Japan Labor Review

Volume 3, Number 1,
Winter 2006

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Labor Dispute Resolution System

Articles

NEXT ISSUE（Spring 2006）
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Japan's system of labor laws has been undergoing various important changes in recent years, but nothing is so particularly striking as the progress that has been made on procedures to resolve labor disputes. The enactment of the Law on Promoting the Resolution of Individual Labor Disputes in 2001 led to provisions for the national mechanism of administrative counseling and conciliation in employment disputes. The 2004 amendments to the Trade Union Law were designed to strengthen the Labor Relations Commission processes related to unfair labor practices, speeding up case processing in particular. Moreover, the Labor Tribunal Law, which was enacted in 2004, will finally take force in April this year (2006), setting up a completely new organ in the district court to deal with individual labor disputes. This is part of structural reforms to Japan's judicial system, and has the potential to yield fundamental changes to the functions of Japanese society and its laws.

Some readers may have the image that Japan is a stranger to labor disputes. It is true that collective labor disputes such as strikes and unfair labor practices have diminished markedly over the past three decades. On the other hand, however, aided by the worsening economic environment, individual labor disputes regarding working conditions and dismissal have rapidly increased since the beginning of the 1990s (and there have also been many cases of group conflicts after these were brought to labor unions), which led to enactment of the new laws described above. In the past, ordinary workers found it quite hard to avail themselves of Japan's civil litigation system because it was so time-consuming and intimidating, and its improvement was long overdue. If a great number of cases are brought before the tribunal, there will be less room for an argument that litigations are few because Japanese people do not like fighting.

This issue features four articles on Japan's labor dispute resolution system. The first, *Judicial Reform and the Reform of the Labor Dispute Resolution System*, by Professor Kazuo Sugeno, presents a general picture of the theme. After reviewing Japan's post-war labor dispute resolution systems, it provides an overview of recent years' labor dispute structural changes, trends in judicial system reforms, the introduction of the labor tribunal system, and improvements

to unfair labor practice procedures. Professor Sugeno led the planning for the labor tribunal system as chair of the labor sector study group of the Judicial Reform Council and is doubtless the most appropriate person to write on this subject.

The second article, *Labor tribunal System: Significance and Issues*, by Professor Katsutoshi Kezuka, provides a more detailed description of the labor tribunal system. Readers will enjoy a precise analysis of the various characteristics the new system possesses, such as the participation of experts who are not professional judges, rapid disposition of the case in three sessions, and efforts at resolution through mediation.

The third article, *The Labor Relations Commission As an Organization to Resolve Collective Labor Disputes*, by Professor Tetsuya Doko, features the Labor Relations Commission, which underwent procedural reforms in 2004 in an effort to remain viable in the declining age of collective labor relations. The article provides an historical overview of the Commission since the enactment of the Trade Union Law in 1945, describes the conditions of today's unfair labor practice system, summarizes the contents of the 2004 amendments to the law, and analyzes some issues to be addressed in the future.

The fourth article, *Employment Problems and Disputing Behavior in Japan*, by Professors Isamu Sugino and Masayuki Murayama, sheds light on the actual form labor disputes take in Japan. Employing their own questionnaire, the authors provide some interesting findings. For example, in the case of work-related trouble, there were remarkably many "did nothing" responses compared to problems in other areas, and there were also significant numbers of replies that thought had been given to using attorneys or the courts for resolution, but that these had not actually been used. It is worth watching whether the labor tribunal system will lead to changes in these sorts of patterns.

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Judicial Reform and the Reform of the Labor Dispute Resolution System

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INTRODUCTION

Since the collapse of the bubble economy in the early 1990's, Japan's industrial society experienced a drastic increase in individual employment disputes. At the same time, union management disputes have been clearly on the decline since the 1980's. To cope with such a structural change of labor disputes, it was necessary to restructure the labor dispute resolution system, which was established after World War II. As a first step, in 2001 the Ministry of Welfare and Labor established a system to offer information, counseling and conciliation services through its local agencies. Then, the Labor Tribunal System was created in 2004 by Judicial Reform as a second major step to respond to the increase in employment disputes. In the same year, Judicial Reform also led modification of the conventional labor law system, i.e., the adjudication of union management disputes by Labor Commissions.

Thus, as a consequence of Judicial Reform, the post-war labor dispute resolution system underwent a large-scale reform in recent years. This paper describes the backgrounds, process and contents of this reform.

1. The Post-War Labor Dispute Resolution System

(1) The Labor Commission system for collective disputes

The Japanese labor law system established after World War II attached the highest importance to collective bargaining disputes, the rights for which were established by the post-War Constitution and Trade Union Law. Under this Law, Labor Relations Commissions were established as expert agencies to handle collective labor disputes through their mediation, conciliation and arbitration procedures. Commissions were also endowed with the power to adjudicate complaints of unfair labor practices prohibited under the Law. The expertise of the Commissions mainly derived from the assistance of labor and management members towards neutral members, who presided over procedures and decided on the cases.

The Labor Relations Commissions actually played important roles in dispute-prone industrial relations until the mid 1970's. During the post-War

period of economic recovery and upsurge, Japan experienced major strikes and lock-outs involving wage-hike demands or economic dismissals, due to confrontation between leftist unionism imbued with class-struggle ideology and tough management with capitalist beliefs. Most of those major disputes were resolved through Commissions' mediation services.

Then, the mainstream unionism at major firms and industries was replaced by enterprise unions that were willing to cooperate with management for increasing productivity. Leftist unions turned into sheer minorities by losing support from rank and file employees, who identified their interests with the prosperity of their companies. There was also covert interference by managers with militant unions to undermine their influence. Such unions thus filed a large number of complaints of unfair labor practices to Commissions in the 1970's. In adjudicating such disputes, Commissions made intensive efforts to settle disputes by curing the antagonism and distrust entrenched in the parties.

Furthermore, the Spring Wage Offensives, which had started in the mid fifties, developed since the late sixties to be accompanied by major transportation strikes involving both national and private railway-systems. Commissions put an end to those annual strikes by making pronounced efforts to mediate the underlying wage hike disputes.

(2) The lack of specialized systems for individual disputes

Individual labor disputes arising from employment relations, on the other hand, were not regarded as significant enough to require a particular system for their resolution. Thus, the post-War labor-law system did not prepare any special scheme to deal with disputes of rights in employment relations. Such disputes were entrusted to ordinary civil procedures.

Under this "conventional" system, workers can claim rights guaranteed by the labor statutes, collective agreements, work rules or employment contracts by filing lawsuits in the court. These suits are brought in an ordinary court that has jurisdiction of the first instance with regards to the case, in accordance with the Civil Procedure Law. The judges making judgments are those who have developed a career in the judiciary. Besides this regular procedure, the Civil Temporary-Relief Law sets forth a procedure by which a temporary order, called a "provisional disposition order," may be issued. To obtain such an order, the Law requires the claimant to establish prima-facie proof of the merits of the case and of the urgency for temporary relief. Workers frequently use this

procedure when seeking relief for employment terminations.

Since 1970, the annual number of newly filed law-suits involving labor relations has numbered around 1,000, including both the regular and provisional procedures. As discussed in the next section, there has been a drastic increase in this number in the post-bubble period, but the figure is still extremely small in comparison to other industrialized countries such as the USA, Great Britain and Germany.

The relative infrequency of employment litigation in industrial relations has been one aspect of the general non-litigiousness of Japanese society, which can be attributed to the difficulties ordinary citizens face in pursuing litigation. The shortage of lawyers, the financial and mental costs of litigation, the formalities of the court and underdeveloped legal-aid programs discourage citizens from using judicial procedures. In addition, parties in industrial relations established informal mechanisms to prevent labor disputes from occurring. Supervisors absorbed employee dissatisfaction through daily communication. Joint consultation mechanisms worked to execute disciplinary measures or employment adjustment smoothly. Above all, the mechanisms of firms' internal labor markets, based upon the long-term employment system, had created a community of interests between labor and management inducing both sides to avoid overt confrontation.

2. The Structural Changes of Labor Disputes

(1) Decreased collective labor disputes and the delay problem

The new wave of labour movement has established the practice of resolving most of issues autonomously between the parties concerned, and the number of cases brought to the Commissions has declined drastically. The turning point was the 1977 spring wage offensive, in which the private railway unions stopped asking the Central Labor Commission to mediate their wage hike negotiations. The number of strikes decreased sharply in late seventies, and since the eighties it has stabilized at a minimum level of about one thousand a year. The establishment of cooperative union management relations was symbolized by the development of joint consultation procedures in which the parties share an abundance of managerial information and collaborate to promote their mutual interest. The strength of militant unions further diminished in the face of the prevalence of cooperative relations. Thus, the number of complaints of unfair labor practices has also decreased since the late 1970's.

Along with stabilization of industrial relations, the Commissions came to face a serious problem of the delay of the unfair practice procedures. As of the end of the 20th century, the average period the Commissions required to dispose of those cases were 44 months in the Prefecture Commissions. This meant that unions or workers needed, on average, to wait for three years and a half to obtain settlement or an order. Management then seeks a review of most of the remedial orders to the Central Commission, which required on average of 60 months for the disposition. These time periods had tripled in length since 1975, demonstrating seriously aggravated delay problem. The factors behind the delay were manifold: the increasing complexity of cases; the diminishing competency of Commissions; the time consuming process of settling disputes; the insufficient authority of Commissions in the handling of the procedures, etc.

(2) The increase of individual labour disputes

Since the early 1990's, on the other hand, the number of disputes involving employment relations has increased sharply. Over the last 13 years, the number of civil litigation at district court involving labor relations tripled. The major types of civil actions involving labor relations are claims for unpaid wages and retirement benefits and claims contesting termination of employment. They are followed by claims challenging the validity of disadvantageous changes of working conditions and disadvantageous transfers.

Labor administrative agencies also received an increasing number of complaints within their jurisdiction. The offices of the Tokyo Metropolitan Government, for example, received about 45,000 complaints in 1996 through their counseling services.

The increase in grievances of individual workers can be attributed mainly to the restructuring and downsizing of enterprises and intensifying global competition during the decade long recession. The Japanese economy entered a serious slump after the collapse of the bubble economy at the beginning of the 1990's, which worsened from the middle years of that decade. Intensifying competition in the global market and, in particular, from the rising Asian economies, pressured firms to exert fierce efforts to cut costs.

Thus, firms have been executing measures to restructure their businesses by closing or cutting off unprofitable undertakings and subsidiaries, or shifting manufacturing abroad. Such pressures made firms resort to a large-scale

adjustment of employment, including suspension of new hiring, massive relocations of workers and encouragement of early retirement.

Diversification and individualization of workers in the labor market provides a second reason behind the increasing trend of individual workers' grievances. Atypical workers (workers employed by part-time or fixed term contracts; workers dispatched from employment agencies; and workers used under self-employed contracts) increased remarkably in numbers. Such diversification has been precipitated by the needs of firms to make their workforce flexible and to cut down personnel costs. Firms also use self-employed contracts to give special salaries to professional workers with valuable talent or expertise in service and information-oriented markets. In this way, one finds a waning predominance of the internal labor market and an expansion of the external labor market within Japanese industrial society.

3. The Necessity for the Reform of Individual Dispute Resolution System

In light of the problems of post-war dispute resolution systems caused by the structural changes of labor disputes, it became obvious that the systems were in need of a major reform.

The greatest demand was for the construction of specialized services to deal with individual labor conflicts comprehensively and expeditiously. In the first place, lacking was a nation-wide counseling for the varying kinds of complaints brought in by individual workers. The agency in charge of this service would also offer expeditious conciliation service if the party so requests.

Based on such an idea, the Ministry of Welfare and Labor drafted the Law to Promote Resolution of Individual Labor Relations Disputes, and obtained Parliamentary endorsement in 2001. The Law set forth a statutory scheme to provide counseling and mediation services at the local offices of the Ministry placed in each of 49 prefectures.

Since the Ministry of Welfare and Labor began such services in October 2001, the number of cases received by the Offices have been rapidly increasing. In the fiscal year 2003, these offices gave counseling in about 730,000 cases, out of which about 170,000 involved disputes of rights in employment relations. They mediated about 5,000 cases in the same year. The cases handled by these mediation services involved dismissals and terminations of employment, inducement of resignation, transfers, alteration of the wage system, sexual and

power harassment, and so on.

In this way, the special administrative service began to successfully respond to more frequent employment disputes. Such a progress in the dispute resolution system, however, highlighted the lack of any expeditious special procedure within the court system to deal with cases left unresolved through such administrative schemes. Thus, the next agenda item in the reform of labor dispute resolution systems became the development of efficient judicial procedures, with expertise on employment relations.

4. The Tide of Judicial Reform

The great difficulties facing Japanese industry after the collapse of the bubble economy drew public attention to the importance of transforming their post-World-War-II systems to regain strength in the global market. These years were accordingly marked with large-scale legislative reforms in the conventional political, administrative, and economic systems.

Legislative reforms carried out encompassed a wide range of fields. First, one can find various legislative acts restructuring administrative organizations, strengthening the authority of the Prime Minister to lead off his major policies, and making the administrative process more responsive and transparent to the people. Second, a whole-scale reform of the economic system resulted in a variety of legislation dismantling or relaxing regulation of new entrants to the market, while strengthening legal rules to secure fair competition therein. The Anti-Monopoly Law has been strengthened and consumer rights were established. Government of corporations has also been a focus of economic reform, resulting in revisions to the corporate laws. Legal schemes to rehabilitate enterprises in heavy debt have been diversified and modernized.

Such reforms were combined and integrated at the highest levels of government, as part of a movement to bring about fundamental structural changes in Japanese society. The lead concept was “Structural Reform,” which was introduced in the 1995 Economic Plan and further elaborated thereafter as “from administrative paternalism to rule of law and self responsibility” and “from pre-entry regulation to rule-based governance, of the market.”

As reforms of administrative and economic systems proceeded in the 1990’s, it became clear that they should be accompanied by a large-scale reform of the justice system. It was thought that the shift from “pre-entry regulation” to “rule-based governance” of market activities required a more effective

justice system with a larger legal profession. In other words, the basic philosophy of the "Structural Reform" was to transfer many of regulatory responsibilities from the bureaucracy to the judiciary.

With this in mind, the Judicial Reform Council was formed in the Cabinet in July 1999. The Council produced an intermediate report in November 2000 and a final report in June 2001. Then, in November 2001, the Judicial Reform Promotion Headquarters, led by the Prime Minister himself, were set up that same year in the Cabinet. Ten study groups were organized in the Headquarters to transform the proposals into more concrete legislative plans. In 2003 and 2004, the Headquarters brought the products of the study groups one by one into Parliament for its legislative endorsement.

The measures attained by Judicial Reform can be classified into three groups: First were the measures to strengthen the legal profession in size and quality. The second group of reforms aimed to make judicial procedures more expeditious, effective and accessible. The third set of reforms became the most controversial element of Judicial Reform—the participation of citizens in criminal trials.

5. The Introduction of Labor Tribunal System

The second above-mentioned group of Judicial Reform comprised measures to reform court procedures on employment disputes. The study group for renovating court procedures for employment disputes came into existence in December 2001, and included members from every relevant institution. As deliberation started, the labor side advocated a prompt and labor-supportive procedure with participation of lay judges from labor and management. Meanwhile, the management side were strongly opposed to such an idea, proposing instead the idea of instituting a specialized mediation procedure with both labor and management experts as mediators. The deliberation reached a deadlock, but the members wanted to take advantage of the tide of Judicial Reform. Both sides agreed to an intermediate proposal to institute a prompt mediation-arbitration procedure with the participation of labor relations experts. The new system, named "the labor tribunal system," was thus unanimously endorsed by the study group in December 2003. The Labor Tribunal Law embodying this proposal gained support from all the political parties and was passed by the Diet in April 2004. The Law will be come into full force from April 2006.

According to the Law, either party in an employment relationship can bring a dispute of rights arising from employment relations under this procedure in the district court. A tribunal, composed of one career judge and two part-time experts in labor relations, first makes mediation efforts. If such efforts fail, then the tribunal renders a decision clarifying the merits of the case and specifying measures to resolve the case. The decision is not binding, and if either party objects, the case is automatically transferred to an ordinary civil procedure. The Law requires the tribunal to dispose of the case within three sessions, and is premised upon the cases lasting a few months.

6. Reform of the Unfair Labor Practice Procedure

As discussed above, the unfair labor dispute adjudication-system administered by Labor Commissions faced a serious problem of delayed procedures. This problem was also addressed by the study group in the Judicial Reform Promotion Headquarters. Sensing the sweeping trends towards Judicial Reform, the Ministry of Labor and Welfare in charge of administering Commissions undertook the reformative task by working out legislative plans, which were endorsed by the above-mentioned study group. Thus, the Bill to reform Labor Commissions and their adjudicative procedures was sent to the Diet and obtained its approval. The relevant sections of the Trade Union Law were thus amended in October 2004.

The amendment purported to expedite the unfair labor practice adjudicative-procedures by strengthening the authority and responsibility of Labor Commissions. The new Law endowed Commissions the authority to order the parties and witnesses to appear in the procedures, to submit documents and other evidences essential for the judgement, and to take oath of witnesses. If the parties defy the order, he or she will be subject to administrative fines and will be enjoined from presenting the evidence they were ordered to submit in the litigation challenging the Commission judgment. The Law also authorized larger Commissions with heavy caseloads to entrust decisions to smaller panels. The Law obligated Commissions to set up and publicize a goal for their efforts to reduce the duration of the procedures. The Law also required Commissions to set forth the schedule and plan of adjudication to the parties.

CONCLUSION

As described above, the dispute resolution system constructed during the post-World War II period was restructured to cope with the structural changes in labor disputes. The new system is centered on the new Labor Tribunal system in the judiciary, to be complimented by the Ministry of Labor and Welfare counseling and mediation services. These new procedures and services are to deal with individual employment disputes, which have been on drastic upsurge in the recent decade. Such a reform was attained only by the great wave of Judicial Reform in the post Bubble years. The conventional Labor Commissions' system to deal with collective labor disputes was also amended to overcome its delay problem.

For the new dispute resolution system to function successfully, it is vital to have a basic legislation clarifying rules governing employment relations. Thus, the next major agenda of the reform of post-war labor law systems has become clear—the enactment of "Employment Contract Law" the contents of which have been governed by complex case law. Thus, the structural reform of post-war labor law is a continuous process, with one reform leading to another.

Significance and Tasks involved in Establishment of a Labor Tribunal System

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1. Introduction

A Labor Tribunal Law was enacted on May 12, 2004, as a move towards the establishment of a new system of resolution of individual labor disputes by what are known as labor tribunals (scheduled for April 2006). Following the establishment of an administrative-led alternative dispute resolution (ADR) system, the reform of the judicial system in the form of adoption of labor tribunals, has brought to a prima-facie conclusion the series of discussions concerning the establishment of a system of individual labor dispute settlement, which started in the 1990s. This article will outline the purposes and special features of this labor tribunal system, and seek to shed light on tasks that may have to be tackled in the future in order to achieve the purposes set at the initial stage.

2. Background to Establishment of a Labor Tribunal System

This section will give a brief account of the background to establishment of the labor tribunal system. It was in the late 1980s that discussions concerning establishment of a system of settling individual labor disputes first drew attention in Japan. The initial interest in the issue arose from a theoretical point of view[1], doubts being cast on the effectiveness of labor laws in Japan where there were an extremely small number of legal disputes compared to European countries[2], and the need to form a basis for the principle of amendment of labor contracts. However, changes in the employment situation and labor-management relations following the collapse of the bubble boom, along with

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1 Research Report "Kobetsu Rodo Funso Shori System no Genjo to Kadai (The Present State of and Tasks for the Individual Labor Dispute Settlement System)," Japan Labor Institute, 1995.

2 Formerly in Japan, there were no tribunals specializing in labor cases, which were handled by ordinary courts. In 1991, the number of new cases accepted by district courts as ordinary lawsuits totaled a mere 669. The figure was extremely small compared to countries in Europe or the U.S.A., but has been increasing ever since; it nearly doubled—1,307 cases—in 1993 and rose to 2,092 in 2000. In fiscal 2004, the number of ordinary lawsuits cases newly accepted by district courts was 2,519. See page 123 ff of the Lawyers Association Journal Vol. 57, No. 8 (2005).

In view of this, emphasis of the reforms had been placed on the training of the legal professions, improvement and speeding up of handling of civil cases, and realization of citizen participation in the legal procedures of criminal cases; less attention was paid to labor cases. However, partly thanks to efforts of Zensen Domei chairman Takagi (now chairman of Rengo), who had joined the above-mentioned council as a workers' representative, labor cases related to intellectual property and errors in medical practices were incorporated in cases requiring professional knowledge. In June 2001, the council drew up the final version of its opinion report, calling for "considerations" of "adoption of a mediation system for labor disputes" and "the rights and wrongs of adopting a judicial system to which persons with professional knowledge of employment, and labor-management relations commit themselves.[4]"

In February 2002, in response to the opinion report, a study group for labor issues was formed within the Bureau for Promotion of Judicial System Reform in order to discuss specific directions of the reform. The study group, headed by Kazuo Sugeno, was comprised of academics, representatives of labor and management, and actual legal professionals (representatives of the Labor Lawyers Association and the Management Lawyers Council). There had been vigorous debate; agreement was rarely reached between labor-management members and practical lawyers concerning the citizen-participation system, and the group almost failed to draw up a unanimous proposal. Nevertheless, on the one hand there was a presentation by three academic members of a proposal concerning the "direction of an interim system[5]", and on the other, there was a hearing of career judges invited by the Japan Law Foundation (from employment tribunals in England and labor courts in Germany).

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[4] Reforms of labor cases discussed and reform realized by the Judicial Reform Council were greatly attributable to the efforts of Tsuyoshi Takagi, a council member from labor circles. For his activities in the Judicial Reform Council and the study group for labor issues, see Tsuyoshi Takagi, "Judicial System Reform and Labor," Journal of the Japan Labor Law Association, Vol. 3 (2003), p. 3 ff.

[5] Where the formation of a collegial body comprising a judge and labor and management representatives is concerned, four patterns were proposed in accordance with whether the body should be authorized, not just to be committed to mediation, but to make certain judgments. If so, which function—mediation or judgments—to emphasize and how to connect such functions with the lawsuit procedures: (i) the type where either mediation or arbitration is chosen; (ii) the type where mediation and arbitration are combined; (iii) the type where mediation and arbitration are blended; and (iv) the type where arbitration only is sought. Type (iii) is the closest to the proposal that was agreed upon.

the rapid globalization of market economies, lead to an increasing number of labor disputes over dismissals and deterioration of working conditions occurring in Japan in the 1990s. In view of this situation, the establishment of a system of resolving labor disputes easily and swiftly had become a fairly practical issue, leading, in the latter half of the 1990s, to active discussion among labor-related, business and governmental circles[3].

The discussions at that time tended towards an improvement of the administrative-led dispute settlement system. One achievement was that a Law on Promoting the Resolution of Individual Labour Disputes was formulated in July 2001, and that general labor counseling centers and Commissions for Adjustment of Disputes were set up within prefectural Labour Bureaus, which are national organizations. At the same time, many local labor relations commissions, whose original tasks were to deal with collective disputes through examinations of unfair labor practices and adjustment of labor disputes, began tackling mediation in individual labor disputes.

The formation of a labor tribunal system is not simply a result of discussions seeking establishment of a system of settling such individual labor disputes. The discussions began as a call for formulation of a system of dispute settlements which would be more feasible than, and an alternative to, the existing system on the tacit premise that Japan's judicial system would not change so drastically. The premise, however, had crumbled. With the globalization of the market economy, businesses related to the handling of disputes were themselves exposed to market competition, and so the move towards the nurturing of globally-conscious legal professions and swift judicial proceedings gathered momentum: In July 1999, the government set up a Judicial Reform Council (headed by Koji Sato), initiating discussion concerning legal reform. Reforms of the justice system had been considered to take place only once in a hundred years and involved fundamental reforms of the system.

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[3] JTUC-Rengo (the Japan Trade Union Confederation), "Research on a New Labor-Management Dispute Settlement System (interim report)," 1995; "Research on a New Labor-Management Dispute Settlement System (final report)," 1998; Nippon Keidanren (the Japan Business Foundation) "On the Future Form of the Labor Relations Commission System," 1998; and "Opinions concerning the Judicial System (final report)," 2000. For discussions in the field of labor law studies, see page 160 ff of Shigeya Nakajima, "Determination and Amendment of Working Conditions, and Dispute Settlement Systems" and other papers in 'Lectures on Labor Laws in the 21st Century, Vol. 3 (2000)'.

Members of the management circles and of labor lawyers reached an agreement in July 2003, and in December of the same year the study group compiled a "summary of the labor tribunal system", which was to lead to the latest legislation[6].

3. Outline and Main Features of the Labor Tribunal System

(1) Outline and Main Features

(a) Labor-Management Arbiters

The first feature of the new labor tribunal system[7] to be adopted is that a panel of labor arbiters will comprise a labor examiner who is a career judge and labor arbiters from both labor and management sides. Moreover, there are several noteworthy features. The first is that, unlike councilors in domestic determination cases who simply witness or hear opinions (Article 3 of the Domestic Determination Law), or labor and employer members of labor relations commissions— who only participate in hearings to be held prior to judgments over unfair labor practices which are made exclusively by public members (Article 24, paragraph 1 of the Trade Union Law)—arbiters have identical right of verdicts with judges. This is as stated in Article 12, paragraph 1 of the Labor Tribunal Law (hereinafter referred to as the "Law"), which says, "resolutions of labor-management arbiter members shall be determined by a majority." In other words, this takes the form of the participation of arbiters in judgments[8] where they deal with them in the same position as examiners, and thus can be seen as achieving the participation of citizens in civil cases just as in the case of citizen judges of criminal cases.

(b) Determinative function

The second feature is that the labor tribunals will possess not only an

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6 For the process of discussion in the study group for labor issues, see Kazuo Sugeno, "Judicial System Reform and the Study Group for Labor Issues," Jiyu to Seigi, June 2004, page 14 ff.

7 For description of the labor tribunal system, see Takashi Muranaka, "Outline and Significance of the Labor Tribunal System" Kikan Rodo Ho (Labor Law Quarterly), Vol. 205, (2004), page 25 ff; and Makoto Johzuka, "On the Current State of Labor Cases and the Newly Established 'Labor Tribunal System'," Hanrei Times (Judicial Precedent Times), No. 1147, (2004), page 4 ff.

8 For the significance of "labor-management participation," see Kazuo Sugeno, "Judicial System Reform and Labor Tribunal," Journal of the Japan Labor Law Association, Vol. 93 (2001), p. 387; and Katsutoshi Mori (ed.), "International Comparison of Individual Labor Dispute Settlement Systems," the Japan Institute of Labor (2002), p. 325.

adjustment function (mediation), but also a determinative function (judgment). This is quite different from the way in which the function of the ADR system for individual labor disputes has so far been confined to an extremely mild adjustment function calling for conciliation. Since it is crucial for such systems to be equipped with a determinative function able to effect coordinated settlements, the new system is quite advantageous in terms of acceptability.

(c) Non-contentious procedure

The third feature is that court procedures will be aimed at non-contentious procedures, outside any legal proceedings. This was a desperate solution devised in order to achieve two goals: the establishment of a mediation system for labor disputes, and adoption of the citizen-participation system as referred to in the final opinion report of the study group for judicial system reform. The labor side called for adoption of a system allowing both labor and management to participate in judgments, whereas the management side strongly opposed this. The fact that labor judgments will be made via a non-contentious procedure shows two things: On the one hand, that the judgments will be kept from the public (Article 16, paragraph 1 of the Law), and, on the other, that the emphasis on official authority (Article 17 of the Law—which labor court systems in Europe have adopted on the grounds of the asymmetry of the parties involved in disputes on labor cases—has been unexpectedly realized[9]. However, it does not take the form of a prior examination, but is designed to provide an alternative to the traditional legal proceeding; whether or not this procedure is made use of will depend on its being seen as easy to use.

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[9] The theoretical distinction between contentious and non-contentious cases is somewhat controversial (see page 19 ff of Koji Shindo, "the Civil Procedure Code, 2nd printing, revised edition"). However, judging from judicial precedents, it seems to be understood that, while the former signifies disputes over the presence or otherwise of rights and obligations, the latter signifies disputes over the specific nature of rights and obligations—thus, in cases where judicial courts exercise their discretionary powers to meet a certain purpose from the position of guardian to define that specific nature. Therefore, the procedures of non-contentious cases are not necessarily open to the public and do not involve cross-examinations, but rely on detections, if necessary, by the courts themselves, carried out ex officio, rather than relying on arguments in accordance with documents and evidence presented by the parties concerned. In such procedures, moreover, judicial courts have a fairly large discretion. See page 19 ff of Koji Shindo, "the Civil Procedure Code, 2nd printing, revised edition"; Noboru Koyama "Contentious and Non-Contentious Cases," Jurist No. 500 (1972), page 310 ff; Masahiro Suzuki, "Contentious and Non-Contentious Cases," in Minsoho Hanrei Hyaku-sen (100 Selected Precedents Related to Civil Procedure Code, 2nd edition," (1982), page 12 ff.

(d) Handling within Three Sessions

Fourth, the system is designed so that the procedure will terminate within three sessions (Article 15, paragraph 2 of the Law). A labor tribunal will "terminate" the court procedures if it determines that the "nature of the case" is "inappropriate for swift, adequate solution of the dispute" (Article 24, paragraph 1 of the Law). Although swiftness is the most important element for a dispute settlement system, the maximum limit of three sessions has undeniably produced a restraint on the use of court procedures. This limit of the number of sessions is the most conspicuous feature of the new system, along with the participation of labor-management representatives, and will affect the practical performance of the system.

(e) Effects of Judgment

Fifth, judgments have the same effect as judicial amicable settlements (Article 21, paragraph 4 of the Law). Thus, unlike the administrative-led ADR system, the same enforcement power as definitive judgments by the court will be attached to decisions by dispute handling organizations, which benefits parties involved in disputes in terms of acceptability. However, the judgment will be nullified if one of the parties concerned makes a formal objection within two weeks (Article 21, paragraphs 1 and 3 of the Law). This provision was the most controversial issue at the final phase of the discussions by the labor study group, in that if a judgment becomes invalid simply by a motion of objection, the labor tribunal system itself could become quite useless. In the end, the discussions decided that, with a motion of objection, "it shall be deemed that an appeal has been made against the appeal for judgment (Article 22). In other words, the parties concerned are not required to appeal again (because the written application for appeal is considered to be a written complaint. Article 32 of the regulations), and the documents and materials obtained during the course of the court procedure can be used as such for the procedure for a judicial action. (However, it is necessary for the party concerned to "request the issuance of duplicate copies of records, etc. because those documents are not automatically passed on to the subsequent procedure.) All the party has to do is to pay the difference between the costs of the court procedure and those of the judicial action.

(f) Establishment of Labor Tribunals at the District Court Level

Sixth, labor tribunals will be established in 50 district courts across the country. If the adjustment function (mediation) had been emphasized, the

tribunals might have been set up in summary courts, but because it was decided that the determinative function was the more important, they were established in district courts throughout the country. In this sense, the tribunals seem to have been given a crucial role as the main part of the system of dealing with individual labor disputes.

(2) Position of Tribunals from the Viewpoint of Comparative Law

In the features described above, the labor tribunals share the following common aspects[10] with the standard labor court system often seen in European countries: i) Representatives of labor and management form part of a single organ for dispute settlements. ii) Adjustment and determinative procedures are well coordinated. (iii) Settlement of disputes is sought for by simple procedures, but are quire different from the latter in these respects: (a) that the jurisdiction of the tribunals in this new system is confined to civil disputes related to individual industrial relations; (b) that cases are handled in the procedure as non-contentious, unlike judicial procedures traditional in courts, and disclosure to the public is not guaranteed; (c) that there is a limit on the number of sessions; and (d) that, although an enforcement power identical to that attached to judicial amicable settlements is given to judgments under the new system, it is not of the kind that may lead to an appeal to a higher court, but becomes invalid simply through a motion of objection. In terms of the number of the labor tribunals to be set up, the new system is larger than the employment court system in the U.K.; it is closer in nature to the counterparts in Germany or France, which incorporate the mechanism of the mediation procedures. At the same time, it also resembles the U.K. system in that an order of execution must be obtained from district courts in order to have the judgment endorsed with power of execution. Either way, the labor tribunals will be quite unique, bearing little resemblance to organizations dealing with labor disputes in any other countries.

[10] See the Research Report cited above, and page 305 ff of the "International Comparison" cited above.

4. Tasks for the Labor Tribunal System

(1) Prerequisite Tasks for the System

(a) Securing of Arbiters

For a successful labor tribunal system, it is crucial, above all, to secure reliable arbiters. Since a panel of arbiters will be set up for each individual case in individual district courts, quite a considerable number of arbiters have to be secured. For this, the significance of citizen-participation lies in its reflection of the feelings of workers themselves in the application of related laws, and the actual application of the laws to enterprises and workplaces. To this end, basically, it is necessary to designate as arbiters those who are responsible for employment, and for labor and management relations, such as persons from workers' and employers' associations, and businesspeople. It seems unnecessary to deliberately choose those with a good knowledge of labor-related laws – this issue has been intensively discussed in the study group. It is persons who, as those involved in labor-management relations, have a sound judgment of labor issues, and who are eager to play an active role in forging fair employment practices through the labor tribunal system that should be chosen as arbiters[11]. In the cases of adjustment committees for individual disputes, it seems that public consultants on social and labor insurance or former civil servants engaged in labor issues have been designated as committee members. However, such persons should not be appointed as arbiters under the new system just because they are familiar with labor laws, although a person of a labor or management organization engaged in, for example, counseling services and having a certificate as the public consultant could well be designated as an arbiter. Currently, an industrial relations association is undertaking a project entrusted by the Ministry of Health, Labour and Welfare, providing candidates for labor arbiters with training programs.

(b) Securing of a Cooperative Structure between Career Judges and Arbiters

In the meantime, judges to serve as labor examiners will be required to enhance their specialized knowledge in labor laws, as well as to change their

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[11] For specialized features of labor cases, see Kazuo Sugeno "Labor-Management Disputes and Role of Judicial Courts," Hoso Shiho (Judicial Times) Vol. 52, No. 7, p 1 (p. 23) ff.

mindsets when experiencing “citizen-participation” in civil cases for the first time. This is so they will be able to take an appropriate initiative in sorting out of the focal points of disputes and in the procedures related to evidence, and to guarantee free discussion with arbiters in the collegial body. Since the time is limited, request forms and other necessary documents should be mailed out prior to the sessions; brief accounts should be given, ahead of the first session, concerning the case itself and focal points; and, as practice in the employment courts in the U.K., examinations should be made intensive, with sufficient time devoted to them during the sessions.

In future, it could be possible to appoint part-time judges as labor examiners, as in the U.K., but until the labor tribunal system has settled down, it is desirable to have incumbent judges in district courts serve as examiners.

(c) Assistance to Workers in Using Examinations

Examinations begin with a request made to a court either by workers or by an employer “in written form stating the purpose and any reasons” (Article 5). However, since labor examinations attach emphasis to swift processing—intended for “typical disputes” which are relatively easy to handle—it is vital to make it easy for ordinary workers to take advantage of examination procedures. It is therefore desirable to make request forms available at the counter of courts, as well as to give advice concerning preparation of documents and certificates required for examinations, and allocate legal service officers who give advice on calculation methods of average wages and extra wages if requests concern the examination of wages. Since there are only three sessions, labor administration should help the courts, if those cannot afford to carry out their preparation by themselves.

Many labor courts and labor tribunals in Europe are operated by labor administration or in collaboration with judicial and labor administrative authorities, since they are wary of any unbalance of power among the parties involved in disputes of labor cases. Hence, labor administration will be required, from the “viewpoint of the legal protection of workers,” to formulate a labor contract law, and build an appropriate cooperative relationship with the judicial administration in assisting dispute settlements.

(d) Establishment of Substantive Laws

In order for disputes to be settled within three sessions, the formulation of a labor contract law is essential—apart from simplification and classification of examination procedures—in that certain criteria for a settlement must be

clearly presented in examinations[12]. The currently most common matters in individual labor disputes concern dismissals and deterioration of working conditions, and should be handled in an appropriate manner. Where dismissals are concerned, aid should be provided to workers in pursuing their desired ways of settlement, and it is also important to confirm the principle of reinstatement of the workers concerned and call for certain rules concerning monetary payment for dissolution, for the sake of greater advantage in accessibility. It will not necessary to establish a rule whereby employers can one-sidedly resort to the monetary settlement, because such a rule would have an impact on the employment system in Japan. However, at the same time, it is unnecessary to reject the formulation of a rule calling for monetary settlement, which can be given as a choice to workers. As for cases concerning deterioration of working conditions, it is not required to create a method of calling for ex-post relief following the changes made to working conditions, but rather to create a legal device, which allows formulation of new contracts after a labor tribunal procedure has seen a judgment[13].

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[12] Since the principle related to the abuse of dismissal power was put on the books in 2003 (Article 18-2 of the Labour Standards Law), debate over the establishment of a labor contract law has been heating up. In October 2005, a study group for ideal labor contract legislation, established within the Ministry of Health, Labour and Welfare, compiled a report presenting the legal grounds of case laws concerning monetary settlement of dismissals and disadvantageous alteration of working conditions; a scheme for amendments of labor contracts for continued employment; and generalization of the labor-management commission system. These issues are currently under discussion at the Labor Policy Council. It is not yet certain whether the debate will result in the enactment of a law, but the tasks involved in establishment of a labor contract law are the issues affecting the most desirable forms of labor-related laws in future. Thus, the debate should not be concluded simply by the formation of criteria for swift proceedings in the labor tribunal system.

[13] In dealing with amendments of contracts as a consequence of reasoned decisions by the judicial courts, from the lawmaking standpoint it is desirable to make such amendments based on the right to seek amendment of contracts which permits the parties to the contract right to adjust its contents, rather than based on a notice of amendment or cancellation of the contract. This is because a notice of amendment or cancellation leads in practice to forcible execution by pressing workers to accept dismissals, and the workers are obliged, if only temporarily, to accept the new conditions, although they are entitled to reserve their acceptance of the dismissal. Among proposals for the law on the basis of the right to claim amendment of the contents of contracts, Rengo-RIALS (Research Institute for Advancement of Living Standards) published a “Draft Proposal for a Labor Contract Law” in 2005.

(2) Tasks related to System Operation

(a) Scope of Individual Labor Disputes subject to Examinations

A problematic feature of the labor tribunal system in operation is that the coverage of the system is limited to "civil disputes arising between individual workers and business proprietors concerning the presence or otherwise of labor contracts and other matters related to labor relations (civil disputes related to individual labor relations)" (Article 1). Since disputes to be covered concern "individual labor relations", cases of unfair labor practice—collective labor disputes under the Trade Union Law—are not, in general, subject to the tribunal system. Even so, an act of claim against unfair labor practices by a worker will not be rejected during the course of examination of a dismissal case[14]. On the other hand, it is not difficult to see that disputes affecting so-called contract workers who are in work under a contract, outsourcing agreements, etc. should be covered by the tribunal system, since disputes involving such workers arise between individuals and—not employers—but "business proprietors." The problem is disputes arising between workers concerning sexual harassment, bullying, and similar workplace issues and disputes directed to superiors or colleagues, together with (or without) the company. Such cases are not, if the letter of the law is complied with, subject to the examination procedures. If the current Law cannot be interpreted flexibly to admit such cases, it should be modified, in that there is no good reason to reject them[15].

Where labor relations affecting public servants are concerned, court precedents suggest that their appointment is considered to be administrative action. As such, they are associated with the public statutes, so that from the perspective of "civil disputes" matters involving public servants would seem to be outside the scope of the application of the system. However, even in the labor relations affecting public servants, cases involving claims for compensation against sexual harassment, etc. are classifiable as civil disputes, so that not all cases affecting public servants are outside the jurisdiction of the industrial tribunal system[16]. At the same time, disputes over dismissals or termination of continuing employment contracts of temporary staff members, etc. should not

[14] See page 27 of Muranaka (2004) cited above.

[15] Article 2, paragraph 1, item 9 of the Labour Court Law in Germany states that "civil disputes among workers arising from illegal acts in relation to the maintenance of the order in collaborative work or labor relations" shall be also under jurisdiction of the labor courts.

[16] See page 27 of Muranaka (2004) cited above.

necessarily be seen outside beyond the jurisdiction of the system. This is because labor relations affecting such workers can be considered to be relations under labor contracts, whereas it is undeniable that "civil disputes" could arise in relations affecting dispatched workers.

(b) Possibility of Practical Restrictions on the Subject of Disputes due to the Limited Sessions

Civil disputes concerning individual workers, which seem unlikely to be processed within three sessions, are deemed as "inappropriate for the labor tribunal procedures to seek a swift, adequate settlement of the dispute" (Article 24 of the Law), and processed as "termination." Cases which are most likely to be rejected from among the requests for swift handling are cases related to disadvantageous changes in labor conditions and cases related to discrimination in employment Matters concerning unfavorable changes in employment regulations, etc. are to be "judged after comprehensive consideration of the following: the degree of disadvantages to be suffered by the workers concerned due to changes in employment regulations; the he nature and degree of necessity for the changes from the viewpoint of the employer; suitability of the nature of the amended employment regulations; measures for compensation or amelioration of other related labor conditions; the background to negotiations with the trade union, etc.; response of other trade unions or other employees; the general state of affairs in the society of Japan concerning similar matters; and so on" (the Daishi Bank Case, February 28, 1997, Supreme Court). Thus it is extremely difficult to process such cases within three sessions. At the same time, it is also highly likely that discriminatory cases in employment such as discrimination against thought and creed, gender discrimination, etc. will be rejected on the grounds that these cases do not fit into the coordinated settlement and normally require a large amount of time for verification of evidence.

Nevertheless, since workers' action for disputes (settlements aimed at) are varied, it seems that workers should not give up on the procedure from the start just because the cases they are involved in do not concern disadvantageous changes in employment conditions or discrimination in employment. If there is any possibility that cases can be settled coordinately, or if cases are simple enough, they should be processed in the examination procedure. In sum, what is important is a flexible judgment.

(c) Prompt Procedure

Expeditious proceedings are the other distinguishing feature of the labor tribunal system, apart from the introduction of labor-management arbiters. "Panels of arbiters must promptly hold hearings of the parties concerned and organize the focal points and evidence of disputes" (Article 15 of the Law), but, at the same time, "the panels may verify the facts ex officio, and, upon request or ex officio, investigate such evidence as is deemed necessary" (Article 17 of the Law). Thus, the panels will be required not only to take the initiative during the sessions but also to make preparations, such as calling on the parties concerned to submit necessary documents, by the time the first session begins.

(d) Procedures by Proxy

For the examination procedures, there is a clause concerning lawyers by proxy. Courts, "when they determine that it is necessary and reasonable in order to protect the right and interest of the parties concerned, and to advance the labor tribunal procedures smoothly, may admit persons who are not lawyers (Article 4 of the Law). On this point, it is likely that a lawyer will be called on to act as a proxy for the party concerned in order to realize efficient examinations within the proscribed three sessions[17]. However, considering the realities of the examinations, the tribunal system should be made flexible enough to allow labor counselors of labor unions and others to act as proxies once the examination procedure in question has got on the right track. This is only natural, in that the handling of individual disputes consists of major tasks for which unions are normally responsible[18]. On the other hand, if lawyers are required to act as proxies, it will be essential to set up some kind of legal aid system

[17] Sugeno states on page 22 of the paper cited above that "it is desirable for specialist lawyers to be involved in order to handle cases effectively within three sessions at a maximum," which seems to aim at the launching and firm establishment of a labor tribunal system. For the system to work as such, it should be established to work properly even without lawyers.

[18] In the case of the labor court system in Germany, only lawyers only are allowed to act as proxies in the second or subsequent trials. However, in the first trial, the proportions of cases where lawyers act as proxies, those where secretaries of trade unions act as proxies, and those where the parties concerned act themselves, have so far been more or less the same. In recent years, however, the proportion of cases where lawyers act as proxies has been increasing due to more easily readily insurance against court actions.

(e) Openness

Labor tribunals handle cases, in principle, behind closed doors, and the labor tribunal may allow "persons who it determines to be reasonable" to observe proceedings for arbitration (Article 16). This is the same provision as laid down in domestic determination cases. The proceedings are not open to the general public, for the sake of protecting the privacy of the parties concerned and the pursuit of coordinated settlements. However, the proceedings are disputes for which the focus has been placed on "settlement taking into account the actual circumstances in cases affecting the interests of the parties concerned" (Article 1), so that it seems that the tribunal system should be utilized flexibly enough to permit observation if workers so wish[19].

(e) Formation of Legislation through the Arbitration Proceedings

The positive significance of the labor tribunal system is that tribunals examine cases and make decisions, rather than simply play a mediatory role. They are required to draw up a decision stating the principal judgment and outlining the reasons (Article 20, paragraph 3 of the Law). Since the precedents created by the tribunals will serve, like court precedents, to form criteria for settlements of future individual labor disputes[20], tribunals are required to make clear decisions concerning the presence or otherwise of rights and obligations.

Here, emphasis can be given to the fact that the labor tribunal system has been launched to deal with disputes as non-contentious cases. The decision to regard disputes as non-contentious is a kind of political compromise where citizen-participation in the lawsuit procedures is hardly acceptable, making it possible for tribunals, as well as citizen-participation, to undertake procedures involving decision-making, and not just coordinated judgments. At the same time, however, it is not wrong to say that the parties committed to the formation of the system shared an implicit recognition of the nature of labor cases—that is, as qualifying for treatment as non-contentious cases. In short, workers in many cases request for adjustment of the interests of the parties concerned and consideration of various other circumstances, since their rights and authorities obviously pertain to dismissals, job rotation, transfer, and assessment. Clearly,

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[19] Muranaka (2004) states on page 31 that union executives in the case of dismissal of union members, and employees who have been treated in the same way as those suffering from disadvantageous alterations of working rules should be allowed to observe the examinations.

[20] See Kunio Miyazato "the Reality of Labor Cases and the Dispute Settlement System," p. 45, Kikan Rodo Ho (Quarterly Labor Law), 2004.

as seen above, it is also necessary to upgrade substantive laws and clarify the legal requirements for such rights and authorities to be exercised as much as possible, but it will still be necessary sometimes to dismiss judgments on the basis of rationality and other factors. One conclusion, if the nature of labor cases conforming to the non-contentious category is taken into account, is that labor tribunals need not hesitate[21] during the proceedings to make decisions that may lead to the formation of certain legislation. In fact, tribunals should take the initiative in the birth of new legislation rather than waiting for existing laws to be amended, thereby making themselves more flexible in the resolution at hand and effective in legal disputes occurring in future.

5. Significance in the Labor Dispute Settlement System, and Future Tasks

(1) Significance in the Labor Dispute Settlement System

In the first half of the 1990s, the following five features of the labor dispute settlement system were highlighted from the viewpoint of comparative law: (i) Its heavy reliance on public systems in an immature setting apart from the legal system; (ii) lack of participation, if the public system is looked at as an organization, of representatives of labor and management associations; (iii) its lack of coordinated settlement procedures preceding any procedures seeking definite judgments; (iv) its failure to achieve social familiarity, though the system was developed to function as an autonomous system within the framework of a private system; (v) its failure to build up a new system corresponding to changes in labor-management relations.

Moreover, no administrative-led dispute settlement system which could realize flexible settlement proceedings and methods was invented; instead, there was simple reliance on a system based on continental law. Nor were organizations or proceedings especially designed for individual labor disputes created. Because of this, the labor dispute settlement system failed to change to make it more easily accessible for workers, and thus gave rise to the remark

[21] For example, there has been criticism of the verdict in the Maruko Alarm Case (Nagano District Court, Ueda Branch, March 13, 1996, Rokeisoku No. 1590-3. The verdict ruled that it abused discretionary power and was illegal if the wages of part-time workers were “80 percent or less than the wages of female regular employees who had worked for the company for the same number of years as the part-time workers.” A formative verdict of this kind should not be denied, taking into account that labor cases bear the nature of non-contentious cases.

that "the current public dispute settlement system in Japan was a system only for acts of dispute which took no account at all of time and cost, that is, a system for disputes pertaining to personal qualities and value judgment[22]." However, over the past decade, as far as the public element is concerned, the system has been subject to fundamental improvement. In particular, the establishment of a labor tribunal system is epoch-making in the history of labor dispute settlement systems.

Nevertheless, it is essential to clearly recognize problems even in such an epoch-making system. A requirement to dispose of cases within three sessions betrays an intention to emphasize nothing but expeditious proceedings. This design suggests that the new system will contribute to the settlement of cases of individual labor disputes where, in the traditional setting, workers have been obliged to give up appeals to the courts and which have been resolved by withdrawing from the dispute settlement system. It will also pay more attention to coordinated settlement methods seeking amicable settlement (mediation) of "typical disputes", e.g., economic disputes seeking a monetary settlement if the case pertains to dismissals[23].

On the other hand, it is true that one of the main features of the labor tribunal system is undoubtedly the introduction of labor and management arbiters. However, such "citizen-participation" is most advantageous in more complicated cases[24], especially in dismissals due to corporate restructuring, changes in labor conditions (disputes over rights), and employment discrimination (disputes concerning the public order and morals). Put differently, types of dispute cases which the labor tribunal system intends to exclude from its coverage in the interest of swift handling are those cases requiring the most

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[22] See Kezuka "Rodo Funso Shori Ho (Labor Disputes Settlement Law)," Jurist No. 1066, 1995, p. 210 ff (p. 213).

[23] For disputes, classification of acts of disputes, and classification of dispute settlements, see Kezuka (1995) cited in the preceding note.

[24] In Germany, evaluation on labor-management participation is higher in higher trials than in lower trials. Career judges appreciate the participation of labor-management arbiters when they deal with somewhat difficult disputes. In the meantime, when Aust-Dodenhoff, Director of the labor tribunal in the state of Berlin,, was invited to Japan by the Japan Federation Bar Associations in July, 2003, and asked about the role of honorary judges, he made the following comment: "Their familiarity with practical affairs of the labor process and the situation of each vocational type" was helpful for career judges, and also "useful for identification of the problems of each case, evaluation of the facts, and assessment of the reliability of witnesses and the credibility of their statements".

participation of labor-management arbiters in their settlement procedures. Under a spell of the principle of three sessions, if the labor tribunals were specialized in the handling of typical disputes or monetary resolutions, arbiters would be treated by the judges as the icing on the cake. In this light, in order to take full advantage of the arbiters, the tribunals should be actively prepared to deal with somewhat difficult disputes. In this case, however, unless panels of arbiters take the initiative in clarifying the issues (e.g., by calling for submission of necessary evidence), the uneven distribution of evidence in labor cases may end up by making workers avoid labor tribunal proceedings, out of fear of hastily-made within three sessions. If such cases are considered possible, it may be better to say that only cases with clear points of dispute and solid evidence should be eligible for the labor tribunal system. Either way, it will not be an easy task to firmly establish the system with its two outstanding features—expeditious processing and labor-management participation—in full use. Revisions of the system should be made without hesitation if the necessity arises after it is in operation.

(2) Reorganization of Other Labor Dispute Settlement Systems

Now that the labor tribunal system is about to be launched, the existing administrative-led ADR system must be reorganized. Labor administration offices in local governments and the prefectural labor bureaus of the government will continue providing one-stop counseling services as before. In addition, if workers cannot receive sufficient support from courts, or expect a lawyer to file the case by proxy, then the workers might be able to make use of an alternate method of gathering the documents and evidence necessary for arbitration proceedings. Since the number of sessions of tribunals is limited to three, they could achieve this with the help of the labor administration office of the local government, the dispute adjustment committee, or whatever means before making an appeal to the tribunal. However, the basic stance that the government's labor administration should take towards general labor civil cases is to supply direct assistance for tribunals, in order that workers can have easy access to the procedures, rather than creation of an alternative method. Therefore, the dispute adjustment committee, as one of the administration dispute settlement systems, should be committed to the future enhancement of its original scope of duties—i.e.. the handling of disputes over the public order

and morals[25]. Meanwhile, it might be effective for the labor relations committees to firm up their legal standing as organizations for settling collective disputes involving employment regulations, taking into account the fact that it remains uncertain whether the newly established tribunal system is capable of handling issues involving changes in collective labor conditions, such as alterations to working rules.

The private dispute settlement system should also be redesigned, in the light of the establishment of the labor tribunal system. Taking into account the diversification of employment patterns, an open, autonomous settlement system should be developed, both in order to allow various kinds of workers comfortable about access, and to link the system to the labor tribunal system. This would be beneficial both for labor and for management[26].

6. Conclusions

Every year, labor bureaus alone hear more than 800,000 labor grievances and more than 160,000 individual workers' complaints related to civil cases. In view of such high demand for settlements[27], the labor tribunal system is expected to deal with an increasing number of labor lawsuits, say 5,000 to 10,000 cases, while district courts currently handle 2,500 or so labor lawsuits. For this to be possible, labor and employers associations, the courts, the legal profession, labor administrative agencies and others concerned, not to mention official publicity, should cooperate in firmly establishing the system and improving it in the future.

Discussions from the time of the formation of the Judicial Reform Council up to the introduction of the labor tribunal system have not only brought new expansion of the bodies handling disputes, but are also changing the legal

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[25] That is, to assist with examinations or lawsuits filed by workers when necessary, such as is done by the employment equality committees in the U.K. and the U.S.A.

[26] For methods of development of intra-corporate dispute settlement systems, see Kezuka, "Atarashii Kobetsu Roshi Funso Shori System no Kochiku (Construction of New Individual Labor-Management Dispute Settlement Systems)," Kikan Rodo Ho (Labor Law Quarterly), No. 184 (1997), p. 10 (p. 19) ff.

[27] In fiscal 2004, general labor grievances brought to the Labor Bureaus numbered 820,000, individual workers' grievances 160,000, and accepted applications for conciliation 6,014 (according to the Ministry of Health, Labor and Welfare). Apart from these, Tokyo Metropolitan Labour Counseling and Information Centers (former labor administration offices) accepted about 44,000 grievances and dealt with 969 cases for conciliation in the same fiscal year (according to the Tokyo Metropolitan Industrial Labor Bureau).

culture associated with labor laws. Steady progress is observable in various areas including: dialogues between lawyers representing labor and management within the Japan Federation of Bar Associations; a Labor Case Council held by lawyers, representing labor and management[28], and judges of the Tokyo District Court; and provision of training materials for judges based on a "note on examinations of labor cases[29]" written by judges in charge of labor cases. In future, if labor examiners are allocated to district courts across the country and start collaborative work with labor arbiters, the situation affecting labor laws and labor dispute proceedings will be improved even more substantially.

[28] The achievements of the discussions concerning measures for improvement and facilitating smooth proceedings in the examination of labor lawsuits are presented in Hanrei Times (Judicial Precedent Times), No. 1143, (2004), page 4 ff.
[29] Hanrei Times (Judicial Precedent Times), No. 1144, (2004), page 9 ff.

The Labor Relations Commission as an Organization to Resolve Collective Labor Disputes

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Introduction

Half a century has passed since the inception of the current system of orders from Labor Relations Commissions to provide relief from unfair labor practices and during this period, each of the Commissions has resolved many cases, either by decree or through conciliation. Judgment of whether or not a case represents unfair labor practice and of the nature of the orders that should be issued has now become a relatively routine matter for the Commissions and many of their actions have also been ratified in court. Labor Relations Commissions have played an extremely important role in the protection of trade unions or their activities in Japan.

Be that as it may, the unfair labor practice remedial system also faces many difficult problems. The number of cases being filed is decreasing and many are individual rather than collective labor disputes. In addition, traditional problems such as the delay in processing cases and the lack of effective remedies remain. Also, the rather peculiar situation now occurs in which 20-30% of Labor Relations Commission orders are cancelled by revocation suits.

The decline in the unionization rate and the influence of trade unions are the first things that we can point out as occurring against this backdrop and the efficacy of the Labor Relations Commissions is a problem. Also, there has not been sufficient debate or research on the unfair labor practice remedial system or the legal principles pertaining to unfair labor practices.

In this paper, I would like to discuss the background to the formation of the system of Labor Relations Commissions in its role of resolving collective labor disputes and to look at some of the problems it faces. On this basis, I will also make an overview on the amendments to the Trade Union Law in 2004 and will conclude by considering what issues lie ahead in terms of improving the system for handling collective labor disputes.

1. The Legislative History of the Trade Union Law

I would like to begin by confirming the legal principles pertaining to unfair labor practices and the basic features of Labor Relations Commissions by

looking at the formative history of Article 7 of the Trade Union Law that prohibits unfair labor practices (1). The Analysis of the current situation and future system design both hinge upon an accurate appreciation of the historical background.

1) The Establishment of the former Trade Union Law (1945)

In keeping with its policy of democratization, GHQ embarked on a program to protect and foster the labor movement in Japan immediately following the end of the Second World War. In October 1945 the Trade Union Law was formulated, approved by cabinet and enacted later that year. Then Minister of Health and Welfare, Hitoshi Ashida, whose Ministry was charged with the administration of labor issues, put forward the following five points as the key focus of the Trade Union Law (2): 1) guaranteeing the right to organize, 2) freedom from claims for compensation for damages resulting from acts of bargaining or dispute 3) securing independence in the formation and operation of labor unions, 4) granting effect to agreements, 5) establishing the Labor Relations Commission system. This provided the foundation for provisions in the present Trade Union Law concerning the internal regulations of labor unions; the guarantee of the right to organize, bargain and dispute; granting of effect to agreements and the establishment of the Labor Relations Commission system.

Let us turn our attention to the specific discussion that occurred that lead up to the enactment of 1945 Trade Union Law. (3)

First, with regard to the concept of labor unions, this law defines them as being composed mainly of workers for the purpose of striving autonomously to maintain and improve working conditions and to raise the economic status of the worker. It also rules out the participation of those who represent the interests of the employer and those who receive the employer's financial support. This is basically the same as the current legislation. However, there was a definite hint of labor union regulations with regard to reporting to the government the union constitution as well as the names and addresses of officials (Article 5), change order for the constitution (Article 8) and the dissolution of the union by court order (Article 15)

Second was the discussion of the provisions concerning anti-union practices. In the 1945 Trade Union Law, as well as prohibiting unfavorable treatment by the employer and yellow-dog contracts as unjust labor practices

(Article 11) it determined that infractions would be punished by up to six months imprisonment or a fine of up to 500 yen (Article 33) At the same time, Clause 2 of Article 33 required that Labor Relations Commissions have some involvement in determining the punishment.

2) The Establishment of Labor Relations Adjustment Law

The Trade Union Law that was enacted in 1945 which came into effect from March 1, 1946, underwent major amendments in 1949, leading on the current law. Between those two dates, the following, important legislation was enacted.

First, the Constitution of Japan was promulgated in 1946. Article 25 provides for the right of life and Article 28 provides workers with the right to organize to bargain and to act collectively. However, before the constitution came into effect the concept of the right to organize was not debated to any great extent. Discussion centered upon whether or not it was possible - from a welfare services point of view - to restrict the right of public servants to act collectively.

Secondly, the Labor Relations Adjustment Law was enacted (in 1946) The increased activity of the labor movement resulted in more disputes between labor and management and brought the necessity to resolve these disputes in a smooth manner. With this in mind, in order "to promote the fair adjustment of labor relations and to prevent or settle labor disputes and thereby contribute to the maintenance of industrial peace and economic development" (Article 1), the government enacted the Labor Relations Adjustment Law which covered placement, mediation and arbitration. Subsequently, the Labor Standards Law was enacted in 1947. The system guaranteeing the right to organize that exists in the Labor Relations Adjustment Law prohibited the unfair dismissal of workers for comments made during disputes between labor and management (Article 40) and by that same law's supplementary regulations, Article 11 Clause 1 of the 1945 Trade Union Law was amended to classify dismissals of workers carried out because a labor union had acted in a justifiable manner as unfair practice.

3) 1949 Amendments to the Trade Union Law

In February 1949, the Ministry of Labor released its "Draft Proposal for Amendments to the Trade Union Law." (4) In addition to guaranteeing the

right to bargain, it introduced a system of units for labor negotiations and required Labor Relations Committee orders to be implemented by court ruling, thereby giving the impression that it was heavily influenced by the American system regarding unfair labor practices. However, subsequently this thinking changed greatly and a more Japanese system was created. That is to say, as well as avoiding clearly stated rules regarding the grounds for refusing to bargain, the system of units for labor negotiations was dropped.

In terms of the system guaranteeing the right to organize, what changes did the 1949 amendments actually bring?

First of all, with regard to labor unions, in the amended law the direct administrative regulations governing their formation and operation were abolished and there was a shift to indirect regulation through the use of a qualifications screening system (Article 5 Clause 1) In other words, it changed from a system centered on the need to report to one in which unions could be freely established. To ensure the autonomy and democracy of labor unions, it gave the details of exactly who would be ruled out from joining a union because they were deemed to represent the interests of the employer (Article 2, No. 1) and outlined the specific details of financial support that should not be permitted (Article 2, No. 2) It also specified the provisions that should be included in a labor union's constitution to ensure the democratic nature of its operations (Article 5 Clause 2)

Secondly, with regard to offering relief from unfair labor practices, two major changes were made and the current system - which has been influenced to a certain extent by that of the United States – was put in place. One of the changes pertained to refusing to bargain (Article 7 Clause 2) and controlling or interfering with the formation or management of a labor union (Article 7 Clause 3) were added to the types of unfair labor practices. The former opened the way for the involvement of the state in the negotiating process and the latter made it possible to bring a diverse range of anti-union activities by the employer into the scope of the regulations. However, the system of units for negotiations was not introduced and there was no mention of the notion of unfair practices by the labor union. The second change was that the emphasis of the remedial system moved from direct punishment to the current situation of administrative remedies by Labor Relations Commissions. The reasoning behind this was that criminal regulations were not necessarily effective and that the change allowed for the victim of unfair labor practices to receive direct

relief. However, there has not been a great deal of debate about the connection between the reason for employing an approach based upon administrative remedies and judicial remedies through the court system.

Third, on the grounds that it represented direct interference in the process of determining working conditions, refusing to bargain was given its own category in unfair labor practices (Article 7 Clause 2) and this is significant to an extent beyond the fact that number of types of unfair labor practices increased. The aim of the 1945 Trade Union Law was expressed as being "to encourage the practice of collective bargaining," and immunity from criminal prosecution was determined to manifest this (Article 1) Provision was also included to recognize the authority of labor union representatives to bargain (Article 10) However, this was because the specific effects of guaranteeing the right to bargain had not been covered. Lending stability and rules to the process of determining working conditions were the main issues in the 1949 amendments. With this in mind, as explained previously, when it was still at the initial draft stage, a system of units for labor negotiations and the refusal to bargain were specifically included, but neither appeared in the bill put to the Diet. The provisions included in the law when it was enacted were broad and abstract, going no further than deeming a refusal to bargain without justifiable reason to be an example of unfair labor practice.

4) Subsequent Developments

The 1949 amendments basically completed the current system to remedy unfair labor practices. However, from 1951, the Labor Relations Bureau of the Ministry of Labor put together the "Outline Draft of the Labor Relations Law (Provisional Title)." Its aim was a) to create a "Labor Relations Law" covering workers employed in private enterprises and the public service, and to integrate all the administrative machinery, b) to partially introduce a system of units for labor negotiations as well as to require labor unions to enter into bargaining, c) to make unfair labor practices fall under the exclusive competency of nationwide Labor Relations Commissions - setting up branches in the regions, and in addition, to require that civil suits concerning unfair labor practices cannot be filed until approved by the Labor Relations Commissions, d) to completely separate the functions of assessment and settlement of cases, with the nationwide Labor Relations Commissions having jurisdiction over the former and the latter falling to the Labor Relations

Adjustment Committee. However, workers and management fiercely opposed the content of this draft and so the 1952 amendments only saw minor changes such as the addition of provisions concerning retaliatory unfavorable treatment in Article 7 Clause 4.

5) What is to be Learned from Legislative History?

Looking at the process by which these laws were put in place will not necessarily give us a clear picture of the system to remedy unfair labor practices, or of the legal principles pertaining to the system. Be that as it may, in terms of making modifications to the remedial system, it is essential to establish a common appreciation of what has, and has not, been debated thus far.

First of all, there was very little in the way of coordinated debate during the period from the first to the fourth of these laws with regard to types of unfair labor practices. Each of the 1945 Trade Union Law, the Labor Relations Adjustment Law (1946) and the amendments to the Trade Union Law (1949, 1952) added their own separate provisions. There is no consistency whatsoever within them, and in particular, the situation with regard to refusal to bargain is unclear. In addition, the discrepancies that exist with regard to the enforcement of provisions forbidding unfair labor practices (the 1945 Trade Union Law includes criminal regulations, the 1949 amended law has administrative remedies and was also judged to be within the scope of the judiciary) have received no consideration whatsoever. Also, there was no particular debate when the Trade Union Law was amended in 1949 and when the system for administrative remedies by Labor Relations Committees was adopted.

Second, we can see two separate ways of approaching the system to remedy unfair labor practices. One focuses entirely on guaranteeing the right to organize and dispute and this line of thinking is reflected in the laws that have been enacted. In other words, the key issue was how to guarantee “the rights of the labor union.” The second view was one that focuses upon “smooth negotiations between management and labor.” This approach manifested itself in the 1949 draft bill in the provisions concerning the guarantee of the right to bargain and the attempt to introduce a system of negotiating units and in the 1951 outline, but this approach eventually failed.

Third, because the notion of making the negotiation process as smooth as possible was not yet generally accepted, the “unfair” of “unfair labor practices” had been linked to the guarantee of the right to organize and therefore was

interpreted to mean "anti-union." Also, these were the halcyon days of the labor union movement, so the regulations concerning disputes represented the main point of contention. Also, because of Article 28 in the Constitution of Japan not only was the concept of "unfair labor practices by a labor union" a taboo issue, there was no significant debate regarding the meaning of "unfair" in the bargaining process between workers and management.

Fourth, with the 1949 Trade Union Law, based upon the premise of the formation of labor unions, the equation of collective bargaining → (industrial action) → agreement and the legal mechanism to support that was formed. There was lively debate over the role of "labor unions" as the manifestation of the workers' right to organize, who could be a union member, the legal definitions involved and the perception or image that should be maintained of worker-management relations. However, the debate focused mainly on ideology and politics rather than the level of the legal principles pertaining to unfair labor practices. Also, there was very little legal debate concerning the problems that might occur within the labor unions or the situation in which more than one union existed.

Notes:

(1) For further detail see Tetsunari Doko *"Futorodokoi no Gyosei Kyusai Hori"* (trans: The Legal Principles of Administrative Remedies for Unfair Labor Practices) 1998, Shinzansha, from pp 10; Tetsunari Doko *"Futorodokoi-Hori no Kihonkozo"* (trans: The Fundamental Structure of the Legal Principles of Unfair Labor Practices) 2002, Hokkaido University Press, from pp 182; Kimitsugu Endo *"Nihon-senryo to Rodokankei-seisaku no Seiritsu"* (trans: The Occupation of Japan and the Establishment of Labor Relations Policy) 1989, University of Tokyo Press, Tokyo Daigaku Rodoho Kenkyukai (University of Tokyo Labor Law Research Group) *"Chushaku Rodokumiaiho Jokan"* (Trade Union Law Annotated Notes Volume One) Yuhikaku, 1980, from pp 9; Kenichi Sotoo *"Wagakuni ni Okeru Futorodokoiseido no Rekishiteki Enkaku"* (trans: The Historical Development of Japan's System to Remedy Unfair Labor Practices) Kenichi Sotoo (edited) *"Futorodokoi no Hori"* (trans: The Legal Principles Concerning Unfair Labor Practices) Yuhikaku, 1985 etc.

(2) Ministry of Labor Publishing *"Rodogyoseishi (Sengo no Rodogyosei)"* (History of Labor Administration - Postwar) Rodohoreikyokai pp 218.

(3) For details of the deliberation and background, see *"Shiryo Rodo Undoshi Showa 20-21 nen"* (transl: The History of the Labor Movement 1945-1946) 1951, Institute

of Labor Administration, from pp 689.

(4) With regard to the specific process involved in enacting this law, see Endo (previously mentioned) pp 285, and for the respective opinions of workers and management, Ministry of Labor Publishing, *"Shiryo Rodo Undoshi Showa 24 nen"* (transl: The History of the Labor Movement 1949) 1951, Institute of Labor Administration, pp 934.

2. Issues Faced by the Unfair Labor Practice Remedial System

Broadly speaking, the issues faced by the unfair labor practice remedial system can be discussed in terms of the following three levels: that of the legal principles that support the system, that of the level of the structure and authority of the current system and the operational level. (1) While the three are closely linked, I would like to deal with them separately. In addition, I will point out recent events which are related to these issues.

1) The Legal Principles that Support the System

The first is that of the legal principles that support the unfair labor practice remedial system. In terms of theory, the following three approaches are put forward mainly concerning Article 28 of the Constitution of Japan and the connection between legal principles and judicial remedy. They are, that concerning the guarantee of the right to organize, that concerning the maintenance of the order with regard to the guarantee of the right to organize and the approach that emphasizes bargaining, but no real debate is currently occurring on these approaches. My position focuses on the realization of "rules concerning the collective labor-management relationship" from the viewpoint of the identity of the administrative remedies. (2)

2) Issues of Structure and Authority

I would like to confirm the basic features of the unfair labor practice remedial system in terms of structure and authority, and to clarify related issues.

The first point is that Labor Relations Commissions – a government council system - were established as a remedial mechanism to deal with unfair labor practices. The objective of such government remedies is generally said to be the swift, inexpensive and efficient resolution of problems and this goes without saying, but in terms of fundamental principles there has not been sufficient

theoretical examination of why a government body should be publicly involved. This is an issue that also exists on the level of legal principles.

The second point is that only unfair labor practices by the employer are prohibited. If we view the system as having been created to realize the intent of Article 28 of the Constitution, then it is difficult to see "unfair labor practices by labor unions" in that context, but in terms of the collective determination of working conditions, a different kind of system design should be possible within the legislation.

In addition, the current system has a bi-polar structure regulating the relationship between the employer and the labor union rather than a tri-polar arrangement that also regulates the relationship between individual labor union members and the union. Labor unions' internal problems are dealt with exclusively on the level of qualifications screening (Article 2 and 5) This qualifications screening has recently been discussed in terms of "management unions" but it is a rather strange system in which management rather than individual union members are able to lodge complaints about unfair practices. Overall, there is little indication that internal disputes within labor unions will be handled properly. The same applies to the situation where two unions exist together.

Third, is the fact that Labor Relations Commissions are involved in remedial action for unfair labor practices and possess the authority (under the Labor Relations Adjustment Law) to act to resolve collective worker-management disputes. From the point of view of handling and resolving collective worker-management disputes, both are closely connected, and also when dealing with cases of unfair labor practices this is a reason why mediated conciliatory settlements are easy to reach. In terms of the administrative "remedial legal principles" of unfair labor practices, it is necessary to separate these functions, but from the point of view of swift and smooth handling and resolution of cases of unfair labor practices, having the authority for both can, depending on how it is used, be seen as a significantly positive aspect. When considering the nature of the system for the future, deciding how the authority for these two should be apportioned is of crucial importance.

Fourth, as a system to help with the implementation of orders, there are provisions covering non-penal fines for violations of an order of the court (Article 32 of the Trade Union Law) and criminal punishment for violations of final judgments of the court (Article 28) Also, because cancellation of a court

order by revocation suits hinders the implementation of a Labor Relations Commission order, there is an emergency order system set up by the court of suit, and urgent violations of the order are subject to the same sanctions as violations of an order of the court. Many problems exist with regard to the effectiveness of the system to implement orders.

Fifth, in terms of a system to deliberate on orders, in response to those issued from the first trial it is possible to request a second deliberation to the Central Labor Relations Commission or to file a revocation suit directly to the district court. The former is more common. It is also possible to file a revocation suit against an order issued by the Central Labor Relations Committee. This kind of double-deliberation system or revocation suit system is fraught with problems. How roles are apportioned between the regional Labor Relations Commissions and the Central body is a particularly important issue.

3) Operational Level

The main operational issues are as follows; (3) They all represent new angles on old problems and improvement in terms of speed and precision of the hearings is the main objective of the 2004 amendments to the Trade Union Law.

First is the issue of the decrease in number of cases and the variance among the cases involved. The decrease in number of cases signify the diminishing role of the Labor Relations Commissions and the variance among the cases involved is a result of the lack of commonality (for example, the delays in processing cases).

Second is the issue of the delay in processing cases. However, apart from those Labor Relations Commissions based in large urban centers, it is the decrease in the number of cases being presented that is the problem and the issue of delay in processing is not something that occurs across the board. Different to the United States National Labor Relations Board, because the Japan Labor Relations Commissions' procedures and operations are designed to be driven by the parties involved, measures driven by committees are difficult. (4) In that respect, it is only natural that a certain amount of time is needed to facilitate voluntary resolutions. In terms of speeding up the processing of cases, the 2004 amendments do give a stronger impression of involvement by the authorities.

Third, are the pros and cons of settlement arrangements. Of course it depends completely upon the nature of the settlement, but in general it is

preferable in order to ensure swift and smooth handling of cases. However, effective settlements require effective remedial orders. In particular, when the union is not that powerful, legal compulsion provides the main drive to back up a settlement. (5)

Fourth is the effectiveness of remedial orders. A flexible approach, with remedies matching each individual case, is one of the objectives of the Labor Relations Commission system, and the High Court emphasizes this too (Dai Ni Hato Taxi Incident (Judgment of the Grand Bench 23 February 1977 Judicial precedent statement No. 840 pp 28) but in actual fact the orders issued do all tend to be rather similar. Effective remedies are needed for the diverse range of control intervention cases or cases of refusal to bargain.

(1) For further detail see Tetsunari Doko, *"Futorodokoi no Gyosei Kyusai Hori"* from pp 1. Op cit.
(2) For details of the rules regarding collective worker-management relations see Tetsunari Doko, *"Futorodokoi-Hori no Kihonkozo"* from pp 221. Op cit.
(3) For comment concerning the actual operation of the system, see Kichiemon Ishikawa and Kiyohiko Hagisawa, *"Futorodokoi Seido no Jissai"* (trans: The Realities of the Remedial System for Unfair Labor Practices) 1980, Japan Institute of Labor, Haruo Naoi and Mieko Narikawa, "Roi Seido Nooto" (trans: Notes on the Labor Relations Commission System) Japan Labor Research Institute, 1998 etc.
(4) Tetsunari Doko, *"Futorodokoi Kyusai no Horiron"* (trans: The Legal Principles Concerning Remedies for Unfair Labor Practices) Yuhikaku, 1988 from pp 93.
(5) For my impression of the handling of such cases see Tetsunari Doko, *"Futorodokoi-Hori no Kihonkoso"* from pp 127. Op cit.

3 2004 Amendments to the Trade Union Law - Content and Problems

There were no real amendments to the Trade Union Law after 1949, but in 2004 some changes were made, mainly with the aim of speeding up and clarifying the Labor Relations Committee screening process. The key aspects of these changes and the problems involved are as follows; (1)

First, the main aim was to speed up what had become an extended deliberation process and to clarify that process in response to the high rate of revocation of judicial judgments. However it should be emphasized that these problems were not experienced nationwide and were more common for the Labor Relations Commissions in Tokyo and Osaka, or the Central Commission,

where delays are caused by the large number of cases that need to be processed.

Second, the law was made more effective by clarifying the legal grounds for conciliation (Article 27 Clause 14) However, when looking at the overall situation we see that this is based upon cases that are not resolved through conciliation, but go as far as an order being required and in addition where revocation suits are lodged. In actual fact, 80% of the cases handled by Labor Relations Commissions are resolved through settlements and therefore do not go as far as orders. When looking at the remedial system for unfair labor practices and the Labor Relations Commissions, two views or images of the system are possible depending upon whether or not we place our emphasis on orders or on reconciliation. Both of these positions have aspects which either complement or are in conflict with each other. Fundamentally, the latest amendments emphasize conciliation. However, doubts remain as to whether the nature of the Labor Relations Commission system is actually appropriate, particularly in terms of its superiority over the court system.

Third, to make the deliberation process faster and more appropriate, in addition to better planning and a stricter approach to establishing the facts, the hearings have been made more like court. Specific examples are the introduction of a system for the removal or challenging of committee members representing the public interest (Article 27-2 and 5) orders to present witnesses and objects (Article 27-7) witnesses under oath (Article 27-8) limits regarding the submission of evidence concerning revocation suits (Article 27-21) The objective is to lower the percentage of revocation suits by establishing the facts properly, and is therefore understandable. However, it does not pay sufficient attention to the fact that the system to remedy unfair labor practices provides the foundation of labor and management self-government. There also does not seem to be sufficient interest shown in what the handling or resolution of cases of unfair labor practices actually involves.

(1) Regarding the problems of the amendments to the Trade Union Law see Tetsunari Doko, *"Futorodokoi no Shinsa wa Do Naru Ka"* (trans: What is to Become of the Deliberation Process for Unfair Labor Practices?) Rodohoritsu junpo 1591-92 (2005) from pp 68; Ryuichi Yamakawa, Shigeo Nakayama, Kunio Miyasato *"Kaisei Rodo Kumiaiho ni Okeru Ronten to Kongo no Kadai"* (trans: Issues Concerning the Amendments to the Trade Union Law) Jurist 1296 (2005)

4 Reexamining the Remedial System for Unfair Labor Practices

Based upon the issues discussed above, let us now consider the remedial system for unfair labor practices as a system to deal with collective management-worker disputes. (1) First of all, with regard to aspects of the collective worker-management relations laws that provide the basis of dealing with disputes, while not necessarily clearly recognized, I would like to state that basically two views exist. The meaning of the word "unfair" in unfair labor practices also differs in each of these.

The first of these views is that which supports labor and management self-government. Working conditions are maintained and enhanced by means of a smooth negotiating system. Emphasis is placed upon the right to bargain which is at the core of the system of negotiation and "unfair" refers to practices (by workers or management) that impede smooth negotiations. The second is the view that focuses on the right to organize. Its main aim is to regulate anti-union unfair practices by management in order to protect the rights of labor unions. With the latter view, the emphasis is placed on the right of the labor union to organize and the right to strike in order to have demands met. These two views of worker-management relations exist together in the current Trade Union Law. When the law was first enacted the latter view was stronger, but recently the former has become more prevalent.

1) Issues concerning the Trade Union Law when viewed in terms of a system to deal with collective management-worker disputes

A view that sees the realization of smooth negotiation based upon labor and management self-government focuses upon the voluntary resolution of management-worker disputes. However, a dispute settlement system is required for those cases in which an appropriate solution cannot be reached. With this in mind, I would like to point out the problems of the current system in terms of realizing a smooth negotiating relationship, and based upon the following three patterns of dispute. (2)

First is that of disputes concerning the establishment and operation of the workers' organizations that represent the foundation of the negotiating relationship. This means a dispute handling system that aims to guarantee the right of workers to establish and operate labor unions. Under the current law, Labor Relations Commissions and courts represent the system guaranteeing the right to organize. The remedial system for unfair labor practices basically

is concerned with this process.

What fundamental problems exist with a dispute handling system on this level?

One is that no specific body exists to deal with disputes that occur within labor unions. The remedial system for unfair labor practices does not assume the existence of such disputes, and neither does the recently established Labor Relations Bureau (Law on Promoting the Resolution of Individual Labor Disputes Article 1) or the individual mediatory services provided by the regional Labor Relations Commissions or the industrial tribunal system. Only courts have the authority to adjudicate over "disputes of law" (Court Organization Law Article 3) and they are not necessarily the most appropriate body to making such judgments.

When internal conflict worsens within a labor union, the issue is most commonly "resolved" not through internal conciliation, but by a split in the union ranks and the formation of another union. In a theoretical sense, Article 28 of the Constitution, that deems the right to organize to be a fundamental human right, has served to add weight to this tendency. At the same time, with regard to the legal rules pertaining to situations in which more than one labor union exists, the obligation of the employer to remain neutral has judicial precedents (Nissan Motors Incident (Judgment of the Third Petty Bench 23 April 1986 Labor precedent 450-23) However, the concept that disputes between labor unions that exist together should be dealt with as such is surprisingly frail. Because employers become involved, most disputes that occur within labor unions or between unions that exist together manifest themselves as cases of unfair labor practices, and are handled as such by Labor Relations Commissions. Because the existence of more than one labor union in a workplace is problematic in terms of determining effective working conditions, an appropriate system to handle disputes within unions is necessary.

The second issue is that both administrative and judicial remedies exist at the same time. In my opinion, there should be a clear demarcation of the two to ensure the autonomy of administrative remedies. (3) In saying this, however, there is also no denying that there are significant problems involved in the means of compulsion used with administrative remedies. Ordering that fines be paid provides no direct relief to the party that filed the case. Increasing the amount of the fines in the 2004 amendments to the Trade Union Law merely indirectly strengthens the compulsory function of the system. The petitioner is obliged to

seek voluntary conciliation or, when that is proved to be difficult, to rely upon administrative remedies. In this respect, amendments that institutionalize and grant teeth to the conciliation process and its content are to be welcomed.

The second pattern of dispute is that concerning the negotiating process. From the perspective of carrying through the labor and management self-government, the guiding principle is that the state does not get involved in this process. (4) However, the Trade Union Law guarantees the right to bargain for the unions, and by obliging the employer to enter into good faith bargaining it assumes that disputes will occur on the following two levels and prepares a system to handle both of these.

The first involves disputes over the rules of negotiation. The points of contention are such issues as the parties involved in the negotiation, the people in charge, the items being negotiated and the rules being used. Compliance orders are recognized for Labor Relations Commissions as a means of remedial action, as are status confirmations for courts (Kokutetsu Incident (Judgment of the Third Petty Bench 23 April 1991 Labor precedent 586-6) or claims for compensation. These can be seen as disputes over rights concerning the right to bargain.

The second involves disputes concerning the content of the negotiations, such as wage increases - in other words, disputes over what stands to be gained. In these cases, the Labor Relations Adjustment Law system of conciliation, arbitration and mediation is used. However, cases involving changes that have a negative impact on working conditions, such as changes in working regulations, often evolve into disputes over rights and the courts become involved.

So what are fundamental issues here? One is that there is no clear system or set or rules governing the connection between the union's internal decision making and bargaining and also between those and each process involved in the conclusion of an agreement. Because the bargaining process has not been institutionalized in the way that the exclusive negotiator system has been under law in the United States, when labor unions in Japan bargain they only represent the members in question, and in cases where more than one labor union exists, each of the unions involved exercises its own right to bargain. As a rule, labor contracts only apply to the union members in question (Trade Union Law Article 16) The view that conditions can be appropriately and smoothly determined for everyone in the workplace is not strongly held, and problems during the negotiating process tend to manifest themselves as disputes over

refusal to bargain. In addition, because no link is made between internal problems in a labor union and the bargaining process, it is easy for a dispute to arise between the employer and an individual union member even in cases where there are negative changes to the working conditions based upon the labor contract. In terms of case law, this is discussed as the obligation to provide fair representation under the legal principles of agreements. (5)

The second issue is that many disputes involve a blend of the negotiating rules and the content of the negotiations. Most disputes concerning the obligation to engage in good faith bargaining are examples of this, and while it might manifest itself as an incident of refusal to negotiate, in many cases the problem is actually the content of the negotiations. This is why Labor Relations Commissions need to employ a flexible approach in dealing with each case. The concept of a discrete system to handle disputes that does not seek to clearly separate the functions of assessment and adjustment and looks at the negotiating process in its entirety is worth considering.

In addition, there is a need for the legal principles and a truly flexible system to provide support in situations of non-bargaining related complaints, labor-management consultation, and the determination of individual working conditions (annual salary system or performance-based wages) There is also the major problem of the genuine enactment into law of the employee representative system. At present, this manifests itself as the Labor Relations Commission system within the moves to legislate the legal structures of employment contracts.

The third issue is that of disputes regarding the outcome of negotiations. Normally, once negotiations have reached a conclusion, an agreement is entered into and the dispute is resolved for the time being. However, it is possible that further dispute will occur over the interpretation of that agreement and if the problem cannot be resolved through talks between the workers and management, the Labor Relations Commission mediation system or the courts are used. Discrete bodies based upon labor and management self-government within companies to deal with complaints are not common and American-style voluntary arbitration systems are rare. On the other hand, if no conclusion is reached the dispute continues and there are occasions when the mediation of the Labor Relations Commissions is used. Rather than focusing on the result of the negotiations, the problem in these cases is actually the negotiating process itself.

With regard to this third level of dispute, despite the insufficient nature of the voluntary resolution system (handling of complaints, arbitration) the system to support for individual complaints it is not widely seen as a problem.

2) Reexamining the Remedial System for Unfair Labor Practices

As mentioned in my comments on the 2004 amendments to the Trade Union Law, in terms of legal adjustments, I basically see the amendments as a counter-measure to revocation suits. This is why there has been a move to improve the accuracy and rigor of the mechanism in order to establish the facts of each case. This is entirely appropriate for those cases at the Central Labor Relations Commission stage or for theoretically or factually complex cases. But on the other hand, increase in use of such judicial procedures does tend to negate the good features of the Labor Relations Commission system, namely its flexibility, and the prospect of speedy process leading to resolution. With this in mind, I would like to close by offering a different perspective on unfair labor practices to that used in the latest amendments.

(i) "Soft" fine-tuning of the current remedial system for unfair labor practices

There are basically two views of the handling of disputes by the Labor Relations Commissions. One is of the conciliatory position that places emphasis on the handling of disputes through mediation and the other is that which emphasizes judgments delivered by means of orders. In terms of the law, and once cases progress as far as the level of the Central Labor Commission, most require resolution by judgment, so the latter stance always seems easier to adopt.

However, the objective of the remedial system for unfair labor practices is fundamentally to establish the rules to support labor and management self-government in the workplace. In specific terms, it supports the autonomous formation and operation of labor unions, but to facilitate this properly it is essential that a) the labor unions that can serve as the standard-bearers of labor-management autonomy possess a certain amount of power and b) the employers also, at least to a certain extent, accept the existence of the union. This also serves as the premise for the establishment of sound labor-management relations. When this is lacking - for example in the case of employers who have been confirmed to be in the wrong or cases that are essentially individual disputes - judicial remedies are likely to be more

appropriate.

When conceptualizing from this standpoint, the emphasis is placed firstly upon "resolution" in keeping with the will of labor and management involved whose objective it is to create the foundation of labor-management autonomy, and secondly upon educational guidance by the Commission members representing public interests, labor and management. It requires a dispute resolving system that emphasizes conciliatory and educational functions that are designed to be accepted by labor and management. On the other hand orders will be issued in cases that cannot be resolved in a voluntary manner. However, a rigorous approach to establishing the facts is not always necessary when cases are still at regional Labor Relations Commissions stage. The Commission's appreciation of the facts and offering a legal evaluation towards a solution are sufficient. I think that there should be a system in which those who do not agree with the orders file to have the case reconsidered by the Central Labor Relations Commission and have the case dealt with at that level by serving judgment based upon a rigorous appraisal of the facts, and that judicial review only be permitted with regard to orders issued by the Central Labor Relations Commission.

In this way, more appropriate solutions are likely to be forthcoming in a system that employs "soft" resolution at the stage of the regional Labor Relations Commissions and "hard" resolution at the stage of the Central Labor Relations Commission. This is because the excessive involvement of the judiciary at the stage of the regional Labor Relations Commissions that results from the 2004 amendments runs the risk of promoting the needless elevation of unfair practices to the status of "incidents" and impeding swift and flexible resolutions that have an eye on the future.

(ii) Slightly "hard" fine-tuning

The slightly "hard" fine-tuning of the current remedial system for unfair labor practices is an attempt to reconsider the nature of the labor-management relations and expand the role of the Labor Relations Commissions. It is motivated by the following line of thinking.

First is the view that the remedial system for unfair labor practices should not limit its focus only to the protection of labor unions and their members. It suggests that by expanding the system to determine collective employment conditions, the group-oriented acts of non-union members (for example,

submitting complaints about employment conditions) or acts by the representatives of the workers taken under the Labor Standards Law are also protected. (6)

Second is the emphasis on the function of labor unions in representing the workplace. It is an idea that features the exclusive negotiating representative system from American law together with the labor union's duty of fair representation together as a set. It grants a more flexible workplace representation function, for example including such ideas as granting the function of representing employees to labor unions that have organized 20% or more of the workers.

Third is the introduction to the Labor Relations Commissions of a system to handle disputes within or between unions (or between a union and an individual employee) Such issues as management unions are not matters that the employer should comment about in terms of the connection with deliberation and they would normally be resolved within the unions themselves and this is why a system to handle such matters is necessary.

(1) In terms of form they are individual disputes, but there are many that are actually collective cases (e.g. disadvantageous modifications to work regulations and individual conciliation concerning working hours or wages).

(2) In this respect the remedial system for unfair labor practices that exists under American law can be seen to be well-constituted. Tetsunari Doko, *"Futorodokoi Kyusai no Horiron"* (trans: The Legal Principles Concerning Remedies for Unfair Labor Practices) Yuhikaku, 1988 from pp 297.

(3) For further detail see, Tetsunari Doko, *"Futorodokoi Kyusai no Horiron"* op cit. from pp 90.

(4) With regard to the right to bargain, see Tetsunari Doko, *"Dankoken no Hoteki Koso"* (trans: The Legal Structure of the Right to Bargain) in *"Koza 21 Seiki no Rodoho 8-kan"* (trans: Labor Law in the 21st Century Volume 8) Yuhikaku, 2000 from pp 66.

(5) For further detail see Tetsunari Doko, *"Rodokyoyaku ni yoru Rodojoken no Furiekihenko to koseidaihyogimu"* (1, 2, 3, 4) (trans: from pp 90. Duty of Fair Representation and Disadvantageous Modifications to Working Conditions through Work Agreements) Labor precedent 851, 853, 855, 857 (2003)

(6) Noriaki Kojima, *"Roshijichi to sono Hori"* (trans: Labor-Management Autonomy and its Legal Principles) Japan Institute of Labor bulletin No. 333. (1987) from pp 13.

Employment Problems and Disputing Behavior in Japan

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1. Introduction: The Current Situation of Labor Disputes in Japan

The face of labor disputes has significantly changed in Japan since the 1970's. Labor disputes used to generally mean collective disputes between the management and the trade union. The mechanism for handling labor disputes was also geared to collective disputes: The nationwide system of Labor Relations Commissions at the national and prefectural levels was expected to handle collective disputes mainly by conciliation, and the national network of Labor Standard Supervision Offices oversaw the compliance of the labor standards among employers.

However, the percentage of organized labor declined significantly from around 35% in 1970 to less than 20% in 2004. This resulted in the decrease of collective disputes. On the other hand, the collapse of the "bubble economy" at the end of the 1980's increased the number of unemployed people through the "restructuring" of companies. Forms of labor contracts became increasingly diversified, as prohibitive regulations were gradually lifted. The legislation for gender equality in employment also facilitated the diversification of labor contract by allowing companies to hire women for work previously prohibited by the law. These changes brought about the increase of individual labor disputes. Now a labor dispute mostly means an individual dispute in which an individual employee confronts her/his employer, often without support by the union.

Until 2001, there were few institutional ways to handle individual labor disputes except the ordinary court system. Tokyo Prefecture was an exception, where a section of the prefectural government, now called the Tokyo Metropolitan Labor Consultation Center, tried to respond to needs arising in individual labor disputes. As Figure 1 shows, the number of consultation cases increased rapidly during the late 1990's and still stayed at a high level in 2004.[1] In most prefectures, people with employment problems were thought to

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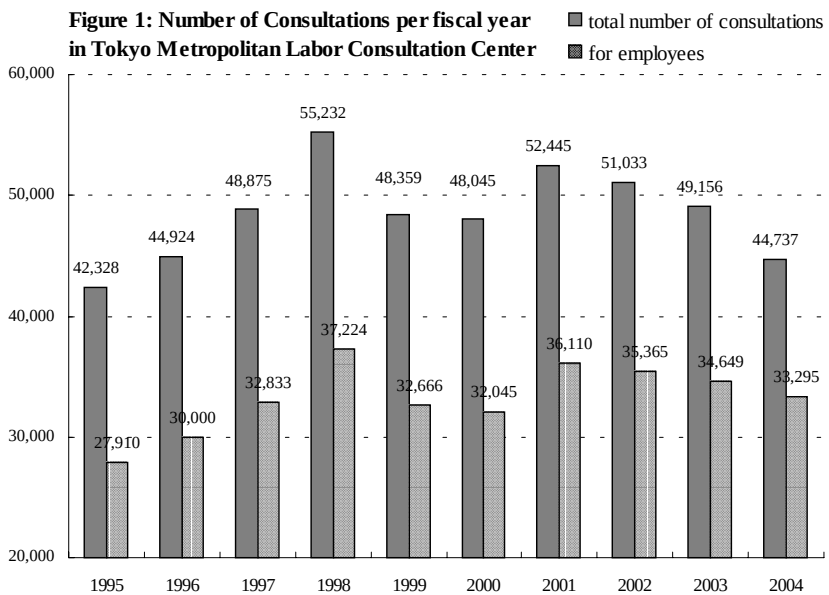
1 The fluctuation of the statistics do not always reflect the change of the demands for

visit or call Labor Standard Supervision Offices, which were said to provide "de facto" help or consultation to employees in trouble. However, as the Offices are administrative agencies without legal jurisdiction over civil disputes, they did not compile any statistics on this matter, and we do not actually know how many individual labor disputes they handled.

Figure 1: Number of Consultations per fiscal year in Tokyo Metropolitan Labor Consultation Center



Source: "Brochure of Labour Consultation and Intermediation" (1999-2004)

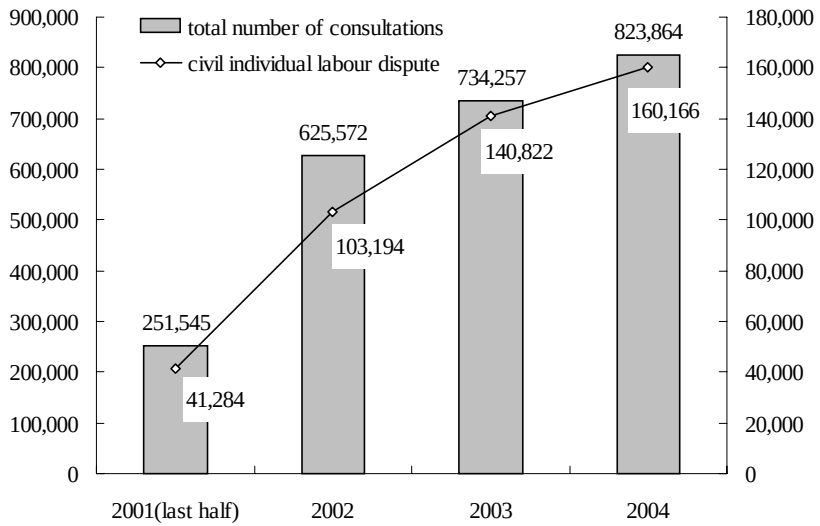
This situation began changing in 2001, when the Diet passed the Law for Facilitating the Resolution of Individual Labor Disputes. The Ministry of Health, Labor and Welfare has its local bureau in each prefecture. Under the law, each Prefectural Labor Bureau set up comprehensive labor consultation centers at the main office, major Labor Standard Supervision Offices and large railway stations. The center was designed to be a "one-stop" consultation center, providing consultation about all kinds of employment problems.[2] In

consultation, as the number of people who worked for consultations at the metropolitan government was not stable throughout the period. As the present prefectural policy is not to duplicate the work which the national government does, the size of the consultation service tends to get reduced.

[2] The Director of the Prefectural Labor Bureau can, if necessary, give advice or guidance

2004, the number of centers totaled about 300 nationwide. How quickly the centers began to be used by an increasing number of employees is well documented in Figure 2. In 2004, the centers gave consultation to 160,166 individual labor disputes, which had been out of the jurisdiction of the administrative regulation before the legislation.

Figure 2: Number of Consultations in Prefectural Labour Bureaus



Source: Enforcement situation of Law on Promoting the Resolution of Individual Labour Dispute(2004)

The Diet passed another law for individual labor disputes in 2004, under which labor tribunals will be set up by summer 2006 to conciliate and, if conciliation fails, adjudicate on individual labor disputes. If a party makes objection to the judgment of the labor tribunal, the ordinary litigation procedure starts at the district court.

Thus, these two statutes, one in 2001 and the other in 2004, instituted a nationwide network of ADR for individual labor disputes. It is a characteristic of Japanese ADR that it is often promoted or organized by administrative agencies not only for collective labor disputes but also consumer problems and

to disputing parties. The Director can also send the case to Dispute Adjustment Committee, which tries to facilitate the settlement of the dispute.

other civil disputes. This characteristic is now extended to the resolution of individual disputes.

Although we have now a whole set of dispute resolution mechanisms for individual labor disputes, we do not really know how widespread individual labor disputes are and how willing people are to use their services. Not all employees with individual labor problems go to the centers for consultation. There may not be many employees who go to see lawyers for their problems. Even fewer probably dare to go to the courts.

2. Civil Justice Research Project: Research Method and Sample

To answer such questions such as how widespread civil legal problems are and how people try to handle those problems, we conducted a national survey, including all kinds of routine legal problems as well as individual labor disputes, arising in the private lives of the Japanese people.[3]

The survey was carried out in spring 2005. We randomly chose 25,014 Japanese people from 20 to 70 years old.[4] The survey consists of two parts: a face-to-face interview and a self-administered questionnaire. As 12,408 people completed both parts, the response rate was 49.6%.

Compared to the general population of this age group, the group of our respondents has some biases: Males are underrepresented (47.0% v. 49.8%) and young people, particularly the 20-24 age group, are also underrepresented (4.6% v. 8.8%). Part-time and self-employed workers are overrepresented (15.2% v. 7.9% and 14.9% v. 9.0%), while full-time workers are significantly underrepresented (37.6% v. 52.8%). Given these biases, we will be careful when we interpret results of subsequent analyses.

3. Experiences of Problems

In the survey we asked the respondents whether they had experienced some types of problems during the previous five years, by showing them examples of problem types: e.g. consumer problems, renting a house or an apartment,

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[3] The survey, Disputing Behavior Survey, is a part of the larger research project, Civil Justice Research Project, funded by the Ministry of Education, Culture, Sports, Sciences and Technology. In addition to the authors, Satoshi Minamikata and Keiichi Ageishi, both from Niigata University, Ryo Hamano from Rikkyo University and Ichiro Ozaki from Hokkaido University participated in the survey. As to foreign research projects of the same kind, see Miller and Sarat [1980-81], Genn [1999] and Pleasence et al. [2004].

[4] It is a probability sample obtained through stratified two-stage sampling method.

family problems, traffic accidents, etc. as well as problems in employment. For the last type of problem, we listed, as examples, non-payment of wages, unfair dismissal, overtime work without payment, and sexual and non-sexual harassment at a workplace. We also asked respondents to answer freely if they had experienced a problem not listed among the examples.

The object of our survey is not household, but individual. As we wanted to know what kind of legal problems people had experienced in their private lives, problems that respondents experienced as employers are excluded from the survey.

The number of respondents who have some experience of problems is 2,339. This accounts for 18.9% of our sample (*n*=12,408). As the total number of experiences reported by the respondents is just 4,144, the average number of problem-experiences per respondent who reported at least one problem is 1.77. This means that about 19% of Japanese adults have experienced one or two problems during the previous five years.[5]

Table 1: The Experience of Employment Problems (Multiple Answers)

	Total		Male		Female	
	n	%	*n*	%	*n*	%
Unpaid Overtime	112	30.4	68	36.6	44	24.0
Non-payment of Wages	89	24.1	54	29.0	35	19.1
Non-sexual Harassment	62	16.8	17	9.1	45	24.6
Unfair Dismissal	36	9.8	18	9.7	18	9.8
Unfair Relocation	36	9.8	24	12.9	12	6.6
Sexual Harassment	28	7.6	3	1.6	25	13.7
Non-payment of Retirement Benefits	16	4.3	9	4.8	7	3.8
Others	49	13.3	19	10.2	30	16.4
Total	428	-	212	-	216	-
n of Respondents with at least one employment-related problem	369	100.0	186	100.0	183	100.0
n of Total Respondents	12,408	-	5,832	-	6,576	-

[5] We did not ask respondents how many times they experienced the same kind of problem, as we found, in the preliminary survey, that respondents did not always remember exactly the frequency of the same kind of a problem and that counting the frequency could be difficult or problematical with some types of problems, such as those with neighbors. Therefore, our data do not show how many problems the people have experienced during the past five years, but rather how many kinds of problems they have experienced.

As is shown in Table 1, among 12,408 respondents in total, 369 respondents experienced at least one problem in relation to their employment during the previous five years. (The appearance rate of a respondent who experienced an employment problem is 0.03). These 369 respondents experienced 428 problems in employment. Thus, on average, a person who experienced at least one employment problem had 1.16 problems. When a respondent experienced a consumer problem or a traffic accident, the substance of the problem was usually just one incident, or one legal problem. However, when a respondent experienced an employment problem, it often includes more than one legal problem. For example, in one case, a request for a paid holiday, which had been rejected by her superior, led to harassment by the same superior. In another, harassment by colleagues led to involuntary resignation. Therefore, it is probably not rare that a respondent experienced a series of problems in the employment, but that s/he picked up one category of problem, which she/he considered most appropriate for her/his response.

Based on the appearance rate of the respondents who experienced employment-related problems (0.03), we can estimate how many people experienced at least one employment-related problem for the previous five years. 3% of the national population aged 20 to 70 years old (86,789 thousands) is about 2,604 thousand persons. For 95% confidence interval, the estimated number of people who had at least one problem in employment is between 2,343 thousand and 2,864 thousand persons, thus 468,600 to 572,800 persons per year.

As Table 1 shows, the most frequently experienced kind of problem is unpaid overtime (30.4%), followed by the nonpayment of wages (24.1%), harassment without sexual implication (16.8%), unfair dismissal (9.8%), unfair relocation (9.8%), sexual harassment (7.6%), the nonpayment of retirement benefits (4.3%) and others (13.3%). Others often include problems with the amount of wages and working hours. It is apparent that unpaid overtime working is the most common problem for Japanese employees. The non-payment of wages or salary is also a very common problem, and, if the reduction of wages, salary or working hours is included, the problem with payment is even a larger problem.

However, there are marked differences between men and women. For male workers, unfair relocation is the third most frequently experienced kind of problems and the fourth is unfair dismissal. In contrast, harassment is the most

frequent kind of problem for women. When sexual harassment and that without sexual implication are combined, harassment ranks highest among all kinds of problem for women (33.3%). Japanese female employees tend to have harassment problems without sexual implication more often than sexual harassment. However, it is also to be noted that women experienced unfair dismissal as often as men.

4. The Most Serious Problem and the Emergence of Disputes

In our survey we wanted to know how the respondents with problems tried to solve their problems. To obtain reliable data, we asked each of the respondents to choose the most serious problem and further asked them how they tried to solve the problems.[6]

(a) The Most Serious Problems

Among 369 respondents who experienced at least one employment-related problem, 232 respondents chose their problem in employment as their most serious problems. As Table 2 shows, the order of the problem types in percentage is not different from that of the overall problem experiences, except that the percentage of unfair relocation has become smaller than that of unfair dismissal.

Table 2: The Experience of Most Serious Problems

	Total		Male		Female	
	n	%	*n*	%	*n*	%
Unpaid Overtime	64	27.6	38	31.4	26	23.4
Non-payment of Wages	51	22.0	35	28.9	16	14.4
Non-sexual Harassment	29	12.5	7	5.8	22	19.8
Unfair Dismissal	22	9.5	10	8.3	12	10.8
Unfair Relocation	15	6.5	10	8.3	5	4.5
Sexual Harassment	10	4.3	1	0.8	9	8.1
Non-payment of Retirement Benefits	10	4.3	5	4.1	5	4.5
Others	31	13.4	15	12.4	16	14.4
Total	232	100.0	121	100.0	111	100.0

[6] When a respondent experienced just one problem, we continued to ask how s/he tried to solve it.

(b) The Amount at Stake

We asked the respondents whether the problem was countable in terms of money and, if yes, whether they could tell how much was at stake. Table 3 shows that respondents did not consider the problem of harassment and that of unfair relocation as countable in terms of money, while they considered the other problems as countable. However, respondents often did not know the amount at stake even when they considered the problems to be countable in terms of money.

The average amount at stake is ¥1,413,000 or US$11,775 (¥120=US$1), which is considerably lower than the average amount (¥2,469,000 or US$20,575) at stake of all the most serious problems. Yet, the average amount at stake concerning retirement benefits is large, and other average amounts at stake are also substantial, except sexual harassment and unfair dismissal problems.

Table 3: Amount at Stake Known, Unknown or Uncountable, and the Average Amount

	Amount at Stake				Average of Known Amount*
Problems	Known	Unknown	Uncountable	*n*	
Unpaid Overtime	38.1%	41.3%	20.6%	63	1,502
Nonpayment of Wages	86.3%	5.9%	7.8%	51	777
Non-sexual Harassment	10.3%	17.2%	72.4%	29	1,803
Unfair Dismissal	22.7%	36.4%	40.9%	22	384
Unfair Relocation	20.0%	13.3%	66.7%	15	3,767
Sexual Harassment	10.0%	10.0%	80.0%	10	140
Non-payment of Retirement Benefits	70.0%	30.0%	0%	10	6,100
Others	29.0%	25.8%	45.2%	31	435
Total	41.6%	24.2%	34.2%	231	1,413

* The average amount is shown in thousands.

(c) Contact Behavior and the Occurrence of Dispute

Problems in employment occur overwhelmingly in the private sector. 79% of the respondents with most serious problems said that principals on the other side were private companies and shops, while only 5% of the respondents said that public agencies were on the other side.

We then asked whether and in what way respondents had contact with the other side. The results are shown in Table 4. Half of the respondents did nothing

to solve their problems. This percentage is conspicuously higher than that for all the most serious problems. As a result, compared to the contact behavior for all the problems, respondents with employment problems less frequently contact with the other side by themselves or through the third party except family members or friends, or use the court.

Respondents with employment problems do not only find it difficult to claim, but also find their claims often rejected. Only in 28% of the contacted cases did the other side agree with the claim, while in 72% the other side did not agree.

Table 4: Contact with the Other Side (Multiple Answers*)

Action	Employment	All Problems
Talked Directly	34.9%	49.6%
With a Letter, Phone, or E-Mail	6.5%	17.7%
Through a Family Member or a Friend	7.3%	10.2%
Through a Lawyer	1.7%	5.2%
Through a Third Party Other Than Lawyer	12.1%	16.5%
Filed Conciliation	0.4%	2.4%
Filed Lawsuit	0.4%	0.8%
Took Other Court Procedure	0.9%	0.8%
Others	0.0%	0.4%
Did Nothing	50.4%	22.1%
The Opponent was Unknown	0.4%	3.7%
DK, NA	0.0%	1.0%
n	232	2,244

* Respondents who had contact with the other party could have contacted them in more than one way.

(d) What Makes Them Contact the Other Side?

Although more than half of the respondents with employment problems did not make contact with the other side, we wished to know what variables facilitated or discouraged contact behavior. To identify those variables, we did binomial logistic regression analysis with 12 of demographic, socio-economic, situational and other variables.[7] Three variables appear significant: (1) junior

[7] Demographic variables are gender and age; Socio-economic variables are education, family income, employment status and firm size; Situational variables are four factor variables obtained by factor analysis of 14 situational variables; other variables are legal connection—whether a respondent knew a legal expert—and past legal experience—whether a respondent had used a lawyer or the court.

Table 5: Logistic Regression analysis of Contact Behavior

	B	*p*	odds ratio
GENDER (RC=male)			
female	-0.665	.143	0.514
AGE GROUP (RC=40-44)			
20-24	-0.600	.500	0.549
25-39	-0.646	.383	0.524
30-34	-0.552	.446	0.576
35-39	-0.247	.730	1.280
45-49	-0.091	.896	0.913
50-54	-0.729	.321	0.483
55-59	-0.484	.513	0.616
60-64	-0.394	.642	0.674
65-70	-0.039	.967	0.961
EDUCATION (RC=high school)			
compulsory	0.654	.311	1.924
junior college	1.393	**.007**	4.027
university	0.013	.981	1.013
FAMILY INCOME	0.451	.444	1.570
SITUATIONAL FACTORS			
relational concern	-0.419	.053	0.657
cost conscious	0.709	**.002**	2.032
normative concern	0.379	.296	1.461
obviousness	0.307	.210	1.359
SOCIAL CAPITAL	0.525	.192	1.691
PAST EXPERIENCE	-0.120	.839	0.887
EMPLOYMENT STATUS[1)] (RC=full-time)			
part-time	0.832	.108	2.299
self-employed	1.444	.099	4.236
not-employed	0.857	.111	2.356

n=182, -2LL*model*=207.056, χ^2(df)=45.052(23), *p*<.005
Hosmer & Remeshow test *p*=.165, Nagelkerke pseudo R^2=.292
1) As of the time when surveyed.

The four factor variables consist of Relational Concern (concern with the relationship with the other party, concern with other people's eyes on the occurrence of the problem, concern with other people's eyes on the resolution of the resolution of the problem; Cronbach's α = .765), Cost Consciousness (concern with how much money one has to spend to solve the problem, concern with how much time one has to devote to solve the problem, concern with how long it takes to solve the problem; α = .691), Normative Concern (consciousness about the law, personal seriousness of the problem, social seriousness of the problem, psychological burden besides money, time and efforts; α = .651), and Obviousness (whether it is clear to whom one should claim; α = .726).

college or vocational school graduates tended to make contact more often than high school graduates. This may have something to do with characteristics of their job conditions: semi-professional, independent, and skilled; (2) self-employed or family workers tend to make contact more often than full-time employees. Self-employed people also work independently;[8] (3) those who are more aware of costs are more apt to make contact. Cost Consciousness is not correlated with the amount of money at stake.[9]

We speculate that Cost Consciousness is not really worry about costs, but rather an awareness of costs and that people aware of costs tend to take action for the resolution of their problems.

5. Consultation Behavior

(a) Information and Advice Seeking Behavior

When we face a problem, how we try to solve the problem often depends upon what kind of information we have and with whom we consult. In this sense, information seeking behavior and consultation behavior must affect subsequent problem-solving behavior and eventual outcomes.

According to our findings, only 9% of the respondents with employment problems sought information from books and 8% from websites, while 81% did not check either. However, more than half (52.6%) of the respondents sought advice from various people and agencies.

As Table 6 shows, people with employment problems often consulted with someone in family or at a work place: 46.7% consulted with family members or relatives, and 41% with colleagues at work. Out of these personal circles, government offices, including Labor Standard Supervision Offices, were most often consulted (21.3%), followed by trade union (13.1%), non-legal consultation at the municipal office (5.7%) and lawyer (4.9%). Overall, administrative agencies were consulted much more often than judicial-legal agencies. This is a characteristic of the overall consultation behavior for all the civil problems, but that is more evident in the case of employment problems.

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[8] Here, we must be careful to distinguish between the job a respondent had when s/he had a problem and the one at the time of interview. Our data indicate the latter. Therefore, we speculate that those who later became self-employed or continued to be self-employed tend to be independent and more apt to make contact with the other party, while full-time employees have too much to lose.

[9] Pearson's correlation coefficient between these two variables is only -.097.

Table 6: Agencies and Persons Consulted (Multiple Answers)

Agency/Person	*N*	%
Office of National/ Municipal Government	26	21.3
Non-Legal Consultation Bureau at the Municipal Office	7	5.7
Police	1	0.8
Lawyer	6	4.9
Quasi-Legal Profession	3	2.5
Consultation Bureau at the Bar Association	2	1.6
Consultation Bureau at the Court	1	0.8
COLLEAGUES AT WORKPLACE	50	41.0
FAMILY/RELATIVES	57	46.7
Trade Union	16	13.1
Political Party/Politician	2	1.6
School Teacher	2	1.6
Medical Center	1	0.8
Others	3	2.5
Total	122	100.0%

Agencies in bolds indicate their administrative character and those in italics indicate their judicial character, while large capitals indicate people in personal relations.

(b) What Makes Them Consult?

As consultation could change the subsequent path of disputing behavior, we wished to know what variables affected whether respondents had consulted or not. To identify these variables, we made binomial logistic regression analysis with 12 of demographic, socio-economic, situational and other variable.[10] Only two variables appear significant: (1) Junior college or vocational school graduates tended to consult more often than high school graduates; (2) Those who are more aware of costs are more apt to consult. These two variables were also significant to facilitate respondents to contact with the other party, though the employment status as self-employed or family workers was not significant in facilitating consultation.

In this logistic regression analysis, the dependent variable includes "family members and relatives" and "colleagues at the workplace". These are people with whom respondents have some personal ties, which would be precisely the reason why respondents consulted with them.[11] However, seeking technical

[10] Independent variables used in this analysis were the same as those used in the logistic regression analysis for contact behavior. See, footnote 8.

[11] A relative with whom a respondent consulted could happen to be a lawyer. In such a case, we asked respondents to choose "lawyer" rather than "relative". Therefore, those

Table 7: Logistic Regression analysis of "Consulting with Another Person or Agency"

	Another Person or Agency			Except Family and Colleague at work		
	B	*p*	odds ratio	B	*p*	Odds ratio
GENDER (RC=male)						
female	.272	.547	1.312	-.604	.280	.547
AGE GROUP (RC=40-44)						
20-24	.388	.649	1.474	.722	.464	2.058
25-39	.937	.259	2.551	-1.445	.144	.236
30-34	-.322	.651	.725	.004	.996	1.004
35-39	.552	.445	1.737	.328	.667	1.388
45-49	.363	.598	1.438	.086	.917	1.090
50-54	-.122	.867	.885	.019	.982	1.019
55-59	-1.222	.120	.295	-1.886	.094	.152
60-64	-.237	.772	.789	-.226	.819	.798
65-70	.497	.601	1.644	-.818	.476	.441
EDUCATION (RC=high school)						
compulsory	-.081	.904	.923	.056	.947	1.057
junior college	1.129	**.033**	3.094	.873	.139	2.394
university	.397	.470	1.487	.223	.723	1.250
FAMILY INCOME	-.037	.539	.964	-.076	.297	.927
SITUATIONAL FACTORS						
relational concern	-.031	.885	.970	-.711	**.007**	.491
cost conscious	.599	**.011**	1.820	.549	**.048**	1.731
normative concern	.561	.117	1.753	1.421	**.004**	4.140
obviousness	-.011	.963	.989	.355	.287	1.426
SOCIAL CAPITAL	.668	.132	1.950	.354	.491	1.425
PAST EXPERIENCE	-.676	.239	.509	.347	.583	1.415
EMPLOYMENT STATUS[1)] (RC=full-time)						
part-time	-.644	.219	.525	.575	.351	1.776
self-employed	1.150	.185	3.158	.996	.267	2.707
not-employed	-.370	.480	.691	-.028	.965	.972
n=182	-2*LL*=203.5, χ^2=47.99**			-2*LL*=157.1, χ^2=50.79**		
Hosmer & Remeshow *p*	.333			.290		
Nagelkerke pseudo R^2	.309			.358		

1) As of the time when surveyed. ** p<.005, d.f.=23

who consulted family members or relatives sought personal advice rather than technical advice.

advice could be different from seeking personal advice, as the purpose of the latter would be to obtain personal, often emotional, support. Then, independent variables, which would facilitate consultation only with agencies, could be different from those which facilitate consultation in general.

To test this hypothesis, we made another logistic regression analysis, excluding consultations with family and relatives and those with colleagues at the workplace. As we expected, two new variables appear significant, while the education variable become insignificant: (1) Those with relational concern tend less frequently to consult with agencies; (2) Those who are cost conscious tend to consult with agencies more frequently; (3) Those with normative concern tend to consult with agencies much more often than those without the concern. All these variables are related to specific problems, and this finding indicates that factors relevant to a concrete problem are much more significant in determining consultation behavior than those relevant to a respondent as individual.

(c) The Use of a Lawyer and the Court

As we saw, Table 6 showed that respondents with employment problems consulted with administrative agencies more often than legal-judicial agencies. This corresponds to an overall characteristic of consultation behavior in all the problems, though respondents with employment problems tend to use a lawyer and a court procedure less frequently, as is shown in Table 8.

However, Table 8 also shows that the percentage of the respondents with employment problems who thought of hiring a lawyer or using a court procedure is significantly higher than that of all the respondents who thought of the same. Compared to the overall tendencies among all the respondents,

Table 8: The Use of Lawyer and Court Procedures

	Employment Problems	All Civil Problems
Lawyer		
Used	5.3% (total *n*=114)	7.3% (total *n*=1,645)
Only Thought About Doing so	22.2% (total *n*=108)	14.4% (total *n*=1,509)
Court		
Used	3.5% (total *n*=114)	5.6% (total *n*=1,631)
Only Thought About Doing So	19.1% (total *n*=110)	10.5% (total *n*=1,540)

Note: "Used a Lawyer" means to hire a lawyer for the resolution of the problem. "Used a Court Procedure" means to use either conciliation, litigation or others.

those with employment problem thought of using a lawyer or a court procedure much more often, but did not actually use either.

6. Outcomes

We asked respondents whether the problem had reached a conclusion at the point of interview. Table 9 shows that more than half of the most serious problems did not come to conclusion by that time. In contrast, in the case of all the problems, 60% of the most serious problems came to conclusion by the time of interview.

Table 9: Has the Problem Come to a Conclusion?

	Employment		All Problems	
	n		*n*	
Concluded	96	41.4%	1,345	60.2%
Not Yet Concluded	122	52.6%	816	36.5%
Do Not Know	14	6.0%	74	3.3%
Total	232	100.0%	2,235	100.0%

In comparison with all the problems, not only did employment problems not come to conclusion, but also there tended to be more disagreements between employees and employers, even when problems came to conclusion, as is shown in Table 10.[12] These findings indicate that employment problems

Table 10: Whether Claim Accepted, Among Those Concluded

	Employment		All Problems	
Claim Accepted?	*n*		*n*	
Fully Accepted	9	9.6%	402	31.6%
Almost Accepted	21	22.3%	411	32.3%
Partially Accepted	18	19.1%	206	16.2%
Not Accepted at All	33	35.1%	222	17.4%
Others *	12	12.8%	5	0.4%
DK	1	1.1%	28	2.2%
Total	94	100.0%	1,274	100.0%

* Among the others, the number of negative outcomes is 2, positive outcome 1, and unclear outcome 9.

[12] In 70.5% of the unconcluded employment problems, claim was not accepted at all by an employer, and in 13.9% partially accepted. These outcomes are not very different from those of all the problems.

are not only difficult to solve and that, even when they came to conclusion, the outcomes may often be unsatisfactory to employees.

7. Conclusion

We saw some basic findings about employment problems from our national survey. According to our data, the experience of individual employment problem is not rare, as three people out of every 100 Japanese aged 20 to 70 years old had such an experience during the previous five years. The most frequent problem is unpaid overtime, followed by the non-payment of wages/salary. For women, harassment seems a frequent problem, but harassment without sexual implication is more frequent than sexual harassment. Unfair relocation is more often experienced by men. However, for both men and women, unfair dismissal is also rather a frequent problem.

The average amount at stake of the employment problems, ¥1,413 thousand or US$11,775 (¥120=US$1), is not large in comparison with that of all the problems. But it is still substantial for ordinary employees.

There are marked differences in problem handling behavior between the employment problems and all the problems. At first, people with employment problems often did not contact with employers concerning the problem, but rather did not do anything. Even when they contacted with employers, their claims were more often rejected.

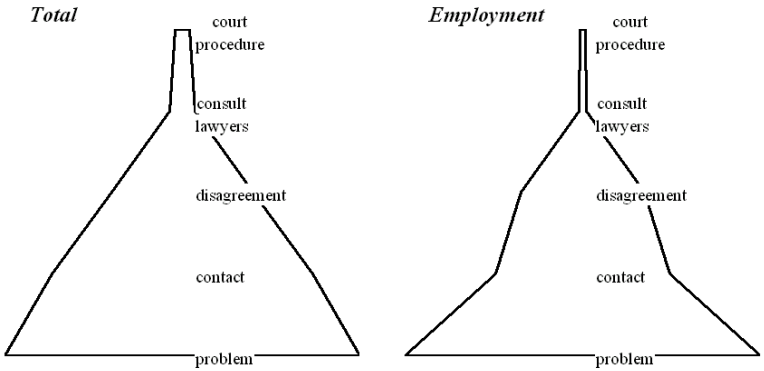
People with employment problems consult with administrative agencies more often than legal-judicial agencies. In fact, only 5% of those who consulted with some agencies or other persons concerning employment problems hired a lawyer to handle their problems and only about 3% used a court procedure. However, about 20% of those who consulted with some agencies or other persons once thought of using a lawyer or a court procedure.

The overall pattern of problem handling behavior is well illustrated in a dispute pyramid, shown in Figure 3, in which we can compare the pattern for all the problems and that for the employment problems.

It is apparent that, in comparison with all the problems, the employment problems are more difficult to voice, more often rejected, handled less frequently by lawyers and in the court.

Given these situations, it may not be surprising that, in comparison with all the problems, employment problems are difficult to conclude and that, even when concluded, much fewer claims are accepted.

Figure 3: Dispute Pyramid



Court Procedure	3.8%	86	1.3%	3
Consulting Lawyer	7.1%	160	2.2%	5
Disagreement	39.8%	894	34.9%	81
Contact with the Other Party	73.3%	1,645	49.1%	114
Occurrence of Problem	100%	2,244	100%	232

These findings indicate that the present system for solving individual labor disputes does not work very effectively. As we describe at the beginning, we will soon have a whole set of institutional arrangements for the administrative and non-litigation dispute resolution of individual employment disputes. However, if the reform is rather a simple extension of the present system, it may not achieve much in the future. It is also necessary to better enforce regulations for work conditions, as many problems will never be voiced.

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JILPT Research Activities

Research Report

The findings of research activities undertaken by JILPT are compiled into Research Reports (in Japanese). Below is a list of the reports published from May to July 2005. The complete text in Japanese of these reports can be accessed from the JILPT website. We are currently working on uploading abstracts of the reports in English onto the JILPT website as well.

No. 38: Japan-U.K. Comparison of Higher Education and Human Resource Development – Relations between Hiring/Training, and University Education Seen in the Results of Interviews with Enterprises (September 2005)

No. 39: Report on "Survey Research concerning Labor Contract Legislation in Various Countries" (September 2005)

No. 40: Performance-Based System and Degree of Satisfaction – An Analysis Based on Re-assessment of Results of JILPT 2004 Survey on Workers' Will to Work and Ideal Form of Employment Management (September 20005)

No. 41: Survey Research on Secondary Jobs of Employed Workers (September 2005)

No. 42: "Basic Study on Tasks for Strategic Urban Employment Policy – Functions of Tokyo in the 21st Century (September 2005)

No. 43: Survey on Organization and Functions of Education/Training Providers – the Second Survey of the Education/Training Service Market (November 2005)

No. 44: Economic Analysis of Minimum Wages in Japan (November 2005)

No. 45: Globalization and Corporate Social Responsibility – with Special Reference to the Field of Labor and Human Rights (November 2005)

No. 46: Vocational Training as Aid in Job-Searching Activities – Role and Effects as a Practical Strategy in Finding Jobs (November 2005)

＊JILPT website: *URL:* http://www.jil.go.jp/english/index.html

Northeast Asia Labor Forum

On October 20, 2005, the Japan Institute for Labor Policy and Training

(JILPT), jointly with the Chinese Academy of Labor and Social Security (CALSS) and the Korea Labor Institute (KLI), held the 4th Northeast Asia Labor Forum in Beijing. The three labor-related research institutes hold a forum once every year with a common theme and present their research results, aiming at mutual understanding among the three countries and the raising of research standards. The latest forum took the theme of "Stable and Harmonious Labor Relations: Mechanism, Measures and Policy Recommendations."

Research papers presented by the three parties are shown below. The papers (full text) are available on the website of the JILPT.

JILPT

Shunichi Uemura, Research Director, *The Recent Movement of Labor-Management Relations in Japan*

Hirokuni Ikezoe, Vice Senior Researcher JILPT, *The Legal System for Labor Dispute Settlement and the Current State of Affairs in Japan*

China

Mr. GUO Xiaoxian, Director, Division of Industrial Relations, Department of Labor and Social Security, Ministry of Labor and Social Security, *Outline, and Prospects for the Development of Labor Relations in China*

Mr. GUO Yue, Director, Labor Relation Research Office, Institute of Labor Studies, *Construction of a Labor Cooperative System Matching Demand of the Socialist Market Economy*

Korea

EOM Hyun-Taek, Director General, Labor Relations Policy Bureau, Ministry of Labor, *Understanding Labor-Management Relations in the R.O.K.*

LIM Sang-Hoon, Research Fellow, KLI, *Stabilization of Labor-Management Relations and Construction of Cooperative Labor-Management Relations in a Changing Environment – with Special Reference to Collective Bargaining, Tripartism and Dispute Settlement System*

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