Article

Interactions of Plural Regulatory Forces within the Workplace: Two Case Studies of Labour Retirement Pay

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CONTENTS

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I. INTRODUCTION

Inadequacies of retirement pay provisions provided by the Labour Standards Law (LSL), including limited coverage, lacking portability, contribution evasion and insufficient contribution, are emphasized by the existing literature concerning the law of labour retirement pay.[1] A variety of statistical data, such as the average life of Small and Medium-sized Enterprises (SMEs) in Taiwan,[2] the percentage of employers who have made contributions to the Labour Retirement Reserve, and the contribution rate made by those employers,[3] are adopted as evidence to support the view that very few employees can in fact, benefit from the system of labour retirement pay established by LSL.[4] Accordingly, versions of regulation blueprints for labour retirement pay have also been investigated by a considerable number of studies.[5]

It is true that these dissections enable clear-cut claims for advancing the aged workers' right to retirement pay during the process of amending LSL. It also seems true that such an analysis serves to improve the coverage and portability of labour retirement pay.[6] The financial penalty imposed on employers for contribution evasion has, at the same time, soared in terms of Article 53 of the Labour Pension Act 2004 (LPA).[7] The

1. *See* Kuo, M. C., *Social Security or Employers' Responsibility?—A Review of Enterprise Social Benefit Based on Labour Standards Law*, *in* SOCIAL SECURITY SYSTEM AND SOCIAL LAW 91-92 (Han-lu 1997); Zheng, K. F., *Labour Retirement Pay is Visible and Obtainable?*, 95 ECONOMIC PROSPECTS 45-46 (2004); F. Y. Chang, *A Reflection on Expanding the Coverage of Labour Standards Law*, 18 J. INDUS. REL. 454 (1999).

2. *See* Y. S. Kuo, *The Impact of the New Labour Retirement Pay on Employers*, 20 J. INDUS. REL. 711 (2002).

3. *See* G. San, *Improving the Retirement System in Labour Standards Law—System Integration of Retirement, Dismissal Pay and Unemployment Insurance*, 10 J. ECO-LAW 6-7 (1992).

4. *See* L. H . Kuo, *The Controversy of Labour Pension in Practice in Taiwan*, 2 LAB L.J. 92 (2002); F. Y. Chang, *Constructing Occupational Pension System for Taiwanese Workers*, 20 J. INDUS. REL. 718 (2002); Y. C. CHU, HISTORICAL ANALYSIS OF POST-WAR POLICY IN OLD-AGE ECONOMIC SECURITY: COMPARING STATE AND CIVIL SOCIETY 44 (unpublished master dissertation of Three Principles of People Department, National Taiwan University, 1999).

5. *See* M. C. Kuo, *A Research on Occupational Pension Draft Bill*, research project commissioned by Council of Labour Affairs (1998); G. Chen, *Constructing A Labour Retirement Pay in Terms of the Demands of Modern Labour Market—An Illustration of Labour Retirement Pay Draft Bill*, 30 LEGISLATIVE YUAN NEWS 11-20 (2002); M. F. Zeng, *The consensus of Economic Development Advisory Council on Legal Change in Labour Retirement Pay*, 30 LEGISLATIVE YUAN NEWS 70-104 (2002); C. M. Chang, *Reconsidering Labour Retirement Pay Draft Bill*, 219 TAIPEI B. J. 31-42 (1997); Y. S. Chang,, *Some Thoughts on Labour Retirement Pay Draft Bill*, 219 TAIPEI B. J. 2-3 (1997).

6. *See* Cing Kae Chiao, *The Development of Labor Law and Policy in Taiwan: 1949-2000*, Paper presented at the International Conference on "Social Security in Taiwan, Retrospect and Prospect of Industrial Relations: 1949-2000", the Graduate Institute of Labor, National Chengchi University, p.V-18 (2000); J. S. Liou & S. Y. Wei, *Retirement Pay Is No Longer Visible but Unobtainable*, 355 PRAC. TAX 82 (2004).

7. *See* M. C. Wang, *Standing on Both Sides of the Scale to Balance the Rights of Employees and Employers*, 164 ELECTRONIC WORK INFO. 21 (2004a).

new labour laws, including the amended LSL and LPA 2004, appear to provide workers with better protection in terms of old-age economic security.

However, it could be said that not all of the problems existed in LSL have been improved by the expansion of coverage in 1998 and the enactment of the LPA in 2004. Under the new laws, the government officials of the Council of Labour Affairs suggest that employers might still evade their obligation of making contributions through the following methods, as they did before: the lowering of the existing wage, or reporting a disguised wage structure. (*United Daily News*, 12th June 2004) Wang M. C. also points out that giving enterprises guidance in terms of transforming "regular payment" in employees' wage structure into "irregular payment" provided by LSL 2002, so as to reduce the enterprise owners' personnel costs in retirement-pay contributions, has become a popular business for corporate management consultants since LPA was enacted in 2004.[8]

Therefore, it could be asserted that not all aged workers' suffering could be diminished by amending the existing positive labour laws. As Hellum and Stewart argue, there are regulatory or normative systems other than positive law that affect and control people's lives.[9] To take the garment industry in New York as an example, Moore demonstrates that the workplace is a "semi-autonomous social field" which is regulated not only by positive law, but also by complex chains of principles, norms, rules, practices, and the institutional activities of administration, legislation, adjudication and enforcement, backed by political power and legitimacy.[10] Indeed, positive law should not be regarded as the only legitimate site of social struggle.[11]

It could also be argued that the statistical data revealing the disadvantages of existing law fail to uncover aged workers' experience of fighting against legal oppression from employers. According to Hellum and Stewart, conventional legal sources could be supplemented with data on the practices of the courts, especially the lower courts.[12] Therefore, it could be suggested that the litigation struggles of aged employees should be dissected, so as to disclose consistent patterns that underlie the legal relationships in employment that cause workers financial difficulties in

8. *See* M. C. Wang, *Adjusting Personnel Structure in Response to the New Retirement System*, 164 ELECTRONIC WORK INFO. 28 (2004b).

9. *See* A. HELLUM & J. STEWART, PURSUING GROUNDED THEORY IN LAW 41 (Mond Books 1998).

10. *See* S. F. Moore, *Law and Social Change: The Semi-autonomous Social Field as an Appropriate Subject of Study*, 7 LAW & SOC'Y REV. 719-729 (1973).

11. *See* R. Terdiman, *Translator's Introduction to "The Force of Law: Toward a Sociology of the Judicial Field" by Pierre Bourdieu*, 38 HASTINGS L.J. 808 (1987).

12. *See* HELLUM & STEWART, *supra* note 9, at 50.

old age.

Taking labour retirement pay as an example, this article aims to pinpoint aged workers' suffering through the interactions of positive labour law, power relations and cultural postulates within the social field of the workplace in Taiwan, which is neglected in the process of LSL amendment. First of all, how the provisions of retirement pay stipulated by LSL actually operate on the ground is examined. Following this, how Taiwan's corporate culture and power relations between employers and workers shape the exercise of such positive labour laws is outlined. In two cases of labour retirement pay collected from the law database on the internet web site of the Judicial Yuan and Lawbank, the courts' perspective on the plural regulatory orders operating in the workplace is reviewed. Finally, this article argues that positive labour law has, indeed, provided aged workers with the right to retirement pay. However, employees' economic security in old age could be aggravated by employers' power of exploitation, reinforced by the patriarchal corporate culture in Taiwan. It suggests that efforts towards changing the labour law in the interests of employees should not be limited to the realm of positive law. Other sources of labour law, including power relations and corporate culture, should be incorporated into the training of legal practitioners, and the teaching of labour law in Taiwan.

II. POSITIVE LABOUR LAW OF RETIREMENT PAY

Labour retirement pay in Taiwan is regulated by two systems of law: the old *Labour Standards Law (LSL)*, first introduced in 1984, and the new Labour Pension Act of 2004. Under the old system, workers who reach the age of 55 with 15 years of service, or those at any age with 25 years of service, are entitled to early retirement (Article 53 of LSL). As for workers who reach the age of 60, or those who are incapacitated on account of mental or physical disability, compulsory retirement may be ordered by the employers (Article 54 of LSL).

Retirement pay is calculated on the basis of two elements: "service years" and "average wage of workers". According to Article 55 of LSL, two units of payment are given for the first 15 years of service, and one unit is given for the remaining years of service, assuming that the total units that a worker accumulates shall not exceed 45. In addition, accumulated service years are limited to those for the same business entity (Article 5 of *LSL Byelaw 1997*). That is, the service years of those workers who are transferred to another company owned by the same employer shall also be included in this calculation. The same principle applies to workers whose new employer agrees to recognise their service

years on a continuous basis, under Article 20 of LSL.[13] However, workers' service years are not portable among different enterprise entities or different employers.[14]

As for the average wage, Article 2(4) stipulates that this sum be arrived at by adding the workers' total amount of wages during the last six months prior to the day of retirement, and then dividing it by the total number of days for that period. Article 55II further indicates that one of the calculation bases for retirement pay is one month of the workers' average wage.

The concept of "wage" is defined by LSL as the reward which a worker receives for his/her work, including wages, salaries, premiums, allowances (whether payable in cash or in kind or computed on an hourly, daily, monthly or piece-work basis), and any other regular payments under whatever term. (Article 2 (3) of LSL 2002) Even though LSL does not provide a specific list of payments that should be regarded as "regular", a number of payments are enumerated in Article 10 of *LSL Byelaw 1997* as examples of irregular payment. These include:

(a) Bonuses;

(b) Prizes: such as Year-end Bonus, Competition Prize, Research and Invention Prize, Special-achievement Prize, Long-service Prize, Fuel and Material Saver Prize, and any other irregular prize;

(c) Festival Bonuses such as Bonus of Lunar New Year, Bonus of Dragon Boat Festival, and Bonus of Moon Festival;

(d) Medical Subsidies, Workers and their Children's Education Subsidy;

(e) Service charges directly received from customers (e.g. tips);

(f) Gifts in cash given by employers for weddings and funerals;

(g) Compensation Fees for Occupational Injury;

(h) Contributions for Labour Insurance and any other private insurance schemes made by employers;

(i) Travel Allowance, Public-relation Fees, Supper Payment, and Meal-delay Payment;

(j) Uniform and the cash for it;

(k) Any other payments identified by the government authority.

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13. Except for workers to be retained through negotiations between the old and the new employers, Article 20 of LSL stipulates that a business entity which contemplates changing its company structure, or assigning its ownership to another business entity shall, terminate its labor contracts with the remaining workers on advance notice within the time limit prescribed in Article 16. In addition, the business entity shall give dismissal payment to workers in accordance with Article 17. The new employer shall recognize the existing service years of the retained workers.

14. Article 2(2) of LSL defines the "employer" as the owner or responsible person of an enterprise, or the person who represents the owner in dealing with employment matters. Article 2(5) of LSL indicates that "business entity" means any entity that engages in any line of business applicable to this law and employs the workers to perform the work.

In other words, any irregular payments, such as those identified above, could be excluded from the bases for calculating workers' retirement pay.

In practice, however, legal control over workers' wage and retirement pay comes not only from LSL but also from other legal sources, including the administrative directives of the Council of Labour Affairs (CLA), judicial precedents, employment contracts and rules of the workplace. For example, CLA holds that any reward that a worker received for his/her work should be taken as a part of "wage" with no regard for its regularity. (CLA 1993.May.19, Labour Letter II, No.25828) A similar argument is asserted by Lin K. S., who maintains that any reward for work should be regarded as part of a wage in terms of the nature of employment contracts. The concept of "regular payment" could serve as the supplementary element of a wage only if it is controversial to regard a payment as a work reward.[15] Moreover, Lin recommends that the judicial system should drop the concept of "bounty payment" commonly adopted by court judgments, owing to the fact that it is not a legal term of labour law, and employers tend to use it as a means of disguising employees' wage structures so as to minimize employees' average wages.[16]

According to Liou C. P., nevertheless, the judiciary in Taiwan, including district courts, high courts and the Supreme Court, all form their judgment based on Article 3 (3) of LSL, which regards regularity as an element of a wage.[17] This attitude towards the wage is shared by Huang G. C..[18]

Apart from administrative and judicial systems, various definitions of wage and conditions of retirement pay also exist in production rules promulgated by enterprise owners and their management teams. Based on Article 70 of LSL and Article 38 of LSL Byelaw, employers should provide the rules of the workplace and declare them at the workplace, which specifies the calculation formula of wages, allowances, prizes and retirement pay. A copy of the rules should also be sent to administrative authorities and each employee. Employers are also allowed to produce individual rules of the workplace for any payment, in terms of Article 39 of LSL Byelaw. Moreover, Article 7 of LSL Byelaw provides that the calculation and adjustment of wages and payment matters such as retirement pay, allowances and prizes should be settled in employment

15. *See* K. S. Lin, *An Essay on "Wage" under Labour Standards Law*, 58 CHENG-CHI U. L. REV. 332 (1997).

16. *See* K. S. Lin, *The Myth of Wage: Bounty Payment—A Review of Supreme Court Judgment No.1638*, 67 TAIWAN L. REV. 181 (2000).

17. *See* C. P. Liou, *An Essay on "Regular Payment" under Labour Standards Law*, *in* RESEARCH ON THEORY AND JUDGMENT OF LABOUR LAW 478-479 (Angle Publishing Co. 2000).

18. *See* G. C. HUANG, A DETAILED EXPLANATION OF LABOUR STANDARDS LAW 71 (San-min 1997).

contracts. Therefore, the rules of the workplace and employment contracts could both be regarded as legal sources of labour retirement pay.[19] According to Lin C. S. and Wang H. L., any payment that is provided by the rules of the workplace and employment contracts should be regarded as part of a wage, because it is an employers' obligation, rather than a bounty from the employer.[20] This opinion is shared by Liou C. P.[21]

With the *Labour Pension Act 2004 (LPA 2004)* having come into practice on 1st July 2005, the problem of portability concerning the provisions of "service years" in LSL has been more effectively ameliorated. According to the new law, a fully-funded, defined contribution Individual Retirement Account has been established for employees (Article 6 of LPA). Contribution records are transferable where an employee changes jobs.[22] As for those who work in the enterprises that employ more than 200 people, a Money Purchase Pension Scheme is provided as another option (Article 35 of LPA). All employees newly recruited from 01/July/2005, and those who prefer to participate in the new system are covered by LPA (Article 7 & 8 of LPA).

However, the definition of the wage, as provided by LSL, still determines the amount of contribution and benefit under the Individual Retirement Account of LPA 2004. According to Article 14 of LPA, the employer's minimum contribution rate is 6% of an employee's monthly wage. Moreover, Article 3 of LPA stipulates that the meaning of "wage" in LPA follows the definition provided by Article 2 of LSL. Consequently, it could be said that problems concerning the definition of the wage, under LSL, would continue to exist in the practice of LPA.

III. POWER RELATIONS IN THE WORKPLACE

It is by no means new to say that industrial relations revolve around power-relations of dominance and subordination between employers and employees. Using the concept of "critical legal pluralism", Arthurs advances the notion that the law of the workplace is ultimately shaped by power relations. He argues that the power of capital usually results in workplace rules which favour corporate employers over individual employees.[23]

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19. *See* C. K. HUANG, LABOUR LAW 132-133 (National Open University 1997); Y. C. HUANG, NEW DISCOURSE OF LABOUR LAW 41-42 (Han-lu 2000).

20. *See* C. S. LIN, A REVISED EXPLANATION OF LABOUR STANDARDS LAW 97 (Jei-tai 1999); H. L.Wang, *An Exploration of the Meaning of Wage*, 13 TAIWAN L. REV. 27 (1996).

21. C. P. Liou, *supra* note 17, at 479-80.

22. *See* J. S. Liou, & S. Y. Wei, *Retirement Pay Is No Longer Visible but Unobtainable*, 355 PRAC. TAX 82 (2004).

23 . *See* H. Arthurs, *Landscape and Memory: Labour Law, Legal Pluralism and Globalisation*, *in* ADVANCING THEORY IN LABOUR LAW AND INDUSTRIAL RELATIONS IN A

Kaufman also points out that employers ordinarily possess bargaining powers superior to employees.[24] Only a few workers, such as senior executive workers and skilled professionals, are able to construct an advantageous status of workplace law through contract or customs of the trade.[25] Most workers, especially those with little individual or collective power, are on the opposite side of the spectrum: their employers could unilaterally impose the rules of the workplace, or could even violate those rules with relative impunity.[26]

In other words, the social rules of work, dictating who does what, and for whom, how work is paid, and how the results of work are appropriated, are usually constructed with relations of power and inequality. Consequently, exploitation could occur through a steady process of transfer of the fruits of the labour of one social group (the workers) so as to benefit another (the employers).[27]

In the case of Taiwan, employers' power of exploitation could be derived from two main aspects:

A. *The Ownership of the Means of Production*

According to Article 814 of Civil Law, the ownership of processed goods should be transferred from the material owner to the person who has done work on it, if the added value is higher than the original materials. Under employment contracts, however, workers cannot obtain ownership of the processed goods. Instead, wages are given in exchange for labour. (Article 482 of Civil Law, Article 2 of LSL)

It is well recognised that the main character of an employment contract is "employees' subjection". For one thing, employees rely on their employers' means of production to carry out their work. In most cases, relatively speaking, it is the employer who decides how much the employee should be paid for his/her work.[28] For another, employees are subject to employers' instructions in terms of working time, working place, working methods and operation procedures. In cases where such instructions are not followed, employers could further impose penalties on their employees.[29] Therefore, it could be said that the ownership of the

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GLOBAL CONTEXT 30 (T. Wilthagen ed., 1998).

24. *See* B. Kaufman, *The Evolution of Thought on the Competitive Nature of Labor Markets*, *in* LABOR ECONOMICS AND INDUSTRIAL RELATIONS: MARKETS AND INSTITUTIONS 145 (C. Kerr & P. Staudohar eds., 1994).

25. *See* Moore, *supra* note 10, at 724-26.

26. *See* Arthurs, *supra* note 23.

27. *See* I. YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 49 (Princeton University Press 1990).

28. *See* C. K. HUANG, *supra* note 19, at 64.

29. *See* Y. C. HUANG, *supra* note 19, at 132.

means of production empowers the employers to absorb the fruit of their workers' labour.

B. *Monopoly of Rules of the Workplace*

In comparing Article 7 of LSL Byelaw with Article 70 of LSL, what should be ruled by employment contracts comes close to overlapping with what could be regulated by rules of the workplace. Accordingly, retirement pay, as an employment condition, could be governed either by employment contract or by rules of the workplace. Owing to the fact that employers could unilaterally decide the content of workplace rules (Article 70 of LSL), it could be argued that the existing legal framework in Taiwan authorises employers to manipulate employment conditions via promulgating the rules of the workplace, rather than by settling with employees through employment contracts.[30] According to Huang Y. C., industrial relations in Taiwan are primarily regulated in practice by rules of the workplace.[31] As a result, it could also be asserted that employers' powers of exploitation are reinforced by the existing labour law.

To sum up, it may be argued that the ownership of the means of production is translated into power, power into law, and law into the economic status of aged workers. Under the existing legal framework and power relations within the workplace, employees in Taiwan are relatively powerless in negotiating employment conditions and asserting their right to retirement pay.

IV. CORPORATE CULTURE IN THE WORKPLACE

It is not new to say that the positive law in Taiwan has notably less effect on mediating social relations than is the case in industrialised Western countries.[32] Taking informal financial practices of small businesses as an example, Winn argues that personal relationships and network building appear to be alternatives to the regulation of trade and commerce in Taiwan.[33] As for the context of industrial relations, it could be said that the cultural heritage of Confucianism commonly shared by Taiwan, Hong Kong, Singapore and South Korea[34] provides a normative source for the regulatory power of employers in Taiwan.

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30. *Id*. at 129, 133.

31. *Id*. at 124.

32. *See* S. Cooney, *The New Taiwan and Its Old Labour Law: Authoritarian Legislation in a Democratised Society*, 18 COMP. LAB L. J. 3 (1997).

33. *See* J. K. Winn, *Relational Practices and the Marginalization of Law: Informal Financial Practices of Small Business in Taiwan*, 8 LAW & SOC'Y REV. 205-208 (1994).

34. *See* J. England, *Chapter 4: Attitudes and Values*, *in* INDUSTRIAL RELATIONS AND LAW IN HONG KONG 44 (Oxford University Press 1989).

Confucian ideals emphasize the authority of the father within the family, the need for solidarity between brothers, and the necessity for harmony and order in the household.[35] The individual is subordinated to the group or larger collectivity.[36] Respect for one's seniors and an acceptance of the established order are required so as to maintain the patriarchal system of authority within the family.[37]

It has been suggested that this traditionally ideal pattern of social relationships defines the structure of work organisation and supports management's prerogatives.[38] Wu and Chen (1999) demonstrate that a cultural orientation of sacrifice to support the superior's decision is favoured by Taiwanese enterprises.[39] Lindholm, meanwhile, maintains that obedience and loyalty to authority, the value of harmony and hard work, and the duty of those who govern to look after the governed are all emphasised in the Chinese work ethic.[40]

England further asserts that employers within Chinese enterprises are regarded as father figures who, unilaterally, have the power to dictate the rules of the workplace, while workers expect employers to adopt a paternalistic attitude towards them.[41] "Father" and "children" enjoy close and harmonious relations, whereby an obedient and hardworking labour force will be rewarded—just as a father might reward his submissive children—by receiving protection against the vicissitudes of life by a powerful, yet benevolent and just father figure.[42] For employers, such corporate culture clearly provides a set of values which attach traditional authority to their de *facto* superior power. Without power, on the other hand, workers had little alternative but to accept the *de facto* position and to look to employers for benevolence, in accordance with traditional teachings.[43]

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35. *See* M. C. Chen, *Family Culture and Corporate management*, *in* MANAGEMENT PERSPECTIVES OF CHINESE 192 (K. S. Yang & S. C. Zheng eds., 1988).

36. *See* M.Warner, *Human Resource Management "With Chinese Characteristics"?*, *in* THE MANAGEMENT OF HUMAN RESOURCES IN CHINESE INDUSTRY 147 (ST. Martin's Press Inc. 1995); K. K. Huang, *Chinese Corporate Culture and Productivity*, 1 RES. IN APPLIED PSYCHOL 167 (1999).

37. *See* O. LANG, CHINESE FAMILY AND SOCIETY 18 (Yale University Press 1986).

38. *See* T. C. Liu, J. J. Wu & S. C. Chang, *The Impact of Organizational Power, Business Patterns, Managerial Decision Influence on Business Performance*, 4 FU JEN MGMT. REV. 139 (1997); Y. L. Zhan, *Corporate Culture in Taiwan*, 6 GLOBAL BUS. 17-18 (1999).

39. *See* W. Y. Wu, & S. H. Chen, *Corporate Culture, Organizational Structures, and Management Styles for Taiwanese, American, and Japanese Firms: An Empirical Investigation in Taiwan*, 1 J. INDUS. MGMT. 160 (1999).

40. *See* N. Lindholm, *Standardized Performance Management? A Study of Joint Ventures in China*, *in* CHANGING WORKPLACE RELATIONS IN THE CHINESE ECONOMY 167 (M. Warner ed., 2000).

41. *See* England, *supra* note 34, at 42.

42. *See* J. England & J. Rear, *Chapter 3: The Employers*, *in* CHINESE LABOUR UNDER BRITISH RULES: A CRITICAL STUDY OF LABOUR RELATIONS AND LAW IN HONG KONG 49 (Oxford University Press 1975).

43. *See* England, *supra* note 34, at 51.

This ideal world of caring "fathers" and loyal "children" operates well in stable market conditions, for domestic services and for small family-owned firms.[44] Liu, Huang and Chen also argue that personal networks resembling family relations remain the core of Chinese corporate culture, and that these would not necessarily change with the process of industrialisation.[45] Moreover, Wang T. S. maintains that Confucian ideas and their legal postulates still have an impact on the Taiwanese legal culture in the present day.[46] Nevertheless, England (1989) points out that in the competitive sector, economic pressures make this traditional value much harder to achieve in actual employment practice.[47] For example, Chen C. F. shows that the business decisions of the banking industry in Taiwan appear to be centrally controlled by the management team, and that employees tend to be dismissed or strongly encouraged to retire early, so as to reduce the personnel costs in response to financial crises.[48]

Article 54 of *Labour Standards Law (1984)* states that employers should provide retirement pay for aged workers who reach the age of 60 with 25 service years. However, the dominant-subordinate power relations in any employment relationship, reinforced as they are by the prevailing corporate culture in Taiwan, has led to the failure of labour laws being enacted by the state to protect aged workers' right to retirement pay. Given these interactions of regulatory forces, the following section further demonstrates that workers' rights to retirement pay tend to be violated in cases where a disguised wage structure is reported by employers, one which enables them to evade their responsibility of providing retirement pay.

V. COURTS' ATTITUDE TOWARDS LEGAL PLURALITY IN CASES OF LABOUR RETIREMENT PAY

As mentioned above, regulatory forces within Taiwan's workplace are constituted by positive labour law, the power of exploitation and Confucian corporate culture. However, very few studies on labour law in Taiwan have considered the issue of legal plurality and its effect on the practice of labour law. Neither has its impact on the economic security of

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44. *See* K. K. Huang, *Modernisation of Family Enterprise in Chinese Style*, *in* CHINESE POWER GAME 250-254 (Taipei, Chu-liu 1989).

45. *See* C. Liu, T. Huang & C. Chen, *Deciphering and Analyzing Corporate Culture: A Study of Three Large Private Corporations*, 37 CHINESE J. PSYCHOL 140 (1995).

46. *See* T. S. Wang, *Chapter 4: Taiwan*, *in* ASIAN LEGAL SYSTEMS: LAW, SOCIETY AND PLURALISM IN East ASIA 150 (P. L. Tan ed., Sydney, Butterworth 1997).

47. *See* England, *supra* note 34, at 51.

48. *See* C. F. Chen, *Corporate Culture and Its Transition*, 26 COOPERATIVE ECON. 69-70 (1994).

aged workers been examined. Positive labour law remains the central realm of debate where legal transformation is concerned.

Huang C. K. acknowledges that court judgments and administrative directives are affected by non-statutory factors, such as the subject ideas of judges and officers, ideologies or public opinions. Nevertheless, he suggests that it is inappropriate for legal academia to discuss such non-statutory factors.[49] Liou C. P., meanwhile, indicates that legal interpretations of LSL created by CLA differ from court judgments' in the case of the definition of "regular payment".[50] He further points out that some judgments made by the Supreme Court are alien to the practice of certain industries.[51] Conflicting interpretations of "regular payment" between the Supreme Court and CLA are demonstrated in his study, but the causes of such conflict are not explored.

Through reviewing two cases of labour retirement pay (Yu v. Shilin Paper Co. and Roy v. Shilin Paper Co.) that are randomly collected from the law data bank provided by the Judicial Yuan, this section will now seek to show the extent to which some courts recognise employees' subordinate status in industrial relations and protect the workers' right to retirement pay. The other courts' indifference to workers' suffering under a variety of regulatory forces shaping the law of the workplace is also revealed. To underscore the conflicting interpretations of laws and facts established by the courts, the chosen cases are the ones where the defendant is the same enterprise owner, and accused of the same issue by different employees (defendants).

In Yu v. Shilin Paper Co., four aged workers claimed that they had worked for the employer S for 24 years and 1 month, 33 years and 11 months, 25 years and 25 years respectively. Their retirement pay granted by S was calculated in terms of the basic wage plus duty bonus and meals allowance. However, the workers asserted that some other payments, including the Festival Bonus, the Supper Payment, the Competition Prize, the Overtime Payment and the Fire-fighting Allowance, also constituted their wages and should be taken into consideration in the calculation of their retirement pay. On the other hand, S argued that the concerned payments, bonus, prizes and allowance were not regularly given, and should not be regarded as a part of the employees' wage. Rather, those payments were the employer's bounty for improving their employees' lives. Therefore, it was argued that these payments should not be counted into the calculation basis of retirement pay. This case was appealed at the court of fifth instance.

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49. *See* C. K. HUANG, *supra* note 19, at 129.

50. *See* C. P. Liou, *supra* note 17, at 482.

51. *See* C. P. Liou, *Rights Disputes in Industrial Disputes and the Law-making Mechanism of the Judges—A Review of Supreme Court Judgments*, 14 TAIWAN L. REV 13-14 (1996).

As for Roy v. Shilin Paper Co., another four aged workers initiated a retirement-pay lawsuit against the same employer (Shilin Paper Co.) for the same reasons, as shown in Yu v. Shilin Paper Co. They had worked for the employer S for 35 years and 1 month, 25 years and 1 month, 21 years and 7 month, and 14 years and 1 month respectively. This case was appealed at the court of seventh instance.

A. *Judicial Recognition of Power Relations in the Workplace*

It is true that some courts have recognised what Arthurs and Kaufman argue, namely that unequal power relations in industrial relations constitute an important shaping force for implementing positive labour law,[52] by which employees' right to retirement pay could be damaged in a variety of ways.

First of all, some courts acknowledge that employers might disguise the wage structure by arguing that the payment in dispute is not historically part of a wage based on the rules of the workplace, in spite of the fact that those payments have actually been transformed as regular rewards for employees' work at present.

As the Court of first instance noted in Roy v. Shilin Paper Co.:[53]

> "According to Article 71 of LSL, the work rules should be null and void if they contravene any mandatory or prohibitive provisions of laws, regulations, or collective agreements applicable to the business entity. In cases where rules of the workplace promulgated by the employer declared that certain bonus, prize and payments, which were actually work rewards in nature and were regularly given, were not a part of employees' 'wage', such rules have violated Article 2 (3) of LSL and damaged the workers' basic rights to retirement pay."

This perspective was reaffirmed by the Courts of second, fourth and sixth instance of Roy v. Shilin Paper Co.,[54] in which Festival Bonus and Supper Payment were both ruled as being calculation bases for labour retirement pay, despite the fact that the employer S denied that they were part of the employees' wage. The Court of fourth instance further contended:

> "If the rules of certain payment had been unilaterally changed by

52. *See* Arthurs, *supra* note 23; Kaufman, *supra* note 24.

53. *See* Shilin District Court, 1998 Labour Lawsuit No.6.

54. *See* High Court, 1998 Labour Appeal No.32; High Court, 2000 Labour Appeal Revised Case No.7; High Court, 2002 Labour Appeal Revised Case No.6.

> the board of directors in the past, and the workers' employment conditions had been worsen by the new rules comparing to the contents of the employment contract, the court maintained that such rules would be invalid for workers if they did not agree with the changes."

According to the judgment of the second trial in Roy v. Shilin Paper Co., the festival bonus in most cases was seen as an uncertain payment, issued in accordance with a company's profit or employment relations. In other words, it was an irregular payment out of employers' bounty, or as a means of providing encouragement for the hard work of employees. However, the court found that the Festival Bonus in dispute was enlisted as part of a wage, within the wage structure of the employees' pay slips. Additionally, the Festival Bonus was given monthly, though not in the months with the lunar festivals. In cases where employees left their jobs before the festivals arrived, they could still receive part of the festival bonus. Therefore, the court argued that Festival Bonus was irrelevant to festivals. Moreover, the employer S asserted that the Festival Bonus was given monthly because he agreed to "lend" the bonus to employees in advance. However, the court doubted the means by which an employer might be able to predict how much profit the company could make prior to the end of every year, and why each employee needed to borrow the bonus from the employer every month. Besides the Festival Bonus, the employer S admitted that a new-year bonus was given to employees at the end of every lunar year, based on the company's profit. As a result, the court held that Festival Bonus in Roy v. Shilin Paper Co. was not a "new-year bonus" in nature. It was, in fact, alien to the "festival bonus" enumerated in Article 10 of LSL Byelaw, even though it was named in a similar way by the board of directors, according to the history of payment rules presented by the employer S. Rather, the Festival Bonus should be seen as part of a wage and counted into the calculation basis of the average wage. This perspective was shared by the judgment of fifth trial in Yu v. Shilin Paper Co..[55]

As for Supper Payment, the Court of fourth instance pointed out that it was listed as an example of an "irregular payment" in Article 10 (9) of the LSL Byelaw, because it was a payment given only occasionally, in most cases. In the court's findings, however, the employer S's factory operated 24 hours per day, and was divided into three shifts. Each employee had to take the middle shift and night shift regularly, by turns, but not occasionally. Consequently, the court ruled that the Supper Payment was a fixed amount of work reward, regularly given to

55. *See* Supreme Court, 2003 Supreme Case No.473.

employees in the Roy v. Shilin Paper Co. It was alien to the irregular earnings of the "supper payment" as enumerated by Article 10 (9) of LSL Byelaw in nature. In spite of the fact that the employer S claimed that the Supper Payment evolved from the "night-shift allowance" was a payment due to the employer's generosity in history, the court asserted that both payments were in fact extra rewards for employees' late work and a compensation for breaking employees' natural clock in physiological terms. Therefore, it was held that the Supper Payment should form part of a wage and should form a basis for labour retirement pay.

Secondly, some courts recognise that employers might create nominal terms for all kinds of payment in rules of the workplace and then argue that the payments in dispute should be excluded from the calculation basis of labour retirement pay, in terms of Article 10 of the LSL Byelaw.

In the judgment of the sixth trial in Roy v. Shilin Paper Co., the High Court maintained:

> "What 'wage' was should be decided by the nature of payments and prizes in terms of the context of the case, but not the nominal terms created by the employers or the government in rules of the workplace or administrative directives. … The prizes and payments enumerated in Article 10 of LSL Byelaw were examples of irregular payments that should be excluded from the definition of wage. However, they would not be applicable to the cases where employers named the regular payments after the terms of irregular payment provided in Article 10 of LSL Byelaw so as to evade their responsibility for labour retirement pay."

The court further argued that the "competition prize" was excluded from the scope of regular payment by Article 10 (2) of LSL, because in most cases, it came from the accidental result of competition. It was not the legislators' design to allow employers to evade their responsibility for retirement pay by naming employees' work rewards under the term of the competition prize. Based on workers' pay slips, the court found that the Competition Prize in dispute was a fixed payment (NT$7,500 per month per person), regularly given to employees. Therefore, the court held that the Competition Prize in dispute was not a competition prize in nature. Rather, it should be seen as a regular reward for employees' work and should count as part of a wage and be considered as a basis for calculating labour retirement pay.

Apart from the Competition Prize, the employer S claimed that the Overtime Payment did not constitute a part of the employees' wage, because both payments had been excluded from the definition of a wage, in terms of Article 29 of work rule promulgated by Shilin Paper Co. on 13

August 1993. However, the court of first trial in Roy v. Shilin Paper Co. asserted:

> "Article 1 of LSL stipulated that no labor conditions concluded between an employer and a worker should be below the minimum standards provided in LSL. In cases where employees' work rewards were denied by the rules of the workplace as a part of wage, such work rules should be invalid for violating workers' fundamental right in retirement pay based on Article 1 & 2 of LSL. … In spite of the fact that the employer might have sent a copy of the work rules to its supervisory government department, such rules should still be invalidated in terms of Article 71 of LSL."

Subsequently, the court rejected the employer S's claim, since the work rule as declared by S had changed the definition of a wage as stipulated by Article 2 (3) of LSL and had violated the principles established in Article 1 of LSL. It was held that both the Competition Prize and the Overtime Payment should be part of a wage and form a basis for calculating labour retirement pay. This view was shared by the court of second, fourth and sixth trials, and was followed by the judgment of third,[56] fifth[57] and seventh[58] instances in Roy v. Shilin Paper Co.

B. *Judicial Indifference to Power Relations Reinforced by Corporate Culture*

Given that they have the power to manipulate the Rules of the workplace, employers tend to evade their responsibility for providing retirement pay through the evasive strategy of reporting a disguised wage structure. To other courts, however, such relations of power and inequality could be justified by Article 70 of LSL which authorises employers to unilaterally create and revise rules of the workplace concerning the calculation formula of wage and retirement pay. In other words, the work rules promulgated by the employers are considered by some courts as the main legal basis of judgment, regardless of the fact that the employees have little bargaining power in the process of rule making.

This may be seen, for instance, in the judgment of first trial of Yu v. Shilin Paper Co.,[59] in which the employees asserted that the Festival Bonus should be part of a wage and should therefore be counted as the

56. *See* Supreme Court, 2000 Supreme Case No.1488.
57. *See* Supreme Court, 2002 Supreme Case No.1818.
58. *See* Supreme Court, 2003 Supreme Case No.2814.
59. *See* Shilin District Court, 1996 Labour Lawsuit No.14.

calculation basis of labour retirement pay, because it was a fixed payment, regularly given to each employee every month. However, the court adopted the employer S's claim, ruling that the Festival Bonus was not in fact a part of the employees' wage, because it was historically a share of the company's profit, based on its payment rules promulgated by the board of directors. In other words, the Festival Bonus was regarded as a bounty from the employer, rather than as a work reward. Even though the employees pointed out that the Festival Bonus was no longer a profit-sharing payment in nature, since it was impossible for the employer to predict and regularly share the profit with employees in advance, the court deserted such a claim, and denied that the Festival Bonus was a basis for calculating labour retirement pay.

Additionally, the employees in Yu v. Shilin Paper Co. asserted that the Supper Payment was a fixed payment for whoever took middle- and night-shifts. That is, the Supper Payment was a reward for employees' work and should be counted as part of a wage, and the calculation basis of labour retirement pay. However, the Courts of fourth trial, sixth trial and seventh trial[60] approved the employer S's statement and held that the Supper Payment in dispute was, rather, a generous bounty from the employer in terms of the history of Supper Payment rules established by the employer. In other words, the Supper Payment used to be a replacement for overtime pay before the latter was required by Article 24 of LSL in 1984. Employer S also asserted that the Supper Payment was at present given on the basis of the employer's sympathy for the employees' overtime working, rather than as a reward for the employees' night shift. Therefore, the courts ruled that the Supper Payment was not part of a wage under Article 10 (9) of LSL Byelaw, and should not therefore be counted into the calculation basis of labour retirement pay.

Moreover, in cases where payments that are regularly given to the employees are listed by the employers under the names of irregular payments enumerated in Article 10 of LSL Byelaw, some courts overlook the nature of such payments within the context in which they occur, and rule that those payments should be excluded as one of the bases for calculating labour retirement pay. For example, the Court of second instance, in Yu v. Shilin Paper Co.[61] noted that the nature of overtime was irregularity which depended on companies' needs and employees' willingness. In other words, Overtime Pay was excluded from the definition of wage by Article 10 of LSL Byelaw because it was an irregular payment in most cases. Despite the fact that Overtime Pay was a

60. *See* High Court, 2001 Labour Appeal Revised Case No.2; High Court, 2003 Labour Appeal Revised Case No.3; Supreme Court, 2004 Supreme Case No.44.

61. *See* High Court, 1998 Labour Appeal No.24.

reward for employees' work, and that the employees asserted that overtime in this case was compulsory with pecuniary penalty, the court held that Overtime Pay should be excluded from the employees' wage structure because overtime only happened occasionally, in most cases.

To take another example, the employer S claimed that the Competition Prize was an irregular payment in terms of Article 10 of LSL Byelaw and should be excluded from the calculation basis of labour retirement pay, because the amount of the prize was not fixed for all, but depended on employees' work performance. According to the employees' statement, however, the Competition Prize in this case was a payment attached to workers' positions and was regularly given to each worker regardless of the competition result. Even though the employer could only prove that the amount of the Competition Prize was different for each worker, he failed to defend himself against the employees' argument, and in consequence, the court of third instance in Yu v. Shilin Paper Co.[62] asymmetrically adopted the employer's statement and ruled that the Competition Prize was not part of a wage, based on the definition provided by LSL.

Furthermore, Taiwanese corporate culture, which emphasises the submissiveness of employees and their sacrifice in supporting their superior's decision,[63] also helps some courts to justify such unequal power relations in the workplace. For example, the Court of first instance in Yu v. Shilin Paper Co. pointed out that the Festival Bonus was historically a share of the company's profit based on its payment rules promulgated by the board of directors. Hence, the court contended that the nature of the Festival Bonus was a bounty payment from the employer, rather than a work reward. Owing to the fact that the concerned aged workers were all senior employees, the court held that they should be familiar with the transition of the Festival Bonus, which was not a part of employees' wage in terms of the work rules regulated by the employer. This judgment was reaffirmed by the Court of fourth instance in Yu v. Shilin Paper Co.

Correspondingly, it may be argued that the employees were required by the courts to accept those orders unilaterally established by the employer. As emphasised in Confucian work values, it was taken for granted by the courts that the employer has the authority to dictate the rules of the workplace,[64] even though such rules might damage the economic security of the aged workers. According to the court judgments on the rules of labour retirement pay, therefore, it could be said that the

62. *See* Supreme Court, 2000 Supreme Case No.2689.
63. *See* Wu & Chen, *supra* note 39; Lindholm, *supra* note 40.
64. *See* England, *supra* note 34; LANG, *supra* note 37.

aged employees' economic status were aggravated by unequal power relations in the workplace, which were reinforced by the Confucian corporate culture dominating Taiwanese enterprises.

C. *Aged Workers' Suffering under the Conflicting Interpretations of Law among the Courts*

As Wang T. S. argues, the doctrine of judicial precedent, which could be found in the common-law system, is not upheld in Taiwan. On the contrary, the lower courts are not bound to follow the precedents of the Supreme Court, and the Supreme Court is not bound to follow its own decisions.[65] The court judgments of both Yu v. Shilin Paper Co. and Roy v. Shilin Paper Co. reflect this statement, in which judicial opinions about the nature of payments in dispute contradict each other, and themselves, from the Court of first instance to the final trial.

Whether Festival Bonus, Competition Prize, Supper Payment and Overtime Pay are regarded by the courts as part of the calculation basis of labour retirement pay may be summarised, for convenience, in Table 1 below. The axis of the ordinate represents the instance of the trial, while the axis of the abscissa signifies the payments in dispute.

Table 1 Judicial opinions about the payments in dispute in Yu v. Shilin Paper Co.

Payments / Trials	Festival Bonus	Competition Prize	Supper Payment	Overtime Pay
Shi-ling District Court (first trial)	×	○	×	×
High Court (second trial)	○	○	○	×
Supreme Court (third trial)	×	×	○	○
High Court (fourth trial)	×	○	×	×
Supreme Court (fifth trial)	×	×	○	○
High Court (sixth trial)	×	×	×	○
Supreme Court (seventh trial)	×	×	×	○

Note: "○" denotes that the court regarded the concerned payment as a part of "wage".
"×" denotes that the court refused to recognise the concerned payment as "wage".

This table indicates that the courts' consensus as to the definition of a wage and the basis for calculating labour retirement pay is weak, particularly among the lower courts. The Supper Payment and the

65. *See* T. S. Wang, *supra* note 46, at 144.

Overtime Pay were regarded as forming part of the employees' wages by the Supreme Court in the third trial and fifth trial of Yu v. Shilin Paper Co., while the Festival Bonus and the Competition Prize were both denied as the calculation basis of labour retirement pay. For the District Court and the High Court in the fourth trial, the Competition Prize was the only payment that was recognised as being a regular reward for employees' work. However, the High Court in the second trial agreed that not only the Competition Prize but also the Festival Bonus and the Supper Payment were part of employees' wage. The High Court in the sixth trial and the Supreme Court in the seventh trial provided the only two judgments that agreed with each other, which solely acknowledged the Overtime Pay as a regular payment. In brief, there are few agreements concerning the nature of payments in dispute for the courts in Yu v. Shilin Paper Co., except the Festival Bonus, which was solidly denied by the courts of the last five instances. Under the Taiwanese legal culture of distrust of the courts,[66] it may be argued that the aged workers' confidence in judicial decisions as regards labour retirement pay could significantly decrease as a result of the conflicting opinions of the courts.

According to Table 1, in addition, over half of the court judgments objected to the the payments in dispute as being part of employees' wage, because the power relations in the workplace that were reinforced by corporate culture in Taiwan were neglected as an important regulatory force shaping the practice of positive labour law. Based on the legal reasoning given by the court judges, as mentioned in the last sub-section, it could be argued that the rules of the workplace were heavily relied upon as the basis for judgment where the Festival Bonus and the Supper Payment were disagreed with as part of the employees' wage. In spite of the facts that work rules were unilaterally produced by the employer, and the concerned rules in this context aggravated the employment conditions of the aged workers, they were regarded as a binding force upon the employees by some courts. Moreover, the courts in Yu v. Shilin Paper Co. tend to deny that the Competition Prize and the Overtime Pay were part of a wage based on the reason that both payments were types of irregular payment listed in Article 10 of the LSL Byelaw, and regardless of the fact that this was an evasive strategy for the employer to minimise aged employees' average wage and, subsequently, retirement pay. Therefore, it could be argued that aged workers were located in a disadvantageous status by the courts in Yu v. Shilin Paper Co., since positive labour law was taken as the only legal source for judgment, while the interactions of regulatory forces at the workplace that could result in damaging workers' right to retirement pay were ignored in most instances.

66. *Id*. at 153.

As regards the courts' attitudes towards the nature of the same payments in Roy v. Shilin Paper Co., these could be outlined as follows, in the table below:

Table 2 Conflicting judicial opinions and interpretations of "wage" in Roy v. Shilin Paper Co.

Payments / Courts	Festival Bonus	Competition Prize	Supper Payment	Overtime Pay
Shi-ling District Court (first trial)	○	○	○	○
High Court (second trial)	○	○	○	○
Supreme Court (third trial)	×	○	×	○
High Court (fourth trial)	○	○	○	○
Supreme Court (fifth trial)	×	×	×	○
High Court (sixth trial)	○	○	○	○
Supreme Court (seventh trial)	×	○	○	○

Note: "○" denotes that the court regarded the concerned payment as a part of "wage".
"×" denotes that the court refused to recognise the concerned payment as "wage".

This table shows that the district court in the first trial and the High Court in the second, fourth and sixth[67] trials held in conformity that all payments in dispute constitute part of employees' wage and should be counted as a basis for calculating labour retirement pay. However, the Supreme Court was opposed to at least one of the payments as part of employees' wages, in the third, fifth and seventh trials. Overtime Pay was the only payment that was thoroughly agreed by the court of each instance in Roy v. Shilin Paper Co. as the calculation basis of average wage.

Based on the legal reasoning analysed in the previous two sub-sections, it could be argued that the local courts are able to respond more sympathetically to the fact that the employer's power of exploitation might jeopardise the economic security of aged employees. By contrast, the Supreme Court not only has conflicting interpretations as to the positive labour law concerning what should be counted as part of a wage, but also fails to recognise the unequal power relations in industrial relations as an important shaping force for the implementation of labour law. In brief, it could be said that the judicial system in Roy v. Shilin Paper Co. also failed to secure aged workers' right to retirement pay against the regulatory forces that could embroil employees in an economically disadvantageous status.

67. *See* High Court, 2003 Labour Appeal Revised Case No.6.

Moreover, it is interesting to note that the defendant of Yu v. Shilin Paper Co. and Roy v. Shilin Paper Co. is the same employer who was accused by different employees for the same reasons. According to the court judgments as set out in Table 1 and Table 2, it may be said that the conflicting opinions as to the bases for calculating labour retirement pay held by the courts in Yu v. Shilin Paper Co. and Roy v. Shilin Paper Co. were somewhat confusing. Employees could encounter varying judgment results from the courts of various instances for the same set of payments in dispute. It may be argued that people's negative attitudes towards the judicial system, being an inherent part of the legal culture in Taiwan,[68] could be strengthened by this phenomena. Chen T. F.[69] also maintains that both parties might be encouraged to appeal as many times as possible and may be discouraged from fulfilling the obligations imposed by the courts. Consequently, it might be said that the opportunity for the employees to be repaid through the procedure of compulsory enforcement executed by the courts could be decreased.

VI. CONCLUSION

Generally speaking, positive labour law, including Labour Standards Law, Labour Pension Act 2004, administrative directives of Council of Labour Affairs, judicial precedents, employment contract and rules of the workplace, provides the main legal sources for labour retirement pay in Taiwan. However, this article argues that aged workers' rights to retirement pay could be jeopardised by other regulatory forces in the workplace, such as employers' powers of exploitation and patriarchal corporate culture based on Confucianism.

By analysing two court cases of labour retirement pay, it has been seen that some courts have recognised that aged employees' economic security could be damaged through the interactions of plural regulatory forces. In other words, the employers tend to manipulate the rules of the workplace and disguise the employees' wage structure in a variety of ways, so as to minimise workers' average wages and provide as little substantial retirement pay as possible.

Nevertheless, most of the courts inclined to adopt the rules of the workplace unilaterally promulgated by the employer as the legal basis of judgment, setting aside the influence of unequal power relations on the operation of positive labour law, which is strengthened by the traditional corporate culture in Taiwan. Therefore, the employers' manipulation of

68. *See* J. D. Tsai, *Statements in the Seminar of Taiwanese Legal Culture and Its Transition*, 40 THOUGHT & WORDS 15 (2002).

69. *See* T. F. Chen, *Litigation and Social Development*, 10 PROCEEDINGS OF THE NATIONAL SCIENCE COUNCIL: HUMANITIES AND SOCIAL SCIENCE 464 (2000).

the rules of the workplace is tolerated by the courts, and the aged workers' suffering under the interactions of regulatory forces is neglected in these court judgments.

Four implications of this article may be stressed at this point. First of all, the discourse of legal pluralism in labour law should be emancipated from the discussion of power relations in the workplace. It is true that the ownership of the means of production could be translated into power,[70] by which the employers are enabled to manipulate the rules of the workplace that might aggravate the economic status of aged employees. However, this article asserts that corporate culture also plays an important role in regulating labour retirement pay. The interactions of regulatory forces in the social field of workplace are constituted not only by positive labour law and power relations in industries, but also by corporate culture.

Secondly, the judicial system in Taiwan should recognise the fact that positive labour law is shaped by unequal power relations between employers and employees that are reinforced by patriarchal corporate culture. In other words, it is necessary to locate positive labour law in the social context when the courts applying them in the process of judgment.[71] In doing so, the courts may be more familiar with the methods employers use to manipulate the meaning of labour law, instead of making judgments in terms of the rules of the workplace unilaterally promulgated by employers, or the fixed employment contract drafted by employers.

It is important to note that the Supreme Court changed its attitude towards the definition of "wage" and "regular payment" in 2006. Even though conflicting opinions as to what should be calculated as part of a wage still exist in the judicial system, the latest judgments of the Supreme Court have shown an awareness of employers' power in the process of rule making, and held that any payment regularly given in terms of rules of the workplace and employment contracts should be counted into the calculation basis of average wage and retirement pay.[72] The lower courts are also required to follow such judgments. In cases of retirement pay, it may be said that aged workers will have little chance to suffer from the legal oppression resulting from the interactions of positive labour law, unequal power relations at the workplace and corporate culture in the Supreme Court.

Thirdly, Article 10 of LSL Byelaw could be supplemented by the second section as "Regularity, as an element of wage, should be determined in terms of the context of individual case rather than the title

70. *See* Arthurs, *supra* note 23, at 29.

71. *See* D. Lin, *Statements in the Seminar of Taiwanese Legal Culture and Its Transition*, 40 THOUGHT & WORDS 2, 28 (2002).

72. *See* Supreme Court, 2006 Supreme Case No.621; Supreme Court, 2006 Supreme Case No.1789; Supreme Court, 2006 Supreme Case No.1943.

of payment." Such legal change may provide a clearer guidance for the courts in acknowledging the fact that positive labour law is often reshaped by unequal power relations within the workplace and patriarchal corporate culture in cases of wage and labour retirement pay.

Fourthly, trade unions could increase workers' participation in rule making at the workplace through promoting collective bargaining, a bilateral process of compromise and problem solving by those directly involved,[73] so as to decrease the extent of employers' unilateral manipulation in the meaning of labour law, such as the definition of "wage".

Finally, it is necessary for the discipline of law in the field of industrial relations to be liberated from the assumptions and techniques of doctrinal study, which have dominated legal scholarship in Taiwan.[74] That is, labour law should not be explicated solely on the basis of the internal elements offered by statutes. On the contrary, legal developments in labour law need to be pursued not only in legislation, but also in judicial decisions and in society itself.

Therefore, addressing legal ideas from the practice of resolving problems in particular empirical settings, such as how legal practitioners might engage law,[75] is recommended for legal education in Taiwan. The use of case studies is also recommended for inclusion in the curriculum of university law schools, so as to combine participant perspectives on law with law teaching.[76] Moreover, this article suggests that the study of labour law should be infused with techniques and approaches drawn from the other disciplines, such as sociology and politics, in order to capture a more comprehensive understanding of the subject.[77]

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73. *See* A. Kleingartner & H. Peng, *Taiwan: An Exploration of Labour Relations in Transition*, 23 BRIT. J. INDUS. REL. 438 (1991).

74. *See* R. M. Huang, *The difficulties of labour law*, 58 NAT'L CHENG-CHI U. L. Rev. 322 (1997).

75. *See* R. Cotterrell, *Why Must Legal Ideas Be Interpreted Sociologically?*, 25 J.L. & SOC'Y 187 (1998); L. K. Chu, *A Review on Legal Education*, 25 TAIWAN L. REV. 35 (1997).

76. *See* Z. C. Hsieh, *Statement in the Seminar of A Health Check on Taiwanese Legal Education*, 25 TAIWAN L. REV. 13 (1997); Cotterrell, *supra* note 75, at 191.

77. *See* A. Bradney, *Law as a Parasitic Discipline*, 25 J. L. & SOC'Y 71 (1998); Z. Y. Lin, *The Curriculum Contents of Basic Legal Education*, 21 TAIWAN L. SOC'Y J. 323 (2000).

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