Disadvantageous Changes to Working Conditions: Focusing on the Korean Supreme Court's Decisions on Disadvantageous Changes through Work Rules and Collective Bargaining Agreements

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Abstract

Industrial labor relations in Korea had been formulated on the basis of a system of life-long-term employment. Accordingly, the development of legal principles and institutions relating to labor law had once been premised on life-long employment and sustained improvement in working conditions. After the 1980s, however, rapid changes in the economic environment combined with the strengthening of labor movements triggered off a sudden increase in labor-management disputes. Consequently, a comprehensive review was required for the existing labor laws. In particular, the economic situation under the "IMF bailout crisis" in November 1997 induced business firms to cut labor expenses by lay-offs and early retirements under the name of "restructuring," and also had a considerably negative impact on the working conditions of those remaining at work.

To cope with new social, economic situation, employers have attempted to lower the standards for working conditions to their advantage by introducing changes to work rules and collective bargaining agreements. The ensuing legal disputes with resisting workers resulted in a spate of the Supreme Court's decisions, generating new labor law principles.

Focusing on the decisions of the Supreme Court of Korea, this paper discusses legally contentious issues emanating primarily from the deterioration of working conditions caused by the modification of work rules and collective bargaining agreements, both of which are the most important norms in formulating working conditions.

To this end, I first take up the issue of disadvantageous changes to working conditions through work rules.

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Since the substance to be changed in such rules is determined unilaterally by the employer, appropriate regulation should be implemented to prevent unilateral harm to the workers. To solve this problem, the Labor Standards Act 1997 sets out statutory provisions governing the disadvantageous changes to work rules. I examine the Korean Supreme Court's position on the interpretation of these statutory provisions as revealed in its recent decisions. I also investigate in turn, the concept and legal nature of work rules, the concept of disadvantageous changes to working conditions, the concept of "reasonableness in the light of common sense" which is excluded from the statutory or regulatory control although it is a type of disadvantageous changes to working conditions, and finally the elements for disadvantageous changes through work rules.

Next, I address disadvantageous changes to working conditions by the modification of collective bargaining agreements. The central issue here revolves around the legal limits on such changes. As a preparatory step to discussing it, I examine the concept and legal nature of collective bargaining agreements, their normative effect and bases. Then I take up the issue of limits on their normative effect. The possibility of disadvantageous changes to working conditions for the purposes of collective bargaining agreements and the possibility of retroactive disadvantageous changes to working conditions are the issues that are usually discussed within the context of the inherent limits of collective bargaining agreements. I discuss these issues under a separate heading together with the Korean Supreme Court's decisions on whether an awareness of disadvantageous changes is necessary for making an ex post facto confirmation on the changes disadvantageous to the workers through the collective bargaining agreement related to such changes.

In conclusion, the Supreme Court's position as revealed from its decisions related to the deterioration of working conditions caused by the modification of work rules and collective bargaining agreements may not entirely write off my general impression of its excessive conservative leanings. Typical of the Supreme Court's growing conservatism are decisions on the relative invalidity of disadvantageous changes to work rules failing to obtain consent of the workers' group, recognition of the majority of all workers employed or the trade union "at the time of ex post facto consent" as the subject of expressing consent in case of a retroactive ex post facto consent to disadvantageous changes to work rules made in the absence of consent from the workers' group, recognition of the trade union's retroactive consent to retirement payment rates, recognition of the power of the trade union to dispose of retirement payments payable for the previous years of work, recognition of retroactive disadvantageous changes to work rules through the collective bargaining agreement, and no requirement for knowledge of disadvantageous changes in case of the confirmation of disadvantageous changes to work rules through the collective bargaining agreement.

Law is the active norm of a community and it is thus natural that the courts reflect social changes in their interpretation of the law. Nevertheless, there should be a clear limit. I am prepared to understand the dilemma facing the Supreme Court in seeking a reasonable settlement in specific cases, but granted such realistic needs, the Supreme Court's rulings mentioned above leave much to be desired in the interpretation of the law. This is especially so when one simply remembers the importance of honoring the basic spirit of the Trade Unions and Labor Relations Adjustment Act embodying the constitutional guarantee of three fundamental rights of workers and also the spirit of the Labor Standards Act aimed at protecting workers. I hope the labor legislation and institutions to be reorganized and streamlined in a more reasonable direction in the future.

I. Introduction

Industrial labor relations in Korea had been formulated on the basis of a system of life-long-term employment. Accordingly, the development of legal principles and institutions relating to labor law had once been premised on life-long employment and sustained improvement in working conditions. After the 1980s, however, rapid changes in the economic environment combined with the strengthening of labor movements triggered off a sudden increase in labor-management disputes.[1] Consequently, a comprehensive review was required for the existing labor laws. In particular, the economic situation under the "IMF bailout crisis" in November 1997 induced business firms to cut labor expenses by lay-offs and early retirements under the name of "restructuring,"[2] and also had a considerably negative impact on the working conditions of those remaining at work.[3]

The government has strived in various ways to cope with the changing environment. On the one hand, the government managed to relax the existing rigorous Labor Standards Act and enact a new Labor Standards Act in March 1997. On the other hand, the government set the foundation for autonomous collective bargaining between the workers and the management, and enacted the Trade Unions and Labor Relations Adjustment Act in March of the same year in order to promote a sound development of the labor-management relations. Afterwards the government has also endeavored to reformulate the labor laws through the consensus among the workers, the management, and the government. In the meanwhile, the courts in Korea have been making the efforts, even before the government's legislative responses, in the

1) The number of unfair labor practices reported against which application for adjudication was filed with the Labor Relations Commission totaled just 323 cases in 1986. But the number increased to 522 cases in 1987, 1439 in 1988, and 1721 in 1989, respectively, which reveals that unfair labor practices registered a sharp increase around 1988 (*See* the Yearbook of the Labor Relations Commission 2001, p.60).

2) According to a report of May 10, 1999 made public by the Daewoo Economic Research Institute, the unemployment rate of this country increased from 2.6% before the IMF bailout crisis to 8.1 % around late March of 1999(*See* Joon-ho Hong, *Reflections on the Deterioration of Working Conditions*, Human Rights and Justice (Korean Bar Association), Issue No.276, 1999.8, p.44, footnote 1.

3) The Daewoo Institute's report cited above shows that the average real wages for a Korean worker decreased from 1,745,000 Won at the end of 1997 to 1,651,000 Won at the end of 1998, a decrease of some 5% and that given drastic cutbacks in and even the abolition of regularly-paid collateral allowances, the disposable income in real terms diminished further. Hong, *id.*, p.44, footnote 2.

formulation of case law that can respond to the above mentioned changes in the economic and social environment.

In the abovementioned period, the management attempted to detract from working conditions not only by entering into new contracts with their employees but also by modifying work rules, which are required by law,[4] at the workplaces or by modifying collective bargaining agreements for workplaces where trade unions had already been organized. Focusing on the decisions of the Supreme Court of Korea, this paper discusses legally contentious issues emanating primarily from the deterioration of working conditions caused by the modification of work rules and collective bargaining agreements, both of which are the most important norms in formulating working conditions.

To this end, I first take up the issue of disadvantageous changes to working conditions through work rules. Since the substance to be changed in such rules is determined unilaterally by the employer, appropriate regulation should be implemented to prevent unilateral harm to the workers. To solve this problem, the Labor Standards Act 1997 sets out statutory provisions governing the disadvantageous changes to work rules. I will examine the Korean Supreme Court's position on the interpretation of these statutory provisions as revealed in its recent decisions. I will also investigate in turn, the concept and legal nature of work rules, the concept of disadvantageous changes to working conditions, the concept of "reasonableness in the light of common sense" —which is excluded from the statutory or regulatory control although it is a type of disadvantageous changes to working conditions—, and finally the elements for disadvantageous changes through work rules.

Next, I will address disadvantageous changes to working conditions by the modification of collective bargaining agreements. The central issue here revolves around the legal limits on such changes. As a preparatory step to discussing it, I will examine the concept and legal nature of collective bargaining agreements, their normative effect and bases. Then I will take up the issue of limits on their normative effect. The possibility of disadvantageous changes to working conditions for the purposes of collective bargaining agreements and the possibility of retroactive disadvantageous changes to working conditions are the issues that are usually

4) Article 96 of the Labor Standards Act requires any employer hiring normally 10 or more workers to draw up and implement work rules.

discussed within the context of the inherent limits of collective bargaining agreements. I will discuss these issues under a separate heading together with the Korean Supreme Court's decisions on whether an awareness of disadvantageous changes is necessary for making an ex post facto confirmation on the changes disadvantageous to the workers through the collective bargaining agreement related to such changes.

II. Disadvantageous Changes to Working Conditions through Work Rules

A. The Concept and Legal Nature of Work Rules

1. The Concept of Work Rules

Work rules are the rules that govern the work ethics and the discipline of a workplace and the working conditions applicable to the workers at the workplace.[5] They refer to all kinds of internal rules prepared unilaterally by the employer regardless of how they are named.[6] Working conditions mean the conditions set out to govern the labor relations between the employer and workers, such as wages, working hours, welfare, dismissal, and other treatment of workers.[7]

Work rules need not be drawn up to be uniformly applied to all workers at the workplace. A separate set of work rules may be established depending on the special nature of work and applied to a particular group of workers. In this case, a combination of two sets of work rules will become the work rules as stipulated under the Labor Standards Act,[8] provided, that the work rules infringe neither Article 5 of the Labor Standards Act, which prohibits the discrimination in treatment by reasons of sex, nationality, religion, or social status, nor Article 34, Paragraph 2 of the same Act, which prohibits the differentiation in retirement payments within the same trade.

Work rules have their origin in the need for establishing the work ethics and discipline by the organizational structure of a business firm. Thus, the functions of

5) Supreme Court Decision No. 93Da30181 dated May 10, 1994 .

6) Supreme Court Decision No. 91Da30828 dated Feb. 28, 1992.

7) Supreme Court Decision No. 91Da19210 dated June 23, 1992.

8) Supreme Court Decision No. 91Da30828 dated Feb. 28, 1992.

work rules used to have little to do with the formation of working conditions. However, with the emergence of the mass production that required a large labor force to flow into business firms, the managerial demands for a uniform regulation of working conditions led to the incorporation of matters related to working conditions into work rules. As a result through their superior bargaining power, employers used work rules as draft for labor contracts with the employees and they came to have a powerful effect on the formulation of working conditions despite the legal demands that the formulation of working conditions must be based on the agreement between the parties involved or on laws.[9)]

The work rules carry with them an important legal significance because they constitute the main substance of labor relations. Nevertheless, due to the fact that the work rules are drawn up unilaterally by the employer, there exists a constant danger that the main contents of labor relations are formulated in favor of the employer while the workers have no alternative but to follow the rules.[10)]

Therefore, for the purposes of protecting and strengthening the position of the workers, the Labor Standards Act stipulates several provisions in regard the work rules, which used to be under the authority of the employers, to prevent the employers from arbitrarily formulating the work rules and to protect the workers. More specifically, the provisions stipulate the entries that should be included in the work rules (Article 96) and impose on the employers the duty to draw up work rules (Article 96), the duty to hear opinions (Article 97, in case of disadvantageous changes to work rules, the duty to obtain a collective consent), the duty to report (Article 96), and the duty to inform the workers of the rules (Article 13). In addition, the Labor Standard Act grants to the work rules, the legal effect as the minimum standards for working conditions (Article 100).

The most contentious issues in legal disputes regarding disadvantageous changes to working conditions through work rules are the elements in making the modification to the work rules that are disadvantageous to the workers, the validity of work rules after the modifications, and the legal nature of the work rules surrounding such changes.

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9) Chul-soo Lee, *Case Law on and Problems with Work Rules*, Judicial Administration (Korean Association of Judicial Administration), Issue No. 392, 1993.8, p.13.

10) The Judicial Research and Training Institute, Dismissal and Wages, 1999, p.229.

2. The Legal Nature of Work Rules

Article 100 of Labor Standards Act provides that, "Any labor contract falling short of providing working conditions according to the standards set out by the work rules shall be void. In this case, the provisions in the contract that are found void shall be replaced by the standards set out under the work rules." This article attributes what we call the normative effect to the working conditions set out by the work rules. There are contesting theories on the normative effect of work rules and they are largely divided into two: the rule theory and the contract theory.

The rule theory immediately recognizes the reality that the work rules in fact formulate the working conditions in workplaces. This theory assesses work rules as legal norm and from that nature of legal norm, it seeks the basis of the normative effect of work rules. Proponents of the rule theory are further divided into two groups over the interpretation of the nature of legal norm of work rules. One group sees work rules as the legal norm of socially indigenous rules with the force of a customary law (theory of socially indigenous rules). The other group sees work rules as state-authorized legal norm established based on the Labor Standards Act (Article 100), which delegates the state's legislative power to the employers for the legislation purposes of the protection of the workers (theory of statutory authorization).

The contract theory denies the nature of legal norm of work rules from the point of view that the work rules are formed by the unilateral act of the employers. This theory assesses the work rules as a mere social norm or general contract conditions and seeksthe basis of the normative effect of work rules from the expressed or implied agreement between the employer and the workers (agreement theory) or from the actual custom in which the standards for working conditions are determined by the work rules (theory of actual custom).[11)]

The contract theory could be seen as a more progressive view because it is based on a reconsideration of the rule theory and requires the workers' consent for the work rules to take effect; however, it is no more than a legal fiction far removed from the reality. By introducing the contract law theory of private autonomy, it relaxes the requirements for consent and consequently it is more likely to incur disadvantageous

11) Hyung-bae Kim, Labor Law (11th ed. Pakyoung-sa, 2000), pp.210-211.

situation for the workers in comparison with the theory of statutory authorization. In conclusion, the theory of statutory authorization is regarded as the more realistic interpretation because it interprets that the Labor Standards Act operates as an actual code of conduct and exercises fixed statutory controls through the working conditions unilaterally decided by the employers under the subordinate labor relations, instead of bringing the entire work rules into the legal system and acknowledging their legal norms.[12)]

In relation to the legal nature of work rules, the Korean Supreme Court has consistently taken the view in favor of the rule theory ever since it held that "Work rules are drawn up by the employers based on the right of business administration and management in order to coherently and uniformly organize the work ethics and discipline or the working conditions at workplaces. Recognizing the reality of subordinate labor relations, the Labor Standards Act has imposed on the employers to draw up work rules and has granted them the nature of legal norm as part of the purposes of protecting and improving the basic living conditions of the workers by protecting and strengthening the workers from their unequal position ".[13)] However, in 1992 the Supreme Court ruled by the majority opinion of Grand Bench Decision that: "The powers of drawing up or modifying the work rules are, as the matter of principle, vested in the employers, therefore, they may draw up and change the work rules at their own will. But the employers are constrained in that they must hear the opinions of the trade union or majority of the workers in accordance with Article 95 of the Labor Standards Act,[14)] especially, in case of disadvantageous changes to the workers, the employers are required to obtain the consent from the workers. It is the consistent position of this Court that the case of disadvantageous changes to the existing working conditions requires a consent through collective decision-making of the workers. Any

12) Eun-young Lee, *Disadvantageous changes to Work Rules, in* Issues in Labor Law: Essays in Honor of Dr. Kim Chi-sun for His Sixtieth Birthday (1983.11), p.220; Kum-shil Kang, *Case Law and Problems relating to Disadvantageous changes to Work Rules, in* Issues in Civil Litigation (Research Association for Civil Litigation Practices), vol.9, 1997.3, p.86; Jung-bae Chun, *A Retroactive Infringement of Claims to Retirement Payments through Work Rules,* Attorneys (Korean Bar Association), vol.25, 1995.1, pp.318-320; Nam-Joon Kim, *The Determination of Disadvantageous changes to Work Rules in Case of a New Establishment of Retirement Age Regulations, and the Effect of Consent Given by the Union Leader*, Critique of 1997 Labor Case Law (Association of Attorneys for a Democratic Society), 1998.8, pp.270-271.

13) Supreme Court Decision No. 77Da355 dated July 26, 1977

14) This provision is comparable to Article 97 of the present Labor Standards Act.

changes to the work rules failing to obtain such consent are invalid...Therefore, in the case where the employers fail to acquire a consent from the workers in making the changes disadvantageous for the workers to the working conditions under the existing work rules, the changes will not take effect on the existing workers whose vested interest is infringed by such changes and the existing work rules will remain in effect. After the changes are made, however, the modified work rules should be applied to those workers who have agreed to establish new labor relations by accepting the new working conditions stipulated under the modified work rules. The workers employed after the changes do not have the infringed vested interests that serve as the justification to restrict the effect of the changes." [15]

Some has the opinion that the above Supreme Court decision, which states that disadvantageous changes to work rules without obtaining consent through the collective decision-making will still remain in effect for those workers who entered into the labor relations after the changes, has incorporated the elements of contract theory because the Court found the basis of the effect of the work rules from the collective consent (in the case of existing workers) or from the individual consent (in the case of new workers).[16] However, even if the theory of statutory authorization is adopted, in the light of the Labor Standards Act's spirit as the statute protecting the workers, the court decision may not necessarily be precluded from the interpretation that disadvantageous changes to work rules require a consent through collective decision-making process. Even in the case of new workers, by principle the legal effect of work rules is recognized on the ground that the right of drawing up and amending work rules lies with the employer. Therefore, it is difficult to view the court decision as having incorporated elements of the contract theory which states that the modified work rules has acquired the normative effect through individual agreements with the new workers. In conclusion, the judicial decisions appear to have adopted the theory of legal authorization. [17]

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15) Supreme Court Decision No. 91Da45165 dated Dec.22, 1992, Grand Bench Decision.

16) Young-ho Choi, *Disadvantageous changes to Work Rules*, Labor Law Research No.3 (Seoul National University Association of Labor Law Research), 1993.12, p.166; Jae-kang Lee, *The Determination of 'Disadvantageous changes' to Work Rules and the so-called 'Reasonableness Doctrine'*, Mudung Annals[mudung chunchu], 1996.3, p.198; Chul-soo Lee, *Case Law on and Problems with Work Rules*, p.15; Il-bong Moon, *The Subject of Retroactive Consent in Respect of Disadvantageous changes to Work Rules*, Lawyers Association Journal [BupJo] vol.44, No.9 (Issue No.468), 1995.9, p.148.

17) See Chang-soo Oh, *Disadvantageous changes to Work Rules*, Case Law Research (7), Seoul Bar Association,

B. The Concept of Disadvantageous Changes to Working Conditions

1. General

The Labor Standards Act prescribes in Article 97, Paragraph 1, Proviso that, in the case of making changes to work rules that are disadvantageous to the workers, a consent be obtained from the trade union in the business or in the workplace where a trade union has been organized representing the majority of workers, or from the majority of workers if such a trade union is absent. Accordingly, the key issue is that what kind of changes to the working conditions stipulated under work rules amount to disadvantageous changes to work rules.

The cases of changing the work conditions to the disadvantage of the workers include not only making the disadvantageous changes to the items stipulated under the work rules already drawn up, but also making changes that are disadvantageous to the workers to the items that have already been applied to the workers prior to the drawing up of the work rules.[18)]

In the case where a company has amended the regulations on the retirement payments while instituting a new allowance for its employees,[19)] and has excluded the new allowance from the basic wages by reference to which retirement payments are assessed, there is no variation in the amount of retirement payments before and after

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1994.1, pp.199-200; Kook-hwan, Lee, *The Effect of Disadvantageous changes to Work Rules without Consent of the Workers' Group and the Ban on Differential Retirement Payments*, Supreme Court Decisions Annotated, 1997.7, p.406; Joon Lee, *Disadvantageous changes to Work Rules and Their Effect on the Workers Happening to Establish Labor Relations After the Changes*, Civil Cases Research (XVII) (Pakyoung-sa, 1996.7), p.342.

18) Supreme Court Decision No. 88Daka4277 dated May 9, 1989

19) Article 34, Paragraph 1 of the Korean Labor Standards Act requires the employer to institute a scheme whereby a retiring worker will be paid as retirement payments at least 30 days' worth of his average wages for every one year of the total number of years of continuous work. And Article 96 of the same Act requires matters relating to retirement payments to be stipulated under work rules. The case law is that retirement payments are deferred wages which the employer pays the retiring workers in return for their continuous work for a certain period [Supreme Court Decision, July 22, 1975 (74 ta 1840); *id.*, March 27, 1998 (97 ta 49732)]. In case of disadvantageous changes to retirement payment regulations stipulated under work rules, there would arise complicated legal problems in relation to the assessment of retirement payments corresponding to the period of work before the disadvantageous changes. Most of the Supreme Court's decisions on disadvantageous changes to work rules are concerned with retirement payment regulations.

the amendment and the existing rights or interests are not deprived from the workers. Therefore, such change cannot be characterized as disadvantageous to the workers.[20]

2. Overall Assessment

In cases where many changes are made at the same time, some of them to the workers' disadvantage and some of them to the workers' advantage, regarding the working conditions stipulated under work rules, the issue of disadvantageous changes should be assessed in light of overall circumstances. For instance, in order to determine whether an amendment to retirement payment regulations is beneficial or disadvantageous to the workers, the variation in the retirement payment rates should be assessed along with any changes to the basic wage which has a compensating relationship or a linkage with the retirement payment rates.[21]

Here, "compensating relationship" means the provision of new working conditions or modification of the existing working conditions to be more beneficial to the workers in order to compensate for the unfavorable changes made to certain working conditions (*quid pro quo*). "Linkage" means the existence of a close connection between the working conditions or regime before the revision and any revised comparable working conditions in terms of the nature and substance. It is said that the employers' subjective intention to compensate is the basis of assessment for the compensating relationship, and the objective criteria dealing with the close connection with the nature or substance is the basis for the assessment of linkage.[22]

3. Borderline Cases

There may also be cases where it is difficult to determine objectively whether the modifications to work rules are overall beneficial or disadvantageous to workers. For example, the retirement payment rates are generally adjusted downwards while the scope of basic wages is considerably expanded during the amendment of the

20) Supreme Court Decision No. 96Da1726 dated Aug.26, 1997

21) Supreme Court Decision No. 94Da18072 dated March 10, 1995 ; Supreme Court Decision No. 96Da1726 dated Aug.26, 1997; Supreme Court Decision No. 99Da45376 dated Sept.29, 2000 .

22) Jae-kang Lee, *supra* note 16, at 201-202.

retirement payment regulations, such that, the changes would be disadvantageous to those who intend to work long-term but beneficial to those who serve for a relatively short period of time. Due to that amendment, if a conflict of interest arises as some workers benefit and other workers suffer disadvantages, it is reasonable to first consider such amendment as overall disadvantageous to the workers and then make a decision following the entire workers' opinions.[23)]

4. Case Study

A company, at the early stage of its founding, established a retirement payment regulation under the work rules. The regulation set out progressive payment rates applicable up to 15 consecutive years of work but made no specific provision for the periods exceeding 15 years of work. As 15 years approached after the founding, the company set out new provisions on retirement payment rates applicable up to 30 consecutive years of work. The previous payment rates applicable up to 15 years of work were cut, and the new payment rates applicable to the periods exceeding 15 years were also regulated to be less than the initial rates applied up to 15 years of work. It is clear that the provisions of retirement payment rates applicable up to 15 years of work were changed to the workers' detriment because the rates were cut below the progressive rates before the change. But in respect of the payment rates applicable to the work periods exceeding 15 years, the Supreme Court offers a rather peculiar interpretation on whether this provision amounts to a disadvantageous change to working conditions.

The original decision [24)] of this case considered that, has the regulation on retirement payment rates not been changed , the last progressive rate of the 15 years of work should have been applied to the periods from the 16th year. For this reason, the court held that the amended retirement payment regulation applicable to the periods over 15 years would amount to disadvantageous changes. However, the Supreme Court gave the opinion that the claims to retirement payments, which exceeds the minimum standards under the Labor Standards Act, would be recognized only if the

23) Supreme Court Decision No. 93Da1893 dated May 14, 1993; Supreme Court Decision No. 94Da18072 dated March 10, 1995; Supreme Court Decision No. 96Da1726 dated Aug.26, 1997

24) Daegu High Court Decision No. 91Na4684 dated June 4, 1992

contents of the retirement payment scheme were already stipulated by the labor contracts, collective bargaining agreements, or the work rules. Therefore, if the regulation on retirement payment rates provided the rate for only the first 15 years after the founding of the company, instead of viewing that the accumulated progressive rate during that 15 years of work should apply to the period exceeding the 15 years, the situation should be reserved for further investigation and the rate of payments for the period exceeding the 15 years should be considered unestablished. On the basis of this reasoning, the Supreme Court concluded that the new regulation of retirement payment rate for the period exceeding 15 years was established because there had been no previous provisions for this period, and thus the new regulation is not considered disadvantageous change. Accordingly, the Supreme Court reversed the original decision of the high court by holding that for the first 15 years the regulation on retirement payment rates before the amendment shall apply, and for the period exceeding the 15 years the amended regulation shall apply .[25)]

The Supreme Court decision's perspective is upheld in that the minimum standards under the Labor Standards Act should be applied to the retirement payment rates for the periods exceeding 15 years of work (that is, from the 16th year of work onwards). At the same time, the decision cited above also drew some criticism. The defendant-company intended to make the retirement payments for the period after the 15 years at the rate according to the new regulations with the justification that the retirement payment rate of the first 15 years is adjusted to be lower pursuant to the new regulations. However, the Supreme Court's decision goes against the intention of the defendant-company, which made the work rules, by invalidating the application of the amended regulation to the rate for the first 15 years and separately applying the amended regulation to the rate of retirement payment for the period after the 15 years. The decision is also against the systematic character and uniformity which the retirement payment regulations take on as an overall norm. Furthermore, any disadvantageous changes should be determined on a comparison of the previous and amended regulations. Holding the amendments to be void is tantamount to saying that no amendments has been made and thus no new regulations exists at all. Consequently, there would be no issue to be disputed on the validity or the invalidity of the new regulations after the amendment. Even if the Supreme Court's decision may cater to the reality of law by reflecting the interests of

25) Supreme Court Decision No. 92Da28556 dated June 24, 1994

both the management and the workers, it offers an unreasonable interpretation. Therefore, there is an opinion that the amendment is overall disadvantageous to the workers and should be interpreted as invalid in its entirety.[26)]

5. The Reference Point of Time for Determination

The determination on whether or not the amendment to the retirement payment regulations amounts to disadvantageous changes is made with respect to the point of time when the amendment occurred. The Supreme Court ruled that, in adjudging the beneficial or disadvantageous aspects of the amendment, it was wrong to include the new allowances established after the amendments in the basic wages, to conclude that the amendment to the regulation is beneficial to the workers, and therefore to declare that there was no necessity to obtain the workers' consent to the amendments.[27)]

C. Exceptions to Disadvantageous Changes: "Reasonable Changes in the Light of Common Sense"

1. General

Until present, it is the established principle of case law to make an exception of a disadvantageous change in work rules, if that change is considered to be a reasonable one in the light of common sense, by not requiring the consent of the labor group to the change. Case law states that, in principle, the employers are not permitted to deprive the workers of their vested rights or interests through unilaterally drawing up new work rules or changing the existing ones. However, in the case where the drawing up of or changes to work rules are regarded as reasonable in the light of common sense based on their need and substance, despite the degree of detrimentthe workers might suffer, the case law states that the applicability of those new rules or changes cannot

26) Dong-hyo Kwak, *Effect of an Amendment Without the Workers' Consent to Retirement Payment Regulations Stipulating Only Payment Rates for a Certain Period of Continuous Work, Under Which the Previous Payment Rates Have Been Lowered and New Payment Rates Have Been Set for Application for the Future*, Trials and Case Law (Daegu Case Law Research Association), 1996.12, pp.472-473; Daegu High Court Decision No. 94Na4098 dated Sept.21, 1995 [original judgment of the decision of the Supreme Court Decision No. 95Da49233 dated Feb.28, 1997].

27) Supreme Court Decision No. 96Da1726 dated Aug.26, 1997

be denied merely because there is not consent through the collective decision-making from the workers who have been subject to the pre-existing working conditions or work rules.[28)]

In the early stages, the Supreme Court used to instruct in obiter dicta to the effect that an amendment to work rules will not amount to disadvantageous changes, insofar as the amendment is recognized as reasonable in the light of common sense. For example, the Court made rulings such as "since setting the retirement age at 55 years of age as in the above may not be seen as an unreasonable scheme deviating from general social practice, the new scheme of the retirement age cannot be concluded as a change to working conditions which infringes on the vested rights of the plaintiff and other workers granted by the existing working conditions ... " [29)]; or "In the case of a change to personnel management regulations, insofar as there is reason to consider that the change is reasonable in the light of common sense, it should not be hastily judged to be disadvantageous only to the workers ... ." [30)] However, after a new provision was established on March 29, 1989 requiring the consent of the workers through collective decision-making with respect to disadvantageous changes to work rules, the court has held the position that by right any disadvantageous changes to work rules require the consent from the workers, but as an exception, if such changes are deemed to be within the scope of reasonableness in the light of common sense, they are still valid without the consent from the workers. For instance, the Court has ruled that "If the drawing up of or a change to work rules deprives the workers of their vested rights or interests and thus imposes disadvantageous working conditions on them, the consent through the collective decision-making is required from the workers who have been subject to pre-existing working conditions or work rules, and accordingly any work rules drafted or changed in the absence of such consent shall be regarded as invalid. Nevertheless, the changes will still be regarded as valid even without the consent from the workers, insofar as they are deemed reasonable in the light of common sense". [31)]

With respect to the criteria for determining reasonableness or unreasonableness in the light of common sense, cases have stated that a judgment should be made after

28) Supreme Court Decision No. 99Da70846 dated Jan.5, 2001

29) Supreme Court Decision No. 78Da1046 dated Sept.12, 1978

30) Supreme Court Decision No. 87Daka2853 dated May 10, 1988

31) Supreme Court Decision No. 88Daka4277 dated May 9, 1989

collectively considering various conditions including, the object and circumstances of the changes to work rules, the business nature of the company in regard, and the general structure of various provisions of work rules.[32] Recently, cases set out more specific standards for consideration in making the determination of reasonableness, such as the degree of detriment to be sustained by the workers from the changes to work rules, the degree and content of the need by the employers to make changes, the reasonableness of the substance of the revised work rules, the situation of improvement in other working conditions including compensating measures, the negotiation process with the trade union and the reaction from the union or other workers, and the general domestic situation involving similar matters.[33]

2. New Establishment of a Retirement Age Scheme

Regarding the case where new regulations have been provisioned in the work rules on the retirement age, on which there has not been any regulations before, the Supreme Court held[34] that the lack of provisions in the previous work rules putting a limitation on the retirement age of the staff was not necessarily intended to guarantee the plaintiff, who is an employee, to work indefinitely for the defendant-association irrespective of the age. Even though the defendant-association unilaterally changed the work rules and set the retirement age at 55 and regulated that the staff shall be dismissed at the retirement age without obtaining the consent from the workers who have been subjected to the previous work rules, the Supreme Court ruled that since the setting of the retirement age at 55 may not be considered an unreasonable scheme diverting significantly from the commonly accepted general social practice, the new establishment of the retirement age scheme cannot be concluded as infringing on the vested rights of the plaintiff and of the workers provided under existing working conditions.

In contrast, the court gave a different opinion in the case of a transport company where a new regulation was provisioned in the work rules setting the retirement age at 55, on which there was no previous regulation. The workers at the transport company

32) Supreme Court Decision No. 87Daka2853 dated May 10, 1988; Supreme Court Decision No. 96Da2507 dated May 16, 1997; Supreme Court Decision No. 99Da45376 dated Sept.29, 2000

33) Supreme Court Decision No. 99Da70846 dated Jan.5, 2001

34) Supreme Court Decision No. 78Da1046 dated Sept.12, 1978.

could work well beyond 55 without any restrictions before the introduction of the regulation, but after the new provision on the retirement age, those who reached 55could continue to work beyond that age only at the scrutiny of the company depending on the company's review. This kind of establishment of new regulation on retirement age is considered to be a scheme that deprives the workers of their vested rights and interests, and imposes disadvantageous working conditions to the workers. Furthermore, although certain companies set the retirement at 55 years of age, many companies set the retirement age well beyond that age, and it can be appropriately inferred from the experience that generally manual workers are capable of working beyond 55. In light of such facts, the court has ruled that the new provision may not be conceived as reasonable in the light of common sense and be exempted from obtaining the consent from the workers.[35)]

3. New Establishment of Grounds for Dismissal and Others

The Supreme Court has once ruled in favor of inserting additional grounds for dismissal for supplementing inadequate provisions. The defendant, the National Agricultural Cooperatives Federation, is a public interest corporation set up by a statute for the purpose of promoting a balanced development of national economy by contriving to improve agricultural productivity and to enhance the economic and social status of the farmers through the farmers' independent cooperative organizations. Given the objective of its establishment and the nature of services provided, a high degree of sincerity and integrity, comparable to those required of public servants, is required of the staff of the defendant. Therefore, the defendant added as one of the grounds of dismissal, the person who has received a suspended sentence of imprisonment or of severer punishment and is still under the grace period. The court has ruled that such change has been made merely as a supplementation to the inadequate personnel management regulations in order to perform the defendant's objectives as a public corporation, and therefore, the change is accepted as reasonable in the light of common sense and is not admitted as unilaterally disadvantageous to the defendant's workers.[36)]

35) Supreme Court Decision No. 96Da2057 dated May 16, 1997

36) Supreme Court Decision No. 87Daka2853 dated May 10, 1988.

The grounds for dismissal are divided into voluntary dismissal, retirement dismissal, natural dismissal, removal, and dismissal due to the company's management situation. The cases of natural dismissal, for example, deceased person, person with sentences severer than or equal to imprisonment, person determined as incompetent or quasi-incompetent, bankrupt person, person whose citizenship has been suspended or taken away, can be additional grounds for dismissal without the consent from the workers incurring no disadvantages to the workers. However, in cases where absence from duty exceeds seven days without report or without unavoidable reasons, there is a conflict of opinions between the employer and the workers as to whether there has or has not been a report to or whether there is or is not unavoidable reasons. Also, such absence is inherently an act of dereliction or violation of the rules and therefore no different than a ground for discipline. Therefore, it would be unreasonable for the employers to include such absence as additional ground for natural dismissal on the basis of their unilateral fact-finding, and such inclusion would be disadvantageous to working conditions for the workers. Therefore, the Supreme Court held that it was difficult to view the new establishment of the regulations as discussed above without obtaining consent from the workers to be reasonable in the light of common sense.

4. Decrease in Retirement Payments for Operational Reform of State-Run Corporations

Government-invested business enterprises including state-run ones are owned by the people since their employees are paid from taxes imposed on and collected from the people. Their operation and management, however, have more often than not incurred deficits, which in the end result in an aggravated tax burden tothe people. Even under these circumstances, salaries and retirement payments of their employees have remained much higher than general civil servants. In a bid to help redress such practices and deficit operation and in accordance with the government's directives and guidelines, state-run corporations set out to amend their own internal regulations to lower the retirement payment rates and to limit the scope of wages based on which retirement payments are caculated. Accordingly, the question has arisen as to whether such amendment to reduce retirement payments is reasonable in light of common sense of society for state-run corporations. The Supreme Court, taking a consistent but negative line of reasoning on this issue, has on various occasions ruled that such

amendment by state-run corporations should not be regarded as reasonable enough to exempt the corporations from the requirement to obtain workers' consent.[37]

5. Amendment to Retirement Payment Regulations for Unified Working Conditions

Where a company has changed work rules to the workers' detriment to standardize working conditions on with other subsidiary companies in the same business group, it has been held that even though limiting base wage for retirement payment calculation would still keep its retirement payment over the required amount under the Labor Standards Act and other subsidiary companies have similar retirement payment regulations, such change would not be justified as reasonable and exempt the company from the obligation to obtain consent from the workers' group.[38]

However, in a case where as a result of business reorganization such as merger or transfer of business retirement payment provisions have been amended to standardize different provisions of different work fields, which would be disadvantageous to workers at some work fields, the Supreme Court has held differently as to the reasonableness in light of common sense.

The case arose when the Korea Precision Equipment Center (KPEC) was merged into the Korea Machinery and Metal Experiment Research Institute (KMMERI) on April 1, 1979. The Supreme Court held that although KMMERI's retirement payment provisions of March 6, 1980 were disadvantageous compared with KPEC's corresponding regulations of Jan.1, 1970 in terms of payment rates, the Institute's March 6, 1980 retirement payment regulations should well be considered reasonable enough to have exempted it from the obligation to acquire the consent of the Center's former staff through the collective decision-making procedure. As its grounds, the Supreme Court stated; that there was a heightened need between the two parties to adjust and unify different retirement payment rates when they drafted a new unified

37) Supreme Court Decision No. 89Daka24780 dated March 13, 1990; Supreme Court Decision No. 92Da32257 dated Nov.27, 1992; Supreme Court Decision No. 92Da49324 dated Jan.26, 1993; Supreme Court Decision No. 93Da1893 dated May 14, 1993; Supreme Court Decision No. 92Da45490 dated Sept.14, 1993; Supreme Court Decision No. 94Da25322 dated Oct.14, 1994.

38) Supreme Court Decision No. 99Da45376 dated Sept.29, 2000.

retirement payment regulation on March 6, 1980; that the retirement age for KPEC was extended till 65 after the merger from 55 before the merger so that employees of it could work for additional 10 years; that the base salary for retirement payment was increased due to the increased salary for KPEC's employees and therefore, the detriment has been significantly complemented; that right before the merger employees of KPEC, while tendering pro forma resignation, received without objection retirement payments calculated in proportion to the existing high rates on the basis of the increased wages, and thus at the time of merger, they were aware that the new rate for the retirement payment would be applied for them.[39]

6. Critique of the Reasonableness Doctrine

Ever since the new requirement on March 29, 1989[40] to obtain the consent of the workers through the collective decision-making process when there is any disadvantageous change to them, the Supreme Court has been more cautious about the reasonableness than before when there was no statutory requirement on it and the Court itself required such consent in the above-mentioned cases on new retirement age scheme. However, the reasonableness doctrine developed under the principles of disadvantageous changes to work rules can be justified only from the perspective of a third party. Even if there is a need for a flexible adjustment of working conditions consequent upon changes in the management environment, it is difficult to agree in the light of general legal principles to the construction that insofar as certain reasonableness is recognized under common sense of a society, changes are construed as valid without the consent of the workers obtained through the collective decision-making process even after a mandatory provision in a statute has been established[41]

39) Supreme Court Decision No. 99Da70846 dated Jan.5, 2001.

40) Previously, it was simply provided, "The employer shall, in relation to the drawing up or revision of work rules, hear the opinions of the trade union where there exists a union organized by the majority of workers at the workplace in question, and the opinions of those persons representing the majority of workers in the absence of such a union". Thus, the employer was only under obligation to hear the opinions. But a proviso was newly inserted reflecting the Supreme Court's decision that consent through the workers' collective decision-making was required for the validity of disadvantageous changes to work rules.

41) Young-ho Choi, *supra* note 16, at 172; Chang-soo Oh, *supra* note 17, at 203-204. In contrast, Kook-hwan Lee [*supra* note 17, at 412] argues that reasonableness under societal common sense is the most fundamental element in

Such a construction is also against the principle of freedom of contract and of equal bargaining power in determining working conditions.[42] Furthermore, such an interpretation is likely to harm the legal stability, since the concept of reasonableness itself is rather vague and abstract. Therefore, it would be desirable not to recognize the doctrine.[43]

D. Elements of Disadvantageous Changes

1. Subject of Expressing Consent

(a) General

As already explained, the Labor Standards Act provides in Article 97, Paragraph 1, Proviso that when the employer intends to change retirement payment regulations to the workers' disadvantage, he must obtain consent either from the trade union if the trade union, in a particular trade or at a particular workplace, is composed of the majority of workers, or from the majority of the workers themselves in the absence of such a trade union. "Workers" here are construed as referring to a group of workers subject to the pre-existing work rules. Thus, such a trade union organized by the majority of workers, or simply the majority of them may act as the subject of expressing its or their consent.[44] Where there has not been organized any trade union at all in a particular trade or workplace, or where even though such a trade union has been organized the number of its members does not constitute of a majority, the employer must obtain consent from the majority of workers.

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determining the validity of changes to work rules; that the reason for requiring the employer to obtain consent of the workers to disadvantageous changes to work rules is to prevent any unreasonable changes; that if the original work rules were patently unreasonable and there were common-sense reasonableness in their changes, such changes should be interpreted as valid irrespective of the existence of consent from the workers; and that even after the new insertion of the proviso, the reasonableness doctrine should validly be maintained.

42) Chul-soo Lee, *supra* note 9, at 21.

43) Jae-kang Lee, *supra* note 16, at 219.

44) Supreme Court Decision No. 77Da355 dated July 26, 1977; Supreme Court Decision No. 91Da17542 dated Sept.24, 1991; Supreme Court Decision No. 91Da37522 dated April 10, 1992.

(b) Where Different Rules Are Applied to Different Groups of Workers in a Workplace

Where workers at a particular workplace have been classified into various groups, and different or separate retirement payment regulations have been stipulated for each group, only the workers' group subject to disadvantageous changes to its retirement payment regulations will be the subject of consent, not every working group.

In a case where different retirement payment regulations had been applied to two groups of workers, the staff personnel and the manual workers, both retirement regulations were changed disadvantageously to both groups. The Supreme Court ruled that even if the manual workers who accounted for over 85% of the total work force had consented to the change, such a consent would have effect in respect only of the manual workers. It held that therefore, if the majority of the staff members had not given their consent, the revised regulations applicable to the staff personnel would have no effect at all, since it had failed to obtain the required consent of the staff personnel, the subject of expressing their consent.[45]

(c) *Ex Post Facto* Consent

In some cases, disadvantageous changes are introduced without obtaining consent from the trade union representing the majority of workers or from their majority "at the time of such change," but the required consent is given subsequently. In these cases, if the disadvantageous changes are applied effective from the point of consent to the future, it would not be any doubt that the subject of consent are the workers employed or their trade union "at the time of such disadvantageous changes." However, the question as to the subject of consent arises when the workers employed or their trade union "at the time of *ex post facto* consent" give their consent to the disadvantageous changes.

Even in this case, according to the Supreme Court, the subject of expressing consent would be the majority of all workers employed or the trade union "at the time of *ex post facto* consent." The Court has held that disadvantageous changes to work

45) Supreme Court Decision No. 90Da19647 dated Dec.7, 1990; Supreme Court Decision No. 90Da6170 dated Jan.15, 1991; Supreme Court Decision No. 90Da15852, 15969, 15976 (consolidated) dated Feb.12, 1991.

rules require consent from the workers subject to the pre-existing work rules through collective decision-making procedures, and any changes without such consent would have no effect; that as to the method of expressing consent including an *ex post facto* confirmation, consent from the trade union is required where such a union has already been organized by the majority of workers; that the same should, in case of giving an *ex post facto* approval of changes to work rules disadvantageous only to some workers, be applicable where the trade union did not exist at the time of the employer's disadvantageous changes to work rules but was organized later, or even where some of the workers who sustained detriment due to the changes were, at the time of the *ex post facto* confirmation, not eligible for union membership on grounds of promotion, etc., and thus there were in practice no union member at all among those workers who suffered by the changes.[46]

However, the position of cases outlined above is not justifiable. In the case of a retroactive *ex post facto* confirmation of the previous disadvantageous changes, there would, after the disadvantageous changes, ensue certain changes to the payroll of employees resulting from new admissions into and withdrawals from the company, etc. In this case, according to a Grand Bench Decision of the Supreme Court (Supreme Court Decision No. 91Da45165 dated December 22, 1992), workers can be divided into two groups: those subject to the pre-existing work rules and those subject to the revised work rules (*i.e.* those not subject to the pre-existing work rules). Since the workers subject to the revised work rules would have no object against or interest in a retroactive *ex post facto* consent, they should be excluded from the subject of consent. Thus, only those workers who had worked before the disadvantageous changes and continued to work after the changes should be the subject of the consent.[47]

(d) Succession of a Universal Title

Where labor relations based on labor contracts have, through transfer of undertakings, amalgamation of businesses or by the provisions of statutes, been succeeded to by a universal title, the pre-existing status of workers based on such labor

46) Supreme Court Decision No. 93Da8870 dated April 21, 1995; Supreme Court Decision No. 95Da55009 dated Feb.11, 1997.

47) Concurring, Kum-shil Kang, *supra* note 12, at 100-101; Il-bong Moon, *supra* note 16, at 155-156.

contracts will likewise be succeeded to. Therefore, the workers employed at business firms before transfer of undertakings or merger will continue to be subject to the retirement payment regulations applied to them before succession.[48] In this case, if the retirement payment regulations before succession are to be disadvantageously changed after succession, consent should be obtained from the workers' group in question that existed before succession through their collective decision-making process.[49]

2. Methods of Consent

(a) In the Presence of a Trade Union Organized by the Majority of Workers

Where work rules are changed to the workers' detriment in a company with a trade union organized by the majority of workers, unless there exists special circumstances which are restricted by relevant statutes, collective bargaining agreements or the constitution of trade union, it will be sufficient for the leader of a trade union to give his consent on behalf of the union and not be required to obtain consent from the majority of the union's membership.[50] Also a valid consent may well be presumed where the rights to vote on changes to work rules have been delegated from the general assembly or a meeting of representatives of a trade union to its steering committee, which in turn has been resolved to consent to the changes.[51]

According to the above-mentioned decisions by the Supreme Court,[52] where the collective bargaining agreement or the constitution of the trade union provides that the union leader should, in exercising his powers of giving his consent, obtain the resolution of the union's general assembly or its meeting of representatives, such a

48) Supreme Court Decision No. 93Da1589 dated March 8, 1994 (merged); Supreme Court Decision No. 93Da58714 dated Aug.26, 1994(decree); Supreme Court Decision No. 95Da41659 dated Dec.26, 1995 (merged); Supreme Court Decision No. 97Da17575 dated Dec.26, 1997(transfer of business).

49) Supreme Court Decision No. 95Da41659 dated Dec.26, 1995; Supreme Court Decision No. 97Da17575 dated Dec.26, 1997.

50) Supreme Court Decision No. 96Da2507 dated May 16, 1997; Supreme Court Decision No. 99Da45376 dated Sept.29, 2000. There has been a criticism that it is inequitable to regard as the consent of a trade union any consent given by the union leader without going through a procedure of hearing the opinions of all union members. Nam-joon Kim, supra note 12, at 276-277.

51) Supreme Court Decision No. 84Daka414 dated Nov.13, 1984.

52) *Supra* note 50.

provision should be construed as requiring him to comply with it. Although this interpretation is considered proper and reasonable, it is still a question how that interpretation may be reconciled with or in harmony with the object and purpose of a Grand Bench Decision of the Supreme Court on April 27, 1993.[53] In its decision, the Supreme Court regarded the union leader's powers to conclude a collective bargaining agreement as unrestricted and held void the collective bargaining agreement or the constitution of a trade union requiring the union leader to obtain a resolution of its general assembly as to the pros and cons of adopting a new collective bargaining agreement.

It is also conceivable that the leader of a trade union organized by the majority of workers gives his consent to disadvantageous changes by concluding an agreement with the employer. Various forms are in practice found: that a transitional provision approving of disadvantageous changes to work rules is written into the annex attached to the collective bargaining agreement, that a citation provision is inserted into the collective bargaining agreement to the effect that matters relating to certain working conditions will be governed by the provisions of work rules, or that a provision containing the same content as that of disadvantageous changes that were already made under work rules is directly stipulated in the collective bargaining agreement. These instances are in principle allowed, save in the case of disadvantageous changes which are substantially and significantly devoid of reasonableness.[54]

(b) In the Absence of a Trade Union Organized by Majority

In this case, consent from the majority of workers reached through the method of workers' meeting is required.[55] Insofar as such consent has been obtained, changes to work rules will be regarded as valid even in the absence of separate consent from individual workers.[56] The "method of workers' meeting" does not necessarily mean

53) Supreme Court Decision No. 91Nu12257 dated April 27, 1993 (Grand Bench Decision) .

54) Supreme Court Decision No. 99Da7572 dated Nov.23, 1999; Supreme Court Decision No. 99Da67536 dated Sept. 29, 2000.

55) Supreme Court Decision No. 91Da17542 dated Sept.24, 1991; Supreme Court Decision No. 92Da30566 dated Nov.10, 1992.

56) Supreme Court Decision No. 91Da31753 dated Nov.24, 1992; Supreme Court Decision No. 93Da46841 dated May 24, 1994.

such a meeting whereby all workers in a particular trade or at a particular workshop assemble at one place at the same time to hold a meeting. It would be sufficient for union members or workers within the same section, department or bureau in a particular trade or at a given workplace to get together, exchange their views, gather up the pros and cons and put them together as a whole without any intervention or interference from the employer side.[57]

However, it would not be recognized as valid to have workers fill out a form without allowing them to exchange their opinions, merely on the ground that work places are scattered across the country and the entire number of workers is very large. But it may well be construed as consent of the majority of workers pursuant to a proper method of meeting if the majority of workers from each and every department have of their own free will consented to changes to work rules, have drawn up a letter of consent to the effect that they have given the employee-members on the Labor-Management Consultative Council a blanket mandate to speak for them, and the employee-members so mandated conferred themselves freely and have agreed to consent to changes to work rules.[58]

(c) Consent by the Employee-Members on the Labor-Management Consultative Council

The Supreme Court has held that the Labor-Management Consultative Council is a regime designed to help both the workers and the employer promote their common interests on the basis of mutual understanding and cooperation, and thus to contribute to industrial peace. Therefore, the Council is in its nature and purpose different from the trade union; that even if a company has set the matters relating to working conditions a subject of consultation on the Council, this should not be seen as the delegation by the workers when electing the employee-members on the Council to the effect that they were entitled to give consent on behalf of the workers to disadvantageous changes to working conditions. Thus, unless there is any evidence that the employee-members had, in exercising their right of consent to changes in the

57) Supreme Court Decision No. 91Da25055 dated Feb.25, 1992; Supreme Court Decision No. 92Da39778 dated Jan.15, 1993; Supreme Court Decision No. 93Da17898 dated Aug.24, 1993.

58) Supreme Court Decision No. 91Da25055 dated Feb 25, 1992.

retirement payment regulations, acted duly on the workers' intention after gathering up and putting together in advance the opinions of the workers from each and every department they represented, the consent from the employee-members should not be identified as a consent from the majority of workers.[59]

Besides, the Supreme Court has also ruled as to the Board of Directors of government-invested institutions that the Management of Government-Invested Institutions Act and the Budget and Accounting of Government-Invested Institutions Act, both repealed by the Framework Act on the Management of Government-Invested Institutions, were distinguished in the purpose of their enactment and of stipulated matters from the Labor Standards Act; that not only could the two Acts hardly be regarded as special laws vis-`a-vis the Labor Standards Act but also had individual provisions of each of the two repealed Acts stipulated no special rules in relation to the Labor Standards Act concerning working conditions such as the salaries and retirement payments, etc. for the directors and staff of government-invested institutions; therefore that the matters relating to working conditions such as their salaries and retirement payments would still be governed by the Labor Standards Act; and that the mere fact that Article 17, Paragraph 1 of the Framework Act on the Management of Government-Invested Institutions implemented following the abrogation of the two Acts provides for the determination by the board of directors of their staffs' salaries pursuant to the directives of the Deputy Prime Minister of the Economic Planning Board, should not be construed as purporting to allow the board to make a valid resolution depriving the staffs of their vested rights or interests related to retirement payments.[60]

(d) Whether or Not to Recognize an Implied Consent

Consent should be obtained from the union leader or through the method of the workers' meeting, which is a positive form of collective decision-making. Thus, an implied consent would be very unlikely to be valid.

The Supreme Court has taken a consistent position on this issue by ruling that no valid inference of an implied consent of the workers could be drawn from the mere

59) Supreme Court Decision No. 92Da28556 dated June 24, 1994.

60) Supreme Court Decision No. 92Da32357 dated Nov.27, 1992.

fact that the trade union or workers, having been notified by their employer of the disadvantageous changes to retirement payment regulations, failed to file an objection at the time of changes or thereafter or that retired workers received their retirement payments without depositing any reservations about it for a considerable period of time during which the amended retirement payment regulations were being implemented.[61]

3. Retroactive Consent

(a) General

Although consent by the workers or the trade union to disadvantageous changes to work rules should, in principle, be obtained before they are amended and implemented, an *ex post facto* consent to such disadvantageous changes may be admitted where the work rules amended without an ex ante consent of the workers or the trade union at the time of changes have been implemented and an *ex post facto* consent is obtained subsequently.[62] Whether an *ex ante* or *ex post facto* consent, no particular problem arises insofar as the substance of consent is intended to apply the disadvantageously amended work rules in the future. But problems may well arise when amended rules are retroactively implemented; when a consent is given to retroactively implement the new rules at the time changes are made,[63] or when a retroactive consent is given after the new rule has been already implemented.[64] Precedents have answered affirmatively to these two cases.

(b) Retroactive Consent to Retirement Payments Rates

Courts have consistently held valid retroactive consents to disadvantageous changes to the progressive rates of retirement payments such as by lowering the yearly

61) Supreme Court Decision No. 91Da17542 dated Sept.24, 1991; Supreme Court Decision No. 92Da49324 dated Jan.26, 1993; Supreme Court Decision No. 99Da45376 dated Sept.29, 2000.

62) The Judicial Research and Training Institute, supra note 10, at 244.

63) Supreme Court Decision No. 91Da31753 dated Nov.24, 1992; Supreme Court Decision No. 93Da46841 dated May 24, 1994.

64) Supreme Court Decision No. 91Da34073 dated July 24, 1992; Supreme Court Decision No. 92Da52115 dated March 23, 1993.

progressive rates or changing it to the uniform rates scheme [65]

In one hand, the Supreme Court held that already claimed retirement payments belong to the claimed workersand so they are subject only to the workers' own disposition. Therefore unless individual consent or authorization has been given to the trade union by the claimed workers, they cannot be disposed by a waiver or a temporary suspension of payment through a collective bargaining agreement with the employer. [66] On the other hand, however, the Court has decided that since claims to retirement payments are deferred wages it becomes a property right only upon retirement. It therefore held that it would, as a result of a retroactive consent, be inevitable to have different retirement payment rates for those who retired prior to the consent to the changes and for those who retired after the retroactive consent to the changes. [67]

However, the obligation to pay retirement payments is one thing, and the retention of claims to retirement payments and the fact that retirement payments are assessable by virtue of or in accordance with the duration period of labor relations is quite another. [68] Therefore it would be reasonable to regard the portion of retirement payment for the period already served before the changes as already acquired property right if we accept the theory of taking retirement payment as deferred wages in its legal nature; and accordingly any infringement by a retroactive consent without workers' individual consents should not be allowed. [69]

With respect to disadvantageous changes to a retirement payment scheme, the Supreme Court has conceded the occurrence of a discrepancy between the pre-existing higher retirement payment rates applicable to those workers who retired before the consent by the workers to disadvantageous changes to the retirement payments scheme

65) Supreme Court Decision No. 91Da25055 dated Feb.25, 1992; Supreme Court Decision No. 91Da34073 dated July 24, 1992; Supreme Court Decision No. 91Da31753 dated Nov.24, 1992; Supreme Court Decision No. 93Da46841 dated May 24, 1994; Supreme Court Decision No. 96Da6967 dated Aug.22, 1997.

66) Supreme Court Decision No. 99Da67536 dated Sept.29, 2000.

67) Supreme Court Decision No. 91Da34073 dated July 24, 1992.

68) Hyung-bae Kim, *supra* note 11, at 296-297.

69) Jae-hoon Kim, *Disadvantageous changes to Existing Working Conditions through a Collective Bargaining Agreement*, Labor Law Research (Seoul National University Association of Labor Law), 1993.12, p.188; Kum-shil Kang, *supra* note 12, at 113; Jung-bae Chun, *supra* note 12, at 322-324; Joo-suk Jung, *Disadvantageous changes to Work Rules and an Ex Post Facto Confirmation by the Trade Union*, Critique of 1997 Labor Case Law (Association of Attorneys for a Democratic Society), 1998.8, pp.283-284.

through the collective decision-making process(since the effect of the disadvantageous changes does not extend to them), and the disadvantageously lower retirement payment rates applicable, on the basis of the validity of a retroactive consent recognized in the above-mentioned decisions, to other workers who retired after a retroactive *ex post facto* consent; but has nevertheless held that the application of the resulting two separate schemes of retirement payments to two different groups of workers will not amount to differential retirement payment schemes prohibited by Article 28, Paragraph 2 of the former Labor Standards Act.[70]

(c) Retroactive Consent and Knowledge of Disadvantageous Changes

The Supreme Court has held that to recognize workers' declaration of intention for a retroactive *ex post facto* consent, approval or confirmation, etc. in relation to disadvantageous changes to retirement payment regulations, the workers or the trade union when they consented must have been aware that the amended retirement payment regulations in *de facto* implementation up until that time would be invalid; and that if the workers or the trade union had believed that the amended regulations would still be valid, acted in the belief that they would remain as it were, and consented to the changes, then such consent could not be construed as the declaration of their intention in favor of a retroactive consent, etc. to the previous disadvantageous changes.

In other words, in order for a retroactive *ex post facto* consent to be legally valid, the workers or the trade union must have clear knowledge that the work rules in question were amended disadvantageously without consent in the past and should on this basis declare their or its intention to consent to the disadvantageous changes to that effect.[71] Again, it was held that the mere fact that the workers or the trade union regarded as valid the remuneration regulations in force at the time of the collective bargaining agreement would not be recognized as intended to confirm revision of the remuneration regulations.[72]

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70) Supreme Court Decision No. 92Da52115 dated March 23, 1993. This provision is comparable to Article 34, Paragraph 2 of the present Labor Standards Act.

71) The Judicial Research and Training Institute, *supra* note 10, at 245.

72) Supreme Court Decision No. 91Da46922 dated Sept.14, 1992.

Conversely, if the workers have consented to the changes with knowledge, at the time of the changes to work rules, that their consent was sought with the intention of complementing the legal effect of the defective retirement payment scheme of uniform increase rates under work rules that were amended previously, the effect of consent intended for their retroactive application should not be denied.[73]

However, the Supreme Court appears to have *de facto* modified this position as to the *ex post facto* confirmation of disadvantageous changes to work rules through collective bargaining agreement, on which I will discuss more later.[74]

E. Effect of the Violation of the Procedure for Expressing Consent

1. General

Even if the employer has the right to draw up and amend work rules in order to introduce unilaterally disadvantageous changes to the workers, to the substance of existing working conditions through an amendment to work rules, consent through collective decision-making procedure is required from the pre-existing workers' group. Consent by majority of the trade union is required when a trade union is organized by majority of workers and majority of the workers should consent to approve the changes when there is no such trade union. No amendment to work rules would have legal effect without consent by either way. [75]

In addition, if certain provisions of the amended work rules are null and void, other related provisions that have been made in "compensation " of or "linked" to them(see supra II.B.2 for their respective meaning) will also become invalid regardless of whether they are disadvantageous or beneficial to the workers. In other words, if an amendment to retirement payments-related provisions is found null and void, the effect is not that another related provision is taken as either valid or invalid depending on its disadvantageous or beneficial nature, but that all the related provisions made in compensation of or linked to the amended provisions will become null and void in

73) Supreme Court Decision No. 91Da25055 dated Feb.25, 1992.

74) *See infra* III.D.3 (Knowledge of Disadvantageous changes).

75) Supreme Court Decision No. 77Da355 dated July 26, 1977; Supreme Court Decision No. 77Da681 dated Sept.28, 1977.

toto. Also, once amendments to work rules relating to the payment of retirement allowances had been found null and void, any provisions relating to their payment which were revised thereafter including those on the payment rates and basic wages, would be likewise null and void, save for special circumstances that they are considered as a retroactive consent to the once-void previous retirement payment regulations or that they are new retirement payment regulations with no link to the void provisions.[76]

2. Relative Invalidity

The Supreme Court had consistently held in the past that when the employer had made disadvantageous changes to work rules without consent from the workers through collective decision-making process, such changes would be null and void, and the pre-existing work rules should be applied to the workers who were employed after such changes.[77] However, a Grand Bench Decision of the Supreme Court has reversed this precedent on December 22, 1992 [78] by ruling that since the power of drawing up and amending work rules lies in principle with the employer, she may draw up and amend them at her own will; that where the employer has amended work rules, they are regarded as valid regardless of whether the amendment is disadvantageous or beneficial to existing workers; and that the amended work rules should have current legal force.[79] Accordingly, even if a valid consent has not been obtained in disadvantageous changes to work rules, the amended work rules should be applied to those newly hired workers, and the pre-existing work rules should be applied only to those pre-hired workers whose vested interests would be infringed by such amendments.

The spirit of the Labor Standards Act as a protective law, its principle to protect vested rights, and to guarantee equal bargaining power between the employer and the

76) Supreme Court Decision No. 94Da18072 dated March 10, 1995.

77) Supreme Court Decision No. 89Daka7754 dated April 27, 1990; Supreme Court Decision No. 89Daka31443 dated July 10, 1990.

78) Supreme Court Decision No. 91Da45165 dated Dec.22, 1992 (Grand Bench Decision)

79) Supreme Court Decision No. 92Da39778 dated Jan. 15, 1993; Supreme Court Decision No. 94Da30638 dated April 26, 1996; Supreme Court Decision No. 96Da3241 dated Sept. 10, 1996; Supreme Court Decision No. 99Da30473 dated Nov. 12, 1999.

employee as set out in Article 3 of the Act, have combined to be three major grounds for the Supreme Court decision on July 26, 1977. This decision has for the first time set a precedent of disadvantageous changes to work rules in that any disadvantageous changes to existing working conditions through an amendment to work rules require employees' consent through collective decision-making procedure and that any disadvantageous changes to work rules without consent are void, and that an individual consent by an employee would not have legal effect. [80)]

When compared with this decision, the above-mentioned Grand Bench Decision of the Supreme Court on December 22, 1992 uphled only one ground out of the three from the July 26, 1977 decision., although the Court was understandably faced with a practical dilemma to arrive at that conclusion. The 1992 ruling may therefore not be immune from the criticism that it sustained only the principle to protect vested rights and discarded not only the spirit of the Labor Standards Act as a protective law but also the principle of equal bargaining power between workers and employers ; that it has ignored the reality that the expression of no consent to the suggested changes on work rules is an automatic discharge for newly hired workers; and that it has passed over the demand for a uniformed and standardized regulation of working conditions through work rules. [81)]

In connection with the cases where the amended work rules have become no longer disadvantageous to existing workers because of circumstantial changes after the amendment, the Supreme Court held that insofar as the right to draw up and amend work rules lied with the employer, the work rules having the current legal force were the amended ones; that the justification for exceptionally applying the pre-existing work rules to existing workers was solely grounded on the fact that the application of the amended work rules was likely to infringe their vested interests; and accordingly that in cases where the revision of work rules had been disadvantageous to the workers at the time of revision but were no longer to infringe the vested interests of workers as a result of changes of circumstance, the work rules applied to existing workers should be the amended work rules having the current legal force, even in the absence of the

80) Supreme Court Decision No. 77Da355 dated July 26, 1977.

81) Young-ho Choi, *supra* note 16, at 169-170; Chul-soo Lee, *supra* note 9, at 22-23; Joon Lee, *supra* note 17, at 344-347; Chang-soo Oh, *supra* note 17, at 205-207 (He criticizes that the majority opinion is not only against the legal nature of work rules but also incapable of being reconciled with the existing theory of case law).

consent of the workers to the amendment.[82)]

3. Precluding of Individual Invalidity

Where due and proper consent fails to be obtained for disadvantageous changes to work rules, the effect of amendment will not in principle extend uniformly to any existing workers. The Supreme Court is of the opinion that insofar as the employer has failed, when amending work rules to the workers' disadvantage, to obtain consent from the workers' group reached through their collective decision-making procedure, the amendment will not take effect even on those who have individually expressed their consent. It follows that even if failure of a worker to raise an objection and to continue to work after having been notified by the company, her employer, of the contents of the amended retirement payment regulations may be recognized as an implicit consent by that worker, the effect of the amended retirement payment regulations will not extend to that worker.[83)]

F. Methods of Calculating Retirement Payments in Connection with Disadvantageous Changes to Work Rules

1. Denial of Retroactive Appliance

Where retirement payment regulations have been disadvantageously amended during the period of their work and made applicable to retiring workers, questions may arise as to which retirement payment regulations should be applied to them for the purpose of calculating their retirement payments.

The original view of the Supreme Court was that where the work rules governing the retirement payments were changed from a scheme of progressive rates determined by the years of work into that of uniform increase rates, the mere fact of consent by the workers to the changes could not be adduced to justify a retroactive application of the amended work rules to the period of work preceding the amendment; therefore that in

82) Supreme Court Decision No. 96Da1726 dated Aug.26, 1997

83) Supreme Court Decision No. 91Da3031 dated March 27, 1991; Supreme Court Decision No. 91Da38174 dated Dec.8, 1992.

assessing the amount of retirement payments payable to workers who had been employed before the amendment but retired after the amendment, the pre-existing work rules should be applied to the period prior to the date of amendment, while the amended work rules governing retirement payment rates should be applied to the period after the amendment to the retirement.[84] In the end, the Supreme Court took the position that unless other transitional provisions were made at the time of amendment, such changes to the staff's remuneration regulations should not automatically be applied retroactively to the period of work preceding the amendment.[85]

2. Approval of Retroactive Appliance

However, with regard to the method of calculating retirement payments in cases where there has been internal reshuffle during workers' employment and her positions have different retirement payment, the Supreme Court held in the majority opinion of Grand Bench Decision on July 11, 1995 that insofar as work rules or collective bargaining agreement have contained retirement payment regulations, and are not in breach of the provision of Article 28, Paragraph 1[86] of the former Labor Standards Act, it would be lawful to apply the regulations. But if no separate regulation has existed, the court held that provisions on calculation of retirement payment of the work rules and collective bargaining agreement should be the bases to determine the calculation method complying with the Article 28, Paragraph 1 of the former Labor Standards Act. According to the Paragraph 1, three bases in calculating retirement payments are total years of continuous employment, rates of retirement payment, and average wages at the time of retirement. As for total years of employment, reshuffle during employment should not affect and be counted as the years of continuous employment. Also the average wages had to be calculated, in accordance with Article 19, Paragraph 1 of the Labor Standards Act, by reference to the average monthly pay for the three months immediately before retirement, i.e., the average monthly salary at the time of retirement after the position change. Therefore the court concluded that the payment rates should also be based on the rates applicable to the position at the time of

84) Supreme Court Decision No. 89Daka15939 dated Nov. 27, 1990.

85) Supreme Court Decision No. 90Daka24311 dated Dec.26, 1990.

86) This provision is comparable to Article 34, Paragraph 1 of the present Labor Standards Act.

retirement, and this would be in accord with the purpose of Article 28, Paragraph 1 of the former Labor Standards Act.[87] At a subsequent case, the Supreme Court upheld that the three bases in calculating retirement payments, years of continuous employment, average salary, and the rate of retirement payments should be those at the time of retirement because claim to retirement payments arise when the "retirement" actually happens.[88] In sum, in case valid amendments have been made to the retirement payment regulations during the period of continuous work, the retirement payment regulations in force and valid at the time of retirement had to be applied to the entire period of work.[89] By these rulings, the Supreme Court has reversed its previous position enunciated in its earlier decision.[90]

3. Comparison of the Regulations before and after the Amendments.

Although the Supreme Court held that since claims to retirement payments arose only upon workers' retirement, if the retirement payment regulations had been amended by the employer during the period of continuous employment, the amended retirement payment regulations had to be applied not only to the period of employment after the amendment, but also to the period of employment before the amendment unless it infringed the vested interests of the workers,[91] it conditioned that the vested interests of workers should not be affected. Accordingly, in respect of the time of employment prior to the amendment, the Supreme Court has ever since held, that the regulation which is more beneficial to the workers should be applied after balancing up the benefits and detriments of the regulations before and after the amendment.[92]

87) Supreme Court Decision No. 93Da26168 dated July 11, 1995 (Grand Bench Decision)

88) Supreme Court Decision No. 95Da19256 dated May 14, 1996

89) Supreme Court Decision No. 96Da3241 dated September 10, 1996

90) Kook-hwan Lee, *supra* note 17, at 427, concurring with the judgment, argues that since retirement payments are not deferred wages but no more than an aid which the law compulsorily requires the employer to give on a legislative policy for the protection of workers' living and the entire amount accrues only upon satisfying the requirement of the occurrence of retirement, there can no such retirement payments as matching a particular period and as such the total amount should be assessed by reference to the retirement payment regulations at the time of retirement, which are the norm in force at the time of the satisfaction of the legal requirement. I am unable to concur with this argument.

91) Supreme Court Decision No. 95Da32631 dated Dec.23, 1996.

4. Changes to the Retirement Payment Scheme Through Laws and Regulations

Article 28, Paragraph 2[93] of the former Labor Standards Act (amended as Act No.3349 on December 31, 1980), for the first time started banning differential retirement payment scheme from April 1, 1981. and Paragraph 2 of the Annex to the same Act stipulated that where a retirement payment scheme introduced before April 1, 1981 by the collective bargaining agreement or work rules amounted to a differential one, unless such a scheme was amended by March 31, 1981 to accommodate the purpose of the Article 28 and was duly reported to the head of the Labor Administration Office, the retirement payment scheme applying to the greatest number of workers should be applied as from April 1, 1981. In accordance with this provision, the retirement payment regulations that had been applied to the workers not belonging to the greatest number of workers have been presumed to be changed into the regulations applied to the greatest number of workers.

In connection with this, the Supreme Court has consistently held that even if the employer has failed, in making disadvantageous changes to work rules, to obtain the consent of workers through collective decision-making procedure, insofar as the right to draw up and amend work rules is vested in the employer, the work rules having the current legal force are the amended work rules; that in respect of the workers already employed whose vested interests would be infringed by the disadvantageous changes to work rules, however, the pre-existing work rules should still be applied; that where it is required in the above-mentioned provisions of Article 28, Paragraph 2 of the former Labor Standards Act 1980 and Paragraph 2 of the Annex to the same Act to apply the retirement payment scheme which had been applied to the greatest number of workers as from April 1, 1981, if such retirement payment regulations had been changed disadvantageously to the workers without their consent through collective decision-making procedure, the pre-existing retirement payment regulations should be applied to those workers who had been employed before the amendment and belonged to the group of the greatest number of workers in order to help protect their vested interests; but that the amended retirement payment regulations having the legal force on the

92) Supreme Court Decision No. 95Da45399 dated July 11, 1997; Supreme Court Decision No. 97Da24511 dated Nov.28, 1997

93) This provision is comparable to Article 34, Paragraph 2 of the present Labor Standards Act.

greatest number of workers should be applied to those workers not belonging to the group of the greatest number of workers, unless such an application infringed their vested interests. Thus, regardless of the number of workers employed after the disadvantageous changes, the disadvantageously amended regulations should apply to the minority of workers. However, in the opinion of the Court, where the retirement payment regulations have been amended by the employer during the period of continuous employment, the above-mentioned legal principle that the amended regulations should be applied not only to the period after the amendment but also to the period before the amendment unless such an application infringed the vested interests, would equally be applied where the retirement payment regulations have been amended not by the employer but by the provisions of the above-cited former Labor Standards Act (amended as Act No.3349 on Dec.31, 1980) which banned a differential retirement payment scheme as from April 1, 1980 and presumed the retirement payment scheme applying to the greatest number of workers at the workplace to be also applicable to the entire workforce.[94)]

III. Disadvantageous Changes to Working Conditions through Collective Bargaining Agreements

A. The Concept and Legal Nature of Collective Bargaining Agreements

"Collective bargaining agreement" is defined as a binding arrangement decided and concluded between the employers and the employees on such matters as working conditions and other labor relations, whether the arrangement has been reached through a peaceful and independent process or through strikes when disagreement of the two parties are too deep to draw an agreement.[95)]

Opinions are divided in to two broad interpretations as to the collective bargaining agreements' legal nature. One group views collective bargaining agreements as possessed with a character of legal norms entirely different from contracts, while the

94) Supreme Court Decision No. 96Da45399 dated July 11, 1997; Supreme Court Decision No. 95Da32631 dated Dec.23, 1996; Supreme Court Decision No. 97Da14934 dated July 11, 1997; Supreme Court Decision No. 98Da11628 dated Feb.25, 2000.

95) The Judicial Research and Training Institute, A Study on the Trade Unions and Labor Relations Adjustment Act (2000) (A Study on TU and LRAA), p.196.

other interprets collective bargaining agreements as having essentially a contractual nature. The former view is again sub-divided into two. One seeks to explain that workers negotiate with the employer through their organization and are in consequence capable of concluding a collective bargaining agreement as a socially autonomous norm having the force of law (theory of socially autonomous norm). The other argues that the law recognizes labor customs under which the workers and the management conclude a collective bargaining agreement independently to lay down legal norms regulating collective labor relations inter se (theory of blanket customary law).

The latter group is also sub-divided into two. One group argues that collective bargaining agreements basically have the nature of a contract entered into by the labor organization and the employer on their free will, and the normative effect of a collective bargaining agreement would only be granted by individual provisions of state-enacted statutes (theory of authorization). The other sees the collective bargaining agreement not only as a collective contract based on the intention of the members of a labor organization but also as a normative contract taking precedence over individual contracts (theory of collective normative contract).[96]

B. The Normative Effect of Collective Bargaining Agreements

1. General

The Trade Unions and Labor Relations Mediation Act provides in Article 33, Paragraph 1, "Any part of a work rule or labor contract which violates standard working conditions and treatment of workers stipulated under the collective bargaining agreement shall be null and void". Thus, the provisions under the collective bargaining agreement stipulating working conditions and other standards for the treatment of workers have been recognized as the norm superior to work rules or labor contracts and have mandatory legal effect. The same provision further stipulates in Paragraph 2, "Any substance which is not included in the labor contract or those provisions part which are null and void by Paragraph 1 shall be determined by the standards stipulated under collective bargaining agreement". Therefore, the standards stipulated under the collective bargaining agreement have been expressly given direct and complementary

96) *Id.* at 196-198.

effect in respect of any part of the work rule or labor contract that has been made null and void by the mandatory force of the collective bargaining agreement or in respect of any matters that have failed to be stipulated in the labor contract. Thus, the Act approves of the principle of the autonomy of collective bargaining agreement by expressly recognizing, as its normative effect, the mandatory and complementary (direct) effect of a collective bargaining agreement.

As such, unlike regular contracts, special legal effect inherently admitted of the collective bargaining agreement for the purpose of a collective and uniform regulation of the contractual labor relations is often called normative effect of collective bargaining agreement. And this normative part of collective bargaining agreement is distinguished in its legal effect from its contractual part to which only contractual obligation is granted as in the case of the effect of contracts in general.[97]

2. The Basis for Normative Effect

As to the basis of normative effect of collective bargaining agreement, opinions are divided depending on how to interpret legal nature of collective bargaining agreement.

According to the theory of authorization, a collective bargaining agreement is essentially a collective contract or an innominate contract made independently between the trade union and employer. Thus, for such a contract to have normative effect, there should be a separate authorization from relevant statutes. Article 33 of the Trade Unions and Labor Relations Adjustment Act is regarded by this theory as having constitutive effect which serves as the basis for granting a collective bargaining agreement normative effect.[98]

On the other hand, the theory of collective normative contract argues that while a collective bargaining agreement is a kind of contract giving rise to rights and obligations between the trade union and the employer, between workers and the employer it has the character of a collective normative contract with mandatory and complementary nature rather than individual agreements. The rationale is that the individual worker, by joining the trade union of his own free will, has entrusted it with a collective regulation of his labor relations.[99]

97) *Id.* at 203-204.

98) Yoo-sung Kim, Labor Law II-Collective Labor Relations Law (Bobmun-sa, 2001), p.159.

The Korean Constitution guarantees three fundamental rights of workers as basic constitutional rights in Article 33, Paragraph 1, "Workers shall enjoy the right to independently organize unions, collectively bargain, and collectively actfor improvement in working conditions". Indeed, it is requested for the betterment of working conditions that workers do not conclude individually with the employer agreements on matters relating to working conditions, but instead collectively bargainthrough their independent association formed in the exercise of their right to have independent organizations, and accordingly make their working conditions regulated collectively. From this perspective, Article 33 is intended to guarantee these three rights as constitutional rights of workers, and it seems reasonable to presume that it will constitute an essential part of the right to collective bargaining for working conditions stipulated in collective bargaining agreement which is concluded as a consequence of collective bargaining to have normative effect on the members of the organization. Therefore, it should be interpreted as a natural corollary of the constitutional right to collective bargaining that matters relating to the standards for working conditions stipulated in collective bargaining agreement which is entered into between the employer. and the workers exercising through their trade union the right to collective bargaining, will enjoy, as a collective norm, legal effect binding on all workers who are members of the trade union.[100]

3. Subjects of Normative Effect Appliance

The normative effect of collective bargaining agreement extends to regulation of the 'rights and obligations arising from individual labor relations' between the members of the trade union and the employer or the employer-member of the employers' association, the parties to the agreement.[101]

Again, since the normative part of a collective bargaining agreement governs the rights and obligations in individual labor relations, its effect extends in principle to the workers who were members of the trade union at the time of making the collective bargaining agreement and who still maintain valid labor relations, but not to the

99) Hyung-bae Kim, *supra* note 11, at 606-607.

100) The Judicial Research and Training Institute, *supra* note 95, at 207-208.

101) *See* Supreme Court Decision No. 94Da49847 dated June 28, 1996.

workers whose labor relations were validly terminated before the conclusion of the agreement. Accordingly, even if the collective bargaining agreement in question stipulates that its normative part is applied retroactively to the rights and obligations that arose before the conclusion of the agreement, there would be no room for such a part to take effect to the workers who already retired before the conclusion of the agreement.[102)]

C. Limits on Normative Effect (Limits on the Autonomy of Collective Bargaining Agreement)

1. General

The autonomy of collective bargaining agreement means that the standards for various working conditions are, independently from state intervention or influence, determined not by separate bargaining between individual workers and the employer but by collective bargaining between the trade union to which workers belong and the employer or employers' association, that the collective bargaining agreement reached as a result of such collective dealings will be honored by the parties to the agreement and their respective constituent members inter se, and that it will be valid as a binding, autonomous norm in individual labor relations.[103)]

The autonomy of collective bargaining agreement is premised on the rights of the trade union to control their members and to regulate their working conditions. These rights of trade unions, however, do not affect every aspect of the working life of their members but may be subject to certain limitations in relation to the freedom of contract and to basic human rights of workers. Discussions on the limitation on the autonomy of collective bargaining agreement, therefore, while recognizing the trade union's power to regulate the working conditions and other treatment of workers, also try to protect the inherent rights and interests of individual workers by setting certain limits on the exercise of those powers. In other words, the limit on the autonomy of collective bargaining agreement in Korea is the limit on its normative effect.[104)]

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102) Supreme Court Decision No. 91Da34073 dated July 24, 1992.

103) Jae-hoon, Kim, *supra* note 69, p.183.

104) Yoo-sung Kim, *supra* note 98, at 171.

In the following discussion, I will first address the principle of precedence of beneficial working conditions in relation to mandatory effect of the collective bargaining agreement. I will then examine the extrinsic and intrinsic limitation on the normative effect of a collective bargaining agreement. The principle of precedence of beneficial working conditions may also be seen as a type of intrinsic limits. But the principle is directly related to the construction of the obligatory force of a collective bargaining agreement, and therefore will be discussed first.

2. The Principle of Precedence of Beneficial Working Conditions

As the substance of normative effects of a collective bargaining agreement, its mandatory effect is recognized whereby it is null and void for work rules or individual labor contracts to stipulate any working conditions which violate the standards of working conditions provided for in the collective bargaining agreement. In connection with this, questions of validity will arise where working conditions established in work rules or individual labor contracts have violated the collective bargaining agreement. In this case, would the work rules and individual labor contracts be entirely null and void not only where their substance is disadvantageous to workers but also where it is beneficial to workers? Or would they be null and void only where their substance is disadvantageous but would still be valid where it is beneficial to workers? It is the principle of precedence of beneficial working conditions that normative effect of the standards in a collective bargaining agreement exists only where the working conditions laid down under a labor contract fall below the standards of the collective bargaining agreement, whereas such normative effect does not exist and the labor contract prevails where the working conditions under the labor contract are more advantageous than the standards stipulated under the collective bargaining agreement. Once this principle is recognized, the collective bargaining agreement is interpreted as enjoying a "one-way" enforcement.[105)]

105) Kun-yoon Lee, *Limits on the Autonomy of Collective Bargaining Agreement*, Supreme Court Decisions Annotated (Court Library, 1998.6), p.360.

(a) Where Collective Bargaining Agreements Set Out Minimum Standards

Where a collective bargaining agreement adopts its standards for working conditions as the minimum standards, if any part of the work rules or individual labor contracts, whether it has existed already or has been executed after the agreement, has stipulated the standards below those under the collective bargaining agreement, it would *ipso facto* be null and void because it violates the agreement. And any other parts of the work rules or individual labor contracts which have stipulated the standards the same as or above those under the collective bargaining agreement do not violate the standards of the collective bargaining agreement and will be valid irrespective of the applicability of the principle of precedence of beneficial working conditions.

(b) Where Collective Bargaining Agreements Set Out Uniform and Tipical Sdandards

It is when a collective bargaining agreement is construed as having set out uniform and typical standards for working conditions that the applicability of the principle of precedence of beneficial working conditions is called into question. In Germany, for example, express provisions have been made under the Collective Bargaining Agreement Act (Tarifvertragsgesetz) to the effect that the principle of precedence of beneficial working conditions is recognized as the limit on the autonomy of collective bargaining agreements. On the other hand, in Korea where no such an express provision has been made, opinions are divided over the construction of the applicability of the principle.

Those arguing for the applicability of the principle[106] see the collective bargaining agreement as having established minimum standards for working conditions, and hold that it is valid for the employer to provide voluntarily working condition more advantageous than the standards stipulated under the collective bargaining agreement or to promise better standards under the agreement.[107] They also believethat it is against public policy and good morals as recognized under the principle of the

106) Joon-ho Hong, *supra* note 2, at 56-61(He takes the view of recognizing the applicability of the principle by refuting each of the arguments put forward by those advocating non-applicability).

107) Hyung-bae Kim, *supra* note 11, at 615.

constitutional guarantee of fundamental rights and thus not allowed for a collective bargaining agreement to set out the highest standards for working conditions; that a standard will carry their significance only as average and typical standard; that the general freedom of action for the purpose of a free manifestation of a person's character has been guaranteed by the Korean Constitution under the right to pursue happiness (Article 10), one of fundamental rights, and accordingly individual workers are free to formulate their own working conditions depending on their performance; that for these reasons, normative effect of the collective bargaining agreement emanating from the principle of the autonomy of collective bargaining agreement will not extend to any such part of labor contracts as providing for advantageous working conditions on which workers individually agree with the employer, regardless of whether the labor contracts have been entered into before or after the collective bargaining agreement; and that within that scope, limits on the autonomy of collective bargaining agreement should be recognized.[108)]

Nevertheless, in Korea where company-based collective bargaining agreements are dominant, the standards under collective bargaining agreement act as the standard of working conditions, and workers themselves can be regarded as having within a certain extent restricted their own freedom of contract by joining to a trade union. Furthermore, insofar as workers remain as members of a trade union, they must comply with collective regulations imposed by the trade union. If individual members of a union are allowed to individually negotiate with the employer for working conditions, this is likely to infringe considerably the trade union's rights to collectively bargain. Also, in the absence of express provisions allowing this, it would not be reasonable to recognize the principle of precedence of beneficial working conditions.[109)] For these reasons, it would be proper to deny the principle of precedence of beneficial working conditions and to view normative effect of a collective bargaining agreement as having a "two-way" enforcement.[110)] No Supreme Court decision has specifically dealt with this issue yet.

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108) The Judicial Research and Training Institute, *supra* note 95, at 211-212; Jae-kwan Noh, *Collective Bargaining Agreement*, Trial Materials No.40: Issues in Actions in Labor Relations II (Office of Court Adminstration, 1987.12), p.193.

109) Yoo-sung Kim, *supra* note 98, at 169-170; Jong-ryul Lim, Labor Law (2nd ed., Pakyoung-sa, 2001.3), pp.131-132.

110) Concurring, Kun-yoon Lee, *supra* note 105, at 360.

(c) Where of Not to Recognize the Principle of Precedence of Beneficial Working Conditions

As mentioned above, the principle of precedence of beneficial working conditions raises problems of validity essentially in relation to labor contracts concluded through individual worker's agreements. In the case of work rules, since they may be disadvantageously amended with the consent of the trade union where there exists such a union organized by the majority of workers, the present legislation is understood as allowing the trade union, when concluding the collective bargaining agreement, to introduce disadvantageous changes to work rules and to lay down the standards for working conditions more disadvantageous than those under the pre-existing work rules. Within this limit, therefore, the applicability of the principle of precedence of beneficial working conditions is construed under the present legislation as excluded as between work rules and the collective bargaining agreement.[111)]

Although there is no express provision made for trade unions not organized by the majority of workers, no valid ground to recognize the principle can be found as between the norms inter se intended for collective regulation. Therefore, the principle of precedence of beneficial working conditions would not be applicable, and it is presumed allowed to bring about disadvantageous changes to work rules through collective bargaining agreements concluded by such a trade union, and to effect, through a new collective bargaining agreement, disadvantageous changes to the standards for working conditions stipulated under the existing collective bargaining agreement.[112)]

3. Extrinsic Limits

The types of norms governing labor relations include the Constitution, labor relations-related laws and regulations, collective bargaining agreements, work rules, and labor contracts, in the order of superiority. Thus, a collective bargaining agreement can not violate labor relations-related laws and regulations, not to mention the

111) Supreme Court Decision No. 91Da34073 dated July 24, 1992; Supreme Court Decision No. 92Da51341 dated March 23, 1993; Supreme Court Decision No. 96Da6967 dated Aug.22, 1997

112) The Judicial Research and Training Institute, *supra* note 95, at 213; Jae-kwan Noh, *supra* note 108, at 193.

Constitution. Nor is a collective bargaining agreement, as a legally binding norm, permitted to violate such general principles of law as the principle of non-retroactivity of law and the respect for vested rights. Nor is a collective bargaining agreement, as a legally binding contract, allowed to violate good morals and other social order as stipulated under Article 103 of the Civil Act.[113]

The Supreme Court has also declared as null and void any standard for working conditions under a collective bargaining agreement which has violated the mandatory rules laid down under statutes such as the Labor Standards Act or good morals and other social order (Article 103 of the Civil Act), since such standard is in breach of superior legal norms.[114]

More specifically, the Supreme Court held that it was null and void for a collective bargaining agreement to stipulate a different retirement age for male and female workers without distinguishing work or of working conditions of different sex, because it had violated such mandatory rules as Article 5 of the Labor Standards Act which bans any discriminatory treatment based on sex without reasonable grounds and as Article 8 of the Equality of the Sexes in Employment Act which prohibits any discrimination against women in relation to retirement age.[115]

In another decision, the Supreme court held that the number of years of continuous employment under the former Labor Standards Act (one before amended to Act No.5245 on December 31, 1996), which would form the basis for the calculation of retirement payments, is from the date of initial employment until that of retirement; that if temporary retirement were found null and void, any arrangement made under agreement on the Labor-Management Consultative Council for an interim settlement of retirement payments and the final settlement upon retirement of the remaining part outstanding for the period after the date of interim settlement and until the date of retirement for the workers posted overseas would in the end be tantamount to having forced them to waive in advance part of their claims to retirement payments; and that even if such an agreement had been given the same effect as the collective bargaining agreement, it would violate the imperative law of the Labor Standards Act and thus be

113) Joon-sang Lee, *Disadvantageous changes to Working Conditions Through the Collective Bargaining Agreement*, Lawyers Association Journal [BupJo], vol.50, No.2 (Issue No. 533)(2001.2), p.214.

114) Supreme Court Decision No. 90Daka24496 dated Dec. 21, 1990

115) Supreme Court Decision No. 92Nu15765 dated April 9, 1993

null and void.[116]

Finally, the Supreme Court also held that normal wages were designed to ensure the minimum of average wages and acted as the basis for the calculation of additional allowances payable for overtime work, night work and holiday work, and advance dismissal notice allowances; and that any agreement between the labor and employer to exclude from normal wages various allowances which in their very nature had to be included in normal wages would be a contract setting out working conditions which fell short of such standards as prescribed under Article 20, Paragraph 1[117] of the former Labor Standards Act and would as such be regarded as null and void.[118]

4. Intrinsic Limits

(a) Disposition of Rights Belonging Essentially to Individual Workers

Since matters belonging inherently to the freedoms and rights of individual workers are not such working conditions that are subject to collective regulations through collective bargaining agreement, a party to a collective bargaining agreement is not entitled to render these matters the object of regulation binding on its members. Savings agreement in relation to wages, agreement on supporting a particular political party, or check-off agreement may be cited as examples of such matters.[119]

(b) Disposition of Rights Already Vested in Individual Workers

Rights already acquired by union members do not fall either within the scope of regulation by a party to a collective bargaining agreement. For example, claims to wages (including bonus) and retirement payments that have arisen have already been transferred to the realm of private property and entrusted to the disposition of the workers. For this reason, insofar as the trade union has not been given individual consent or authorization, no act of disposition such as waiver or grace of payment may

116) Supreme Court Decision No. 96Da22174 dated July 25, 1997

117) This provision is comparable to Article 22, Paragraph 1 of the present Labor Standards Act.

118) Supreme Court Decision No. 93Da4816 dated May 11, 1993; Supreme Court Decision No. 95Nu17380 dated June 27, 1997

119) The Judicial Research and Training Institute, *supra* note 95, at 214.

be undertaken merely through a collective bargaining agreement with the employer.[120]

Again, in relation to claims to retirement payments, cases have taken the position that retirement payments are in nature deferred wages which the employer pays to workers who retire after having served consistently for a certain period of time; that specific claims to retirement payments arise only upon satisfying the requirement of the occurrence of retirement putting an end to continuous work; and therefore that if a collective bargaining agreement has been concluded before retirement to make disadvantageous changes with a retroactive effect to the retirement payment rates forming the basis of assessing the amount of retirement payments, the normative effect arising from the autonomy of a collective bargaining agreement will duly be recognized.[121] However, in view of the facts that an interim settlement of retirement payments is recognized under the present Labor Standards Act (Article 34, Paragraph 3) and of the Supreme Court's decisions that retirement payments are in nature a deferred payment of wages, it would be reasonable to regard the retirement payments payable in proportion to the already served period of continuous work as having been transferred to the realm of private property of the worker and as not subject to the disposition through a collective bargaining agreement, save in the case of consent from the worker.[122]

(c) Change in the Status of Individual Workers under Labor Contracts

Again, in respect of matters bringing about any changes in the status of individual workers under labor contracts, the trade union as a party to a collective bargaining agreement may not make an agreement that has its normative effect.

Even if a trade union has through a collective bargaining agreement included a

120) Supreme Court Decision No. 99Da67536 dated Sept.29, 2000

121) Supreme Court Decision No. 92Da17754 dated Sept.14, 1992; Supreme Court decision No. 95Da19256 dated May 14, 1996

122) Joon-sang Lee, *supra* note 113, 232-233; Jae-hoon Kim, *supra* note 69, at 188; Jung-bae Chun, *supra* note 12, at 326; Joo-suk Jung, *supra* note 69, at 283; Jae-sung Jung, *Disadvantageous changes to Existing Working Conditions through the Collective Bargaining Agreement,* Labor Cases Annotated (1999.4), p.194; Joon-ho Hong, *supra* note 2, at 63(The writer considers that since claims to retirement payments arise upon retirement, claims over the past period of work done may not before retirement be established as an individual property, but argues that such claims should not be defeated under the rule of reliance, one of the general principles of law, by new rules of labor relations, and a retroactive applicability should thus be negated).

certain scope of workers as being subject to dismissal, this is no more than setting out the standards for redundancy and will not by itself rendesuch a determination of the scope of redundancy taking effect in respect of individual workers. Likewise, even if a trade union has through a collective bargaining agreement decided to designate a certain scope of workers as subject to transfer or shift to other departments, the agreement does not automatically take effect. In order for such a transfer or shift to be valid, consent from individual workers is required.[123)]

(d) A New Institution of the Duty to Work

Creation of the duty to work is grounded on labor contracts, and the intention of a trade union may not take the place of that of individual workers. For this reason, any provision under a collective bargaining agreement intended to institute a duty of work would have no legal effect.[124)]

Even if a provision has been made under a collective bargaining agreement to the effect that the trade union agrees to overtime work, it does not *ipso facto* create the duty to work overtime vis-`a-vis individual workers, and only with the consent of their individual consent may the employer direct them to work overtime.[125)]

In connection with the interpretation of Article 42, Paragraph 1 of the former Labor Standards Act providing for the standard daily working time of eight hours and also stipulating as an exception to this rule an extended work by agreement of the parties,[126)] the Supreme Court held that the "agreement of the parties" meant individual agreements between the employer and workers and that agreement through a collective bargaining agreement would be admissible only if it does not deprive individual workers of their right to give their consent or not restrictsuch a right.[127)]

123) The Judicial Research and Training Institute, *supra* note 95, at 215.

124) Kun-yoon Lee, *supra* note 105, at 364.

125) The Judicial Research and Training Institute, *supra* note 98, at 215.

126) The provision is comparable to Article 52, Paragraph 1 of the present Labor Standards Act.

127) Supreme Court Decision No. 93Nu5796 dated Dec.21, 1993

D. Disadvantageous Changes to Working Conditions by Collective Bargaining Agreement

1. Admissibility

An argument has been raised that since a collective bargaining agreement is primarily designed to maintain and improve working conditions, it will be against the purpose of collective autonomy in light of the purpose of a trade union and will thus not be permissible to conclude a collective bargaining agreement which provides for working conditions falling below those already stipulated under the existing labor contracts or collective bargaining agreement at the time of its conclusion.[128] However, maintenance and improvement of working conditions should be considered in a long-term perspective. And since collective bargaining is also possessed with a character of transactions, consent may also be given to temporarily disadvantageous changes, taking into consideration national economy, the circumstance of the business firm in question, and of labor relations. For these reasons, any collective bargaining agreement changing the existing working conditions, including wages, unfavorably to the workers is generally accepted as valid.[129]

The Supreme Court also ruled that disadvantageous changes to working conditions through a collective bargaining agreement would still be regarded as valid, insofar as it did not amount to an abuse of right. In the opinion of the Court, even if a collective bargaining agreement and ensuing remuneration provisions have been amended disadvantageously to some plaintiff-workers for whom honorary early retirement has not taken effect formally, insofar as the agreement has been duly and lawfully concluded with the trade union empowered to give its consent, the mere existence of such circumstances will not render the labor-management agreement tantamount to an abuse of right.[130]

After the decision, the Supreme Court has specified the standards for the

128) Joon-ho Hong, *supra* note 2, at 53-54.

129) Yoo-sung Kim, *supra* note 98, at 173; Hyung-bae Kim, *supra* note 11, at 616; Jong-ryul Lim, *supra* note 109, at 132; Hong-kyu Park, Labor Law (2d ed., Samyoung-sa, 1998.3), pp.730-731; Byung-ho Noh, *Considerations on Certain Problems of the Collective Bargaining Agreement*, in the "Tasks of Civil Law and an Illumination of Modern Legal Science" (Essays in honor of Professor Chun-yong Hong in his sixtieth birthday: 1997.11), pp.971-972.

130) Supreme Court Decision No. 96a56306 dated Sept.12, 1997

determination of exceptional grounds by ruling that a trade union is free to decide on working conditions through a collective bargaining agreement with the employer; that even where a trade union has concluded a collective bargaining agreement resultingdisadvantageous changes to working conditions applicable only to some workers or beneficial changes inapplicable to some other workers, unless the agreement has considerably lacked in reasonableness and there exists such special circumstances as can be regarded as deviating from the purpose of a trade union, such an agreement between the labor and employer may not be regarded as null and void; and that a trade union need not, for the purpose of reaching the labor-management agreement, obtain an *ex ante* individual consent or authorization from the workers who may be subject to the agreement.[131] These decisions, basically recognizing disadvantageous changes to working conditions through a collective bargaining agreement, put forward as an exception "such special circumstances as may be considered to have lacked considerably in reasonableness and to have deviated from the purpose of a trade union". The Supreme Court has also specified the standards to determine an exception that the question whether there was a considerable lack of reasonableness in a collective bargaining agreement should be determined taking into account various circumstances such as the backgrounds of concluding the collective bargaining agreement and the managerial situation facing the employer.

In sum, the Supreme Court's reasoning is that a collective bargaining agreement which adopts disadvantageous changes to working conditions in accordance with the principle of autonomy of a collective bargaining agreement is regarded as prima facie valid; however that if those changes were unreasonable enough to deprive them of the essential purpose of a collective bargaining agreement, i.e. the maintenance and improvement of working conditions, such changes would be invalid; and that the determination of reasonableness should be made by reference to a comprehensive assessment. The Supreme Court's position as outlined above seems generally reasonable and justified.[132]

131) Supreme Court Decision No. 99Da7572 dated Nov.23, 1999; Supreme Court Decision No. 99Da67536 dated Sept.29, 2000

132) *See* Joon-sang Lee, *supra* note 113, at 220.

2. Retroactive Disadvantageous Changes

Further questions may arise as to whether disadvantageous changes may become retroactively effective through a collective bargaining agreement. Scholarly opinions generally support the view that the principle of non-retroactivity of law should apply to the collective bargaining agreement in light of its nature as a norm. They argue that since in practice the right or claim a worker has acquired under the former collective bargaining agreement or the labor contract has been established as his own vested right and is thus outside the normative regulatory power of a new collective bargaining agreement, such a right or claim may not be restricted or deprived through a new collective bargaining agreement and therefore that retroactive disadvantageous changes will not in principle be recognized.[133)]

However, the Supreme Court has developed legal principles on the assumption that retroactive disadvantageous changes through a collective bargaining agreement should be regarded valid, without trying to distinguish the issue from that of an ex post facto confirmation of work rules by the trade union. The Court has ruled: where the annex to a collective bargaining agreement made with the employer has provided that any matters which occurred or arose before the effective date of the agreement shall be presumed to be governed by this agreement, since the agreement has not specifically made provisions to exclude revision of work rules to introduce changes to retirement payment rates, the trade union should be regarded to have consented retroactively through an agreement to the changes to retirement payment rates; and that it should not be interpreted as having approved of the annex taking effect only for the future.[134)]

3. Knowledge of Disadvantageous Changes

(a) Precedents

In the past, the Supreme Court had taken the position that it was not a valid

133) Byung-ho Noh, *supra* note 129, at 974; Byung-tae Lee, *Limits on the Autonomy of Collective Bargaining Agreement*, Hanyang University Law Journal (Hanyang University Press), vol.7, 1990.9, pp.10-11; Jae-sung Jung, *supra* note 122, at 193.

134) Supreme Court Decision No. 91Da34073 dated July 24, 1992

confirmation to make the same retirement payment regulations as the previously amended ones if the new regulations were made without knowing that they are null and void. In other words, although changes to the retirement payment regulations were introduced to the disadvantage of the workers who, at the time of the changes, had been subject to the pre-existing regulations, without the consent of the workers through a collective decision-making process, nevertheless, the regulations were thereafter being implemented for a long period of time. Under these circumstances, even if the trade union organized by the workers, when concluding a collective bargaining agreement with the employer, made retirement payment regulations that were the same as the previously amended disadvantageous regulations, such previous amendment may not be regarded as having been made valid by a retroactive *ex post facto* confirmation, insofar as there exists no evidence that the trade union organized by the above-mentioned workers had the knowledge that the previously amended regulations in force at the time of the conclusion of the collective bargaining agreement were null and void. [135)]

Again, the Supreme Court has ruled that it may not be regarded as an *ex post facto* confirmation of the amendment where the trade union organized after revision of the regulations and the employer concluded a collective bargaining agreement making the regulations revert to the progressive rates and leaving any matters unregulated under the collective bargaining agreement regulated by relevant regulations made by the employer;[136)] or as where the trade union, without knowing the retirement payment regulations then in force to be null and void, concluded a collective bargaining agreement and made a provision in the annex that any matters not specified to the agreement would be governed by relevant laws and regulations and practices.[137)]

(b) Different Decisions

However, unlike the general decisions mentioned above, in cases where a collective bargaining agreement has been concluded in an *ex post fact* confirmation of disadvantageous changes to the retirement payment regulations, the Supreme Court

135) Supreme Court Decision No. 92Da19316 dated June 11, 1993

136) Supreme Court Decision No. 92Da32357 dated Nov.27, 1992

137) Supreme Court Decision No. 93Da26168 dated July 11, 1995 (93 ta 26168) (Grand Bench Decision)

has, without any special reference to whether the trade union or the workers knew the disadvantageous changes to work rules to be null and void at the time of the conclusion of the collective bargaining agreement, simply recognized the facts that the intention such as consent to the retroactive application of the collective bargaining agreement has been declared through the collective bargaining agreement.

To paraphrase, the employer, when amending the retirement payment regulations to lower the payment rates, had not obtained consent from the workers through a collective decision-making but later concluded with a trade union organized subsequently by the workers a collective bargaining agreement which stipulated in the annex "[a]ny matters that occurred before the date of enforcement of the collective bargaining agreement shall be presumed to be governed by the agreement". Under these circumstances, since the collective bargaining agreement did not make any specific provision that excluded revision of work rules to change retirement payment rates, the acts of the trade union should be construed as having consented retroactively to the changes, and not merely as having consented to the annex taking effect for the future.[138)]

In another case, the employer amended the staff remuneration and retirement payment regulations to lower their respective payment rates without obtaining consent from the workers through a collective decision-making procedure. Later, as the trade union was in the course of concluding a new collective bargaining agreement, there were opinions that since the retirement payment regulations had already been amended, the new collective bargaining agreement, unlike the previous one, would rather take the form of citing directly the staff remuneration and retirement payment regulations. Thus, if the collective bargaining agreement had made a provision directly quoting the already amended staff remuneration and retirement payment regulations in respect of the retirement payment scheme, the amended staff remuneration and the retirement payment regulations should be regarded as having through the collective bargaining agreement obtained an ex post facto confirmation from the trade union and also having taken effect.[139)]

Although these decisions were handed down more or less at a similar period with

138) Supreme Court Decision No. 91Da34073 dated July 24, 1992; Supreme Court Decision No. 92Da52115 dated March 23, 1993

139) Supreme Court Decision No. 92Da49294 dated May 11, 1993

above mentioned (a) Prededents decisions, the Supreme Court arrived at the contrary conclusion. But it is not clear what extent of differences in facts existed.

(c) Change in Precedents

Since then, cases have gone further. The Supreme Court has been able to rule that a collective bargaining agreement is an agreement concluded between the trade union and employer or employers' association to regulate matters such as working conditions arising from the labor-management relations; that where the trade union has concluded with the employer a collective bargaining agreement approving or consenting retroactively to the standards for working conditions such as existing wages, working hours and retirement payments, etc., such consent or approval will take effect on the union members or workers who will have been working in the particular business firm after the agreement and will thus have been subject to the agreement; that even where the pre-existing work rules should be applied to existing workers whose vested interests would be infringed by disadvantageous changes to work rules which the employer has introduced without obtaining consent from the workers through the collective decision-making procedure, if the trade union had concluded with the employer a new collective bargaining agreement, that agreement would, irrespective of whether or not the union had known that the pre-existing work rules had to be applied to existing workers whose vested interests would be infringed, take effect in principle on union members or workers to be subject to it; and therefore that the work rules amended in accordance with the new collective bargaining agreement should be applied to the workers.[140] The Supreme Court has thus made clear a de facto shift from its previous position by ruling that the declaration of intention such as retroactive consent or approval, etc., will be valid regardless of whether or not the trade union or workers had been aware of at the time of the collective bargaining agreement that not the retirement payment regulations disadvantageously amended in the past but the pre-existing regulations would be applied to existing workers already under employment at the time of disadvantageous changes. Nevertheless, if we follow the Supreme Court's precedents that claims to retirement payments arise upon retirement and that their rates

140) Supreme Court Decision No. 95Da34316 dated June 10, 1997; Supreme Court Decision No. 96Da6967 dated Aug. 22, 1997

are governed by the rates in force at the time of retirement, it is doubtful that the application of a new retirement payment scheme to existing workers would amount to retroactive disadvantageous changes to working conditions.

IV. Concluding Remarks

The legal principles that had developed on such premises as life-long employment and sustained improvement in working conditions have been subjectto transformation because of rapid changes in labor-management relations introduced in Korea since the 1980s. The changes have been fuelled by the situation precipitated by the "International Monetary Fund's bailout plan" in November 1997.

To cope with new socio-economic situation, employers have attempted to lower the standards for working conditions to their advantage by introducing changes to work rules and collective bargaining agreements. The ensuing legal disputes with resisting workers resulted in a spate of the Supreme Court's decisions, generating new labor law principles.

Above all, the Supreme Court's position as revealed from its decisions may not entirely write off my general impression of its excessive conservative leanings. Typical of the Supreme Court's growing conservatism are decisions on the relative invalidity of disadvantageous changes to work rules failing to obtain consent of the workers' group, the subject of expressing consent in case of a retroactive *ex post facto* consent to disadvantageous changes to work rules made in the absence of consent from the workers' group, recognition of the trade union's retroactive consent to retirement payment rates, recognition of the power of the trade union to take dispositive measures on retirement payments payable for the previous years of work, recognition of retroactive disadvantageous changes to work rules through the collective bargaining agreement, and no requirement for knowledge of disadvantageous changes in case of the confirmation of disadvantageous changes to work rules through the collective bargaining agreement.

Law is the active norm of a community and it is thus natural that the courts reflect social changes in their interpretation of the law. Nevertheless, there should be a clear limit. I am prepared to understand the dilemma facing the Supreme Court in seeking a reasonable settlement in specific cases, but granted such realistic needs, the Supreme Court's rulings mentioned above leave much to be desired in the interpretation of the

law. This is especially so when one simply remembers the importance of honoring the basic spirit of the Trade Unions and Labor Relations Adjustment Act embodying the constitutional guarantee of three fundamental rights of workers and also the spirit of the Labor Standards Act aimed at protecting workers. I hope the labor legislation and institutions to be reorganized and streamlined in a more reasonable direction in the future.