

Decentralizing Decentralized Industrial Relations?: the Role of Labor Unions and Employee Representatives in Japan*

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I. Introduction

Japan is a country of freedom. Thus you can unionize locally, professionally, or industrially, if you like, and some actually do so.¹ Yet, in fact, typical labor unions in Japan are organized at the enterprise level and there is almost no collective bargaining or agreement at the industrial level. If they work for the same company, both white- and blue-color workers participate in the same union. Enterprise unions are organized by regular employees, who have in common the same interest under the so-called long-term employment practice,² in order to improve their employment security, working conditions, and workplace welfare.³ In other words, they try not only to win favorable working conditions for union members through the adversarial process of collective bargaining, but also to cooperate with employers by participating in the management of the enterprise to ensure its prosperity and the employees' welfare.⁴

Since the 1970s, Japanese labor unions have been getting steadily less dense year by year (see Chart 1.). In 2005, union members constituted only 18.7 percent of employees. It has been generally pointed out that a series of complex factors caused the decline in union membership: a) the shift from the primary and secondary industries to the tertiary; b) deindustrialization or relocation of production in formerly non-competitive industries caused by intensified global competition; c) the shrinking of the public sector caused by deregulation and privatization; d) the growing number of new union-free companies established by the restructuring of corporate organization; and e) diversification and individualization of the

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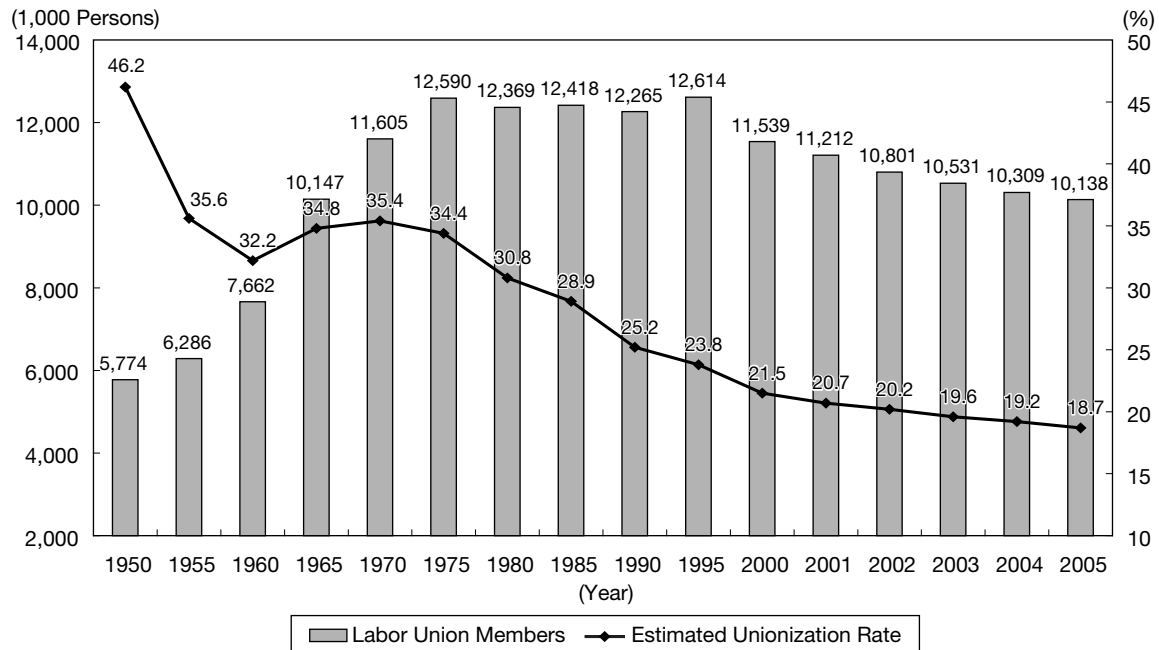
¹ Major industrial unions include All Japan Dockworkers' Union and the National Federation of Construction Workers' Union.

² The long-term employment practice in Japan can be described briefly as follows: a regular employee enters a company immediately after graduation and enjoys secure employment until reaching the mandatory retirement age. He or she receives systematic in-house education and training (OJT) and experiences various types of work under a periodical relocation program. Seniority, or the length of his or her service at a particular company, is the major factor determining promotion and wages. See Takashi Araki, *Developing Employment Relations Law in Japan (Part 1: Japan's Long-term Employment Practice)*, Labor Issues Quarterly, No. 20, p.21 (1993).

³ K.Sugeno, *SHIN KOYO SHAKAI NO HO (Employment System and Labor Law)*, p.4 (2002).

⁴ K.Sugeno, *JAPANESE EMPLOYMENT AND LABOR LAW*, p.499 (2002).

Chart 1.: Union Density in Japan



Source: Ministry Health, Labour and Welfare, *Basic Survey on Labour Unions*.

workforce.⁵ However, the real reason for the decline is, in short, the failure of the labor unions, in particular their failure to organize female and part-time workers and, among others, employees who are working in newly-established firms in the service industry.⁶

Interestingly enough, while the overall unionization rate is below 20 percent, unions seem to succeed in dominating the workplace; about 80 percent of unions organize more than 50 percent of qualified employees.⁷ In other words, workplaces in Japan are bipolarized. Most Japanese employees have never seen labor unions at their workplaces, but if you are luckily enough to happen to see a union at your workplace, chances are that most of your colleagues are already union members.

Other features of Japanese unions are as follows: more labor unions are organized in larger companies than in small- and medium-sized;⁸ they cover more densely the manufacturing industry and the public sector than the tertiary; and, while recently unions have successfully organized more non-regular employees than previously, the estimated unionization rate of part-time workers is still only 3.3 percent as of 2005.⁹

II. Unions in Labor Legislation

1. Labor Unions' Authority

Japanese labor unions or their members can exercise three fundamental rights: the right

⁵ T.Araki, "Bargaining Decentralization, Workforce Diversification and Challenges Labor Union Face: Focusing on German and Japanese Case," A.Holand et al (ed.), *EMPLOYEE INVOLVEMENT IN A GLOBALISING WORLD?* (2005), p.469.

⁶ H.Fujimura, "The Future of Trade Unions in Japan," *Japan Labour Bulletin*, Vol.37, No.7 (1998).

⁷ Ministry of Health, Labour and Welfare, *Survey on Labour Union Situation* (2003).

⁸ As of June 2005, the estimated unionization rate in companies with 1,000 employees or more was 47.7 percent, while it was 15.0 percent in companies with 100 to 999 employees and 1.2 percent with 99 employees or less. Ministry of Health, Labour and Welfare, *Basic Survey on Labour Unions* (2005).

⁹ Ministry of Health, Labour and Welfare, *supra* note 8.

to organize, to bargain collectively, and to act collectively.

1.1. The Right to Organize and Union Shop Agreements

In principle, any employee can voluntarily form, join, or resign from a union. However, there is an important exception to this rule. The Supreme Court held a union shop agreement partly invalid, as long as it obligated the employer to dismiss any employee who had resigned or been expelled from the signatory union but had formed or joined another union.¹⁰ To put it the other way around, a union shop agreement is valid, as long as it is applied to an employee who has resigned or been expelled from the party union and has *not* formed or joined another union.¹¹ In a sense, this interpretation has prevented Japanese unions from declining more drastically; according to a survey, more than 75 percent of union members answered that they had joined labor unions because the unions had union shop agreements¹² with the employers.¹³

1.2. The Right to Bargain Collectively

Under the current law, a plurality of unions can exist side by side in the workplace and each union is guaranteed the right to negotiate with the employer, even if it has only two or three members. Every union has the right to bargain collectively with the employer and employers are under the duty to negotiate in good faith with every union in the workplace, if they are called to the bargaining table. That is why some employers are willing to conclude a union shop agreement with a majority union; it could legally reduce the number of unions with which s/he must negotiate.

If an employer refuses to bargain without proper reasons, s/he shall be considered to be committing an unfair labor practice.¹⁴ On the other hand, the duty to bargain is not imposed on unions; the legislator only prohibits employers' unfair labor practices.

1.3. The Right to Act Collectively

Labor unions enjoy legal protection of their dispute acts and activities. "Proper" dispute acts, including strikes and picketing, and "proper" union activities are not punishable under criminal law¹⁵ and are exempted from civil liability.¹⁶ In addition, an employer's dismissal, discipline or other disadvantageous treatment of employees because of their participation in "proper" dispute acts or union activities is considered illegal.

2. Remediating Unfair Labor Practice

The Trade Union Law (hereinafter TUL) establishes special, quasi-judicial Labor Commission procedures for remediating unfair labor practice, while courts can deal with unfair labor practice cases and give union members judicial remedies such as damages. Prohibited unfair labor practices by employers are: a) disadvantageous treatment of employees because of their union membership, their attempt to join or organize a union, or their having performed proper dispute acts or union activities, etc.; b) refusal to bargain collectively with unions

¹⁰ *Mitsui Soko* case, Supr. Ct., Dec. 14, 1989, Minshu (the Supreme Court Reporter (Civil Cases)) 43-12-2051.

¹¹ K.Sugeno, *supra* note 4, p.520. Some legal scholars oppose this interpretation and consider union shop agreements completely invalid. See, among others, S.Nishitani, RODO KUMIAI HO (Labor Union Law), p.89 (1998).

¹² In fact, most union shop agreements in Japan are "imperfect" ones, under which employers can avoid discharging an employee they regard as essential. Some argue that the main function of such agreements is to declare an employer's recognition of a union. K.Sugeno, *supra* note 4, p.519.

¹³ Ministry of Labour, *Basic Survey on Labour Unions* (1993).

¹⁴ The Trade Union Law (hereinafter TUL), Art.7, No.2.

¹⁵ TUL, Art.1, Par.2.

¹⁶ TUL, Art.8.

without proper reasons; and c) domination over or interference in the formation or operation of labor unions.¹⁷

In order to improve and stabilize future labor relations, Labor Commissions have discretionary authority to issue remedy orders of reinstatement, back pay, good faith bargaining, notice-posting, and so forth, to which judicial courts cannot resort in their decisions.

3. Unions' Participation in the Creation of Working Conditions

Labor unions can be directly or indirectly involved in the creation of individual employees' working conditions.

3.1. Collective Agreements

A collective agreement is a signed or sealed agreement in writing concluded between a labor union and an employer or an employers' organization concerning working conditions and various rules governing the labor-management relationship.¹⁸

3.1.1. The "Normative Effect" of Collective Agreements

Article 16 of the TUL provides that collective agreements have a so-called "normative effect" on labor contracts. In principle, working conditions set forth in a collective agreement become the contents of union members' labor contracts, even if they are more disadvantageous than those stipulated in the original labor contracts. In other words, a union member's individual labor contract is not allowed to change, favorably or unfavorably, working conditions prescribed by collective agreements.

More precisely, according to an authoritative legal scholar's opinion,¹⁹ it is up to the parties to the collective agreement whether to allow more favorable individual agreements than the terms and conditions in the agreement, because there is no statutory provision stipulating the so-called "favorability" principle. However, Japanese collective agreements usually do not have any provision declaring the favorability rule explicitly. Besides, it is natural to consider a collective agreement to be prescribing not minimum standards but actual working conditions in the workplace, if it is concluded at the enterprise level, not at the industry or national level. To sum up, collective agreements have normative effects on labor contracts in both these ways.

3.1.2. Disadvantageous Changes in Working Conditions by Collective Agreements

According to a Supreme Court case, a collective agreement can modify working conditions even disadvantageously to union members, unless its conclusion is considered to deviate from the spirit of labor unions or, for example, it is concluded for the purpose of treating a certain category of the members particularly disadvantageously.²⁰ Many legal scholars concur with this view, on the grounds that collective bargaining is a matter of give-and-take and the denial of labor unions' power to concede would extraordinarily curtail their function granted by the Constitution and the TUL.²¹

3.1.3. Extension of Collective Agreements

As mentioned above (1.2.), the current legislation has adopted the plural union system of bargaining representation. Thus, in principle, a collective agreement only affects the members

¹⁷ TUL, Art. 7, Nos. 1-3.

¹⁸ TUL, Art. 14.

¹⁹ K. Sugeno, *supra* note 4, p. 590.

²⁰ *Asahi Kasai (Ishido)* case, Supr. Ct., Mar. 27, 1997, Rohan (Rodo Hanrei, Labor Case Judgments) 713-27.

²¹ T. Araki, *supra* note 5, p. 465.

of the labor union that concluded it. However, there are two exceptions. According to Article 17 of the TUL, when a collective agreement comes to cover three-quarters or more of the employees of the same kind regularly employed in a workplace, it shall be considered as also applying to the remaining one-quarter or less of the employees. It is generally understood that the extension should not take place when a minority of employees, that is, one-quarter or less of the total employees, are forming their own union, in view of respecting the minority union's right to organize equally with that of the majority union.²²

Article 18 of the TUL provides another possibility for collective agreement extension, that is, regional extension. However, this type of extension has not been used recently because regional level collective agreements are very rare in Japan.²³

3.2. Participation in Drawing Up and Changing Work Rules

Work rules are established by employers and are one of the most important sources of labor law in Japan. Basically employees work in accordance with the conditions stipulated in the work rules. An employer shall draw up work rules if ten or more employees are continuously employed at the workplace.²⁴ According to a Supreme Court precedent, the provision of work rules, if reasonable in content, constitutes the terms of individual labor contracts.²⁵ The Supreme Court also held that, while in principle disadvantageous changes in work rules do not give rise to a binding effect on employees, they do bind the employees if the changes are "reasonable."²⁶

When a labor union organizes more than a half of employees at the workplace, it plays a certain role in regard to the work rules. In drawing up or changing the work rules, the employer must ask the opinion of a labor union organized by a majority of the employees (hereinafter "majority union") or, if there is no such union, of a person representing a majority of employees (hereinafter "majority representative") at the workplace.²⁷ However, it should be noted that all employers have to do is just request the opinion; neither do they have to obtain the employees' consent nor even negotiate with them. This provision only guarantees employees an opportunity to express their views with regard to their working conditions stipulated in the work rules.²⁸

3.3. Participation in Disadvantageous Changes of Working Conditions by Work Rules

Labor unions could play a much larger role when changes in work rules are at stake. As mentioned above, an employee is subject to disadvantageous changes in work rules if the changes are "reasonable." In the *Daishi Ginko* case,²⁹ the Supreme Court clarified the meaning of "reasonableness." According to this case, whether changes in work rules are "reasonable" or not is determined by considering the following factors: the extent of disadvantage; the extent of improvements in related working conditions; the need for changes; social propriety of the changes; and, last but not least, the course of negotiations with the union or the attitude of other employees, which is most important in this context. That is to say, when an employer intends to change working conditions disadvantageously at the workplace where there is a union, what s/he should do is to negotiate with the union and try to obtain its consent. If the employer succeeds in obtaining the consent from the majority union,

²² K.Sugeno, *supra* note 4, p.605.

²³ During the last fifty years, there has only been one case of regional extension.

²⁴ The Labor Standards Law (hereinafter LSL), Art. 89.

²⁵ *Denden Kosha Obihiro Kyoku* case, Supr. Ct., Mar. 13, 1986, Rohan 470-6.

²⁶ *Shuhoku Bus* case, Supr. Ct., Grand Bench, Dec. 25, 1968, Minshu 22-13-3459.

²⁷ LSL, Art.90, Par.1.

²⁸ K.Sugeno, *supra* note 4, p.113.

²⁹ *Daishi Ginko* Case, Supr. Ct., Feb. 28, 1997, Minshu 51-2-705.

there will be more chances for her or him to win the lawsuit. This means that labor unions may hold the decisive vote.

3.4. Workplace Labor-Management Agreements

A workplace labor-management agreement, which must be distinguished from a collective agreement,³⁰ is a written agreement concluded between the employer and the majority union or, if there is no such union, the majority representative at the workplace. A majority union could use this agreement as a means of negotiation with the employer by offering to conclude (or not to conclude) it, because certain kinds of these agreements, such as the so-called “Article 36 agreement” mentioned below, are indispensable for the normal operation of the enterprise in Japan.

3.4.1. Effects of Workplace Labor-Management Agreements

The LSL sets up the mandatory minimum standards of working conditions. Employers cannot be exempted from the obligation to observe these standards even with the consent of the employee. Any part of a labor contract providing for working conditions which do not meet the standards of the LSL shall be invalid and be replaced by the standards.³¹ In addition, a penalty shall be imposed upon an employer who has violated the LSL. For example, if a boss has his or her assistant work for more than eight hours a day,³² s/he will possibly be punished with imprisonment or a fine.³³ It is also possible for the enterprise itself to be fined.³⁴

However, workplace labor-management agreements ease the above-mentioned employers’ obligation. For example, if a workplace labor-management agreement has been concluded concerning overtime work (the so-called “Article 36 agreement”) and filed with the administrative office, the employer is allowed to have employees work more than eight hours a day.³⁵ With workplace labor-management agreements, employers can engage employees in overtime work without violating the LSL. More generally speaking, while an employer cannot escape from the regulations of the LSL, even when an employee agrees to it individually, s/he can do so if there is collective consent, that is, a workplace labor-management agreement, which has the “derogatory” or “contract-out” power from the legal norms.

Yet it should be noted that a workplace labor-management agreement itself does not have any normative effect on individual labor contracts, because there is no such statutory provision. It simply makes the employer immune from the criminal liability of the LSL. It requires some form of legal grounds, such as a collective agreement, work rules, or an individual labor contract, to impose a civil obligation to work overtime, etc. on an employee.³⁶

3.4.2. Types of Workplace Labor-Management Agreements

Under the LSL, an employer has to conclude a workplace labor-management agreement with a majority union or representative: a) to manage employees’ savings entrusted by them;³⁷ b) to deduct a sum from employees’ wages;³⁸ c) to adopt working-hours averaging systems;³⁹

³⁰ However, a collective agreement can also serve as a workplace labor-management agreement, if the former satisfies the legal requirements of the latter.

³¹ LSL, Art.13.

³² LSL, Art.32, Par.2.

³³ LSL, Art.119, No.1.

³⁴ LSL, Art.121, Par.1.

³⁵ LSL, Art.36, Par.1. In this case the employer must pay increased wages for overtime. LSL, Art.37, Par.1.

³⁶ Jan. 1, 1988, Kihatsu (Notification in the name of the Chief of the Labor Standards Bureau), No.1, 7(5).

³⁷ LSL, Art.18, Par.2.

³⁸ LSL, Art.24, Par.1.

³⁹ LSL, Art.32-2, Par.1; Art.32-4, Par.1; Art.32-5, Par.1.

d) to adopt a flexi-time system;⁴⁰ e) to be exempted from the obligation to give all the employees a recess at the same time;⁴¹ f) to engage employees in overtime or holiday work;⁴² g) to adopt a special working hours calculation system for work outside the workplace;⁴³ h) to adopt a discretionary work scheme for professional jobs;⁴⁴ i) to adopt a scheduled annual paid-leave system;⁴⁵ and j) to pay the wages for annual paid-leave days in the form of standardized remuneration under the social insurance system.⁴⁶

The Child and Long-Term Care Law also uses workplace labor-management agreements as a condition for deregulation. An employer has to conclude an agreement to deny a request for child or long-term care from an employee of certain categories.⁴⁷

3.5. Joint Labor-Management Consultation

Even when there is a union at the workplace, in many cases joint labor-management machinery is voluntarily established and the union often acts as a party to such consultation. According to a survey, 80.5 percent of the unionized workplaces have such machinery.⁴⁸ As mentioned above, because most of Japanese labor unions are organized at the enterprise level, it is hard to draw the line between collective bargaining and joint consultation; both take place at the enterprise or workplace level, and both deal with the same subjects such as working hours, wages, holidays, and so forth.⁴⁹ In short, the only difference is the level of formality. Joint consultation is a more informal procedure than collective bargaining, under which an employer and a union can discuss any issue other than the so-called “mandatory bargaining subjects,” with no holds barred and in a more cooperative way. In other words, informal joint consultation complements formal collective bargaining.

III. Non-Union Employee Representation Systems

1. Majority Representatives

Under the current law, as mentioned above, a majority representative can always be an alternative for a majority union when the latter does not exist at the workplace. A majority representative is a person who is qualified to represent the employees at the workplace and thus must be independent of the employer. S/he must be chosen from among employees who are not in managerial or supervisory positions. This is done by voting or a show of hands, accompanied by an explanation that such a method is taken to select a person who has the authority to conclude a workplace labor-management agreement or of whom the employer should ask the opinion in drawing up or changing work rules.⁵⁰ An employer shall not accord disadvantageous treatment to a majority representative on the grounds of his or her being, having tried to become, or having performed proper acts as, a majority representative.⁵¹

Employers shall neither take any initiative nor reflect their intention in this selection process.⁵² In the *Tokoro* case, a workplace labor-management agreement was held illegal and

⁴⁰ LSL, Art.32-3, Par.1.

⁴¹ LSL, Art.34, Par.2.

⁴² LSL, Art.36, Par.1.

⁴³ LSL, Art.38-2, Par.2.

⁴⁴ LSL, Art.38-3, Par.1.

⁴⁵ LSL, Art.39, Par.5.

⁴⁶ LSL, Art.39, Par.6.

⁴⁷ The Child and Long-Term Care Law, Art.6, Par.1.

⁴⁸ Ministry of Labour, *Labour-Management Communication Survey* (2004).

⁴⁹ T.Araki, *supra* note 5, p.463.

⁵⁰ LSL Enf. Reg., Art.6-2, Par.1.

⁵¹ LSL Enf. Reg., Art.6-2, Par.3.

⁵² Jan. 1, 1988, Kihatsu, No.1, 7(5).

void. This was because a party to the agreement was a representative of an employee friendship association composed of all the employees of the company including officers and the selection process was not democratic in that there was no opportunity for employees to decide whether or not the person was qualified to conclude a labor-management agreement as a representative of the workplace.⁵³

When there is a union but it only organizes less than a half of the employees at the workplace, the union cannot conclude a workplace labor-management agreement by itself. In such a case, labor unions would probably take some initiative in choosing a majority representative.

It has been pointed out that, as to a majority representative, there are several flaws in the current law. For example, it is not clear if a majority representative can be appointed on a fixed term or if more than one person can act as such a representative.⁵⁴

2. Labor-Management Committee

2.1. Background

In principle, if the hours worked exceed the daily or weekly legal maximum hours, the employer is required to pay increased wages for the overtime work. An exception to this principle is discretionary work schemes. Under a discretionary work scheme for professional jobs,⁵⁵ an employer can calculate the number of work hours based on the conclusive presumption of work hours agreed in a workplace labor-management agreement, irrespective of the number of hours actually worked.⁵⁶

Another type of discretionary work scheme was introduced by the 1998 revision of the LSL and put in effect on April 1, 2000. This newly-introduced scheme, that is, a discretionary work scheme for management planning jobs, also uses the above-mentioned method of presuming working hours. It covers duties of planning, research, and analysis regarding the operation of the enterprise which are performed at the discretion of the employees engaged in such duties and for which the employer does not give any concrete directives.⁵⁷

In the late 1990s, business circles strongly contended that the discretionary work scheme should be made available for most white-collar employees, not only for professionals. By contrast, the labor side severely opposed the expansion of the scheme for fear that it could deprive employees of their rights to overtime pay.⁵⁸ A compromise was finally reached.⁵⁹

⁵³ *Tokoro* case, Tokyo High Ct., Feb. 17, 1997, Rohan 729-44, approved by Supr. Ct., Jun. 22, 2001, Rohan 808-11.

⁵⁴ The University of Tokyo Labor Law Study Group (ed.), CHUSHAKU RODO KIJUN-HO (Commentary on Labor Standards Law) (I) (2003), p.45 [Kawata].

⁵⁵ Professional activities covered by this scheme include research and development of new products and technology, planning and analysis of information-management systems, information-gathering and editing in the mass media, designing, TV or film producers and directors, duties of attorneys and university professors, and so forth.

⁵⁶ LSL, Art.38-3.

⁵⁷ LSL, Art.38-4.

⁵⁸ Unpaid overtime work is undoubtedly illegal but is not a very rare phenomenon in Japan, particularly among white-collar workers. Many companies regard overtime exceeding a certain amount of hours as being done "voluntarily." From the employers' side, the discretionary work scheme was needed to regulate the reality adequately. From the labor side, extending the coverage of the discretionary work scheme was legalization of illegal unpaid overtime. T.Araki, "Regulation of Working Hours for White-Collar Workers Engaging in 'Discretionary Activities,'" Japan Labor Bulletin, Vol. 35, No. 7 (1996) (page number unidentified; see <http://www.jil.go.jp/bulletin/year/1996/vol35-07/05.htm>).

⁵⁹ Traditionally Japanese labor policies have been formed by tripartite deliberation councils, not by the National Diet. Such councils are composed of labor and management representatives, and scholars and experts representing public interests. If the labor or management side opposes a proposal draft of the council, it will not become the bill to be submitted to the Diet.

Labor unions agreed to the introduction of the new discretionary work scheme but businesses had to concede stricter regulations in the new scheme: the labor-management “committee,” instead of the workplace labor-management “agreement.”

2.2. Powers and Roles

A labor-management committee is composed of labor and management members. Half of the committee members, that is, labor members, must be designated with a fixed term by a majority union or representative. The minutes of the committee meetings must be taken, kept, and known to the employees at the workplace.⁶⁰

Currently, the introduction of a discretionary work scheme for management planning jobs is the only case where the creation of a labor-management committee at the workplace is required.⁶¹ However, under the current law, a committee is expected to play a more general role; it is set up to investigate and deliberate matters related to working conditions such as wages, working hours, etc. and offer its opinions on such matters to the employer.⁶² The committee’s resolution, adopted by four-fifths or more of the membership, can replace a workplace labor-management agreement as to working hours or annual paid-leaves such as an “Article 36 agreement,” a flexi-time agreement, and so forth (see II.3.4.2.).

In the same way as a workplace labor-management agreement, a labor-management committee’s resolution does not have a normative effect on individual labor contracts. It only works to immunize the employer against criminal liability (see II.3.4.1.).

3. Committee for Promoting the Reduction of Working Hours

The Law concerning Temporary Measures for Promoting the Reduction of Working Hours provides the employers’ duty to endeavor to set up a committee for promoting the reduction of working hours.⁶³ The committee’s resolution adopted by four-fifths or more of the membership can replace a workplace labor-management agreement in the same way as a labor-management committee does (see 2.2.).

4. Joint Labor-Management Consultation

Voluntary joint labor-management consultation takes place at workplaces without labor unions as well as at unionized companies (see II.3.5.). In this case, the party representing employees is elected by mutual vote or appointed by the employer.⁶⁴

IV. Recent Developments in Collective Labor Relations

1. The Slow Death of the Spring Wage Offensive (“*Shunto*”)

It has been said that the spring wage offensive (*Shunto*) system makes up for the defects in Japan’s decentralized industrial relations such as the weak bargaining power of enterprise unions, and the lack of drive to establish industry- or nation-wide fair labor standards. In short, this system intends to spread a level of wage increases in leading companies in key

⁶⁰ LSL, Art.34-3, Par.2.

⁶¹ A labor-management committee must specify in its resolution the duties covered by the discretionary work scheme for management planning jobs and the number of hours which employees engaged in those duties will be deemed to have spent.

⁶² LSL, Art.38-4, Par.1.

⁶³ As of April 1, 2006, the law will be renamed as the Law concerning Special Measures for Improving Allocation, Etc. of Working Hours and thereafter the committee will be addressed as a committee for improving allocation, etc. of working hours.

⁶⁴ 72.8 percent of non-unionized workplaces hold mutual elections and 32.9 percent use the appointment-by-employer system. Ministry of Labour, *Labour-Management Communication Survey* (2004).

industries over other companies and industries by synchronizing enterprise-level collective negotiations. First, industrial federations of enterprise unions and national confederations set the goal for wage increases, the time schedule of negotiation and possible strikes for each industry. Then, at the beginning of the schedule, leading enterprise unions in key industries try to set the pattern for that year's wage increases. Other unions follow suit. There is no need for an enterprise union to fear losing its competitiveness in the market even when it considers going on strike, because its competitors are also in the midst of collective bargaining at the same time.

The *Shunto* outcome affects wage levels in the public sector, because the National Personnel Agency refers to it in recommending standard wage increases for public service employees. It also virtually decides the wages of employees in the unorganized sector such as part-time workers, because regional minimum wages, revised every fall, are decided by referring to the *Shunto* increases.

In this manner, until recently, the *Shunto* system made Japanese decentralized collective labor relations work as if they were centralized. Thanks to the system, for more than 40 years, labor unions have succeeded in showing off their *raison d'être* to the public. However, at present, the effectiveness of the *Shunto* is questioned. Recently, the *Shunto* has yielded only a trifling wage hike, even though it has expended a huge amount of time and money. Due to low economic growth, people care about their employment security, not about wage increases. Besides, there may be no room for *Shunto*'s wage hike to directly affect individual employees' wages, because in most cases, particularly concerning white-collar workers, their wages are determined individually based on the evaluation of the individual's performance.⁶⁵ Above all, people wish to be individualized; most employees, particularly of the younger generation, do not consider the *Shunto* or labor unions "cool."

2. Reforms under Consideration

In 2005, a report of the Study Group on Future Labor Contract Legislation, composed mainly of authoritative labor law professors and established by the Ministry of Health, Labor and Welfare, proposed that the labor-management committee should play a much larger role in future labor legislation. More concretely, it recommended that the legislator should promote the establishment of a standing labor-management committee, where the employer and the employees can discuss matters related to working conditions on an equal footing in non-unionized workplaces. In addition, the report also proposed that a labor-management committee's resolution should have a certain legal effect in labor contract legislation; for example, disadvantageous changes in work rules (see II.3.3.) shall be presumed "reasonable," when a resolution approving the changes is adopted by four-fifths or more of the committee members.

The report also suggests that a standing labor management committee should be allowed to be set up even when there is a majority union, as long as it does not impede the union's function in collective bargaining. The labor side strongly opposes it. The Japanese Trade Union Federation (RENGO) considers it one of the "biggest problems" in the content of the report, stating that "a labor management committee, of which the function essentially differs from a labor union" should not be given an important function such as consulting over the determination and change of working conditions and judging "reasonableness" of changes in work rules. The National Confederation of Trade Unions (ZENROREN) criticizes the report more severely for turning labor unions into a total wreck and destroying their rights by introducing the new standing labor-management committee system.

⁶⁵ T.Araki, *supra* note 5, p.471.

V. Conclusion

1. Jurisdictional Peace?

Under the current decentralized system in Japan, one of the most complex legal issues debated in other countries does not necessarily need to be considered: conflict of jurisdiction. Labor unions are organized at the enterprise level. Collective agreements are concluded at the enterprise level. An enterprise level collective agreement prescribes enterprise-specific, actual working conditions and has a normative effect on individual labor contracts, even if it is more disadvantageous than the original contracts. No problem occurs as to conflicts of jurisdiction between the enterprise level and industry or region level, because there is almost no industry or regional collective bargaining or agreement.

At the enterprise or workplace level, a workplace labor-management agreement plays an important role. Yet there is no jurisdictional problem between such an agreement and an enterprise-level collective agreement, because, unlike the latter, the former does not have a normative effect on individual labor contracts; it only immunizes the employer against criminal liability. In other words, the role of a workplace labor-management agreement is different from that of a collective agreement. The same goes for a labor-management committee under the current law. Its resolutions do not have a normative effect on individual contracts.

There is almost no conflict of jurisdiction between a labor union and a non-union representative either. The current legislation adopts a purely simple democratic system: if a labor union organizes more than a half of the employees at the workplace, it can exercise the authority to conclude a workplace labor-management agreement or designate labor-side labor-management committee members. If there is no majority union, a majority representative performs such duties. In this case one might say that there is a jurisdictional problem between a non-majority union and a majority representative. However, a majority representative cannot do what a minority union can under the current plural unionism, such as going on strike, demanding collective bargaining, and so forth. All s/he can do is to allow derogation from the legal norms under the LSL. Thus, it is fair to say that there is no conflict of jurisdiction in practice.

Under the current legislation, a labor-management committee is expected to play a general role such as investigating and deliberating matters related to working conditions, and offering its opinions on such matters to the employer. If a committee really carried out these missions, there could be a partial conflict between the roles of the committee and labor unions. Yet it is not a legal obligation to set up such a committee, unless the discretionary work scheme for management planning jobs is adopted at the workplace. Even if a committee is set up, its resolutions do not have a normative effect on individual labor contracts.

2. The Need for Labor-Management Committees as Joint-Determination Machinery?

It may be a good idea to promote replacing a workplace labor-management “agreement” with a labor-management “committee” as a means of derogation from legal norms under the LSL with a view to securing an institutional basis of more effective negotiation. However, it seems that the Study Group on Future Labor Contract Legislation has gone further. The report of the Study Group tries to create a new jurisdictional problem by promoting the establishment of a standing labor-management committee with the power to participate in forming or changing working conditions. Needless to say, the Study Group does not intend to bring labor unions to ruin; it is seriously worried about the dysfunction of enterprise unionism. At the centralized level, the *Shunto* system faces difficult challenges. At the decentralized level, union density has steadily declined. The group may believe that there must be a place for employees and the employer to discuss and make decisions in every

workplace and that labor law should set the stage for it.

Yet it is doubtful if labor law should really be that paternalistic. Employees are already granted a special exclusive privilege by law, that is, the right to organize a labor union. Under the current plural unionism, all employees can get together and form a union. Every union, regardless of its size, has the right to demand negotiation with the employer and go on strike. It is true that in Japan most enterprise unions are only organized by regular employees, the unionization rate has been declining year by year, and it is particularly low in the service industry, in newly-emerged “IT” (information technology) companies, and among temporary or part-time workers. However, it should be noted that all the employees in such categories are equally guaranteed the same right to organize a union as regular-employees in large companies. Despite that, they voluntarily choose not to do so. Most existing labor unions have not organized, or have failed to organize, these people. Is it really possible for employees in IT industries or part-time workers who have been indifferent to labor unions or the *Shunto*, all of a sudden, to get actively involved in the operation of a standing labor-management committee, when the law requires every workplace to set up such a committee? Without any doubt, labor law is interventionist and paternalistic in nature. Thus, we must always examine whether it has gone too far.