

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 “*Shiryō 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, “*Shiryō Rodo Undōshi 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 Kihonkoso*" from pp 221. Op cit.
- (3) For comment concerning the actual operation of the system, see Kichiemon Ishikawa and Kiyohiko Hagsawa, "*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 of 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, "*Rodokoyaku ni yoru Rodojoken no Furiekihenka 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.