, there was an evident reduction of dispatched workers. From 2011 to the end of 2013, the total number of dispatched workers in the four big banks in China had reduced from 172,900 to 142,600 workers (Qiao, 2014).

²² On 28 December 2012, the Standing Committee of the National People's Congress issued the Decision on Amending the People's Republic of China Labour Contract Law (effective from 1st July 2013). In January 2014, the Ministry of Human Resources and Social Security of China issued the Provisional Regulations on Labour Dispatch (effective from 1st March 2014); see Cairns (2015) for more details.

4.2 Non-standard employment in Japan

In Japan, workers are broadly classified into two categories: regular workers and non-regular workers (Osawa et al., 2013; also see Section 5 for legal definition and discussion). Non-standard employment include: self-employment and family business work, temporary employment, and part-time work (Gottfried, 2008).²³ Self-employed workers categorized in the Japanese Labour Force Survey include household industry workers, primarily in textiles and electronic appliances (Gottfried, 2008). ‘These household workers contract with agencies to manufacture or sell goods on consignment; they mainly engage in labour-intensive work earning low pay, and face uncertainty and insecurity because their work is vulnerable to business fluctuations’ (Gottfried, 2008, p.182). A temporary worker is defined as one who is employed on a contract lasting at least one month but less than one year, whereas day labourer is defined as a worker who is hired on a temporary basis for less than one month’ (Osawa et al., 2013).

Temporary employment includes two categories: those employed directly and temporary agency workers, referred to as dispatched workers (or *haken*) (Osawa et al., 2013). Temporary employment, in both forms, is ‘one of the fastest growing segments of the Japanese labour force’ (Gottfried, 2008, p.186). This is particularly the case after the temporary services industry was semi-legalised in 1986 and fully legalised in 1999, as noted in the previous section.²⁴ In the early 2000s, clerical work was the largest area of temporary dispatched work and two-thirds of all temporary dispatched workers were women (Shire, 2002).

A part-time worker in Japan is considered anyone whose weekly hours fall below those of regular workers in the same establishment (Gottfried and Hayashi, 1998). The majority of non-regular workers are in part-time employment (Peng, 2012), and at least one-third of workers with a ‘part-timer’ status work full-time (Osawa et al, 2013). Part-time jobs are often filled by mothers, youth and older workers as cheap labour. Part-time work symbolises an inferior employment status with lower wage, less job security, and fewer workplace benefits and social security benefits (Peng, 2012). It is ‘primarily constructed with women in mind’ (Gottfried, 2008, p.184), particularly for middle-aged women who are stuck in part-time employment due to systematic barriers to full-time and secure jobs (Yu, 2002).

Japanese employers have strong incentives to employ part-time female employees because they ‘received only 60 to 70 per cent of a regular female employee’s wages, as well as fewer benefits’ (Kucera 1998, p.27). The *Nenko* system that rewards employees based on the long service and hard work principle further assumes that this principle only applies to regular male workers but not women even if they are in regular status jobs (Nakata and Takehiro, 2002; Yuasa, 2005). Another factor is the weaker bargaining power of women workers in the labour market. In Japan, a widening gender wage gap was observed. A major reason for this is ‘the system of seniority-based earnings and promotion, from which part-time, temporary, and non-union employees are typically excluded’ (Kucera, 1998, p.28).²⁵

²³ See Gottfried (2008) for an overview of forms of non-standard employment in Japan; and Osawa et al. (2013) for more detailed descriptions of different types of non-regular workers.

²⁴ See Imai (2004) for a detailed account of the institutionalisation process of the temporary dispatching work system in Japan; see Coe et al. (2011) for an overview of the rise of temporary staffing in Japan as a result of the deregulation of the industry during the period of 1987 and 2007; also see Ono and Sullivan (2013) for a plant level study of the motivations for firms to use temporary workers and types of firms that are more likely to use temporary workers in the manufacturing sector in Japan.

²⁵ See Geraghty (2008) for an overview of history of Japanese gender equality and gender equality laws.

In the early 1980s, non-regular workers were mostly students and married women working part-time (Osawa et al., 2013). In the 1990s, younger and middle-aged male workers also joined the cohort (Osawa et al., 2013). According to Asano et al. (2013), non-standard employment grew from 17 to 34 per cent between 1986 and 2008 as a result of changes in the economic structure, demand fluctuation, advancement of information and communication technology and more importantly, employers declining commitment to the long-term employment relationship to contain labour cost. As such, the new workers, including younger men, and female workers of all age, constitute the bulk of those in non-standard employment. Heightened competition associated with globalisation has been attributed to 'the dramatic growth of precarious employment in Japan since the 1990s' (Osawa et al., 2013, p.309). As Osawa et al. (2013, p.310) argue, progressive deregulation of the labour market since the late 1990s 'has facilitated the growth of the precariat, leaving many more workers vulnerable to fluctuations in the business cycle'.

Facing labour shortages in part due to an ageing population and in a persistent effort to contain wage cost, Japanese employers also started to use foreign workers, from the late 1980s, to overcome the acute shortage of unskilled labour that 'threatened to paralyse many small- and medium-sized businesses, especially in the manufacturing sector' (Tsuda, 1999, p.687). Employers initially turned to Japanese-descended Brazilians and later their spouses to fill vacancies because they inherited the Japanese work ethics, cultural tradition and physiognomy. They were favoured more than Japanese part-time workers because the former were believed to work even harder and longer hours, and were 'more willing to do overtime, night shifts, and difficult tasks' (Tsuda, 1999, p.596). Since the 2000s, Japanese employers across a number of industries, but especially small 'family-run manufacturers and employers in farming and fishing industries, have increasingly relied on Asian trainees and interns, particularly from China, Vietnam, Indonesia, and the Philippines' (Shipper, 2011, p.506).

The intern programme warrants further discussion here. Japanese law bars the act of importing unskilled foreign labour, though such practices took place discretely. The Technical Intern Training Programme was established in 1993 (revised in 2009 and 2014) as a side door to import foreign unskilled labour. Internship is usually for a three-year period. Interns sign up with a labour export company in their home country to work in Japan's 'foreign technical intern' programme supported by the Japan International Training Cooperation Organization, a foundation funded by the government and member groups (Harvey and Slodkowski, 2014). Many interns work in small-scale family-run businesses which operate on a low margin and quick turnaround time once the order is placed. Officially as trainees, interns are paid significantly lower hourly wages than the stipulated local minimum wages. Their work is often paid by piece rather than by hour. The most recent government data show that there are about 155,000 technical interns in Japan. Nearly 70 per cent are from China, where some labour recruiters require payment of bonds worth thousands of dollars to work in Japan (Harvey and Slodkowski, 2014). Interns toil in garment and food factories, on farms and in metal-working shops. In these workplaces, labour abuse is endemic: An investigation by labour inspectors in 2012 found that 79 per cent of the companies that employed interns were breaking labour laws (Harvey and Slodkowski, 2014). Harvey and Slodkowski (2014) argue that Japan's 'trainee system' may be a sweatshop in disguise and that foreign interns pay the price for Japan's labour shortage. Some trainees cannot sustain the hardship and escape from their 'employer' before their intern period is over and become illegal workers. Some of them are supported by the civil society as mentioned in the previous section.²⁶

²⁶ See Shin (2001) for a more detailed discussion of immigration law, migrant labour and the gendered impact in Japan and responses from institutional actors in supporting this broad category of workers.

In recent years, foreign workers are no longer restricted to unskilled labour as the ageing population and skill shortage problem deepens. For example, Ford and Kawashima's (2013, p.430) study found that, despite traditional resistance to 'structured forms of labour migration', labour migration schemes have been set up, through trade negotiations, to recruit 'nurses and other care workers from selected South and Southeast Asian countries' for hospitals and residential care facilities.

Finally, a hierarchy exists among the foreign workers in Japan, 'which is roughly structured according to Japanese ethnic preferences' (Tsuda, 1999, p.698). In particular, Japanese-descended foreign workers are on the top of the hierarchy, reflected in the immigration policy in which they are classified as 'social subjects' whereas the rest of the foreign workers are classified as 'economic subjects' (Harvey and Slodkowski, 2014). For the rest of the foreign workers, the pecking order appears to be: East Asians, Southeast Asians, South Asians and the Middle Easterners. The quality of jobs and wage levels for these workers take a similar descending order in general (Tsuda, 1999; Harvey and Slodkowski, 2014).

4.3 Non-standard employment in Korea

In Korea, non-regular workers include temporary workers, subcontractor workers, daily workers and dispatched workers (see Section 5 for legal definition and discussion). Workers 'in temporary jobs include fixed-term jobs of a limited duration, which is close to the so-called contingent workers, as well as TWA [temporary work agency], individual contract workers, at-home workers, on-call workers' (OECD, 2014, p.148).²⁷ According to OECD (2012, p.120), the share of temporary workers, 'who account for more than one-third of non-regular workers in Korea, was the fourth highest in the OECD area in 2010' (also see Section 2). Similar to Japan, the Korean dual labour market is segmented by gender, age and education level in which younger and well-educated men are more concentrated in regular jobs (OECD, 2000).²⁸ Table 4 offers a summary of trends of non-regular workers from 2002 to 2011.

²⁷ Fixed-term contract is usually for less than two years and part-time work is usually less than 36 hours a week.

²⁸ See OECD (2000) for a more detailed analysis of the labour market reform.

Table 4. Trends in non-regular workers, 2002-2011 (thousands, per cent)

Year	Regular workers	Non-regular workers	Subtypes of non-regular workers						
			Limited-term workers	Part-time workers	Atypical workers				
					Daily	Dispatched	Subcontract	Home workers	Special employment
2002	10,190 (72.6)	3,839 (27.4)	2,063 (14.7)	807 (5.8)	412 (2.9)	94 (0.7)	332 (2.4)	235 (1.7)	772 (5.5)
2003	9,542 (67.4)	4,606 (32.6)	3,013 (21.3)	929 (6.6)	589 (4.2)	98 (0.7)	346 (2.4)	166 (1.2)	600 (4.2)
2004	9,190 (63.0)	5,394 (37.0)	3,597 (24.7)	1,072 (7.4)	666 (4.6)	117 (0.8)	413 (2.8)	171 (1.2)	711 (4.9)
2005	9,486 (63.4)	5,483 (36.6)	3,615 (24.2)	1,045 (7.0)	718 (4.8)	118 (0.8)	430 (2.9)	141 (0.9)	634 (4.2)
2006	9,894 (64.5)	5,457 (35.5)	3,626 (23.6)	1,135 (7.4)	667 (4.3)	131 (0.9)	499 (3.2)	175 (1.1)	617 (4.0)
2007	10,180 (64.1)	5,703 (35.9)	3,546 (22.3)	1,201 (7.6)	845 (5.3)	174 ((1.1)	593 (3.7)	125 (0.8)	635 (4.0)
2008	10,658 (66.2)	5,445 (33.8)	3,288 (20.4)	1,299 (7.6)	818 (5.4)	139 (0.9)	641 (4.0)	65 (0.4)	595 (3.7)
2009	10,725 (65.1)	5,754 (34.9)	3,507 (21.3)	1,426 (8.7)	883 (5.4)	165 (1.0)	622 (3.8)	99 (0.6)	637 (3.9)
2010	11,362 (66.7)	5,685 (33.4)	3,281 (19.2)	1,620 (9.5)	870 (5.1)	211 (1.2)	608 (3.6)	70 (0.4)	590 (3.5)
2011	11,515 (65.8)	5,994 (34.2)	3,442 (19.7)	1,702 (9.7)	962 (5.5)	197 (1.1)	672 (3.8)	75 (0.4)	614 (3.5)

Source: Korea Labour Institute (2011, pp.4-7), cited in Shin (2013, p.343)

If agency temps for clerical work (and more) staffed primarily by women (and young men) is a unique phenomenon in the Japanese non-standard employment, then the growing use of subcontract workers through ‘in-company subcontracting’, particularly in male dominant manufacturing jobs such as auto-making, is a distinct feature in Korea (c.f. Yun, 2011, also see Section 5.4 for more discussion). Large Korean firms (*chaebol*) bring in subcontracting firms to be based on the company premises. Workers hired by the subcontracting firms are managed by the subcontracting firm who also decides their employment terms and conditions. Subcontract workers often work alongside permanent employees of the large firm doing similar work but earning much less (Yun, 2011). It is believed that the reason for large Korean corporations to deploy subcontract workers, i.e. indirect workers, is to avoid employing them directly in order to avoid legal obligations as the employer (Jeon, 2014a). As Jeon (2014b) pointed out, in-house subcontract work in the manufacturing industry is at the heart of the problem of indirect employment. It was reported that the number of subcontract workers had increased from 332,000 in 2002 to 672,000 in 2011 (Shin, 2013). Other report estimated that there were some 2 million indirect workers by 2014 (Jeon, 2014b).

It is important to note that subcontracted employment is not a new employment practice in Korea; what is new is its widespread use after the 1997 Asian financial crisis (Jeon, 2014b). Similarly, it is important to note that this form of employment is not confined to the private sector but also public sector including areas with public safety responsibilities, and not just in ordinary but also managerial positions. For example, in the wake of the Sewol tragedy in which 304 lives were lost as a result of the sinking of the ferry on 16th April 2014,²⁹ it was reported that a significant number of the ferry’s crewmembers and the captain were contract workers (Jeon, 2014a).

Self-employment is another distinct feature of non-standard employment in Korea. It was reported that in 2008, ‘one third of the economically active population in South Korea was self-employed’, with the majority of them working in the service sector such as wholesale, retail, restaurant and hotel industry (Shin, 2013, p.341). A large proportion of those in self-employment have experienced hardship due to low income and economic insecurity (Shin, 2013).

According to statistics available from Statistics Korea, 45.9 per cent, or 8.37 million of Korea’s total 18.24 million workers were in irregular employment as of August 2013. These included short-term, hourly, dispatch, contract, special employment, and temporary workers at small businesses, earning only 49.7 per cent of the wages of regular workers (cited in Jeon, 2014a). A government survey conducted in 2011 also revealed that less than half of the non-regular workers accepted non-regular employment voluntarily; in other words, about 3 million of workers in non-regular employment accepted this form of employment involuntarily instead of by their own choice (cited in OECD, 2012).

Compared to regular workers, irregular workers have a significant lower level of social insurance coverage (see Table 5). In addition, statistics from the Ministry of Employment and Labour shows that 9.5 per cent of day labourers were enrolled in the national pension plan in 2013, down by 5.0 per cent from 2012. The rate of dispatch workers who were on the rolls of national pension, national health insurance, and employment insurance was also declining. The union membership rate of irregular workers had also fallen by 0.3 per cent from 2012 to 1.4 per cent (cited in Jeon, 2014a). It was reported that employers’ intention to save insurance premiums and workers’ unaffordability to insurance contributions are the main reasons for irregular workers not being covered by pension and/or unemployment insurance (Shin, 2013).

²⁹ See Koleilat (2014) for a more detailed report.

The sharp rise of non-standard employment since the 1990s in Korea became ‘a core of political debates’ (Shin, 2013, p.338). And the lack of job security and inferior employment terms and conditions has been a main cause of labour struggles, as noted earlier in the study.

Table 5. Extent of coverage of major kinds of social insurance between regular and irregular workers in Korea in 2013*

Types of insurance	Regular workers	Irregular workers
Employment insurance	95.6	60.9
Health insurance	97.4	50.6
National pension	97.2	47.0
Accident insurance	97.8	96.4

Source: Ministry of Employment and Labour 2013 Employment Type Survey, cited in Jeon (2014a).

* figures in percentage

In Section 2, we discussed Korean women’s disadvantaged labour market position in comparison to Korean men, largely due to discriminations of labour laws and employer practices. Here, we will focus on another vulnerable group of workers in non-standard employment – foreign workers. Foreign workers in Korea are mostly engaged in dirty, dangerous and demeaning (3D) jobs which Korean nationals are unwilling to take up despite a government subsidy for firms to replace foreign workers with Korean nationals (OECD, 2000).

Like Japan, the Korean immigration law of 1994 prohibits unskilled foreign workers from entering Korea for employment except in the case of technical (industrial) trainees (Kang, 1996). The Technical Trainee system was therefore established in 1991 by the Ministry of Justice in co-operation with the Ministry of Trade and Industry to help small- and medium-sized businesses to overcome severe labour shortage (Kang, 1996).³⁰ This is essentially a state-organized international contract labour programme as a temporary measure to alleviate labour shortages initially in the manufacturing sector but later on spread across other sectors. By 1994, some 40,000 foreign workers were recruited as ‘technical trainees’ (Kang, 1996). This figure was increased to over 300,000 in the early 2000s (Kim, 2003). These workers have no trade union or political rights and many of them work under repressive conditions with the threat of deportation (Kang, 1996).³¹ It was reported that a major problem with this trainee scheme is that trainees deserted factories in violation of labour contracts (Kim, 2003). According to the statistics of the Ministry of Justice, as of 2002, 41,240 (36 per cent) of the 113,989 trainees had run away and nearly 20 per cent of all runaway trainees became unauthorised workers ‘within the first year of their apprenticeship, and about one out of every four trainees end up staying illegally in the country beyond four years’ (Kim, 2003, p.244; also see Section 3 on the role of NGOs in supporting this group of workers). In 2014, Mr Mutuma Ruteere, United Nation special rapporteur on racism called on the South Korean government, in a press conference during his visit to Korea to examine the racial discrimination situation there, to tackle the country’s racism and xenophobia issue by strengthening education and legislation against discrimination. He pointed out that the state of

³⁰ See Kang (1996) for a more detailed account of the scheme.

³¹ These workers are now beginning to be organized by new unions or other NGOs, albeit in small scale and with limited impact as discussed in Section 2.

migrant workers in the agriculture industry in particular required ‘serious attention’ (Lee, 2014).

The extent and characteristics of non-standard employment is shaped by the regulations, employers’ strategy and workers’ choice and bargaining power (or lack of it as is often the case). So far in this report, we have discussed the respective role of institutional actors in shaping the labour market. In the next section, we will turn our attention to the role of labour regulations in creating opportunities or constraints for non-standard employment.

5. Regulatory frameworks for non-standard employment

In this section, we first provide a brief overview of labour regulations in China, Japan and Korea as the backdrop. We then provide a more detailed analysis of labour regulations that cover non-standard employment in China, Japan and Korea respectively. The term ‘regulation’ is used here in a broad sense to include: 1). formal legislation; and 2). administrative/policy regulation.

5.1 Overview of labour laws in China, Japan and Korea

In China, Japan and Korea, a series of labour laws and regulations have been promulgated since the late 1940s to provide a regulatory framework within which to govern the employment relationship (see Table 6). In China, the labour legislative system was developed relatively late and it was not until 1995 when the first main labour law was enacted (promulgated in 1994). This law, supplemented by a variety of administrative regulations at various governmental levels, was not sufficient to deal with radical changes in the labour market and the rising level of labour disputes, and resulted in the enactment of three major pieces of labour and employment legislation in 2008 (Cooke, 2011a).³² In Japan, its first major piece of labour legislation, the Employment Security Law, was introduced in 1947, which has been amended several times especially since the 1990s in response to economic change and labour market reforms.³³ In the 1990s and 2000s, a number of laws were introduced or amended to reflect the more diverse labour market conditions. Similarly, Korea established its first sets of labour laws in the early 1950s, followed by several major additions/revisions since the mid-1980s. The relatively quiet period in the legislative front in the period of 1960s and 1970s (and for China 1980s also) reflected the dominance of the internal labour market in the urban sector in all three countries in that period. While all three countries have regulations in place for non-standard employment, it is important to note that Japan is the only country amongst the three in this study that has ratified C181 - Private Employment Agencies Convention, 1997 (No. 181) of ILO.

³² See Neal (2011) for an overview of the development of the Chinese legislative system for labour regulation with a particular focus on the three major laws enacted in 2008; also see Cooney et al. (2007); Ho (2009); Brown (2010, 2012); and Cooke (2011a).

³³ See Yamakawa (2001) for an overview of labour law reform in the 1990s in response to the socio-economic changes in Japan in the 1980s and 1990s.

Table 6. List of major labour laws and regulations in China, Japan and Korea*

China	
1950	Trade Union Law (replaced by the Trade Union Law of 2001)
1982	Opinions on Issues Concerning Labour Service Companies ³⁴
1990	Regulations on the Management of Labour Employment Service Enterprises ³⁵
1992	Trade Union Law (amended in 2001)
1995	Labour Law
1995	Employment Agency Regulation
2002	Law on Work Safety
2002	Law on Prevention and Control of Occupational Diseases
2004	Regulation on Enterprises Minimum Wage
2008	Labour Contract Law (amended in 2013)
2008	Labour Disputes Mediation and Arbitration Law
2008	Employment Promotion Law
2011	Social Security Law
2014	Provisional Regulations on Labour Dispatch
2015	Opinions on Building Harmonious Labour Relations

Japan	
1947	Employment Security Law (amended in 1952, 1964, 1997, 1999, 2000 and 2004)
1947	Labour Standards Law (amended in 1998, 2003)
1985	Equal Employment Opportunity Law (amended in 1997 and 2006)
1986	Worker Dispatching Law (also translated as Temporary Worker Law, amended in 1996, 1999, 2004 and 2007; also see Table 10)
1991	Child Care Leave Law (amended and renamed as Child Care and Family Care Law in 1995)
1993	Part-Time Work Law (amended in 1999)
2000	Labour Contract Succession Law (amended in 2012 and 2013)
2001	Individual Dispute Resolution Law
2004	Whistleblowers Protection Law
2006	Labour Tribunal Law
2014	Act for Partial Revision of the Act on Improvement in Management of Employment of Part-Time Workers
2015	Worker Dispatch Law

³⁴ ‘Opinions on Issues Concerning Labour Service Companies’ is an administrative regulation issued by the Ministry of Labour and Personnel on 15th September 1982 (see *Chinese Law and Government*, vol. 34, no. 1, January/February 2001, pp.31–37).

³⁵ ‘Regulations on the Management of Labour Employment Service Enterprises’ was issued by the State Council on 22nd November 1990 (see *Chinese Law and Government*, vol. 34, no. 1, January/February 2001, pp.41–47).

Korea

1953	Trade Union Act
1953	Labour Dispute Adjustment Act
1953	Labour Standards Act (amended in 1998)
1953	Labour Relations Commission Act
1986	Minimum Wage Act (applying to all firms with ten and more, and since 1999 five and more, employees)
1987	Equal Employment Act
1997	Trade Union and Labour Relations Adjustment Act (incorporating the 1953 Trade Union Act and Labour Dispute Adjustment Act)
1998	Act on Protection for Temporary Agency Workers (amended in 2007)
2000	National Basic Livelihood Security Law
2014	Act on Protection of Fixed-Term and Part-time Workers
2014	Act on Protection of Dispatch Workers

* Year refers to the year when the law was enacted and when the amended version was effective.

The following sub-sections describe how the various jurisdictions treat the types of non-standard employment in comparison with standard employment. It focuses primarily on labour law, but also, where relevant, identifies and discusses other types of laws, such as social security laws.

5.2 Labour laws regulating non-standard employment in China

In China, employers have lowered their labour costs by employing workers in irregular employment, including in probationary, part-time, and dispatched worker positions (also see Section 4.1). The relevant law of China is the LCL,³⁶ and its revisions.³⁷ The LCL was enacted in 2008 for the purpose of regulating Chinese labour markets and to provide workers with statutory rights and protection. The LCL lowered the flexibility, profitability, and arguably the exploitability of full-time workers. No longer could employers so easily avoid providing labour contracts to all, including to the vast number of migrant workers; also, the legal grounds for dismissing a worker were explicitly tightened for workers under various contractual arrangements, and workers began to know and demand their rights and benefits under the law, thus cutting into employers' former ability to more easily dodge the legal requirements and maintain higher flexibility and profitability (Brown, 2010). After LCL and the Labour Disputes Mediation and Arbitration Law (LDMAL) took effect, the number of mediations and arbitrations rose dramatically, spurring greater enforcement and award of remedies.³⁸ Therefore, using irregular employees left employers with some flexibility; and while *probationary* and *part-time* workers gave employers some measure of discretion, it was

³⁶ Zhonghua Renmin Gongheguo Laodong Hetong Fa [Labour Contract Law (P.R.C.)] (promulgated by the Standing Committee of National People's Congress, 29th June 2007, effective on 1st January 2008) STANDING COMM. NAT'L. PEOPLE'S CONG. GAZ. (P.R.C.), available at: <http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/76384/108021/F755819546/CHN76384%20Eng.pdf>.

³⁷ Decision on the Standing Committee on the Revision of the Labor Contract Law of the People's Republic of China, effective July 1, 2013 [hereafter Revisions], with supplementary provisional regulations provided by the Ministry of Human Resources and Social Security, effective 1st March 2014 [hereafter Revision Regulations]. See discussion in Tong and Cai (2013).

³⁸ See Brown (2014) for statistical data and discussion of this growth.

the *dispatch* workers that provided the most. Dispatch workers were largely excluded from the protections of the LCL. Inadvertently, the LCL provided employers with an incentive to replace full-time workers with dispatch workers in order to avoid the heightened restrictions of the LCL.³⁹ In response to this incentive misalignment, in 2012 the Standing Committee of the National People's Congress made revisions that addressed the issue.⁴⁰ The amended LCL took effect on July 1, 2013.⁴¹

Under the revised LCL, employees may be hired on a *probationary* basis for up to six months,⁴² cannot be terminated without 'explanation' unless falling within a statutory basis,⁴³ and they must be paid at least minimum wage and no less than eighty per cent of the non-probationary rate.⁴⁴ *Part-time* employment is defined as work generally compensated on an hourly basis and that does not exceed an average of 24 hours per week or 4 hours per day for the same employer.⁴⁵ They need not be hired under a written contract and can be dismissed (or they can quit) at will without severance pay.⁴⁶ The expression 'part-time employment' in China does not equate to the usage of the same term under the ILO Part-Time Work Convention, 1994 (No. 175), EU law or in other jurisdictions; this expression refers instead to essentially casual work that is paid by the hour, such as domestic workers who carry out household chores and those employed by enterprises carrying out auxiliary chores. These hourly-paid workers may have to carry out several 'part-time' jobs to generate sufficient income. Part-time workers must be paid at least the local minimum wage, though not most

³⁹ According to Ho and Huang (2014, p.983), the enactment of the Labour Contract Law dramatically increased the use of dispatch workers in China. Recent estimates by the All-China Federation of Trade Unions (ACFTU) show that more than 60 million of China's 300 million urban employees are dispatched workers. Macroeconomic shifts are a partial explanation for these numbers; labour costs in China have increased over the past decade driven in part by labor shortages in traditional urban manufacturing centers, tougher grassroots demands from a new generation of migrant workers, and changing development policies that require increased domestic purchasing power to offset weakness in foreign export markets. Dispatch workers provide relief to employers in terms of paying for social insurance and other benefits. Increased demand for flexible, cost-effective hiring models has also contributed to informalization, as employers attempt to keep up with seasonal consumer demand and just-in-time inventory practices.

⁴⁰ Decision on the Standing Committee on the Revision of the Labor Contract Law of the People's Republic of China, effective 1st July 2013 [hereinafter Revisions], with supplementary provisional regulations provided by the Ministry of Human Resources and Social Security, effective 1st March 2014 [hereinafter Revision Regulations]. *China Amends Labor Contract Law to Eliminate Labor Dispatch Abuse*, BRYAN CAVE LLP (18th April 2013),

<http://www.bryancave.com/files/Publication/030e4ed6-0109-4ce8-9d0a-4c9928c016d8/Presentation/PublicationAttachment/91bb2766-574c-417f-ad07-4e32cd68550a/LaborAlert4-18-13.pdf>; see also Interim Provisions on Labor Dispatch (promulgated by Ministry of Human Resources & Soc. Sec., 24th January 2014, effective 1st March 2014), available at:

<http://www.lawinfochina.com/display.aspx?id=16484&lib=law&SearchKeyword=dispatch&SearchCKeyword=>.

⁴¹ *Zhonghua Renmin Gongheguo Laodong Hetong Fa* (2012 Xiuzheng) [Labour Contract Law (P.R.C.) (2012 amendment)], (promulgated by the Standing Comm. National People's Congress on 28th December 2012, effective on 1st July 2013) STANDING COMMITTEE OF THE NATIONAL PEOPLE'S CONGRESS GAZ. (P.R.C.), available at:

<http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/76384/112877/F-1525487621/CHN76384%20EngChn.pdf> (hereinafter LCL Amendments).

⁴² LCL Amendments, *supra* note 36, art. 19.

⁴³ *Id.* art. 21 ('explanation'), which references proper statutory bases for dismissal under article 39 and where 30 days' notice may be required under article 40 (1) and (2).

⁴⁴ *Id.* art. 20.

⁴⁵ *Id.* art. 68.

⁴⁶ *Id.* arts. 69, 71.

other labour benefits,⁴⁷ and cannot be subject to a probationary term.⁴⁸ Also, these workers are sometimes categorized as ‘casual employees’, and fall largely outside the protection of the labour laws; they have been estimated to number about 60-70 million workers (see Cooney et al., 2014, pp.96-99). They are distinguished in that they have no fixed time or labour contract. Fixed-term employees are entitled to most of the same protections and benefits as open-term employees, are not contingent workers, and they must be provided labour contracts (Cooney et al., 2014, pp.96-99).

Independent contractors who are not under the employer’s direct control are outside the employment relationship and the LCL; however, they may become *de facto* employees if the employer lacks sufficient evidence of their independent status. They instead fall under the Contract Law and are parties to a labour services contract and therefore they have no right to labour benefits except as they may be ‘employees’ falling under the employment of an independent contractor who employs them (c.f. Brown, 2010; Cooney et al., 2014).⁴⁹ Another large group of workers falling outside the protections of the labour laws are vocational students (‘industrial interns’), numbering in the hundreds of thousands, who are certified to work in production centres as trainees for periods of years.⁵⁰

Originally, Article 66 of the LCL outlined the scope of labour dispatch to include temporary, auxiliary, and substitute positions; however, none of these terms were defined.⁵¹ In addition to providing more concrete definitions for these terms, the amended Article 66 also mandates that dispatch work can ‘only’ be these three types of workers.⁵² *Temporary* is now defined as work that does not exceed six months duration.⁵³ *Auxiliary* is defined as a non-

⁴⁷ *Id.* art. 72.

⁴⁸ *Id.* art. 70.

⁴⁹ An example of the difference of labor rights and benefits of independent contractors from ‘employees’ is highlighted by the former under civil contract law having only a right to wages, but not most other labour legislation benefits afforded to the latter under the labour laws under which they fall. There is a practice in the construction industry in China to use an illegal middleman to hire migrant labor as construction workers so the workers are technically considered independent contractors. See Pun and Lu (2010) for example. See also ‘Notice on Relevant Matters related to the Establishment of Employment Relationships’, issued by the Ministry of Labour and Social Security (25th May 2005). Article 82 of the law also provides that each employee is required to enter into written employment contracts with his or her employer, and employers that violate this provision must pay double the salary to the employee. Companies should thus make sure that any independent contractor: (1) contracts with the company through his or her own corporate entity; and (2) has a written employment contract with that corporate entity. See also, Burnham, C. and Puckett, B. Independent Contractor or Employee: How Some Countries Differ, at <http://blog.ogletreedeakins.com/independent-contractor-or-employee-how-some-countries-differ-2/#sthash.DMAPzOAD.dpuf>.

⁵⁰ See Brown, E. Jr. and deCant, K. (2014) ‘Exploiting Chinese Interns as Unprotected Industrial Labor’, 15.2 APLPJ 150, at: http://www.solidaritycenter.org/wpcontent/uploads/2014/11/APLPJ.15.2.Brown_deCant.FINAL_.pdf.

⁵¹ LCL, *supra* note 35, art. 66; Bryan Cave LLP, *supra* note 39.

⁵² LCL Amendments, *supra* note 35, art. 66 (‘Labor dispatch is a supplementary form and shall exclusively apply to provisional, auxiliary or substitutive positions’); Bryan Cave LLP, *supra* note 39.

⁵³ LCL Amendments, *supra* note 35, art. 66 (“provisional position” as prescribed in the preceding paragraph means a position that exists for less than six months’); Bryan Cave LLP, *supra* note 39. See discussion above, text accompanying footnotes 12-15, discussing the potential overlap, particularly in terminology and classifications, between part-time and casual workers; the same appears to be true for temporary and casual. Except for the clear definition of a dispatch worker coming from a third-party employer, it is doubtful employers pay particular attention to distinctions of contingent employee classifications of casual, temporary, and part-time.

primary business position that supports the receiving employer's core business.⁵⁴ *Substitute positions*, also translated as 'back-up jobs', are defined as positions that provide temporary coverage for full-time employees that are on leave.⁵⁵ Labour dispatch agencies (LDA) are further defined and regulated⁵⁶ and penalties are provided for violations.⁵⁷

Although the categories of temporary and substitute positions are well defined, substantial ambiguity remains as to the meaning of 'auxiliary'.⁵⁸ Neither the amended LCL nor the revision regulations provide any guide for distinguishing primary and non-primary business positions.⁵⁹ The revision regulations leave open the definitions to be determined by the receiving employer in an Article 4 'consultation'.⁶⁰ An Article 4 consultation requires

⁵⁴ LCL Amendments, *supra* note 35, art. 66 ("auxiliary position" means a non-major business position providing services to main business positions"); Bryan Cave LLP, *supra* note 39; *China Amends Its Labour Dispatch Rules*, COVINGTON & BURLING LLP (23rd September 2013), http://www.cov.com/files/Publication/494fa6c1-0adb-40d7-af43-02063951e952/Presentation/PublicationAttachment/c53fc542-36a4-424e-8392-032a0785ef75/China_Amends_its_Labour_Dispatch_Rules.pdf.

⁵⁵ LCL Amendments, *supra* note 35, art. 66 ("substitutive position" means a position that may be held by any other employee on a substitutive basis during a certain period of time when the employee of the employer who originally holds the position is unable to work because such employee is undergoing full-time training, on vacation or for any other reason"); Bryan Cave LLP, *supra* note 39.

⁵⁶ LCL Amendments, *supra* note 35, art. 57. The legal requirements for the formation of an LDA are provided in Article 57 of the LCL. Originally, an LDA only had to be established according to the Company Law of the People's Republic of China and have registered capital of five hundred thousand yuan (RMB), hereafter RMB, or about eighty thousand in United States Dollars, hereafter USD. The amendments to the LCL raise the minimum capital requirement to two million RMB, over three hundred thousand USD. Amended Article 57 further requires that prospective LDA's have a fixed office premise, suitable facilities for conducting business, and must be managed responsibly. LDA's established after 1st July 2013 must meet all the Article 57 requirements before being granted a license by the local labor bureau. Already existing LDA's have been given until 1st July 2014 to come into compliance with amended Article 57; failure to do so will result in a revocation of the LDA's license.

⁵⁷ LCL Amendments, *supra* note 35, ch. VII ('Legal Liabilities'). Local labour bureaus are granted the authority to find and impose penalties for violations of the LCL. The labor bureau will initially order the LDA or receiving employer to cure the violation; but if the violation is not cured, the bureau can impose fines between five and ten thousand RMB, between eight and sixteen hundred USD, per dispatch worker involved. If an LDA is found to be operating without a license, the bureau may fine the LDA one to five times the amount of total income the LDA received from the illegal activities. If there no illegal gains, the bureau may assess a base fine of up to fifty thousand RMB, or eight thousand USD. Finally, both the LDA and the receiving employer will be held joint and severally liable to the dispatch worker for any harm caused by a violation of the LCL.

⁵⁸ Interim Provisions on Labour Dispatch, The Interim Provisions on Labor Dispatch, as deliberated and adopted at the 21st executive meeting of the Ministry of Human Resources and Social Security on 20th December 2013, are hereby issued and shall come into force on 1st March 2014, *available at*:

<http://www.lawinfochina.com/display.aspx?id=16484&lib=law>. See also: *China Issues Interim Provisions on Labor Dispatch*, MAYER BROWN JSM (11th February 2014), <http://www.mayerbrown.com/files/Publication/129f94f0-0dbb-415a-9640-489f1150f35a/Presentation/PublicationAttachment/559cc298-f044-4ba5-a571-4b0851c6b380/140211-PRC-Employment.pdf>.

⁵⁹ *Id.*

⁶⁰ LCL Amendments, *supra* note 35, art. 4 ('Where an employer formulates, amends or decides rules or important events concerning the remuneration, working time, break, vacation, work safety and sanitation, insurance and welfare, training of employees, labour discipline, or management of production quota, which are directly related to the interests of the employees, such rules or important events shall be discussed at the meeting of employees' representatives or the general meeting of all employees, and the employer shall also put forward proposals and opinions to the employees and negotiate with the labor union or the employees' representatives on an equal basis to reach agreements on these rules or events'); and see Interim Provisions on Labour Dispatch

employers to consult with their employees, the employees' representatives, and the trade union on all matters that have a material and direct bearing on the interests of labour.⁶¹ Article 4 does not require consensus to be reached and the employees' consent is not necessary; Article 4 only mandates that the employer go through this "democratic labour process".⁶²

Article 66 and the revision regulations further provide that dispatch workers may not exceed ten per cent of the receiving employer's total workforce.⁶³ Employers are unable to circumvent the Article 66 percentage cap by using independent contractors.⁶⁴ The People's Congress was concerned with the practice of 'in-sourcing', where, in order to circumvent labour laws, the hiring employer brings in outside worker under the title of independent contractor even though these workers function as employees.⁶⁵ To prevent giving employers an incentive to replace full-time workers with in-sourced labour, the ten per cent cap applies

(promulgated by Ministry of Human Resources & Soc. Sec., 24th January 2014, effective 1st March 2014), Ch. 2, art. 4, *available at*:

<http://www.lawinfochina.com/display.aspx?id=16484&lib=law&SearchKeyword=dispatch&SearchCKeyword=> ('To determine auxiliary positions in which dispatched workers are to be employed, and employer shall put forward proposals and suggestions after discussion by the workers' congress or by all employees, conduct equal consultations with its trade union or employees' representatives, and shall make an announcement internally'); Mayer Brown JSM, *supra* note 20.

⁶¹ *Id.*; Interim Provisions on Labor Dispatch (promulgated by Ministry of Human Resources & Soc. Sec., 24th January 2014, effective 1st March 2014); also see *China Employment Law Alert: New Regulations on Temporary Employees (Labor Dispatch)*, SEYFARTH SHAW (12th February 2014), <http://www.seyfarth.com/uploads/siteFiles/publications/ChinaLawNewRegulationsonTemporaryEmployees.pdf>. ('Considering the ambiguous nature of the word 'auxiliary', the Regulation requires the employer to complete certain procedures before using labor dispatch for auxiliary positions. These procedures include: discussion with an employee's representative congress or all the employees, negotiation with the trade union or employee representatives, and a general announcement. Employers may not take advantage of the ambiguous nature of the word 'auxiliary' to escape the limitations set out by the Regulation and the remainder of the labor dispatch laws.').

⁶² LCL Amendments, *supra* note 35, art. 4; Mayer Brown JSM, *supra* note 57. Thus the obligation appears to be primarily providing notice.

⁶³ LCL Amendments, *supra* note 35, art. 66 ('The employer shall strictly control the number of dispatched workers, which shall not exceed a certain proportion of its total employees, and the specific proportion shall be prescribed by the labor administrative department of the State Council'); and see Interim Provisions on Labour Dispatch (promulgated by Ministry of Human Resources & Soc. Sec., 24th January 2014, effective 1st March 2014), Ch. 2, art. 4, *available at*: <http://www.lawinfochina.com/display.aspx?id=16484&lib=law&SearchKeyword=dispatch&SearchCKeyword=> (stating that an employer shall 'strictly control the number of dispatched workers employed which shall not exceed 10 per cent of the total number of its workers.').; Bryan Cave LLP, *supra* note 39.

⁶⁴ Under the Interim Provisions on Labour Dispatch, an employer that calculates the proportion of the dispatched workers employed refers to an employer that can enter into labor contracts with workers in accordance with the Labour Contract Law and the Regulation on the Implementation of the Labour Contract Law. Notice; therefore, counted employees must be those who can have 'labour' contracts, thus excluding the inclusion of independent contractors who do not have labor contracts. Interim Provisions on Labor Dispatch (promulgated by Ministry of Human Resources & Soc. Sec., 24th January 2014, effective 1st March 2014), Ch. 2, art. 4, *available at*:

<http://www.lawinfochina.com/display.aspx?id=16484&lib=law&SearchKeyword=dispatch&SearchCKeyword=> (stating that an employer shall 'strictly control the number of dispatched workers employed which shall not exceed 10 per cent of the total number of its workers.')

⁶⁵ *Id.*

not only to dispatch workers, but independent contractors that either work on the premises or are otherwise effectively controlled by the receiving employer.⁶⁶

Article 63 of the LCL, as originally enacted, required compensation for dispatch work to be identical to the compensation of the receiving employer's regular employees.⁶⁷ The revised Article 63 reiterates this principle and clarifies that compensation is to include not only basic salary, but also all bonuses, subsidies, allowances, and all other employment benefits.⁶⁸

Termination of dispatch workers is governed by Article 65 of the LCL and provides that dispatch workers may be returned to the LDA if the receiving employer has a major change in circumstances as defined by Article 40 or is required to make mass layoffs due to financial difficulties under Article 41.⁶⁹ The dispatch worker may also be returned to the LDA if the receiving party is declared bankrupt, has its business license revoked, is ordered to close down, or is otherwise expunged according to the law.⁷⁰ If the receiving employer voluntarily decides to discontinue business operations or the dispatch service contract has expired, the dispatch worker may similarly be returned.⁷¹ If the dispatch worker is returned for any of

⁶⁶ *Id.*

⁶⁷ LCL, *supra* note 35, art. 63 ('Dispatched workers shall enjoy the right of equal pay for equal work as the workers of the receiving unit do.');

Bryan Cave LLP, *supra* note 39. Although in theory contracted or dispatch workers are paid the same, with benefits supplied by the agencies who are legally their direct employers, it is argued, in practice many contracted workers, especially in manufacturing industries and state-owned enterprises, do not enjoy benefits and are paid less. Employment agencies have been set up by local governments and even by companies themselves to keep an arms-length relationship with workers. Workers who are underpaid, fired or suffer injury often find it very difficult to pursue compensation through agencies. Lucy Hornby, *China tightens loophole on hiring temporary workers*, REUTERS.COM (28th December 2012), <http://www.reuters.com/article/2012/12/28/us-china-labor-idUSBRE8BR04120121228>.

⁶⁸ LCL Amendments, *supra* note 35, art. 63 ('An employer shall, under the principle of equal pay for equal work, adopt the same methods for the distribution of labor remuneration for the dispatched workers and its employees at the same position.');

Bryan Cave LLP *supra* note 39; *Amendments to China Labor Contract Law Will Force Employers to Re-Evaluate Their Use of Labor Outsourcing*, BENESCH ATTORNEYS AT LAW (February 2013), http://www.beneschlaw.com/files/Publication/821a47aa-285c-4461-a9b3-6da96a2586c8/Presentation/PublicationAttachment/619ad948-9bc3-45f0-b955-798891499ae5/China_Amendments%20to%20China%20Labor%20Contract%20Law.pdf; 'Contracting agencies have taken off since China implemented the Labor Contract Law in 2008, which stipulates employers must pay worker' health insurance and social security benefits and makes firing very difficult.' Lucy Hornby, *China tightens loophole on hiring temporary workers*, REUTERS.COM (28th December 2012), <http://www.reuters.com/article/2012/12/28/us-china-labor-idUSBRE8BR04120121228>. The Interim Provisions provide some provisions on social welfare insurance issues where a worker is dispatched to work outside the area in which the dispatch agency is located. Pursuant to the Interim Provisions, social welfare insurance payments will be based on the company's location and in accordance with its local regulations, by the branch of the dispatch agency in the area the company located in, if any, or by the company on behalf of the dispatch agency if there is no branch of the dispatch agency in such area. See http://www.hoganlovells.com/files/Publication/26c8c73f-25a8-4790-93d1-74d8bcf30ad8/Presentation/PublicationAttachment/519cfaf3-4b3c-4f1f-9636-761734333f4f/%231091060-Hogan%20Lovells_Client_Alert_-_Developments_in_China's_Labor_Dispatch_Regul.pdf

⁶⁹ LCL Amendments, *supra* note 35, art. 65 ('A worker dispatched may, according to Articles 36 and 38 of this Law, dissolve the labor contract between him and the worker dispatch service provider.');

Mayer Brown JSM, *supra* note 57.

⁷⁰ LCL Amendments, *supra* note 35, art. 65 ('Where a worker dispatched is under any of the circumstances as mentioned in Article 39 and Article 40 (i) and (ii), the accepting entity may return the worker to the worker dispatch service provider, the worker dispatch service provider may dissolve the labor contract with the worker.');

Mayer Brown JSM, *supra* note 57.

⁷¹ *Id.*

these enumerated reasons, the LDA is required to pay the dispatch worker a monthly salary that meets the local statutory minimum wage requirements until the worker can be dispatched again.⁷²

The revision regulations further clarify that the return of a dispatch worker to the LDA is considered a dismissal within the meaning of the LCL and consequently, a dispatch worker may not be returned to the LDA for any reason that would constitute illegal dismissal of a normal employee.⁷³ This includes dismissal because the worker is suffering from a work-related injury; suffering from a non-work-related injury but within the statutorily allotted time for medical treatment; or a female employee on statutory leave for pregnancy, maternity, or nursing.⁷⁴ The following points regarding the LCL amendment are worth noting:

From the perspective of a worker, the recent amendments to the LCL should be encouraging in that China recognized the incentive misalignment under the original LCL and addressed the issues only four years later (Tong and Cai, 2013).⁷⁵ Second, the LCL clearly intends to limit the use of dispatch work to temporary positions, and to prevent the use of dispatch work as a replacement for full-time employees.⁷⁶ The legislation anticipated the possibility of employers continuing to replace full-time employees, not with dispatch workers, but with in-sourced ‘independent’ contractors; and the issue has already been addressed through the inclusion of independent contractors in the ten per cent cap on dispatch workers.⁷⁷ However, there is no limit as to the duration on the use of dispatch workers like there is in South Korea. Although the category of temporary work does have a six month limit, the auxiliary category is left open to be determined by the receiving employer.⁷⁸ This is potentially an exploitable loophole to get around the six month limit on the use of dispatch workers. There are no current reliable statistics on the degree of compliance with this new law.⁷⁹ The US-China Business Council (USCBC) published the following suggestions from Human Resource managers to employers in complying with the new law.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Also see Bryan Cave LLP, *supra* note 39.

⁷⁶ See generally, LCL Amendments, *supra* note 35; Bryan Cave LLP, *supra* note 39.

⁷⁷ Interim Provisions on Labor Dispatch (promulgated by Ministry of Human Resources & Soc. Sec., 24th January 2014, effective 1st March 2014), Ch. 2, art. 4, available at :

<http://www.lawinfochina.com/display.aspx?id=16484&lib=law&SearchKeyword=dispatch&SearchCKeyword=> (stating that an employer shall ‘strictly control the number of dispatched workers employed which shall not exceed 10 per cent of the total number of its workers.’).

⁷⁸ See text, *supra* note 57; Mayer Brown JSM, *supra* note 57.

⁷⁹ A recent report on China compliance with laws reported, ‘[I]n the past six years, the use of dispatch labor has been on a roller coaster. It started to climb in 2008, reached its peak in 2010 and started its descent to previous levels in 2013. It is now back on solid ground. The new rules restrict the use of dispatch labor to supplemental roles that are truly temporary, auxiliary and substitutive, and comprise no more than ten per cent of a workforce. Some companies have, unfortunately, found conforming the new rules to be expensive and disruptive but, with a carefully managed program of transition in place, that doesn’t have to be the situation for all. Companies that have not yet started transitioning their workforce from dispatched to contracted labor should do so urgently to avoid enforcement challenges and limit exposure.’ Focus on China Compliance - March 2015, *May Lu*, Dispatch Labor Restored to Original Use, at <http://www.mwe.com/Focus-on-China-Compliance---March-2015-03-09-2015/>.

- **Hiring the employee directly:** This is the preferred solution by most employees and the Chinese government. However, companies noted that converting dispatch employees to contract employees increases compensation and benefits costs and reduces hiring flexibility. One manufacturing company decided to categorize workers and sign contracts directly with those employees in positions that were critical to company operations or those who had long tenure. They also considered employees with records of high performance, but these were not as important as employees in the first two categories. Another member company said their HR department evaluates how long dispatch employees have worked for the company. If the employee has signed two consecutive contracts, he or she is eligible for an “indefinite contract” instead of the two-year contract that is typically offered.
- **Applying for an extension to convert dispatch workers to direct-hire employees:** The regulation allows companies to apply for a two-year grace period by submitting a plan to the local government human resources department on how the company plans to bring the proportion of dispatch workers to 10 per cent. HR executives agreed that a company should discuss its proposal with the local government’s department of human resources and social services and make recommended changes before formal submission.
- **Eliminating dispatch labour positions:** If companies elect to eliminate dispatch positions they can either wait until the dispatch labour contract expires or offer a severance package in advance. Interviews indicated these two options are often impractical as company labour needs tend to outstrip existing worker supply.⁸⁰

Compensation and termination provisions also properly align incentives to discourage the long-term use of dispatch workers. The LCL clearly outlines that compensation is not limited just to salary or hourly wages, but includes all employment bonuses and benefits.⁸¹ Treating a return of a dispatch worker to the LDA as the equivalent of termination of a full-time employee further de-incentivizes the use of dispatch workers.⁸² Traditionally dispatch workers were desirable because dispatch workers were paid less than full-time employees and they were easier to terminate; but if dispatch workers are now entitled to equal pay and can only be dismissed under a standard approaching for cause, then the receiving employer might be better served just hiring a full-time employee.⁸³

From the perspective of businesses, the LCL is somewhat problematic. Small LDAs are particularly vulnerable to the increased capital requirement. A quadrupling of the capital requirement could be difficult for smaller LDAs that either have neither the income nor the

⁸⁰ Jake Parker, Dealing with Dispatch Labor under China’s New Labor Law, at: <http://www.chinabusinessreview.com/dealing-with-dispatch-labor-under-chinas-new-labor-law/>.

⁸¹ See text, *supra* note 35; Bryan Cave LLP, *supra* note 39; *Amendments to China Labor Contract Law Will Force Employers to Re-Evaluate Their Use of Labor Outsourcing*, BENESCH ATTORNEYS AT LAW (February 2013), <http://www.beneschlaw.com/files/Publication/821a47aa-285c-4461-a9b3-6da96a2586c8/Presentation/PublicationAttachment/619ad948-9bc3-45f0-b955-798891499ae5/China%20to%20China%20Labor%20Contract%20Law.pdf>.

⁸² Mayer Brown JSM, *supra* note 57. ‘Part-time work is particularly clustered in the accommodations, food and beverages sector (60 per cent), though also high in the retail and personal services sector. Dispatch work is highest in IT (8.5 per cent), though also present in manufacturing (4.9 per cent), transportation (3.7 per cent) and finance and insurance (5.6 per cent). Contract employment is highest in education (9.7 per cent). Non-regular employment is about 25 per cent in large firms over 1000, and increases to roughly 40 per cent as the size of the firm decreases (though the highest proportion is in firms from 50-99 workers – 42.3 per cent).’

⁸³ Of course part of the calculation whether to attain the 10 per cent dispatch workforce can include the cost advantages of cost-shifting of non-compensatory labor law benefits to the dispatching agency as the employer.

unencumbered assets necessary to meet the capital requirements.⁸⁴ The additional requirement of LDAs to pay the dispatch workers minimum wage even while not actively dispatched is a drain on the profitability of operating an LDA.⁸⁵ Not only has a barrier to entry been erected, but the overall profitability of LDAs has decreased as well. One might reasonably anticipate a reduction in the number of operating LDAs.

The only remaining exploitable portion of the LCL is the definition of auxiliary work. The definition is determined by the receiving employer, and although a consultation with the trade union and labour representatives is mandatory, consent of the trade union and labour representatives is not necessary.⁸⁶ At present it is unclear how far the definition of auxiliary may be stretched, but some commentators feel that areas such as cleaning/maintenance and human resources are potentially easily outsourced.⁸⁷ The developing definition of ‘auxiliary’ bears watching to see whether it will become a substantive definition negotiated between the receiving employer and labour, or whether the employer is given too much discretion so as to allow a return to exploitive employment practices.

To conclude, Table 7 summarizes the rights of workers in China in formal employment and in selected categories of non-standard employment. Despite the provision of rights to the majority of workers, these rights may not materialize in reality, such as the right to unionization and collective bargaining when the mainstream unions are not keen to organize and represent them (see Section 3). Similar situation also applies to the case of Japan and Korea (see Tables 8 and 9) as we shall see later.

⁸⁴ *Amendments to China Labor Contract Law Will Force Employers to Re-Evaluate Their Use of Labor Outsourcing*, BENESCH ATTORNEYS AT LAW (February 2013), [http://www.beneschlaw.com/files/Publication/821a47aa-285c-4461-a9b3-6da96a2586c8/Presentation/PublicationAttachment/619ad948-9bc3-45f0-b955-798891499ae5/China Amendments%20to%20China%20Labor%20Contract%20Law.pdf](http://www.beneschlaw.com/files/Publication/821a47aa-285c-4461-a9b3-6da96a2586c8/Presentation/PublicationAttachment/619ad948-9bc3-45f0-b955-798891499ae5/China%20Amendments%20to%20China%20Labor%20Contract%20Law.pdf).

⁸⁵ Mayer Brown JSM, *supra* note 57.

⁸⁶ *Id.*

⁸⁷ *Id.*

Table 7. Summary of rights and entitlements, by type of employment - China

Right/ standard	Permanent employee	Temporary worker	Workers employed by self-employed businesses⁸⁸	Agency worker
Freedom of association & collective bargaining	✓	✓	✓	✓
Anti-discrimination/equal employment opportunity	✓	✓	✓	✓
Prohibition on child labour	✓	✓	✓	✓
Prohibition on forced labour	✓	✓	✓	✓
Explicit right to equal treatment with permanent employees	n/a	✓	✓	✓
Occupational health and safety	✓	✓	✓	✓
Workers' compensation	✓	✓	✓	✓
Social security (social insurance; health insurance; unemployment insurance; pension)	✓	✓	✓	✓
Minimum wage	✓	✓	✓	✓
Protection against termination of employment	✓ subject to minimum service threshold	✓ subject to minimum service threshold	✓ subject to minimum service threshold	✓ with direct employer, and subject to minimum service threshold
Protections on working hours	✓	✓	✓	✓
Leave	✓ subject to minimum service threshold	✓ subject to minimum service threshold	✓ subject to minimum service threshold	✓ subject to minimum service threshold

Source: Compiled by authors, based on survey of relevant laws and regulations

⁸⁸ Workers employed by the self-employed businesses are not the business owners, but employees of these businesses. Self-employed businesses are privately-owned business that may employ no more than eight workers in addition to the owner workers. Self-employed businesses are in a different tax category than larger private businesses (see Cooke, 2005 for more detailed discussion).

5.3. Labour laws regulating non-standard employment in Japan

In Japan, regular employees are considered workers who are hired by an employer for an indeterminate period and for full-time and regular hours. These employees are covered by the labour laws, including for wages, public insurance and health, unemployment, and workers compensation.⁸⁹ By contrast, a non-regular employee is a worker that lacks the above employment relationship. For use in Japanese Government statistics, categories of non-regular employees have been described as part-time, temporary, dispatched, contract, and entrusted employees.⁹⁰ Another category of workers not usually referred to in discussions of non-standard workers are those who are self-employed.⁹¹

While ‘employee’ is not defined in the Labour Standards Act (LSA), a ‘worker’ is defined under the Trade Union Law (TUL).⁹² The definition in the TUL is broader than the LSA and a worker can meet the definition ‘living by their wages’ etc. and be a union member, while at the same time if having a labour service contract rather than a labour contract, would be considered an independent contractor not eligible as an employee under the LSA.⁹³ Traditionally, enterprise unions solely organized regular employees; and non-regular workers such as part-time workers and fixed-term contract workers remained unorganized.⁹⁴ Independent contractors are generally outside the LSA. A judgment rendered by the Japanese Supreme Court in 2011, with respect to evaluating workers as independent contractors or ‘employees’ provides some guidance on their legal designation under the LSA and the Trade Union Act (also referred to as Labour Union Act (LUA)).⁹⁵ In its ruling of 12th April 2011, the Japanese Supreme Court held,

‘[c]ustomer engineers (“CEs”) who were engaged in the repair of housing equipment under outsourcing contracts with INAX Maintenance Corporation (“INAX”) are “workers” under the LUA. In the case in question, the Supreme Court adopted the framework previously established in practice, which considers five factors when deciding whether labour suppliers in question are ‘workers’ who should be accorded the right to engage in collective bargaining:

⁸⁹ Yukata Asao, Overview of Non-regular Employment in Japan, in Non-regular Employment – Issues and Challenges Common to the Major Developed Countries 1, Japan Inst. Lab. Pol. & Training No. 10, (2011), available at http://www.jil.go.jp/english/reports/documents/jilpt-reports/no.10_japan.pdf [hereinafter, JILPT 10].

⁹⁰ Professor Asao further delineates the terms as *Part-time* workers: both fixed-term and open-ended, part-time, direct employment; *Temporary* workers: relatively short fixed-term, fulltime, direct employment; *Dispatched* workers from temporary agency: both fixed-term and open-ended, full- or part-time, indirect employment; *Contract* employees: relatively long fixed-term, full-time, direct employment; *Entrusted* employees: relatively long fixed-term, full-time, direct employment. *Id.* at 2. Though there are special laws that pertain to these irregular workers; the Labor Standards Law is applied to non-regular salaried workers, and grants them the same benefits as a regular worker. See discussion in text, *infra*, accompanying notes 64-69.

⁹¹ See <http://data.worldbank.org/country/japan>.

⁹² Shinya Ouchi, Labor Law Coverage and the Concept of ‘Worker,’ 111, at: <http://www.jil.go.jp/english/reports/documents/jilpt-reports/no1.pdf>

⁹³ Kazuo Sugeno and Leo Kanowitz, Japanese Employment and Labor Law 505 (2004).

⁹⁴ In the 1990s, the target of corporate restructuring concentrated on middle management employees and employees promoted to middle management are supposed to leave unions. Takashi Araki, The System of Regulating the Terms and Conditions of Employment in Japan 16, at: http://www.jil.go.jp/english/events/documents/cils04_araki.pdf. Dispatch workers usually are ineligible for participation in the union apparently as a result of custom and practice rather than express provisions; however, they can and have established their own union since 2005. For example see, <http://www.haken-union.jp/>.

⁹⁵ Labour Union Act Act No. 174 of 1949, at <http://www.cas.go.jp/jp/seisaku/hourei/data/lua.pdf>; and see Hideki Thurgood Kano, Japanese Labor & Employment Law and Practice 116 (2011).

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- 1) Whether labour suppliers are included in the organization of the company as indispensable labour to perform its business and for the purpose of ensuring such labour on a permanent basis;
 - 2) Whether terms and conditions of work are decided unilaterally by the company;
 - 3) The extent to which compensation for such work is similar to wages or salaries;
 - 4) Whether labour suppliers can freely accept or reject offers from the company; and
 - 5) Whether work is performed under instruction, supervision, and restrictions regarding time and place provided by the company.’⁹⁶

Thus, in applying the criteria, the Supreme Court found that even if a company converts its workforce into ‘independent contractors’, the contractors may still be able to exercise their collective bargaining rights.

The Japanese Trade Union Confederation (RENGO), due to wage stagnation from 1997 to 2012 (falling from an average wage of 4,673,000 yen to 4,080,000) and an increase in working hours (with 13 per cent of workers working 60 hours a week and 2.7 per cent working 75 hours), in 2012 pushed for substantial reforms of the contract and dispatch work laws and made better conditions for irregular workers one of its objectives in the 2014 annual wage talks.⁹⁷

The Japanese Institute for Labour Policy and Training reported that ‘non-regular employees accounted for 35.2 per cent of all employees in 2012. Women were over twice as likely to be employed in precarious forms of work – 54.5 per cent compared to 19.7 per cent for men. Among precarious form of employment, 5 per cent are temp agency workers, 19.5 per cent are contract/entrusted workers, 7 per cent other, with the vast bulk of being part-time work – 68.5 per cent.’⁹⁸ Though there is no legal definition of non-regular employees, there are a number of laws that refer to them and provide some content to their meaning noting variables such as workers with shorter hours, dispatched workers, and those with fixed-term employment.⁹⁹

⁹⁶ Independent contractors in Japan may still retain the collective bargaining rights they had when they were employees, Jones Day, at: <http://www.lexology.com/library/detail.aspx?g=70d9b18e-945c-435c-ad2bc0923d1ef778>.

⁹⁷ Precarious Work in the Asia Pacific Region: A 10 country study by The International Trade Union Confederation (ITUC) and ITUC Asia-Pacific (2014) 29-30, at <http://www.ituc-csi.org/precarious-work-in-the-asia?lang=en>.

⁹⁸ *Id.* at 29.

⁹⁹ See, e.g., Labour Standards Act, Act No. 49 of April 1947, art. 14 (Japan Institute for Labour Policy and Training [JILPT]), <http://www.jil.go.jp/english/laws/documents/l.standards2012.pdf> (Japan); Act for Securing the Proper Operation of Worker Dispatching Undertakings and Improved Working Conditions for Dispatched Workers, Law No. 88 of 1985, art. 2 (Japanese Law Translation [JLT]), <http://www.japaneselawtranslation.go.jp/law/detail/?id=75&vm=04&re=01> (Japan); Act on Improvement, etc. of Employment Management for Part-Time Workers, Act No. 76 of 1993, art. 2 (Japanese Law Translation [JLT]), <http://www.japaneselawtranslation.go.jp/law/detail/?id=84&vm=04&re=01> (Japan). First, there is the Act on Improvement, etc. of Employment Management for Part-Time Workers. Article 2 stipulates that the term ‘part-time’ worker as used in this Act means a worker whose prescribed weekly working hours are shorter than those of ordinary workers employed at the same business establishment ... Second, there is the Act for Securing the Proper Operation of Worker Dispatching Undertakings and Improved Working Conditions for Dispatched Workers. Workers dispatched based on this Act are defined as dispatched workers. Thirdly, there are some legal provisions related to fixed-term contract employment. Article 14 of the Labour Standards Act stipulates Labour contracts, excluding those without a definite period, and excepting those providing that the period shall be the period necessary for completion of a specified project, shall not be concluded for a period exceeding 3 years...

The LSA is applied to non-regular salaried workers, and grants them the same benefits as a regular worker.¹⁰⁰ Part-time work is primarily governed by the Part-Time Work Law (PTWL) which came into force on 18th June 1993.¹⁰¹ There have been changes to the Labour Contract Act that took effect on 10th August 2012 which altered the future for fixed-term contract workers with contract periods of over five years in total: essentially workers in this position must be granted open-ended employment by their employers if they apply for it.¹⁰² That is, contract workers with term contracts in excess of five years may make formal application for permanent status and new amendments to the Japanese Labour Contract Act, effective in 2013, were enacted, limiting an employer's right to deny certain employee's renewal requests. It established three new provisions regarding fixed-term employment contracts.¹⁰³ The Amendment provided that if the total period of a consecutive fixed-term employment contract under the same employer exceeds five years, and the employee submits

As such, the contract period for fixed-term employment is to be kept under three years (five years, in special cases). *Id.* at 3.

¹⁰⁰ Labour Standards Act, Act No. 49 of April 1947, art. 1 (Japan Institute for Labour Policy and Training [JILPT]), <http://www.jil.go.jp/english/laws/documents/l.standards2012.pdf> (Japan). The Labor Standards Act addresses working conditions but leaves occupational health and safety to the Industrial Safety and Health Law (Act No. 57 of 1972). Labor Standards Act, Chapter V, Art. 42. Despite these provisions in the Labor Standards Act (LSA), employers have been known to not provide workers their rights. Critics note that workers may too often mistakenly believe they are exempt from the LSA, and the Labour Standards Inspection Office (responsible for reviewing claims of violations and enforcing punishment) is understaffed and cannot handle all the cases. See Mutusuko Asakura, *Workers Protection in Japan*, ILO.ORG, http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/genericdocument/wcms_205369.pdf (last visited 5th October 2014).

Labor Laws of Japan, at <http://www.jil.go.jp/english/laws/index.html>.

¹⁰¹ Labor Laws of Japan, at <http://www.jil.go.jp/english/laws/index.html>; see also Liliane Jung, *International Labour Law Profile: Japan*, ILO.ORG (Jun. 17, 2011), http://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158904/lang--en/index.htm; see also Act on Improvement, etc. of Employment Management for Part-Time Workers, Act No. 76 of 1993 (Japan), available at <http://www.japaneselawtranslation.go.jp/law/detail/?id=84&vm=04&re=01>.

¹⁰² NATLEX, at:

http://www.ilo.org/dyn/natlex/natlex_browse.details?p_lang=en&p_country=JPN&p_classification=12.1&p_origin=COUNTRY&p_sortby=SORTBY_COUNTRY; see also Labor Laws of Japan, at <http://www.jil.go.jp/english/laws/index.html>; see also Elizabeth Cole, L. Mark Weeks, and Yumiko Ohta, Amendments to fixed-term labor contracts in Japan at: <http://www.lexology.com/library/detail.aspx?g=9b4ee7c1-e129-4797-92d4-6c5b6a66c8e5>. Hifumi Okunuki, *Labor Law Reform Raises Rather Than Relieves Workers' Worries*, JAPAN TIMES, 19th March 2013, available at <http://www.japantimes.co.jp/community/2013/03/19/how-tos/labor-law-reform-raises-rather-than-relieves-workers-worries/#.VBjyL0vgVuY>; see also Labour Contract Act, Act No. 128 of 2007 (Japan), available at <http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/79056/84831/F687495906/JPN79056%20Eng.pdf>. This regulation has raised mixed reviews as it presents a solution to the abuse of fixed-term workers, but puts a burden on a company that has reasonably hired a fixed-term worker for the duration of a project, which is what that worker's flexible status was initially intended for. '[C]ompanies routinely use temporary contracts for work that continues far beyond the end date. They do this to slash labor costs and to shirk all social and economic responsibility for their employees — a responsibility that firms are expected to take seriously in Japan.' 'The original purpose was presumably to enable employers to find workers to complete work projects that themselves were of fixed duration. In that way, the term of the contract would reflect the time-fixed nature of the work itself.' The practical result is that companies attempted to get rid of their fixed-term workers before the reform kicked in, and have used the law to justify three-year limits on renewals, and no renewals at all. *Id.*

¹⁰³ Elizabeth Cole, L. Mark Weeks, and Yumiko Ohta, Amendments to fixed-term labour contracts in Japan, at <http://www.lexology.com/library/detail.aspx?g=9b4ee7c1-e129-4797-92d4-6c5b6a66c8e5>. Also see, JAPAN EMPLOYMENT LAW UPDATE (April 2013), at, <http://www.herberrsmithfreehills.com/-/media/Files/PDFs/2013/Japan%20Employment%20Law%20Update%20-E-%20April%202013.pdf>.

a request to be converted to an undetermined-term employee, the employer will be deemed to have accepted and the conversion will take effect the day after expiration of the fixed-term contract. Denial of the application for the nonrenewal of an employment contract will not be accepted and the fixed-term contract will be deemed to have been renewed under the following conditions:

- 1) If termination under the fixed-term employment contract is deemed to be equivalent to termination under an undetermined-term contract due to repeated renewals; or
- 2) If the employee has a reasonable expectation that the fixed-term contract shall be renewed after expiration, and nonrenewal by the employer is not considered socially acceptable.¹⁰⁴

The Amendment also prohibits unreasonable working conditions resulting from the difference in work period of a fixed-term employee compared to an undetermined-term employee. Whether or not employment conditions are “unreasonable” will be determined based on the following factors:

1. Content of the work;
2. Scope and content of work due to assignment change; or
3. Other factors (standard employment affairs).¹⁰⁵

Though data is not yet available, some commentators have noted that it is ‘now expected that the number of companies that refuse to renew a fixed-term employment contract before it exceeds five years will increase, which would actually lead to occupational instability for fixed-term employees;’¹⁰⁶ whereas on the other hand, a recent survey in Japan found there is some employer movement to regularize its part-time workers by shifting contract workers into some forms of indefinite contract.¹⁰⁷

Though Japan had included part-time workers in the initial Labour Standards Law (1947) (LSL) it has since enacted laws to regulate the use and treatment of some non-regular workers. On 23rd April 2014, the Act for Partial Revision (APR) of the Act on Improvement in

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ ‘A movement is becoming prevalent in Japan to regularize non-regular workers such as part-timers and contract workers. Following Starbucks Coffee Japan which was reported to convert its 800 contract workers to full-fledged regular employees, UNIQLO First Retailing (a manufacturer and retailer of casual wear) announced that the company would shift some 16,000 part-timers to “area limited” regular employees (whose terms of employment are limited in regard to geographical area of duty stations and tasks to be assigned) within two to three years. Furthermore, it is reported that IKEA Japan, a giant furniture manufacturer, is to offer WLT contracts to its part-timers, and that the Bank of Tokyo-Mitsubishi UFJ would shift its contract workers with more than three years of service to WLT contracts.’ Noboru Ogino, Director for Policy Issues, Research and Statistical Information Analysis Department, Sign of Change in Employment Portfolio, Japan Institute for Labour Policy and Training (JILPT), Regularization of employees expands by ways of without-limit-of-time (WLT) contracts, conversion to regular employees, and introduction of ‘limited regular employees’ category, *on file with author*. This appears to be leading to a revision of the employment categories by adding a new status of ‘limited regular employees’ which provides *without-limit-of time contracts* by limiting the area of duty stations and tasks to be assigned, rather than just dividing two employment statuses as regular (WLT) and non-regular (fixed-term contract) workers. Whether this will gain legal distinction is uncertain, but a recent survey shows a quarter of surveyed employers expect an increase in the number of employees placed in this category and over 40 per cent of companies which employ full-time fixed-term workers said they would shift contract workers into some forms of indefinite contract. *Id.*

Management of Employment of Part-Time Workers [hereafter APR] was promulgated, with the aim of improving working conditions and other kinds of treatment of Part-Time Workers to enhance and stabilize their status. The amendment will come into force in 2015.¹⁰⁸ Before the new laws, the share of regular work in 2012 was reported to be just about 65 per cent of the workforce while at the same time forms of irregular work were increasing.¹⁰⁹

The APR expands the scope and meaning of ‘part-time workers equivalent to ordinary workers’ in order to reduce discriminatory treatment and stipulates that differences in the treatment between part-time workers and ordinary employees should not be unreasonable in light of their job content, the personnel system, and other conditions.¹¹⁰ The APR also introduces a new requirement to enhance part-time workers’ understanding of the changes made by the APR so that newly hired and part-time workers become aware of the improvements to their rights.¹¹¹ Additional provisions include corrective actions against employers who fail to follow the Health, Labour, and Welfare Minister’s advice to improve their employment management of part-time workers by publicly announcing their names, and the delegation of services for part-time workers’ employment management to the Regional Labour Bureaus as opposed to the ‘Part-Time Working Assistance Centers’ (abolished in 2011).¹¹²

Temporary work (dispatched work) is governed by the Worker Dispatching Law (WDL) adopted 5th July 1985 and subsequently amended, particularly regarding duration.¹¹³ Japan has a mixed history with the use of dispatch workers. The use of dispatch workers was viewed as

¹⁰⁸ Act for Partial Revision of the Act on Improvement, etc. of Employment Management for Part-Time Workers, Law No. 27 of 2014, (Ministry of Health, Labour and Welfare [MHLW]), <http://www.mhlw.go.jp/stf/houdou/0000044198.html> (Japan). The Act for Partial Revision of the Act on Improvement in Management of Employment of Part-Time Workers was promulgated on 23rd April 2014. The amendment will come into force in 2015.

¹⁰⁹ Precarious Work in the Asia Pacific Region: A 10 country study by The International Trade Union Confederation (ITUC) and ITUC Asia-Pacific (2014) 33, at <http://www.ituc-csi.org/precarious-work-in-the-asia?lang=en>. It was reported that precarious work is pervasive throughout the economy. ‘Part-time work is particularly clustered in the accommodations, food and beverages sector (60 per cent), though also high in the retail and personal services sector. Dispatch work is highest in IT (8.5 per cent), though also present in manufacturing (4.9 per cent), transportation (3.7 per cent) and finance and insurance (5.6 per cent). Contract employment is highest in education (9.7 per cent). Non-regular employment is about 25 per cent in large firms over 1000, and increases to roughly 40 per cent as the size of the firm decreases (though the highest proportion is in firms from 50-99 workers – 42.3 per cent).’ *Id.*

¹¹⁰ *The Act for Partial Revision of the Act on Improvement of the Employment Management of Part-Time Workers (Overview)*, MINISTRY OF HEALTH, LABOR AND WELFARE, <http://www.mhlw.go.jp/english/policy/employ-labour/fixed-term-workers/index.html> (last visited 28th October 2014).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Dispatch Rules Face Changes*, The Japan Times (29th January 2014), <http://www.japantimes.co.jp/news/2014/01/29/business/dispatch-rules-face-changes/#.U3bPVnZc-IA>. The Act for Securing the Proper Operation of Worker Dispatching Undertakings and Improved Working Conditions for Dispatched Workers, Act No. 88 of 5th July 1985, as amended (Japanese Law Translation [JLT]), <http://www.japaneselawtranslation.go.jp/law/detail/?id=75&vm=04&re=01> (Japan). The title of the Act will change to the ‘Act for Securing the Proper Operation of Worker Dispatching Undertakings and Ensuring the Protection of Dispatched Workers’ after the amendment comes into effect, available at <http://www.japaneselawtranslation.go.jp/law/detail/?id=75&vm=04&re=01>. For summary commentary, see *Labor and Employment*, ANDERSON, MORI & TOMOTSUNE, available at https://www.amt-law.com/en/pdf/bulletins7_pdf/LELB27.pdf.

contrary to Japanese culture and the values of lifetime employment, and until 1985 was prohibited under the Employment Security Act.¹¹⁴ In 1986, needing to respond to the growing need for flexibility in the labour market, the Japanese legislature passed the WDL.¹¹⁵ From 1986 until 2008, there was a series of amendments that increasingly liberalized and deregulated the use of dispatch workers.¹¹⁶ The amendments had always been controversial, but it was not until a mass layoff of dispatch workers in response to the 2008 Financial Crisis that the legislature began to gravitate more towards worker protection.¹¹⁷ The WDL was amended in March 2012, with those amendments coming into force on 1st October 2014; and additional amendments passed in January 2014, to take effect by April 2015.¹¹⁸

The WDL subdivides dispatch workers into two categories, specified workers and registered workers.¹¹⁹ Specified workers have their employment contract directly with the LDA and are contracted out to perform a specified task or service.¹²⁰ Because specified workers have their employment contract directly with the LDA, specified workers receive salary as well as social and labour insurance even while not actively dispatched.¹²¹ In contrast, although registered dispatch workers also have their employment contracts with the LDA,

¹¹⁴Employment Security Act, Act No. 141 of 30th November 1947, as amended (Japanese Law Translation [JLT]), <http://www.japaneselawtranslation.go.jp/law/detail/?id=10&vm=04&re=01> (Japan); see *Japan: Worker Dispatch Act Passes*, RADIUS (26th June 2012), <http://www.radiusworldwide.com/knowledge/country-updates/2012/6/japan-worker-dispatch-act-passes>.

¹¹⁵ The Act for Securing the Proper Operation of Worker Dispatching Undertakings and Improved Working Conditions for Dispatched Workers, Act No. 88 of July 5, 1985, as amended (Japanese Law Translation [JLT]), <http://www.japaneselawtranslation.go.jp/law/detail/?id=75&vm=04&re=01> (Japan); see *Japan: Worker Dispatch Act Passes*, RADIUS (26th June 2012), <http://www.radiusworldwide.com/knowledge/country-updates/2012/6/japan-worker-dispatch-act-passes>.

¹¹⁶ *Japan: Worker Dispatch Act Passes*, RADIUS (26th June 2012), <http://www.radiusworldwide.com/knowledge/country-updates/2012/6/japan-worker-dispatch-act-passes>.

¹¹⁷ *Id.*

¹¹⁸ The Act for Securing the Proper Operation of Worker Dispatching Undertakings and Improved Working Conditions for Dispatched Workers, Act No. 88 of 5th July 1985, as amended (Japanese Law Translation [JLT]), <http://www.japaneselawtranslation.go.jp/law/detail/?id=75&vm=04&re=01> (Japan); Elizabeth Cole, L. Mark Weeks, and Yumiko Ohta, *Revision of Worker Dispatch Law in Japan*, LEXOLOGY (16th October 2012), <http://www.lexology.com/library/detail.aspx?g=22fce1ea-a708-494a-9343-f9cd3640e97a>; *Dispatch Rules Face Changes*, THE JAPAN TIMES (29th January 2014), <http://www.japantimes.co.jp/news/2014/01/29/business/dispatch-rules-face-changes/#.U3bPVnZc-IA>.

¹¹⁹ The Act for Securing the Proper Operation of Worker Dispatching Undertakings and Improved Working Conditions for Dispatched Workers, Act No. 88 of 5th July 1985, art. 2, as amended (Japanese Law Translation [JLT]), <http://www.japaneselawtranslation.go.jp/law/detail/?id=75&vm=04&re=01> (Japan); *The Current Status and the Challenges of Dispatched Work in Japan*, JAPAN INSTITUTE FOR LABOUR POLICY AND TRAINING, <http://www.jil.go.jp/english/ljsj/detailed/2011-2012/chapter2.pdf>.

¹²⁰ The Act for Securing the Proper Operation of Worker Dispatching Undertakings and Improved Working Conditions for Dispatched Workers, Act No. 88 of 5th July 1985, art. 16-22, as amended (Japanese Law Translation [JLT]), <http://www.japaneselawtranslation.go.jp/law/detail/?id=75&vm=04&re=01> (Japan); *The Current Status and the Challenges of Dispatched Work in Japan*, JAPAN INSTITUTE FOR LABOUR POLICY AND TRAINING, <http://www.jil.go.jp/english/ljsj/detailed/2011-2012/chapter2.pdf>.

¹²¹ As an employer, the LSA applies to dispatch employers, as it does to all employees, even though the employees work for a labor dispatch company. Labour Standards Act, Act No. 49 of April 1947, art. 1 (Japan Institute for Labour Policy and Training [JILPT]): http://www.jil.go.jp/english/laws/documents/l_standards2012.pdf (Japan). Peter Godwin, Dominic Roughton, David Gilmore, and Giles Ockenden, *Japan's New Government Intending to Amend Worker Dispatch Law*, LEXOLOGY (17th January 2010), <http://www.lexology.com/library/detail.aspx?g=ffa601d7-75e0-4214-aad7-358750a4e1dc>.

their contract is contingent upon the existence of a receiving employer; therefore registered dispatch workers are only paid while actively dispatched.¹²²

The WDL further subdivides registered dispatch workers into categories based on skills.¹²³ Originally, there were only thirteen enumerated skill categories, such as software development and office equipment operation.¹²⁴ By December of 1996, the categories had been expanded to include the twenty-six different skill areas still in effect under the current law.¹²⁵ Although at one time there existed a quasi-twenty-seventh catch all category for workers falling outside the enumerated twenty-six areas, known as deregulated workers; since 2009 it has been illegal for LDA's to dispatch registered workers that do not fall into one of the twenty-six categories,¹²⁶ though this restriction is eliminated by the new law.¹²⁷

The WDL once provided both a minimum and a maximum for the duration of dispatch work. In order to prevent the rapid shuffling of dispatch workers from one job to the next, the WDL prohibits any dispatch for a position lasting less than thirty days.¹²⁸ The limit on maximum duration originally only applied to workers outside of the twenty-six enumerated skill categories, such as specified workers and deregulated workers before the use of deregulated workers became illegal.¹²⁹ The duration limit prohibited the use of dispatch workers in excess of three years, but the three-year duration limit was applied in a unique way.¹³⁰ The three-year duration limit tracked the receiving employer's use of dispatch workers as a class, rather than focusing on the use of any one individual dispatch worker.¹³¹ This prevented employers from having positions permanently filled by a 'revolving door' of dispatch workers.¹³²

A January 2014 Proposed Amendment would change the three-year duration limit.¹³³ As of this writing, the Amendment has been proposed, and a draft bill is in the Diet with the following changes is expected to come into force in April 2015. Currently, the time period a user company may use dispatched workers is based on the type of duties performed rather than the status of the person performing the duties and if the job duties fell under one of the

¹²² *Id.*; Japan Institute for Labour Policy and Training, *supra* note 1199.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ The Act for Securing the Proper Operation of Worker Dispatching Undertakings and Improved Working Conditions for Dispatched Workers, Act No. 88 of 5th July 1985, art. XX, as amended (Japanese Law Translation [JLT]), <http://www.japaneselawtranslation.go.jp/law/detail/?id=75&vm=04&re=01> (Japan); Japan Institute for Labour Policy and Training *supra* note 119.

¹²⁶ The Act for Securing the Proper Operation of Worker Dispatching Undertakings and Improved Working Conditions for Dispatched Workers, Act No. 88 of 5th July 1985, art. XX, as amended (Japanese Law Translation [JLT]), <http://www.japaneselawtranslation.go.jp/law/detail/?id=75&vm=04&re=01> (Japan); Japan Institute for Labour Policy and Training.

¹²⁷ Godwin, Roughton, Gilmore and Ockenden *supra* note 120.

¹²⁸ Cole, Weeks and Ohta *supra* note 117.

¹²⁹ *The Asia Employment Landscape in 2014*, Freshfields, Bruchkhaus and Deringer (22nd January 2014), http://www.freshfields.com/en/knowledge/The_Asia_employment_landscape_in_2014/?LanguageId=2057.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ The final version of the new law is not yet available, but see discussion in Japan's Worker Dispatch Act, at http://www.americanbar.org/content/newsletter/groups/labor_law/int_newsletter/2014/april/japan.html.

former '26 specialized fields of work,' there was no time limitation. Now, under the proposed amendments, these 26 job areas are eliminated and there will be limitations on how long specific individuals can provide services in any job. The amendments limit to three years the time the user company can use the *same* dispatched worker at the same business unit of the same workplace, and it also limits the time the user company can utilize any dispatched workers at the same workplace to a period of up to three years (renewable for one three year period). An exception to the three-year limitation period is made if the dispatched worker is a regular, non-fixed term, employee of the dispatching agency.¹³⁴

Observers suggest that these amendments are good news for utilizing companies, who will have more flexibility in the use of dispatched workers. Unhappy perhaps are the dispatched workers in the 26 prescribed types of professional assignments who until these proposed changes had been exempt from the three-year restriction periods, and are now to be subjected to a three-year per dispatched worker restriction under the new law.¹³⁵

Prior to the new Proposed Amendment of April 2015, the remedy for dispatch worker violations was permanent employment with the receiving employers and that remedy does not appear to be removed by the new Proposed Amendment, so it would seem the original remedy would remain in place. If a receiving employer knowingly retains a dispatch worker beyond the three-year limit in violation of the WDL, the receiving employer will be deemed to have directly entered employment relations with the dispatch worker.¹³⁶ If a dispatch worker in a fixed-term contract with a receiving employer works beyond the limits of the fixed term, the receiving employer will similarly have been deemed to have entered into direct employment relations with the dispatch worker.¹³⁷ The receiving employer is also required to pay the dispatch worker directly and cover all social and labour insurance premiums in the event the

¹³⁴ While a draft of the proposed new law is unavailable as it is in the legislative process, see discussion in 'Japan's Worker Dispatch Act', at: http://www.americanbar.org/content/newsletter/groups/labor_law/int_newsletter/2014/april/japan.html. *Dispatch Rules Face Changes*, The Japan Times (29th January 2014), <http://www.japantimes.co.jp/news/2014/01/29/business/dispatch-rules-face-changes/#.U3bPVnZc-IA>. Although this is a concession on the part of organized labour, the trade off is that now receiving employers must make a good faith effort to hear the opinions of labour unions in regards to the use of dispatch workers. *Id.* In deciding whether or not to dispatch a worker, the LDA and receiving employer must "give consideration" to whether dispatch workers receive equal pay, similar treatment, training, and benefits compared to full time employees, and whether the dispatch worker will ultimately be offered a permanent position at the receiving employer. Cole, Weeks & Ohta *supra* note 117. Florence Cheung, Changing times: New rules for dispatch workers in Japan, at <http://www.lexology.com/library/detail.aspx?g=a1f10c74-28fb-47c5-a123-3299bf387c4d>. See also Employment Law Briefing 2015 DLA Piper, at: <https://www.dlapiper.com/~media/Files/Insights/Events/2015/01/Employment%20Law%20Briefing%20Materials/International%20Overview2.pdf>.

¹³⁵ These amendments are expected to be good news for utilising companies, who will have more flexibility in the use of dispatched workers; however third-party dispatching agencies are likely to face more obligations and scrutiny imposed by the new law. Dispatched workers in the 26 prescribed types of professional assignments are also against the amendments, as they have, until now, enjoyed exemption from the three year restriction periods, but they will be subjected to a three year per dispatched worker restriction under the new law. See Florence Cheung, Changing times: New rules for dispatch workers in Japan, at: <http://www.lexology.com/library/detail.aspx?g=a1f10c74-28fb-47c5-a123-3299bf387c4d>. 'Dispatch Rules Face Changes', *The Japan Times* (29th January 2014), <http://www.japantimes.co.jp/news/2014/01/29/business/dispatch-rules-face-changes/#.U3bPVnZc-IA>.

¹³⁶ Florence Cheung, *id.*

¹³⁷ Godwin, Roughton, Gilmore, and Ockenden *supra* note 120.

LDA is unable to do so, including situations where the receiving employer has already transferred money to the LDA for this purpose.¹³⁸

Table 8 summarizes the rights for regular and selected categories of non-regular workers in Japan. Similar to the case for China, despite the provision of rights to the majority of workers, these rights may not materialize in reality, such as the right to unionization and collective bargaining when the mainstream unions are not keen to organize and represent them (see Section 3).

Table 8. Summary of rights and entitlements, by type of employment - Japan

Right/ standard	Permanent employee	Temporary employee	Foreign intern	Agency worker
Freedom of association & collective bargaining	✓	✓	✗	✓
Anti-discrimination/equal employment opportunity	✓	✓	✗	✓
Prohibition on child labour	✓	✓	✓	✓
Prohibition on forced labour	✓	✓	✓	✓
Explicit right to equal treatment with permanent employees	n/a	✓	✗	✓
Occupational health and safety	✓	✓	✓	✓
Workers' compensation	✓	✓	✓	✓
Social security (social insurance; health insurance; unemployment insurance; pension)	✓	✓	✗	✓
Minimum wage	✓	✓	✗	✓
Protection against termination of employment	✓ subject to minimum service threshold	✓ subject to minimum service threshold	✗	✓ with direct employer, and subject to minimum service threshold
Protections on working hours	✓	✓	✗	✓
Leave	✓ subject to minimum service threshold	✓ subject to minimum service threshold	✓ subject to minimum service threshold	✓ subject to minimum service threshold

Source: Compiled by authors, based on survey of relevant laws and regulations

¹³⁸ *Id.*

5.4 Labour laws regulating non-standard employment in Korea

Under Korean law, workers are categorized as follows:

Article 17 of the Act defines a contract of employment as a contract formed with the purpose of providing labour for the employer and paying wages to the employee.¹³⁹ Employees under the LSA can be categorized into permanent employees, fixed-term employees and part-time employees, with legislation on each:

1. Dispatched employees (Act on the Protection of Temporary Agency Worker) are employed by a TWA, and provide services for a user company in accordance with the terms and conditions of a contract on temporary placement of workers;
2. Part-time workers (Act on the Protection of Fixed-Term and Part-Time Employees);
3. Independent contractors;¹⁴⁰
4. Subcontracted workers on employer premises (independent contractors, dispatch workers, or employees).¹⁴¹

Employees and dispatched employees are entitled to statutory employment rights, such as statutory severance pay and paid annual paid leave, while other types of workers (such as independent contractors) are not.^{142 & 143}

The issue of independent contractor classification and misclassification of workers has been addressed by the Korean Court System in recent years, and increasingly, it has found independent contractors, in law, to be ‘employees’ under the LSA, notwithstanding contrary contractual or other understandings.¹⁴⁴ In the construction industry, due to its complicated

¹³⁹ Art. 17, Korean Labour Standards Act, Act No. 5309, 13th March 1997, amended by Act No. 11270, 1st February 2012, ([hereinafter LSA](#)), available at:

http://www.ilo.org/dyn/natlex/natlex_browse.details?p_lang=en&p_country=KOR&p_classification=01.02&p_origin=COUNTRY&p_sortby=SORTBY_COUNTRY.

¹⁴⁰ Pursuant to the Trade Union and Labour Relations Adjustment Act (TULRA), independent contractors are prohibited from forming trade unions on the basis that they are not workers having an employment contract with an employer. ‘Articles 2(4) (d) and 23(1) prohibit unemployed workers, including dismissed workers, from joining a union and provide that non-union members are ineligible for trade union office. These provisions have an adverse impact on irregular workers, especially short term contract workers.’ Precarious Work in the Asia Pacific Region: A 10 country study by The International Trade Union Confederation (ITUC) and ITUC Asia-Pacific (2014) 41, at <http://www.ituc-csi.org/precarious-work-in-the-asia?lang=en>.

¹⁴¹ ITUC reports that ‘subcontracted or agency workers are not covered by the collective agreements that apply to directly employed workers. The Supreme Court holds a negative view of a user enterprise being a party to a collective agreement as it considers that a party to collective bargaining must first be a party to an employment contract. Employees may only bargain with the subcontracting entity.’ Precarious Work in the Asia Pacific Region: A 10 country study by The International Trade Union Confederation (ITUC) and ITUC Asia-Pacific (2014) 41, at <http://www.ituc-csi.org/precarious-work-in-the-asia?lang=en>.

¹⁴² Act relating to Protection, etc., for Dispatched Workers (Act No. 5512), at: http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=51008&p_country=KOR&p_count=145&p_classification=12&p_classcount=10. See discussion in Chun Wook Hyun, Weon Jung Kim, Matthew F Jones and Seungyul Shawn Yum, Kim & Chang, Employment and employee benefits in South Korea: overview, at <http://us.practicallaw.com/6-508-2342#a703863>

¹⁴³ Another category of workers not usually referred to in discussions of non-standard workers are those who are self-employed, see <http://data.worldbank.org/country/korea-republic>.

¹⁴⁴ Sean Hayes, Korean Independent Contractor Risks under LSA, <http://www.thekoreanlawblog.com/2011/07/korean-independent-contractor-risks.html>.

structure of using subcontractors, it is difficult to identify the employment relationship. Construction workers are employed by subcontractors in temporary agency work and nominal self-employment for the period of the particular project.¹⁴⁵

The Supreme Court of Korea has developed a list of factors (not all of which need be met) relevant to whether a contractor is improperly classified, including: (1) does the company determine the scope of the contractor's duties; (2) whether the contractor is subject to the company's work rules or other employment policies or international regulations apply to the contractor; (3) degree of direct supervision and control in performing the contractor's services; (4) does the contractor determine the time and place of services; (5) can the contractor engage in other jobs; and/or delegate its work to others; (6) does the contractor pay his or her own expenses and assume business risks; (7) who supplies materials for performing services; (8) is the contractor paid a basic salary or for completion of work; (9) whether the company makes applicable withholdings; (10) whether the contractor participates in-company benefit plans or is an employee under the Korean Social Security System; and (11) whether the work with the company is continuous, not temporary.¹⁴⁶

If deemed an employee, the LSA will apply.

Korea has been notably concerned about the status of its temporary and part-time workers, where precarious workers earned roughly 40 per cent less than regular workers doing the same or similar work and are found throughout the Korean economy, from manufacturing, to IT services to education, and where over one-third of the workforce was under some form of precarious work arrangement creating a two-tiered labour market with little mobility between the two; and so, has addressed it by specific legislation.¹⁴⁷ The Korean

¹⁴⁵ Precarious Work in the Asia Pacific Region: A 10 country study by The International Trade Union Confederation (ITUC) and ITUC Asia-Pacific (2014) 40, at <http://www.ituc-csi.org/precarious-work-in-the-asia?lang=en>. Multi-layer subcontracting occurs when intermediaries or foremen provide labour to a general contractor and a subcontractor outsources labour requirements to another contractor. A construction company is able to easily hide behind innumerable layers of subcontractors to avoid responsibility over the workers who were hired by the subcontractors or intermediaries. *Id.*

¹⁴⁶ Korean Supreme Court Decision 2004 Da 29736, decided 7th December 2006. Other later cases are Korean Supreme Court Decision 2011 Da44276, decided 26th June 2013; and Korean Supreme Court Decision 2010 Da50601, decided on 12th January 2012. *See discussion in*, Carson G. Burnham and Bonnie Puckett, at <http://blog.ogletreedekins.com/independent-contractor-or-employee-how-some-countries-differ-2/#sthash>. Also see Whether a door-to-door water filter salesman may be classified as an "employee was decided by the" Yoon and Yang, LLC, at http://www.lexology.com/library/detail.aspx?g=681fcb33-693a_4bdb-914d-1ffed4733c3b, citing Supreme Court case no. 2010Da81407 rendered on 10th May 2012.

¹⁴⁷ The term 'part-time worker' in this Act means an employee whose contractual working hours per week are shorter than those of a full-time worker engaged in the same kind of job in the same workplace.' See <http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/46401/74081/F437818795/OR6401%20Eng2014.pdf>. The International Labour Organization's 2012 Report of the Committee of Experts on the Application of Conventions and Recommendations in its discussion of the Republic of Korea and Convention No. 111, noted the unequal treatment accorded to 'irregular' workers (fixed-term, part-time and agency workers) and its effect of resulting gender discrimination. It is reported that 70 per cent of women in the labour force are non-regular workers and the quality of women's employment had deteriorated as jobs were created by expanding part-time work after the current economic crisis. See discussion, Peter Rossman, 'Establishing Rights in the Disposable Jobs Regime, in Meeting the Challenge of Precarious Work: A Workers' Agenda', 5 INTERNATIONAL JOURNAL OF LABOR RESEARCH 23, 34 (2013), available at http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---actrav/documents/publication/wcms_216282.pdf. Precarious workers earned roughly 40 per cent less than regular workers doing the same or similar work and are found throughout the Korean economy, from manufacturing, to IT services to education. For example, the use of precarious work in the shipyards of Ulsan is common-place. Hyundai Heavy Industries builds massive ships, not by directly employed workforces built instead by dozens of separate crews each headed by a subcontracted employer, which are responsible for a small section of the ship. The pay is very low and workers are often frightened to report injuries on the job, which are

LSA provides the minimum guidelines for conditions for employment.¹⁴⁸ The following are the relevant laws on non-regular workers. It identifies and defines a ‘part-time worker’ and under what working conditions the LSA is applicable. Article 18 defines the working conditions for a part-time worker.¹⁴⁹

The Act on the Protection of Fixed-Term and Part-Time Employees was designed to address the undue discrimination against fixed-term and part-time employees and strengthen the protection of their working conditions.¹⁵⁰ The Act further defines the categories of workers covered by the Act as ‘fixed term employee and defines part-time employee.’¹⁵¹

Dispatch workers are regulated by the Act on the Protection of Dispatch Workers (APDW) that was last amended in 2013.¹⁵²

common, for fear of losing their jobs. Past efforts to unionize workers were crushed; though workers are trying to rebuild though fear of blacklisting and being frozen out of the trade prevents many workers from joining a union. Precarious Work in the Asia Pacific Region: A 10 country study by The International Trade Union Confederation (ITUC) and ITUC Asia-Pacific (2014) 37, at <http://www.ituc-csi.org/precarious-work-in-the-asia?lang=en>.

¹⁴⁸ Korean Labour Standards Act, Act No. 5309, 13th March 1997, *amended by* Act No. 11270, 1st February 2012, available at: http://www.ilo.org/dyn/natlex/natlex_browse.details?p_lang=en&p_country=KOR&p_classification=01.02&p_origin=COUNTRY&p_sortby=SORTBY_COUNTRY (hereinafter LSA).

¹⁴⁹ The working conditions of part-time workers shall be determined based on the relative ratio of their working hours compared with those of full-time workers engaged in the same field of work. Limitations to the application of the LSA again apply in subsection (2) and (3) stating that the Presidential Decree will apply to other matters affecting the determination of working conditions, and for those who work less than 15 hours per week over a four-week period, articles 55 and 60 shall not apply. LSA, *supra* note 2, ch.1, art. 18.

¹⁵⁰ Act on the Protection, Etc. of Fixed-Term and Part-Time Employees, Act No. 8074, Dec. 21, 2006, *amended by* Act No. 11273, 1st February 2012, available at <http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/79807/85982/F-2091075080/KOR79807%20Eng%202012.pdf> (last visited Nov. 9, 2014). The Act applies to businesses where there are 5 or more workers, and depending on the circumstances, sometimes to cases where there are 4 or less workers. The Act regulates the employment of fixed-term employees (Chapter II), and part-time employees (Chapter III), regarding working hours, overtime, length of contract, and conversion into a full-time working position. The Act also addresses unlawful discrimination of fixed-term and part-time workers, supplementary provisions such as prohibition of unfavourable treatment and a written statement of working conditions, and penal provisions for failure to comply with the Act. *Id.* art. 3.

¹⁵¹ The term ‘fixed-term employee’ refers to an employee who has signed a labor contract whose period is fixed (hereinafter referred to as ‘fixed-term labour contract’). The term ‘part-time employee’ refers to a part-time employee as defined in Article 2 of the Labor Standards Act. It also defines the term ‘discriminatory treatment’ as unfavourable treatment in terms of wages and other working conditions etc. given without any justifiable reasons. Act on the Protection, Etc. of Fixed-Term and Part-Time Employees, Act No. 8074, 21st December 2006, *amended by* Act No. 11273, 1st February 2012, available at <http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/79807/85982/F-2091075080/KOR79807%20Eng%202012.pdf> (last visited Nov. 9, 2014).

¹⁵² [The latest translated amendment available online is the 2012 revision] The APDW was amended on 22nd March 2013 and came into force on September 23rd, 2013. Sang Hoon Park, Tae Hwan Oh, WonHyung Kim, Amendments to the Act on the Protection of Fixed-Term and Part-Time Employees and the Act on the Protection of Dispatched Worker specify prohibited areas of discriminatory treatment against fixed-term and part-time employees, and dispatched workers, YOON & YANG, LLC (12th April 2013), <http://www.lexology.com/library/detail.aspx?g=f795cbea-3a63-4dde-a661-4592b29b00b5>; see also, Act on the Protection, Etc., of Dispatched Workers, Act. No. 5512, Feb. 20, 1998, amended by Act. No. 11279, 1st February 2012, available at http://elaw.klri.re.kr/eng_service/lawView.do?hseq=25605&lang=ENG (last visited 9th November 2014) (hereinafter APDW). The amendment to the APDW was motivated in large part by an

This Act governs dispatched (leased) workers and requirements for setting up staffing companies. The Act on the Protection, etc. of Dispatched Workers (hereinafter DWA) focuses on enhancing the ‘flexibility of supply and demand of manpower by managing worker dispatch undertakings properly and setting up criteria such as for working conditions for dispatched workers, thereby contributing to employment security and welfare promotion for dispatched workers.’ It also regulates the jobs permitted, the length of the dispatch period, criteria for permission to work as a leased worker, the process of cancelling a dispatch worker, and the working conditions of dispatched workers, including the terms of the labour contract and labour standards applied. The Act also provides penal provisions for employers who fail to comply with the regulations of DWA.¹⁵³

The Korean Supreme Court also created limits to the law in the 2010 decision regarding a Hyundai worker who was found to be working as a ‘dispatch worker’ rather than the employer’s claim that he was an ‘in-house subcontractor’.¹⁵⁴ The court’s decision marked a judicial trend in attempting to halt the practice of employers misrepresenting dispatched workers as in-house contractors as a means of avoiding the proper statutory protections granted to dispatch workers.¹⁵⁵ Additionally, a decision by the National Labour Relations Commission (NLRC) on 20th March 2013 found that use of dispatch workers at Hyundai and their misclassification resulted in more illegal acts.¹⁵⁶

excessive use of dispatch workers in certain industries, even though illegal; and in March 2013, the National Labor Relations Commission found that the entirety of Hyundai’s assembly line was staffed exclusively by dispatch workers. Kim Jeong-pil, Supreme Court Recognizes GM Korea’s Illegal Dispatch Work, THE HANKYOREH (1st March 2013), http://english.hani.co.kr/arti/english_edition/e_business/576146.html; Kim So-youn & Kim Kyung-rok, Illegal Dispatch Labor Still Prevalent at Hyundai Motor, THE HANKYOREH (21st March 2013), http://www.hani.co.kr/arti/english_edition/e_business/579054.html; Sang Hoon Park, Tae Hwan Oh, WonHyung Kim, Amendments to the Act on the Protection of Fixed-Term and Part-Time Employees and the Act on the Protection of Dispatched Worker specify prohibited areas of discriminatory treatment against fixed-term and part-time employees, and dispatched workers, YOON & YANG, LLC (12th April 2013), <http://www.lexology.com/library/detail.aspx?g=f795cbea-3a63-4dde-a661-4592b29b00b5>.

¹⁵³ Act on the Protection, Etc., of Dispatched Workers, Act. No. 5512, 20th February 1998, art. 46, *amended by* Act. No. 11279, 1st February 2012, *available at*: http://elaw.klri.re.kr/eng_service/lawView.do?hseq=25605&lang=ENG (last visited 9th November 2014).

¹⁵⁴ Ahn v. Commission of National Labor Relations, Supreme Court (S. Ct.), 2008 Du4367, 22nd July 2010 (South Korea).

¹⁵⁵ Anita Gardner, *Korean courts again confirm Hyundai Motor's responsibility for precarious workers*, SOUTHERN INITIATIVE ON GLOBALISATION AND TRADE UNION RIGHTS (8th November 2010), <http://www.sigtur.com/home-mainmenu-1/140-korean-courts-again-confirm-hyundai-motors-responsibility-for-precarious-workers>. ‘The Seoul High Court issued a ruling on November 12 in a case brought by seven former in-house subcontracted workers at Asan Plant of Hyundai Motor. The ruling is in line with previous court rulings, which state that in-house subcontractors’ employees, who worked continuously for two years or longer, are in fact illegal dispatch workers and instead should be treated as the employees of the contractor company.’ *Id.* Additionally, a decision by the National Labor Relations Commission (NLRC) on 20th March 2013 found that use of dispatch workers at Hyundai and their misclassification resulted in more illegal acts. Kim So-youn & Kim Kyung-rok, *Illegal dispatch labor still prevalent at Hyundai Motor*, THE HANKYOREH (21st March 2013), http://www.hani.co.kr/arti/english_edition/e_business/579054.html;

¹⁵⁶ The Enforcement Decree of the Act on the Protection, Etc., of Dispatched Workers, Presidential Decree No. 15828, 1st July 1998, amended by Presidential Decree No. 22799, 30th March 2011, stipulates to matters delegated by the DWA and other issues necessary for its enforcement. Kim So-young & Kim Kyung-rok, *Recent findings show that use of illegal dispatch workers is far more widespread than the company had claimed*, HANKYOREH (21st March 2013), http://www.hani.co.kr/arti/english_edition/e_business/579054.html; see also The Enforcement Decree of the Act on the Protection, Etc., of Dispatched Workers, Presidential Decree No. 15828, 1st July 1998, art.1, *amended by* Presidential Decree No. 22799, 30th March 2011, *available at* <http://www.moleg.go.kr/english/korLawEng?pstSeq=57982&pageIndex=5> (last visited 9th November 2014).

Article 5 of the APDW outlines the scope of work that may be carried out by dispatch workers.

(1) Jobs permitted for worker dispatch shall be those considered suitable for that purpose given their nature or required professional knowledge, skills or experience, and prescribed by Presidential Decree, except for those directly related to production in the manufacturing industry. (2) Notwithstanding paragraph (1), if a vacancy occurs due to childbirth, illness, injury, etc., or there is a need to temporarily or intermittently secure manpower, worker dispatch undertakings may be carried out.¹⁵⁷

Like other dispatch worker statutes, the APDW tries to limit the use of dispatch workers and prevent the replacement of full-time employees with dispatch workers. The APDW goes on to further provide a list of five categories of work that may not be performed by dispatch workers.¹⁵⁸ This includes: jobs relating to construction sites, certain jobs related to harbor and rail transit, jobs on the high seas, harmful or hazardous jobs, and other jobs that may be determined by Presidential Decree on the grounds of worker protection.¹⁵⁹

Article 6 provides limits on the duration of dispatch work.¹⁶⁰ Section 1 provides that ‘worker dispatch shall not exceed one year, except for cases falling under Article 5(2)’.¹⁶¹ Unless the dispatch work falls into the narrow category of temporary replacement for illness, etc., under Article 5 Section 2, dispatch work is limited to one year unless all parties involved agree otherwise. Article 6 Section 2 provides that “if there is an agreement between the [LDA], [receiving employer], and the dispatched worker, the period may be extended . . . the extended period . . . shall not exceed one year, and the total dispatch period, including the extended period, shall not exceed two years.”¹⁶²

Article 6-2 governs the working conditions of dispatch workers and provides that working conditions for the dispatch worker shall be as follows: ‘1. If among the workers employed by the [receiving employer], there is a worker performing the same or similar kind of work the dispatch worker performs, working conditions prescribed in employment rules applicable to the worker shall apply to the dispatched worker; and 2. If among the workers employed by the [receiving employer], there is no worker performing the same or similar kind

“The NLRC decision, which partially acknowledges that illegal dispatch work is taking place, represents a retreat from decisions by the Supreme Court, which found that subcontracting is impossible in the automobile manufacturing process (GM Korea) and that the automobile manufacturing process, which is based on a conveyor belt system, is illegal dispatch work (Hyundai Motor). However, it is still very significant in the sense that it reconfirms the fact that Hyundai Motor is an illegal dispatch workplace.” Kim So-young & Kim Kyung-rok, *Recent findings show that use of illegal dispatch workers is far more widespread than the company had claimed*, HANKYOREH (21st March 2013), http://www.hani.co.kr/arti/english_edition/e_business/579054.html. ‘The NLRC has followed the footsteps of the Ministry of Labor and the Supreme Court to recognize that Hyundai Motor has been widely involved in illegal dispatching,’ said a statement released on the same day by the irregular workers’ union at Hyundai Motor. ‘Since the NLRC has judged that Hyundai Motor is the employer, it must regularize the illegal dispatch workers and immediately comply with our demands for negotiations,’ the group demanded through the statement.’ *Id.*

¹⁵⁷ APDW, *supra* note 151, art. 5, §§ 1-2.

¹⁵⁸ *Id.* § 3.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* art. 6.

¹⁶¹ *Id.* § 1.

¹⁶² APDW, *supra* note 151, art. 6, § 2.

of work the dispatch worker performs, working conditions for the dispatch worker shall not be worse than the existing.’¹⁶³

The statute effectively ensures that dispatch workers will have the same working conditions as full-time employees. Even if there are no full-time employees doing the same work as the dispatch worker, the dispatch worker is still entitled to the minimum standard of working conditions afforded full-time employees. Dispatch workers are also entitled to the same compensation as full-time employees.¹⁶⁴ This includes not only wages, but also bonuses, such as holiday and periodic bonuses, as well as any performance based incentives or other employment benefits.¹⁶⁵

A. Permission Requirements for LDA

Article 7 requires anyone who “intends to carry out a worker dispatch undertaking” to obtain permission from the Ministry of Employment and Labour.¹⁶⁶ Article 8 disqualifies someone from engaging in dispatch work if the person is a minor, incompetent, quasi-incompetent, declared bankrupt, or has been sentenced to prison and two years have not elapsed from the end of the prison term.¹⁶⁷ These disqualifications also apply to any judicial person that has an executive officer falling into one of the enumerated disqualified categories.¹⁶⁸ Article 14 places further restrictions by limiting the concurrent businesses someone may run while pursuing a worker dispatch undertaking.¹⁶⁹ They include the food and entertainment industry, the lodging industry, marital counselling or matchmaking services, and other businesses prescribed by presidential decree.¹⁷⁰ The APDW strives to ensure the integrity of those engaged in worker dispatch and also prevent the use of worker dispatch for illegal activities, such as prostitution.

In order to receive permission from the Ministry of Employment and Labour, a prospective LDA must comply with the list of criteria set forth in Article 9. A prospective LDA must have the assets and facilities to enable worker dispatch to be carried out properly.¹⁷¹ The prospective LDA is also prohibited from targeting a small number of receiving employers.¹⁷² Article 9 leaves open the specific detailed criteria to be determined by Presidential Decree.¹⁷³

¹⁶³ ADPW, *supra* note 151, art. 6-2.

¹⁶⁴ Sang Hoon Park, Tae Hwan Oh, WonHyung Kim, Amendments to the Act on the Protection of Fixed-Term and Part-Time Employees and the Act on the Protection of Dispatched Worker specify prohibited areas of discriminatory treatment against fixed-term and part-time employees, and dispatched workers, YOON & YANG, LLC (12th April 2013), <http://www.lexology.com/library/detail.aspx?g=f795cbea-3a63-4dde-a661-4592b29b00b5>.

¹⁶⁵ *Id.*

¹⁶⁶ ADPW, *supra* note 7, art. 7.

¹⁶⁷ *Id.* art. 8.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* art. 14.

¹⁷⁰ *Id.*

¹⁷¹ ADPW, *supra* note 151, art. 9.

¹⁷² *Id.* The legislative history is not clear on this, but perhaps it is to prevent large companies from an ‘alter ego’ relationship with a feeder company.

¹⁷³ *Id.*

Once obtained, permission is valid for a period of three years and may be renewed for an additional three years.¹⁷⁴ If the LDA voluntarily discontinues its labour dispatch service, then the LDA must inform the Ministry of Employment and Labour, at which time the permission shall be revoked.¹⁷⁵ The Ministry of Employment and Labour can also revoke permission or suspend an LDA's operation if the LDA is found to have violated any of the provisions enumerated in Article 12. This includes, but is not limited to, obtaining permission by fraudulent means, using dispatch workers in a prohibited industry, operating a prohibited concurrent business, failing to obtain permission from the Ministry for material changes to important matters, failing to report voluntary cessation of business operations, and failing to keep accurate records of dispatch activities.¹⁷⁶

In Korea there also is the choice to prosecute violations of the APDW as criminal offenses. Article 42 provides that 'any person who dispatches a worker to be employed for work harmful to public health or public morality shall be punished by imprisonment of up to five years or a fine not exceeding thirty million won'.¹⁷⁷ Article 43 punishes violations of industry restrictions, dispatch durations, and permission requirements with imprisonment of up to three years or fines up to 20 million KRW, or slightly less than 20,000 USD.¹⁷⁸ The use of dispatch workers to replace full-time employees engaged in labour stoppages or other industrial action is prohibited under Article 16, and Article 44 provides for a penalty of one year imprisonment or a fine of 10 million KRW for a violation, slightly less than 10,000 USD.¹⁷⁹ Article 45 extends criminal liability to all agents, servants, or employees of a juristic person or individual if that agent, servant, or employee's negligence in monitoring or supervising the dispatch work facilitated the violation of the APDW.¹⁸⁰

Article 6-2 provides a victimized dispatch worker with the remedy of employment at the receiving employer, unless the dispatch worker objects.¹⁸¹ The receiving employer is deemed to have entered directly into employment relations with a dispatch worker if the receiving employer uses the dispatch worker in violation of either the two-year maximum duration or in violation of the restricted industries.¹⁸² Dispatch workers are also entitled to employment at the receiving employer if the LDA is in violation of permission requirements.¹⁸³ In all cases, including where the LDA is exclusively at fault, the dispatch worker is entitled to immediate employment at the receiving employer.¹⁸⁴ The receiving employer is not allowed the two

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* art. 11.

¹⁷⁶ *Id.* art. 12.

¹⁷⁷ *Id.* art. 42. Thirty million won (hereafter KRW) converts to slightly less than 30,000 USD. *US Dollar-South Korean Won Exchange Rate*, BLOOMBERG (14th May 2014), <http://www.bloomberg.com/quote/USDKRW:CUR>.

¹⁷⁸ *Id.*; see APDW, *supra* note 151, art. 43.

¹⁷⁹ APDW, *supra* note 151, arts. 16, 44; Bloomberg, *supra* note 176.

¹⁸⁰ APDW, *supra* note 151, art. 45.

¹⁸¹ *Id.* art. 6-2. Examples of employer violations could include retaining the dispatcher too long or misclassifying the worker as a non-employer.

¹⁸² *Id.*

¹⁸³ K.Y. Kim, Dispatched Workers Used in Ways Contrary to Statutory Limitations Should be Immediately Employed by Service Recipient Company Under Amended Statute, INTERNATIONAL LABOR & EMPLOYMENT LAW COMMITTEE NEWSLETTER (April 2012), http://www.americanbar.org/content/newsletter/groups/labor_law/int_newsletter/ilel_news20121/april2012/1204_aball_int_skorea.html.

¹⁸⁴ *Id.*

years of dispatch work that would have been allowed but for the non-compliance of the LDA.¹⁸⁵ Article 46 provides if a receiving employer fails to offer a victimized dispatch worker employment in violation of Article 6-2, the receiving employer will be fined up to 30 million KRW.¹⁸⁶

The Enforcement Decree of the Act on the Protection, etc. of Dispatched Workers, Presidential Decree No. 15828, 1st July 1998 stipulates to matters delegated by the DWA and other issues necessary for its enforcement.

As observed earlier, but also pertinent here, the Korean Supreme Court also created limits to the law in the 2010 decision regarding a Hyundai worker who was found to be working as a ‘dispatch worker’ rather than the employer’s claim that he was a ‘in-house subcontractor’.¹⁸⁷ The court’s decision marked a judicial trend in attempting to halt the practice of employers misrepresenting dispatched workers as in-house contractors as a means of avoiding the proper statutory protections granted to dispatch workers.¹⁸⁸ Additionally, a decision by the NLRC on 20th March 2013 found that use of dispatch workers at Hyundai and their misclassification resulted in more illegal acts.¹⁸⁹

In view of the above cases and what might be presumed to be a continuing dilemma with employer compliance and law enforcement, currently there is no reported legislative activity to further amend the Dispatch Law or otherwise improve enforcement.¹⁹⁰

Table 9 summarizes the rights for regular and selected categories of non-regular workers in Japan. Similar to the case for China and Japan, despite the provision of rights to the majority of workers, these rights may not materialize in reality, such as the right to

¹⁸⁵ *Id.*

¹⁸⁶ APDW, *supra* note 151, art. 46.

¹⁸⁷ Ahn v. Commission of National Labor Relations, Supreme Court (S. Ct.), 2008 Du4367, 22nd July 2010 (S. Kor.).

¹⁸⁸ Anita Gardner, *Korean courts again confirm Hyundai Motor's responsibility for precarious workers*, Southern Initiative on Globalisation and Trade Union Rights (8th November 2010), <http://www.sigtur.com/home-mainmenu-1/140-korean-courts-again-confirm-hyundai-motors-responsibility-for-precarious-workers>. ‘The Seoul High Court issued a ruling on November 12 in a case brought by seven former in-house subcontracted workers at Asan Plant of Hyundai Motor. The ruling is in line with previous court rulings, which state that in-house subcontractors’ employees, who worked continuously for two years or longer, are in fact illegal dispatch workers and instead should be treated as the employees of the contractor company.’ *Id.*

¹⁸⁹ Kim So-young & Kim Kyung-rok, *Recent findings show that use of illegal dispatch workers is far more widespread than the company had claimed*, HANKYOREH (21st March 2013), http://www.hani.co.kr/arti/english_edition/e_business/579054.html. ‘The NLRC decision, which partially acknowledges that illegal dispatch work is taking place, represents a retreat from decisions by the Supreme Court, which found that subcontracting is impossible in the automobile manufacturing process (GM Korea) and that the automobile manufacturing process, which is based on a conveyor belt system, is illegal dispatch work (Hyundai Motor). However, it is still very significant in the sense that it reconfirms the fact that Hyundai Motor is an illegal dispatch workplace. “The NLRC has followed the footsteps of the Ministry of Labor and the Supreme Court to recognize that Hyundai Motor has been widely involved in illegal dispatching,” said a statement released on the same day by the irregular workers’ union at Hyundai Motor. “Since the NLRC has judged that Hyundai Motor is the employer, it must regularize the illegal dispatch workers and immediately comply with our demands for negotiations,” the group demanded through the statement.’ *Id.*

¹⁹⁰ Inasmuch as this law is still relatively new, whether compliance and enforcement will be forthcoming, especially against the big car companies, is unknown at this time.

unionization and collective bargaining when the mainstream unions are not motivated to organize and represent them (see Section 3).

Table 9. Summary of rights and entitlements, by type of employment - Korea

Right/ standard	Permanent employee	Temporary worker	Daily worker	Agency worker
Freedom of association & collective bargaining	✓	✓	✓	✓
Anti-discrimination/equal employment opportunity	✓	✓	✓	✓
Prohibition on child labour	✓	✓	✓	✓
Prohibition on forced labour	✓	✓	✓	✓
Explicit right to equal treatment with permanent employees	n/a	✓	✗	✓
Occupational health and safety	✓	✓	✓	✓
Workers' compensation	✓	✓	✓	✓
Social security (social insurance; health insurance; unemployment insurance; pension)	✓	✓	✓	✓
Minimum wage	✓	✓	✓	✓
Protection against termination of employment	✓ subject to minimum service threshold	✓ subject to minimum service threshold	✓ subject to minimum service threshold	✓ with direct employer, and subject to minimum service threshold
Protections on working hours	✓	✓	✗	✓
Leave	✓ subject to minimum service threshold	✓ subject to minimum service threshold	✓ subject to minimum service threshold	✓ subject to minimum service threshold

Source: Compiled by authors, based on survey of relevant laws and regulations

6. Regulatory responses to non-standard employment

From the above discussion, we can see that the growth of non-standard employment in its various forms in China, Japan and Korea has to a large extent been facilitated by reforms in the economic policies and labour laws in these countries in an attempt to increase labour market flexibility to enhance business competitiveness in the globalised economy. For Japan and Korea, reform pressure came from international pressure groups. What becomes clear is that economic and legal reforms in these three countries impact on non-standard employment in two directions. On the one hand, it was the labour market deregulation in Japan and Korea in the 1980s and 1990s that has facilitated the significant growth of non-standard employment. For example, the legalisation of the private temporary staffing agency industry that took place in 1986 and 1999 led to the rise in the use of agency temps across a wide range of occupations and industries (c.f. Coe et al., 2011; Osawa et al., 2013).

On the other hand, governments of all three nations have been under pressure to introduce regulations to provide better protection to those in non-standard employment, resulting in the extension of legal coverage to various categories of non-standard workers (see Table 6). These include, for example, the enactment of the Social Security Law in 2011, the amendment of the LCL in 2013 and the enactment of the Provisional Regulations on Labour Dispatch in 2014 in China in an attempt to improve the quality of non-standard employment and to reduce the use of fixed-term employment and agency employment. On 21st March 2015, the State council of China issued a comprehensive document: ‘Opinions on Building Harmonious Labour Relations’, which emphasises its intention to strengthen workers’ basic rights, including tighter enforcement of on-time wage payment, rest days and further regulating the use of hourly work, dispatched labour, human resource outsourcing and subcontracting.¹⁹¹ In Japan, a series of regulatory activities have also taken place to re-regulate non-standard employment, as illustrated in Table 10.¹⁹² For example, the 1999 revision of the Temporary Dispatching Work Law was an attempt to curb widespread use of agency temps ‘by prohibiting the practice of establishing subsidiaries dedicated to providing temps for a single parent firm’ (Shire, 2002, p.26). However, the Japanese Government’s (more precisely the Democratic Party of Japan that came into power in 2009) intention to impose further restriction on the use of temporary agency workers was undermined by the 2011 earthquake, tsunami and nuclear crises. As a result, the public lost confidence with the Party which was voted into power in large part because of its pledge to re-regulate the labour market to reduce widening social and economic disparities (Osawa et al., 2013). In Korea, in September 2014, the Act on Protection Etc. of Fixed-Term and Part-time Workers (‘Temporary Workers Act’) and the Act on Protection Etc. of Dispatch Workers (‘Dispatch Workers Act’) were amended to offer greater protections to non-regular workers in Korea. Amendments stipulate corrective orders for discriminatory treatment, punitive damages, and compensation for overtime performed by part-time workers.

It should be noted that increased regulation on non-standard employment may actually have the adverse effect. For example, in China, the tightening of labour laws (i.e. the enactment of the LCL in 2008) has inadvertently led to the growth of non-standard employment as a result of employers’ creative compliance of the law. In Korea, in-company subcontracting has grown substantially in the manufacturing industry as employers seek to avoid regulations on irregular workers (i.e. Act on the Protection Etc. of Fixed-Term and Part-Time Employees and the Act on the Protection Etc. of Temporary Agency Workers). Similar opportunistic behaviour has also been observed in Japan.

¹⁹¹ See *Jilin Workers’ Newspaper*, 2nd April 2015, p.3.

¹⁹² See Imai (2004) for a more detailed review of the legislative attempt to re-regulate the temporary agency industry in Japan.

Table 10. Changes in the Labour Supply and Temporary Work Regulations in Japan, 1990-2003

1990	The revision of the Ministerial Ordinance of Temporary Dispatching Work Law Extension of occupational list and length of dispatching: permitted occupations expanded from 13 to 16, and the term of dispatch was extended from nine months to one year.
1994	The revision of Temporary Dispatching Work Law Replacement of positive list with negative list for elderly workers: the regulations on the temporary dispatched work are lifted for workers over 60 except for a short list (negative list) of occupations such as transportation, construction, and security.
1996	The revision of Temporary Dispatching Work Law Extension of occupational list: expansion of the permitted occupations from 16 to 26 (note: the new law in 2015 will remove these categories as discussed in Section 5).
1997	The revision of the Ministerial Ordinance of Employment Security Law Replacement of positive list with negative list, loosening the conditions to start private job placement and limitations on charges: some exceptions are listed as “negative list.” Negative list includes clerical works, sales, service occupations except for already accepted ones, security, agriculture and fishery, construction and manufacturing assembly line.
1997	ILO revised Convention No. 181 Private Employment Agencies Convention: accept the existence of the private personnel businesses, and set the standards for worker protection.
1999	The revision of Temporary Dispatching Work Law Replacement of positive list with negative list, extension of the terms of dispatching: few exceptions are listed as ‘negative list’. Negative list includes transportation, construction, security, manufacturing assembly line, and medical occupations. Term of dispatch for the original 26 occupations is extended from one to three years, for the rest of the occupations, set at one year.
1999	The revision of Employment Security Law Radical removal of the occupations from negative list: all the occupations on negative list are removed except for port services and construction.
2003	The revision of Temporary Dispatching Work Law Partial removal of negative list, partial extension of terms of dispatching: among a few negative list occupations, manufacturing assembly line to be permitted for dispatch up to one year. For the original 26 occupations, the limitation of the term of dispatch is to be kept, and for other occupations, the term will be extended to three years.
2003	The revision of Employment Security Law Loosening the conditions to start private job placement: deregulation of the limitation of private job placement as side business in the industries such as restaurant, hotel business, second hand shop, and money-lending business.

Source: adapted from Imai (2004, pp.25-26)

It is important to note that regulatory responses from China, Japan and Korea are not restricted to changes in labour laws to directly address non-standard employment, amendments are also made in social welfare policy to extend the coverage to those who are traditionally outside, or much less well covered by social security. Such an extension is

necessary to eliminate poverty as the role of the extended family as a source of income support and social care, a tradition informed by the Confucian values, has been weakening in all three societies. Similarly, the introduction of social care programmes such as parental leave, childcare and elderly care, and skills-training in Japan and Korea have had some effects in helping all workers, particularly those in non-standard employment who may otherwise not receive such benefits from their employer as the regular workers would (c.f. Peng, 2012). However, the uptake of social security schemes, such as pension and unemployment insurance, from those in non-standard employment who would stand to gain the most remains relatively low, as indicated in earlier sections. The low level of social insurance coverage indicates poor compliance from employers and unaffordability from the workers.

In short, despite efforts by the Chinese, Japanese and Korean government to re-regulate non-standard employment, considerable gaps remain in the employment terms and conditions and social security benefits between those in standard and non-standard employment. In addition, legislative responses alone are insufficient without moral commitment from the employers to provide equitable employment opportunities and outcomes to their workers (e.g. Kim and Lee, 2014). In the next section, we assess the impact of non-standard employment on individuals and the labour market more generally.

7. The impact of non-standard employment

What we have seen so far is that, despite some commonalities, forms of non-standard employment differ across China, Japan and Korea as a result of different legislative frameworks and specific socio-economic contexts, and impact workers in different ways. In this section, we first examine the impact of non-standard employment on individual workers. We then discuss the impact of non-standard employment on the development of the labour market.

7.1 Impact on workers

Poor terms and conditions, poor social security and workplace welfare provisions, and poor mental wellbeing have been some of the main economic, social and psychological consequences of those in non-standard employment, with some categories, such as women, foreign and rural migrant workers, faring worse than others (also see Section 4.1). For example, Du et al.'s (2009) study found that engaging in informal employment incurred a 44 per cent wage penalty for urban workers and 33 per cent for rural migrant workers in China. In addition, only 29 per cent of migrant workers in formal employment and 2 per cent of migrant workers in informal employment were entitled to statutory pensions compared with 82 per cent of formal workers with urban residential status (also see Zhou, 2012).¹⁹³

In Japan, according to statistics from the Ministry of Health, Labour and Welfare (2009), almost all regular workers are enrolled in all of the social programs, whereas only 60 per cent of non-regular workers were enrolled in the unemployment insurance programme, 48.6 per cent in health insurance, and 46.6 per cent in the public pension scheme. Among non-regular workers, temporary workers and part-time workers have the lowest enrolment rates in social

¹⁹³ Also see Wang (2011) for an overview of problems in the social security protection for rural migrant workers prior to the enactment of the Social Security Law in 2011 in China; also see Meng (2012) for an overview of the labour market reform of China since the late 1970s and wage inequality between the urban and rural migrant workers in which the latter are disadvantaged due to their household registration status.

insurance programmes (cited in Osawa et al., 2013, p.317). Some part-time workers earn as little as 60 per cent of that earned by regular workers and do not receive training, pension contributions or unemployment insurance (Coe et al., 2011). In addition, non-regular workers are more likely to report poorer health conditions and receiving health check-ups less frequently than regular workers (e.g. Inoue et al., 2012). In a similar vein, Kachi et al.'s (2014, p.465) study found that 'precarious employment is associated with double the risk of serious psychological distress incidence among middle-aged Japanese men and – when stratified by marital status – among unmarried women. This highlights a major gender difference in the association between precarious employment and risk of serious psychological distress'.

In Korea, income disparities between regular and irregular workers have been widened as the latter earn less than half of the wage of the former (Kim and Park, 2006; OECD, 2012). Wage disparity between regular and non-regular workers is even more striking when gender is taken into account, resulting in female non-regular workers earning about 38.3 per cent of male regular workers in 2010 (see Table 11). Working poor is seen as a major contributor to the poverty rates in Korea in both absolute and relative terms (Kim and Park, 2006; OECD, 2000, 2012).¹⁹⁴ In addition, workers in non-standard employment are also more likely to suffer from mental health problems compared to standard employees (Kim et al., 2006).

Table 11. Wage disparity by type of employment and gender, 2003-2010 in Korea

Type	2003	2004	2005	2006	2007	2008	2009	2010
Male regular	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Female regular	68.9	69.4	69.6	70.1	68.0	67.4	68.5	67.3
Male non-regular	56.0	55.3	54.0	54.3	53.1	51.0	49.4	47.9
Female non-regular	41.5	43.0	41.2	41.5	39.4	40.4	39.0	38.3

Source: Kim, Y. S. (2011, p.26), cited in Shin (2013, p.346).

In all three countries, the existence and growth of non-standard employment not only has a negative impact on those in this form of employment, but also those in formal employment. For example, in the interest of saving regular jobs, labour unions in Japan and Korea have retreated from making high wage demands as well as other concessions. Further, the co-existence of in-house subcontract workers and regular employees undermines the cohesion of workplace relationship and labour solidarity, as the former are largely not organized and bargained for by the unions (e.g. OECD, 2012). For example, Lee and Frenkel's (2004) study of workplace relationships between regular and contract workers in a large automotive plant in Korea revealed a variety of forms of moral exclusion of contract workers. More specifically, regular workers play an active role in discriminating against contract workers through constructing a sense of inferiority and using tactics of discrimination, for example, in resource and social cost distribution. Double standards are applied in inspecting quality of production and workplace behaviour of regular workers and their contract counterparts, with the latter being treated much more harshly.

¹⁹⁴ 'According to a recent study (Lee, 2011), 20 per cent of non-regular workers are in relative poverty. In addition, a 2009 study found that the rate of poverty among the working-age population was only 1.5 per cent for regular workers, but as high for 13.5 per cent for temporary employees and 26.3 per cent for day labourers' (cited in OECD, 2012, p.125).

7.2 Impact on labour markets

The current state of non-standard employment affects the labour markets of China, Japan and Korea in a number of ways, reflecting ‘the logic and hegemony of labour market flexibility’ (Urano and Stewart, 2007, p.120) underpinned by labour regulations and employers’ strategy in recent decades. For China, this form of employment has created job opportunities to absorb surplus rural labour, many of whom would otherwise be less well off financially. In Japan and Korea, non-standard employment has also created job opportunities for women and older workers who are structurally marginalized from the primary labour market for regular jobs. However, existing evidence suggests that inter-segment mobility has been limited and largely taken the downward direction from the primary to secondary labour market. Such a downward move has largely been involuntary and employer-initiated as the core of regular workers is shrinking (e.g. Hassard et al., 2007; Kuruvilla et al., 2011; Osawa et al., 2013). While upward transition from the secondary to primary labour market may exist for well-educated younger (male) workers (e.g. OECD, 2012; Osawa et al., 2013),¹⁹⁵ the majority of those in non-standard employment (e.g. older workers, women, rural migrants and foreign workers) have little prospect of upgrading and career progression (e.g. Jeon, 2014a). This is even when Japan and Korea are facing exacerbating labour shortage and relying on foreign labour to fill the gaps.

This trend of labour deployment suggests that while education (human capital) may play a role in determining the labour market outcomes of the growing force of workers in non-standard employment, it is the structure of the labour market that plays a more fundamental role (e.g. Li, 2012). In the context of intensifying global competition, the labour market restructuring that has taken place in all three countries, especially in Japan and Korean, has been strongly influenced by government policy reforms and employers’ strategic responses. As a result, a significant proportion of the workforce remains trapped in non-standard work. It is important to note that this large labour market segment is then further stratified hierarchically along the lines of skill levels, gender, age, nationality and ethnic ties (for Japan),¹⁹⁶ and residential status (for China). Moreover, non-standard employment is segmented by geography, industrial sector, firm size, and occupation, as is found in temporary employment in Japan (e.g. Coe et al., 2011). The structural embeddedness of these cohorts of non-standard workers, despite various (intra-segment) mobility opportunities and patterns, indicates that their labour market position is not just an outcome of economic determinants, but also a culturally mediated social process that is largely beyond the control of individual workers (c.f. Tsuda, 1999).

Despite the benefits of a dual labour market, dualism with a high proportion of non-standard employment carries a number of negative effects on the labour market development, from a human capital development perspective and a social justice perspective.

¹⁹⁵ Yu’s (2012, p.753) study of labour market mobility in Japan ‘shows that accepting a contingent job delays individuals’ transition to standard employment more than remaining jobless. Moreover, having a contingent job, rather than having no job, leads Japanese men to have lower occupational status after they transition back to standard employment’. Yu (2012, p.763) argues ‘that in a highly segmented labor market like Japan’s, the strict separation of labor pools for standard and contingent jobs makes being labelled as a contingent worker particularly detrimental. Meanwhile, the legacy of Japan’s welfare corporatism alleviates the stigma of unemployment, making individuals better off jobless than having a contingent job. This research thus demonstrates the importance of labor-market contexts in shaping the scarring effects of contingent work arrangements.’

¹⁹⁶ For example, Urano and Stewart’s (2007) study revealed that, in Japan, migrants of Japanese descent enjoy a higher employment status in the production chain with higher salaries than workers from other Asian countries with trainee visas or without documents.

From a human capital perspective, non-standard employment is not conducive to skill development in this segment, even with state training intervention. Existing evidence suggest that employers are much less willing to invest in training non-regular workers for human capital development and rewarding them through wage growth (e.g. Zhang, 2013; Hara, 2014).¹⁹⁷ Surprisingly, workers may not be willing to receive training either for various reasons. For instance, a survey conducted in the Yangzi River Delta area, a relatively affluent economic zone in the eastern region of China, revealed that 44 per cent of the young rural migrant workers were unwilling to participate in skill training. Amongst those unwilling, 77 per cent gave the following reasons: no time, no opportunity, and financial difficulty. In addition, the survey found that the most important reason for the new generation of rural migrant workers not wanting to participate in training was the anxiety they are experiencing due to poor job environment in the urban area. Some rural migrant workers also believed that the primary motive of the training offered by enterprises is productivity enhancement and not for their benefit. This is because training was often conducted in the workers' spare time and not remunerated. Skill development and productivity gain as a result of training has not been adequately rewarded by pay rise or promotion (Zhang, 2013).

The large segment of non-standard employment may also mask the fact of under-employment (e.g. Kim and Park, 2006) in China, Japan and Korea, where unemployment rate has been reported relatively low at less than 5 per cent for all three countries in recent years. This is not only an economic issue, but also a social justice issue. Regardless their relative size, non-standard workers by and large lack bargaining power economically and politically in all three countries essential to advancing their rights and interests.

From a social justice perspective, labour market inequality and broader social inequality have negative consequences to those in non-standard employment. First, this is reflected in income disparities as a result of lower wages and limited social security provision legally entitled and/or actually enjoyed by this large segment of the workforce. Second, inequality holds down career advancement, particularly in the case for women – a phenomenon that is more serious in Japan and Korea than in China (e.g. Benson et al. 2007; Cho and Kwon, 2010; Cooke, 2010). As mentioned earlier, women and their marital status are crucial sources of discrimination against their employment status and wage level in Japan and Korea and to a lesser extent in China. In Korea, women are encouraged by companies and union members to resign 'voluntarily' and accept a re-employment contract as an irregular worker with lower pay and less job security when their companies are undergoing downsizing processes (Chun, 2006). In Japan, new opportunities created for women by the equal opportunity law in the late 1980s and early 1990s were then eroded when Japan's economic growth 'bubble' burst after 1992 (Gelb, 2000). Compared to China, a relatively weaker childcare support system in Japan and Korea adds further constraints to women's labour market participation and career progression (Cooke, 2010). Research evidence (e.g. Duignan and Iaquinto 2005; Cho and Kwon 2010; Xiao and Cooke 2012) suggests that employers in all three countries appear to share a common (mis-)perception that women employees are less productive or committed to their job/career due to their family commitment. Employers are hence much less willing to invest in training and development of female employees.

¹⁹⁷ Hara's (2014, p.337) study of on-the-job training of non-regular workers did show that training participation 'make the transition from non-regular to regular employment in the current occupation more likely, enhancing the probability of future wage increase'.

8. Conclusions

This study charted the growth of various forms of non-standard employment in China, Japan and Korea since the 1980s and the main reasons for this growth. It also examined the extent to which workers in non-standard employment are covered, in principle and in reality, by fundamental principles and labour regulations. Statistics from all three countries indicate that workers in non-standard employment are generally much less well-off compared with those in standard employment, measured by the level of wage income, various forms of social security provision and other forms of wellbeing such as health. Mobility from precarious to regular jobs has been limited as employers are cautious in opening up permanent positions to contain cost and improve labour flexibility. Despite some positive effect, regulatory attempts from the governments have been met with implementational slippage, creative compliance and simply non-compliance in all three countries, especially China. As such, the existence of rights and new regulatory interventions from the state have not led to the reduction of non-standard employment in absolute terms or the improvement of conditions of non-standard workers, but created pressure/opportunity for the emergence/growth of other sub-categories of non-standard employment. Instead, workers are merely squeezed from one type of non-standard employment to another without the concerted effort and commitment from other key institutional actors, particularly the trade unions, to uplift their employment prospects.

We argue that the evaluation of the labour rights and conditions of non-standard employment of a specific country needs to take into account its broader institutional arrangements, societal culture of gender norms and social hierarchies, and historical trajectory. Regulations are one (albeit crucial) institutional dimension that segments the labour market, whereas other institutional dimensions play a significant role in determining how specific nations *choose to respond*, with policy reform and regulation, to matters such as exogenous shocks (e.g. financial crises which have partly driven the casualization of labour markets), and which groups of workers end up bearing the brunt of the this casualization. In other words, broader institutional dimensions determine if and how these societies regulate non-standard forms of work, and whose interests are served and indeed, not served, by the relevant regulation. Further, labour market reforms as experienced in China, Japan and Korea may be a rearrangement of ‘old inequalities’ (Shire, 2002) of the society concerned, disregarding the size of the disadvantaged group(s). For example, in China, it is the farmers/rural migrant workers who remain marginalized in the dual labour market across the urban-rural divide. In Japan and Korea, the gendered structuring of the labour market and the rise in non-regular work has undermined achievements made on gender equality under political pressure during the 1980s, with a larger proportion of women ending up in non-regular work. For countries that rely on immigrant workers to address their labour shortage, demographic of the domestic workforce, political and social attitude towards immigrants, and the pecking order of the sending countries explicitly and implicitly drawn by the destination country government and nationals are further dimensions to be taken into consideration. It is the uniqueness of these institutional and social forces that marks the distinct characteristics of non-standard employment and the labour market segments in which workers are organized in these countries, despite sharing some common features.

Finally, this study brings to the fore a number of related implications, or more precisely, questions to stakeholders, as outlined below.

1. Given that permanence of temporary work appears to be a common trend in all three countries, what may be the broader social impact beyond the labour markets? For example, existing studies have highlighted the detrimental effect on young people entering the labour market, including delaying or avoiding marriage and family formation, and the low fertility rate, as well as the negative effect of working poverty on health and on single mothers/women in particular.

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2. What more can be done by the governments to enhance the labour market outcomes of some of the most disadvantaged groups of workers, such as women, rural migrant and foreign workers, to sustain the country's economy on the one hand and to create a more inclusive and fair society on the other? For example, how can social welfare policy be better integrated with labour market reforms and reinforced by labour regulations to create more equitable outcomes for those in non-standard employment?
 3. What human resource impact will the persistent trend of non-standard employment have on sustainable business competitiveness? How can we assess the negative impact of declining job quality on human resource management, including burnout, labour turnover, workplace tensions, and reduced motivation and productivity, and make employers aware of the limit of poor jobs? What training incentives and opportunities can the state provide to ensure its national competitiveness in the long term? This is particularly in the context that unpromising employment outlook is said to have led to the brain drain in Korea as a result of the emigration of skilled and well-educated Korean workers in search for better employment and career prospects (e.g. Kim and Park, 2006).
 4. How can the main unions broaden their representational scope and develop an effective strategy to represent both standard and non-standard workers? What institutional space and resources can NGOs and civil society create to step up their support to those in non-standard employment when the main stream institutional forces are not in their favour?
 5. What may be the deeper interactive effects of bi-lateral political relationship, government policy/regulations on immigrant workers, and labour market supply and demand on the non-standard employment of immigrant workers? Of particular relevance in this study is the fact that China is a sending country to Japan and Korea and the employment prospect and wellbeing of these industrial trainees/interns are intricately linked to bi-lateral government relationships, both political and economic, as well as bi-lateral business and social relationships.
 6. Finally, what generalizable insights can we gain from this study into the challenges/barriers to institutional/regulatory change that will hold beyond the three countries that we have analyzed? What lessons can be learned for other countries?

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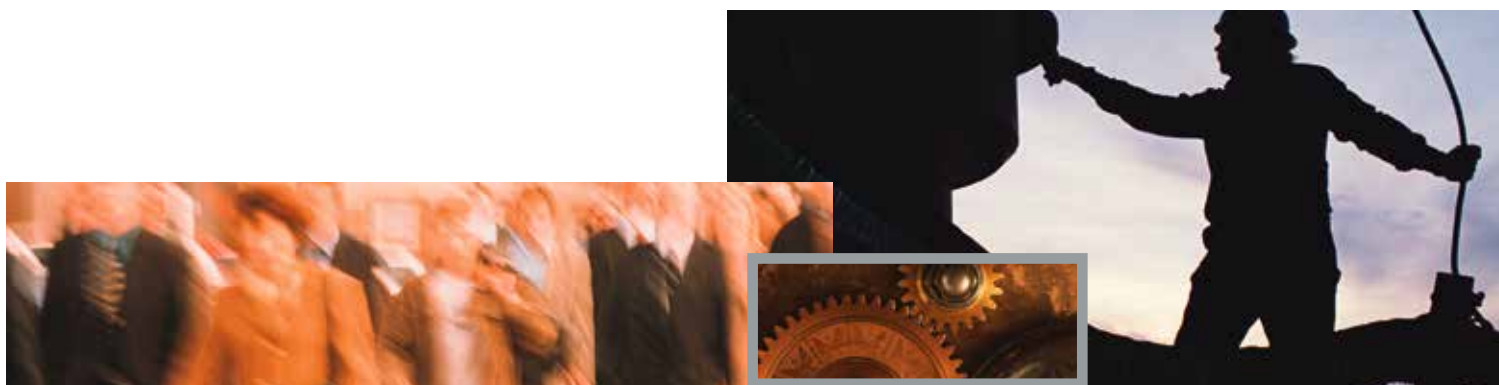
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