

The System of Employee Representation at the Enterprise in Japan

Hisashi Takeuchi-Okuno*

I. Introduction

Enterprise unions in Japan, especially those organizing the majority of employees in the workplace, have represented member employees as well as non-member employees in an enterprise through collective bargaining as well as the joint-consultation system.¹ However, due to the fact that the unionization rate has continued to decline and that the ratio of non-regular employees not yet organized has been sharply rising, more and more employees are left without representation through labor unions.

Meanwhile, although Japanese labor law has developed statutorily institutionalized mechanisms through which employees in the workplace are represented, namely the majority representation system and the labor-management committee, these are far from full-fledged systems of employee representation like the works councils in European countries, especially in terms of their function and organization.² Simply put, employees are insufficiently represented through the statutorily institutionalized system of employee representation in Japan.

In this article, the nature of enterprise unions, the roles they play (or have played), and their presence in modern workplaces are analyzed (section II). Then, the historical development, functions, organization, and operation of a majority representative and a labor-management committee will be discussed (section III). The article concludes with an evaluation of the current systems of employee representation at the enterprise and the scholarly calls for reform (section IV).

* Associate Professor, Faculty of Law and Politics, Rikkyo University, Japan

¹ See generally Takashi Araki, *Labor and Employment Law in Japan* 179-181 (2002), for the explanation of the joint-consultation system. Under the joint-consultation system, an employer and a union mainly provide information and/or consult over a variety of matters, including working conditions as well as managerial matters. It is a voluntary, cooperative rather than adversarial system, and even when the parties cannot agree, resort to industrial action is not expected. Informal joint-consultation between management and labor can be found even in some non-unionized companies (*see infra* note 17). This article focuses on the formal, legally institutionalized system of employee representation at the enterprise, and will not discuss the details of the informal joint-consultation mechanism.

² It is possible, therefore, to say that *virtually*, the Japanese system of employee representation at the enterprise is the *single channel system* through labor unions.

II. Employee Representation through Enterprise Unions

1. Enterprise Unionism

In Japan, slightly more than 10 million of the roughly 54 million (or 18.5%) employees in both public and private sectors were organized by labor unions in 2010.³ Nearly 90% of unionized workers were organized by enterprise unions, accounting for more than 95% of all unions nationwide.⁴

Enterprise unions, as the name indicates, are organized and bargain collectively on an enterprise (or establishment⁵) basis. Union membership is limited to the employees (in most cases regular employees) of a particular firm and a union is managed by officials elected from the union members who are employees of the company. Each enterprise union bargains collectively with its company over the concrete terms and conditions of employment with the company. Though many of the enterprise unions are affiliated with industrial alliances and through them, national centers such as JTUF-RENGO (the largest national center), control by these groups over enterprise unions is quite limited. About a third of organized employees are members of enterprise unions that are not affiliated with any industrial alliances or national centers and instead remain purely in-house organizations.⁶

2. Enterprise Unions as the Representative of Employees at the Enterprise

A labor union, whether it is an enterprise union, a regional union, or an industrial union, enjoys the rights “to organize and to bargain and act collectively” as guaranteed in article 28 of the Constitution. Unions also enjoy protections provided in the Labor Union Act such as a remedy from the Labor Relations Commissions for an employer’s unfair labor practices, including disadvantageous treatment, refusal to bargain without just cause, or dominance and interference. These protections are provided if, basically speaking, the union is an organization mainly composed of workers and maintains independence from an employer.⁷ Such a labor union can bargain with an employer who employs a member of the union (the employer is obliged to bargain with the union) and is immune from civil and criminal liability for “justifiable”⁸ strikes and other industrial actions. Under Japanese labor law, a plural representation system is adopted instead of an exclusive representation system, and each union has the right to bargain collectively with respect to matters affecting its own members irrespective of its size or the number of its members.⁹ Since

³ Ministry of Health, Labor and Welfare, *Basic Survey on Labor Unions FY 2010*, available at: <http://www.mhlw.go.jp/toukei/itiran/roudou/roushi/kiso/10/index.html> (last accessed Apr. 6, 2012). In 2011, union members fell slightly short of 10 million (9.96 million) for the first time in 47 years. Ministry of Health, Labor and Welfare, *Basic Survey on Labor Unions FY 2011*, available at: <http://www.mhlw.go.jp/toukei/itiran/roudou/roushi/kiso/11/index.html> (last accessed Apr. 6, 2012). The unionization rate in FY2011 is not available due to the Great East Japan Earthquake.

⁴ Takashi Araki, *supra note 1*, at 165. Note that the number of labor unions amounts to about 26,000 in 2010 (see Ministry of Health, Labor and Welfare, *Basic Survey on Labor Unions FY 2010*, *supra*), which itself indicates that labor unions are established in decentralized, enterprise-by-enterprise bases in Japan.

⁵ See below III 1 (3) (i), for the meaning of an “establishment.”

⁶ Kazuo Sugeno, *Koyo Shakai no Ho Hoteiban (Employment System and Labor Law, revised ed.)* 291 (2004).

⁷ See Hisashi Takeuchi-Okuno, *General Unions and Community Unions, and Japanese Labor Law*, 9 *Japan Labor Review* 86 (2012) (available at: <http://www.jil.go.jp/english/JLR.htm> (last accessed Apr. 6, 2012)), at 88-95, for detailed requirements for these rights and protections and an overview of the contents of these rights and protections.

⁸ See *id.*, at 93-94 and Araki, *supra note 1*, at 184-186, for the meaning of “justifiability.”

⁹ *Nissan Jidosya v. Cent. Lab. Rel. Comm’n*, 39 *Minshu* 730 (S. Ct., Apr. 23, 1985) (the Supreme Court held that where two or more labor unions concurrently exist within one firm, each of these unions, irrespective of its size or the number

under Japanese labor law, the independence of enterprise unions is confirmed with almost no doubt, these unions represent member employees at an enterprise with regard to terms and conditions of employment through collective bargaining.

In addition, enterprise unions that organize the majority of employees at an establishment have historically more or less represented *all* the employees of the establishment. Under the Japanese labor law, a union-shop agreement is valid as long as it is concluded between the employer and the majority union of an establishment and it does not stipulate expulsion of members of other unions.¹⁰ A majority union, having concluded a union-shop agreement, will represent all of the employees as long as there are no other unions in the workplace. Also, if there is a majority union in the workplace, modification of work rules,¹¹ through which an employer is able to change working conditions of *all* the employees in the workplace, is usually made through collective bargaining with the majority union. Finally, some Supreme Court cases presume the reasonableness of modification of work rules (in other words, the binding effect of modified terms and conditions of employment) if the modification is made with the approval of a majority union,¹² thus implicitly recognizing the majority union as a desirable body to represent all the employees in the workplace.

3. Decrease or Lack of Union Presence in an Enterprise

Although, as mentioned above, enterprise unions represent employees at the enterprise level and in some respects function as a body to represent all the employees at that level, their presence continues to decline. The unionization rate was a little more than 30% until 1975, but has continued falling annually since then (with the exception of 2009). The unionization rate declined until the mid-90s because the increase in the number of entire employees outgrew the increase in the number of union members. Since the mid-90s, the decrease of union members¹³ combined with the rapid increase of non-regular

of its members, has its own right to bargain collectively with the firm). According to the Japan Institute for Labor Policy and Training ed., *Rodo Jyoken no Settei Henko to Jinji Shogou ni Kansuru Jittai Chosa (A Research on the Reality of Setting and Changing Working Conditions and Human Resource Management)* 123 (2005), there exists more than one labor union in 4.8% of establishments.

¹⁰ *Mitsui Soko Ko'un v. Miura*, 43 Minshu 2051 (S. Ct., Dec 14, 1989) (the Supreme Court held that a part of an union-shop agreement which stipulated the employer's obligation to discharge an employee who is a member of another labor union and not a member of the one which is the party to the agreement was null and void because such a provision would be an infringement on the right to organize of members of other labor unions). 60.9% of labor unions concluded union-shop agreements with their employer in 2008. Ministry of Health, Labor and Welfare, *Survey on Labor-Management Communications FY 2008*, statistical chart no. 3 (available at: <http://www.e-stat.go.jp/SG1/estat/List.do?bid=000001023484&cycode=0> (last accessed Apr. 6, 2012)).

¹¹ "Work rules" (called as *Syugyo Kisoku* in Japanese) are a set of rules stipulated by employer, and although an employer can install them unilaterally (as discussed below III 1 (2) (ii), an employer is obliged by the Labor Standards Act only "ask the opinion" of majority representative at the establishment when he/she stipulates work rules), the Supreme Court has confirmed that work rules would be the contents of employment contract if its contents were "reasonable." *Yoshikawa v. Shuhoku Basu*, 22 Minshu 3459 (S. Ct., Grand Bench, Dec. 25, 1968); *Satoh v. Daishi Ginko*, 51 Minshu 705 (S. Ct., Feb. 28, 1997). Article 10 of the Labor Contract Act of 2007 incorporated the case law and stipulates that contents of employment conditions shall be in accord with those of work rules, as far as the modification of work rules are "reasonable" and if the modified work rules are made public to employees in the establishment. As for the case law on work rules, see generally Araki, *supra* note 1, at 51-55.

¹² *Dai Ichi Kogata Haiya v. Oikawa*, 630 Rodo Hanrei 6 (S. Ct., Jul. 13, 1992); *Satoh v. Daishi Ginko*, *supra* note 11. *But see, Murose v. Michinoku Ginko*, 54 Minshu 2075 (S. Ct., Sep. 7, 2000) (the Supreme Court denied the reasonableness of modified work rules with the approval of majority union, putting emphasis on the severity of the disadvantage brought to employees).

¹³ The Japan Institute for Labor Policy and Training ed., *Rodo Jyoken Kettei Sisutemu no Genjyo to Hokosei (The Present and Future of the System of Determining Terms and Conditions of Employment)* 38 (2007).

employees (such as part-time workers and temporary workers) to whom enterprise unions in the majority of cases have been denying membership and who therefore are far less organized by unions,¹⁴ has resulted in a decrease in union density.

Additionally, employees of smaller companies are less represented by labor unions. In 2010, the unionization rate (the ratio of union members to those employed) was 46.2% among private enterprises with 1,000 workers or more, whereas the rate was lower among those with 100 to 999 workers (14.2%) and far lower among those with 99 workers or less (1.1%).¹⁵ There exists a labor union in 73.6% of companies employing 1000 or more workers, whereas the rate decreases as the size of the firm gets smaller: 46.2% in companies employing 300 to 999 workers, 33% in companies employing 100 to 299 workers, 16.3% in companies employing 50 to 99 workers, and only 4.4% in companies employing 10 to 49 workers in 2004.¹⁶ These number shows that employees in medium- and small-sized companies are often not represented by labor unions.¹⁷

III. Majority Representation and Labor-management Committee

Apart from representation through labor unions, Japanese labor and employment law provides —albeit in a sporadic and immature way—alternative systems of employee representation at an enterprise, namely, the majority representation system and the labor-management committee system. These are the systems of employee representation on an establishment basis, enabling employees to voice their views on certain matters concerning their working conditions and especially allowing employers to derogate from statutory regulations. There is no system of employee representation on corporate boards.

1. Majority Representation

The majority representation system is the system in which a labor union organized by a majority of the employees at an establishment or a person representing a majority of the employees at an establishment where a majority union is not organized will be designated as the representative of all the employees in the establishment with regard to the regulations of certain working conditions under statutes such as the Labor Standards Act (hereinafter the LSA).

(1) Historical Development

The majority representation system originates from articles 36 and 90 of the LSA, enacted in 1947. Article 36 of the LSA allows an employer to derogate from the working

¹⁴ The unionization rate of part-time workers is 5.6% in 2010. Ministry of Health, Labor and Welfare, *Basic Survey on Labor Unions FY 2010*, *supra* note 3. As for temporary workers, estimated unionization rate in 2005 is 8.3%. The Japan Institute for Labor Policy and Training, *supra* note 13, at 43. The ratio of “non-regular worker” to entire employees has risen relatively sharply since mid-90s, and is 34.4% in 2010. *Labor Force Survey*, historical data no. 9, available at: <http://www.stat.go.jp/english/data/roudou/Ingindex.htm> (last accessed Apr. 6, 2012).

¹⁵ Ministry of Health, Labor and Welfare, *Basic Survey on Labor Unions FY 2010*, *supra* note 3.

¹⁶ The Japan Institute for Labor Policy and Training, *supra* note 13, at 44-45.

¹⁷ Note that the fact that employees are not represented by a labor union does not necessarily mean that they have no mechanism to voice their views. In about a quarter of establishments where there is no union, joint-consultation between an employer and employees is conducted. About 60% of such establishments have an association of employees such as an amity association, and about 20% of them perform a function to voice views of employees. This is possible because, unlike in the U.S., it is not necessarily an unfair labor practice for an employer to initiate a non-union mechanism of employee representation. Note further, however, the employees’ voice through these mechanisms is largely confined to matters concerning working hours and benefits. See Japan Labor Institute ed., *Mukumiai Kigyo no Roshi Kankei (The Labor-Management Relations in Enterprises without Union)* 5-6, 105-128 (1996).

hour regulation and rest-day regulation by ordering overtime work under the condition of concluding a labor-management agreement with a majority representative (i.e., a labor union organized by a majority of the employees at an establishment or a person representing a majority of the employees at an establishment where a majority union is not organized) and thereafter submitting the agreement to the local labor inspection office. Mr. Kosaku Teramoto, the government official who played an important role in enacting the LSA in 1947, explains the purpose of requiring the consent of the majority representative for derogation from the working hour and rest-day regulations as effectuating these regulations by allowing deviation only with the collective consent of employees, which is more enlightened than the consent of individual employees.¹⁸

Article 90 of the LSA requires an employer seeking to establish or amend work rules¹⁹ to ask an opinion²⁰ of the majority representative. Mr. Teramoto expected that the involvement of the majority representative in establishing work rules “allows for employees to be assured the opportunity to participate collectively in the determination of working conditions and leads to the conclusion of the collective bargaining agreement.”²¹ It should be noted that with regard to the regulation of article 90 of the LSA, Mr. Teramoto seems to mainly assume a majority union, not a person representing the majority of employees at an establishment, as the majority representative (in other words, representation through labor unions).²²

After its enactment, provisions were gradually added to the LSA that involved the majority representative in conclusion of labor-management agreements that are required for an employer to derogate from the regulation in the Act similar to the stipulations of article 36.²³ Other labor and employment statutes also came to involve the majority representation system.²⁴ At present, there are about 50-60 provisions stipulating the involvement of a majority representative in various labor and employment statutes.^{25 26}

(2) The Functions of Majority Representative

The functions of the majority representative are stipulated in provisions in the LSA and other labor and employment statutes. They can be grouped into four categories: (i) to be a party to a labor-management agreement, (ii) to deliver an opinion when an employer establishes or amends work rules, (iii) to appoint or nominate members of workplace committees such as a labor-management committee, and (iv) to be consulted with regard to

¹⁸ Kosaku Teramoto, *Rodo Kijyun Ho Kaisetsu (Commentary on the Labor Standards Act)* 237 (originally published in 1948).

¹⁹ Article 89 of the LSA requires an employer employing 10 or more employees in an establishment to install work rules for the establishment.

²⁰ See below (2) (ii), for the meaning of “ask an opinion.”

²¹ Teramoto, *supra* note 18, at 354.

²² At the time when the LSA was enacted, nearly half (45.3%) of those employed were organized by labor unions and it seems that assuming labor unions (most of which were enterprise unions) as the representative at the enterprise level was quite realistic at that time.

²³ The number of provisions stipulating the involvement of the majority representative for a derogatory purpose especially increased in 1987, when the LSA was amended to introduce various measures for flexible working time arrangements such as hours-averaging schemes, flextime, and discretionary work schemes for professional work. See generally Araki, *supra* note 1, at 89-96 for the explanation of these arrangements.

²⁴ See *infra* note 33, for examples of provisions involving the majority representative.

²⁵ See Noriaki Kojima, *Jyugyoin Daihyo Sei (the System of Employee Representation)* in *Rieki Daihyo Sisutemu to Danketsuken (the System of Representing the Interests of Employees and the Right to Organize)* 50 (Nihon Rodo Ho Gakkai ed., 2000), 56-60 (reporting 60 provisions stipulating involvement of majority representative effective in 2000).

²⁶ In addition to these functions in labor and employment law, statutes concerning reorganization procedure of companies stipulate that majority representative shall be notified or deliver an opinion with regard to the reorganization.

a split of a company. Of these functions, (i) is the most important role that majority representatives play. Nearly half of the provisions referring to a majority representative fall into this category. In contrast, functions (ii) and (iii) are relatively less significant, and function (iv) is quite exceptional.

(i) Concluding a Labor-management Agreement

As mentioned above, the most important role of a majority representative is to be a party to a labor-management agreement. These labor-management agreements are concluded in most cases as a pre-condition²⁷ for allowing an employer to derogate from statutorily stipulated standards with regard to all the employees²⁸ in an establishment.

The most typical labor-management agreement occurs under article 36 of the LSA (often called an *article 36 agreement*). If an employer and a majority representative in an establishment conclude a labor-management agreement in writing stipulating the specific reasons for requiring employees to work overtime or on rest-days, the type of jobs and number of employees with regard to which overtime work or rest-day work are required, the number of hours the employer may order overtime work in a day and a fixed period exceeding a day (week, month, etc.), and the days off on which the employees may be required to work in accordance with the article 36 of the LSA and the article 16 of the Ordinance for Enforcement of the LSA, the employer *may* require all the employees within the establishment to work overtime or on rest-days. In other words, the employer will be exempt from the penalty²⁹ for requiring employees to work beyond the daily and weekly maximum hours allowed under the LSA or to work on the rest-day irrespective of the regulation in the LSA that requires employers to provide at least one rest-day per week, and the employer's order for overtime or rest-day work will not be nullified by these regulations.

Conclusion of a labor-management agreement does not, in general, directly affect rights and duties of employees.³⁰ For example, an article 36 agreement itself does not establish employees' contractual duty to work overtime or on rest-day.³¹ An employer must provide a proper contractual basis through a collective bargaining agreement, work rules, or individual employment contract. Note, however, that the Supreme Court³² held with regard to the duty to work overtime that a provision in work rules stipulating that an employer may order overtime work based on business necessities in accordance with a labor-management agreement is sufficient as a contractual basis even when the labor-management agreement provided reasons for overtime work in general terms. Concluding an article 36 agreement, therefore, has a significant *de facto* influence on the working hours of employees.

²⁷ This means that a majority representative has a veto on employer's derogation from labor and employment statutes. However, it seems less common that the veto power is exercised, especially with regard to derogation from the regulation on overtime and rest-day work.

²⁸ Therefore, for example, when a majority union concludes a labor-management agreement, the agreement is effective even in terms with an employee who is not the member of the majority union.

²⁹ Article 119 of the LSA stipulates that any person who violated the regulation on maximum working hours or rest-days shall be punished by imprisonment with work of not more than 6 months or by a fine of not more than 300,000 yen.

³⁰ One exception is that a labor management agreement on scheduled paid leave concluded in accordance with article 39, paragraph 6 of the LSA. The period of annual paid leave designated in or determined in accordance with the agreement is binding on both the employer and the employees, and an employee cannot designate another period for his/her paid leave. *Masuda v. Mitsubishi Heavy Industries Ltd.*, 45 Rominshu 123 (Fukuoka High Ct., Mar. 24, 1994).

³¹ Araki, *supra* note 1, at 87.

³² *Tanaka v. Hitachi, Ltd.*, 45 Minshu 1270 (S. Ct., Nov. 28, 1991).

The labor-management agreements that an employer is required to conclude with a majority representative for derogation from the regulations of the LSA other than an article 36 agreement include: an agreement authorizing an employer to take charge of employees' savings entrusted to him/her (article 18); an agreement allowing an employer to deduct a part of wage (article 24); an agreement which enables an employer to introduce a flexible working hour scheme, such as an hours-averaging scheme or flextime (articles 32-2, 32-4, 32-5 and 32-3); an agreement allowing an employer to derogate from certain rest-period regulation (article 34); an agreement permitting an employer to give paid leave in lieu of payment of overtime premium (article 37); an agreement granting an employer to presume working hours for work performed outside of the establishment (article 38-2); an agreement allowing an employer to introduce the discretionary work scheme for professional work (article 38-3); an agreement authorizing an employer to allow paid leave of less than a day on request from an employee (article 39, section 4); an agreement on scheduled paid leave, authorizing an employer to give paid leave as designated in the agreement (article 39, section 6); and an agreement enabling an employer to derogate from certain regulation for the method of payment for the leave taken (article 39, section 7). Many of these agreements relate to implementing flexible ways of working with regard to working hour regulation.³³

(ii) Delivering an Opinion

As described in (1), article 90 of the LSA requires an employer when establishing or amending work rules to “ask an opinion” of the majority representative in order to assure employees to voice their opinion.³⁴ It only requires an employer to “ask an opinion” of the majority representative. Neither consultation with nor obtaining the agreement of majority representative is needed. Even obtaining absolutely opposing opinion from a majority representative is enough with regard to fulfilling the duty under the article.³⁵ Except in the case that a majority union acts as the majority representative, where the procedure can also function as collective bargaining, the power of a majority representative to have his/her opinion heard has limited significance.

(iii) Appointing or Nominating Members of Workplace Committees

The third function a majority representative performs is to appoint or nominate members of several workplace committees such as a labor-management committee (see 2. below), an occupational safety and health committee, and a committee for improving working hour arrangement.

An occupational safety and health committee is a body consisting of representatives of both the employer and the employees required in principle wherever an employer has 50 or more employees in an establishment. Its role is to research measures needed to prevent work-related accidents and to advance an opinion on this matter to the employer. Half of

³³ Other important labor-management agreements for derogation under the labor and employment statute include, among others: an agreement stipulating the scope of employees with regard to which an employer may deny parental leave or family care leave (article 6 and 12 of the Act on the Welfare of Workers Who Take Care of Children or Other Family Members Including Child Care and Family Care Leave); an agreement setting a standard for re-employment after reaching to the mandatory retirement age (article 9 of the Act on the Stabilization of Employment of Elderly Workers).

³⁴ Similar provisions can be found in the Occupational Safety and Health Act with regard to plans for the improvement of occupational safety and health (article 78, paragraph 2).

³⁵ Note, however, that the attitudes of employees including that of majority representative are one of the factors the courts consider when they examine the reasonableness of the work rules (see the article 10 of the Labor Contract Act). There is a possibility that an absolutely opposing stance of the majority representative may affect the binding effect of work rules.

the members of this committee (excluding the chairperson) must be nominated by the majority representative.³⁶ Although these committees exist in nearly three-quarters of the establishments required to have them, the Japan Institute for Labor Policy and Training points out that they are rather inactive.³⁷

A committee for improving working hour arrangement is a body appointed at the option of the employer (but not required by regulation) that consists of the representatives of both the employer and the employees. It purports to research measures to improve working hour arrangement (such as measures to reduce working hours) and to advance an opinion to the employer. Its resolution can be a substitute for a labor-management agreement concerning working hour regulation if the half of the members of the committee are appointed based on the nomination of a majority representative.³⁸

Although these committees, especially labor-management committees, may be Japanese-style works councils, their impact is so far limited due to the fact that either that they are inactive or that the number of committees remains relatively small. The significance of the power of a majority representative to appoint or nominate the committee members is therefore also limited.

(iv) Consultation with regard to a Split of a Company

A majority representative is to be consulted only in an exceptional situation. Article 7 of the Act on the Succession to Labor Contracts upon Company Split, which purports to protect employees in case of company split, provides that “in conducting a split, the split company shall endeavor, . . . to obtain the understanding and cooperation of the employees.” Article 4 of the Enforcement Ordinance for the Act stipulates that the split company shall endeavor to obtain the understanding and cooperation of the employees through “consultation or other equivalent way with a majority representative.”

(3) Election and Operation of Majority Representative

The LSA provides only a few regulations with regard to the organization and operation of a majority representative. Although the representative’s function is largely confined to enabling an employer to derogate from or to perform the duties under the statutory regulations, improvement is apparently needed in order to better reflect employees’ views.

(i) Election of a Majority Representative

A majority representative stipulated in the LSA must be elected at each establishment (i.e., a unit of work performed in an interrelated manner at a certain place, such as a plant, a store, or an office).³⁹ An enterprise as a whole is not, in general, regarded as an establishment unless its size is quite small and has no branches.

The provisions stipulating involvement of a majority representative require election on an *ad hoc* basis. In other words, an employer must request employees to elect a majority representative every time he/she needs to conclude a labor-management agreement or to ask an opinion. Especially in the case where there is no majority union, this means that the

³⁶ See articles 17, 18 and 19 of the Occupational Safety and Health Act.

³⁷ See the Japan Institute for Labor Policy and Training, *supra* note 13, at 153-154.

³⁸ See articles 6 and 7 of the Act on Special Measures concerning the Improvement of Working Hour Arrangement.

³⁹ Tokyo Daigaku Rodo Ho Kenkyu Kai ed., *Chusyaku Rodo Kijyun Ho (Jyo) (Commentary on the Labor Standards Act (vol. 1))* 160-161 (2003).

majority representation system does not assume permanently-installed employee representation, such as that provided by standing committees.⁴⁰

If there is a union organized by a majority of the employees at an establishment, the union automatically becomes the majority representative.⁴¹ Where there is no such a union, an individual must be elected to serve as majority representative. Where there is a majority union, regulations do not permit designation of an individual to serve as majority representative. Although the scope of “employees at an establishment” is not stipulated in the LSA, it is considered in practice to mean *all* the employees at the establishment, irrespective of whether an employee will be affected by the activities of a majority representative.⁴²

The LSA does not provide any procedure, such as an election, to assure the majority status of a union. A labor union is only required to organize a majority of the employees at an establishment at the time when there is a need to elect a majority representative (e.g., for conclusion of a labor-management agreement). Even if the majority union, after the conclusion of a labor-management agreement, lost this majority status, it does not affect the validity of the agreement.⁴³ This derives from the *ad hoc* nature of the system.

With regard to “a person representing a majority of the employees at the establishment,” article 6-2 of the Ordinance for Enforcement of the LSA (introduced in 1998) stipulates eligibility of the representative and election procedure. The provision provide that “employees in positions of supervision or management” as stipulated in article 41, item 2 of the LSA cannot be elected majority representative, except where there are no employees other than those in positions of supervision or management in the workplace. This provision prevents the selection of a person representing the interest of employer and ensures the election of a representative who can represent the interest of employees.⁴⁴ The provision also stipulates that a majority representative must be selected according to election procedures “such as vote or a show of hands.” Administrative circulars⁴⁵ with regard to article 6-2 of the Ordinance for Enforcement of the LSA additionally allow a majority representative to be selected based on discussion among employees and other democratic procedures, while requiring that the majority representative must not be elected based on the employer’s wish. The Supreme Court denied the eligibility as the majority representative in a case where the president of the amity association of employees was automatically designated as a majority representative.⁴⁶

Although the election of an individual serving as majority representative is thus regulated, in reality election of a majority representative is not always conducted properly.

⁴⁰ Even if, in case that there is no majority union, a person is elected for a certain term to represent the majority of employees in an establishment (according to the Japan Institute for Labor Policy and Training, *supra* note 9, at 29, 30.2% of the employer answers that the majority representative was elected for a certain term), the majority status of the person must be examined every time the person acts as the majority representative under the LSA. Tokyo Daigaku Rodo Ho Kenkyu Kai, *supra* note 39, at 45.

⁴¹ The Japan Institute for Labor Policy and Training, *supra* note 13, at 45 and 141 points out that the ratio of establishments where there is a majority union is not so high, explaining that the number of enterprises where there is a union itself is on decline and that majority union exist in only about 60% of companies where there is a union.

⁴² See Tokyo Daigaku Rodo Ho Kenkyu Kai, *supra* note 39, at 40.

⁴³ *Id.*, at 42.

⁴⁴ *Id.*, at 43.

⁴⁵ Jan. 29, 1999, Kihatsu No. 45 and Mar. 31, 1999, Kihatsu No. 169. Administrative circular is an internal message of an administrative agency that is issued by upper bodies as an instruction to lower bodies. Though courts are not bound by an administrative circular since it is merely internal message within an administrative agency, in practice it is fairly often respected by courts.

⁴⁶ *Tokoro Co. v. Idehara*, 808 Rodo Hanrei 11 (S. Ct., Jun. 22, 2001).

According to research conducted by the Japan Institute for Labor Policy and Training in 2004, about 30% of employers responding to the questionnaire admitted that the president of the amity association of employees was automatically designated as a majority representative or that the employer appointed the majority representative.⁴⁷ Even with regard to an election, a vote of confidence, or discussion among employees, it is pointed out that candidates are decided in a manner that is not necessarily proper.⁴⁸

(ii) Operations of the Majority Representative

As for the operations of the majority representative, there exist no regulations beyond a protection from disadvantageous treatment. Article 6-2, paragraph 3 of the Ordinance for Enforcement of the LSA prohibits the employer from treating an employee disadvantageously by reason of being the majority representative or performing a proper act as a majority representative.⁴⁹ The LSA does not provide provisions concerning the decision-making procedure of the majority representative, including the manner in which the representative collects the views of the fellow employees whom he/she will represent. Nor does the LSA stipulate the cost of the activities of majority representative. The lack of regulations are due to the fact that the majority representative (especially where the representative is an individual rather than the majority union) is elected on an *ad hoc* basis, as mentioned in (i).

2. Labor-management Committee System

(1) Functions of the Labor-management Committee

A labor-management committee is “a committee ... comprising an employer and representatives of employees at an establishment ... instituted with the aim of examining and deliberating on wages, working hours and other matters concerning working conditions at the establishment and of stating its opinions regarding the said matters to the employer” (article 38-4, paragraph 1). The resolution by a four-fifth majority of the members of this committee on matters stipulated in article 38-4, paragraph 1 is one of the prerequisites for an employer to introduce the discretionary work scheme⁵⁰ for workers engaging in the work of planning, drafting, researching and analyzing matters regarding business operations. The labor-management committee system was introduced when the discretionary work scheme for aforesaid workers was instituted in the LSA in 1998. The purpose of introducing the system is to let labor and management in the workplace decide the proper scope of employees covered by the work scheme and the conditions under the work scheme, while empowering employees so that they can communicate their views on the scheme more effectively.⁵¹

In addition to introducing a discretionary work scheme, the committee can also act as a substitute for a labor-management agreement concerning working hour regulations.⁵² In

⁴⁷ The Japan Institute for Labor Policy and Training, *supra* note 9, at 23 (2005).

⁴⁸ *Id.*, at 25-26 reports that in the case of a vote of confidence, 26.5% of employers answered that he/she nominated the candidate, while another 51.3% said that the president of the amity association of employees or certain employees were automatically designated as the candidate.

⁴⁹ “A proper act as a majority representative” includes, among others, having vetoed to the conclusion of a labor-management agreement. Jan. 29, 1999, Kihatsu No. 45.

⁵⁰ See generally Araki, *supra* note 1, at 94-98, for an explanation of the discretionary work scheme.

⁵¹ See Araki, *supra*, at 97 and Tokyo Daigaku Rodo Ho Kenkyu Kai, *supra* note 39, at 35-36.

⁵² Labor-management agreements that can be substituted for include those stipulated in the articles 32-2, 32-3, 32-4, 32-5, 34, 36, 37, 38-2, 38-3, 39 of the LSA (see accompanying texts for footnote 33, for the contents of these provisions).

other words, the committee is able to perform the function of allowing an employer to derogate from working hour regulations stipulated in the LSA. The committee is further empowered to “examin[e] and deliberat[e] on wages, working hours and other matters concerning working conditions at the establishment and... [to] stat[e] its opinions regarding the said matters to the employer” (article 38-4, paragraph 1), although the LSA is silent on the effect of the opinions expressed by the committee. Although it is presumed that the rate of establishment of these committees in workplaces remain low,⁵³ there is a possibility that its activities lead to consultation on working conditions between the employer and employees. As discussed later, some scholars expect the committee to be developed into a Japanese version of works councils.

(2) Election of Members and Operation of the Committee

Unlike a person representing the majority of employees in the establishment, the committee is clearly expected to be a standing body to represent employees in an establishment.⁵⁴ Half of the members of the committee shall be appointed by a labor union organized by a majority of the employees at the establishment or a person representing a majority of the employees at the establishment where a majority union is not organized.⁵⁵ “Employees in positions of supervision or management” as stipulated in article 41, item 2 of the LSA cannot be members representing employees (article 24-2-4, paragraph 1 of the Ordinance for Enforcement of the LSA). As for the election of “a person representing a majority of the employees at the establishment,” the same regulations mentioned in 1(3) (i) will be applied.

As for the operation of the committee, article 24-2-4, paragraph 6 of the Ordinance for Enforcement of the LSA prohibits the employer from treating his/her employees disadvantageously by reason of being or trying to be a member of the committee or performing a proper act as a member, and article 38-4, paragraph 2 of the LSA obliges the committee to keep the minutes and make them public to the employees of the establishment. Otherwise, the law does not regulate the operations of the committee. Except where certain resolutions must be made by a four-fifth majority, there is no regulation of the decision-making procedure, including whether or how the committee should collect the views of the employees whom it represents. Nor is there a provision stipulating the cost of the activities of the committee.

3. Relationship of Labor Unions and Majority Representation System and Labor-management Committee System

There is a distinction between the role that labor unions play and the ones that a majority representative and a labor management committee perform with regard to working conditions. The functions of a majority representative and a labor-management committee are basically confined to allowing an employer to derogate from the statutory regulations or enabling an employer to perform his/her duty. The rights and duties of

⁵³ According to the General Survey on Working Conditions in FY 2011 (available at: <http://www.mhlw.go.jp/toukei/itiran/roudou/jikan/syurou/11/index.html> (last accessed Apr. 6, 2012)), only 0.7% of enterprises introduced the discretionary work scheme for workers engaging in the work of planning, drafting, researching and analyzing matters regarding business operations. Since the committee is deeply interrelated with the scheme, it is presumed that the number of the committees so far established remains small.

⁵⁴ The article 38-4, paragraph 2 of the LSA stipulates that members shall be appointed for a fixed term. There is, however, no regulation on the length of the term.

⁵⁵ The remaining half of the members who represent the employer will be appointed by the employer.

employees are determined through the collective bargaining agreement that unions conclude with an employer, through work rules an employer establish or through individual employment contract. In other words, the statutory representatives of employees are not expected to be a body that determines the rights and duties of employees.

As for the involvement of labor unions in the statutorily provided system of employee representation, both in the majority representation system and the labor-management committee system, a majority union is expected to be the primary representative (or designator of the representative) of employees. In other words, a labor union can play a role or take control of the majority representative or the committee as far as the union organizes the majority of employees of the establishment. Conversely, if a union remains in the minority, it cannot act as the representative of employees unless it (or a person whom it nominates) will be approved as an entity that represents the majority of employees in just the same way as “a person representing a majority of the employees at the establishment.”

IV. Concluding Remarks: Evaluation of the Present System and Discussions for Reform

In Japan, collective bargaining has been practiced throughout at the enterprise level, and enterprise unions (especially majority unions) have performed the function of representing employees at the enterprise. However, this primary channel of employee representation at the enterprise is faced with difficulty because union density has been declining since the mid-70s while the number of non-regular employees has increased significantly since mid-90s. These trends have resulted in the absence of union representation in many companies, especially in smaller ones.

Meanwhile, the LSA has developed both the majority representation system and the labor-management committee system through which all the employees at an establishment will be represented. However, the function and institutional capacity of this secondary channel of employee representation at the enterprise is limited, especially when there is no majority union. Involvement of the majority representative or the committee is for the most part limited to reflecting employees’ opinion in terms of derogation from the mandates of statutes, i.e., exempting an employer from penal sanction so that it can implement lower working conditions than the standards provided by statutes without violating them. Though a labor-management committee can convey opinions about matters concerning working conditions at the establishment to the employer, the impact of such a function is unclear. In addition, selection of the representative or establishment of the committee is not mandatory, unless an employer wishes to be exempted from the statutory regulation. As for institutional aspects, the majority representative, especially “a person representing a majority of the employees” is expected to be elected only on an *ad hoc* basis and completely lacks a standing, institutional basis. A labor-management committee is much more institutionalized, but still lacks the institutional guarantee of collecting and coordinating the opinions of employees. In sum, both functional and institutional reforms are needed if majority representatives and labor-management committees are to truly represent the interests of employees in an enterprise.⁵⁶

⁵⁶ See, e.g., Tokyo Daigaku Rodo Ho Kenkyu Kai, *supra* note 39, at 37-39.

Concerning the direction of the reform, two aspects need special consideration. First, the position of labor unions or the relationship between labor unions and the statutory system of employee representation must be examined. Some scholars, considering the Constitutional guarantee of the right to organize coupled with the fact that labor unions have been playing, at least to some extent, a role to represent employees at the enterprise level, insist upon strengthening the power of majority unions and placing the duty of fair representation on them.⁵⁷ Alternatively, these scholars recommend taking measures to eliminate obstacles to unionization⁵⁸ rather than strengthening the function and organization of a labor-management committee that might turn out to be a sham union. Others insist that functions of such committees be limited so that they would not hinder the activities of unions.⁵⁹ Second, the system utilized must be able to properly consider and coordinate the diversified interests of employees. Here, scholars insist that the committee members shall be elected proportionally so that even a non-regular, minority employee can make his/her voice heard.⁶⁰

Examining the position of unions in representing employees' interests and considering the way to properly reflect the diversified interests of employees present major challenges for the system of employee representation at enterprise level in Japan.

⁵⁷ See, e.g., Tetsunari Doko, *Roshi Kankei Ho no Syorai (The Future of Labor-management Relations Law)* 97 *Nihon Rodoho Gakkaishi* 187 (2001), 198-203.

⁵⁸ See, e.g., Shinya Ouchi, *Rodosya Daihyo Hosei ni Kansuru Kenkyu (Study on the Legal System of Employee Representation)* (2007).

⁵⁹ See, e.g., Katsutoshi Kezuka, *Nihon ni Okeru Rodosya Daihyosei no Genzai Kako Mirai (The Past, Present and Future of the System of Employee Representation in Japan)* 216 *Kikan Rodoho* 4 (2007).

⁶⁰ See, e.g., Yuichiro Mizumachi, *Arata na Rodoho no Gurando Dezain (The Grand Design of New Labor and Employment Law)* in *Rodoho Kaikaku (Reform of Labor and Employment Law)* (Yuichiro Mizumachi and Rengo Sogo Seikatsu Kaihatsu Kenkyusyo ed., 2010) 47, 47-56. The report of study group on the future of labor contract law, published in 2005, also suggests a modification that puts an emphasis on securing that the committee will fairly represent the diversified interests of employees.