General Unions and Community Unions, and Japanese Labor Law

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General unions and community unions are labor unions composed mainly of workers of small- and medium-sized enterprises and organized on a regional basis, beyond the boundaries of enterprises, and particularly referring to such labor unions that allow workers to join on an individual basis. As the Constitution and the Labor Union Act of Japan do not differentiate the treatment of labor unions according to their organizational aspects, both general unions and community unions are guaranteed the constitutional right to organize as well as to bargain and act collectively, as enterprise unions and other types of labor unions are guaranteed these rights. Yet, general unions and community unions are distinctive in the sense that, as one of their important tasks, these unions carry out collective bargaining substantially for the purpose of trying to resolve disputes arising from the dismissal or the working conditions of individual workers, which is different from the primarily presumed purpose of collective bargaining, *i.e.* establishing collective standards for working conditions. Due to this reality, the question of how to understand such a way of using collective bargaining in the context of the labor law arises. The academic views, the Labor Relations Commissions and courts recognize the collective bargaining processed by general unions and community unions for resolving individual disputes in labor relations as being eligible for protection and assistance under the Labor Union Act, and as being basically covered by the measures for assistance for dispute resolution, such as relief from unfair labor practices and dispute adjustment. This handling is based on the perception of the current situation where general unions and community unions serve as a *safety net*, to some extent, for workers of enterprises that do not have well-organized in-house unions. From the perspective of legal theory, however, there are still many issues that need further in-depth discussions on this point.

I. Introduction

This article discusses labor law issues concerning a specific category of labor unions, namely “general unions” or “community unions.”

Most labor unions in Japan are enterprise unions, which are formed within the respective enterprises and composed of their workers.[1] These unions basically admit only regular workers into their membership.[2] In Japan, the unionization rate is extremely low among small- and medium-sized enterprises as compared to that among large enterprises.[3]

[1] About 90% of organized workers are the members of enterprise unions. Kazuo Sugeno, *Rodoho (dai 9 han) (Labor and Employment Law, 9th ed.)* (Kobundo, 2010) 506.

[2] Recently, however, some enterprise unions admit non-regular workers, such as part-time workers, into their membership.

[3] As of 2010, the unionization rate was 46.2% among private enterprises with 1,000 workers or more, whereas the rate was lower among those with 100 to 999 workers, at 14.2%, and far lower among those with 99 workers or less, only at 1.1%. The average union density among all private en-

Against the backdrop of this situation, a new type of labor union has emerged since the mid-1950s, as regional unions organize workers of small- and medium-sized enterprises, irrespective of the enterprise or industry that the workers belong to. These unions are called "general unions." Subsequently, since around the 1980s, another type of regional labor union, called a "community union," has come on the scene. Community unions accept non-regular workers such as part-time workers, who usually were not entitled to membership in enterprise unions, as members affiliated on an individual basis,[4] and help these workers resolve their labor disputes. Although there are no clear definitions of the terms "general union" and "community union," these terms are generally used to refer to labor unions composed mainly of workers of small- and medium-sized enterprises and organized on a regional basis, beyond the boundaries of enterprises. In most cases, these terms especially refer to labor unions that allow workers to join on an individual basis, instead of in units of enterprise, as an approach to organize workers beyond the boundaries of enterprises. In the sections below, the terms "general union" and "community union" mean this category of labor union.[5]

An important area of activities carried out by general unions and community unions is to provide individual union members with assistance for resolving their labor disputes arising from dismissal or in relation to working conditions.[6] These unions attempt to resolve the disputes through collective bargaining with the members' employers. In practical terms, individual workers' complaints about working conditions and other labor-related problems are handled through the collective bargaining process. In other words, general unions and community unions play a role in resolving *individual* disputes in labor relations through collective bargaining, a means primarily tailored to resolving *collective* disputes in labor relations.[7]

Article 28 of the Constitution of Japan guarantees labor-related rights to workers, namely, the rights to organize, bargain collectively, and act collectively (engage in strikes and other concerted activities). Based on these constitutional rights, the Labor Union Act

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terprises was 16.9%. Ministry of Health, Labour, and Welfare, *Basic Survey on Labour Unions of FY2010*, available at: http://www.mhlw.go.jp/toukei/itiran/roudou/roushi/kiso/10/kekka03.html (last accessed, November 1, 2011).

[4] General unions and community unions generally do not limit their membership only to non-regular workers, but they also admit regular workers, who account for slightly less than 60% of all members. Hak-Soo Oh, *Roshikankei no Furontia: Rodokumiai no Rashinban (Frontiers of Industrial Relations in Japan: Compass for Labor Unions)* (Japan Institute for Labour Policy and Training, 2011) 317–318.

[5] For the history and status of general unions and community unions, and the functions that they actually perform, see Oh, *supra* note 4, at 264–341.

[6] Of course, general unions and community unions also carry out activities to maintain and improve working conditions for groups of workers at medium- and small-sized enterprises by conducting collective bargaining and concluding collective bargaining agreements, in addition to solving individual disputes in labor relations.

[7] Oh, *supra* note 4, at 321–322.

provides that a variety of protection and assistance shall be given to labor unions that meet the definition of "labor unions" set forth in this Act (Article 2) (for more details, see Section II). The Labor Union Act does not limit the scope of such "labor unions" that are eligible for this protection and assistance only to enterprise unions. Therefore, as long as it falls within the scope of "labor unions" under this Act, any labor union—whether it is an enterprise union, industrial union, or trade union, or is a general union or community union— is to be granted the statutory protection and assistance.

However, general unions and community unions often face legal issues that enterprise unions rarely encounter, due to the difference in the types of workers they organize and the activities that they engage in. Among others, a question arises as to how we should understand the fact that the collective bargaining process conducted by general unions and community unions is often intended to resolve individual disputes in labor relations.

Bearing in mind the current situation as explained above, in the following sections, I will first take a look at the general framework under the Labor Union Act of Japan for providing labor unions with the statutory protection and assistance, and then discuss various issues related to labor law that general unions and community unions sometimes encounter, focusing on issues concerning the organizational aspects and collective bargaining.

II. Overview of the Labor Union Act of Japan

Article 28 of the Constitution of Japan provides that, "The right of workers to organize and to bargain and act collectively is guaranteed."

Under this constitutional principle, the Labor Union Act provides workers with a variety of protection and assistance, for the following purposes: "to elevate the status of workers by promoting their being on equal standing with their employer in their bargaining with the employer; to defend the exercise by workers of voluntary organization and association in labor unions so that they may carry out collective action, including the designation of representatives of their own choosing to negotiate working conditions; and to promote the practice of collective bargaining, and procedures therefore, for the purpose of concluding collective bargaining agreements regulating relations between employers and workers" (Article 1). One of the measures for such protection and assistance is the relief from unfair labor practices, granted by the Labor Relations Commission.

1. "Labor Unions" Eligible for the Protection and Assistance under the Labor Union Act

A variety of protection and assistance set forth in the Labor Union Act shall be given to "labor unions" as defined by this Act. Workers are free to form a labor union, but in order for the labor union to receive the statutory protection and assistance, the labor union needs

to comply with the definition of "labor unions" under this Act (Article 5, paragraph 1).[8]

Article 2 of the Labor Union Act defines the term "labor unions" as used in this Act as "those organizations, or federation thereof, formed voluntarily and composed mainly of workers for the main purposes of maintaining and improving working conditions and raising the economic status of the workers." According to this definition, in order to be recognized as a "labor union" in the meaning under the Act, a labor union must meet the following conditions: (i) it must be composed "mainly of workers;" (ii) its "main purposes" must be to "maintain and improve working conditions and raise the economic status of the workers;" (iii) it must be formed "voluntarily;" and (iv) it must be an "organization." Among these conditions, (i) and (iii) are often to lead to legal problems, while (ii) and (iv) rarely become problems.[9]

(1) Who Are "Workers"?

A "labor union" in the meaning under the Labor Union Act must be composed "mainly of workers." This condition involves an issue of who can be "workers." This issue has recently attracted much attention for the following reasons. Along with the increased diversification of people's style of working, it has become more popular to adopt a scheme wherein work that was conventionally performed by workers under employment contracts is, at least as a matter of form, assigned to self-employed individuals under contract for services. In addition, under such circumstances, rulings rendered by lower courts in recent years tend to narrowly interpret the concept of "workers" under the Labor Union Act (as discussed later). As general unions and community unions are willing to admit non-regular workers, who face difficulty in joining enterprise unions, into their membership, it may be more likely that members of these unions include people who engage in work, at least in form, in the capacity of the self-employed. In this respect, the issue of who are "workers" could mean more to general unions and community unions.

Article 3 of the Labor Union Act defines the term "workers" as "those persons who live on their wages, salaries, or other equivalent income, regardless of the kind of occupation." Meanwhile, the term "workers" is defined in different ways in the field of employment law: "persons who are employed to engage in work and are paid wages by an employ-

[8] In order to receive assistance, including the relief from unfair practices granted by the Labor Relations Commissions, a labor union must also have a constitution which provides for, among others, equal treatment of members and members' direct participation in determining important matters concerning the labor union (Article 5, paragraphs 1 and 2 of the Labor Union Act).

[9] Condition (ii) can be met as long as "maintaining and improving working conditions and raising the economic status of the workers" is the main purpose of the organization concerned, and the organization does not need to have this purpose as its sole purpose. It follows that organizations that conduct mutual aid services or carry out political or social movements only as their auxiliary purposes can also fall within the scope of "labor unions" under the Labor Union Act (see the proviso, items (iii) and (iv) of Article 2). In order to meet condition (iv), the labor union must consist of at least two members and have its own management structure, including a constitution, decision-making organ, officers, and assets.

er" (Article 2, paragraph 1 of the Labor Contract Act); "people who are employed at an enterprise…and are paid wages thereby" (Article 9 of the Labor Standards Act). Thus, unlike these statutes requiring one party (the worker) to be "employed" by (under the control and supervision of) the other party (the employer), the Labor Union Act does not literally require such an employment relationship. Academic views, Labor Relations Commission orders, and lower court rulings, based on such wording and the legislative history of the Labor Union Act, conventionally understood that the definition of "workers" under the Labor Union Act was broader than the definition of "workers" in the field of employment law.[10] Given this understanding, for instance, professional baseball players and football players are excluded from the scope of "workers" in the context of the Labor Standards Act, etc., whereas they are regarded as "workers" under the Labor Union Act. Similarly, unemployed people are not "workers" in the context of the Labor Standards Act, etc. but they are "workers" under the Labor Union Act.

In recent years, a new trend has been seen in lower court rulings in connection with this issue, that is, lower courts began to understand the concept of "workers" under the Labor Union Act as being almost the same as that applied in the field of employment law, thereby construing the concept of "workers" under the Labor Union Act narrowly, and they tended to draw a conclusion that the person concerned was not a "worker" under the Labor Union Act.[11] However, the Supreme Court[12] denied this narrow construction, and it reaffirmed the relaxed criteria for acknowledging that a person who engages in work meets the definition of the term "workers" under the Labor Union Act, by comprehensively taking into consideration the following circumstances: (i) whether or not the person is integrated into the organization of the firm; (ii) whether or not the firm decides the details of the contract one-sidedly; (iii) whether or not the remuneration for the person has the nature of compensation for his/her provision of labor, in light of the calculation method, etc.; (iv) whether or not the person is basically obligated to accept individual offers of work from the firm; and (v) whether or not the person provides labor under the control and supervision of the firm or under some constraints in terms of time or place of work.

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[10] For details of academic views, lower court rulings, and Labor Relations Commission orders, see Hisashi Takeuchi-Okuno, *Rodokumiaiho jo no Rodoshasei ni tsuite Kangaeru: Naze Rodo Keiyaku Kijun Apurochi nanoka? (Eligibility as a Worker Under the Labor Union Act: Why to apply employment contract-based approach?*), 229 Kikan Rodoho 99 (2010).

[11] *Cent. Lab. Rel. Comm'n v. Shin-Kokuritsu Gekijyo Un'ei Zaidan,* 981 Rodo Hanrei 13 (Tokyo High Ct., Mar. 25, 2009); *Cent. Lab. Rel. Comm'n v. INAX Maintenance,* 989 Rodo Hanrei 12 (Tokyo High Ct., Sep. 16, 2009); *Cent. Lab. Rel. Comm'n v. Victor Service & Engineering,* 1012 Rodo Hanrei 86 (Tokyo High Ct., Aug. 26, 2010).

[12] *Cent. Lab. Rel. Comm'n v. Shin-Kokuritsu Gekijyo Un'ei Zaidan,* 1026 Rodo Hanrei 6 (S. Ct., Apr. 12, 2011), *Cent. Lab. Rel. Comm'n v. INAX Maintenance,* 1026 Rodo Hanrei 27 (S. Ct., Apr. 12, 2011). For the commentary on these two rulings of the highest court, see Hisashi Takeuchi-Okuno, *Rodokumiaiho jo no Rodoshasei wo meguru 2 tsuno Saikosai Hanketsu ni tsuite (Two Supreme Court Decisions on Eligibility as a Worker under the Labor Union Act),* 118 Nihon Rodoho Gakkaishi 165 (2011).

(2) Securing *Voluntariness* (Independency) and Prohibiting the Membership of "Persons Who Represent the Interests of the Employer"[13]

Another condition to be met by a labor union in order to be recognized as a "labor union" under the Labor Union Act is that the labor union is organized and operated "voluntarily," or independently of the employer. For securing such *voluntariness*, the proviso, item (i) of Article 2 of the Labor Union Act provide that a labor union which admits into its membership, officers, "workers in supervisory positions having direct authority with respect to hiring, firing, promotions, or transfers," and "other persons who represent the interests of the employer," shall not be recognized as a "labor union" under this Act.

In practical terms, enterprise unions often deny membership to workers who hold managerial positions in the organization of their firms. However, the judicial precedent[14] presented a very narrow interpretation on the scope of "persons who represent the interests of the employer," and determined that only a limited range of persons in senior managerial positions fall within this scope.

Since the 1990s, in the depression following the burst of the economic bubble, one after another firms lowered working conditions offered to the middle-aged or older workers in managerial positions. This situation led to the formation of labor unions for workers in managerial positions, and some general unions and community unions started to admit these workers into their membership. The question may arise as to whether such unions, which can be called "managers' unions," can be recognized as "labor unions" under the Labor Union Act. According to the aforementioned judicial precedent, most of such unions would not be regarded as admitting "persons who represent the interests of the employer" into their membership, so they are eligible to be recognized as "labor unions" under the Labor Union Act.[15]

2. Collective Bargaining

(1) Adopting Plural Representation System, Instead of Exclusive Representation System

As mentioned earlier, Article 28 of the Constitution of Japan guarantees workers the right to bargain collectively, in addition to the rights to organize and act collectively. Following this, Article 7, item (ii) of the Labor Union Act designates the employer's "refusal to bargain collectively with the representatives of the workers employed by the employer

[13] For details on this topic, see Hisashi Takeuchi-Okuno, *The Position and Function of Executive Staff Members in Japanese Labor Law*, in Manfred Weiss et. al., eds., Labour Law of Executive Staff in Selected Countries (Nomos, 2010) 228–260.

[14] See, e.g., *Natoko Paint v. Aichi Lab. Rel. Comm'n.*, 524 Rodo Hanrei 35 (Nagoya Dist. Ct., July. 15, 1989).

[15] In *Cemedine v. Cent. Lab. Rel. Comm'n*, 807 Rodo Hanrei 7 (Tokyo High Ct., Feb. 29, 2000), which involved a "managers' union" consisting of workers in managerial positions of a particular firm, the court found that the union did not admit to membership "persons who represent the interests of the employer," and recognized its eligibility as a "labor union" under the Labor Union Act.

without justifiable reasons" as a type of unfair labor practice, thus placing the employer under the obligation to bargain collectively.

As for the workers' right to bargain collectively, Article 6 of the Labor Union Act provides that "Representatives of a labor union…shall have authority to negotiate with the employer or the employers' organization on behalf of the labor union or the members of the labor union with respect to conclusion of collective bargaining agreements and other matters." Thus, each union has the right to bargain collectively with respect to matters affecting its own members. In other words, the Japanese labor law does not adopt the "exclusive representation system." Furthermore, every labor union has the right to bargain collectively, irrespective of its size or the number of its members.[16] It often happens that a general union or community union includes among its members only one worker among those who belong to a particular firm (this situation is occasionally seen in the case of the "*kakekomi-uttae*" discussed later). Even in that situation, the firm is bound to bargain collectively with the union.

(2) Mandatory Subjects of Bargaining

The employer has the obligation to bargain collectively only with regard to mandatory subjects of bargaining. According to the judicial precedent,[17] mandatory subjects of bargaining are specified as "matters concerning the working conditions and other terms of treatment of the workers or the handling of the collective labor relations between the labor union and the employer, for which the employer has the power to decide."

Mandatory subjects of bargaining are specified as follows: (i) matters concerning "working conditions and other terms of treatment" include wages, working hours, rest periods, days-off, leaves of absence, safety and health, industrial accident compensation, and education and training, as well as standards for personnel affairs, such as personnel relocation, disciplinary action, and dismissal; (ii) matters concerning the "handling of collective labor relations" include the procedures for conducting a collective bargaining process and carrying out industrial actions. In addition, (iii) matters concerning corporate management and production are regarded as mandatory subjects of bargaining as long as they are related directly to the employment of the worker concerned and only with regard to the issue affecting the employment.[18]

It is a theory established as the case law doctrine and supported by the academic sector that not only the *standards* for personnel affairs such as personnel relocation, disciplinary action, and dismissal, but also *each dispute* over relocation, disciplinary action, or

[16] In *Nissan Motor Co. v. Cent. Lab. Rel. Comm'n*, 39 Minshu 730 (S. Ct., Apr. 23, 1985), the Supreme Court ruled that where two or more labor unions concurrently exist within one firm, each of these unions, irrespective of its size or the number of its members, has its own right to bargain collectively with the firm.

[17] *Cent. Lab. Rel. Comm'n v. INAX Maintenance*, 1026 Rodo Hanrei 27 (S. Ct., Apr. 12, 2011).

[18] See e.g., *Hayashi v. Meidi-ya*, 14 Rominshu 1081 (Nagoya Dist. Ct., May 6, 1963).

dismissal of a particular union member, are included in the scope of mandatory subjects of bargaining.[19] Similarly, each worker's claim or complaint about his/her working conditions, etc., is also construed as a mandatory subject of bargaining. This construction, in combination with the legal status of the labor union's authority to bargain collectively mentioned in (1), provides a legal basis for general unions and community unions functioning to handle individual workers' complaints through collective bargaining.

3. Collective Bargaining Agreements

When the labor and the management reach an agreement on the matters discussed in the collective bargaining process, the parties usually enter into a collective bargaining agreement. This is an agreement between a labor union and an employer or an employers' organization concerning working conditions and other matters, which is put in writing and is either signed by or affixed with the names and seals of both of the parties concerned (see Article 14 of the Labor Union Act). Provisions of collective bargaining agreements for the "standards concerning working conditions and other matters relating to the treatment of workers" are given a "normative effect" (see Article 16 of the Labor Union Act). Any part of an employment contract that contravenes a provision of a collective bargaining agreement that is given the "normative effect" shall be void, and as for the part of the employment contract thus made void, those standards provided in the collective bargaining agreement shall be effective to directly govern the terms of the contract (the same shall apply to matters which a employment contract does not provide).

Article 17 of the Labor Union Act provides that, "When three-fourths or more of the workers of the same kind regularly employed in a particular factory or workplace come under application of a particular collective bargaining agreement, the agreement concerned shall also apply to the remaining workers of the same kind employed in the factory or workplace concerned." This provision gives rise to a question, in connection with the rule of plural representation, as to whether or not this provision is applicable if those remaining workers, less than one-fourth of all workers, have membership in other labor unions. Opinions are divided into those for and against the applicability of this provision, both among scholars and among lower courts.

4. Collective Action

Article 28 of the Constitution of Japan guarantees workers' right to carry out strikes

[19] Tokyo Daigaku Rodoho Kenkyukai ed., *Chushaku Rodokumiaiho (Jo) (Commentary on the Labor Union Act [1st volume]*) (Yuhikaku, 1980) 303; Sugeno, *supra* note 1, at 577. Note that, one academic view argues that the labor relations law should be revised to exclude individual workers' complaints from the scope of matters for which the employer's refusal to bargain collectively constitutes unfair labor practice, while allowing the Labor Relations Commissions to conduct conciliation. Noriaki Kojima, *Roshikankeiho to Minaoshi no Hoko (Labor-Management Relations Law and the Direction of Its Revision)*, 96 Nihon Rodoho Gakkaishi 123, 131–135 (2000).

and other concerted activities. Those who engage in a justifiable collective action are exempt from criminal and civil liability and are also protected from adverse treatment imposed thereon by the employer on the grounds of their engagement in the collective action.

As such exemption and protection are granted only for *justifiable* collective action, the criteria for such *justifiability* become an issue. This issue is discussed from four aspects, namely, (i) the party who takes the initiative in the collective action, (ii) the purpose of the collective action, (iii) the procedure for commencing the collective action, and (iv) the manner in which the collective action is carried out. Among these aspects, the fourth one, the manner in which the collective action is carried out, is often called into question. The judicial precedent found *picketing* to be justifiable, provided that this action was carried out only by refusing to provide labor or trying to dissuade workers from going to work. On the other hand, justifiability has been denied in the case where union members placed the facilities and assets that were in the possession of the employer under their control by force.[20]

5. Labor Relations Commissions

The Labor Union Act provides for the Labor Relations Commission system as a means to resolve collective disputes in labor relations. A Labor Relations Commission, set up as a dispute resolution body specialized in labor relations, consists of members who respectively represent the public interest, the workers, and the employer. Labor Relations Commissions play a role in promoting the settlement of collective disputes in labor relations through two approaches, granting relief from unfair labor practices and adjusting labor disputes.

(1) Relief from Unfair Labor Practices

Article 7 of the Labor Union Act prohibits the employer from committing the following acts, which constitute unfair labor practices: (i) to discharge or otherwise treat in an adverse manner a worker "by reason of such worker's being a member of a labor union, having tried to join or organize a labor union, or having performed justifiable acts of a labor union" ("adverse treatment"); (ii) to "refuse to bargain collectively with the representatives of the workers employed by the employer without justifiable reasons" ("refusal of collective bargaining"); (iii) to "control or interfere with the formation or management of a labor union by workers or to give financial assistance in paying the labor union's operational expenditures" ("control or interference").[21] When the employer has committed any of these acts, a worker or the labor union may file a petition with the Labor Relations Commission for remedy. Where the Labor Relations Commission examines the case and finds the unfair labor practice as claimed, it will issue a remedial order which the Commission considers

[20] *Mikuni Haiya v. Noguchi*, 619 Rodo Hanrei 8 (S. Ct., Oct. 2, 1992).

[21] The Labor Union Act also prohibits the employer from applying adverse treatment to a worker as a retaliatory action by reason that the worker has filed a petition with the Labor Relations Commission for relief from unfair labor practices (Article 7, item (iv)).

appropriate for the case. The relief from unfair labor practices is a system aimed for securing normal labor relations for the future.[22]

As a recent trend, more than half of the petitions for remedy filed with Labor Relations Commissions come from general unions or community unions.[23]

(2) Assistance for Settling Labor Disputes

In addition to granting relief from unfair labor practices, Labor Relations Commissions also play a role in assisting the settlement of labor disputes between workers and employers through making adjustments to labor relations under the Labor Relations Adjustment Act. In this context, the term "labor dispute" refers to a "disagreement over claims regarding labor relations arising between the parties concerned with labor relations, resulting in either the occurrence of acts of dispute or the risk of such an occurrence" (Article 6 of the Labor Relations Adjustment Act; the term "act of dispute" is defined in Article 7 of this Act). Under this Act, Labor Relations Commissions are entrusted with the mission of assisting the settlement of disputes through conciliation, mediation, or arbitration. Actually, almost all of the cases brought to the commissions for the adjustment of labor relations are processed by conciliation, while mediation is used only on rare occasions and arbitration is used in almost no cases.[24]

As provided in Article 6 of the Labor Relations Adjustment Act, in order for a Labor Relations Commission to commence the conciliation or other adjustment proceedings, it is required that an act of dispute has occurred or that there is the risk of such an occurrence. Of these prerequisites, the "risk of occurrence of an act of dispute" is interpreted very loosely. In reality, where a general union or community union, both of which are quite unlikely to carry out a strike, files an application with a Labor Relations Commission for conciliation or other adjustments in order to seek the settlement of an individual dispute arising from the dismissal, etc., of a particular member, such a case is also handled as a case subject to the dispute adjustment process by the Labor Relations Commission.[25]

In 2010, about 70% of all cases seeking adjustment for disputes with private enterprises (393 of 563) were brought by general unions and community unions, and more than half of all dispute adjustment cases involving general unions and community unions (207 of

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[22] *Tokyo Lab. Rel. Comm'n v. Anzen Kogyo, successor of Dai Ni Hato Taxi*, 31 Minshu 93 (S. Ct., Feb. 23, 1977).

[23] Sugeno, *supra* note 1, at 508.

[24] In 2010, of all 566 cases newly brought to Labor Relations Commissions, 556 were conciliation cases, 10 were mediation cases, and there was no arbitration case. Central Labor Relations Commission, Status of Handling Adjustment Cases, available at: http://www.mhlw.go.jp/churoi/chousei/sougi/sougi05.html (last accessed, November 1, 2011) .

[25] For an academic view that claims the revision to the Labor Relations Adjustment Act based on the recognition that the actual operations conducted by Labor Relations Commissions should be properly incorporated into the language of this Act, see Akira Watanabe, *Rodokankeichoseiho no Jidai (Age of the Labor Relations Adjustment Act)*, 633 Roi Rokyo 3 (2009).

393, or 52.7%) were cases of the "*kakekomi-uttae"* discussed later.[26]

III. Labor Law Issues Pertaining to General Unions and Community Unions

In this section, among labor law issues pertaining to general unions and community unions, those concerning the organizational aspects of labor unions and those concerning collective bargaining are discussed, with more emphasis placed on the latter.[27]

1. Issues Concerning the Organization of Labor Unions

The first point at issue concerning the organizational aspects of general unions and community unions is that a question may be raised in some cases as to whether members of these unions can be regarded as "workers" according to the meaning under the Labor Union Act. This question could arise in relation to enterprise unions as well. However, as mentioned above,[28] while enterprise unions consist mainly of regular workers, general unions and community unions widely admit non-regular workers into their membership, in which case these types of unions are more likely to include among their members those people whose eligibility as "workers" is not clear from their work arrangements. Consequently, this issue has more importance to these unions than to enterprise unions.

As also mentioned above,[29] the existing case law doctrine interprets the term "workers" rather broadly, acknowledging the eligibility as "workers" under the Labor Union Act for those engaged in self-employment only as a matter of form.

Unlike enterprise unions, some general unions and community unions also accept workers in managerial positions as their members, a tendency that raises concerns about whether these members in managerial positions might be recognized as "persons who represent the interests of the employer." However, according to the very narrow interpreta-

[26] Central Labor Relations Commission, *Data on Labor Relations Disputes Handled in Japan in 2010*, available at: http://www.mhlw.go.jp/churoi/houdou/kobetsu/dl/shiryo-h22-roushihunsou.pdf (last accessed, November 1, 2011).

[27] In addition to those discussed in the main text, labor law issues pertaining to general unions and community unions include an issue concerning a collective bargaining agreement, that is, supposing the situation where the employer and the general union or community union reach an agreement on a dispute over the dismissal of a particular worker or conditions thereof, and the agreement is formed in writing, whether the written agreement should be treated as a collective agreement, or as an agreement between the employer and the dismissed worker represented by the union. Furthermore, although it is rare that a general union or community union carries out a strike or other act of dispute, a theoretical question may arise due to the nature of this type of union as a labor union organized beyond the boundary of only one enterprise, that is, in the case where a labor dispute takes place at a particular enterprise, and the commencement of an act of dispute is decided only by the union members employed by that particular enterprise, whether or not such an act of dispute is justified, and whether or not it is justifiable for the rest of the union members employed by other enterprises to carry out the act of dispute.

[28] See Section II 1 (1).

[29] See Section II 1 (1).

tion given by the judicial precedent as mentioned earlier,[30] it is rare that the unions are denied eligibility to receive protection and assistance under the Labor Union Act by being regarded as admitting "persons who represent the interests of the employer" into their membership.

2. Issues Concerning Collective Bargaining

Most labor law issues that general unions and community unions face are taking place in conjunction with collective bargaining. This is because, when general unions and community unions collectively bargain with employers, they do so, in most cases, substantially with the aim of dealing with individual workers' complaints about working conditions. In other words, collective bargaining carried out by general unions and community unions fulfills the function of processing individual disputes in labor relations, rather than the primarily expected function of negotiating standards for working conditions for the collective benefit of a group of workers. How should we understand such a reality in the context of the Labor Union Act?

(1) Mandatory Subjects of Bargaining?

When general unions and community unions demand collective bargaining with employers, in most cases, they intend to bargain about individual workers' grievances in terms of working conditions, such as the ones seeking the revocation of the dismissal of a particular worker. Theoretically, this leads to a question as to whether or not the treatment of individual workers in terms of working conditions is included in the scope of mandatory subjects of bargaining. As mentioned earlier,[31] the theory established in the judicial and academic communities is that individual treatment falls within this scope of matters.

(2) Are General Unions and Community Unions the "Representatives of the Workers Employed by the Employer"?

(i) "Workers Employed by the Employer"?

As stated in (1), in the process of collective bargaining between general unions and community unions and employers, the dismissal of particular workers and the treatment of individual workers in terms of working conditions are frequently brought up for debate. On such an occasion, in association with the wording in the provision of Article 7, item (ii) of the Labor Union Act, which designates the employer's refusal to bargain collectively with the representatives of the "workers employed by the employer" without justifiable reasons as a type of unfair labor practice, one would question whether a worker who has already been dismissed by the employer can still be regarded as maintaining the status of a "worker

[30] See Section II 1 (2).
[31] See Section II 2 (2).

employed by the employer."

In general terms, the concept of a "worker employed by the employer" refers to a worker who is *currently* being employed by the employer.[32] Nevertheless, in cases where a dispute exists between the worker and the employer regarding the termination of the employment contract, such as the validity of the dismissal or terms for dismissal, or where a dispute over working conditions, occurred while the employment contract was in effect and it has yet to be resolved even after the employment contract has been terminated, the worker concerned should be regarded as maintaining the status as a "worker employed by the employer" with respect to the disputed matter, in line with the purports of Article 28 of the Constitution and Article 7, item (ii) of the Labor Union Act. This is now applied as an established theory in academic views, Labor Relations Commission orders, and leading judicial cases.[33]

Whether one is a "worker employed by the employer" may also become a problem in the situation where a dispute, which did not surface during the term of and at the end of the employment contract, emerges after the contract has been terminated and a labor union, which the ex-worker joins after the dispute emerges, demands collective bargaining in order to resolve the dispute. In that situation, does the ex-worker maintain the status as a "worker employed by the employer?" This problem has recently been drawing attention as retirees, who left their employment several years ago, claim that they are suffering from health problems due to asbestos exposure during their employment and request collective bargaining with their former employer through a labor union which the retirees join after the health problem arises.[34] Both Labor Relations Commissions[35] and lower courts[36] acknowledged the existence of unsolved disputes in labor relations derived from risks that had existed

[32] Article 7, item (ii) of the Labor Union Act uses the term "employed." According to the dominant academic view, whether or not a person who engages in work is "employed" is determined depending on whether or not the person falls within the scope of a "worker" as defined in Article 3 of this Act. The judicial precedent (*Cent. Lab. Rel. Comm'n v. INAX Maintenance*, 1026 Rodo Hanrei 27 [S. Ct., Apr. 12, 2011]) appears to take the same stance.

[33] Takayasu Yanagiya, *Rodo Keiyaku Kankei Shuryogo Soto no Kikan Keikago ni Rodosha ga Kanyushita Rodokumiai to no Danko Odaku Gimu no Sonpi (Legal Status of Labor Union to Demand Collective Bargaining Concerning Ex-Workers)*, 60 Ho to Seiji 65, 70–75 (2009).

[34] Health problems that ex-workers suffer due to having been exposed to asbestos while at work, such as lung cancer, become evident only after a long period of incubation has passed. In addition, in Japan, it is only recently that the health risk of asbestos exposure has become publicly known. Given such circumstances, disputes making claims for compensation for the health problems caused by the asbestos exposure that workers experienced while at work some decades ago, were initiated only after a long period of time has passed since their retirement. These disputes have frequently occurred in recent years.

[35] *Nichias,* 1387 Bessatsu Chuo Rodo Jiho 93 (Nara Pref. Lab. Rel. Comm'n, Jul. 24, 2008); *San'yo Dannetsu,* 979 Rodo Hanrei 96 (Kanagawa Pref. Lab. Rel. Comm'n, Feb. 25, 2009); *Honda Giken Kogyo,* 988 Rodo Hanrei 95 (Kanagawa Pref. Lab. Rel. Comm'n, Jul. 30, 2009).

[36] *Hyogo Union v. Hyogo Pref.,* 973 Rodo Hanrei 5 (Kobe Dist. Ct., Dec. 10, 2008); *Hyogo Pref v. Hyogo Union.,* 994 Rodo Hanrei 81 (Osaka High Ct., Dec. 22, 2009). The Supreme Court denied the petition for acceptance of appeal (i.e., petition for writ of certiorari) for the case on Nov. 10 2011.

during the term of employment contracts, even when the disputes had not surfaced prior to the termination of the contracts, and determined that the ex-workers involved in the disputes over health problem due to asbestos exposure during their employment were "workers employed the employer."

It should be noted, however, that the Central Labor Relations Commission took a narrower view.[37] Apart from those who are currently employed, persons who fall within the scope of "workers employed by the employer" are only found in such cases as a dispute over working conditions *already surfacing* while a labor contract was in effect and having yet to be resolved even after the labor contract is terminated; or a dispute existing between the worker and the employer with respect to the termination of the labor contract. If a dispute did not surface during the duration of the labor contract, the ex-worker is regarded as a "worker employed by the employer" *only* where it is objectively unavoidable that the dispute had not come to light prior to the termination of the labor contract. Some Labor Relations Commissions orders also deny the ex-workers' status as "workers employed by the employer" in similar cases, ruling that it would be unsuitable to the purpose of the remedial system, which is designed to secure normal labor relations for the future, to order the employer to bargain collectively with the labor union over the compensation for retirees' health damage caused by asbestos exposure.[38]

Thus, opinions over this problem are divided in practices. This conflict in opinions reflects the different understanding of the purpose of the unfair labor practices remedial system, which is one of the cornerstones of the Japanese Labor Union Act.[39]

(ii) "Representatives" of the Workers Employed by the Employer?

Collective bargaining about the dismissal of individual workers, mentioned in (i) above, is often demanded with regard to workers who were not affiliated with any labor union at the time of dismissal but became members of general unions or community unions after being dismissed (this way of demanding collective bargaining is sometimes called a "*kakekomi-uttae"*). In such a case, one would also question whether these general unions and community unions can be recognized as the "representatives" set forth in Article 7, item

[37] *Nichias,* 1394 Bessatsu Chuo Rodo Jiho 21 (Cent. Lab. Rel. Comm'n, Mar. 31, 2010).

[38] *Sumitomo Gomu,* 1366 Bessatsu Chuo Rodo Jiho 427 (Hyogo Pref. Lab. Rel. Comm'n, Jul. 5, 2007); *Sumitomo Gomu (No. 2), yet to be published,* (Hyogo Pref. Lab. Rel. Comm'n, Mar. 4, 2010).

[39] Opinions are divided as to the scope of normal labor relations to be secured for the future. Some understand this scope rather narrowly, only including the relations between the employer (a specific enterprise) and the workers who are currently under employment contracts with the employer (see *Sumitomo Gomu,* 1366 Bessatsu Chuo Rodo Jiho 427 [Hyogo Pref. Lab. Rel. Comm'n, Jul. 5, 2007]; *Sumitomo Gomu (No. 2), yet to be published,* [Hyogo Pref. Lab. Rel. Comm'n, Mar. 4, 2010]). Others enlarge this scope by including more continuous relations, taking into consideration the possibility that the resolution of a specific dispute through collective bargaining will lead to resolving similar issues that may be disputed in the future (Yuichiro Mizumachi, *Ishiwata ni Bakuro shita Rodosha no Taishokugo no Danko Moshiire to Danko Kyohi no Seitona Riyu (Casenote on Nichias, 1394 Bessatsu Chuo Rodo Jiho 21),* 1183 Chuo Rodo Jiho 14, 18 (2011).

(ii) of the Labor Union Act. The dominant academic view answers this question in the affirmative, stating that these unions can be regarded as the "representatives" of such dismissed workers and that they are eligible to demand collective bargaining of the employer on behalf of these workers. The practice also follows this view.[40]

(3) Demand for Collective Bargaining Made after a Long Period of Time Has Passed Since Dismissal, and Justifiability of the Employer's Refusal of Such a Demand

In some of those cases where workers become members of general unions or community unions after being dismissed by their employer and then seek collective bargaining with said employer, collective bargaining is demanded only after a considerable period of time has passed since the workers were dismissed. In such cases, does the employer still have the obligation to accept the demand for collective bargaining about the dismissal?

In one case, the Central Labor Relations Commission stated that "request for collective bargaining should be made by the labor union within a reasonable period of time following the dismissal of the worker concerned, according to the socially accepted standards." This was a case in which a worker joined a labor union after about two years had passed since her dismissal, and it was not until about six years after her joining the union that the union actually demanded collective bargaining about the dismissal. The Commission found the fact that collective bargaining had not been demanded during reasonable period of time, although litigation was initiated and negotiation other than collective bargaining was attempted. Based on this, it concluded that the firm had a justifiable reason to refuse collective bargaining and its refusal would not be regarded as an unfair labor practice.[41]

This view was also seen in a past lower court ruling. In this case, a worker joined a labor union after seven years and seven months had passed since his dismissal, and it was only one year and three months after his joining the union that the union actually demanded collective bargaining to seek the revocation of the dismissal. The court held that "there may be cases where, depending on the period of time that has passed since the dismissal of the worker or on other circumstances within that period, the labor union's demand for collective bargaining to seek the revocation of the dismissal would be deemed to be unreasonable, and therefore one cannot say that the employer has no justifiable reason to refuse collective bargaining." Based on the fact that the labor union had not tried to resolve the dispute through collective bargaining until that time, the court concluded that the firm had a justifiable reason to refuse collective bargaining, and that its refusal would not be regarded as an unfair labor practice.[42]

Thus, both orders by Labor Relations Commissions and rulings by lower courts require that collective bargaining be demanded via the labor union within a reasonable period

[40] Yanagiya, *supra* note 33, at 75–76.

[41] *Toyo Kohan*, 64 Meireishu 777 (Cent. Lab. Rel. Comm'n, Nov. 15, 1978).

[42] *Sohyo Zenkoku Ippan Rodo Kumiai Kanagawa Chiho Honbu v. Cent. Lab. Rel. Comm'n*, 532 Rodo Hanrei 7 (Tokyo Dist. Ct., Dec. 22, 1988).

of time, depending on the circumstances following the dismissal of the worker.[43]

IV. Conclusion

General unions and community unions, just like enterprise unions, are guaranteed the right to organize and to bargain and act collectively, and they are also granted a variety of protection and assistance under the Constitution and the Labor Union Act and other labor laws. There is no difference in the legal treatment of these unions directly derived from the different types of organization.

Yet, general unions and community unions are distinctive in the respect that these unions, as one of their important tasks, carry out collective bargaining substantially for the purpose of trying to resolve individual employment disputes. How this task should be construed under the labor law becomes an issue. The academic views, the Labor Relations Commissions and courts consider that collective bargaining carried out for that purpose remains within the scope of legally protected collective bargaining, thus basically acknowledging the relief from unfair labor practices granted by Labor Relations Commissions in the event that an employer refuses to bargain collectively. They also recognize the labor-management conflict over such collective bargaining as a kind of "labor dispute" defined in the Labor Relations Adjustment Act and thus as the subject of dispute adjustment by Labor Relations Commissions. In short, the dispute resolution process conducted by general unions and community unions through collective bargaining, which is substantially for the purpose of resolving individual disputes in labor relations, is regarded to be fit within the collective dispute resolution system.

This notion is based on the awareness that general unions and community unions, in reality, serve as the *safety net* for workers of small- and medium-sized enterprises which do not have well-organized in-house unions, and also for non-regular workers who are generally not admitted into enterprise unions. By assisting these workers in resolving individual disputes in labor relations, these unions play a role in filling the vacancy of enterprise unions to some extent. However, in many cases, collective bargaining carried out by general unions and community unions is not completely the same as collective bargaining in its

[43] The specific length of time following the dismissal that can be regarded as a "reasonable period of time" is not clear, however, due to other factors in the respective cases. In *Nihon Kokan v. Kanagawa Lab. Rel. Comm'n*, 406 Rodo Hanrei 69 (Tokyo High. Ct., Oct. 7, 1982), two dismissed workers, while challenging the validity of their dismissal in litigation, joined a labor union several years after the dismissal (six years and ten months or four years and five months), and the labor union demanded collective bargaining about the dismissal immediately after their joining the union. The court found that these workers had not left their issue unaddressed but had been arguing against the validity of their dismissal and that the labor union demanded collective bargaining immediately after they joined the union. The court also pointed out that the attempt to resolve a dispute through collective bargaining in addition to litigation has its own meaning. In conclusion, the court determined that the labor union's demand for collective bargaining was not an extremely belated one, and therefore the employer had no justifiable reason to refuse collective bargaining.

primarily presumed meaning, which aims to establish standards for working conditions, so its compatibility with the purpose of the relief from unfair labor practices should be further studied.