Changes in Industrial Relations and the Ideal Legal System

Yuichiro Mizumachi
Associate Professor, Institute of Social Science, University of Tokyo

Shunichi Uemura
Research Director, the Japan Institute for Labour Policy and Training

Introduction

Based on the social trends of post-industrialization and globalization, industrial relations are changing substantially around the world thus making it necessary to drastically revise and employment labor laws that regulate industrial relations. Even if we look only at Japanese labor and employment laws, we can see the following swift changes that have been made:

- Introduction of the discretionary labor system for those engaged in planning-related work by the amendment of the Labor Standard Law (1998)
- Liberalization, in principle, of the worker dispatch business and private job-placement business by the amendment of the Worker Dispatch Law and Employment Security Law (1999)
- The Law on Promoting the Resolution of Individual Labor Disputes to establish a system for providing support in solving employment disputes (2001)
- The Law for Promoting the Measures to Support Fostering of the Next Generation to promote support of child raising (2003)
- The Labor Tribunal Law to introduce the labor judgment system for solution of employment disputes (2004)
- Amendment of the Law Concerning Stabilization of Employment of Older Persons to provide employment security measures for workers up to the age of 65 (2004)
- Amendment of the Equal Employment Opportunity Law to prohibit indirect discrimination (2006)

Various studies are also conducted, including examination of ideal employment contract law for the purpose of expressly providing legal rules in relation to employment contracts and the possible reform of laws related to working hours to introduce the autonomous system of working hours. It is considered that employment contract law and laws related to working hours

need to be reorganized to prepare the working environment to allow people to realize diverse working styles with a sense of security and satisfaction, and to address issues related to diversified employment styles, the increasing incidents of employment disputes, an increasing number of people working long hours, etc. along with a decrease in the labor force due to an aging population and declining birthrate. For example, these studies include examination of the establishment of: (1) rules to collectively change working conditions by revising working rules, in light of the fact that working conditions are determined by the working rules in Japan, and (2) the system to allow white-collar workers to adopt an autonomous working style from the viewpoint of allowing those who aspire for self-realization to exercise their full potential and those who are engaged in the kind of work that warrants them to adopt such a working style, under a relaxed-type of control to ensure a fulfilling professional and personal life while maintaining their health and further exercising their potential.

Such a drastic change in labor and employment laws can be seen not only in Japan, but also in advanced countries to some degree. Labor and employment laws were supposedly designed for "indefinite, full-time, collective, dependent workers" who were positioned at the center of the industrialized society in the period from the 19th to 20th century, and it provided the State with facilities to establish blanket codes. Recent social changes, however, made conventional labor and employment laws dysfunctional, thus prompting a drastic reform of the labor and employment law system.

In 2005, the Japan Institute for Labour Policy and Training conducted a study on the "Change in Industrial Relations and Ideals of the Legal System."[1]

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[1] The research result is summarized in the JILPT Research Report No. 55 "Change in Industrial Relations and Ideals of the Legal System." The researchers in charge: Yuichiro Mizumachi (Associate Professor, Institute of Social Science, University of Tokyo), Shigeki Uno (Associate Professor, Institute of Social Science, University of Tokyo), Naofumi Nakamura (Associate Professor, Institute of Social Science, University of Tokyo), Takashi Iida (Associate Professor, Faculty of Law, Seikei University), Kaoko Okuda (Associate Professor, Faculty of Welfare Sociology, Kyoto Prefectural University), Yoko Hashimoto (Professor, Faculty of Law, Gakushuin University), Yumiko Kuwamura (Research Associate, Faculty of Law, University of Tokyo), Chikako Kanchi (Doctoral Course, University of Tokyo Graduate Schools for Law and Politics), Tamako Hasegawa (Special Researcher, Japan Society for the Promotion of Science), Shunichi Uemura (Research Director, the Japan Institute for Labour Policy and Training), Satoko Hotta (Research Associate, Institute of Social Science, University of Tokyo), Junko Hirasawa (Researcher, the Japan Institute for Labour

In this study we observed changes, including background factors, in industrial relations and labor and employment laws that were brought about in major countries to adapt to changes in social and economic structures. We then analyzed the findings from the viewpoint of comparison, legal and political philosophy, labor history, law and economics. In addition, we also conducted a fact-finding survey on Japanese companies in this study and attempted to propose a new labor and employment law model (a basic framework) that can broadly adapt to changes in industrial relations. This report is based on the above study and contains additional observations.

1. Research Method

Based on the research studies conducted in various academic fields, the trend of labor and employment laws in different countries, the actual condition of industrial relations in companies in Japan, etc., we set the following two hypotheses for this research.

[Hypothesis 1]

Decision-making level: Decentralization is emphasized more these days for negotiation and communication in industrial relations.

[Hypothesis 2]

Decision-making process: In reality, collective negotiation and communication are emphasized more than individual negotiation and communication. Collective negotiation and communication tend to place emphasis not only on the decision made by the majority, but also on opinions expressed by minorities.

Decentralization, referred to in the above Hypothesis 1, implies a wide concept including not only the shift from centralization to decentralization at the level of labor-management negotiation and consultation (for example, the shift of labor-management negotiation from the industry level to the company/ workplace level), but also the shift from centralized decision-making and codes set by law to flexible decision-making through negotiation between individuals. "Collective negotiation and communication," referred to in the above Hypothesis 2, implies a diversified concept including not only collective negotiations and labor-management consultations between labor and management, but also such

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organizations represented by employees under the law as business committees, workplace committees, and labor-management committees, as well as complaint handling, dispute settlement, information collection and provision systems, etc. Using this wide concept and dynamically comparing and analyzing a variety of events, we are able to capture the whole that may seem to consist of individual sporadic events and to understand its relative meaning. Furthermore, we will aim to deduce important policy implications from the comparison and analysis.

Based on the two hypotheses, we conducted our analysis and observation in this research in the following three core areas.

Firstly, to clarify the theoretical meaning of the two hypotheses, observations are made on issues related to changes in industrial relations from the viewpoint of multiple academic fields covering law, political philosophy, labor history, and law and economics. It is designed to examine the theoretical foundation for the new legal system from multiple viewpoints and identify specific issues that require verification.

Secondly, we analyze the trend of industrial relations as well as labor and employment law in other countries to verify the two hypotheses, examining various systems that exist in each country. We selected France, Germany, Britain, the United States of America and Japan for this research. In our observations, we tried to analyze the trends with careful consideration given to differences in the historical background and social foundation of each country by using interviews and other methods to collect information on the actual issues that each country faces and their reform programs. In this way, we tried to identify the specific model and institutional framework of a legal system that can respond to changes in the industrial relations.

Thirdly, we analyzed the situation of industrial relations of Japanese companies and verified the validity and significance of the two hypotheses in regards to them. The formulation of a new legal system requires understanding of the actual conditions of Japanese companies to which the law is applied, solving the problems identified, and ensuring the affinity of the new legal system to actual conditions. During the survey in particular, we conducted repeated interviews and careful analysis of six companies selected to ensure diversity with respect to their size and whether or not they had a labor union, the number of labor unions, nature of their business, and so forth.

Based on the analysis and observations from the three different viewpoints described above, we attempted to theoretically deduce a new model of labor

and employment law that can respond to the changes.

2. Observations from the Viewpoint of Legal and Political Philosophy, Labor History, Law and Economics

(1) Observations from the Viewpoint of Legal Philosophy

From the viewpoint of law, implications and issues of the two hypotheses are identified through two legal approaches proposed within the context of recent social changes. One is the "proceduralization of law"[2] mainly proposed in European countries, and the other is the "structural approach"[3] proposed in the United States of America. In short, for the first hypothesis (decision-making level), decentralized negotiation and communication by the parties concerned is important, based on (1) the viewpoint that "procedural reason" is given emphasis as a new reason that supports legitimacy in an increasingly complex and uncertain society, and (2) the viewpoint of "economic efficiency" that

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[2] In the proceduralization of law, a priori establishment of practical and abstract codes is avoided, but discussions in the negotiation are flexible in terms of space, contents and time, showing its rationality in the process (procedure) of recognizing and solving problems. There are two cores in the institutionalization of a model of procedural regulation. The first core is establishment of obligations for the parties concerned. For example, these obligations may include (1) obligation to publish information widely to people concerned, (2) obligation to conduct open negotiation, (3) obligation to exhibit and explain the plan on how to solve the problems, including the scenario of what effect the plan will have, and (4) obligation to conduct an investigation and evaluation after the decision is made. The second core is the provision of institutional measures and resources to support and guide the parties concerned to recognize and solve problems. For example, (1) control by the court to check whether or not rational procedure is taken by the parties concerned, (2) support provided by specialists or special organizations to help the parties concerned to correctly recognize increasingly complicated and diversified problems and to design a scenario for solving these problems, and (3) financial support using public funds to ensure that the consequence of proceduralization is not affected by the financial capacity of the parties concerned.

[3] It is proposed by Susan Sturm (Columbia University) in the United State of America and others. Firstly, importance is placed on the procedure that is used to solve specific problems that occur in the workplace, instead of the distinct practical rules defined by the law or courts. In particular, it is important to verify that the process of (1) collection and sharing of related information, (2) discovery and recognition of the problems, (3) establishment of a system to effectively solve the problems, (4) practice of problem solving, and (5) evaluation and rediscovery of problems is functioning effectively. Secondly, multiple entities are associated with each other and go beyond the existing framework to radically solve these problems. Three entities are involved in solving them: the court, workplace and mediator, and it is important that these entities interact with each other to reach a comprehensive solution.

efficiently solves today's complex, deep-rooted problems and generates profits. Here, collective decision making is not totally rejected; however, the issue is how to segregate decentralized decision-making from collective decision-making and how to strike a balance between the two. For the second hypothesis (decision-making process), the collective, contextual decision-making process that also takes into consideration the views and interests of minorities rather than individualized negotiation and decision-making is important based on (1) the viewpoint of arriving at a new reason (procedural reason) through free discussion from multiple viewpoints and coordination of those viewpoints, and (2) the viewpoint of listening to workers' true feelings to address their dissatisfaction and problems and raise their motivation. However, these two approaches do not always correspond with each other with respect to the practical design of the legal system.

(2) Observations from the Viewpoint of Political Philosophy

From the perspective of political philosophy, we examined the changes in industrial relations in the context of the reorganization of intermediate groups and "something social."[4] The changes can be summarized as follows. After the bourgeois revolution, individuals were almost dispersed and then reorganized into "welfare states" with the help of the technology called "social insurance". However, these states are once again losing their basis (social solidarity) due to the diversification and individualization of risk after the 1970s. Today, these "intermediate organizations" (labor-management negotiations, local governments, NGOs, NPOs, families, etc.) commonly play an important role in many countries in providing different individuals with many social bonds while adapting to the diversification of individuals. In relation to the two hypotheses, decentralization on the decision-making level (Hypothesis 1) is considered as a natural move to respond more precisely to the individualization and diversification of society. As for the decision-making process (Hypothesis 2); (1) the most valuable social right in today's society is the right to have social bonds, but this right cannot be realized through individual negotiations that lack social relation. (2) Social relation is there to better realize the rights of the individuals who belong to that society, and instead of simply giving priority to the majority, a greater

[4] The "intermediate group" is a collection of groups in general that exist between the state and individuals, and the "something social" is the principle by which individuals are organized into society.

built before the war took the form of labor unions of factory workers and office workers, but regular employees were unionized exclusively, and (3) historically, workers' organizations in Japan were reorganized through the initiatives of employers, which meant that the views of individual workers were weak vis-à-vis the ideology of the family that ran the business (absorbed into the family that runs the business). To describe this in relation to our two hypotheses above, it can be said that industrial relations are established in Japan by encompassing the idea of decentralization (though through conciliation and organization by the employer) (Hypothesis 1), and that traditionally collective decision-making is emphasized (however, non-regular employees are not included, and as for regular employees, there is a tendency that the views of individual employees are sometimes overlooked).

(4) Observations from the Viewpoint of Law and Economics

From the viewpoint of law and economics, we attempted to identify the guidelines for establishing a system by theoretically integrating "decentralization" and "collectivization." According to observations, it was indicated that: (1) in a society with diversified values and preferences the "decentralized" method of negotiation and decision-making is preferred since it offers refined and diversified selections (Oates' decentralization theorem), and that (2) the "collective" method of negotiation and decision-making is advantageous for the kind of negotiation that will increase the interest of both parties through labor-management collaboration (cooperative surplus), improving the efficiency of negotiations through the participation of repeat players and reducing the cost of negotiations and management (negotiation cost). As for the correlation between "decentralization" and "collectivization," "collective" functions are fully exercised only when an appropriate level of "decentralized" negotiation is set. Specifically, when the nature of the agenda has bearing on the interest of a large number of workers (public property), negotiations should be conducted in a place where there is authority for decision-making (for example, at the workplace level for matters that are to be decided in the workplace). Further, to support decentralized and collective negotiation in the legal system, we found that it was important: (1) to press companies to promote independent and flexible negotiations, (2) to oblige the parties concerned to engage in honest bargaining and make information available to prevent any inefficiency that might arise from uncooperative behavior (strategic behavior) on the part of

negotiating parties, (3) to establish a system to provide workers with practical help in case unionization or negotiations do not proceed successfully, and (4) to establish a system to supplement information distribution that might be lost due to decentralization (an information network through dedicated mediators, etc.).

3. Comparison of Laws

(1) France

In France, there existed traditionally the culture of collectivization where working conditions were determined by detailed provisions of the law and by collective agreements in each industry. However, since the 1980s in particular, "decentralization" has progressed (Hypothesis 1). It consists of two major shifts: (1) a shift from blanket regulations of the law to flexible regulations of collective negotiations, and (2) another shift from industry-level negotiations to company-level negotiations. Decentralization, however, has not occurred in every aspect in a one-way direction. In the course of decentralization, however, law and industry-based agreements define the basic objectives and direction and the framework of regulations in many cases, and decentralized negotiations give concrete form to the regulations or supplement them. The basic rights of workers' health and safety may also not be infringed upon by decentralization. For the decision-making process (Hypothesis 2), "collectivization" is emphasized, disallowing opt-out of laws and regulations by individual agreement. To enhance the legitimacy of collective agreements, the Law of 2004 introduced the "Majority Rule" (the rule in which the representative labor unions that gained the majority are entitled to refuse application of collective agreements concluded by minority labor unions or in which acknowledgment is granted for application of collective agreements concluded by the majority labor unions). The basis or premise of this system, however, guarantees the participation of minorities in regards to the procedures as: (1) collective bargaining is conducted with all representative labor unions including minorities sitting at the same table and (2) the proportional representation system is used for the election of employee representatives to works council or other organizations, which facilitates the election of minorities. The system also substantially respects the rights and interests of minorities as (1) collective agreements that have been concluded are applied equally to all workers including those in minority groups and (2) it guarantees that the basic rights of workers and areas related to personal matters

are not infringed by the majority decision.

(2) Germany

In Germany, there have traditionally been two layers of industrial relations: one of labor unions organized outside the company at the industry level and the other of works councils organized within companies. Since the 1980s, decentralization has been in progress at the decision-making level in terms of: (1) the authorization of works council agreements with the use of open clauses of industry collective agreements and (2) an increase in the number of collective agreements targeting specific companies (in addition, legal provision that are open to collective agreements are also increasing) (Hypothesis 1). However, this "decentralization" is carried out based on collective agreements at the industry level, and decentralization is not currently permitted beyond the boundary of the direction and framework established at the collective level (for example, the "Alliance for Jobs" at the company level is not legally permitted). Furthermore, collective agreements are directly bound by the equality principle based on fundamental laws, and works council agreements are subject to examination by the court regarding fairness (suitability, congruence), while opposing decentralized decision-making does not have a binding force. In the decision-making process (Hypothesis 2), "collectivization" is still emphasized in consideration of the weak positions of individual workers, and the effectiveness of individual agreements that fall below the criteria set by legal provisions, collective agreements, or works council agreements are not recognized (the same is true with people who have obtained a higher education or possess qualifications). In collective decision-making, consideration for the opinions and interests of minorities is legally institutionalized in the form of voluntary participation (freedom of participation) and the guarantee of equal rights in collective agreements, and also in an election system based on proportional representation and other institutional guarantees reflecting diverse interests as well as examination by courts of the fairness of works council agreements.

(3) Britain

In Britain, there existed a tradition of the collective laissez-faire principle mainly in industry-level collective negotiations and collective agreements, which was justified by the agreement of individuals on its binding power (contract).

Since the 1980s, as the rigidity of collective negotiation was pointed out and the rights of labor unions were legally restricted, industry-level collective negotiation declined, and in its place a number of laws were established to give rights to individual workers. On the decision-making level (Hypothesis 1), this can be viewed as a move to "collectivization" in the sense that industry-based collective agreements transformed into national blanket codes. Today, however, some point out that the collective decision-making system without intermediate groups is dysfunctional. It indicates that it is difficult to actually guarantee the rights of individuals (ensure effectiveness) with only a legal guarantee, unless a collective foundation and support are provided. Thus, the current Labour Party government is attempting to form two collective channels from the viewpoint of ensuring efficiency and fairness. One of the channels is the promotion of collective negotiation by labor unions, and the other is the establishment of systems of information provision and consultation within companies. Although how much influence these collective channels will come to have is not yet known, it can be seen as a move towards institutional re-"decentralization." In the decision-making process (Hypothesis 2), the emphasis is on the individuals as, for example, they may individually agree to implement the deregulation (opt-out) of working hours. There are also legislations and theories to build up collective channels. These collective channels are designed to ensure the interests and participation of minorities, since the binding force of collective agreements is based on the agreement of individual workers and representatives in the system for the provision of information and consultation are elected through direct election by all employees.

(4) United State of America

In the U.S., industrial relations were formed based on collective negotiations and collective agreements under the collective negotiation system established in the 1930s. Since the 1960s, however, labor unions have gradually declined, and instead a number of laws have been established to directly secure the rights of individual workers. This can be interpreted as "collectivization" on the decision-making level (Hypothesis 1). More recently, however, it has been pointed out that rights of individuals are difficult to implement with a legal guarantee unless collective support is provided, and that it is not possible to solve or prevent increasingly complicated problems in practice. Under these situations, recent court rulings and legislations have placed emphasis on the

collective process in identifying and solving problems, and such arrangements have actually been introduced into some advanced companies. In this regard, there are moves toward "decentralization." In particular, this move is more advanced for such regulations as anti-discrimination, occupational health and safety, and working hours, for which the basic objectives, principles and framework are defined by law with use of the decentralized process for practical implementation. In the decision-making process (Hypothesis 2), the traditional framework of collective bargaining is one of exclusive negotiation by representatives of the majority where "collective" decision-making by the "majority" holds sway. Some people theoretically claim that this system does not reflect the increasingly diverse opinions and interests of workers. To refute this, the new process of in-house collective problem solving allows minorities to be directly involved in the process, and their views and interests are considered (the level of fairness and effectiveness are considered to be key in legal evaluation).

4. Japan

(1) Statutory Law and Case Law

In Japan, there existed two decision-making levels: one of collective decision-making and establishment of order by the State, and the other of decentralized decision-making through labor-management relations in each company. Since the late 1980s, however, there has been a move toward "decentralization" with a legal shift from blanket regulations of the State to flexible decision-making at the company level (Hypothesis 1). In terms of the statutory law, this move toward decentralization can be observed over a wide area, including regulations on working hours, occupational health and safety, the period of accepting dispatched workers, the range of senior workers subject to continued employment, utilization of woman workers, support for parents raising children, and remuneration for employee's inventions. With case law, however, the move is not consistent.

As an example of statutory law, the working hours system is described below. In a series of amendments of the Labor Standard Law starting from 1987, the system of flexible working hours was introduced and expanded (working hour averaging system, flexible working hours system, discretionary working system). (i) While working hours are defined either weekly (40 hours) or daily (8 hours) as a general rule, the period exceeding these basic units of working

hours is averaged in the working hours system. The amendment of 1987 introduced two types of working hour averaging systems: for a period within three months and for a period in the unit of a week. The amendment of 1998 provided the working hour averaging system for a period within a month on the condition that labor-management agreements are made either with the labor union representing the majority of workers at the workplace or the representative of the majority of workers in the workplace. (ii) The flexible working hours system allows workers to select the starting and finishing time of their work. The amendment of 1987 provided this system on the condition that the labor-management agreement is made either with the majority labor union or representative of the majority of workers. (iii) The discretionary working hours system allows workers to work at their own discretion, and they are paid for predetermined hours regardless of their actual working hours. The amendment of 1987 provided this system to those who are engaged in research, information processing, designing and certain other types of professional work on the condition that labor-management agreements are made either with the majority labor union or representative of the majority of workers (discretionary working system for professional work). Furthermore, the amendment of 1998 provided this system to workers engaged in planning in the head office of a company or other workplaces where important decisions are made on the operation of business on the condition that resolutions are made by the labor-management committee consisting of workers and management (the system of discretionary labor for those engaged in planning-related work). The half of the labor-management committees are appointed by either the majority labor union or the majority representatives. In 2003, the system of discretionary labor for those engaged in planning-related work was expanded outside the head office, and the requirement for the resolution of labor-management was also changed from "unanimous" to "four fifths of the committee or more." In the decentralized decision-making process (Hypothesis 2), the current law does not allow for individual agreements on the deregulation (opt-out) of working hours, which is observed in Britain, and "collectivization" is emphasized when establishing exceptions in the laws and regulations.

While case law emphasizes the collective communication and agreement with the majority labor union (legal principle for modification of work rules),[7]

[7] To summarize the moves made by decisions of the Supreme Court in determination

emphasis should be given to the views of diverse minorities in the decision-making process.

(3) Observations from the Viewpoint of Labor History

From the viewpoint of labor history, we examined the industrial relations in Japan starting from its origins and tried to identify the historical premises of today's labor-management negotiations. In particular, we identified three stages of changes in industrial relations in Japan: a change from indirect management to direct management in the period before and after the Japanese-Russo War,[5] establishment of the factory committee (an informal labor-management meeting system) after the First World War,[6] and introduction of company labor unions that unionized both white and blue collar workers after the Second World War. Industrial relations in Japan that formed through historical events are characterized by: (1) the fact that the origin of "decentralized" relations was already formed by different companies before the war, (2) the labor unions that were established and grew in number after the war based on the foundation

[5] In the workplace of the large heavy industry business before the Sino-Japanese War (1894-95), the foreman contract system was generally used, with which a cooperative group consisting of 7 to 15 workers was organized and controlled under the foreman. The foreman contract system, from the employer's perspective, was an indirect way to control workers, and it was a suitable way to administer a group of workers based on the premises of the system of apprenticeship of craftsmen. After the Sino-Japanese War, however, industrialization increased the demand for workers, and the craftsmen apprenticeship system faded, moving toward the introduction of individual-based contract and piece-rate wage systems. Since the period before and after the Russo-Japanese War (1904-05), management began to promote higher retention of workers in their company by improving the in-house welfare programs and in-house training programs. Furthermore, some managers abandoned the contract system and introduced the efficiency wage system, thus changing the direct administration.

[6] In the period after the First World War, industrial disputes frequently occurred for the right of collective bargaining. Meanwhile, management proposed the establishment of a factory committee as an alternative means to refuse collective bargaining with companywide labor unions. The factory committee acted as an organization to facilitate communication with workers through workers' representatives and attempted to resolve the complaints and dissatisfaction of worker by substituting the functions of labor unions. As a result of interaction with the factory committee, management successfully detached workers from companywide labor unions. In the 1920s, large industries protected themselves from the invasion of companywide labor unions by establishing factory committees or other labor-management communication organizations, and developed policies to promote long-term employment, establish skills training facilities, generalize the periodic pay raise system, and introduce the retirement age and severance pay system.

there are court rulings that do not establish a clear distinction between collective negotiation and individual negotiation (for example, the legal principles for dismissal due to business necessity[8] and for job transfers).[9] With regard to the consideration of the opinions and interests of minorities in collective

of rationality in changing the employment rules, the Supreme Court places importance on the procedural element of agreements by the majority unions, but: (1) it denies rationality in the relationship with the workers in question even when there is agreement of the majority unions, if "considerable disadvantages" are imposed on specific workers (thus overthrowing the presumption of rationality), and (2) it approves rationality even when there is opposition by the majority unions, if (the court finds that) the workers do not receive large disadvantages in practice in relation to the requirement for change and/or social suitability (giving priority to the practical element in this respect).

[8] As for dismissal due to business necessity, examples of court ruling show the formation and establishment of a legal principle, in which the dismissal is annulled for abuse of the right of dismissal if "four requirements" are not met. The "four requirements" are: (1) requirement to reduce personnel (due to an unavoidable situation in which personnel must be reduced for the rational operation of business), (2) efforts to avoid dismissal (making efforts to avoid dismissal by reducing overtime, refraining from new recruitment, transferring/ dispatching excess personnel, not hiring or dismissing non-regular employees, temporary suspension, or by offering a voluntary retirement program, etc.), (3) rationale for the selection of people (setting and applying rational and fair criteria objectively when selecting people to dismiss), and (4) appropriateness of procedure (sincere consultation for the explanation and agreement of requirements, time, size and method of dismissal to labor unions and workers). Recent examples of court ruling show cases in which importance is placed on the procedural elements, while a more comprehensive view is given for judgment. Firstly, there is a change that strict "requirements" considered before are now considered as relative "elements," to make comprehensive and relative determination depending on the specific situations. Secondly, there is another change that among factors (requirements) that are used for determination, the procedural factors are considered more important as much as the extent that the substantial factors are reduced.

[9] Many Japanese companies periodically transfer their employees (changing job descriptions and moving working places) to form skillful workers within their companies and maintain employment. As for the order of transfer by employers, a legal principle has been established with restriction by contract and restriction of abuse of rights. Consequently, first, for the employer to give effective order of transfer, his right to order the transfer must be based on employment contracts such as employment agreements and working rules. Second, even if the employer is given the right to order the transfer, the execution of his right is restricted by the principle of abuse of right. On the other hand, more recent examples of court rulings show that a certain consideration is required for the employer to show before he can give an order of transfer. Firstly, in the process of examining the employer to check for any breach of duty of consideration or any abuse of right, appropriateness is considered for the procedure in which the transfer is reached as a conclusion. Secondly, while appropriateness of the procedure varies depending on the case, considerations are taken when the employer, not only simply asking individual workers for their situations, but also if he explained specific reasons and the treatment of transfer to the worker, if he sincerely negotiated with labor unions in a serious manner, etc.

communication, labor-management agreements that are based on the Labor Standard Law and the system of the labor-management committee place emphasis on the labor union that has organized the majority of employees at a company (if there is such a labor union), and the opinions and interests of minorities are not considered[10].

(2) Situation in Japanese Companies

We examined the actual conditions of industrial relations of Japanese companies to verify the validity and significance of the two hypotheses in Japanese companies. To be specific, we surveyed preceding research studies on labor-management communication in Japan, and based on this survey, we conducted a case study of six companies, the automobile manufacturer *A*, railway company *B*, general retailer *C*, textile retailer *D*, information company *E* and specialized construction company *F*, to find out the actual conditions on the channels of communication between workers and management and the decision-making process, and to make observations based on the two hypotheses.

All companies are in the process of revising and reinforcing their labor-management communication. Based on the idea that the enhancement of labor-management communication is indispensable to address changes and to stabilize and improve corporate performance, they are attempting to establish and develop multilayered communication channels and otherwise substantiate those channels.

From the viewpoint of the levels of communication (Hypothesis 1), it can be said, based on the two aspects discussed below, that the emphasis is generally on "decentralized" communication.

Firstly, practical channels of communication are provided for discussions and proposals at the levels of blocks, departments, stores and workplaces, and

[10] In the revision of the laws concerning working hours, there has been an expansion of the system using labor-management agreements with the majority representatives, in addition to reorganization of the election procedure. The requirements in electing the majority representative was based on the rules of interpretation provided by the Ministry of Labor until the 1998 amendment of the Labor Standard Law, which now provides requirements in the rules of practice and also bans disadvantageous practice of the majority representatives. However, the majority representative is only required that he/she should not be in the supervisory or administrative position and that he/she should be elected by the procedure of vote, hand raising or other method, exhibiting a clear statement to indicate that it is the election for a person who makes agreements that are provided by law.

workers are making their voices heard through these channels. This takes place regardless of the type or size of business, or of whether or not there is a labor union within the company. In addition to the institutionalized channels of communication, senior officers and managers in the field pick up information on a daily basis. Secondly, with regard to collective labor-management relations, more emphasis is put on a flexible style of communication over collective bargaining and other formal modes of negotiations and consultations. For example, in Company *A*, instead of collective bargaining, theme-based meetings play a more important role when determining actual working conditions. In Company *C*, opinions are exchanged frankly during the periodical labor-management meeting, which is held before a case is brought before the central labor-management committee, and the director in charge (director in charge of personnel) makes decisions on the case that can be handled within his authority. Based on the long history of relationships of trust built between workers and management, both companies are in the process of decentralization to flexibly address increasingly diverse themes.

There are, however, moves that are not going in the direction of decentralization. Company *B* used a field consultation system, which caused confusion in the workplace due to excessive decentralization, and now maintains collective labor-management relations in branch offices and above. Company *A* conducted an annual spring negotiation to discuss the direction of the improvement of working conditions with the purpose of enhancing its competitive power company-wide. Company *D* provides a wide range of authority to each retail store, but also tries to provide each store with company-wide propositions on working conditions with the aim of sustained business growth.

Let us also examine their communication process (Hypothesis 2). Regarding this, "collective" communication is important, while the importance of the role of "individual" communication with, for example, one’s boss, is also increasing.

The type of "collective" communication varies from that done through labor unions to that initiated by the company, and from that which is institutionalized to that which is not institutionalized. Based on the idea that "collective" communication is more efficient and fair and that a higher degree of commitment is achieved through "collective" discussions, there is a trend to give more emphasis to "collective" communication. If we categorize the contents of such communication, when there is a labor union in the company,

opportunities for periodic labor-management meeting to discuss labor related issues, such as working conditions and the working environment, are guaranteed. On the other hand, when there is no labor union in the company and the company has thoroughly implemented the ability principle, there generally tends to be more interest in business and management strategies, and the response to labor related issues tends to lag. Institutionalized mechanisms have advantages in that they promote a stable, smooth response, while non-institutionalized mechanisms have other advantages in that they provide more opportunities for open discussions with people concerned. In addition to these collective processes, separate channels of communication are also provided through contacts with workers' superiors to gather personal complaints and proposals from individuals. External third-party organizations are hardly used to verify the fairness of the collective process or to provide support for problem solving.

Also, we should consider whether the opinions and interests of minorities are considered in collective communication? In negotiations and consultations with labor unions, issues related to non-unionist management personnel, non-regular employees or minority unionists are often not discussed, and communications tend to revolve around the majority. On the other hand, Company *C* rapidly unionized non-regular employees, who were not unionists before, and the interests of the non-regular employees are now taken into consideration in negotiations. There are still issues, such as the need to establish a system that better reflects the voices of community employees and to implement more open dialogue. In contrast, three other companies that do not have a labor union provide all employees with opportunities to participate and speak out. Company *F* places the highest priority on general meetings and invites not only its employees but also everyone concerned including self-employed craftsmen. Building strong contact between the president, management and craftsmen and sharing information, this company uses their general meeting in creating a practical place to speak out. As companies *D* and *E* are large firms, general meetings of all of the companies' employees are not a practical place for the employees to speak out, but the meetings are used by the management to convey their messages and for sharing visions. In addition to that meeting, both companies provide other opportunities for employees to participate and speak out, creating an environment for everyone to speak and discuss openly within individual groups. There are still problems such as how to address those who do not want to participate in the discussion and difficulty in collecting

opinions on working conditions.

5. Summary and Proposed Model

(1) "Decentralization" on the Decision-making Level

We theoretically substantiated "decentralization" on the decision-making level and found that it is a major trend in terms of comparative law as well.

The process of decision-making through decentralized communication proves to be a preferable method. From the viewpoint of law (legal philosophy), it provides an opportunity for the practice of a new reason (procedural reason) in recognizing and solving complicated problems. From the viewpoint of political philosophy, it works as one of the "intermediate organizations" that incorporates diversification of individuals and provide social bonds to individuals. From the viewpoint of law and economics, it is one of the ways to provide a more precise response to diversified values and preferences. In comparing laws, we have confirmed that there is a shift from collective decision-making provided by law to negotiations and decision-making by the parties concerned, and that the levels of labor-management negotiation are being decentralized (in France and Germany where collective negotiation has been traditionally practiced, and this move is legally approved).

Decentralization, however, has not made progress with respect to all problems and issues. Even with the progress of decentralization, decisions on the basic objectives, direction, and framework are often made at the collective level (France, Germany, and the U.S.A.), and infringement by decentralization of the basic rights of workers, such as equal rights and rights to protect their health and safety, is prohibited. From the viewpoint of law and economics, it is noteworthy that in promoting decentralized negotiations it is effective to increase the intimidatory values in case the negotiation fails.

As regards to Japan, decentralized industrial relations are already implemented at the company level with a particular emphasis on flexible communication at the workplace. Also in terms of legislation, moves to place emphasis on flexible decision-making by labor and management can be observed. Historically, workers' organizations in Japan were reorganized and unionized through the initiatives of employers, which meant that the views of individual workers were weak vis-à-vis the ideology of the family that ran the business. Here, Hypothesis 2 is used to examine specific ideals of decentralized communication.

(2) Decision-making Process

In the decision-making process, there are many theories as well as moves to place more emphasis on "collective" decision-making than on "individual" decision-making, pointing out the importance of considering and respecting the opinions and interests of the "minorities."

To begin with, in the history of labor-management relations in Japan emphasis was placed on the process of collective decision-making with a particular focus on regular employees. Today in Japan, companies that have a labor union tend to place more importance on unionists and particularly regular employees who are not in managerial positions (some companies promote unionization of non-regular employees and take into consideration the interests of these workers in their union activities, but ensuring more open dialogue remains a challenge for the future). On the other hand, other companies (three companies in the survey) that do not have a labor union provide all employees with the opportunities to participate and speak out, regardless of whether the employees belong to the majority or minority, and to gather and reflect diverse opinions; however, those companies tend to have difficulty in gathering opinions that are related to labor issues such as working conditions. In terms of law, the emphasis is on the decisions of the union that represents the majority of workers at a company (a person representing the majority of workers if there is no such labor union) in the process of decentralization under the law (this position has not been established in case law).

In terms of comparative law, on the other hand, there are moves to emphasize collectivization because individual workers lack negotiating power and due to the ineffectiveness in realizing rights without collective support (collectivization has traditionally been emphasized in France and Germany, while its importance is been recognized in the U.S. and Britain). At the same time, the systems are designed so that decisions are not simply based on the majority but that the opinions and interests of minorities are also taken into consideration. Roughly there are two forms of this: firstly, by providing procedures to promote the participation and reflection of the opinions of minorities (open collective bargaining (France)), election of employee representatives based on proportional representation to facilitate the representation of minorities (France, Germany, Britain), and a problem solving process open to minorities (U.S.A., etc.). Secondly, there is a guarantee on the protection of practical basic rights, which cannot be infringed upon even by the majority decision (France, Germany).

These moves can be substantiated theoretically. From the viewpoint of law (legal philosophy), coordination is required, including coordination of the views and interests of minorities, in recognizing and solving complicated problems. From the viewpoint of political philosophy, social bonds and relations are needed in today's society for the purpose of better realizing the rights of individuals who belong to that society, and priority should not be given simply to the opinions of the majority. From the viewpoint of law and economics, setting an appropriate level of decentralized negotiation is a condition for fully achieving collective functions (efficiency). To be concrete, negotiation should preferably be conducted in the place where the authority of decision-making rests, if many items on the agenda involve the interests of workers (however, if there is a large variation in opinions when forming a collective opinion, there is a risk that inefficiency that surpasses savings in the negotiation cost may be generated).

(3) A New Model of Labor and Employment Law

A new model of labor and employment law derived from the above observations is shown below.

Firstly, a "decentralized" legal system needs to be established, placing emphasis on flexible negotiations and decision-making through social negotiations, instead of uniform standards and regulations based on law and precedents. As for the method to achieve this: (1) after regulations are established as legal standards, they can be lifted if the decentralized process of negotiation and decision-making is practiced (the same method as practiced in the relationship between the current Labor Standard Law and labor-management agreements and committees), and (2) if considerations and preventive measures are sufficiently provided based on decentralized negotiation and decision-making on the obligations and responsibilities of employers established in the precedents, the responsibilities of the employers can be exempted. To promote an appropriate process of decentralized negotiation, it is important to set higher levels of regulations and responsibilities that are applied to cases where negotiations are not carried out appropriately. As the premise and basis of decentralization, the basic objectives, direction, and framework of the system as well as the guarantee on the basic rights of workers must be centrally determined.

Secondly, the process of decentralized negotiation must be designed for the purpose of collectivization and be able to reflect the opinions and interests of minorities. To be concrete, possible approaches include, for example: (1) legally

institutionalizing the election system of members who will serve in the organization that represent employees based on proportional representation (as France and Germany), and (2) (instead of establishing the legal system described in (1)) legally promoting open negotiations carried out appropriately in light of the nature of the issues by labor, management, and other parties concerned (with use of legal sanctions if negotiations are not conducted properly). The approach (1) is suitable for the first method of decentralization (decentralization of the Labor Standard Law, etc.) and approach (2) is suitable for the second method of decentralization (responsibilities of employers and its exemption by case law, etc.). These approaches have both advantages and disadvantages. Approach (1) has an advantage in that institutional guarantee is provided for opinions to be reflected proportionately including those of the minorities, but it has a disadvantage in that the institution may become hardened or the negotiation process may become just a formality and lose its meaning. On the other hand, approach (2) has an advantage in that negotiations can be performed flexibly depending on the nature and situation of the issues in question, but there are concerns of the risk that it may not truly reflect the opinions and interests of the minorities, it may have difficulties capturing the opinions of those who do not voluntarily participate in the negotiations, and it may fail to provide workers with the opportunity to voice their real opinions on working conditions under the procedure managed by the initiative of the employer. To minimize the disadvantages of either approach, the basic rule must be defined to promote decentralized and collective negotiation and decision-making that takes into consideration the opinions of minorities as well, by keeping the procedures open to minorities, by conducting honest negotiation and providing sufficient information for substantial negotiation, by legally clarifying legal sanction (or removing legal preference) in case proper negotiations are not conducted, and by establishing public institutions that swiftly investigate whether or not the procedure is fair and order relief measures where necessary. The government and external specialists (NPOs, etc.) should establish a system to support decentralized negotiation by building an information network to facilitate the distribution of information required to investigate and resolve these problems, and should examine and support negotiations conducted by the parties concerned.