



**JILPT REPORT**

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# **Decentralizing Industrial Relations and the Role of Labor Unions and Employee Representatives**

— 2006 JILPT Comparative Labor Law Seminar —

**The Japan Institute for Labour Policy and Training**

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the Role of Labor Unions  
and Employee Representatives**

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**The Japan Institute for Labour Policy and Training**

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## Foreword

This report is a compilation of papers provided to the Eighth Comparative Labor Law Seminar held on February 21, 2006, in Tokyo.

Since its start in 1991, the seminar has been held biannually, with the aim of creating a space for domestic and foreign researchers to hold cross-cultural discussions on labor law. The last seminar, held in March 2004, was held under two themes from our nine core research projects: “The Mechanism for Establishing and Changing the Terms and Conditions of Employment” and “The Scope of Labor Law and the Notion of Employees.” As for this year’s seminar, we decided to concentrate on the former theme, focusing on “Decentralizing Industrial Relations and the Role of Labor Unions and Employee Representatives” in order to further deepen discussion and analysis. For this purpose, we invited eight researchers from Europe, the U.S., Australia, Taiwan and South Korea to present national papers and to participate in the seminar. We believe the seminar was a great success, with much thought-provoking discussion and insights into the similarities and differences between the industrial relations of each country from a comparative aspect.

We would like to express our appreciation to Professor Araki and Professor Ouchi for their indispensable role in coordinating the seminar and to the invited researchers from eight countries and from Japan for their enthusiastic participation. Since our core research projects are in their final year (FY2006), we intend to have the results of the seminar reflected in our research results. We also hope that this report will provide useful and up-to-date information on current trends in industrial relations.

April 2006

Akira Ono  
President  
The Japan Institute for Labour Policy and Training

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# Introduction

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The 8th Comparative Labor Law Seminar (JILPT Tokyo Seminar) was held on 21 February. This seminar considered one of the most controversial labor policy issues: Decentralizing Industrial Relations and the Role of Labor Unions and Employee Representatives. The seminar organizers asked the participants to describe the following issues in their national papers.

1. General description of the labor unions in your country
  - The main forms of labor unions and the levels of organization in your country
  - Is union density increasing or decreasing?
  - The role and function of labor unions in labor relations and in labor legislation
2. Non-union employee representation systems
  - Are there any employee representation systems such as works councils or employee representatives that are different from labor unions?
  - If you have any employee representation systems, what are their functions, powers and roles? How are members of such non-union representatives chosen? Are unions given preferential treatment in submitting lists of candidates for non-union representatives? If there is no employee representation system, what are the reasons? Are there any demands for employee representation systems?
  - What are the differences between labor unions and non-union employee representatives? Are non-union representatives allowed to strike? What is the legal effect of agreements concluded between employers and non-union representatives? Is there any discussion on jurisdiction conflicts between labor unions and non-union employee representatives? Are non-union representatives entitled to participate in collective bargaining?
3. Recent developments in collective labor relations: the decentralization of industrial relations and the changing roles and functions of labor unions and employee representatives
  - Have there been any significant changes in collective bargaining patterns in recent years? Are there any trends in centralized unions delegating their bargaining power to decentralized parties such as local unions, employee representatives at the company level, or individual employees?
  - Is an agreement concluded at the company or establishment level allowed to unfavorably change working conditions prescribed by collective agreements concluded at the national, sectoral or regional level? If so, are there any substantive or procedural requirements to do so?
  - Is an individual employment contract allowed to change working conditions prescribed by collective agreements? If so, are there any substantive or procedural requirements?

- Are there any mechanisms to allow the collective and individual parties to deviate from statutory imperative norms? If so, what are the reasons and conditions for such deviations?
- If any changes in collective bargaining patterns and in the centralized system to establish working conditions have occurred, what are the reasons for such changes? Does declining union density and the legitimacy of centralized parties explain such trends? Does the decentralization of collective bargaining occur in connection with the need to make labor protective regulations prescribed by statutes or collective bargaining agreements more flexible?

## Discussion Summary

The main topics in the seminar can be divided into three: the relationship between labor unions and employee representatives, the shift in collective bargaining from industry or branch towards the company or establishment level, and the role of labor unions or employee representatives in the flexibilization of labor protective regulations.

As for the relationship between labor unions and employee representatives, in any country, the traditional and typical form of workers' representation is a labor union. However, in countries where collective bargaining is conducted mainly at the industry or regional level, there is a type of workers' representation at the company or establishment level other than a labor union. This is an employee representative. German works councils (*Betriebsrat*) are typical examples of employee representatives. In France there are not only union representatives (*délégué syndical*), but also elected employee representatives such as *Comité d'entreprise* and *délégué du personnel*. However, French works councils (*Comité d'entreprise*) are different from their German counterpart, in that the former is composed not only of worker representatives, but also of employer representative, while the latter is composed solely of worker representatives. Currently in Japan, the Study Group organized by the Ministry of Health, Labour and Welfare recommended that a standing labor-management committee should be promoted, particularly in workplaces where there is no labor union. This labor-management committee is similar to the French works council model, at least in terms of composition.

What is the difference between labor unions and employee representatives? First of all, labor unions are associations of union members, but employee representatives are elected by all employees represented at each workplace. Secondly, labor unions are a spontaneous form of worker representation, but employee representatives are created by legal intervention.

In countries where there exist double forms of worker representation, that is labor unions and employee representatives, the relationship between both is a delicate problem.

In Germany, works councils are organs separated from labor unions, and the area of operation of the former is also separated from that of the latter. But works councils do not play the same role as labor unions, rather they are normally under the strong influence of labor unions. Furthermore, the possibility that works councils can conclude work agreements (*Betriebsvereinbarung*) with employers is considerably limited, in that the conclusion of a work agreement is prohibited for matters usually handled by collective labor agreements concluded by labor unions (Article 77, Section 3 of the *Betriebsverfassungsgesetz*). French labor unions are not only allowed to have their own representative within the workplace, but also hold an influence on employee representatives; that is French labor unions have a priority for submitting a candidate list for the elections of employee representative.

In Italy, employee representatives are not clearly separated from labor unions. Italian workers representatives at the establishment level (*Rappresentanza Sindacale Aziendale*) are a mixture of labor union workplace representatives and elected employee representatives (Article 19 of the so-called Workers' Statute). In practice, the three big confederations of



labor unions agreed to formulate a unitary representative at the workplace level (*Rappresentanza Sindacale Unitaria*), which corresponds to RSA, which is a unique legally recognized workers representative at the workplace level. In any event, obviously RSA or RSU is strongly influenced by external labor unions.

Thus in some European continental countries, where collective bargaining is conducted at the industrial or regional level, employee representatives are organized at the company or plant level, but the supremacy of labor unions over employee representatives is recognized. There are some reasons for this: first, activities of labor unions are guaranteed by constitutions, but those of employee representatives are not. In a legal hierarchy, labor unions prevail over employee representatives. Secondly, labor unions usually hold some political power. As a result, labor unions tend to be able to resist a legal system in which the authority of an employee representative is strengthened, exerting their political power. Thirdly, employee representatives are not usually allowed to go on strike and consequently cannot have the same bargaining power as that of labor unions. This means that employee representatives are less able than labor unions to protect workers' interests. Fourthly, labor unions, as associations, are formed voluntarily by workers who are union members; this means that the representative power of labor unions derives directly from the contract concluded between unions and union members. On the other hand, a formation of employee representatives is forced by law. From this it follows that the legitimacy for representation of the labor unions is of a higher grade than that of employee representatives.

When we look at countries where collective bargaining is conducted mainly at the decentralized level, the double channel — union channel and elected employee representative channel — system is not adopted, but the single channel system is introduced as a principle. First of all, in the U.S., labor unions, precisely majority labor unions in the bargaining unit, are granted the authority to monopolize collective bargaining in such a unit. And some attempts to legalize employee representatives were repeatedly frustrated. Since the enactment of the Wagner Act in 1935, there have been fears that employee representatives may be transformed into a company union, that is to say a union dominated by the employer. In the U.K., traditionally the single channel system had been maintained. Recently under the influence of EU law, the elected representative system was introduced, but the U.K., in particular British trade unions, are reluctant to accept the German model, namely a true double channel system, because the existence of employee representatives must be a threat to labor unions. In this aspect, Australian's situation, where decentralization of collective bargaining has been advanced recently, is similar to that of the U.K. But in Australia, we cannot find a government opinion that protects or promotes labor unions. Such an anti-union policy in Australia, similar to the era of the Conservative Government in the U.K., is notably striking when compared to the systems in other countries.

In Asia, Taiwan, South Korea and Japan are in a more or less similar situations. Practically, collective bargaining plays a less important role in determining working conditions than work rules established by employers. And in Taiwan and South Korea the relationship between enterprise unions and labor-management conferences (Taiwan) or committees (Korea) has been questioned and the distinction between the two forms is not very clear. To European watchers, who are accustomed to seeing labor unions operating at the industrial or regional level, it seems that enterprise unions in these Asian countries, including Japan, are not able to hold bargaining power sufficiently antagonistic to employers. But at least in Japan, worker participation through a labor management consultation system has functioned very well. Sharing managerial information among management and unions has contributed to the development of cooperative industrial relations and Japanese economic growth. Now the problem we are facing is the low rate of unionization. In many mid and small-sized companies, there is no labor union. As mentioned above, with a view to creating worker representation in such companies, the government intends to provide employee

representatives, which are alternative forms of worker representation other than labor unions. But a serious legal problem remains: whether such a legal intervention is consistent or not with the constitutional norm, which guarantees the right of workers to form labor unions and the right to collective bargaining and to strike, and in this sense obviously privileges the formation and activities of labor unions.

As far as decentralization is concerned, in European countries there is a tendency to shift collective bargaining from the industry or regional level to the company or establishment level. As for the legal hierarchy, in countries such as Germany and France, collective bargaining at the industry level prevails over that at company or establishment level. But even in these countries, decentralized collective bargaining is becoming more and more important. For example, in Germany, strictly speaking, work agreements (*Betriebsvereinbarung*) are not collective labor agreements, but they have a normative effect. Even though collective agreements at the industrial level prevail over work agreements according to law (*BetrVG*), recently in practice work agreements or other forms of arrangements concluded between works councils and employers are invading the turf of labor unions, sometimes illegally. Furthermore the escape of employers from employers' association and *OT* (without collective labor agreement)-membership is undermining the supremacy of collective agreements. In addition, in France, the law of 2004 drastically changed the supremacy of collective bargaining at the branch level over that of the company level, even though collective bargaining at the branch level continues to hold control over collective agreements at lower levels.

Furthermore, in some European continental countries in general there is a principle of favorability. According to this principle, collective agreements made at lower level prevail over those made at upper levels, only if the former contains provisions more favorable to workers than the latter. But this principle was recently revised (in 2004). Also in Italy, this principle has not been strictly adhered to.

What is more important in this respect is whether a collective agreement at the enterprise level which contains deteriorating working conditions, such as wage or working hours in order to guarantee employment security, is binding and effective. This matter is represented differently in various countries. For example, in some European continental countries, this is a conflict between different levels of collective agreement or between collective agreements and workplace agreements. On the contrary, in the U.S., there is no jurisdiction problem. Collective labor agreements are allowed to include disadvantageous working conditions. This is applied to the U.K. also. In Australia, the "No Disadvantage Test," which used to regulate the relationship between awards and enterprise agreements, was abolished and instead the AFPCS (Australian Fair Pay and Conditions Standard) was newly introduced, but in essence this means that the prerogative of employers is widely recognized. In Asia — South Korea, Taiwan and Japan — this is mainly a problem of disadvantageous modification of work rules. In any event, we should bear in mind that only in South Korea are there some influential opinions in favor of the centralization of collective bargaining, taking into consideration that the bargaining power of enterprise unions is actually too weak.

To sum up, employers are not free to modify unilaterally working conditions. But with some restrictions, there is room for flexible determination of working conditions through conclusion of enterprise collective agreements or workplace agreements, or a rational — unilateral — revision of work rules.

The last point regards the flexibilization of labor protective regulations. This is one aspect of decentralization of labor regulations. What is most important is the extent to which an individual agreement is allowed to derogate from labor regulations. In some European countries and Japan, one can find some reluctance to derogate from labor regulations through individual agreements. In these countries, the concept of the "subordination of labor" is so profound and far-reaching that one takes it for granted that consent of an individual employee

is not a derogative effect. At least the approval of the labor unions or employees' representative is indispensable for such an individual derogation. On the contrary, in Anglo-Saxon countries with common-law tradition, the concept of the "subordination of labor" is not familiar to people, rather an individual employment contract is a corner stone in labor regulations, as is typically the case with the U.K. In Australia, the AIRC (Australian Industrial Relations Commission) does not play an important role and individual agreements are becoming more and more important in the determination of working conditions. Also in the U.K, as for regulations about working hours, contracting out through individual agreement is recognized. In the U.S. labor unions can monopolize the power to determine working conditions, excluding the possibility of individual agreements to derogate (deviate) from collective labor agreements. But where there is no labor union, everything is left to individual agreements, that is, practically to the employers' unilateral decision.

Finally, in almost all countries mentioned above there are some common tendencies: labor unions are declining and labor density is decreasing; determination of working conditions at the enterprise level is gradually becoming widespread; pressure for disadvantageous modification of working conditions in return for employment security is growing; derogation and deregulation are being more widely needed and accepted.

In this context, the supremacy of labor unions is being questioned. This issue concerns the historical, cultural and political background of each country. Each country needs to decide which way to go: first, reactivation of labor unions or collective labor agreements; second, abandoning labor unions and at the same time promoting employee representatives or workplace agreements; third, complete deregulation or individualization.

# 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.<sup>1</sup> 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,<sup>2</sup> in order to improve their employment security, working conditions, and workplace welfare.<sup>3</sup> 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.<sup>4</sup>

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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\* This article is a country report for the JILPT Comparative Labor Law Seminar (Tokyo Seminar) (Tokyo, February 2006).

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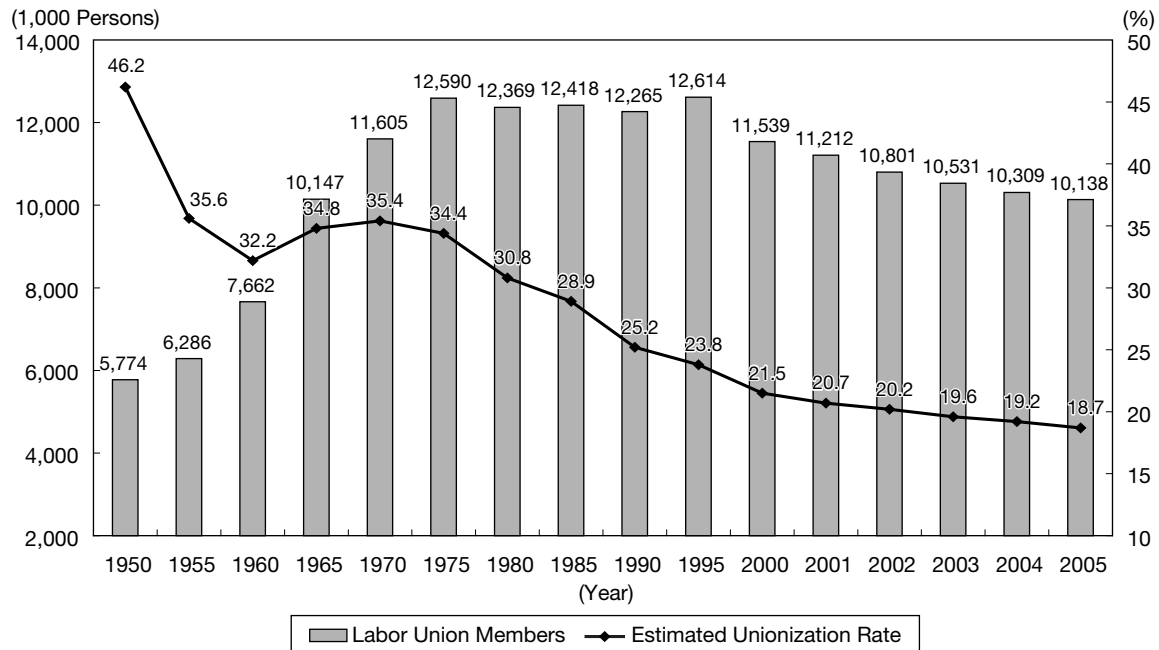
<sup>1</sup> Major industrial unions include All Japan Dockworkers' Union and the National Federation of Construction Workers' Union.

<sup>2</sup> 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).

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

<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup>

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.<sup>7</sup> 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;<sup>8</sup> 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.<sup>9</sup>

## II. Unions in Labor Legislation

### 1. Labor Unions' Authority

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

<sup>5</sup> 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.

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

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

<sup>8</sup> 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).

<sup>9</sup> 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.<sup>10</sup> 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.<sup>11</sup> 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 agreements<sup>12</sup> with the employers.<sup>13</sup>

### **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.<sup>14</sup> 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 law<sup>15</sup> and are exempted from civil liability.<sup>16</sup> 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

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

<sup>11</sup> 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).

<sup>12</sup> 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.

<sup>13</sup> Ministry of Labour, *Basic Survey on Labour Unions* (1993).

<sup>14</sup> The Trade Union Law (hereinafter TUL), Art.7, No.2.

<sup>15</sup> TUL, Art.1, Par.2.

<sup>16</sup> TUL, Art.8.

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

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.<sup>18</sup>

##### **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,<sup>19</sup> 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.<sup>20</sup> 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.<sup>21</sup>

##### **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

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<sup>17</sup> TUL, Art. 7, Nos. 1-3.

<sup>18</sup> TUL, Art. 14.

<sup>19</sup> K. Sugeno, *supra* note 4, p. 590.

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

<sup>21</sup> 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.<sup>22</sup>

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.<sup>23</sup>

### **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.<sup>24</sup> According to a Supreme Court precedent, the provision of work rules, if reasonable in content, constitutes the terms of individual labor contracts.<sup>25</sup> 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."<sup>26</sup>

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.<sup>27</sup> 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.<sup>28</sup>

### **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,<sup>29</sup> 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,

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<sup>22</sup> K.Sugeno, *supra* note 4, p.605.

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

<sup>24</sup> The Labor Standards Law (hereinafter LSL), Art. 89.

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

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

<sup>27</sup> LSL, Art.90, Par.1.

<sup>28</sup> K.Sugeno, *supra* note 4, p.113.

<sup>29</sup> *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,<sup>30</sup> 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.<sup>31</sup> 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,<sup>32</sup> s/he will possibly be punished with imprisonment or a fine.<sup>33</sup> It is also possible for the enterprise itself to be fined.<sup>34</sup>

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.<sup>35</sup> 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.<sup>36</sup>

#### **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;<sup>37</sup> b) to deduct a sum from employees’ wages;<sup>38</sup> c) to adopt working-hours averaging systems;<sup>39</sup>

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

<sup>31</sup> LSL, Art.13.

<sup>32</sup> LSL, Art.32, Par.2.

<sup>33</sup> LSL, Art.119, No.1.

<sup>34</sup> LSL, Art.121, Par.1.

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

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

<sup>37</sup> LSL, Art.18, Par.2.

<sup>38</sup> LSL, Art.24, Par.1.

<sup>39</sup> LSL, Art.32-2, Par.1; Art.32-4, Par.1; Art.32-5, Par.1.

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

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.<sup>47</sup>

### **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.<sup>48</sup> 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.<sup>49</sup> 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.<sup>50</sup> 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.<sup>51</sup>

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

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<sup>40</sup> LSL, Art.32-3, Par.1.

<sup>41</sup> LSL, Art.34, Par.2.

<sup>42</sup> LSL, Art.36, Par.1.

<sup>43</sup> LSL, Art.38-2, Par.2.

<sup>44</sup> LSL, Art.38-3, Par.1.

<sup>45</sup> LSL, Art.39, Par.5.

<sup>46</sup> LSL, Art.39, Par.6.

<sup>47</sup> The Child and Long-Term Care Law, Art.6, Par.1.

<sup>48</sup> Ministry of Labour, *Labour-Management Communication Survey* (2004).

<sup>49</sup> T.Araki, *supra* note 5, p.463.

<sup>50</sup> LSL Enf. Reg., Art.6-2, Par.1.

<sup>51</sup> LSL Enf. Reg., Art.6-2, Par.3.

<sup>52</sup> 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.<sup>53</sup>

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.<sup>54</sup>

## 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,<sup>55</sup> 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.<sup>56</sup>

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.<sup>57</sup>

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.<sup>58</sup> A compromise was finally reached.<sup>59</sup>

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

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

<sup>55</sup> 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.

<sup>56</sup> LSL, Art.38-3.

<sup>57</sup> LSL, Art.38-4.

<sup>58</sup> 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>).

<sup>59</sup> 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.<sup>60</sup>

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.<sup>61</sup> 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.<sup>62</sup> 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.<sup>63</sup> 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.<sup>64</sup>

# **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

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<sup>60</sup> LSL, Art.34-3, Par.2.

<sup>61</sup> 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.

<sup>62</sup> LSL, Art.38-4, Par.1.

<sup>63</sup> 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.

<sup>64</sup> 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.<sup>65</sup> 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.

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<sup>65</sup> 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.

# Decentralizing Industrial Relations and the Role of Labor Unions and Employee Representatives in Germany

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## A. Introduction: The Two-Tier System of German Labour Law

As opposed to many other countries, Germany has a two-tier-system of workers representation. The interests of workers are represented on the one hand by trade unions and on the other hand by works councils. Trade unions represent the interests of their members mainly by stipulating collective bargaining agreements. Works councils are established on the shop-floor level on the basis of elections. They represent all workers who belong to a certain establishment. Though works councils can enter into collective agreements which essentially have the same effect as collective bargaining agreements (concluded by trade unions and individual employers or employers' associations), the legislator has ensured that works councils cannot easily enter the area of bargaining about wages or other working conditions (D. II. 1.).

Representation of workers' interests by works councils and trade unions must be separated from each other for a couple of reasons: The mandate of a trade union is established by a contract, for it is dependant on an employee joining a trade union. The mandate of the works council is based on the law which makes provision for the election of works councils. The mandate of a trade union essentially comes to an end as soon as an employee leaves the association. The works council on the other hand has a mandate as long as there is an employment relationship between the employee and the employer. The main instrument of representing workers' interests by trade unions is the conclusion of collective bargaining agreements, with the freedom to strike being the major tool of bringing about such agreements. The major instrument of representing workers' interests by works councils is the conclusion of works agreements. Where no agreement can be reached, compulsory arbitration may be available. According to section 74 subsection 2 sentence 1 of the Works Constitution Act (*Betriebsverfassungsgesetz*, BetrVG), works councils are expressly prevented from entering into strike action<sup>1</sup>.

Admittedly, in spite of the institutional separation between trade unions and works councils there are in practice close links and interrelationships. These are partly reflected by legal provisions: According to section 2 subsection 3 BetrVG, the duties of the trade unions and the employers' associations, in particular the safeguarding of interests of its members, are not affected by the works constitution. And according to section 74 subsection 3 BetrVG, employees who undertake duties pursuant to the Act may not be restricted with regard to their trade union activities in the establishment. Finally, according to section 75 subsection 1 BetrVG, the employer and the works council ensure, that all persons working in the establishment are treated in accordance with the principles of justice and fairness, in particular

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<sup>1</sup> See for an overview *Zwanziger*, *Collective Labor Law in a Changing Environment: Aspects of the German Experience*, *Comparative Labor Law & Policy Journal* 2006, p. 303.



that no persons are discriminated against due to union activities.

Apart from that, trade unions in practice exert an immense influence on the composition of the works councils. Around two thirds of works council members belong to a trade union. However, neither must a works council member necessarily belong to a trade union, nor is it imperative that a trade union nominates him. According to section 14 subsection 3 BetrVG not only the trade unions represented in the establishment, but also all employees eligible to vote are allowed to make nominations for the works councils' election.

In practice works council members feel often "safer" when belonging to a trade union and having trade union backing. This, however, is not to say that the relationship between works councils and trade unions is completely without tensions. Works councils are often nearer to what is going on at the individual establishment. As a consequence, they are often prepared to consent to agreements with employers – so-called shop floor-related pacts for labour (*Betriebliche Bündnisse für Arbeit*) – that deviate from provisions laid down in collective bargaining agreement. As will be seen later, however, the room for such pacts for labour is restricted (D. III.).

## **B. The Role of Trade Unions in Collective Bargaining: Some Factual Observations**

Before having a closer look at the German law on collective bargaining some empirical observations should be made. The most important factual development in this regard might be that in the last decades trade unions in Germany as well as in many other countries have experienced severe membership losses and reductions in union density. German unification offered trade unions a one-time chance to expand what indeed they did at the time. But very soon the trend reversed with the DGB unions losing almost 800,000 members in 1992 and another 500,000 members in 1993. Membership in eastern Germany has continued to fall since. By the end of 1998, the last year for which disaggregate union statistics are available, the DGB unions had only 1.8 million members in eastern Germany, a loss of 56 per cent since 1991. Membership problems were aggravated by the fact that in the same period almost 1.2 million members turned their back on the DGB unions in western Germany. The percentage of union members among German employees in the year 2000 were 25.4% in the West (1992: 28.7%) and 18.5% in the East (1992: 39.7%). Among blue collar workers the relevant percentages are 31.6% (1992: 37.6%) and 22.2% (1992: 37.8%). For white collar workers the percentages are 18.5% (1992: 20.2%) and 15.1% (1992: 40.7%) according to a recent study <sup>2</sup>.

The overwhelming majority of trade unions in Germany are organized on an industry basis (so-called principle of industrial organization, *Industrieverbandsprinzip*). This means that their function is to represent the interests not of particular occupations but of the employees working in a given industry or branch of activity. By way of illustration, the metal workers' union (*IG Metall*), which is the largest individual union, is not a union of manual metalworkers alone but an industrial union whose membership also includes all other employees working in the metal industry.

This principle of industrial organization is enshrined in the standing rules of the German Federation of Trade Unions (*Deutscher Gewerkschaftsbund*, DGB). It has the advantage of concentrating the system of bargaining to a very considerable extent, since it counteracts excessive overlap in the bargaining jurisdiction of different unions and conflicts between collective bargaining agreements which may result from this.

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<sup>2</sup> See *Schnabel/Wagner*, Trade Union Membership in Eastern and Western Germany: Convergence or Divergence?, IZA Discussion Paper No. 707, 2003; see for more recent information also *Addison/Schnabel/Wagner*, The (Parlous) State of German Unions, IZA Discussion Paper No. 2000, 2006.

## **C. The Law of Collective Bargaining Agreements and its Rigidities**

Wages and other elements for working conditions are to a wide extent fixed by collective bargaining agreements in Germany. The legal basis of collective bargaining is – on a constitutional level – Art. 9 of the Basic Law (*Grundgesetz*, GG), the German constitution, and – on the statutory level – by the Collective Bargaining Agreements Act (*Tarifvertragsgesetz*, TVG).

### **I. Freedom of association (Art 9 section 3 GG)**

Art. 9 section 3 GG contains the fundamental right of freedom of association.

#### **1. The essential content of the freedom of association**

According to this provision, the “right to form associations to safeguard and improve working and economic conditions shall be guaranteed to every individual and to every occupation.” When applied literally, the wording of Art. 9 section 3 GG guarantees the fundamental right to every individual who intends to form an association within this sense. The Federal Constitutional Court (*Bundesverfassungsgericht*, BVerfG) has however transcended the wording by ruling that the association itself can also be subject to the fundamental right. For this reason, the right is commonly referred to as a twofold fundamental right (*Doppelgrundrecht*), which comprises both the individual and the collective freedom of association. The bearer of the former right is the individual employer and the individual employee. The bearer of the latter right is the so-called coalition (employers’ association or trade union) itself<sup>3</sup>.

The wording of Art. 9 section 3 GG is too narrow in yet another aspect. The protection offered by the constitution by far exceeds the sole freedom of forming an association. It extends to a range of further activities, such as the freedom of joining an association as well as the freedom of engagement in an association. With regard to employers’ associations and trade unions the most eminent part of the constitutional guarantee is the right to engage in collective bargaining and to conclude collective bargaining agreements without interference by the state. This is called the autonomy to bargain collectively (*Tarifautonomie*)<sup>4</sup>.

Another important feature of the freedom of association merits some observations. The freedom of association is not exclusively directed against the State, when preventing it, for example, from restricting an employee to engage in trade union activities. A third person is also an eligible addressee of the freedom of association. This (direct) effect of the fundamental right on third parties follows from Art. 9 section 3 sentence GG, which explicitly states that agreements which “restrict or seek to impair” the fundamental right of freedom of association “shall be void” and “measures directed to this end” shall be unlawful.

#### **2. Coalitions as bearers of the right of freedom of association**

##### **a) Coalitions within the meaning of Art. 9 section 3 GG**

The freedom of association as guaranteed by Art. 9 section 1 GG is, according to the predominant view, nothing more than a special manifestation of the general freedom of organisation, as protected by Art. 9 section 1 GG. Therefore, a coalition must first of all

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<sup>3</sup> See, for instance, Federal Constitutional Court (*Bundesverfassungsgericht*) of 26.6.1991, Decisions of the Federal Constitutional Court 84, 212.

<sup>4</sup> Federal Constitutional Court (*Bundesverfassungsgericht*) of 18.11.1954, Decisions of the Federal Constitutional Court 4, 96.

qualify as an organisation under Art. 9 section 1 GG. A legal definition of how to classify an organisation in this sense is provided for by section 2 subsection 1 of the Law of Organisations (*Vereinsgesetz*, VereinsG). It may not be self-explanatory why a definition of a constitutional term is contained within a lower ranking legal provision. It is, however, generally accepted that in creating section 2 subsection 1 VereinsG the legislator has given the constitutional term of 'organisation' a concretisation in a constitutionally permissible manner.

According to section 2 subsection 1 VereinsG, existence of a legally recognised organisation, therefore also of an association, is conditional on three requirements: (1) The association must be entered into deliberately and be governed by the rules of civil law; (2) the association must be intended on a permanent basis, (3) it must be a association of corporate nature, with the prospect of forming a joint will.

The condition of deliberateness follows directly from the fact that an organisation in the sense of Art. 9 section 1 GG is formed by way of individuals exercising their fundamental freedom of forming such organisation. This outrules public-law organisations from the list of possible associations, for the reason that they can be subject to a statutory mandatory membership (as for example in the case of Chambers of Industry and Trade). The suggestion that associations shall be undisturbed from State influences is expressed in the condition that organisations need to be governed by civil law. Such independence would not be safeguarded in the case of public-law associations, because they depend on recognition by way of a public law act and, besides, are subject to state control up to a certain extent.

Secondly, the organisation must be intended for a permanent period of time. This requirement must be understood against the background of the associations' far reaching entitlement to industrial action in order to pursue their aims. For the reason that industrial action as *per definitionem* inflicts damage on the opposite site (and possibly as well on uninvolved third parties), there is a need to ensure access to certain liability assets for the damaged party. This access would not be secured if entirely unstable associations would qualify as associations. Apart from that, it must be noted that according to German constitutional interpretation, the right to enter into industrial action is strictly limited to associations and not extended to any other mergers of employers or employees. Above all, so-called 'wild strikes' are prohibited. This ban would be of hypothetical nature, if a spontaneous merger of employees would qualify as an association purely on merit of the fact that it constitutes a merger with a (temporarily) shared objective.

Final requirement is the existence of a corporative nature of the organisation, and the prospect of forming a joint will. Corporative nature is to be understood in the sense that the organisation is independent of the joining or leaving of members and furthermore employs an integrated company structure, i.e. a structure which allows for bodies capable of representing the members. This requirement, too, arises from the coalition's need to prove a certain element of stability.

#### **b) Further requirements**

Coalitions must be associations within the meaning of Art. 9 section 1 GG. But they must meet certain additional requirements originating from the specific purpose of associations operating in the area of industrial relations.

##### **aa) Independence from the opposing side**

In order to qualify as a coalition within the meaning of Art. 9 section 3 GG, an association must possess the so-called independence from the opposing side (*Gegnerunabhängigkeit*)<sup>5</sup>.

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<sup>5</sup> Federal Constitutional Court (*Bundesverfassungsgericht*) of 18.11.1954, Decisions of the Federal Constitutional Court 4, 96.

The rationale of this requirement is that only independent trade unions can be true representatives of workers' interests. In history so-called "yellow trade unions" existed that were mere puppets of employers. Today employers are far from being able to exert such influence. As far as workers co-determination on board level<sup>6</sup> and the collaboration of trade unions and employers within the framework of institutions jointly established by them is concerned, it is acknowledged, that this does not lead to trade unions being dependant on the employers either.

#### **bb) Independence from third parties**

Finally, in order to qualify as a coalition within the meaning of Art. 9 section 3 GG, an association must be neutral in the sense that it must not be dependent from either the state or the church or political parties.

### **II. The capacity of coalitions to bargain collectively according to section 1 subsection 1 TVG**

A coalition which intends to conclude collective bargaining agreements must fulfil a couple of further requirements. The rationale for the legislator to limit access to the conclusion of collective bargaining agreements lies in the vast regulatory powers granted to the bargaining parties. Not only are they entitled to enter into agreements which are directly binding for those parties subject to a collective bargaining agreement. Collective bargaining agreements also play a strong influential role, for the reason that employment contracts between parties, which are not subject to collective bargaining agreements, are commonly modelled along the lines of the relevant collective bargaining agreement. Against this background it becomes apparent why collective bargaining capacity is conditional on compliance with a number of pre-conditions of an objective nature, the meeting of which safeguards that the freedom to conclude collective bargaining agreements is transferred into "safe hands".

#### **1. Democratic organisation**

Some assume that existence of a democratic form of organisation is the first pre-condition for an organisation in order to qualify as an association<sup>7</sup>. At the very least, collective bargaining capacity should, however, be inextricably linked to a democratic form of organisation. It would be unacceptable if associations are granted permission to exercise legislative power over their members, without being sufficiently democratically legitimated. A democratic legitimacy in this sense requires that the members are given the opportunity to (indirectly) change the process of intra-association opinion building by way of elections which are held in accordance with democratic principles. The requirement of a sufficient form of democratic organisation has another, quasi horizontal dimension. This follows from the necessity that members must be generally entitled to equal co-decision and voting rights. If members of an employers' association are granted voting rights of varying power, that may, however, be justified by their different economical weight. A form of organisation can in any way only be classified as sufficiently democratic if it ensures satisfactory protection for minorities. Therefore, the elements of a democratic form of organisation are: (1) democratic election procedures, (2) generally equal co-decision and voting rights, and (3) protection of minorities.

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<sup>6</sup> Federal Constitutional Court (*Bundesverfassungsgericht*) of 1.3.1979, *Neue Juristische Wochenschrift* (NJW) 1979, 593.

<sup>7</sup> See, for instance, Federal Labour Court (*Bundesarbeitsgericht*), of 15.11.1963, 9.7.1968 and 25.11.1986, *Arbeitsrechtliche Praxis* (AP) TVG § 2, No. 14, 25 and 36.

When the courts apply a relatively generous approach with respect to this requirement – which is in fact the case – this needs to be attributed to the courts’ reluctance to interfere with the (constitutionally protected) autonomy of associations. Arguably the most important problem in this context concerns the question whether members of a trade union are entitled to play a role in the initiation of industrial action by way of the so called ‘*Urabstimmung*’ (ballot), or if the trade unions’ autonomy with regard to their statutes includes the right to abolish the necessity for such ballot.

## 2. Social power and effectiveness

Regardless of this, it is generally accepted that trade unions are required to adopt a certain extent of capability to perform and to enforce their objectives. This is commonly referred to as the trade unions’ social power<sup>8</sup>. This means, again, that trade unions must be capable of exerting pressure and re-pressure on the opposite side in order to encourage it to conclude a collective bargaining agreement. Whether a certain union is deemed to possess such social power can only be determined on a case to case basis. Possible factors can be, e.g., the number of members, the existence of a satisfactorily permanent structure of organisation, and sufficient financial funds.

## 3. Willingness to enter into collective bargaining

According to jurisdiction, the collective bargaining capacity furthermore depends on collective bargaining willingness (*Tarifwilligkeit*)<sup>9</sup>. This means that the statutes of an association claiming collective bargaining capacity need to demonstrate the will to enter into such agreements. Section 2 subsection 3 TVG explicitly demands this willingness to conclude collective bargaining agreements in the case of the so called ‘*Spitzenorganisationen*’ (head organisations). The requirement is equally necessary for all other associations. The rationale behind the requirement of collective bargaining willingness is, again, to be found in considerations concerning democratic legitimation. The members of an association should be enabled to foresee in the moment of joining, whether or not they will be subject to the association’s legislation regarding collective bargaining agreements.

## 4. Recognition of the collective bargaining system

Finally, according to the Federal Employment Court (*Bundesarbeitsgericht*, BAG), an association claiming collective bargaining capacity is under a duty to recognize the existing collective bargaining system<sup>10</sup>. Parts of the academic literature request moreover the acknowledgement of the State’s right of settlement and industrial action. Some voices even require the association seeking eligibility to acknowledge the current legal and economical order, or, at the very least, the constitutional order. It is in fact a greatly convincing approach to tie the right of participation in the collective bargaining process to the condition that the ‘rules of the game’ are being recognized. Some academics have, however, also voiced criticisms. Those views can be credited in so far as that it would be inappropriate to overstrain this requirement.

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<sup>8</sup> See, for instance, Federal Labour Court (*Bundesarbeitsgericht*) of 16.11.1982, *Arbeitsrechtliche Praxis* (AP) TVG § 2, No. 32.

<sup>9</sup> See, for instance, Federal Labour Court (*Bundesarbeitsgericht*) of 10.9.1985, *Arbeitsrechtliche Praxis* (AP) TVG § 2, No. 34.

<sup>10</sup> See, for instance, Federal Labour Court (*Bundesarbeitsgericht*) of 10.9.1985 and 25.11.1986, *Arbeitsrechtliche Praxis* (AP) TVG § 2, No. 34 and 36.

### **III. Collective bargaining capacity of the single employer**

According to section 2 subsection 1 TVG collective bargaining capacity is transferred not only to trade unions and employers' unions but also to the single employer. This provision does however not aim at improving the status of the employer as such. The underlying principle is rather to be found in the endeavour to ensure availability of potential collective bargaining partners, should no association exist on the side of the employer. In other words: Employers must not be relieved from their responsibility to conclude collective bargaining agreements by way of refusal to form employers' associations. This also means that employers can not simply opt out from their collective bargaining capacity. On the basis that collective bargaining capacity has not been transferred to employers in their own interest, they are consequently not entitled to eschew from this duty.

The collective bargaining capacity of the single employer does continue to exist even if the employer joins an association. The chance to 'get hold' of an employer by way of concluding an association agreement (between the employers' association and the trade union), does not fully eliminate any interest a trade union may have in the conclusion of a company agreement (between the employer and the trade union). The continuation of the employers collective bargaining capability does however raise difficult questions in its consequences, should a company agreement between trade union and employer be concluded (C. V.).

### **IV. No easy way out: The binding nature of collective bargaining agreements**

According to section 4 subsection 1 sentence 1 TVG the legal provisions contained in a collective bargaining agreement that regulate the content, commencement or termination of employment relationships shall apply directly and with mandatory effect as between both parties bound by the agreement (so-called *Tarifgebundenheit*) who fall within the area of application of the agreement. Arrangements which depart from provisions in collective bargaining agreements are, according to section 4 subsection 3 sentence 1 TVG, permissible only if they are authorized by the collective bargaining agreement or the departure is to the employees' advantage.

The question who is bound to a collective bargaining agreement is answered in section 3 subsection 1 TVG. According to this provision, members of the parties to a collective bargaining agreement and the employer who is himself a party thereto is bound by the agreement. The latter alternative refers to an employer who himself concludes a collective bargaining agreement (so-called *Haus- or Firmentarifvertrag*). If an employer concludes such agreement he, being party to the agreement, is (self-evidently) bound to it. Company agreements in this sense, however, are relatively rare. The most collective bargaining agreements by far are concluded in Germany on the level of a branch and therefore exceed the boundaries of the individual company. With regard to these so-called association-level collective bargaining agreements (*Verbandstarifverträge*) section 3 subsection 1 TVG makes it clear that employers and employees are bound to them if, but only if, they belong to the employers' association or trade union, respectively that has concluded the relevant agreement. It must be noted that an employer and an employee in their employment contract may make provision for a reference to an existing (or future) collective bargaining agreement. In this case the provisions of the collective bargaining agreement are clearly of relevance for the content of the employment relationship. The effect of these provisions on the contract, however, is one of incorporation into the individual agreement and the basis of them having this effect is the contract and not the collective bargaining agreement as such. It can therefore not be said that in this case the employer and the employee are bound to the collective bargaining agreement in the sense that they are subjected to the power of employers'

associations and trade unions to regulate in the area of industrial relations by concluding collective bargaining agreements. Consequently, in the case of a mere contractual reference to collective bargaining agreements, the provisions of such agreements lack mandatory effect.

In principle, employers and employees are bound to a collective bargaining agreement only if they belong to the relevant association. There are, however, two major exceptions to this rule. The first relates to provisions of collective bargaining agreements that do not aim at a single employment relationship but at the establishment as such. According to section 3 subsection 2 TVG, the legal provisions set forth in a collective bargaining agreement that regulate matters relating to the operation of the establishment and legal aspects of the works' constitution are applicable to all establishments where the employers are bound by the collective bargaining agreement. With regard to certain provisions the effectiveness of collective bargaining agreements, in other words, is not dependant on the employee being a member of the relevant trade union.

The other exception relates to a so-called declaration of generally binding. According to section 5 subsection 1 TVG, on request by a party to a collective bargaining agreement, the Federal Minister for Labor Law and Social Affairs, acting in consultation with a committee consisting of representatives of the central organizations of the employers and representatives of the central organizations of the employees can declare the agreement generally binding if (1) the employers bound by the agreement employ not less than fifty percent of the employees coming within its area of application and (2) the declaration that the agreement is generally binding appears to be necessary for the public interest. According to section 4 subsection 4 TVG, if a collective bargaining agreement is declared generally binding, the legal provisions it contains also apply, within its area of application, to employers and employees not previously bound by the agreement.

Such extension of collective bargaining agreements are questionable from the viewpoint of constitutional law for the very reason that there are strong indications that the right to be left alone by collective bargaining agreements forms an indispensable part of the "negative" freedom of association. However, the Federal Constitutional Court in a ruling on section 5 TVG argued that this does not render the provision unconstitutional for a generally binding declaration requires among other things that such a declaration appears necessary in the public interest<sup>11</sup>.

An employer (or employee) who is, within the sense of section 3 subsection 1 TVG, bound to a collective bargaining agreement, remains to be bound to the agreement even if he leaves the coalition. This is a consequence of section 3 subsection 3 TVG. According to this provision a collective bargaining agreement continues to be binding until it expires or is terminated. Even if the agreement expires or is terminated, it has effects on employers who have left their organisation. According to section 4 subsection 5 TVG, upon the expiration (or termination) of a collective bargaining agreement, the legal provisions set forth therein continue to apply until they are replaced by another arrangement. This so-called *Nachwirkung* comes into play even if the individual employer does not belong to the employers' association any more<sup>12</sup>. One thing, however, has to be made clear. The combined effect of §§ 3 subsection 3, 5 subsection 5 TVG is only to hold the employer to existing collective bargaining agreements which upon their expiration only lose their mandatory effect. The effect of these provisions is *not* to subject the employer to the autonomy to bargain collectively even if he has

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<sup>11</sup> Federal Constitutional Court (*Bundesverfassungsgericht*) of 14.6.1983, Decisions of the Federal Constitutional Court 64, 208.

<sup>12</sup> See Federal Labour Court (*Bundesarbeitsgericht*) of 14.2.1991, *Arbeitsrechtliche Praxis* (AP) TVG § 3, No. 10; Federal Labour Court (*Bundesarbeitsgericht*) of 17.5.2000, *Arbeitsrechtliche Praxis* (AP) TVG § 3 Verbandsaustritt, No. 8; Federal Labour Court (*Bundesarbeitsgericht*) of 7.11.2001, *Arbeitsrechtliche Praxis* (AP) TVG § 3 Verbandsaustritt, No. 11.

left his organisation. In other words: An employer who has left his employers' association is bound to existing collective bargaining agreements, but he is not bound to future agreements.

Apart from remaining bound to collective bargaining agreements by operation of sections 3 subsection 3, 4 subsection 5 TVG, it is not easy for employers to "escape" from such agreements by transferring or outsourcing certain activities either. According to section 613a subsection 1 of the German Civil Code (*Bürgerliches Gesetzbuch*, BGB), in case of a business transfer, rights and obligations governed by rules contained in a collective bargaining agreement become part of the employment relationship between the transferee and the employee and cannot be modified to the employees' disadvantage within one year of the date of the transfer. The content of collective agreements, in other words, is transformed into individual contractual rights, unless the new employer is already bound by one collective agreement or another. This transformation is designed to ensure that employees enjoy the rights which derive from a collective bargaining agreement at least for a certain period of time. In order to achieve this, the provisions of collective agreements are transformed into provisions of the individual contract of employment by way of a legal fiction and at the same time declared mandatory for a period of one year, after which period the transferee is free to make use of the normal tools for varying the employment contract, the so-called dismissal with the option of altered conditions of employment (*Änderungskündigung*) being the most important of them. Only if the new employer is bound by another collective bargaining agreement, whether by having concluded such agreement individually or being subjected to an agreement by his employers' association, the provisions of the collective bargaining agreement may become part of the relationship.

#### **V. Decentralisation of collective bargaining: Company-level collective agreements as an alternative to association-level agreements**

As pointed out earlier, the power to conclude collective bargaining agreements is not restricted to employers' associations (and trade unions). The individual employer can as well enter into such agreements. According to section 2 subsection 1 TVG, possible parties to a collective bargaining agreement are not only trade unions and associations of employers but also individual employers.

Even if an individual employer is a member of an employers' association, he is technically entitled to conclude such an agreement. The question of whether or not employers are allowed to do so under the terms of their membership of an association and its internal rules has no bearing on the validity of the agreement.

From an employers' perspective the conclusion of separate company agreements is particularly desirable in cases where the general conditions agreed collectively with an association are not appropriate for them. The trade unions, on the other hand are normally reluctant to enter into such agreements because they fear that the spreading of company-level agreements could put holes in their association-level agreements and, as a consequence, undermine their overall bargaining power. This is why most collective bargaining agreements by far are concluded on an association-level in Germany.

If, however, an employer has found a trade union willing to enter into a company-level collective bargaining agreement, the provisions of such agreement take precedence over an association-level agreement the employer may, as a member to the employers' association, be equally bound to. This is a consequence of the rules which have been developed by the Federal Labour Court relating to so-called concurring collective bargaining agreements (*Tarifkonkurrenz*). One of the most important examples of such concurrence is indeed the existence of both an association-level and a company-level agreement, which an employer may have concluded while being a member of an employers' association (or after having left such association only recently). With regard to concurring collective bargaining agreements



the Federal Labour Court applies two legal principles. According to the so-called principle of unity (*Grundsatz der Tarifeinheit*), if there is a real conflict between the concurring collective agreements, this conflict must be resolved on the ground that an individual employment relationship cannot be governed by more than one collective bargaining agreement. According to the so-called principle of speciality (*Spezialitätsgrundsatz*), the conflict then has to be decided on the basis of which of the two collective agreements contains provisions closest to the situation of a given establishment. As a consequence of the application of the principle of speciality a company-level agreement takes precedence over an association-level agreement<sup>13</sup>.

It must again be noted, however, that decentralized bargaining by concluding company-level collective bargaining agreements is possible only, if the employer finds a trade union that is willing to enter into such agreement. Most activities and branches in Germany, however, are covered by a single trade union, the majority of unions forming part of the German Federation of Trade Unions (see B.: *Industrieverbandsprinzip*). This is why employers normally are dependant on the same trade unions as possible partners to a company-level agreement who have also participated in the conclusion of the association-level agreement.

In recent years, however, a couple of smaller trade unions have established themselves partly as the result of certain discontent among employees relating to the bargaining policy of the big trade unions. In some cases these little trade unions have offered themselves as partners of company-level agreements with the provisions of these agreements pushing aside the provisions of the concurring association-wide agreement. But this is not an easy route out of existing obligations arising from association-level agreements because these small trade unions may not qualify as coalitions being able to conclude collective bargaining agreements. As pointed out earlier an association requires a certain social power and effectiveness in order to qualify as a trade union being able to enter into collective bargaining agreements (C. II. 2.). By referring to the requirement of social power the courts in some decisions have ruled that one or the other association of employees lacks the power to conclude collective agreements<sup>14</sup>.

Some of these rulings, it must be said, have met with resistance. Though it is justified to ensure that the freedom to conclude collective bargaining agreements is transferred into “safe hands” only, there is the downside that the system of collective bargaining is at peril of monopolisation. If conclusion of collective bargaining agreements is, for example, exclusive to certain trade unions, this, in turn, excludes other trade unions from the process and thus deprives them of the opportunity to commend themselves to potential members by negotiating specific collective bargaining regulations. But be it as it may, it must be noted in any event that the conclusion of entering into company-level agreements offers only a limited chance of decentralization

## **D. The Role of Works Councils: Which Room for Decentralized Bargaining?**

### **I. Works council and the employer as partners to so-called works agreements**

According to section 1 subsection 1 sentence 1 BetrVG, works councils are elected in establishments (on the shopfloor level) which regularly have at least five permanent employees eligible to vote, of whom three are eligible for election. Though election of works councils is mandatory, enforcement depends on employees or trade unions demanding an election. This is the reason why the majority of establishment, especially smaller establishments, are without a works council. In big companies, however, mostly works

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<sup>13</sup> See, for instance, Federal Labour Court (*Bundesarbeitsgericht*) of 24.9.1975, *Arbeitsrechtliche Praxis* (AP) TVG § 4 Tarifkonkurrenz, No. 11; Federal Labour Court (*Bundesarbeitsgericht*) of 4.4.2001, *Arbeitsrechtliche Praxis* (AP) TVG § 4 Tarifkonkurrenz, No. 26.

<sup>14</sup> See *Löwisch/Rieble*, *Tarifvertragsgesetz*, 2<sup>nd</sup> ed., 2004, § 2, 35 ff. with further references.

councils exist. Therefore it is safe to say that roughly 50% of the total workforce in Germany is represented by works councils.

The works councils in Germany have vast powers ranging from information and consultation rights to co-determination rights. The latter form the strongest form of works council participation. Pursuant to section 87 subsection 1 BetrVG, the works council participates in the determination of a variety of social matters (including, for instance, demands to work overtime), to the extent that they are not already regulated by statute or collective bargaining agreements. Under section 87 BetrVG, the works council has a genuine co-determination right. This means that the employer cannot implement certain planned measures without the consent of the works council. In the event that the parties cannot reach an agreement, either may appeal to the conciliation board, which would then rule on the matter.

One of the instruments of co-determination by works councils is the conclusion of a so-called works agreement (*Betriebsvereinbarung*). In this regard section 77 subsection 1 sentence 1 BetrVG states: "Agreements between the works council and the employer, including those based on a decision of the conciliation board, shall be implemented by the employer unless otherwise agreed in an individual case". A works agreement is a special type of contract. It is concluded between the employer and the works council and contains general rules with regard to the working conditions of individual employees. According to section 77 subsection 4 sentence 1 BetrVG, works agreements have immediate and binding effect on the individual employment relationships in the same way as statutory law or collective bargaining agreements. All types of works councils (works councils, joint works councils, group works councils) are enabled to enter into these agreements. Depending on the type of the participating works council these agreements differ as to whether they apply to an individual undertaking, all undertakings of a company or even all undertakings of a group of companies.

As a rule works agreements contain clauses binding both on the employer and the works council. Furthermore, they contain normative clauses regulating the works conditions for the employees who belong to the undertaking. It is with regard to these clauses, that works agreements have immediate and binding effect. Accordingly, the content of the works agreement regulates the individual employee's employment relationship in the same way as a mandatory statutory law or collective bargaining agreements. The works agreement need not to be formally incorporated into the individual employment contracts. Apart from that the employer and the individual employee are not allowed to deviate from the works agreements to the disadvantage of the employee, unless the works council agrees thereto (§ 77 section 4 sentence 2 BetrVG).

## **II. The interrelationship between collective bargaining agreements and works agreements**

Works councils in Germany are made up exclusively of workers' representatives. Though there are close links between works councils and trade unions (A.), it must be reiterated that, according to the law, works councils are separated from the trade unions. For works councils and employers by law enjoy the right to enter into work agreements and for these agreements in principle have the same legal effect as a collective bargaining agreement, the question arises of the relationship between these two sources of agreements.

### **1. The principle: The prevention of works councils from collective bargaining**

An unrestricted power of works councils of entering into works agreements would end in a possible competition between works councils and trade unions and could put the bargaining structure in great danger. In order to prevent this, it is foreseen that works agreements that deal with remuneration or other working conditions are only legally admissible as long as the

same matter is not treated in a collective agreement. To be more precise, remuneration and other working conditions which are regulated or normally regulated by collective bargaining agreements may not be the subject of a works agreement. However, the parties to a collective agreement may expressly permit the conclusion of works agreements which supplement or specify their contract.

As a consequence of section 77 subsection 3 BetrVG, collective bargaining agreements in principle exclude conflicting works agreements. The purpose of the regulation is to protect the freedom to bargain collectively by making sure that the works councils do not compete with trade unions and, by doing so, become “quasi trade unions” that undermine the power of trade unions as the pre-eminent means of workers’ representation. It would be particularly dangerous if works councils would be seen by individual employees as being in a position of bargaining successfully for higher wages than those fixed by collective bargaining agreements. Apart from that, section 77 subsection 3 BetrVG aims at making the not-entering into an employers’ association or the leaving of such association less attractive. If the employer by either abstaining from an employers’ association or leaving an employers’ association cannot hope for achieving more favourable conditions, he will think twice about doing so. To sum it all up, the German legislator, by stating that competing works agreements are null and void tries to make the collective bargaining system more stable. And though it is debatable whether section 77 subsection 3 BetrVG must be regarded as a consequence of the autonomy to bargain collectively as fixed in the German constitution, it is widely acknowledged that this regulation reflects the importance of the freedom to bargain collectively.

If one takes a closer look at section 77 subsection 3 BetrVG, it becomes immediately clear that the power to conclude works agreements is severely restricted on the basis of this regulation. First, it must be noted that the application of section 77 subsection 3 BetrVG is not dependent on the employer being bound to the conflicting collective bargaining agreement (or such agreement being representative for a certain area or branch). Second, for section 77 subsection 3 BetrVG to apply it is sufficient that the collective bargaining agreement, upon expiration, continues to apply until being replaced by another arrangement. Finally, and perhaps most importantly, section 77 subsection 3 BetrVG states that for the restriction to apply it suffices that remuneration or other working conditions are “normally regulated” by collective bargaining agreements.

#### **a) The importance of the scope of application of the collective bargaining agreement**

In order of section 77 subsection 3 BetrVG to apply, the employer must not, as a member of the relevant employers’ association be bound to the relevant collective bargaining agreement. It is only required that the employer falls within the scope of application of the collective bargaining agreement<sup>15</sup>. This means that if a collective bargaining agreement is in place, an employer is not allowed to enter into a competing works agreement if he fulfils the criteria fixed in the collective bargaining agreements according to which it is decided whether the agreement can be applied to him. In this case it is not of importance if the employer claims that he does not belong to the employers’ association that concluded the collective bargaining agreement.

#### **b) Is the subject matter typically governed by collective bargaining?**

The application of section 77 subsection 3 BetrVG is not even necessarily dependant on the existence of a collective bargaining agreement in the first place. It is sufficient that the

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<sup>15</sup> Federal Labour Court (*Bundesarbeitsgericht*) of 5.3.1997, *Arbeitsrechtliche Praxis (AP) BetrVG 1972 § 77 Tarifvorbehalt*, No. 10.

subject matter of the works agreements is normally (or typically) regulated by a collective bargaining agreement. This means that, though there may be no existing collective bargaining agreement, the power of entering into works agreements is restricted because the subject matter of these agreements is a typical playing field of the parties to collective agreements.

## **2. Exceptions to the principle of pre-eminence (false and true)**

Though section 77 subsection 3 BetrVG is relatively rigid with regard to conflicting works agreements it should be noted that in practice there exist quite a number of works agreements covering the area of remuneration or other working conditions<sup>16</sup>.

### **a) Illegal practices but no normative power of factual developments**

Most of these agreements, however, are (strictly speaking) illegal. Often, an employer who does not belong and did never belong to an employers' association is not fully aware of the fact that section 77 subsection 3 BetrVG already applies if a subject-matter is typically governed by collective bargaining. But relatively often employers and works councils, by entering into works agreements, may simply leave aside section 77 subsection 3 BetrVG, hoping that no one is interested in taking them to the court.

According to a survey conducted by the WSI, a trade union think tank, a majority of member companies of the employers' associations examined deviate from standards set by the industry-wide agreement<sup>17</sup>. The survey explicitly asked about those practices which are not permitted by the agreement. The authors found that even in the construction materials industry, the industry with the lowest percentage of incidences of 'unlawful decentralisation', 69% of member companies deviate from collectively agreed standards. In contrast to earlier studies on this issue, the survey found that the vast majority of deviations occur in the field of working time, while pay issues are much less important.

There are so many works agreements which are in conflict with collective bargaining agreement that some scholars have put forward the idea of a possible derogation of section 77 subsection 3 BetrVG on the basis of customary law. Though this certainly is taking it too far it still must be acknowledged that practice is to a wide extent not in line with the law. There are many experts which argue that the rigidities of the law are to blame with regard to this.

### **b) Works agreements within the area of co-determination proper**

Apart from that a word or two should be said about the relationship between section 77 subsection 3 of the Works Constitution Act on the one hand and section 87 BetrVG on the other hand. According to section 87 BetrVG the works council has a right of codetermination (so-called compulsory co-determination) on a couple of matters ranging from "questions of order in the undertaking and the conduct of the employees in the undertaking" (section 87 subsection 1 no. 1) to "principles regarding the performance of group work" (section 87 subsection 1 no. 13). In all the matters listed in section 87 subsection 1 BetrVG, if no agreement can be reached between the employer and the works council, a conciliation board renders a decision with the decision of the conciliation board replacing an agreement between the employer and the works council (§ 87 subsection 2). According to the Federal Labour Court section 87 subsection 1 BetrVG takes precedence over section 77 subsection 3 of the Act<sup>18</sup>. This means that, when it comes to the matters fixed in section 87 BetrVG, the validity

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<sup>16</sup> See *Kania*, § 77 Abs. 3 Betriebsverfassungsgesetz auf dem Rückzug – auch mit Hilfe der Verbände, Betriebs-Berater (BB) 2001, 1091.

<sup>17</sup> WSI Works Council Survey 1999/2000.

<sup>18</sup> So-called *Vorrangtheorie*; see Federal Labour Court (Bundesarbeitsgericht) of 3.12.1991 – GS 2/90, Arbeitsrechtliche Praxis (AP) BetrVG 1972 § 87 Lohngestaltung, No. 51.

of a works agreement is determined by exclusively applying section 87 of the Act – the consequence being that employer and works council are prevented from entering into a works agreement, if but only if, there is a competing collective bargaining agreement in existence. Or to put it the other way round: As far as matters of co-determination within the meaning of section 87 BetrVG are concerned, it is not sufficient for the prevention of the conclusion of works agreements that the subject matter of these agreements is normally (or typically) governed by collective bargaining. From all this, however, it does not follow that there is a wide range of topics works councils and employers could regulate if the undertaking is not covered by an actual collective bargaining agreement. This is because the level of wages and salaries as well as the length of working hours are not subject to compulsory co-determination.

**c) The power to decide upon the area of application and the opportunity to escape collective bargaining**

There is another reason for section 77 subsection 3 BetrVG leaving a certain (limited) room for concluding works agreements after all. As already mentioned the application of section 77 subsection 3 BetrVG is dependant on the employer falling within the scope of application of the relevant collective bargaining agreement. For instance, a collective bargaining agreement which covers the area of the metal industry prevents employers from entering into works agreements if these employers belong to this branch. In recent years, however, trade unions and employers' associations, in fixing the area of application of their agreements, increasingly applied the sole criterion of the membership of the employer in the relevant employers' associations without having regard of the activity of the employer. The aim of this approach has been to ensure that all employment relationships between individual employees and the employer are governed by the collective bargaining agreement even if the main area of activity of the company has changed fundamentally. With regard to section 77 subsection 3 BetrVG there is, however, a drawback for an employer, who is not a member of the employers' association, does not fall within the scope of application of the collective bargaining agreement and, as a consequence, is not prevented from entering into a conflicting works agreement.

**d) Works agreements and the “naked membership”**

Another, increasingly important feature of the German collective bargaining system must be mentioned in this context: the so-called “membership without” (OT-Mitgliedschaft), which means membership without being bound to collective agreements. A couple of years ago many employers' associations started to offer a special ‘OT’ membership status, whereby companies are not covered by the industry-wide collective agreements concluded by the associations but still receive a full range of other membership services. This status was introduced as a response to a wide-spread opposition among some employers to some of the major provisions of industry-wide agreements. As a response many member companies have decided to change their status.

This development must be seen against the background of declining membership in employers' associations. Concerns have mostly been expressed with reference to the declining membership of *Gesammetall*, the pattern-setting employers' associations for the metalworking industry. Because reliable membership data of employers' associations is scarce, the future of German employers' associations has basically been associated with *Gesammetall's* situation. Until recently *Gesammetall* has continuously lost members since 1970, which is most striking when focusing on the percentage of companies within the metalworking industry which are members of the association. Membership in *Gesammetall* has decreased from 9595 (covering 3.26 million employees) in the year 1970 to 5697 (covering 2.02 million employees) in the year 2001 in the West and from 1192 (940.000) in

the year 1990 to 396 (80.000) in the year 2001 according to *Gesamtmetall* <sup>19</sup> .

Traditionally, coverage by an industry-wide collective agreement comes with membership of the employers' association which is party to the agreement. This, however, is no longer true for a large number of employers' associations. In the late 1980s, the Association of Employers in the Wood and Plastics Processing Industry of Rhineland-Palatinate (*Verband der holz- und kunststoffverarbeitenden Industrie Rheinland-Pfalz eV*) was the first of a number of associations to introduce a special membership status, known as 'Ohne Tarifvertrag' (OT) status. This status provides companies with the full range of services of the association (such as legal assistance or political lobbying) but relieves them of the duty to comply with the standards set by the industry-wide collective agreement. Some companies took advantage of this special OT status and later negotiated company-level agreements, often with the support of their employers' association. Most 'OT' members, however, have simply refrained from collective bargaining altogether.

Two different versions of 'non-coverage membership' of an employers' association can be observed. In the first version, companies remain members of the original employers' association but switch to a separate membership status which is included in the association's constitution. In the second version, a second 'non-coverage association' is created and companies are invited to transfer from the regular association into this new organisation. As a result of this development, being a member of an employers' association is no longer identical with being covered by an industry-wide collective agreement<sup>20</sup>.

The take-up of 'OT' membership varies widely between industries as well as individual associations. However, the take-up of this option is in any event closely related to companies' size. According to recent findings 'OT' status is mostly used by medium-sized and large companies. The reason for this is that managers in these companies fear that they would be an easy target for unions' 'strike power' if they left an association. As long as they are a member of an 'OT' association, however, they could quickly retransfer into regular membership and thus find a safe haven from union strike threats. Smaller 'Mittelstand' companies, by contrast, are less exposed to union power, and union membership in these companies is usually far below the industrial average, but management largely depends on the basic membership services provided by the employers' association. While these companies tend to remain members of the association, they often practice what is known as 'unlawful decentralisation', ie they more or less openly contravene collective agreements.

### **III. The so-called pacts for labour**

§ 4 subsection 3 TVG states: "Arrangements which depart from the foregoing [the provisions of the Act on the legal effects of collective bargaining provisions] shall be permissible only if they are authorized by the collective bargaining agreement or the departure is to the employees' disadvantage". In these words the legislator has enshrined the so-called favourability principle (*Günstigkeitsprinzip*). The problem, however, is to determine, when a provision contained in a works agreement can be regarded as being more favourable than a provision of a collective bargaining agreement.

One of the most contested areas of application of the principle of favourability is the assessment of favourability in connection with exchanging poorer conditions for job security. Many legal scholars in Germany are of the opinion that in the case of an economic crisis of an enterprise, it must be assumed to be more favourable for an employee to receive less wages provided that this deviation from the collective agreement is met with the assurance that jobs

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<sup>19</sup> WSI Works Council Survey 1999/2000.

<sup>20</sup> See *Schaub*, *Arbeitsrechts-Handbuch*, 11<sup>th</sup> ed., 2005, § 199, 8.

will be secured<sup>21</sup>.

### 1. The so-called Burda-case

This approach, however, was clearly rejected in the so-called Burda-case. In 1996, Burda management and works council concluded a company arrangement which contained the following provisions: a four-hour extension of working time from the collectively agreed 35-hour week to a 39 hour-week. The first two additional hours are unpaid while the second two hours are paid, but without overtime bonuses; a reduction in collectively agreed bonuses for night work, Sunday and holiday work, overtime etc; a job guarantee lasting until 31 December 2000.

Since section 77 subsection 3 BetrVG forbids the conclusion of works agreements on topics which are normally regulated by collective agreements, Burda management and the works council adopted instead a “company arrangement” (*betriebliche Regelungsabrede*) which is not automatically legally binding but creates only rights and obligations between the parties to the agreement. In order to substitute for the missing normative effect the company asked all employees to accept the new working conditions through a change to their individual employment contracts. More than 95% of the workforce proved to be ready to accept these inferior working conditions in exchange for job security.

This approach at the time of the conclusion of the agreement seemed to offer a relatively safe way for employers who wanted to escape their obligations arising from collective bargaining agreement: First, the choice of agreements with a mere obligatory effect seemingly ensured that the principle of pre-eminence of collective bargaining agreement according to section 77 subsection 3 of the Works Constitution did not apply. Secondly, and even more importantly the consent of the workers concerned led the employers who made use of pacts for labour to believe that a conventional wisdom was applicable to their arrangements according to which there is only a judge if there is a plaintiff in the first place. When taken to the court by the trade union it became clear, however, that the approach failed.

### 2. The ruling of the Federal Labour Court

#### a) A contested interpretation of the favourability principle

The Federal Labour Court in its ruling<sup>22</sup> argued that it is only possible to compare terms of employment of a specific type, i.e., different salary components or working hours. According to the court, the comparison of provisions must be based on objective criteria (“group comparison”, *Sachgruppenvergleich*). The criterion applied in the comparison is the individual interest of the employee concerned, using however an objective-hypothetical approach from a comparative perspective. From the perspective of the court, it is not possible to make an overall comparison. For instance, an increase in the working hours could not be compensated for by a job guarantee. According to the courts this would result in a comparison of “apples and pears”. Furthermore, it is not legally possible to deviate from collective bargaining agreements to the disadvantage of the employees by individual agreements with the employee. The consent of the employee is regarded as irrelevant.

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<sup>21</sup> See for further reading *Höland/Reim/Brecht*, Association-Level Agreements and Favourability Principle – Summary of an empirical and legal study of the application of association-level agreements at the establishment level, ZERP-Diskussionspapier 2/2000.

<sup>22</sup> Federal Labour Court (*Bundesarbeitsgericht*) of 20.4.1999, *Arbeitsrechtliche Praxis (AP) BetrVG 1972 § 87 Unterlassungsanspruch*, No. 3.

**b) The recognition of a direct claim of trade unions**

What is more, the Federal Labour Court expressly acknowledged the right of trade unions to bring court cases against employers who are bound to a collective bargaining agreement and which they accuse of operating a company arrangement that contravenes a collective agreement in force<sup>23</sup>. According to the view taken by the court, trade unions have the right to ask that employers cease an unlawful company arrangement in order to safeguard the unions' constitutional right to freedom of association. Up to the decision of the Federal Labour Court, it was widely argued that only the individual employee, and not a trade union, has the right to bring court cases against company arrangements alleged to contravene collective agreements. According to this view, the unions have no statutory right to effectively enforce the provisions of a collective bargaining agreement for an individual employee. The special protection for union members which comes with collective bargaining agreements as minimum terms of work must in principle be enforced by each individual employee. The union itself is not entitled to demand the application of collective bargaining agreements on behalf of its members, i.e., the individual employees. Therefore, the unions were not regarded as being entitled to force an employer to apply a collective bargaining agreement. According to this view the only possible claim of a trade union was the right of the trade union towards the employers' association to carry out the contract (so-called *Durchführungspflicht*): The parties to a collective agreement are not only prevented from violating contractual obligations; they are also bound to take all necessary steps to ensure that the contract is applied by their members in a proper way. For instance, they have to inform their members about the content of collective agreements and must use all reasonable means in the case that members do not respect the contractual duties which arise from the collective agreement. A direct claim against an individual employer, however, was not acknowledged.

It was exactly this relatively weak position of the unions with regard of the enforceability of collective bargaining that resulted in the described "pacts for jobs" between employer and works council and individual employees. The BAG, however, in its Burda-ruling took a different view and acknowledged a union's right to take legal action when it suspects employers who are legally bound to a collective bargaining agreement of violation of the agreement, in order to defend the unions' constitutional right to "freedom of association".

In order to have a claim towards an individual employer, the collective bargaining agreement, according to the Federal Labour Court, must be in force and binding on the employer. It is, however, not necessary that a formal works agreement be reached. Informal agreements are regarded as being sufficient to give a right to the trade union. If such agreement is reached it may even be sufficient that a collective bargaining agreement is not actually, but only usually, in force.

**c) More than a technical problem: Protection of members vs. effective enforcement of collective agreements**

There is, however, a severe problem, that arises in this context. According to the Federal Labour Court, the content of the claim of a trade union is to a certain extent dependant on the intention of the employer. The employer may try to establish less favourable working conditions for all employees regardless of them being members of a trade union or not. In this case, the bid which is intended as one act generally applicable to all employees is regarded as completely illegal. If, on the other hand, the employer has no principal objection to members of the trade union not accepting an offer of less favourable working conditions, the claim that lies with the trade union can only be successful if it aims at preventing the employer from

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<sup>23</sup> See K. Schmidt, Die normative Tarifgeltung am Beispiel des allgemeinen koalitionsrechtlichen Unterlassungsanspruchs, *Recht der Arbeit (RdA)* 2004, 152.



actually including union members in the offer.

The employer, however, is normally not aware of its employees' membership in a union. Against this background the question had to be decided, whether or not a trade union is under an obligation to give the names of members being employed in the particular undertaking. In 2003 this question was answered by the Federal Labour Court in the affirmative<sup>24</sup>. According to the court, an employer who is ordered to apply the collective bargaining agreement to the employment relationship of the union members is not aware of who in his workforce is a union member and therefore to whom the collective bargaining agreement must be applied. In the view of the Federal Labour Court, it is therefore up to the complaining union to identify the respective employees.

This ruling in all likelihood will hamper the effort of trade unions that want to take individual employers to the court. In many cases unions may abstain from taking legal action because they are not prepared to disclose the names of their members. Up to now it was completely out of the question that a union would explicitly state the names of its members in a certain company. It was standard practice instead that a union tried to keep the identity of its members secret. Even if it were legally required to prove that some of its members were working in a certain establishment, other ways were found to prevent the unions from disclosing the identity of their members. In such a case, the unions would, for instance, by informing a notary, who was under a duty to maintain confidentiality, of the identity of the members. Against this background it is highly questionable whether the unions will pursue court rulings that would force employers to apply collective bargaining agreements if that would require revealing the identity of its members. From an employers' perspective, the new ruling therefore gives rise to the hope that unions will refrain from fighting "pacts for jobs" in the future.

## E. Conclusions and Future Perspectives

Collective bargaining in Germany is under severe strains. Many employers have already left their employers' associations. Many have converted their (full) existing membership into a membership according to which they are not longer subject to collective bargaining agreement. Increasingly agreements between employers and works councils are concluded which are contrary to collective bargaining agreements and therefore illegal.

To a certain extent trade unions have reacted to this development by expressly permitting the conclusion of (supplementary) works agreements. In this respect some trade unions have proved to be more "liberal" than others depending on their long-term strategy. The future will show which stance (loosening up or staying put) is more successful.

Many employers have gone to the limits of the existing system: by closely examining whether a collective bargaining agreement leaves room to manoeuvre or by concluding so-called pacts for work and at the same time ensuring that the competent representatives of the relevant trade union give their tacit consent, which is not binding but can prove to be convenient nevertheless. If an employer, after having left his employers' association and after termination of the collective bargaining agreement that existed at the time of his withdrawal, gets the consent of the individual employees there is no way for a trade union to interfere. Finally, an employer, who is bound to a collective agreement and may even still be a member of an employers' association, may succeed in stipulating a company-level agreement. The chances of this, however, are slim for trade unions normally do not lend a hand if there are not very good reasons for this.

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<sup>24</sup> Federal Labour Court (*Bundesarbeitsgericht*) of 19.3.2003, *Arbeitsrechtliche Praxis* (AP) BetrVG 1972 § 87 Unterlassungsanspruch, No. 11.

Against the background various legislative proposals were put forward which aim at “softening” the existing system. For instance, the Christian Democrats and the Liberals introduced legislation that proposed to amend section 4 subsection 3 TVG, the rule concerning the principle of favourability (*Günstigkeitsprinzip*). According to these proposals, job security was to be regarded as a factor when evaluating if a term of employment was more favourable to the employee compared to the terms of a collective bargaining agreement. Both parties tried to involve the work force and the works council in the procedure. Under the Liberals’ proposal, an agreement was regarded as to the advantage of the employee if a protection against dismissal by reason of redundancy or business reorganization was provided and either the works council agreed, or 75% of employees who got the same offer accepted. Under the proposal put forward by the Christian-Democrats the works council and two-thirds of the workforce had to agree to the proposal. In addition, the agreement of less favourable working conditions could only be agreed for the period during which the bargaining agreement in question was in effect.

After the general election, that was held in 2005 and resulted in the formation of a “grand coalition” (between Christian Democrats and Social Democrats) it is highly unlikely that such proposals will make it into the statute book. The agreement that forms the legal foundation of the “grand coalition” contains language which is extremely vague: Both parties expressly recognise the autonomy to bargain collectively. They express their appreciation for “pacts for labour within the framework of collective bargaining” as a means of securing employment too. Apart from that the willingness is announced to hold talks on this issue with the representatives of trade unions and employers’ associations. All this does not sound radical.

For the time being decentralization will remain in the hands of the partners to collective bargaining<sup>25</sup>. As mentioned earlier some unions have displayed more flexibility, others less. The legislator might step in only if they utterly fail.

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<sup>25</sup> See *Lessner*, Chancen dezentraler Tarifpolitik – Herausforderungen für die gewerkschaftliche Willensbildung, *Recht der Arbeit (RdA)* 2005, 285.

# Collective Relations in France: A Multi-layered System in Mutation

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As is the case all over the World, and to cope with the changes stemming from the global economy, collective industrial relations in France have been changing. If employees are traditionally represented by trade unions, (I) they are not the only ones, and, (II) the different adaptations of collective relations seem to lie in the balance between the roles, missions and attributions given to the different representatives, mainly unions and elected representatives, and the norms they produce.

Recently, a law passed on May 4, 2004<sup>1</sup>, created a synthesis of all previous experimentations in this field and, therefore, can be considered as a landmark in the move towards decentralization of industrial collective relations (III).

## I. A Brief Overview of Unions and Unionization in France

Unions were the first representatives of employees, and remain linked to the story of industrialization. This representativeness of the unions was first recognized outside companies, after having been banned (A). Their acceptance inside the company came later (B). In France, we are facing, as are many other countries, what could be interpreted as a crisis of unionization (C).

### A. Historical landmarks

It is impossible to detail the story of the trade union movement in France in so few pages. We will merely give some important dates and events.

A legacy from the French Revolution, the *loi Le Chapelier* (*Le Chapelier* law) prohibited the creation of organizations and, indeed, unions of workers. Unions were then prohibited, even if, secretly, they started organizing the emerging working class. Lawfulness came from the law called *Waldeck-Rousseau*, enacted on March 21, 1884, even if, before this law and following the era of prohibition, a time of relative acceptance emerged during the reign of Napoleon III. The law of 1884 had a broad vision of the role of unions and did not reserve the benefit of unions for workers only. Moreover, the law did not make many requirements for the creation of a union: just registration of the statutes and the name of leaders<sup>2</sup>. Unionization then spread. Provisions of this law have been integrated into the Labor Code. Later, sectional unions appeared (executives, civil servants, in addition to those for independent workers, such as craftsman, shopkeepers, *etc.*).

The structure of the union movement in France resulted from a move between 1884 and

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<sup>1</sup> Also known under the name “*Loi Fillon*”, after the name of the Minister of labor of the time, or law for renewing the social dialogue.

<sup>2</sup> These are still the only requirements today, art L. 411-3 of the French Labor Code.

the First World War towards organizing unions on a local (*unions locales et départementales*), then professional (*fédérations*) and national (*confédérations*) basis. This is still the structure of the trade union movement in France.

In 1919, unions were allowed to sign collective industrial agreements. In 1936, in a time of unity for the trade union movement, the government of the time, very favorable to social rights and workers, gave these collective agreements a real and appropriate statute. In contrast, the 1960s saw new divisions appearing in the trade unions. Still, at that time, the unions were not recognized inside companies. This would happen at the end of the 1960s in the aftermath of the demonstrations and riots of *Mai 68*.

## **B. Their presence in companies**

The role of trade unions in the social protests of May 1968 was a key factor. Negotiations between the authorities, employers associations and the union confederations led to accords (*Accords de Grenelle*) providing many improvements for workers: a rise in the minimum wage and wages in general, employment security, *etc.*, and recognition of the role of unions in companies. This latter topic will lead to the law of December 27, 1968, the first law arising from the *Accords de Grenelle*. This law fully recognized the role of unions within companies. Any representative union can decide to set up a union group (*section syndicale*) in a company, whatever the number of persons employed by the company. Moreover, providing they are representative in the company, unions are granted new means for their action in the company, in order to fully fulfill the right to unionization recognized in every company<sup>3</sup>. With this law, unions were allowed to organize not only outside the companies, but also within. The organization of employees will, practically speaking, lead to the setting up of union groups<sup>4</sup>. These are not company unions; these are gatherings of members of a union working in the company. The union group can display posters in the company, at appropriate places<sup>5</sup>, and distribute union literature to workers even within the company<sup>6</sup>. Moreover, union groups were entitled to a room in companies employing more than 200 people (art. L 412-9). Union groups were also given a *crédit global d'heures* (hours allocation)<sup>7</sup> for preparing and negotiating company-level agreements.

This law of 1968 was a great victory for the unions: now they were organized within the companies themselves. This glorious period lasted for a while, but recent history is less glorious, and it is commonly said that the union movement is in crisis.

## **C. Recently: a crisis of unionization?**

In France, as in many other developed countries, the unionization rate is decreasing constantly, especially since the 1980s (Table 1). Nowadays, less than 10% of workers (8.2% in 2003), including civil servants, are unionized. The consequence of this weak unionization rate is that unions in France are poor. One of the main reasons for this phenomenon can be seen in a characteristic of the French industrial collective relation system, namely that it is not necessary to belong to the union that signed the agreement to benefit from the provisions contained in this agreement. All the employees of the company or professional branch will benefit from the provisions of the agreement, even if they are not unionized, or if they belong to another union that did not sign the agreement. This characteristic is obviously not an

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<sup>3</sup> Art. L. 412-1.

<sup>4</sup> Art. L. 412-6.

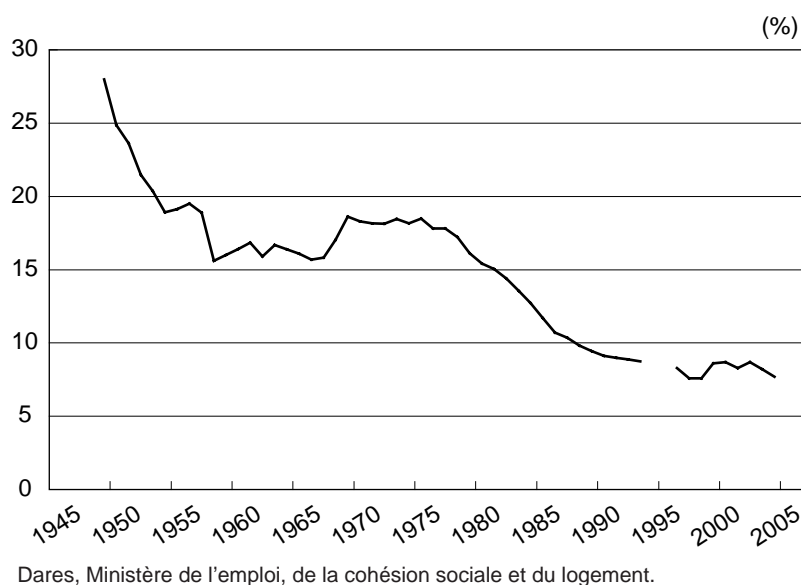
<sup>5</sup> Art. L. 412-8.

<sup>6</sup> Cass. Crim. January 30<sup>th</sup> 1973. *Bull. Crim.*, n° 54.

<sup>7</sup> 10 hours in a year for companies employing at least 500 people, 15 hours for the ones with 1000 employees or more.

incentive for joining a union. And it leads to a paradox: While the unionization rate is around 8%, 90% of workers are covered by an industrial collective agreement (a national, professional or company-level agreement). Moreover, when asked which way they think is the more efficient for defending their interests, employees tend to prefer direct discussion with the management (45%) than asking unions (26%)<sup>8</sup>. Unions are not the preferred agents of employees for defending their interests.

Table 1: Unionization rate from 1949 to 2005



But it does not mean that social disputes disappeared. However, recently, it may appear that there was a split between unions and the general public about the use of strikes. The action taken by the unions in November 2005 in the area of public transportation (trains) appeared to be in vain and not endorsed by a broad part of the population – and even the employees of the railway services themselves, as only 22% of the employees concerned stopped working. Moreover, it seemed in this case and others occurring at the same time that management did not give in to the demands of the unions<sup>9</sup>.

Another characteristic of French industrial relations must be pointed out. According to the rule of *représentativité présumée* (presumed representativeness), any union belonging to one of the five big national union confederations<sup>10</sup> is said to be representative of the employees, even if, in fact, only a minority of employees at a company or plant belong to one of these unions<sup>11</sup>. Being representative, they can sign a collective agreement with the management of the company and this agreement, as we have noted already, will be applied to any employee in the company, unionized or not, belonging to this union or another one. This would not be such a problem if the government had not set up another rule at the same time (1982). From this date on, the law allowed representative unions to sign dispensatory

<sup>8</sup> These figures are quoted from a recent opinion poll : “Les syndicats sont-ils mortels? Résultats du sondage TNS-SOFRES, Colloques, dialogues”, TNS-SOFRES, January 16<sup>th</sup> 2006.

<sup>9</sup> See *Le Monde*, “Le spleen des “perdeurs de grèves”” January 4<sup>th</sup> 2006, p.3

<sup>10</sup> CGT, CGT-FO, CFTC, CFDT, CGC-CFE .

<sup>11</sup> Of course, beside this presumed representativeness, a union can be representative even if it doesn't belong to one of the five national confederations .But in case its representativeness is questioned, this union will then have to prove that it is representative.

agreements (*accords dérogatoires*) with employers that could contain provisions less favorable than the law<sup>12</sup>. This meant that a union effectively representing a minority of the employees could sign an agreement with the employer, applied to all the employees, that was less favorable for them than the law. This led to heated debates and questions about this notion of representativeness.

In order to deal with this problem, a law passed on May 4, 2004, changed the situation<sup>13</sup>. In order to be valid, an agreement at the branch level must be signed by one or several unions representing a majority of the employees of the branch or company. The value of this new “proven” representativeness can be appreciated at times of negotiations or during the election of works council or staff representatives. For agreements at the company level, only the results from the election of employees’ representatives are taken into account. This can be considered as a revolution in the French collective relations system.

Nevertheless, this weakness of unions is also a problem on the management side. Many employers need a counterpart in order to sign collective agreements at the company level. Some employers decided to encourage the presence of unions in their companies, giving unions new financial means – the “union check,” for example, which is given to an employee by the employer in order to finance, if the employee wants it, the union he/she wants<sup>14</sup>. At the same time, it seems, when analyzing the evolution of unionization (see Table 1), that the rate of unionization has been more or less stable in the past few years. In addition, the fact that representative unions have a very important role in the administration of some bodies, such as public companies or the social insurance system, must also be underlined. Nevertheless, this aspect is sometimes seen as a reason for the decline of the unions, which became institutionalized and lost their original mission, *i.e.*, making claims on management in order to improve the working conditions of the workers.

Another reason for this phenomenon might seem to be the fact that unions are no longer the only representatives of workers at the workplace or at the professional level: after World War II, various laws set up different types of representatives (II). But among them, one is directly linked to the unions: the union representative (A). For the others (B), the unions still play an important role.

## II. Workers Representation in Companies in France

Besides the union groups inside companies, described above, there is also a union representative within the company, designated by a representative union (A). But there are also other representatives, who are chosen, directly or indirectly, by the employees (B).

### A. Designated representatives : le délégué syndical (union representative)

The *délégué syndical* (*d.s.*) represents his or her union in the company in order to make suggestions, complaints, etc. He or she is also an intermediary between the union and the employees in the company, and also takes part in social bargaining.

A *délégué syndical* must be set in companies or workplaces with 50 employees or more for 12 months or more (continuously or not) during the past 3 years. But they are not elected: representative unions in the company or at the workplace designate union representatives. Only unions that are representative in the company can designate union representatives, and it

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<sup>12</sup> Cf. *infra*.

<sup>13</sup> For a detailed analysis of this question, see J.-E. Ray, “*Les curieux accords dits “majoritaires”*”, *Droit Social* 2004, p. 590.

<sup>14</sup> See G. Adam, “Des syndicats sous perfusion”, *Droit Social* 1990, p. 833.

is not necessary to prove the existence of a union section in the company at the time of the designation, as it used to be<sup>15</sup>. The number of union representatives varies depending on the workforce, from 1 to 5 (Table 2). In small companies employing less than 50 people, a union can designate a *délégué du personnel* (staff representative) as union representative on the condition that this person was not elected in the name of another union. No length for the union representative's mission is specified: this depends entirely on the union that designated the union representative. Unions must choose an employee who is 18 years or older and who has worked in the company for at least 1 year (6 months for temporary work agencies or 4 months in case of newly established companies). A union representative can be at the same time a staff representative, a member of the works council or of the *CHSCT*<sup>16</sup>.

#### a. Missions

First of all, the union representative is a link:

- between his union and the employer – to that extent, the representative transmits complaints, claims or propositions;
- between his union and the employees of the company.

But the most important and specific mission of the *délégué syndical* is social bargaining. As the Labor Code stipulates that social agreements are negotiated between the employers and representative union within the company, being the link between the unions and the employer, it is normal that the union representative is in charge of negotiating collective agreements.

Social bargaining starts each time the employer wants to conclude an agreement, but there are also mandatory annual negotiations on some topics, like wages or work time. If the employer has not taken the initiative for this mandatory collective bargaining for more than 12 months since the previous one, collective bargaining starts when a representative union asks for it, within the following 15 days. Other mandatory annual negotiation topics include disabled workers and equality between women and men. The list of these mandatory negotiation subjects is continuously widening, both at the company and branch level<sup>17</sup>, which, of course, encourages collective bargaining, at both levels.

#### b . Documents that must be made available to the union representative

In order to negotiate, various documents must be made available to the union representative:

- the collective agreement and other agreements applicable in the company,
- the annual report concerning equality between women and men drawn up for the work council,
- the report drawn up by the employer about the mandatory hiring quota of disabled workers,
- the annual statement on the utilization of part-time work,
- the *Bilan Social*, which outlines the social situation in the company<sup>18</sup>,
- documentation for the works council on the elaboration of training plans,
- documentation for the works council concerning interns in the company.

<sup>15</sup> Cass. Soc. May 27th 1997, *Dalloz* 1997, P. 416 : the existence of the union section is established by the designation of the union representative.

<sup>16</sup> *Cf. infra*.

<sup>17</sup> On this question, see A. Supiot, "un faux dilemme: la loi ou le contrat?", *Droit Social* 2003, pp. 70-71.

<sup>18</sup> *Cf. infra*, works council (comité d'entreprise).



Table 2: Number of union representatives depending on the workforce of the company

Workforce of the company	Number of representatives
50 to 999 employees	1 representative
1,000 to 1,999 employees	2 representatives
2,000 to 3,999 employees	3 representatives
4,000 to 9,999 employees	4 representatives
10,000 employees and more	5 representatives

## B. Elected representatives

### 1. *Le délégué du personnel* (staff representative)

This institution traces its origins back to the law of April 16, 1946, but workers' representatives (*délégués ouvriers*) were already instituted in 1936 for plants employing more than 10 workers. The *délégué du personnel's* (*d.p.*) mission is essentially to communicate to management the complaints of the staff. Since 1982<sup>19</sup>, there has been no distinction between complaints and claims: the staff representatives bring both to the employer. To that extent, they meet the head of the company at least once a month<sup>20</sup>.

A *délégué du personnel* must be set in companies or workplaces with 11 or more employees for 12 months or more (continuously or not) in the past 3 years by elections at the workplace every 2 years, organized by the company. The number of staff representatives varies depending on the workforce of the company (Table 3).

The representative unions in the company or the plant play a very important role in these direct elections. They negotiate and sign with the employer a pre-electoral accord that governs the elections (on topics such as the number and composition of the electoral colleges, representation of the workforce in the colleges, *etc.*) and they have a monopoly on the presentation of candidates in the first round of the elections.

Any employee who has been working for the company for one year or more and who is 18 years or older can be elected, but he or she can not be the spouse, ancestral descendant, brother, sister or relative by marriage in the first degree to the head of the Company. Any employee who has worked for the company for three months or more and who is 16 years or older can vote.

#### a) Missions

The main mission of the *délégué du personnel* is to represent the employees and transmit to the employer any individual or collective complaints concerning wages and the application of labor regulations in the company (*Code du Travail* [Labor Code], collective agreements, work time, safety regulations, *etc.*)<sup>21</sup>. It is not only regular employees who can bring a complaint to the staff representative<sup>22</sup> but also workers who do not belong to the company or

<sup>19</sup> Before the *Loi Auroux* (*Auroux Law*, named after the Minister of Labour at the time) of October 28<sup>th</sup> 1982, the *Cour de Cassation* (the Higher Court in France) used to draw a line between the *réclamations* (complaints, concerning the application of the rules at the workplace) and *revendications* (claims, aiming at the transformation of the rules). The second ones, because unions have the monopoly of claiming at the workplace, could only be formulated by the union representative(s) if there were one or several of them at the workplace, *cf.* Cass. Crim, May 24<sup>th</sup> 1973, *Dalloz* 1973, p. 599. With the law of 1982, the unions lost this monopoly.

<sup>20</sup> Art. L.424-4 of the *Code du Travail*.

<sup>21</sup> Art. L.422-1.

<sup>22</sup> Art. L. 422-1.



Table 3: The number of staff representatives depending on the workforce of the company

Workforce of the company	Number of representatives
11 to 25 employees	1 representative + 1 substitute representative
26 to 74 employees	2 representatives + 2 substitute representatives
75 to 99 employees	3 representatives + 3 substitute representatives
100 to 124 employees	4 representatives + 4 substitute representatives
125 to 174 employees	5 representatives + 5 substitute representatives
174 to 249 employees	6 representatives + 6 substitute representatives
250 to 499 employees	7 representatives + 7 substitute representatives
500 to 749 employees	8 representatives + 8 substitute representatives
750 to 999 employees	9 representatives + 9 substitute representatives
1,000 employees and more	1 more representative + 1 more substitute representative for every 250 employees

temporary workers. These complaints and claims are usually submitted to the employer during the mandatory monthly meeting. The requests from the staff representatives must be submitted to the employer at least two days before the meeting. Moreover, these requests must be written. Answers from the employer must also be made in writing within six days of the meeting. Notwithstanding this mandatory monthly meeting, the staff representatives can ask the employer for a meeting individually, or by category, section, *etc.*<sup>23</sup>

The presence of staff representatives does not prevent the employee from introducing his complaints personally to the employer or the employer's representative.

In the event that the staff representative notices a breach of personal rights, either physical or mental, he informs the employer, who will start an investigation. In the event of deficiency on the part of the employer or if there is disagreement on the reality of the breach in question, the employee or the staff representative (if the employee has given a written consent stipulating he does not oppose the action by them) can complain to the *Conseil des prud'hommes* (the industrial tribunal). The staff representative can also submit a case to the administration (*inspecteur du travail*, factory inspector) concerning any problem related to the application of labor law. Actually, the staff representatives are the real link between the workers and the work inspection, and are allowed to leave the workplace to visit the office of the factory inspector without asking for permission from the employer.

The staff representatives must also be consulted by the employer in certain situations: the placement of an employee who has been the victim of a work accident or some professional disease to the extent that he cannot perform his regular job anymore, the allocation of annual paid leave, and work stoppage due to weather conditions in construction and civil engineering firms. If there is no work council (C.E., *Comité d'entreprise*) in a firm with 50 employees or more, they will also be consulted on dismissals for economic reasons, work time (overtime, individualized work time schemes) and vocational training.

They can also make suggestions on the general organization of the company, in particular to the work council.

## 2. Le comité d'entreprise (works council)

The *comité d'entreprise* (*c.e.*) was established by an ordinance on June 18, 1946. The works council deals with economic (the head of the company must ask the *c.e.* its opinion

<sup>23</sup> Art. 424-4 § 2.

prior to important decisions concerning the management of the company, such as the organization of work time, the introduction of new technology, *etc.*), cultural and social aspects (for example: managing the welfare activities of the company). The goal of this council is to “allow a collective expression of the employees” and to take into account their interests on a permanent basis. In 1982, these ideas replaced the previous text of 1945 according to which the aim of the council was to allow “cooperation” with management, an idea broadly rejected by the unions.

As with union representatives, a *comité d'entreprise* must be set in companies or workplaces with 50 employees or more over 12 months or more (continuously or not) during the past 3 years. If the company is composed of several plants with 50 or more employees, one *c.e.* in each of these plants and a *comité central d'entreprise* (central work council) must be set up. Actually the works council exists at the different decision-making levels: plant, company, group and company or groups with a European dimension (plants in different countries of the European Union). This makes some scholars say the different levels of works councils are organized in a “federal” way<sup>24</sup>.

Representatives of employees at the *c.e.* are elected at the workplace every four years<sup>25</sup>. The election is organized by the company and is a direct election, as for the staff representatives. The unions play the same important role in these elections as for the staff representatives (pre-electoral draft treaty and presentation of the candidates)<sup>26</sup>. Any employee who has worked for the company for one year or more and who is 18 years or older can be elected, but he or she cannot be the spouse, ancestral, descendant, brother, sister or relative by marriage of the first degree to the head of the company.

Any employee who has worked for the company for three months or more and who is 16 years or older can vote in the election for employee representatives on the works council.

### a) Structure of the works council

#### *α. A tripartite structure*

The *c.e.* comprises:

- The head of the Company, assisted by a maximum of two colleagues, under the laws of December 20, 1993, and May 4, 2004. This means that in small companies, it is possible to have the same number of representatives for both management and workers, which, one assumes, was not the initial idea behind the works council. The employer is the president of the works council. Nevertheless, he can designate an employee of the company, more likely an executive, as his representative, who will sit on the council.
- One or several union representatives designated by the unions. A distinction must be made depending on the size of the company. In companies employing less than 300 persons, these representatives can, at the same time, also be a *délégué syndical* (union representative) in the company<sup>27</sup>. In cases where there are several union representatives of the same union, the union designates one of them to sit on the works council. In contrast, in companies employing 300 persons or more, any union

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<sup>24</sup> J.Pélissier, A. Supiot, A. Jeammaud, *Droit du Travail*, 22nd edition, Dalloz, 2004, p.837.

<sup>25</sup> Since 2005 (law of August 2<sup>nd</sup> 2005) the length of the mandate has been extended to 4 years, whereas it was 2 years initially. This length will be applied for members of the works council elected after August 3<sup>rd</sup> 2005, the day the new law was published. This extension is clearly a sign of reinforcement of the power of the workers representatives at the works council, as, for example, they will benefit from a longer protection, *cf. infra*.

<sup>26</sup> *Cf. supra*.

<sup>27</sup> Art. L. 412-17.

considered as representative in the company can designate one representative<sup>28</sup> to the council, different from the union representative in the company.

- A delegation of employees, who are elected. The number of representatives varies with the size of the firm (Table 4). These figures can be increased by agreement.

### *β. Commissions*

There are two types of commissions within the works council. Some are mandatory and take into account the number of people working in the company – the commission for vocational training and employment and the commission for professional equality (more than 200 employees), the commission for housing (more than 300), and an economic commission (1,000 employees or more). The works council, for dealing with various specific matters, can create other commissions<sup>29</sup>. In these latter ones, various experts are allowed in.

Table 4: Number of elected worker representatives at the works council according to the workforce

<b>Workforce of the company</b>	<b>Number of representatives</b>
50 to 74 employees	3 representatives + 3 substitute representatives
75 to 99 employees	4 representatives + 4 substitute representatives
100 to 399 employees	5 representatives + 5 substitute representatives
400 to 749 employees	6 representatives + 6 substitute representatives
750 to 999 employees	7 representatives + 7 substitute representatives
1,000 to 1,999 employees	8 representatives + 8 substitute representatives
2,000 to 2,999 employees	9 representatives + 9 substitute representatives
3,000 to 3,999 employees	10 representatives + 10 substitute representatives
4,000 to 4,999 employees	11 representatives + 11 substitute representatives
5,000 to 7,499 employees	12 representatives + 12 substitute representatives
7,500 to 9,999 employees	13 representatives + 13 substitute representatives
10,000 employees and more	15 representatives + 15 substitute representatives

### **b) Social attributions**

Since an ordinance of February 2, 1945, all company benefit schemes were transferred to works councils. This was reasserted in 1982: “The works council manages and controls the administration of all company benefit schemes set up in the companies to benefit the employees or their families”<sup>30</sup>. According to jurisprudence, these benefit schemes “must not be mandatory by law”, “mainly to the advantage of the employees of the company” and the aim must be “to improve the collective employment, working and living conditions of the employees within the company”<sup>31</sup>. The benefit of such schemes must ensue from being an employee of the company<sup>32</sup>.

The role of the works council depends on the nature of the schemes:

- They directly manage benefit schemes that are not legal entities.
- They take part in the management of legal entities with designated representatives on the board.

<sup>28</sup> Can be designated only on representative by union, unless a more favorable agreement exists, Cass. Soc. July 2<sup>nd</sup> 1981, *Bull. civ.* V, n°644.

<sup>29</sup> Art. L. 434-7.

<sup>30</sup> Art. L. 432-8.

<sup>31</sup> Cass. Soc. November 13<sup>th</sup> 1975, *Bull. Civ.* V, n° 533.

<sup>32</sup> Cass. Soc. January 13<sup>th</sup> 1981, *Bull. Civ.* V, n° 25.

- They simply check the management of some benefit schemes (for example, concerning the construction of housing for employees).

There are some limits. The works council cannot allocate funds for political activities or activities linked to unions, but this restriction does not apply to cultural activities (lecture, exhibitions, journeys, *etc.*). The works council can also invite people from outside the company for informational meetings in the works council room<sup>33</sup>.

In order to fulfill its social attributions, the works council receives a specific contribution from the employer that is different from the general contribution to the works council<sup>34</sup>.

### c) Economic attributions

Basically, the employer must consult with the works council prior to certain decisions regarding the company and must also forward certain information and documents.

#### *α. Meetings and consultations*

There are two kinds of meetings. On the one hand, are the regular meetings, which can take place every year for some topics (flexible work hours, paid leave, equality between men and women, vocational training, R&D, *etc.*), every month (in companies with 150 employees or more) or every two months (for companies employing less than 150 persons). Then there are extraordinary meetings, sometimes occurring between regular meetings, should the majority of the members of the council ask for such<sup>35</sup>. The program of the meeting (*l'ordre du jour*) and notice to attend must be given three days in advance.

The works council must be informed of any decision regarding the organization, management and general operation of the company<sup>36</sup> and, among others, of measures that could affect the size or the structure of the workforce, working time, the working and employment conditions and the vocational training of the employees<sup>37</sup>. The most important criterion to take into account in this text is that of “importance,” whatever the nature (strictly economic, social, direct consequences on the workforce, *etc.*) of the measure. As for the organization of the company, the measure can concern itself with the internal (new methods in work organization, introduction of new technology, *etc.*) or external (merger, transfer, *etc.*) organization. This consultation was extended by the law of October 28, 1982, to cases where the company acquires an interest (between 10 and 50% of the capital) in another company, or when another company acquires an interest in the company in question<sup>38</sup>.

#### *β. Communication of documents and information*

The employer must communicate to the work council various documents.

- One month after the council has been elected, the employer must forward to the new council financial documents detailing the nature of the company and its organization, including the economic prospects of the company<sup>39</sup>.
- Every three months, the employer must appraise the work council with a general outline of orders made with the company and its financial situation and production plans (art. L. 432-4, last paragraph). Every three months in companies employing 300

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<sup>33</sup> Art. L. 431-7.

<sup>34</sup> *Cf. supra.*

<sup>35</sup> Art. L. 434-3.

<sup>36</sup> Art. L.432-1.

<sup>37</sup> For a more complete detailing of the case in which the employer must consult the works council, see J.Pélissier, A. Supiot, A. Jeammaud, *op. cit.* , p.836

<sup>38</sup> L.432-1, § 8.

<sup>39</sup> Art. L. 432-4 § 1.

persons or more and every six months in others, the employer must inform the council of planned measures for improving, renewing or transforming equipment or production methods and their influence on working conditions and employment, and the change in the workforce and other matters<sup>40</sup>. Concerning this last point, the information given by the employer must describe the utilization of employees under fixed-term contracts, temporary workers, part-timers and employees of other companies working at the company. On this specific matter, the attributions of the work council go further: The council can alert the administration in case it thinks there might have been abuses in the utilization of workers with fixed-term contracts and temporary workers or when there is a sharp increase in the utilization of such contracts.

- Each year, the employer must forward various documents to the council. First, the council must receive a report concerning the activity of the company, turnover, profit, investment, economic prospects for the coming year, *etc.* (art. L. 432-4 §2). In addition to this, the council will also be communicated the *Bilan Social*, which draws up a statement of the social situation in the company (in companies employing at least 300 persons)<sup>41</sup>. The council must also receive copies of the accounts drawn up by the company.

Nevertheless, the power of the *c.e.* never goes as far as the *Betriebsrat* in Germany; there is clearly no co-administration in France. The works council only needs to be consulted, except in some (rare) situations in which it can veto a measure (such as the introduction of an individual working hours system). Moreover, in principle, as long as there is a union representative in the company, the works council has no power to conclude a collective agreement<sup>42</sup>; this is the role of the representative unions and their representatives.

In companies with less than 200 employees, there can be a unique representation (*la délégation unique*) instead of a *comité d'entreprise* and *délégués du personnel*, which is given the attributions of both.

### 3. Le Comité d'Hygiène, Sécurité et des Conditions de Travail (*CHSCT*, committee for hygiene, safety and working conditions)

The *CHSCT* contributes to the protection of the health and safety of employees and to the improvement of their working conditions<sup>43</sup>. In concrete terms, this committee's aim is first to advise the employer when the latter is planning a measure that will have a strong impact on hygiene, safety or working conditions in the company<sup>44</sup>. The employer must also consult the committee when work rules are altered and for certain measures concerning specific categories of workers (disabled, victims of work accidents, *etc.*). It must be set up in companies with 50 employees or more. The *CHSCT* comprises a president, namely the employer or his representative, and a worker delegation comprising employees of the company elected by indirect elections. Workers representatives on the *CHSCT* are designated for two years (renewable) by a college comprising staff representatives and the elected members of the works council.

<sup>40</sup> Art. L. 432-4 and L. 432-4-1.

<sup>41</sup> Art. R. 438-1 gives the precise content of this document.

<sup>42</sup> Nevertheless, there are 2 exceptions: it is possible to negotiate an agreement on interest and participation within the works council (art. L441-1 and L. 442-10) and a company or plant agreement in case there is no union representative (art L. 136-26 of the Labor Code, resulting from the law of May 4<sup>th</sup> 2004, *cf. infra*).

<sup>43</sup> In companies classified as dangerous, it is also in charge or threats the company may represents for the environment, art. L. 236-2 of the Labor Code.

<sup>44</sup> Art. L. 236-2 § 7).

At least once a year, the employer must give the committee a report analyzing the situation regarding hygiene, safety and working conditions in the company.

Besides its consultation aspects, the committee also controls the situation of hygiene, safety and working conditions, analyzing the professional risks in the company. To that extent, the *CHSCT* will conduct inspections in the company at least four times a year (art. L. 236-2 § 3 and R. 236-10). The aim of these inspections is to check if the legal provisions are being respected. It also conducts investigation on professional diseases and work accidents.

### C. Means and protections

In order to fulfill their mission, and considering their specific role in the company, which could lead them into conflict with the employer, the workers' representatives are given specific means and protection.

#### 1. Means

They have different means to fulfill their mission. The *délégués du personnel*<sup>45</sup> and *délégués syndicaux*<sup>46</sup> have a certain number of hours (*crédit d'heures*), depending on the size of the company (from 10 to 20 hours), in order to fulfill their missions. The actual time can exceed the time allowance in case of exceptional circumstances (an industrial dispute, for example). The time spent in meeting with the employer is not deducted from this time allocation. These hours are considered as work time and, therefore, paid as such.

The *comité d'entreprise* is allocated both time (20 hours per month for each representative, considered as work time) and money (contributed by the employer), and a venue for holding information meetings, etc., for employees.

They also must have free access to certain company documents, as well as the freedom to go anywhere they want at the workplace when on mission, in order, for example, to meet employees within the company, providing this does not make problems for the worker. They can also do so at hours other than their working hours. They are also allowed to quit the workplace during their allocation of hours in order to fulfill their duties (for example, going to the factory inspection office).

#### 2. Special protection

All the representatives have special protection during their mission and even beyond: six months or one year, depending on the case (Table 5). Any employer who would like to dismiss such a representative must ask for authorization from the *inspecteur du travail* (factory inspector), whatever the reason for the dismissal. The works council must be consulted in the event that the employer plans to dismiss one of its members or a staff representative, but this is a simple opinion. The dismissal pronounced without authorization, or contradicting the authorization is null and void.

The scope of protection in cases of dismissal has been extended by law to other situations, such as transfer, retirement or modification of the individual contract<sup>47</sup>. In addition, the law established some specific rules in some cases (terminating a fixed-term contract, for

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<sup>45</sup> Each staff representative has 10 hours per month in firms with less than 50 employees, 15 hours in companies employing 50 or more persons.

<sup>46</sup> Each unions representative is allocated 10 hours per month in companies employing between 50 and 150 persons, 15 hours in companies with 151 to 500 employees and 20 hours for companies with more than 500 employees.

<sup>47</sup> P.-Y. Verkindt, "La modification du contrat de travail du salarié protégé", *Mélanges H. Sinay*, 1994, p.281.

Table 5: Length of protection for former representatives and election candidates

Length of protection	Protected employee status
6 months	<ul style="list-style-type: none"> <li>-Former staff representatives</li> <li>-Former employee representatives to the works council and former union representatives at the works council, who have fulfilled their duties for at least 2 years.</li> <li>-Candidates for staff representative elections, starting from acceptance of the candidacy by the employer.</li> <li>-Non-elected candidates at the latest election for the works council, starting from the sending of the lists of candidates to the employer.</li> <li>-The first employee who asked the employer to organize elections (works council or staff representatives) or accepted to organize elections if his initiative is confirmed by a union.</li> </ul>
12 months	Former union representatives having fulfilled their duties for at least one year.

example: application of the same scope as dismissal)<sup>48</sup>.

We have just seen there are multiple levels of representation of workers in companies, factories and groups in France. But the elected representatives are not competitors to the traditional unions: it is more of a complementary situation. Moreover, unions retain an important role in the setting up and operation of these representatives. Nevertheless, recently, new tendencies have appeared to alter this balance, giving non-union representatives new attributions in a search for decentralization and flexibility in industrial collective norms.

### III. New trends toward the decentralization of collective relations

There has been a clear trend in French labor law recently toward a decentralization of collective industrial relations. This tendency relies mainly on two means: A) a new supremacy given to the company (or plant) level agreement in the hierarchy of collective industrial norms, leading to new relations between the different levels; and B) new opportunities given for collective bargaining at companies where there is no union representation.

#### A. New relations between the different levels

The Law of May 4, 2004, marked a disruption in relations between the different levels of collective labor relations. Clearly, it gave the company- or plant-level agreement greater emphasis. This law, and the radical shift it made compared with previous practice and legal norms, is the result of a long process during which, in the name of deregulation and flexibility, the old system was criticized and applied less stringently. It was necessary to examine this in order to understand the genesis of the law of 2004.

##### a. Before the law of 2004: a tendency and pressures for renewing relations between levels

The existence of several levels of collective bargaining (national, professional, company or plant) is a typical characteristic of the French system of collective labor relations. The basic

<sup>48</sup> Art. L. 425-2 and L. 436-2.

principle of this somewhat complicated articulation was that what was acceptable at a lower level should not contradict what was implemented at the upper level, except in cases where it grants the employees with more favorable terms<sup>49</sup>. It meant that the collective agreement concluded at the company level could deviate from the agreement concluded at the branch level only if it granted the employees of companies with terms more favorable than the ones in the branch-level agreement.

The law of November 13, 1982, tried to make this relationship between the company level and branch level clearer<sup>50</sup>. In the event that the company-level agreement is signed after the branch-level agreement, its aim should be the improvement of the branch-level agreement, with more favorable clauses, clauses on topics not dealt with in the upper-level agreement, and adaptations of the branch-level agreement to the particularities of the company. In contrast, if a branch-level agreement becomes applicable in a company where an agreement has already been concluded at the level of the company, the provisions of the company agreement must be adapted. This text seemed to establish a hierarchy between the levels in favor of the branch agreement: in case the conflict between the two cannot be resolved using the principle of the most favorable provision for the employees, the branch agreement prevails.<sup>51</sup>

Nevertheless, even after that time, some signs contradicting these principles surfaced. First of all, some dispensatory agreements (*accords dérogatoires*) were authorized, under certain conditions, to set different provisions, sometimes less favorable than the law, as we have explained<sup>52</sup>. Under the law of October 13, these agreements were limited to the question of salaries (with some limits)<sup>53</sup> and working time (adjustment)<sup>54</sup>. In these cases, the law allowed the company-level agreement to contain some different provisions, including less favorable ones, from the branch-level agreement and, eventually, the law itself.

On October 31, 1995, trade unions and employer associations concluded an *accord national interprofessionnel* (inter-professional national agreement) in which this system of linking the three levels (nation, branch, company) was highly criticized, calling for the re-consideration of the role to be given to each level<sup>55</sup>. To that extent, this agreement proposed a new role for the branch-level agreement. According to the 1995 national agreement, the branch-level agreement should allow more freedom for company-level social bargaining. But this new approach was highly criticized<sup>56</sup> for denying the principles of articles L 132-2 and L 132-23 of the Labor Code, *i.e.*, the application of the most favorable provision and the place of the branch level agreement, as a standard. This may explain why this new linking of the norms was not taken up again in the law of November 12<sup>th</sup> 1996.

Of course, the Laws *Aubry I* on June 13, 1998, and *Aubry II* in January 2000 have encouraged social bargaining, especially at the level of the companies, inviting the employers to conclude agreements on the 35-hour workweek.

At last, in 2001, the Medef (the employers association) and four union confederations

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<sup>49</sup> *Ordre public social, principe de faveur, or dérogation in melius*, whatever the name, these describes this principle, art. L 132-4 of The Labor Code. This rule has been applied by the jurisprudence many times: for an example, Soc. June 8<sup>th</sup> 1999, *Droit Social* 1999, p.852.

<sup>50</sup> Art. L. 132-23 Labour Code.

<sup>51</sup> M.-A. Rotschild-Souriac, "Les accords collectifs au niveau de l'entreprise", thèse, Paris I, 1986, p.1410.

<sup>52</sup> *Cf. supra*.

<sup>53</sup> Art. L. 132-24.

<sup>54</sup> Art. L. 212-10.

<sup>55</sup> *Liaison Sociales* C1 n°7354, November 9<sup>th</sup> 1995.

<sup>56</sup> See C. Tissandier, "L'articulation des niveaux de négociation: à la recherche de nouveaux principes", *Droit Social* 1997, p.1045. Some scholars, at the contrary, pretended this part of the agreement wasn't in contradiction with the legal system of the moment, see for example M.-L. Morin, "L'articulation des niveaux de négociation dans l'accord interprofessionnel sur la politique contractuelle du 31 octobre 1995", *Droit Social* 1995, P. 11.



signed a text, a *position commune*, calling for the authorities to take legislative measures in order to radically change the relations between the different levels of social bargaining. If this text is not legally binding in any way, it could be seen as the last step before the law of 2004: the radical change it promotes can directly lead to this law, which we are going to examine now.

#### **b. The revolution of 2004**

All the previous laws were more or less adaptations of the original principle. This is not the case of the law of 2004, which obviously changed the relationship between the collective agreements of different levels.

With the law of May 4, 2004, the article L. 132-23 of the Labor Code, as it resulted from the law of 1982<sup>57</sup>, is not deleted or rewritten. Nevertheless, two new paragraphs change the whole system. According to the new text, the company or plant agreement can include provisions superseding all (or part of) those that are applicable to an agreement with a wider territorial or professional field unless this agreement states to the contrary<sup>58</sup>. So, since this law, the principle is that the company or plant agreement can include provisions different to the ones in the branch level (or professional or inter-professional), including less favorable provisions for the employees. The old system will be applied only if the upper-level agreement clearly says the company agreement cannot do so. The old system became an exception. With this text, the emphasis is clearly placed at the company (or plant) level, whereas it used to be at the branch level. Now, in case of conflict between the different levels (company and branch), this is the decentralized text that will be applied, whether it is more or less favorable for the employees<sup>59</sup>. The positive side of the new regulation is that the solution is now far simpler in case of conflict between a branch and company agreement.

Nevertheless: a new principle generally means new exceptions too. Article L. 132-23 of the Labor Code gives these exceptions where the company or plant agreement cannot depart from the provisions contained in a branch or national or inter-professional agreement. And the fact is that the scope of these exceptions is very limited. First, this concerns some mechanisms functioning at a wider area than the company: mutual benefit insurance systems financed by funds collected for vocational training, collective guarantees concerning contingency, etc. Second, the professional classification or minimum wages – here too, the company agreement cannot contain provisions departing from the branch (or professional or inter-professional) agreement. French law shifted from a positive list system (general prohibition with exceptions where deviations were allowed) to a negative list system (generally allowed, except for some specific subjects).

So, obviously, the law of 2004 changed the relationship between collective agreements at different levels. Now, the company (decentralized level) agreement prevails over the branch-level agreement (other than some exceptions). In that sense, this law clearly went in the direction of the decentralization of industrial relations.

### **B. Social bargaining in the absence of a union representative**

We have seen that the most important, and most typical, task of the union representatives in the company has been to negotiate collective agreements<sup>60</sup>. The question arises as to what should be done in companies where agreements are required but where there is no such

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<sup>57</sup> Cf. *supra*.

<sup>58</sup> Art. L. 132-23 § 4.

<sup>59</sup> M.-A. Rotschild-Souriac, "L'articulation des niveaux de négociation", *Droit Social* 2004, p.579.

<sup>60</sup> Cf. *supra*.

representation. This kind of situation is clearly topical at a time when the unionization rate is low, especially in small companies. The employers have also claimed the prerogative to conclude collective agreements, seeking greater flexibility. In order to satisfy this need for decentralized regulation, several laws imposed different measures. The law of May 2004 discussed above concerning the link between the different levels, made a synthesis of these previous texts while renewing the ideas of certain points. We are now going to examine all these different laws and norms (1) before detailing the 2004 law on this question (2).

### 1. The recent multiplication of norms towards the attribution of the power of negotiating to other persons than the union representatives (1995-2003)

As has often been the case on this problem of renewed social dialogue, the initiative came from an *accord national interprofessionnel* (inter-professional national agreement) on October 31, 1995, the same as seen in §A. One of the aims of this accord, signed by employers and unions, was to allow the opening of negotiations with other participants than union representatives in companies where they are not present. There was also a conflict here with the past of industrial relations<sup>61</sup>. But it must be pointed out that this avenue was possible only in companies where there was no union representative: the idea was not to set a “double track” for negotiating collective agreements; this is still the natural role of the labor unions and their representatives<sup>62</sup>. The aim was only to compensate for the absence of a union representative, not to “bypass” the unions.

This idea was accepted by the authorities and set out in the law of November 12, 1996, but only in an experimental way (for a limited period of time). As in the way management and labor concluded it in 1995, the law allowed elected representatives of the company and employees who received a mandate from a union representative in the company to negotiate collective agreements. But there were conditions, and this must have been allowed by a branch-level agreement.

These conditions disappeared in the two laws concerning the 35-hour workweek, encouraging the conclusion of agreement at the company level concerning the reduction of working hours. Attention should be paid to one particular point: Only employees who received a mandate from a representative union could conclude such agreements under the law of June 13, 1998. This comes from the fact that the experimental scheme of the 1996 law was still applicable. So, practically, the two different schemes were available. With the law of January 19, 2000, (the second law), only those with a mandate from the representative unions were allowed to conclude such agreements. In that sense, the law of 2000 reduced the possibilities of negotiation with persons other than union representatives. And it must be repeated here that this was limited to agreements concerning the reduction of working hours.

The reduction of possibilities of alternative negotiations will be more spectacular in 2003; the law of January 2003 (known as the law concerning employees, work time and the development of employment) simply abolished these schemes.

As we can see, the possibilities of negotiating with persons other than union representatives in companies where they were not present were very limited before 2004: it was allowed only for a limited time (as an experiment in 1996) or on a precise subject (the

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<sup>61</sup> See V. G. Coin, “L'accord interprofessionnel du 31 octobre 1995 sur la politique contractuelle”, *Droit Social* 1996, p. 3.

<sup>62</sup> According to the jurisprudence, law gives a monopoly to unions for representing interests of employees in social bargaining (Cass. Crim, November 18<sup>th</sup> 1997, *Droit Social* 1998, p.409. Nevertheless, this monopoly has no constitutional value, and, therefore, the law can allow other types of collective representation as long as the aim and the result are not to counter the representation of the unions (Conseil Constitutionnel, November 6<sup>th</sup> 1996, *Droit Social* 1997, p. 31.

reduction of working hours in 1998 and 2000). The law of 2004 did not set such limitations.

## 2 . The return to “alternative” negotiations with the law of May 4, 2004

This is more or less a return to the system under the 1996 law, with some adjustments inspired by the experiences of the laws that followed. But the law of 2004 also introduced some new ideas. For example, the branch agreement organizing the negotiations does not have to specify the number of employees under which the negotiations are allowed. This could lead to a wider spread of such schemes. Directly inspired by the law of 1996 and the accord of 1995, the new law targets both the elected representatives (a) in the company and the employees with a mandate from a representative union (b).

### a) Elected representatives

It is the branch agreement that fixes the subjects of negotiations carried out by the elected representatives; the law itself does not give the domain of the negotiation anymore. We saw that this was limited to a reduction of working hours in the law of 2000. This is a widening of the scope of this form of negotiation, but this is no more or less than a return to the solutions of 1995 and 1996<sup>63</sup>. In principle, general authorization seems now to have been given to elected representatives to negotiate at the company level, in the absence of a union representative, on any subject.

But the lawmakers also put a limit in 2004, setting up a national branch joint commission (with the same number of representatives for both labor and management) that must approve the agreement concluded by the employee representatives in order for the agreement to be considered as a binding industrial collective agreement. This commission will not only check the validity of such an agreement, as it was set up in the law of 1996, but will give its approval, which means it could also check, for example, if the agreement is appropriate<sup>64</sup>.

### b) Employees with a mandate from representative unions

On this point, the lawmakers in 2004 seemed to alter the tendency seen in the law of 2000. If this latter law suppressed the possibility of allowing elected representatives to conclude agreements on working hours, therefore putting a strong emphasis on the employees appointed by a union, the law of 2004 seems to give less importance to these new participants in industrial collective relations<sup>65</sup>. Now, the emphasis seems to be on the employees' representatives. Still, the law of 2004 contains some interesting and useful details. First, it is clear that one representative union<sup>66</sup> can give a mandate to only one employee, where the law of 2000 simply stated that “a union” can give a mandate to an employee. Moreover, it is now specified that the agreement will be enforced after being communicated to the administration<sup>67</sup>. Of course – and it was already provided in the text before – the employees receiving a mandate benefit from the same protection as the union representative during their mandate and 12 months after the end of the negotiation.

Whatever the details, the fact is that, after having disappeared in 2003, since 2004 it is possible again for the employer to conclude a collective agreement with persons other than union representatives, *i.e.*, employee representatives in the company or an employee of the

<sup>63</sup> Cf. *supra*, 1.

<sup>64</sup> G. Borenfreund, “La négociation collective dans les entreprises dépourvues de délégués syndicaux”, *Droit Social* 2004, p.606.

<sup>65</sup> G. Borenfreund, *op.cit.*, p. 609.

<sup>66</sup> In 2004 like in 1998 and 2000, only the union representative at the national level can give a mandate to an employee of the company in order to negotiate a collective agreement.

<sup>67</sup> Art. L. 132-10.

company especially appointed by a union on any subject, but still with the limit of the authorization from a branch agreement.

As a conclusion, we could say that it is obvious that, in France, there was, and still is, a move towards the decentralization of industrial relations, but this movement can appear at first sight not to be against a traditional role of trade unions, *i.e.*, the negotiation of collective agreements. Collective bargaining is left to the elected representatives or employee with a mandate from a union only in case there is no union representative in the company. This is not about changing the role of unions; this is just about filling a gap. The only change is that specially appointed representative employees are given a new mission where nothing existed before. On this point, this is not about changing the roles of the participants; this is just about improving the system. Moreover, unions keep broad control over the norms stemming from this new schemes, or on the person in charge of the negotiations. And this move must be praised, as it has brought social bargaining in economic entities where it never occurred before.

The real change comes from the role and hierarchy of the bargaining levels themselves: the decentralized level (the company, the plant) has taken a broader role than the branch level. And this is where the main change appears. Considering that the branch level is still dominated by the unions, minimizing the role of agreements decided at the branch level and giving the priority to provisions instituted by the company or a plant-level agreement, where it is not only unions who are bargaining with the employer, is surely minimizing the role and the influence of unions.

# Decentralizing Industrial Relations and the Role of Labor Unions and Employee Representatives

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## 1. General overview of the trade union system in Italy

The system of industrial relations in Italy is traditionally characterized by a position of conflict between the actors in Collective Bargaining, with a distinct differentiation of the role of management, on one side, and trade unions, on the other.

This means that, differing from what happens in other European systems and, in particular, in the German system, trade unions do not participate in the decisions taken at any phase of the running of a business.

At a legal level, the fundamental disposition is that contained in the Constitution, in section 39, according to which trade union organization is free.

This principle has led to a distancing of the present situation to that of the fascist period, in force between the two world wars, in which trade union activity was made illegal, as was any form of organisation by workers for their rights; especially strike action. During the fascist period, corporations, organisms for public law, were to represent workers' interests by law, though they had to take into account the greater interest of the Nation and, therefore, also the needs of companies.

The principle of trade union freedom was introduced in 1948 with the Constitution and has led to the formation of trade unions that, adopting a system of voluntary membership, have had significant ties with the political forces present in parliament.

In Italy there are three main trade union confederations: the Cgil, the Cisl, and the Uil, that have had the respective political references: the Communist Party, the Christian Democratic Party and the Socialist Party.

After the severe crisis of the traditional political parties in Italy between the late 1980s and early 1990s, following the fall of the Berlin's wall, on the one hand, and judicial investigations into corruption in politics, on the other hand, both the Communist Party and the Christian Democratic Party have left the scene, whilst the Socialist Party, although still formally in existence, has but a marginal political weight. It can be said, still today, the Cgil is the most left-wing trade union, the Cisl is one of catholic inspiration and more inclined to moderate positions and collaboration with business, while the Uil is a moderate left-wing reformist one.

Although the trade union to gain the greatest consensus from workers has always been the Cgil, the three trade unions have always worked together to try and overcome their differences and to form a common front. There have been, however, periods in which trade union unity has been fragile especially over certain issues like, in the 1980s, the abandonment of the system of automatic wage increases linked to the reduction of purchasing power due to inflation ("scala mobile") and, between 2001 and 2005, the so-called Pact for Italy and the renewal of the national collective contract for metal workers.

The period of greatest social conflict that our country has had since the Second World War was from the 1960s to the early 1970s, during which time the political scene was strongly characterized by the influence of left-wing workers' political movements, that in those years – not only in Italy but in Europe in general – had widespread parliamentary representation.

Those years were the last of a period of extraordinary economic expansion for Italy, that had passed the difficult phase of post-war reconstruction. There was, therefore, a need to distribute part of the wealth that had been produced to the working class, whose work had not yet been adequately compensated. In that period, collective contractual bargaining, that ended periods of often harsh conflict with employers, brought continuous improvements in wages and work conditions and the trade unions, as one can easily imagine, enjoyed the full support of the workers.

But those boom years were soon followed by the first serious economic recession of the post-war period that had its roots in the oil crisis of the 1970s.

This meant that trade unions had less space in which to manoeuvre. For the first time contractual and wage discussions were made from a weakened position and the trade unions had the difficult task of mediating between the survival needs of business and the primary value of the defence of jobs.

There were the first so-called ablativ agreements; contracts that made the workers' conditions worse than under previous collective agreements. This situation led to a serious crisis of consensus within the trade union movement, aggravated by the fact that, from a legal point of view, in Italy collective agreements do not have effectiveness for all workers but are limited to the members of the stipulating trade union.

Whatever the complex economic, ideological, cultural or historical reasons maybe, one can say that, since the 1980s, trade unionism in Italy has been in a phase of crisis in terms of workers' representativeness that does not seem, at least for the moment, destined to be overcome.

## **2. Union Density and the role of trade unions in their recent developments**

In discussing this point it is interesting to analyse the estimates of workers' membership in trade unions.

To be able to read the data of trade union density, however, one must consider that even though the total number of members of the main trade union confederations has increased by approximately two million since 1979, more than half of the members are pensioners. If the number of pensioners is not considered, however, the degree of unionisation can be seen to have come down from approximately 50% in 1980 to approximately 35% today: a reduction of over a quarter.

This drop in unionisation has probably been compensated, at least in part, by the increase in autonomous union membership, particularly strong in the public sector and in sectors protected from competition (the post office, railroads, energy etc.) and in the banking sector. Even so it is still difficult to determine the exact level of adhesion to this type of trade union.

In spite of the undeniable difficulties that trade unions have had in reinstating a relationship of confidence with their own traditional base, trade unions have gradually been assuming an increasingly greater role in deciding the political-economic agendas of the governments in the last decade.

According to some observers, the trade unions' increase in political weight is partially due to the overall weakness that has characterized the Italian political-institutional system since the beginning of the 1990s, as well as to the fact that becoming part of the European Union and the Euro area would not have been possible without the collaboration of all the social partners, especially the trade unions.

In fact the role of trade unions in last ten to fifteen years has radically changed: from an

antagonist of business and the constituted political power, to a privileged and necessary interlocutor in the most critical steps of the political and economic life of the country. Naturally, this new and important role has led trade unions to abandon more radical positions and to embrace the logic of the so-called "*concertazione*" (*concertation*).

Concertation seems to have been the key word of the Italian industrial relations at "macro" level during the 1990s. Even though concertation does not mean co-determination (in the sense used in the German system), its effect is that of preventing industrial conflict and, therefore, social conflict, through a system of continuous dialogue on economic issues that engage the social partners – that is, trade unions, employers' organisations and the government – to promote initiatives which have been previously agreed.

The need for concertation comes from the realisation – shared by all the social partners – that conflict generates diseconomy that is not sustainable in a fragile economic reality that is irreversibly projected into a competitive global market. Therefore, with concertation, it should be possible to resolve conflicts of interest that are inevitably generated between various members of society efficiently.

The practical effects of this concertation have been significant. In 1993 a trilateral agreement (the so called "1993 Protocol") between government, trade unions and employers' representatives was signed, which put an end to the automatic wage increase mechanism which was mentioned above. The mechanism was considered a generator of inflation; a framework stipulating the structure of policies concerning workers' wages and contracts was drawn up following predefined criteria which were in line with documents of economic and financial programming written each year by the government.

The complex system of collective bargaining was redesigned and, in particular, the relationships between the nation wide sector based contract and company level contract were defined. In the same Protocol of 1993 the social partners engaged to recognize a new structure of trade union representation within companies, on an elective and tendentially unitary base, in the sense of representing unitarily all the different union components.

The system of concertation introduced in the 1990s has had a high degree of effectiveness. This means that the social partners abide by the rules which they themselves have laid down through the stipulation of the collective agreement. It has also meant that there has been a significant reduction in industrial conflict, with a remarkable decrease of the hours of strike action.

The resistance of the system of concertation may also be attributed, in part, to the political scene of the late 1990s. Since 1995, Italy has had a series of centre-left governments. These governments have been considered as "friendly" governments and, above all, friendly towards the far-left component of the trade unions, represented by the Cgil that is the trade union that has the greatest number of members. The relationship of political homogeneity between government and trade unions has made the latter more open to accepting legislative innovations that, in the past, had been strongly opposed because considered "too liberal". A significant example of this collaborative attitude of trade unions was the go-ahead they gave to the introduction, in 1997, of the so-called "Pacchetto Treu", a body of norms aimed at introducing greater flexibility in the labour market and allowing, for the first time, the use of temporary jobs which had been prohibited by law until then.

Interesting results have also been achieved regarding collective bargaining: for example, the introduction of the so-called area or emersion contracts. With these collective agreements it is possible to derogate from – in certain geographic areas of our country and particularly in the south and other economically depressed areas – the minimum norms and wage scales established in national collective bargaining agreements. The aims of which is both to encourage businesses to invest in the lesser-industrialized areas and to bring out into the open the underground economy, that escapes, by definition, all collective contractual regulation.

It can be said that the centre-left governments have been able to put into effect – also

thanks to the system of concertation and, therefore, the direct involvement of trade unions in the writing of bills – social and labour policies that tend to give greater freedom to business and to favour, as far as possible, greater employment flexibility. A policy that the previous governments had not been able to realize due to the opposition of the trade unions.

Moreover, the system of the concertation intrinsically stands on fragile foundations. It is a system which needs the consent of all the social partners as each possesses the power of veto. For this reason it is clear that the system works and is productive as long as all parties have a common goal, this presupposes aims that are widely shared. Not only: concertation also necessitates strong cohesion between the single components within the trade union, it is not possible for them to sit at the negotiation table if the different trade unions have differing positions.

Though these characteristics of fragility have not represented a real problem of stability for the system of concertation during the years of the centre-left “friendly” governments, the political change with the electoral victory of the centre-right, in 2001, has radically altered the scene.

The politics regarding unions followed by the centre-right government have been characterized by a tendentially negative attitude towards concertation, as it is seen as an obstacle in the reforming process the new government wished to realize. In concertation there is a necessity to find the unanimous consent of all the trade union components. Each component has the possibility of vetoing and so can block reform processes.

As has already been pointed out, between 2001 and 2005 a conflict took place between the Cgil, on one side, and the Cisl and Uil, on the other, which had serious repercussions on the entire system of collective bargaining and, more generally, on the system of trade union relationships. Today, after the three trade unions signed the new collective contract for metal workers on 18<sup>th</sup> January, we can say that this conflict has passed.

### 3. The organizational structure of trade unions

The Constitution of the Italian Republic, section 39, 1<sup>st</sup> paragraph, guarantees the freedom of trade union organisation. This means that trade unions do not have restrictions in the type of organisational structure they wish to have; they can choose to form an association, committee or occasional group in the prospect of a specific trade union dispute.

The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> paragraphs of article 39, that have never been implemented by the ordinary legislator and so are not in force, has made the provision for the registration of trade unions and, therefore, the recognition of the legal status. If this system, hypothesised by the Constitution, had been put into effect, registered trade unions with legal status, would have been able to – through special representational organisms constituted in proportion to their membership – stipulate collective national agreements which would have effectiveness extended to all those pertaining to the category to which the agreements refer. However, as has already been noted, this system of trade union representation and collective bargaining has never been put into effect. Therefore, today, Italian trade unions cannot stipulate valid collective agreements *erga omnes*. Even though, in actual fact, the extension of collective bargaining goes beyond the membership of the stipulating trade union.

In 1970, the law no: 300 (the so-called *Statuto dei lavoratori*), recognized the specific right to allow trade union activity within the workplace, predisposing a special support regulation for trade unions at company level.

At the same time, the *Statuto dei lavoratori* specified the sense of trade union freedom, asserting the right of workers not to unionise or undertake any trade union activity, in doing so guaranteeing anti-discriminatory protection with penal endorsements.

The recognition of the freedom of union **organization** helps to understand the variety of types and structures of organized groups, like the same system of **pluralism**, typical of our



country marked by the presence of three main trade union confederations: the CGIL, CISL and UIL.

The trade union organizational structure is both **horizontal** and **vertical**.

The horizontal level is organised in function of territorial issues and is divided into: 1) district (territorial work office for the CGIL and UIL or the territorial work union for the CISL); 2) regional (territorial work office for the CGIL and UIL or territorial work union for the UIL) and 3) national (political trade-unionism). The last includes all the trade unions that cover productive categories present in a specific territory.

The vertical level is organised depending on the type of work sector of the company in which the worker enrolled in the union is employed: in this sense the confederations, federations of different categories, regional structures of the different categories are recognised and the territorial structures of the different categories are recognised.

Vertical and horizontal organizational structures also exist within the structures of entrepreneurial associations: these can also be divided into territorial or productive categories. However an important difference must be stated: whilst union organizations automatically belong to both vertical and horizontal levels, the entrepreneurial associations may be part of the territorial level without necessarily belonging to one of categories and vice-versa.

#### 4. Trade union representation at company level

With specific reference to the safeguarding of workers' rights at company level, section 19 of the *Statuto dei lavoratori*, as modified following the referendum of 11<sup>th</sup> June 1995, expressly recognizes the right of individual workers to constitute workplace representatives (RSA) for every productive unit, in the area of trade unions that are parties of collective bargaining agreements applied to their productive unit. Trade union rights of promotion and support of trade union activity by the workers in a company for union representatives and their managers were recognised.

In its original formulation, section 19 of the *Statuto dei lavoratori* was written to get over the privatistic logic of trade union representation, typical of the qualification of the trade union as an unrecognised association according to the effects of section 36 and ss. of the Civil Code. The possibility for workers to constitute workplace representatives was recognized by the associations affiliated to the most representative confederations, that is, the associations not affiliated to the confederations mentioned above, as they are parties of national or provincial collective agreements applied to the productive unit.

Other than the demand for a connection to the extra-company reality, the original formulation of section 19 of the *Statuto dei lavoratori* also introduced a criterion of selection of the union – that of **greater union representativeness** – aimed at making, in the company domain, an area of privileged union activity; that is on the presupposition of the presumption of representativeness, consisting in the affiliation to a confederation that is better represented at a national level.

Following the referendum of 11<sup>th</sup> June 1995, symptomatic of a deeper and more radical crisis of the representative ability of trade unions, the text of section 19 St. lav. was partially modified: not fulfilling the requirement of greater representativeness, the support of trade union activity within companies is reserved exclusively to the parties of collective agreements already applied in the productive unit.

In limiting itself substantially to promoting and supporting only collective bargaining where it already exists, the new text of section 19 of the *Statuto dei lavoratori* does but widen the gap between the strong and weak areas of trade union representation. Today, after the new regulation system, the numerous marginal sectors of our economy can be seen to be compromised; collective bargaining is systematically eluded. There is no doubt that there now exists in such sectors an additional incentive to avoid unionisation and collective bargaining,

as this is the only condition for the constitution of workplace representatives.

Section 19 St. lav. does not identify a specific model of union representation in the workplace, but relies on the experience of industrial relations. Currently, workplace representatives (RSA) are identified with **unitary trade union representations** (RSU) by the 1993 Protocol.

RSUs are distinguishable from RSAs in that they represent all the workers in the working unit and not only those that are union members.

RSUs can be constituted in all productive units and in public administration where there are more than 15 employees.

Two thirds of the composition of the RSU is voted by means of a proportional election by secret ballot. The last third is assigned to the trade unions that are part of the nation wide-sector collective agreements applied to the productive unit.

It can be said that in Italy the representation of workers other than through trade unions does not exist, unlike, for example, the works councils in Germany or the comité of entreprise in France. As has already been mentioned, RSUs must be constituted by trade union associations.

These bodies are formally recognised as official interlocutors in bargaining processes, together with territorial-level union organisations. Recognition is granted by agreements. This means that decentralised collective bargaining (at the level of a company or smaller administrative unit as opposed to a whole department) is handled jointly by territorial worker-sector and the bodies elected by all the workers.

The RSU reflect the single-channel representation model traditionally prevailing in Italy, in which the body representing workers in the workplace is still formed “within” trade union organisations: when such bodies are voluntarily created, the unions forgo their right to form their own representative bodies. In this way, the united body combines representation of both the workers and the unions.

Although decentralised bargaining is quantitatively limited in Italy RSUs play an important bargaining and advisory role and at times take part indirectly in management of the health and safety protection system.

## 5. European Works Councils in Italy

As stressed in the last Italian report on the evolving structure of collective bargaining (<http://unifi.it/archive/00001164/>), the transposition of the directive on EWCs was greatly delayed in Italy and was only achieved with Legislative Decree no. 74 of 2 April 2002, which was enacted just in time to avoid an appeal by the Commission to the European Court of Justice on grounds of non-fulfilment.

The process of implementing the directive was, however, rapidly activated by the social partners, with the stipulation of an inter-confederate agreement on 27 November 1996 between Confindustria, Assicredito and the CGIL, CISL and UIL union confederations, in the presence of the Minister for Labour and Social Security; the agreement transposed the directive via bargaining, thus paving the way for company-level agreements to set up EWCs long before the actual directive was transposed. Until 2003 thirty-two agreements were signed in Italy, out of a total of about seven hundred in Europe as a whole. There are, however, many multinationals in which it has not yet been possible to set up an EWC. The consultation of EWCs and the quality of the information they are provided with follows the general trend. It emerged from a recent conference that «in most cases works councils only succeed in obtaining limited, generic information which is often already in the public domain, and are held only once a year, without being followed by the consultative phase, which would after all prove to be useless. Although limited in number, there are companies which provide satisfactory previous information, but leave no room for consultation; only a very small

number of EWCs are lucky enough to meet with a management providing adequate information and allowing delegates to express an opinion, which in many cases proves extremely useful to solve serious problems, especially regarding employment».

The operational difficulties experienced by EWCs are exacerbated by linguistic communication and management that is often hostile towards them. Sectors close to the unions demand modification of the EWC directive to impose and strengthen the rights it provides and require more active, direct involvement of EWCs in the social responsibility strategies pursued by companies.

## **6. The articulation of collective bargaining and the role of the nation wide-sector agreements**

In Italy the aggregation of workers has happened, other than for some rare exceptions (like, for example, in the case of managers or air traffic controllers), around professional categories. The difference in other countries, above all in the UK and North America, where, in many cases, where the solidarity of professional groups is derived from the type of trade practised, in Italy workers are usually organized depending on the type of productive activity exercised by the company for which they work (trade union for sector or industry).

The collective agreements through which organised workers express solidarity and concur to work regulations are therefore, mainly, the **nation wide-sector collective contract**, that contain the minimum economic and normative treatment for all the workers employed in a certain productive sector (the category), even though it is not excluded that, for some areas or institutions of general interest, agreements be reached that involve all categories of workers (inter-confederate agreements). This happened, for example, for individual and collective dismissal regarding which, before the legislator intervened to regulate the case in point heteronomously, the only regulation was contained in inter-confederate agreements. In some cases, collective bargaining follows the specificities of the individual local and territorial contexts, with specific norms for certain areas of the country (territorial agreements). It is however the nation wide-sector collective contract that – although there are some recent signs of crisis caused by the tendency, generalized in all industrialised countries, of the decentralization of negotiation levels – now represents the main instrument of collective negotiation autonomy in the regulation of employment relationships and that governs the various types of collective agreements and agreements stipulated in our country.

## **7. The company-level contract**

The presence of a company-level contract is frequent in medium and large companies, whose norms are added to those defined at other contractual levels.

The company-level contract is in a position to regulate the problems of every single productive context and to adapt general and abstract rules agreed at category level or fixed by law to the organizational and company peculiarities in which they must find concrete application. In particular, this happens with reference to the determination of wages linked to productivity or the economic results of a single company, to issues connected to company canteens, to the collective management of company crises, to the operations of outsourcing, to career paths of employees etc.

The plurality of the levels of collective bargaining corresponds to the organisational structure of the representative associations of the workers and employers, organized at inter-confederate (national and territorial), federal category (national, regional and district) and company level.

To calculate the contractual level, the parties of collective agreements are the trade union and employers' confederations at inter-confederate level, the trade union and employers' of

sectors associations at categorial level, and the workplace representatives and employer at company level.

In the absence of trade union legislation, mutual recognition represents the main empirical criterion of selection for the parties that sign the collective contract.

At the moment, the set-up and levels of collective bargaining are contained in the previously mentioned 1993 Protocol. In synthesis, this agreement provides for two levels of bargaining: nation wide-sector contract is positioned with, where the parties feel it opportune, collective bargaining at a secondary, territorial-type level or, more often, at a company level. Nation wide-sector agreements have a duration of 4 years for the part relative to the regulation of workplace relations (c.d. **part normative**) and a biennial duration for the profile relative to wage schemes (**economic part**). The second-level collective contract has a four-year duration and is only valid in issues and institutions that are "different and not repetitive in respect to those of the national collective contract of category" (point 2 of the Protocol).

## 8. Subjects bound by collective agreements

Although expression of self-regulating power of interests of private subjects (**collective autonomy**), structure, content and effects of the collective contract cannot be adequately understood from (only) the general dispositions of the civil code in contract matter and obligations. It is true to say that in the field of industrial relations – and not only in our country – the collective bargaining agreement manifests a natural vocation to be seen as a privileged and generally obligatory instrument of regulation for employment relations, and thus can be better compared to a type of law governing the professional category, that is, the territorial and/or business context to which it refers.

If for the common law of contracts, the collective contract has an effectiveness only for unionised workers, one cannot neglect the tendency of all the interested parties to consider the collective bargaining agreement a collection of economic and normative conditions for the treatment of workers that should be respected, whether individual workers are members of the stipulating organizations or not. Such a spontaneous tendency assumes, in truth, legal relevance as the process of doctrinal and jurisprudential elaboration aimed at extending the subjective effectiveness of the collective bargaining agreement to all subjects that are not directly bound, by means of a plurality of techniques that range from the implicit adhesion to a certain collective contract to the extension of economic treatment in application of the constitutional precept of sufficient compensation.

## 9. The relationships between law and contract and the new functions of collective bargaining

According to a consolidated model, the relationships between contractual sources and legal sources in labour law are constructed hierarchically in the same way as the argumentation concerning civil law, that assumes the automatic prevalence of the legal source compared to the contractual source. Such a model is founded on two fundamental postulates: that the heteronomous source (the law generally speaking) has the task of safeguarding, in an *imperative* way, the fundamental rights – of freedom, dignity, safety – of the subordinate workers. Consequently, every norm produced from a contract – be it individual or collective – that lowers the system defined by the heteronomous precept will be annulled and destined to be replaced by the corresponding legal precept (in application of section 1418 of the civil code). In other words, the heteronomous source cannot be derogated "*in peius*" by the contractual source.

This seems to imply the existence – in truth, much debated at the level of positive law – of a **principle of favour for the worker**, which always remains except if there is the

possibility of derogating from the legal source from the subordinate source (the act of private contractual autonomy) when there are conditions or treatments that would improve the workers' position. In virtue of the possibility - limitless - of improvement of the legal limitations, the contractual source would therefore be provided with a competence towards improvement. This second postulate is usually defined as the capacity of being able to **derogate in melius** from the autonomous source regarding the heteronomous source.

In truth, formulating the reasoning in these terms is not totally convincing. The second postulate – that of the ability of derogating *in melius* – is in fact founded on an assumption that needs to be demonstrated, that is, the existence in our legal system of a general principle of favour for the employee. Although specific normative references exist, some of which have done so for a considerable time, it is a principle that is not sanctioned in an explicit and generalized way by any norm of our regulations. To derive a similar general rule from some specific and fragmentary normative references therefore does not seem to be very persuasive.

It is necessary to point out that the first postulate of this way of reasoning – the impossibility to derogate *in pejus* of the legal source compared to the contractual source – is also a moot point due to the loss of centrality of State law and from the contextual expansion of self-regulation of social processes. Furthermore, it is the same legislator who, more and more frequently, delegates to the collective bargaining the possibility to introduce derogation – also pejorative – from regulations of heteronomous derivation, be it for management of situations of business crisis be it for strategies to combat unemployment that often demand the introduction of flexible normative systems that are adherent to the conditions in the territory and/or in the single company.

To say the truth, it is the premise assumed initially that is not totally correct. The theory that places autonomous and heteronomous sources at the same level, connecting them to each other through hierarchical relationships, does not faithfully reflect the formation of our labour law. In reality autonomous sources are totally inhomogeneous compared to the heteronomous sources: regarding the subjects that express them (society and the State) the formative procedure and in relation to the actual structural aspects.

Until the relationship between autonomous and heteronomous sources had remained quantitatively insignificant (in Italy until the 1970s) it was possible to conceive the relationship between law and collective autonomy as a mutual relationship of non-interference and, consequently, as a last resort in case of conflict, the use of the unbreakability *in peius* criterion and the prevalence of the heteronomous source over the autonomous source.

In the present context, in which the overlap of autonomous and heteronomous sources is the norm in the regulation of labour law – creating a situation of continual conflict, competition and, often, also integration between the various sources – the criterion of unbreakability can but lose its centrality and importance. As regards the real dynamics of normative processes, the relationship between autonomous and heteronomous sources is consequently better explained in terms of competing sources – even though they are hierarchically ordered – and do not simply follow an abstract hierarchical criterion. However, according to prevailing opinion, the existence of an area reserved for the exclusive determination of collective bargaining with the preclusion of State law participation should be excluded.

After the most recent legal developments, autonomous sources are today sometimes involved in actual normative procedures, as the presupposition for the State law and as the content of the same law. In many other cases autonomous sources derogate from heteronomous sources (for example in the case of the change of worker's duties); in others, laws are integrated (as happened in the case of the hypotheses of staff leasing legitimated during collective bargaining); in yet others, they are proposed as alternative sources to the heteronomous ones for the regulation of employment relationships (illustrated by the case of the criteria of choice of the workers to be dismissed collectively based on the law no.

233/1991).

In all these cases, it is the same legislator that realises that the collective bargaining constitute the most suitable instrument of social regulation and so does not exercise his regulatory power.

Theoretical debate on the topic has for some time now highlighted a progressive enrichment and diversification of the functions of bargaining, showing that in an evolving economic and social context it has come to involve issues in which it does not perform its traditional acquisitive function as regards wage increases and new guarantees, but rather “administers” risks a group of workers are exposed to. With increasing frequency in the last few decades, often thanks to specific legal delegation, collective bargaining has been entrusted with the additional task of collaborating in the organisation of labour and in particular handling company crises and the ensuing employment problems.

## 10. The relationship between collective agreements of different levels

Coordination and connection problems, other than those between sources of law and contracts, are also found in norms of contractual derivation, both in relation to the relationships between the different types of acts of the collective autonomy and between these and the acts produced by the autonomy concerning individual legal transactions. The question is which of the clauses of the nation wide-sector contract and those of the company-level contract should prevail in case of divergence from the regulation by the same institution or issue. A similar question may be asked in case of conflict between a collective bargaining agreement and an individual contract.

We shall first consider the relationship between the different collective agreements.

In the applied experience, overlap of collective clauses of different levels happen. It must be said that a general norm that regulates the relationships between the sources of the collective autonomy does not exist. The rules used to resolve cases of conflict are normally only those elaborated at a doctrinal and jurisprudential level. Jurisprudence has dealt with the problem of relationships between collective agreements for a long time; an effect of the principle of the *favour* for the worker mentioned earlier. When a problem of contrast between two collective regulations arose the regulations that most favoured the worker prevailed, applying to the relationships between collective agreements the logic of section 2077 of the civil code that regulates, in terms of the impossibility to derogate *in peius*, the relationship between collective agreements and individual contracts.

Since the 1970s, jurisprudence has changed orientation and the proposed solutions have been varied and sometimes divergent. It has been claimed, for example, that contractual structure should be supported by a principle of hierarchy generally speaking – based on the principle of the irrevocable mandate to contract conferred by the stipulating trade union associations the contract of inferior level in favour of the associations of a superior level – for which contracts of inferior level could never derogate from contracts of a superior level neither *in melius* nor *in peius*. But an opposing theory has also been advanced; that for which contracts of an inferior level could always derogate (even *in peius*) from contracts of a superior level, in virtue of the fact that the trade union associations of an inferior level stipulating such a pejorative contract would implicitly manifest the will to revoke the mandate to contract conferred to the organizations of a superior level.

More recently the hypothesis that the relationships between contracts of various levels should be resolved based on **the criterion of speciality** has been advanced, in the sense that the clauses of the collective contract that are nearest the actual situation to be regulated should always have prevalence, that is those of the company contract (whether they be more or less favourable for the workers). This theory has been accepted in some occasions also in jurisprudence. Finally, the problems of conflict between contractual norms of different levels

have been resolved based on a **chronological criterion** for which successive regulation prevails. This solution seems to be the most viable today and the one that has met with greatest favour in both doctrine and jurisprudence.

Often however, in order to resolve the possible contrasts between collective norms in advance, the stipulating parties should regulate the mechanisms of coordination between the different levels in advance and so establish the areas of competence of the different levels concerning legal transactions. As has already been mentioned, the Protocol of 1993, provided that second level bargaining (that which is integrative for the company or territory) need not be repetitive in terms of the national ones as regards to remunerative structures. In order to avoid overlapping and conflicts the competences of the different contractual levels have been separated.

## 11. The relationship between collective agreements and individual work agreements

As for collective sources of different levels, problems of conflict between norms of collective agreements and individual contracts may arise. Between agreements at a collective level and ones at an individual level, as a general rule, the principle of unbreakability *in pejus* is valid for the latter compared to the former.

This principle has been supported by jurisprudence on the basis of section 2077 of the civil code, which asserts the principle of real effectiveness or unbreakability of the collective contract. The first paragraph establishes that "individual work contracts between those parties of the category to which the collective contract refers must conform to its dispositions". The second paragraph sanctions, in cases of violation of the rule in the first paragraph, the sanction of the real effectiveness is not merely obligatory, providing that "the different clauses of the individual contracts, pre-existent or successive to the collective contract, are surpassed by those of the collective contract unless they contain more favourable dispositions to the employee". The real effectiveness is differentiated by the automatic substitution of the different clause, where the merely obligatory effectiveness would cause a simple breach of contract, with eventual compensation for damage.

However doctrine has criticized the reference to section 2077 of the civil code, as it is a norm devised for the corporative system, where the collective contract has been inserted among the sources of law at a superior level to the contractual autonomy.

Since 1973, the problem of the unbreakability of collective agreements by individual contracts has been resolved by the reformulation of section 2113 of the civil code. In this norm the invalidity of every renunciation or transaction of rights deriving from the law or the collective contract is established.

This means that the parties cannot make agreements in which there be a pejorative derogation not only in respect to that provided for by law but also in respect to what is provided for by collective agreements, of whichever level.

Moreover, article 2113 of the civil code provides for exceptions to the principle of absolute unbreakability. Indeed, both the employer and the worker can derogate from, even *in peius* for the worker, the conditions provided for by the collective contract or the law, if the agreement is signed before a judge and in the presence of the lawyer for defence, or in trade union offices, in the presence of a trade union representative with the appropriate power of attorney.

The presence of a judge and lawyer (in the case of transaction during litigation), or the presence of a trade union representative (in the case of transaction on trade union premises) guarantees that the renunciation of the worker not be due to pressure exercised on them by the employer and, at the same time, that the worker be totally aware of the rights he/she is renouncing.

This exception to the principle of unbreakability is seen to be necessary in order to allow

the all parties involved in the employment relationship to establish the terms of the transaction themselves and not to risk losing the case.

## **12. The possibility to derogate *in peius* in relations with collective agreements**

The question of the possibility that collective autonomy may dispose of rights that employees derive from the collective regulation of the employment relationship, also in the hypotheses in which the purview of the statute of such rights is derived from an inferior level (for example company level contract) compared to that from which the right itself is derived (for example a nation wide-sector contract).

Doctrine and jurisprudence are in agreement in that the clauses of collective agreements are not incorporated in individual employment contracts, the reason for which collective bargaining may always dispose of rights of which they are personally the source and that are destined to operate within the sphere of the employment relationship. Collective agreements can therefore modify for the future previous collective regulations, even if in a pejorative sense for the employee.

The only limitation is that of the vested rights of the worker, and these rights, even though they derive from statutes concerning legal transactions, they can be considered to have become part of the workers' rights.

## **13. The phenomenon of the so called “company usages”**

The phenomenon of the so-called “company usages” deserves a brief mention. According to jurisprudence company use constitutes the activities of the entrepreneur, who, spontaneously, out of generosity (and not because he/she feels obliged) gives all his/her employees (or a certain number of them), consistently and for a certain period of time, money or treatment that is neither stipulated in the individual contracts nor in the collective ones. Jurisprudence deems that the company usage legally binds the employer to guarantee the favourable activities in the future and also extend them to those workers who enter the group subsequently.

In order to understand the relationships between the company usages and the other collective sources it is necessary to define their nature. It is debated whether they are norms of the individual autonomy, or simply praxes to be seen within the framework of the collective autonomy (like collective company agreements or company regulations). The first solution, having greater support in jurisprudence, has as an effect the incorporation of the usages in the individual employment contracts: they therefore cannot be altered in successive collective agreements. The second interpretative solution requires that the usages be modifiable from any source that is referable to the collective bargaining.

## **14. The tendency of decentralising collective bargaining**

The centralization of collective bargaining, established in the Protocol of 1993, has unquestionably contributed to the balancing of public finance and the reduction of inflation thanks to the control of wages. However, in a situation where inflation is at very modest levels and with union demands linked to increased productivity, the two-tier contractual system has progressively shown all its limits. The structure of collective bargaining can be seen not to be sufficiently articulate to tackle the specificities of the labour markets throughout the territory, squeezing the enormous potential of local employment policies. Also company contractual bargaining, that should have increased the variable part of remuneration and guaranteed flexibility in the contractual system, has been unsatisfactory both at a quantitative and



qualitative level, being limited to a traditional type of distribution which are rarely linked to objective parameters of productivity. Wage adjustments have been hindered as well as policies for employment.

The limitations of the contractual model designed in the agreement of 1993 were highlighted, as early as 1997, by the Giugni Commission that verified the performance of the protocol and did not hesitate in speaking out about the stickiness of the previous praxes, the "cultural" unpreparedness of the subjects involved in decentralised collective bargaining as well as the resistance met in increasing the issues object to bargaining (for example employment organization). On the basis of these considerations an important debate amongst academics about the articulation of the collective bargaining and the relationships between national agreements and company agreements has been going on for the last decade. In the wake of this debate there was published, in October 2001, the White Paper on Labour Markets that, from what had emerged from scientific reflection, proposed the strengthening of decentralised bargaining so as to render wage structuring more flexible. A greater emphasis on company and territorial bargaining, far from decreeing the death of income policies, could turn out to be coherent both in terms of overcoming the logic of wage moderation and in terms of the need to render the coherence of the negotiating system more effective, already included in the 1993 Protocol, to take into account the costs entailed at the various phases of negotiation. Once the barycentre of the contractual system has been moved from the national level to the company and territorial ones it would be possible to guarantee not only a more effective distribution of productivity, but also a greater diffusion of agreements for new employment organisation that have long been desired, included in the European Strategy for employment, with reference to the objective of the adaptability of companies and their workers.

In a future perspective, it has to be noted the role of bilateral decentralised bodies. These are voluntary organisms to which national agreements assign management and dynamic bargaining tasks (based on the concertation method), which are of increasing importance in market issues and active labour policies (see 2003 national contract in the tourism and commerce sector); the realisation of new industrial relations at the level of decentralised production units; conflict prevention.

Of interest also is the fact that bilateral decentralised organisms are also entrusted with handling delicate "new" issues such as mobbing and sexual harassment or topics such as food safety and the social responsibility of companies.

In the transition from a system of collective bargaining of a distributive type to a model that is more oriented towards competitiveness and employment, the national employment contract seems destined to play a central role for a long time. Probably that role of framework ("*accordo quadro*") that is able to safeguard the purchasing power of low-income workers and contribute to its consolidation in a climate of reciprocal confidence between the parties involved in the system of industrial relations, without necessarily questioning the (virtuous) bonds of wage policies based on programmed inflation.

In conclusion, it must be noted that in the last few months the debate on the necessity of a thorough review of the contractual system has seen a sudden revival, having been stimulated by, amongst other things, the serious difficulties found in the final phase of the renewal of the collective contract for metal workers. It can be said that nobody today sees the current system of collective bargaining as efficient, and the solutions that are being proposed by different parties: trade unions, businesses and politics are more and more numerous. So numerous in fact to make one fear that things will remain as they are for a long time to come.

# Worker Representation in the UK

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## A. Introduction

In the United Kingdom worker representation has traditionally been channelled through recognised unions. This is the famous single-channel approach where a recognised union has a monopoly on worker representation. Until very recently, the concept of works councils or their equivalents was unfamiliar in the UK as was the idea of direct representation (workers can represent themselves). The single channel approach, combined with the abstention of the state from involvement in industrial relations, have been distinguishing characteristics of British industrial relations since the nineteenth century.<sup>1</sup> Indeed, in 1954 Kahn-Freund observed that British industrial relations have, in the main, developed by way of industrial autonomy.<sup>2</sup> At the end of the 1970s he noted that although ‘[i]n many respects the law intervenes in the organisation of collective labour relations today in a decisive way ... [t]his intervention ... remains supplementary and is in no sense antagonistic to the principle of autonomy’.<sup>3</sup> The single channel model formed the centre-piece of the industrial pluralist model of worker representation which was informed by the idea of equality of arms and an acceptance of a conflictual relationship between employers and trade unions.

This picture has, however, significantly altered over the last ten years or so, due in part to increased government intervention in industrial relations and in part to external pressure from the European Community. At domestic level, the Labour government committed itself in its *Fairness at Work* White Paper,<sup>4</sup> to a programme of replacing the notion of conflict between employers and employees with the promotion of partnership.<sup>5</sup> As the government said:

...[I]ndividual contracts of employment are not always agreements between equal partners. Good employers and employees recognise that there is a basic justification in terms of fairness at work for fair representation of all employees. Collective representation of individuals at work can be the best method of ensuring that employees are treated fairly, and it is often the preferred option of both employers and employees.<sup>6</sup>

As far as the EU is concerned, worker information and consultation is the cornerstone of a flexible and productive workplace. According to the Commission, workers need to be

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<sup>1</sup> Clark and Winchester, “Management and Trade Unions” in *Personnel Management: Comprehensive Guide to theory and Practice in Britain*, K.Sisson (ed), Blackwell, Oxford, p.714.

<sup>2</sup> O.Kahn-Freund, “Legal Framework” in A.Flanders and H.Clegg *The System of Industrial relations in Great Britain*, (Oxford: Blackwell, 1954), 43, cited in B.Simpson *The Determination of Trade Union Representativeness in the United Kingdom*, Paper presented to the ILO, October 1994, 1.

<sup>3</sup> O.Kahn-Freund, “Labour Law” in *Selected Writings*, London: Stevens, 1978, 39, cited in Simpson, above, n.2, 1.

<sup>4</sup> <http://www.dti.gov.uk/IR/fairness>.

<sup>5</sup> Para. 1.11.

<sup>6</sup> Para. 4.2.

committed to the process of change. Thus, according to the Green Paper on *Partnership for a New Organisation of Work*, flexibility within organisations will be encouraged by reinforcing mechanisms for employee participation at the level of the plant or enterprise.<sup>7</sup>

The combined effect of these developments is the emergence of a significantly-weakened union structure with collective bargaining taking place predominantly at establishment/company or even plant level, combined with the emergence of alternative methods of worker consultation mechanisms influenced by the 'dual channel' approach found on the Continent. The developments at European Union level, while sitting awkwardly with the British model of single channel have, to a large extent, received the support of the British trade union movement and have, to a certain extent, helped to offer a lifeline to a declining institution by giving trade unions the chance to gain access to the workplace by fielding candidates for election as worker representatives, even where the employer does not actually recognise trade unions.

## B. British Trade Unions in Perspective

### 1. The Profile of British Trade Unionism

Total membership of unions in the UK in 2004 was 6.78 million people in employment,<sup>8</sup> 26% of all people in employment (see Figure 1), the lowest figure since 1945, and declining (by 0.5% or 36,000 since 2003).<sup>9</sup> Trade union membership has fallen by over 4.8 million since 1979 when the Conservative government came to power. The spread of trade union membership is far from even. Less than 1 in 5 (17.2%) of private sector employees in the UK were union members in 2004, with private sector union density declining by 1% in 2004.<sup>10</sup> Almost three in five (58.8%) public sector employees in the UK were union members. Public sector union density fell by 0.3% in 2004. Despite this fall in density, the number of public sector union members rose by approximately 138,000 in 2004 as the size of the public sector grew.<sup>11</sup> The number of trade unions<sup>12</sup> has also declined, from a peak of 1,384 in 1920<sup>13</sup> to 186 today (195 in 2004).<sup>14</sup>

The fall in the number of unions reflects the continuing process of union mergers<sup>15</sup> and transfers of membership, as well as declining unionisation. One of the most important mergers was that of COHSE, a health service union, and NALGO and NUPE, two public sector unions, to form UNISON, the Public Service Union.<sup>16</sup> It became the largest union, overtaking the Transport and General Workers' Union (TGWU),<sup>17</sup> with 1.3 million members

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<sup>7</sup> COM(97) 127, para. 44.

<sup>8</sup> DTI, Trade Union Membership 2004, EMAR, April 2005.

<sup>9</sup> Cully and Woodland, "Trade union membership and recognition 1996-7: an analysis of data from the Certification Officer and the LFS" (1998) *Labour Market Trends* 353.

<sup>10</sup> DTI, above, n.8.

<sup>11</sup> Ibid.

<sup>12</sup> The Certification Officer keeps a list of trade unions: s.2 TULR(C)A 1992. Trade unions, as defined by s.1 TULR(C)A 1992, are organisations, whether temporary or permanent, whose principal purposes include the regulation of relations between workers and employers.

<sup>13</sup> Cully and Woodland, above, n.9, 354.

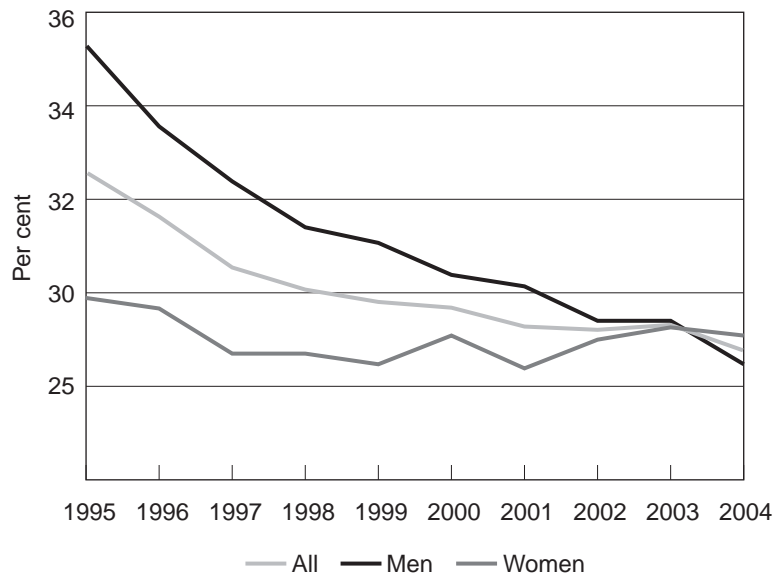
<sup>14</sup> Ibid., 7.

<sup>15</sup> For an amalgamation to occur, a resolution approving the instrument of amalgamation or transfer must be passed on a ballot of the members of the trade union held in accordance with sections 100A-E TULR(C)A - s.100 TULR(C)A 1992. See also Willman and Cave, "The Union of the Future: Super Unions or Joint Ventures" (1994) 32 BJIR 390.

<sup>16</sup> Other super unions include MSF (1989), GMPU (1991) and AEEU, formed from EETPU and the AEU (1992).

<sup>17</sup> TGWU had the largest membership for a number of years prior to 1993. Its membership fell in 1993 by nearly 90,000 to 949,000. It now stands at 750,000 (2004).

Figure 1. Trade union density figures for the UK, 2004, DTI.



in 2004. The 11 unions each with over 250,000 members now account for almost three quarters of total membership.<sup>18</sup> Nevertheless, some of the biggest unions, such as Amicus and GMB still reported significant decreases in union membership of over 100,000 each in 2004-2005.<sup>19</sup>

The trend towards amalgamation of unions has been characterised as defensive, since unions seek to rationalise their organisation in the face of reduced membership, in order to avoid competition for members or to combat financial difficulties through economies of scale.<sup>20</sup> Nevertheless, despite this trend, the survival of ex-craft unions, and the virtual abstention up until now (see below) of the law from the regulation of union recognition, has discouraged the practice of one union, one establishment,<sup>21</sup> and complex patterns of bargaining have survived. However, in the 1980s a number of 'new-style' single union agreements were signed, particularly on greenfield sites in manufacturing, such as the Pirelli plant in South Wales.<sup>22</sup> Although such agreements were eventually condemned by the 1991 TUC Conference as alien to the tradition of trade unionism, single union representation has in fact proved to be a widespread and long-standing phenomenon, more often in the service sector than in the new manufacturing plants.<sup>23</sup> However, workplaces with a single union tend to have weaker forms of unionism than multi-union workplaces. Membership density averaged 46% of employees in workplaces with a single union compared to 72% in multi-union workplaces.<sup>24</sup>

In order to represent their members effectively three conditions must be satisfied. First, the organisation must be a union as defined by the statute, second it must be independent and third it must be recognised by the employer. According to s.1 TULR(C)A 1992, a *trade union* means an organisation (whether temporary or permanent) which consists wholly or mainly of workers of one or more descriptions and whose principal purposes include the regulation of relations between workers of that description or those descriptions and employers or

<sup>18</sup> Metcalf, see below, n.32, 5.

<sup>19</sup> Certification Officer's Annual Report, 2004-2005, 2.

<sup>20</sup> Simpson, above, n.2, 2.

<sup>21</sup> Clark and Winchester 1994, above, n.1, 715.

<sup>22</sup> See J.Clark, *Managing Innovation and Change*, (London: Sage, 1995).

<sup>23</sup> Millward, *The New Industrial Relations*, 1994, 121.

<sup>24</sup> *Ibid*, 122.

employers' associations.<sup>25</sup> Almost half of UK employees (48.4%) worked in workplaces where a trade union was present. However, union presence was much lower in the private sector (34.2%) than the public sector (84.7%).<sup>26</sup>

According to s.5 TULR(C)A 1992, an *independent* trade union means one which 'is not under the domination or control of an employer or group of employers or one or more employers' associations and is not liable to interference by an employer or any such group or association'. A trade union entered on the list of trade unions may apply to the Certification Officer for a certificate that it is independent.<sup>27</sup>

The *recognition* requirement is more difficult. The definition of recognition contained in S.178(3) TULR(C)A is circular: it merely says that recognition means 'the recognition of the union by an employer, or two or more associated employers, to any extent for the purposes of collective bargaining'. Once again the principle of autonomy is demonstrated by the almost total absence of any binding or universally agreed criteria or procedures for determining questions relating to trade union recognition – or derecognition – although this changed, at least in part, in 1999 (see below).<sup>28</sup> As a result, unions can achieve recognition and prevent derecognition mainly through persuasion.<sup>29</sup> Such persuasion may result in recognition only for the purposes of individual grievance representation or non-pay bargaining or consultation and not collective bargaining. This requirement of recognition clearly limits the effectiveness of union representation and generates the so-called 'representation gap' which, over the last decade or so the government has sought to fill using other forms of worker representation.

44.3% or around 10 million employees work in workplaces where trade unions are recognised by management.<sup>30</sup> However, it is striking that the decline in the proportion of employees who worked in workplaces at which trade unions were recognised is smaller than the fall in trade union density over the same period, implying that union density has fallen within workplaces with recognition.<sup>31</sup> In 1997 35.5% of employees had their pay determined by collective bargaining.<sup>32</sup> There was, however, a great variation between the degree of recognition in the public and private sector, with 79% of public sector employees reporting

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<sup>25</sup> The definition also includes constituent or affiliated associations: s.1(b) TULR(C)A 1992.

<sup>26</sup> DTI, above, n.8.

<sup>27</sup> s.6 TULR(C)A.

<sup>28</sup> Simpson, above, n.2, p.12. There are also no prescribed methods of confirming any recognition that does occur. The IRS survey indicated that formal agreements recognising trade unions were unusual in younger workplaces - Millward, above, n.23, 24. Under the Employment Act 1975 an independent trade union could refer recognition disputes to ACAS which could ultimately result in an employer being ordered to recognise a union ss.11-16 EPA 1975 (see IRS Employment Trends 641, 12). This procedure was widely used with some 1600 references of recognition issues made by independent trade union for investigation and report. The procedure was widely perceived to be undermined by legal challenges made by both employers and disappointed unions (Simpson, above, n.2, 13). This procedure was abolished in 1980. Now the only state supported mechanism for resolving recognition disputes lies in the general power of ACAS to conciliate in collective disputes - s.210 TULR(C)A 1992.

<sup>29</sup> Legislation prohibits union recognition requirements from being imposed in contracts for goods or services (s.186 TULR(C)A). In addition, a person or company cannot refuse to deal with a supplier or potential supplier who does not recognise one or more trade unions for the purpose of negotiating on behalf of workers or who does not negotiate or consult with one or more trade unions (s.187 TULR(C)A).

<sup>30</sup> Cully and Woodland, above, n.9, 360.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.* According to David Metcalf's recently published figures, only just over a third of employees (around 8.8 million or 36%) are covered by collective bargaining. Of these, 5.5 million (22%) are union members. For further details, see David Metcalf, 2005. *British Unions: Resurgence or Perdition?* London: Work Foundation. He concludes: 'Whichever way one looks at it the last two decades of the twentieth century were a period of relentless, sustained corrosion of British unionization. Membership fell by 5.5 million and density from over half to under one third of employees. The fraction of workers whose pay was set by collective bargaining halved from around 70% to 35%.'

that unions were recognised at their workplace ('the good employer model'), compared with 32% of employees working in the private sector in workplaces with 25 or more employees.<sup>33</sup> However, even if a union is recognised, this does not necessarily mean that all employees have their pay determined by collective bargaining. The number of unions recognised for collective bargaining over pay and working conditions fell by almost 20% between 1980 and 1990. It seems that this decline was largely due to a much lower rate of union recognition in establishments founded in the 1980s than in previous years, particularly in the private sector.<sup>34</sup>

There has also been a marked trend towards derecognition of unions, where establishments move from union to non-union status, with management discontinuing their voluntary recognition of trade unions for the purposes of collective bargaining.<sup>35</sup> Beaumont and Harris suggested that between 1984 and 1990, derecognition<sup>36</sup> occurred in 3.9% of establishments in the case of manual employees and 3.1% of establishments in the case of non-manual employees in their private sector sample.<sup>37</sup> To this group they added those workforces in which recognition was lost through loss of all union members in the workforce. This brought the total number of establishments to 9.5% (manual employees) and 7% (non-manual employees). There is thus evidence of what Brown *et al* describe as procedural individualisation: the removal of collective mechanisms for determining terms and conditions of employment. Therefore, the British position can be characterised as one of declining trade union membership, declining trade union recognition and more than half the workforce working for an employer which does not recognise trade unions.

The consequences of these changes are the following. Large parts of the private sector are now characterised by workplaces with few or no union members. Even where the workplaces do have a significant number of trade union members, the employer may well not recognise any trade union. Finally, particularly in the public sector, there are workplaces with recognised trade unions covering some, or all, grades of worker.

## 2. Why Has There Been a Decline in Trade Union Membership?

In the UK the fall in trade union membership is due in part to a fall in employment, especially in highly unionised industries, particularly construction and manufacturing,<sup>38</sup> and to new management policies. Newer workplaces tend towards non-union status: they are smaller, mostly in service industries, employ fewer skilled manual workers and take on many more part-timers.<sup>39</sup> Free market policies and privatisation may have exacerbated this trend.

<sup>33</sup> Cully and Woodland, above n.9, 361. In small private sector workplaces (with less than 25 employees) coverage is 7%.

<sup>34</sup> Disney, Gosling, Machin, "British Unions in Decline: Determinants of the 1980s fall in Union Recognition" (1995) 48 *Industrial and Labor Relations Review* 403.

<sup>35</sup> Simpson, above, n.2, p.19.

<sup>36</sup> They define derecognition as "management withdrew recognition of the union for the purposes of collective bargaining, although union members remained present in the workforce".

<sup>37</sup> "Union de-recognition and declining union density in Britain" (1995) *Industrial and Labor Relations Review* 389, 393-4. See also Gall and McKay, "Trade Union Derecognition in Britain, 1988-94" (1994) 32 *BJIR* 433.

<sup>38</sup> Some of this section is developed from Barnard, 'The changing shape of worker representation in the UK: the influence of European Community Law' [1999] *Australian Journal of Labour Law*, 1-21. See also W.Brown, S.Deakin and P.Ryan "The Effects of British Industrial Relations Legislation 1979-1997 [1997] *National Institute of Economic Review* 69. However, as Edwards *et al* point out in Ferner and Hyman (eds), *Changing Industrial Relations in Europe* (Oxford: Blackwell, 1998), 27, decline in manufacturing does not alone explain the severity of the decline. Not only did the number of jobs in manufacturing fall but so did the decline within manufacturing. They suggest that business cycle indicators - movements in unemployment, retail prices and wages - explain much of the short-term fluctuation in union membership.

<sup>39</sup> N.Millward, above n.23, 24.

Some authors also attribute this decline either directly or indirectly to the Conservative government's growing hostility towards trade unions from 1979,<sup>40</sup> strongly influenced by Hayekian concerns that trade unions represent a substantial impediment to the free operation of the market.<sup>41</sup> This hostility manifested itself in various forms. First, the government weakened and in some cases abolished representative institutions. For example, the National Economic Development Council (NEDC) and the Manpower Services Commission (MSC) – both of which had TUC nominated members – were abolished<sup>42</sup> and the duties of Advisory, Conciliation and Arbitration Service (ACAS) (on which there were also TUC nominated members) were modified to delete the requirement of encouraging the extension and reform of collective bargaining.<sup>43</sup> Second, the government withdrew support for collective bargaining in the public sector and government pressures for more decentralised pay determination in the public sector have undermined many long established national bargaining structures, especially where privatisation has occurred.<sup>44</sup>

Third, Conservative legislation interfered with the very operation of unions and their relations with employers, largely with a view to discouraging the establishment and operation of representative organisations of workers. This has resulted in an extensive body of legislation, now consolidated into a single Act, the Trade Union and Labour Relations (Consolidation) Act (TULR(C)A) 1992.<sup>45</sup> The legislation also interferes with a trade union's ability to take industrial action by eroding trade union immunities from actions in tort.<sup>46</sup> In its Fairness at Work White Paper, the Labour government made clear that it had no intention of reversing these elements of Conservative legislation.

Hostile judicial decisions exacerbated the problem. For example, a decision of the House of Lords in *Associated Newspapers v Wilson*<sup>47</sup> made clear that the right to be a trade union member<sup>48</sup> and to be active in that union<sup>49</sup> meant merely the right to hold a trade union card. It did not mean that members could call on the assistance of their union for help in dealing with their employer.<sup>50</sup> In that case the employer decided to offer higher pay increases to employees who agreed to accept personal contracts in place of collectively agreed terms and conditions of employment. Employees who refused to do so, and consequently did not receive the increase, claimed that the employer had taken action short of dismissal against the employees on grounds of their union membership contrary to what is now s.146 TULR(C)A

<sup>40</sup> P. Edwards *et al*, in Ferner and Hyman (eds), above, n.38, 1. However, as they point out, if the law was the only factor, one would expect, with the further tightening of legal controls, an accelerating decline in density since 1986 (the date they take for when governmental controls really started to bite); this has not occurred.

<sup>41</sup> See generally Lord Wedderburn, "Freedom of Association and Philosophies of Labour Law" (1989) 18 ILJ 1.

<sup>42</sup> The government initially downgraded the role of the NEDC and then abolished it in 1992. The MSC was abolished in 1989.

<sup>43</sup> s.209 TULR(C)A 1992, as amended by s.43(1) TURERA 1993.

<sup>44</sup> Simpson, above n.2, 11.

<sup>45</sup> Legislation interfering with the internal operation of unions has, for example, regulated elections to certain positions (ss.46-59). It has given members rights to a ballot before industrial action (s.62) and provided members with the right not to be unjustifiably disciplined (ss.64-7), the right to terminate membership (s.69), and the right not to be excluded or expelled unreasonably from a union (ss.174-7).

<sup>46</sup> For example, while the legislation gives the union immunities from liability for certain torts (s.219), this immunity has gradually been removed in respect of action to enforce trade union membership, action taken because of dismissal for taking unofficial action, secondary action and pressure to impose union recognition requirements (ss.222-225). In addition, the trade union must take a ballot before industrial action (ss.226-234) and notify the employer of the industrial action (s.234A). Finally, unfair dismissal protection is removed from those taking part in unofficial industrial action (s.237).

<sup>47</sup> [1995] IRLR 258.

<sup>48</sup> s.174 TULR(C)A 1992.

<sup>49</sup> ss.46-48 TULR(C)A 1992.

<sup>50</sup> K. Ewing, 'The Implications of *Wilson and Palmer*' (2003) 32 ILJ 1.

1992.<sup>51</sup> According to the leading judgment in the Court of Appeal, the right of an employee under s.146 was not only a right to union membership itself. Dillon LJ said there was no genuine distinction between membership of the union and making use of essential services of the union.<sup>52</sup> By contrast, the House of Lords held that withholding from an employee a benefit which was conferred upon another employee could not amount to 'action', whatever the purpose of the omission and hence the employers had not taken action short of dismissal against the employees by withholding benefits. Consequently, the existing legal protection for trade members under s.146 meant no more than the right to carry a union card. The decision therefore paved the way for employers to discriminate against union members.<sup>53</sup> While, as we shall see, the legal position has changed since the European Court of Human Rights condemned the UK the House of Lords' decision illustrated the general climate of hostility to trade unions.

These various steps led Edwards *et al* to conclude that the legal climate was one factor encouraging employers to resist unionisation after 1987; its effects have been indirect rather than direct. With such a climate it is not surprising that trade union membership declined. Nevertheless, such a decline was not confined to the UK: other states have experienced similar declines during the 1980s and 1990s, even in countries more sympathetic to trade unions.<sup>54</sup>

## C. Forms of Worker Participation

### 1. Introduction

Collective bargaining is seen as the most intense form of worker participation. Where regulation exists, this is broadly a matter for domestic law. Traditionally, the UK has not been concerned with the less intense forms of worker participation such as information and consultation.<sup>55</sup> However, it is this form of workers participation, together with a desire to encourage worker representatives to have a role on company boards, which has preoccupied the European Union. The EU has focused on the information/consultation aspect of collective labour law, partly because it has no clear competence in respect of pay, freedom of association, strikes and lock-outs,<sup>56</sup> despite general aspirations to that effect in the Community Social Charter of 1989, and partly because it coincides with the EU's agenda to develop high trust workplaces based on high skill and high productivity.

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<sup>51</sup> The relevant provision at that stage was s.23(1) Employment Protection (Consolidation) Act 1978.

<sup>52</sup> The government then amended s.146 TULR(C)A to provide that in determining the purpose of the action taken against the complainant in a case where there is evidence that the employer's purpose was to further a change in his relationship with all or any class of his employees, and there is also evidence that his purpose was to take action short of dismissal against a union member, the tribunal shall have regard only to the first purpose, unless it considers that the action was such as no reasonable employer would take having regard to the first purpose.

<sup>53</sup> The Labour government proposes to reverse this ruling: DTI, *Fairness at Work White Paper*, 1998, para.4.25. This approach would be in keeping with the UK's obligations under Article 11 of the European Convention on Human Rights which the UK is due to incorporate as part of domestic law.

<sup>54</sup> W.Brown, S.Deakin, M.Hudson, C.Pratten and P.Ryan, "The Individualisation of Employment Contracts in Britain", DTI Report, 1998.

<sup>55</sup> See generally, P. Davies and C. Kilpatrick, 'UK Worker Representation After Single Channel', (2004) 33 ILJ 121.

<sup>56</sup> Art. 137(6) after the renumbering caused by the Treaty of Amsterdam.



## 2. Collective Bargaining

### 2.1 Legal Support for Collective Bargaining

Collective bargaining between employers or employer's organisations and recognised trade unions is considered the most intense form of worker representation. British law supports this in four ways. First, it guarantees freedom of association through specific rights. S.137 TULR(C)A 1992 concerns refusal of access to employment on the grounds of trade union membership, s.152 makes it automatically unfair dismissal to dismiss an employee on the grounds of their trade union membership, activities or because they have sought to use the services of a trade union; and s.146 prohibits detrimental treatment against an individual worker on the grounds of trade union membership, activities or services.<sup>57</sup> As we saw above, s.146 used to concern action short of dismissal, a concept which the House of Lords in *Wilson and Palmer* gave a narrow interpretation. The UK was subsequently condemned by the European Court of Human Rights<sup>58</sup> which made clear that:

It is the essence of the right to join a trade union for the protection of their interests that employees should be free to instruct or permit the union to make representations to their employer or to take action in support of their interests on their behalf. If workers are prevented from so doing, their freedom to belong to a trade union, for the protection of their interests becomes illusory.

The amendments made to s.146, together with new provisions prohibiting financial inducements s.145A and s.145B TULR(C)A 1992 were the UK's response. But these reforms are individualist rather than collectivist in nature,<sup>59</sup> despite the suggestion of the European Court of Human Rights in *Wilson and Palmer* that trade unions have rights independent from those of the workers.

Second, British law encourages trade union recognition. As a result of the British tradition of collective *laissez faire*, recognition has been a voluntary process: employers have the choice whether to recognise a particular trade union and if so on what terms. Recognition, if it occurs, often takes the form of a written recognition agreement but this is not necessarily the case. And the lack of formality for recognition of a trade union is matched by the ease with which employers can derecognise a trade union. However, as an incentive to encourage employers to recognise a trade union, s.244(1)(g) TULR(C)A provides that one of the grounds of immunity for industrial action is where a trade dispute concerns a union seeking recognition.

In its 1997 election manifesto, the Labour government committed itself to introducing a compulsory statutory recognition procedure (SRP). It achieved this through the Employment Relations Act 1999 which introduced a new Schedule (A1) into TULR(C)A 1992. According to this procedure, which encourages voluntary or semi voluntary recognition at every state, an independent trade union in a workplace with more than 21 workers can apply to the employer for recognition. If the employer refuses, the matter goes to the Central Arbitration Committee (CAC) which determines first whether the trade union's request is admissible and, if it is, what the relevant bargaining unit is. If the trade union can demonstrate majority membership in that bargaining unit then there is automatic recognition. If there is not, then the CAC can order the employer to hold a ballot. If the ballot shows that a majority of those voting and at least 40 % of those eligible to vote are in favour of recognition CAC will order recognition and the employer and trade union will then be required to sort out arrangements for collective bargaining. However, the collective bargaining is confined to pay, hours and holiday. In terms

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<sup>57</sup> All three provisions apply equally to non membership of a trade union.

<sup>58</sup> *Wilson and NUJ v. UK; Palmer, Wyeth and National Union of Rail Maritime and Transport Workers v. UK; Doolan and others v. UK* [2002] IRLR 568.

<sup>59</sup> Bogg, 'Employment Relations Act 2004: Another False Dawn for Collectivism?' (2005) 34 ILJ 72.

of final outcome, the number of applications accepted by the CAC over the first five years of operation of the SRP was 272. Of these, automatic awards of recognition have been made in 52 cases and awards of recognition by ballot in 72 cases. Unions lost ballots in 44 cases with just over 23,000 workers being covered by statutory awards.<sup>60</sup>

Opinion is divided over the success of the procedure. Some argue that the rather lower than expected number of applications to CAC (80 to 100 as opposed to 150) indicates that the procedure has had the desired effect: it has encouraged employers to recognise trade unions without going through the SRP<sup>61</sup>. This 'shadow' effect has led to 1800 new voluntary recognition deals being signed covering just over 800,000 employees.<sup>62</sup> Others lament the complexity of the procedure. However, the detail contained in Schedule A1 was a deliberate tactic to discourage judicial review of the CAC's decisions<sup>63</sup> (there have been only eight applications for judicial review of which six were granted and five ultimately supported the CAC) and to ensure that the British procedure does not suffer from some of the problems experienced by its American counterparts.

The third limb of support for collective bargaining in British law can be found in s.168 TULR(C)A on paid time off for trade union officials in respect of trade union activities and duties and, in s.170, on unpaid time off for trade union members. The fourth and final limb is s.181 TULR(C)A which obliges employers to provide trade unions with information in connection with collective bargaining.

## 2.2 Legal Effect of Collective Agreements

Collective agreements themselves are presumed not to be legally binding (s.179 TULR(C)A)<sup>64</sup> and, unlike Continental systems they do not have *erga omnes* effects. However they can have legal effect through individual contracts of employment provided two conditions are satisfied: first, there needs to be a bridging term (which can be express or implied, including through custom) and second, the terms themselves must be suitable for individuation (that is that they contain matters relating to the individual (eg redundancy selection procedures,<sup>65</sup> disciplinary and grievance procedures<sup>66</sup>) as opposed to collective or procedural terms.

Because collective agreements derive their legal force from the contract, this has three significant consequences. First, all employees with a bridging term in their contracts will benefit from the collective agreement, whether trade union members or not. Second, because collective agreements do not operate as a floor of rights in the UK, employers and employees can agree that the terms of the collective agreements do not apply to them. Thirdly, even if the employer breaches the collective agreement, this has no effect on the individual contracts of employment; the individual contracts themselves will need to be amended if the employer wishes to remove all effects of the collective agreement.<sup>67</sup> In 2002 there were 8.7 million employees whose pay was affected by collective agreements, which is 36 per cent of all employees.<sup>68</sup>

<sup>60</sup> Gaal, 'The First Five Years of Britain's Third Statutory Recognition Procedure' (2005) 34 ILJ 345, 346.

<sup>61</sup> Ibid, 348.

<sup>62</sup> Ibid, 347.

<sup>63</sup> For an example of judicial deference to CAC's decision making, see *Fullarton Computer Industries Ltd v. CAC* [2001] IRLR 752.

<sup>64</sup> See also *NCB v. NUM* [1986] IRLR 439 and *Ford Motor Co v. AUEFW* [1969] 2 QB 303.

<sup>65</sup> *BL v. McQuilken* [1987] IRLR 245; *Anderson v. Pringle of Scotland* [1998] IRLR 64.

<sup>66</sup> *Dietman v. Brent LBC* [1988] IRLR 299.

<sup>67</sup> *Robertson v. British Gas* [1983] IRLR 302.

<sup>68</sup> Labour Market Trends, Spotlight, July 2003.

### 3. Information and Consultation

#### 3.1 Information and Consultation on Specific Topics

In some of the earliest social policy Directives the European Community focused on the obligation of information and consultation of ‘representatives of the employees provided for by the law and practice of the Member States’ (Article 2(c) of Directive 77/187/EEC on transfers of undertakings, now Directive 2001/23) or ‘workers’ representatives’ (Article 1(b) of Directive 75/129 on collective redundancies, now Directive 98/59) in times of economic difficulties, albeit that the obligation does not allow the worker representatives to interfere with the managerial prerogative to take decisions. In the UK the obligation was implemented by requiring employers to consult with a recognised trade union.<sup>69</sup> While in the late 1970s, when the Directive was first implemented, this may have been adequate, the subsequent decline in trade union recognition highlighted the inadequate implementation of the Directive in respect of at least half the workforce. As a result the European Commission brought against the UK in Case C-383/92 *Commission v UK*<sup>70</sup> arguing that the UK had failed to fulfil its obligations under Articles 2 and 3 of Directive 75/129/EEC on collective redundancies by not providing a mechanism for the designation of workers’ representatives in an undertaking where the employer refused to recognise such representatives. The Commission made a similar allegation in Case C-382/93 *Commission v UK* in respect of Directive 77/187/EEC on transfers of undertakings. The British government argued that since workers’ representatives were defined in the Directive as ‘those representatives provided for by the laws or practices of the Member States’ the representation of workers in the UK has traditionally been based on voluntary recognition of trade unions by employers and for that reason an employer who did not recognise a trade union was not subject to the obligations laid down in the Directives.

The Court of Justice rejected the UK’s arguments and found that the UK had not implemented the Directives correctly.<sup>71</sup> This meant that the UK had to rectify this representation gap. As Davies pointed out, for the first time the Court effectively required a Member State to amend collective representation structures to bring them into line with Community norms, raising complex issues on trade union recognition. However, since the Directives did not require “full harmonisation of national systems for the representation of employees in an undertaking”<sup>72</sup> the UK government had considerable discretion as to how to bring UK law into line.

The UK’s initial response can be found in SI 1995/2587 The CRATUPE Regulations<sup>73</sup> requiring an employer to consult with ‘appropriate representatives’ of any of the employees who are going to be dismissed in the case of collective redundancies and ‘affected employees’ in the case of transfer of undertakings. These ‘appropriate representatives’ of any employees are:

- (a) employee representatives elected by them, *or*
- (b) if the employees are of a description in respect of which an independent trade union is recognised by the employer, representatives of the trade union.<sup>74</sup>

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<sup>69</sup> Section 188 TULR(C)A 1992 provided: “An employer proposing to dismiss as redundant an employee of a description in respect of which an independent trade union is recognised by him shall consult representatives of the union about the dismissal in accordance with this section”. Regulation 10 of the Transfer of Undertakings (Protection of Employment) (TUPE) Regulations 1981 contained a similar provision.

<sup>70</sup> Case C-383/92 [1994] ECR I-2479.

<sup>71</sup> See generally P. Davies, “A Challenge to Single Channel” (1994) 23 ILJ 272.

<sup>72</sup> Para. 28 of Case 382/92 and para. 25 of Case 383/92.

<sup>73</sup> The Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1995.

<sup>74</sup> Regulation 3(1), Regulation 9(4).

Initially, the employer could choose which group to consult.<sup>75</sup> The ‘grudging, minimalist’<sup>76</sup> Regulations received much criticism, with the TUC said that they undermined established industrial relations by allowing employers to bypass recognised employee representatives. However, subsequent amendments introduced by the Labour government gave priority to a recognised trade union: only if there was no recognised trade union could worker representatives be elected.

However, by envisaging a role for collective worker representatives, these regulations marked the first substantial inroad into the single channel.<sup>77</sup> This new approach is described as ‘a modified single channel’<sup>78</sup> or ‘single channel plus’. However, there are criticisms. In particular, the government did not believe that there was any need for standing arrangements for elected representatives, saying that effective ad hoc arrangements would be acceptable,<sup>79</sup> with the result that the election process itself may well erode the time allowed for consultation of those representatives.<sup>80</sup> The government also did not specify the means of conducting the election, considering that this was a matter best left to employers and employees,<sup>81</sup> nor did it place any restriction on who was to be elected: the representatives did not even need to be employees.<sup>82</sup>

### 3.2 General Mechanism for Worker Information and Consultation

Two of the EU’s most significant pieces of legislation in the field of information and consultation in recent years are the European Works Councils (EWC) Directive 94/95/EC,<sup>83</sup> implemented in the UK through the TICE Regulations and Directive 2002/14 on national level information and consultation,<sup>84</sup> which have been implemented in the UK through the ICE Regulations.<sup>85</sup> The EWC Directive requires the establishment of a European Works Council (EWC) or a procedure for informing and consulting (ICP) employees in Community-scale

<sup>75</sup> In the context of health and safety the 1977 Regulations (SI 1977/500 as amended by SI 1992/2051) allowed a recognised trade union to appoint a safety representative. The 1996 Regulations (SI 1996/1513) provided that where the employees are not represented by safety representatives under the 1977 Regulations the employer shall consult with either the employees directly or elected employee representatives.

<sup>76</sup> M.Hall, “Beyond Recognition? Employee Representation and EU Law” (1996) 25 ILJ 15, 17.

<sup>77</sup> Department of Employment, *Consultation about collective redundancies and business transfers: a legislative proposal*, April 1995.

<sup>78</sup> Davies, above, n. 72, 279.

<sup>79</sup> The TUC disagrees. It argues that there must be an element of continuity otherwise the effectiveness of the consultations is weakened. It will always be the employer who proposes the redundancies or effects the transfer. To combine that with the selection of workers and to guarantee meaningful consultation with a view to reaching agreement would be extremely difficult. It would also be difficult to find suitable representatives at a time of crisis to volunteer - *Consultation about collective redundancies and business transfers: TUC response to legislative proposals*.

<sup>80</sup> Provided the employer has issued the invitation for the employees to hold the elections long enough before the time when the consultation is required to begin, the employer is treated as having complied with the requirements.

<sup>81</sup> This contrasts unfavourably with the detailed prescription found in the legislation regulating how a ballot should be held by trade unions prior to industrial action.

<sup>82</sup> This raises questions about the independence of such appointments, since the employers would be free to put forward their own nominations.

<sup>83</sup> OJ 1994 L254/64 considered by C.McGlynn, ‘European Works Councils: Towards Industrial Democracy’ (1995) 24 ILJ 78.

<sup>84</sup> OJ [2002] L80/29.

<sup>85</sup> SI 2004/3426 The Information and Consultation Regulations 2004.

undertakings or Community-scale groups of undertakings<sup>86</sup> with more than 1,000 employees across the now 28 States<sup>87</sup> and at least two establishments<sup>88</sup> in different Member States each employing at least 150 people.<sup>89</sup> The Framework Directive on Information and Consultation 2002/14 is open textured and un-prescriptive. It leaves nearly all detail to be sorted out by the Member States or by the social partners. Given its ‘ground breaking’<sup>90</sup> potential for changing the face of British worker participation, we shall focus on the impact of this Directive.

The ICE Regulations depart from the priority for recognised trade union model considered above: no priority is given to recognised trade unions at all. Instead, they provide for three means of informing and consulting workers (see Annex I): through a pre-existing agreement (PEA), through a negotiated agreement (NA) and through the standard information and consultation provisions laid down by the regulations in the case of failure of the other two routes. Both the PEA and the NA envisage information and consultation not only with workers representatives but also with individual employees. Only the standard, fallback rules require that information and consultation must take place with elected worker representatives and not just to employees. The standard rules, like the collective redundancies directive, also envisage the strong form of consultation: ‘with a view to reaching agreement’. It is here that the boundary between consultation and collective bargaining becomes blurred. By contrast, the PEA and the NA envisage only the softer form of consultation, requiring consultation but not with a view to reaching agreement.

#### 4. Statutory Bargained Adjustments

The 1995 CRATUPE Regulations paved the way for the implementation of other European Directives such as the Working Time Directive 93/104 (as it then was now 2003/88), the Parental Leave Directive 96/34 and the Fixed Term Work Directive 99/70. These three Directives make provision for the ‘social partners’<sup>91</sup> to take certain steps, such as fleshing out the provisions controlling the abuse of fixed term contracts in Directive 99/70 or expanding the detailed rules for applying for parental leave in Directive 96/34. In the case of the Working Time Directive, the social partners can *derogate from* (ie lower) standards laid down in the Directive on for example breaks, nightwork, daily rest periods. Together these Directives permit what are referred to as ‘statutory bargained adjustments’.

What worker participation mechanism does the UK use to give effect to this? The Working Time Regulations provide a good example. They refer to a relevant agreement, ‘in relation to a worker, means a workforce agreement which applies to him, any provision of a

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<sup>86</sup> Articles 1(1) and (2). A group of undertakings means a controlling undertaking - defined to mean an undertaking which can exercise a dominant influence over another undertaking by virtue of ownership, financial participation or the rules which govern it (Article 3(1) and (2)) - and its controlled undertakings (Article 2(1)(b)). These definitions are based on Council Directive 89/440/EEC (OJ No.L210, 21.7.89, p.1) amending Directive 71/305/EEC concerning coordination of procedures for the award of public works contracts.

<sup>87</sup> The prescribed thresholds for the size of the workforce are to be based on the average number of employees, including part-time employees, employed during the previous two years calculated according to national legislation and/or practice - Article 2(2). The figure of 17 includes the EEA states but excludes the UK. The UK has now agreed to be bound by the Directive.

<sup>88</sup> In the case of Community scale groups of undertakings, read groups of undertakings in the place of establishments - Article 2(1)(c).

<sup>89</sup> Article 2(1)(a) and (c). Member States may provide that this Directive does not apply to merchant navy crews - Article 1(5).

<sup>90</sup> This is the description given by the government minister responsible for the Regulations, cited in Hall, ‘Assessing the Information and Consultation of Employees Regulations’ (2005) 34 ILJ 103.

<sup>91</sup> Various descriptions in the Directives as management and labour (Parental leave), social partners (fixed term work) and the two sides of industry (Working Time).

collective agreement which forms part of a contract between him and his employer, or any other agreement which is legally enforceable as between the workers and his employer'.<sup>92</sup> Collective agreements take priority. Therefore, as with the CRATUPE Regulations, there is priority for recognised trade unions. This is made clear in the definition of 'Workforce agreements' which are designed to provide a mechanism for employers to agree working time arrangements with workers who do not have *any terms and conditions set by collective agreement*.<sup>93</sup> To be valid a "workforce agreement" must:

- be in writing;
- have effect for a specified period not exceeding five years;
- apply either to all of the relevant members of the workforce (other than those covered by collective agreement – thus employers cannot by-pass a recognised trade union), or to all of the relevant members of the workforce who belong to a particular group. Employers must decide at what level they wish to make an agreement;
- be signed by the representatives of the workforce or the representatives of the group where appropriate, (excluding in either case any representative not a relevant member of the workforce on the date on which the agreement was first made available for signature). However, significantly, if the employer employed 20 or fewer workers on the date on which the agreement was first made available for signature it must be signed either by the appropriate representatives *or* by the majority of workers (a "majority agreement").

Thus, in a workforce of less than 20, the Working Time Regulations make provision for so-called direct representation ie individuals and not their representatives can enter agreements with the employer under the rubric of workforce agreements. Individuals can also enter 'relevant agreements with their employers, as Regulation 2(1) makes clear. Relevant agreements include not only workforce agreements and collective agreements but also 'any other agreement in writing which is legally enforceable as between the worker and his employer'. Effectively this allows for individual agreements to replace what would otherwise be collectively agreed norms. This demonstrates how easily the quest for decentralisation can lead to individualisation.

Paragraph 2 of Schedule 1 provides that 'representatives of the workforce' are workers duly elected to represent the relevant members of the workforce; 'representatives of the group' are workers duly elected to represent the members of a particular group, and representatives are 'duly elected' if their election satisfies the requirements of paragraph 3 of the Schedule. The Working Time Regulations provide some details of the method of carrying out elections.<sup>94</sup> The Working Time Regulations are, however, far less prescriptive than those contained in TULR(C)A for the election of trade union officials and, as the TUC has pointed out, employers have too much power in deciding how the representatives are to be elected and there are no controls on ballot-rigging.<sup>95</sup> This has prompted concern as to whether the elected worker representatives will pass the test of representativity laid down by the Court of Justice in *UEAPME*.<sup>96</sup> Finally, worker representatives enjoy the same statutory protection as, for example, employee representatives for consultation over redundancies or transfers. Therefore, they have the right not to suffer detriment, not to be dismissed (in the case of employees only) and not to be selected for redundancy on the grounds of performance of their functions (Regs 31 and 32) but they do not have an express right to time-off to fulfil their various functions.

<sup>92</sup> Reg. 2(1) Working Time Regulations.

<sup>93</sup> Sch 1, para.2.

<sup>94</sup> Schedule 1, paragraph 3.

<sup>95</sup> Research paper 98/82, 25.

<sup>96</sup> Case T-135/96 *UEAPME v. Council of the European Union* [1998] IRLR 602.

What legal effect do these workforce or individual agreements have? They are similar to collective agreements in that they are negotiated; they differ because they may not be negotiated by independent representatives and the sanction to persuade an employer to enter into them is not the threat of industrial action but the threat that the statutory procedures will apply in the event of a failure to reach an agreement. Their legal force may derive from being incorporated into a contract or it may derive from the statute introducing the concept of statutory bargained adjustments.

Despite the novelty of the workforce agreement, research on the Working Time Regulations suggest that they have been used only rarely due to the complexity of the procedure and because of the prevailing culture of UK industrial relations: although non-statutory works committees and similar representative bodies are becoming more common in the UK, there is no tradition of such bodies negotiating over the implementation or variation of statutory standards on working time, as there is on the continent, where statutory works councils and enterprise committees commonly perform this task.

#### **D. The Response of the British Trade Union Movement to the Changing Face of Worker Representation**

The Continental European systems of worker representation have been characterised, on paper at least, by a division of functions between trade unions and worker representatives: crudely speaking, the trade union function is external to the workplace, negotiating agreements at sectoral or intersectoral level, while the worker representative function is internal to the workplace dealing with issues such as personnel matters. The two bodies therefore serve a complementary roles. By contrast, in the UK, where collective bargaining is conducted largely at the enterprise/company or even plant/establishment level, this does not apparently leave a 'space' for worker representatives. Furthermore, while competition between unions is regulated by the so-called Bridlington principles, no such rules apply to 'competition' between trade unions and works councils/elected worker representatives. Therefore, in the UK any second channel might be perceived as a threat to established trade unions and might risk undermining collective bargaining. Furthermore, there has been a tendency for trade unions to consider worker representatives to be rather second rate: unions pride themselves on their independence from the state and employers. Other forms of worker representatives are seen as dominated by the employers.

However, implementation of the ICE Regulations provides an interesting illustration of the changing perspective by trade unions both towards the unions views of the second channel and the changing nature of the relationship between the trade unions, the employers' organisation (the CBI) and the government. As Hall explains,<sup>97</sup> during the first half of 2003 the DTI met with representatives of the CBI and the TUC to agree an outline scheme setting out a framework for Regulations to implement the Directive. This was a novel move for the UK but the TUC in particular, saw important political benefits in achieving a national social partner style framework agreement as the basis for the UK's transposition of the legislation. Both the CBI and the TUC were keen to maintain existing company practice for informing and consulting staff.

Will the developments at European Community and national level stop the slide towards individualisation? The response is inevitably mixed. The emphasis on information and consultation requirements does preserve some space for collective employee representation, albeit that in the UK this is no longer the exclusive province of trade unions. The modified

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<sup>97</sup> Hall, 'Assessing the Information and Consultation of Employees Regulations (2005) 34 ILJ 103, 108.

single channel has, however, helped to modify the tension between the Continental and British traditions. The European-level collective agreements, on subjects such as parental leave, part time and fixed term work, have served to reinvigorate both centralised collective bargaining and the European trade union confederation, and decentralised, plant-level bargaining for the implementation of any agreement reached. On the other hand, the lack of Community competence in respect of freedom of association, strikes and lock-outs prevents the creation of a fully-fledged collective dimension in EC law. In this respect, the incorporation of the European Convention of Human Rights into British law by the Human Rights Act 1998 has offered an alternative 'European magic wand' to help solve problems.<sup>98</sup>

Many commentators note the economic rather social imperatives of market integration inform much of the debate at Community level<sup>99</sup> and this is intensely damaging in creating a fully fledged individual and collective social dimension at EU level. On the other hand, some argue that effective collective rights are not only a consequence of economic success but a vital component of the European social model which produces that success.<sup>100</sup> Even the British government has started to recognise this. In introducing its proposals for a statutory recognition procedure the government recognised that 'businesses will gain' by accommodating the employees' wish to have a trade union voice. It adds 'Businesses and other organisations are unlikely to establish a successful partnership for change and competitiveness while overriding the wishes of a substantial group of employees'.<sup>101</sup>

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<sup>98</sup> Lord Wedderburn, *Labour Law and Freedom: Further Essays in Labour Law*, Lawrence and Wishart, 1995, 391.

<sup>99</sup> See, for example, S.Deakin, "Labour Law as Market regulation" in P. Davies, A. Lyon-Caen, S. Sciarra and S. Simitis (eds), *European Community Labour Law: Principles and Perspectives. Liber Amicorum Lord Wedderburn of Charlton* (Clarendon, 1996); P.Davies, "Market Integration and Social Policy in the Court of Justice" (1995) 24 ILJ 49.

<sup>100</sup> See, for example, W.Streeck and J.Rogers, "Workplace Representation Overseas: the Works Council Story" in R.Freeman (ed), *Working Under Different Rules*, 1994 National Bureau of Economic Research.

<sup>101</sup> *Fairness at Work White Paper*, Para.4.12.



# **Decentralizing Industrial Relations: The American Situation and its Significance in Comparative Perspective**

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## **A. Introduction**

One seeking after a model of decentralization need look no farther than the United States. Famously the home of decentralized industrial relations, the American taste for locally rooted institutional arrangements reflects itself in many spheres of our lives, from our industrial relations system, to our constitutional and political structures, and extending to many of our social arrangements as well. We may not have invented federalism (the Founders properly thanked Montesquieu for that), but we have applied the principle more extensively than has any other land. As a people, we tend to distrust—or at least we say we do—large, centralized institutions, particularly those that have anything to do with government. When we deal with large organizations, we prefer to do so straight-on, in a direct, one-on-one fashion, with no other body mediating the relationship. These attitudes mirror the starkly individualistic attitudes that characterize Americans and that stamp so many of our habits and ways of doing things.

Consequently, the topic of decentralization, so important to the discussions of trends in other work ordering systems, has gone largely unmentioned in the United States. It is embedded in our labor relations system and typifies both our institutional arrangements and our ways of doing things. We simply assume it as a natural state. Nevertheless, what I might term as the symptoms of an advanced form of decentralization have begun to appear among us and may eventually surface in the systems of other nations and regions as well. As I will note, in the American case, decentralization in the employment context has more to do with the devolution of risk of all types to the individual employee. Among employees who have enjoyed employment related benefits, for example, these risks run from assuming the risk for the investment of one's retirement funds to a slowly growing trend to shift to individuals the responsibility to save funds for underwriting their medical costs. This version of decentralization is a natural outgrowth of at least two, interrelated factors: the steady erosion of unions and our distinctive form of individualism, an attitude that represents one of our most successful and popular exports. Given trends across developed countries, one can expect decentralization to have effects that go well beyond the structures of collective representation. As will be discussed in the conclusion, the decentralization of industrial relations is symptomatic of far-deeper and more fundamental changes attitudes and habits that touch nearly every sphere of our lives.

## **B. Employee Representation in the United States: Some Key Characteristics**

### **1. Levels of Organizing and Bargaining**

As in Japan and increasingly in the United Kingdom, and in strong contrast to countries like Germany (although that situation may be changing), collective bargaining in the United States typically takes place at the establishment or at the company level, with a single

employer. For the most part, union organizing historically has occurred at these levels as well. Branch, sectoral, industry- or economy-wide agreements do not exist in the United States. Consequently, employer associations, so familiar in Europe, generally have no real equivalent in the American scheme. Multi-employer bargaining, once an important feature of collective bargaining practice in steel, coal and in trucking, largely has disappeared, a casualty in part of structural changes in these industries and especially in trucking, of deregulation.

In the American case, pattern bargaining probably represents the closest approximation to the sort of branch or industrial agreements that exist in countries like Germany. For example, the United Automobile Workers (UAW) long has employed the technique in its bargaining with the currently beleaguered American automobile manufacturers. Used as a means to take wages out of competition, in pattern bargaining, the union concludes an agreement with one of the auto firms, and then uses its key terms as a pattern for the contracts that it will negotiate with the other manufacturers. Consistent with the grass-roots focus of American style collective bargaining, and as part of the bargaining process, local union affiliates of the UAW standardly negotiate supplemental, plant level agreements to regulate local conditions not covered by the master agreement.

At least in some quarters, signs of change have begun to appear in these well-settled patterns. Some unions, such as the Service Employees International Union (SEIU), have taken radically different approaches in the ways they organize and bargain for their members. For example, instead of following the traditional model of organizing individual workplaces or companies, the SEIU's "Justice for Janitors" campaign has undertaken unionizing efforts on a city or regional basis, with some notable success.

The "Justice for Janitors" campaign represents a national undertaking that began in 1985. In it, the SEIU has focused its efforts on low-wage workers and immigrants who perform work, as the Union describes it, "on the first rung of the economic ladder." Easily replaceable because of fungible skills and employed in an intensely competitive industry that permits little room for wage and cost differentials, these workers typically have gone without representation. In its organizing campaigns, the SEIU seeks public support and makes broad alliances with religious groups, pension funds, community organizations, elected officials and other local leaders. It typically avoids the use of representation election procedures that the National Labor Relations Act establishes. Instead, the Union makes voluntary recognition pacts by which employers agree to recognize the Union once it can show majority employee support, verified by an independent third party.

Once recognized, the union bargains a market-wide master agreement with the employers that takes wages out of competition. The master contract has "trigger" provisions, designed to protect the employers who execute it. Because the employers in the cleaning industry typically are sub-contractors whose contracts with building owners can be cancelled on thirty days notice, the wage and benefit terms of SEIU collective agreements only become effective when a sufficient proportion of the companies operating in the market become signatories to the master agreement.

Whether the SEIU's approaches to organizing and bargaining represent the cutting edge of a fundamental change in organizing and bargaining patterns in the United States is not yet clear. At the end of November, however, the union announced that it had obtained majority support among 5,300 janitors in Houston, Texas, a result certified by the American Arbitration Association.<sup>1</sup> These janitors work in more than sixty per cent of the office space in Houston, and significantly, nearly all of them are Latino immigrants. The parties recently commenced bargaining for a master agreement. The Houston campaign represents the largest unionizing effort undertaken in the American South in years, a region that traditionally has resisted organizing. The union presently has 27 master contracts in urban and suburban markets throughout the country, including New York City, Chicago, Los Angeles, and

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<sup>1</sup> See, Stephen Greenhouse, *Janitor's Drive in Texas Gives Hope to Unions*, N.Y. Times, Nov. 28, 2005, at A1

Washington, D.C. With 1.8 million members, the SEIU now constitutes the largest and the fastest growing union in the United States.

UNITE HERE (the recently merged Union of Needle Trades, Industrial and Textile Employees with the Hotel Employee and Restaurant Employees Union) just has announced that it will undertake a “Hotel Workers Rising” campaign, the tactics of which closely resemble those used by the SEIU in its Justice for Janitors campaign. While the union does not seek a nation-wide agreement or standardized wages, it does propose to bargain with corporate representatives of the major hotel chains rather than with their representatives in separate cities. The union also has spoken of the possibility of a nation-wide strike and has called on the hotel chains to follow the policies the major casinos have adopted in settling agreements with the union. John Wilhelm, the president of UNITE HERE, has stated that “The present bargaining system is 60 years old and doesn’t work any more.”<sup>2</sup> UNITE HERE and the SEIU are among the unions that recently departed the AFL-CIO to form a new union federation, called Change to Win.

## **2. The National Labor Relations Act and American Employment Law: General Characteristics**

The National Labor Relations Act<sup>3</sup> is the basic labor relations statute for the United States. Passed seventy years ago, Congress has made only two major modifications to its terms. The 1947 Taft-Hartley Act reorganized the structure of the National Labor Relations Board, the Agency charged with the administration of the Act. The amendments split the Board’s adjudicative and prosecutorial functions and placed them in separate divisions. The Taft-Hartley amendments also added union unfair labor practices to the statute, as well as provisions that largely outlawed secondary strikes and related activities by unions. The Landrum-Griffin amendments, passed in 1959, refined and tightened restrictions on union secondary appeals.

In 1974, Congress enacted some minor amendments to the Act to extend its jurisdiction to private, non-profit health care institutions. These represent the last amendments of any significance to the statute. Notably, the health-care amendments enjoyed bi-partisan sponsorship and sparked little, if any, controversy. Just four years later, a bill to reform and streamline the Agency’s processes, and to strengthen its impressively weak remedies, died in Congress, perhaps signaling a growing shift in attitudes about the desirability and significance of the institution of collective bargaining. Since that time, no bill to amend the Act’s terms, regardless of sponsorship, has met with success in Congress, demonstrating both a lack of political consensus about the Act and, I suspect, a spreading view that collective bargaining retains only fading importance as a social and economic institution.

Never warmly embraced by many in management, growing numbers of unionists also appear to have lost confidence in the Act, if not in the institution of collective bargaining itself, and some even have gone so far as to call for the statute’s repeal.<sup>4</sup> Many unionists complain that the National Labor Relations Board’s decisions reflect a partisan bias toward management, and increasingly, unions seem eager to avoid recourse to the Board’s processes altogether. The SEIU’s reliance on voluntary recognition agreements as an alternative to the use of the rather cumbersome union election procedures established by the Act serves as an example of this trend.

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<sup>2</sup> Howard Stutz, *Union Boss Says Hotels Can Avoid Strike*, Las Vegas Review Journal, Jan. 27, 2006.

<sup>3</sup> 49 Stat. 449 (1935), amended by 29 U.S.C. §§ 151-69 (2000).

<sup>4</sup> See, e.g., *AFL-CIO Chief Calls Labor Laws a Dead Letter*, Wall St. J., Aug. 16, 1984 at 8; *Kirkland’s Call to Void Labor Laws Ignites a Growing National Debate*, Wall St. J., Nov. 6, 1984, at 29.

Described in 1935 by its framers as an experiment, the terms of the National Labor Relations Act cover only employees in the private sector of the economy. Nevertheless, the NLRA has served as the model for public sector labor relations statutes as well. Although most public employees do not enjoy the right to strike—a key right protected by the terms of the NLRA—most of the core features of the NLRA and the practices and institutions developed in private sector collective bargaining find their parallel in the statutes and practices that govern public sector labor relations at both the state and the federal level.

In considering the NLRA and the model of industrial relations that it sanctions, one should keep some key characteristics of American employment law in mind. In contrast to nearly all other legal regimes, employment at-will constitutes the default rule against which all other American employment rules operate. Under the at-will rule, unless otherwise agreed-upon, either party may terminate the employment relationship at any time and for any reason not specifically prohibited by law. Premised on the notion of a constant exchange of offer and acceptance of contractual terms, the rule also permits employers unilaterally to change the terms and conditions of employment. In large part, employment discrimination legislation, such as Title VII of the Civil Rights Act of 1964 or the Age Discrimination in Employment Act, simply state exceptions to the employment at-will regime. Employers remain free to exercise their discretion so long as they do not premise their employment related decisions on one of the statutorily forbidden grounds.

Unlike most other nations, the United States has relatively little law that gives substantive structure to the terms of the employment relationship. Something like the Japanese Labor Standards Act, for example, finds no counterpart in the American system. In addition, employment law in the United States (as opposed to the law of collective bargaining) largely exists as a matter of state, rather than of federal law. Where labor law in Germany constitutes an articulated, nationally uniform whole encompassing individual and collective labor law and social security law, employment regulation in the United States represents a patchwork of statutory provisions and common law doctrine that exist at both the state and federal levels. Attitudes of contractual freedom and positivism strongly stamp our understandings of the employment relationship. Such attitudes, as Max Weber long ago taught us, mean that American courts typically will not inquire into the substantive terms of employment arrangements, but simply will enforce their terms. Traditionally, legislatures at both the federal and state levels have demonstrated a similar disinclination comprehensively to examine or to regulate the relationship of employment.

The overwhelming majority of Americans in the private sector labor force constitute at-will employees. For them, explicit protections against unfair discharge would only exist through the “just cause” provisions contained in nearly all collective bargaining agreements. Particularly for relatively well-compensated middle- and upper-level members of management near the end of their careers, employment discrimination laws have become an alternative means to challenge terminations or other significant employment decisions. In 1935, Congress enacted the NLRA against what might be called a green field. Little other statutory employment regulation existed. In stark contrast to the approach then taken by many other industrialized nations, Congress avoided the creation of a body of substantive regulation. Instead, through the NLRA, it sanctioned a framework for the private ordering of the law governing the employment relationship.

### **3. Employee Representation and the Act: Sections 2(5) and 8(a)(2) of the NLRA**

The NLRA rests on the key principles of majority rule and exclusive representation. Under the Act’s structure, a union selected by a majority of the employees in the affected workplace becomes the exclusive representative of them all. The majority rule principle follows the model of governance in a political democracy, where majority choice displaces

individual preference. The exclusivity principle prohibits an employer from attempting to bypass the majority designated representative by unilaterally changing the terms and conditions of employment or by dealing with individuals or groups of employees independently of the union. The privileged status that exclusivity confers on the majority representative carries with it the legally-enforceable obligation to represent all employees, regardless of their support for or actual membership status in the union, fairly and even-handedly.

The exclusivity principle starkly differentiates the American version of collective bargaining from the schemes adopted by many other countries. The principle prevents fragmentation and dissolution of the strength that employees achieve through collective action. It thereby serves to safeguard the notions of majoritarianism that underpin the Act's structure. The exclusivity principle reflects the organizational and bargaining patterns in the United States, and the emphasis in the American system on local, "bottom-up" workplace law-making. This emphasis traditionally has obviated the need for German-style works councils that in part fill the representation gap between the individual workplace and an umbrella agreement whose generalized terms extend to numerous employers and differing local conditions. The centrality of exclusivity to the Act's scheme reveals its preoccupation with the removal of impediments to employee self-organization.

Section 8 (a)(2) of the National Labor Relations Act constitutes the statute's key structural provision. In pertinent part, that Section provides that

It shall be an unfair labor practice for an employer...to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it....

Section 2 (5) of the Act provides that

The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

During the Congressional hearings that eventually resulted in the passage of the NLRA, of all the language under consideration, these two provisions sparked by far the most controversy. Over the course of the past two decades or so, debate over these provisions has stirred anew. What has made such innocuous seeming language the focus of repeated and passionate debate?

Answering this question requires a bit of historical perspective.<sup>5</sup> The response of American employers to the development and rise of an independent labor movement during the late Nineteenth and early Twentieth Centuries did not differ appreciably from that of employers in other industrializing nations. One reaction was wholly negative and involved employer resistance through such devices as yellow dog contracts, blacklists, the use of informants and secret police, resort to the courts for injunctions, threats and where other measures failed, various levels of violence.

The other, and far less ham-fisted approach, entailed creative efforts to develop effective alternatives to unions and to collective bargaining. These alternatives took a wide variety of forms, including welfare work (encompassing everything from company-built model towns to employer-sponsored educational and recreational programs); scientific-management techniques (based on the work of Frederick Taylor); and the development of what we now call human resource management (drawing from the efforts of Elton Mayo and the early "human

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<sup>5</sup> For a more thorough discussion, see Thomas C. Kohler, *Models of Worker Participation: The Uncertain Significance of Section 8(a)(2)*, 27 Boston College L. Rev. 499 (1986).

relationists”). The most popular and successful alternatives, however, were employer-sponsored participative management schemes.

Not all of these participative schemes represented simple union-avoidance devices. At least some constituted good-faith and innovative efforts to find effective means by which to permit employees to gain some voice in managerial decision making. Some grew out of religious, ethical or socially-conscious motivations, while concerns over improving employee morale, increasing productivity and cutting worker turnover rates, at least in part, impelled the creation of others.

Whatever the intentions behind their institution, these participative schemes assumed numerous shapes. Even before 1920, some of them took the form of what we now call semi-autonomous work teams that had the authority to make hiring, promotion and discharge decisions, to solicit customer orders, to determine production methods and schedules, to prepare cost estimates and the like. Others made provisions for placing non-voting employee representatives on company boards—the earliest such instance I have found in the United States dates back to 1893. Most, however, involved the implementation by employers of employee representation committees, a development that appeared roughly contemporaneously across the industrialized portions of Europe as well as in the United States.

The details of these representation structures varied. Until the early 1930s, the prevailing form involved the use of joint committees on which employee and employer representatives served. Management typically formulated and implemented these plans unilaterally, often in response to a union organizing effort or the threat of a recognitional strike. Generally, the committees consisted of equal numbers of employee and managerial representatives who enjoyed equal voting power. As one of their contemporary proponents explained it, “few executives” who instituted such plans would regard them “as in any sense implying that employees should ‘participate’ in management.” Instead, the committees had “essentially *advisory* functions” and management remained “free to adopt or reject” their proposals. Normally, these plans restricted the jurisdiction of the joint committees to questions involving grievances and other personnel matters, housekeeping and safety issues, and ways to improve products and production methods. Wages, hours, work rules and related matters typically had no place in the agenda of the committees.

With the passage of the ill-fated National Industrial Recovery Act (NIRA), the structure of many employer-sponsored representation plans changed. Enacted in 1933, at the depths of the depression, the NIRA represented the Roosevelt administration’s quick response to the economic emergency. Section 7 (a) of the NIRA, added at the insistence of the union movement, provided that “employees shall have the right to organize and bargain collectively through representatives of their own choosing,” free of employer interference, restraint, or coercion. This language, intended to protect employee self-organization, sprang from the 1926 Railway Labor Act, and subsequently became the language of Section 7 of the National Labor Relations Act.

The adoption of this language had two unintended consequences. It prompted many employers to change the structure of their representation plans to make them resemble the structure of independent unions. It also spurred many other employers, fearful of being forced to bargain with independent unions, either as a result of governmental order or because of a successful organizing effort, to initiate company-sponsored “unions” instead. The frequently used term, company union, stems from this development, but in recognition of their sponsorship and the source of their control, the term has come to describe both the pre- and post-1933 versions of management implemented representation plans.

By 1928, company sponsored representation schemes had come into such widespread use, reported the Social Science Research Council, “that while unionism was practically the only form of collective dealing two decades ago, since that time there has been rapid spread of

other forms of group representation.” In the management sponsored “employee representation movement,” the Social Science Research Council observed, “a real challenge had been offered” to collective bargaining through employee self-organization.

The National Labor Relations Act settled that challenge. After two sessions of Congress, and two years of extensive hearings and ringing debates, much of which centered about the language of Sections 2(5) and 8(a)(2), Congress endorsed collective bargaining through self-organized and autonomous employee associations as the accepted model of group dealing by employers. The definition of a “labor organization” as set forth in Section 2(5) represents a core structural component of the NLRA’s scheme.

The key to determining whether something that constitutes a “labor organization” unlawfully is dominated turns upon whether it is structurally independent of the employment relationship. As Senator Wagner explained it, that question “is entirely one of fact, and turns upon whether or not the employee organization is entirely the agency of the workers....The organization itself should be independent of the employer-employee relationship.”

#### **4. Sections 2(5) and 8(a)(2), the Courts and the Board**

##### ***a. Supreme Court Construction and Lower Court Reception***

Given the state of commerce clause and federalism doctrine at the time of its passage, substantial questions loomed over the constitutionality of the provisions of the proposed NLRA as the law wended its way through the hearings and debates over its terms. In fact, some in Congress who otherwise would have opposed the bill voted in its favor, permitting them to gain credit with constituents who supported the bill while being quietly convinced that the NLRA would not survive challenge before the United States Supreme Court. After the Act’s passage, the NLRB’s first general counsel, Charles Fahy, carefully selected a set of cases that would act as vehicles both to test the constitutionality of the NLRA and to establish the reach of its provisions.

The matter of *NLRB v. Newport News Shipbuilding & Drydock Co*<sup>6</sup>, in which the Court first construed the terms of Sections 2(5) and 8(a)(2), was among those early cases. *Newport News* reached the Court in 1939, just two years after the Court’s momentous decision in *NLRB v. Jones & Laughlin Steel Co*<sup>7</sup>. , in which the Court upheld—to the surprise of many observers—the constitutionality of the NLRA. In *Newport News*, the employer had established a series of committees with joint-employer and employee representation, which among other things adjusted employee grievances and dealt with matters concerning working conditions. The Court unanimously upheld the NLRB’s conclusion that the employer unlawfully had dominated the committees, even though they enjoyed overwhelming employee support. “Such control of the form and structure of an employee organization,” the Court instructed, “deprives employees of the complete freedom of action guaranteed by the Act....” The determining factor in deciding such cases, the Court made clear, is “the statutory test of independence.” In applying that test, the Court reminded, the employer intent for establishing the program is immaterial.

The Supreme Court next construed the language of Sections 2(5) and 8(a)(2) in its 1959 opinion in *NLRB v. Cabot Carbon Co*.<sup>8</sup> There, at the behest of the War Labor Board during World War II, the employer had established joint employee-management committees at several of its plants. Satisfied with their operation, the employer retained them after the war ended. Concluding that the committees did not bargain collectively with the employer, but served only as a forum for discussion, the United States Court of Appeals for the Fifth Circuit ruled

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<sup>6</sup> 308 U.S. 241 (1939).

<sup>7</sup> 301 U.S. 1 (1937).

<sup>8</sup> 360 U.S. 203 (1959).



that the committees were not “dealing with” the employer as Section 2(5) of the Act used the term. Upon its review, the Supreme Court reversed this holding. It was not necessary, the Court stated, for an employee committee to bargain with the employer to be “dealing with” it for the purposes of the Act. Merely making recommendations concerning any of the subjects enumerated in the statutory definition of a labor organization is sufficient. Nothing in the Act or its legislative history, the Court continued, “indicates that the broad term ‘dealing with’ is to be read as synonymous with the more limited term ‘bargaining with’.” Consequently, the Court concluded that the committees constituted labor organizations as defined in the statute.

Despite their construction by the Supreme Court, the terms of Sections 2(5) and 8(a)(2) have not always gained either easy comprehension or enthusiastic reception by the lower courts. For example, in his dissent in *NLRB v. Walton Manufacturing Co.*,<sup>9</sup> a case decided two years after the Supreme Court’s *Cabot Carbon* decision, Judge Wisdom stated that

To my mind, an inflexible attitude of hostility toward employee committees defeats the Act. It erects an iron curtain between employer and employees, penetrable only by the bargaining agent of a certified union, if there is one, preventing the development of a decent, honest, constructive relationship between management and labor.

Somewhat less modestly, and over a strong dissent, a panel of the Sixth Circuit Court of Appeals in its 1982 opinion in *NLRB v. Scott & Fetzer Co.*<sup>10</sup>, simply declared that “our court [has joined] a minority of circuits indicating that the adversarial model of labor relations is an anachronism.” In that case, and after two unsuccessful union organizing efforts, the employer established an “in plant representation committee.” The employee members of the committee were chosen by secret ballot for three-month terms and met monthly with the management members to discuss working conditions, review employee complaints, and similar matters.

The Sixth Circuit’s opinion acknowledged that *Cabot Carbon* specifically had held that the making of recommendations by an employee committee concerning topics enumerated in the definition of a labor organization constituted “dealing with” the employer. Nevertheless, it continued, left open by *Cabot Carbon* was “how much interaction is necessary before dealing is found.” Here, the court concluded, the committee had been established to determine “employee attitudes regarding working conditions...for the company’s self-enlightenment” and not to “pursue a course of dealings.” Admitting that the “difference between communication of ideas and a course of dealings at times is seemingly indistinct,” the court stated that the difference nevertheless was “vital” to determining this case. Concluding that the committee did not fall within the definition of a labor organization, the court found no violation of the statute. Notably absent from the court’s analysis is any investigation of the structural independence of the committee in question.

### ***b. Sections 2(5) and 8(a)(2) and the NLRB: Post-1970 Developments***

For nearly two decades after the Supreme Court’s issuance of its *Cabot Carbon* opinion, relatively few cases arose involving the interpretation and application of the terms of Sections 2(5) and 8(a)(2). That situation began to change in the late 1970s, when a new series of cases raising issues under that portion of the Act suddenly started to appear. Two things seem to have driven this trend. The first factor was a decline in union membership. As we will discuss later, union density reached its peak in the United States in the late 1950s, and then very slowly began to recede. By the late 1970s and the early 1980s, what had started as a trickle had begun to turn into a stream. The basic social institution for employee representation, and on whose existence the entire scheme of the NLRA depends, had started to disappear.

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<sup>9</sup> 289 F.2d 177 (5<sup>th</sup> Cir. 1951).

<sup>10</sup> 691 F.2d 288 (6<sup>th</sup> Cir. 1982).



Secondly, because of the comparative success during that time of the German and Japanese economies, American management had begun to take great interest in quality circles, works councils, and other participative management techniques that it saw being used successfully in Europe and Asia. To many, such devices took on the character of being the “silver bullet” that could resolve America’s competitive woes. By the mid-1980s, the noted industrial relations scholar, Jack Barbash, observed that participation had become a “new managerial ethic.” Certainly, worker participation represented one of the central research topics in management schools and over the next decade, a torrent of mostly complementary literature would be devoted to it.

The first of the new wave of cases involving Section 8(a)(2) arose before the National Labor Relations Board in the late 1970s. One of the earliest was the *Sparks Nugget, Inc.*<sup>11</sup> case. There, after withdrawing recognition from the union representing its employees, the employer established a joint employee-management committee which made binding resolutions of employee grievances. The committee, the Board concluded, did not constitute a labor organization for the purposes of the Act. Consequently, it dismissed the 8(a)(2) allegations. In so doing, the Board distinguished *Cabot Carbon*. The committees in question in *Cabot Carbon*, the Board stated, were “dealing with” the employer “in some sense as the employees’ advocates.” In contrast, the grievance committee at issue in *Sparks Nugget* “performs a purely adjudicatory function.” Because it performed a function for management, it cannot be said to be “dealing with” management.

The Board’s decision in *Mercy-Memorial Hospital*<sup>12</sup> quickly followed. Once again, the case involved the establishment by management of a joint employer-employee grievance committee, and once again, the Board had no trouble in distinguishing the facts of this matter from the *Cabot Carbon* holding. “The critical factor,” the Board stated, in the statutory definition of a labor organization for the purposes of resolving this case, “is whether the Grievance Committee ‘exists for the purpose ... of dealing with’” the hospital concerning grievances. Because “the committee was created simply to give employees a voice in resolving the grievances of their fellow employees” and not to present them to or negotiate over them with management, the Board concluded that the grievance committee was not “dealing with” management.

The last and perhaps most significant case in this line of cases is the Board’s *General Foods Corp.*<sup>13</sup> decision. There, the employer had organized the workforce at its dog food manufacturing facility into four “job-enrichment teams.” Each team as a group had the authority to assign work, schedule overtime, and on occasion, to interview job applicants. The teams also discussed complaints about their work with management after which adjustment in practices sometimes occurred. In addition, during their meetings with management, the teams conferred about the job expectations to be incorporated into a “contract” that individual employees were required to reach with their supervisors, and they reviewed the job descriptions other employees had prepared.

In a decision that cited no authority, the Administrative Law Judge (ALJ) who heard the case dismissed the complaint. “The essence of a labor organization, as this term has been construed by the Board and the courts,” the ALJ wrote, “is a group or a person which stands in an agency relationship to a larger body on whose behalf it is called to act.” The teams, the ALJ found, were merely work crews that had been established by the employer for reasons that “had nothing to do with labor relations, as that term is generally understood,” even though he also found that “team meetings served as occasions for management to communicate

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<sup>11</sup> 298 NLRB 524 (1990).

<sup>12</sup> 231 NLRB 1108 (1977).

<sup>13</sup> 231 NLRB 1232 (1977).

directly with its employees and vice versa.” Concluding that the teams did not stand in an agency relationship to anyone, and despite the meetings, that managerial functions simply had been “flatly delegated” to the teams, the ALJ found that the teams did not “deal with” the employer. The National Labor Relations Board adopted the ALJ’s decision as its own without comment.

It is a bit difficult to know what to make of these decisions. None of them cite the Supreme Court’s *Newport News* opinion, and as mentioned, the *General Foods* decision cites no legal authority whatsoever. The critical factor of the independence of the bodies in question from the employment relationship remained unmentioned and unexamined. While, as the *Newport News* Court pointed out, the employer’s motive is of no legal consequence in the finding of a violation of Section 8(a)(2), the *General Foods* decision does beg the question of what reasons, apart from labor relations, would have motivated the employer to organize the work teams? The only thing that seems to explain the *General Foods* decision is that the Board had no idea how to think about a participative device that did not appear just like a union. Through the passage of time, it appears that the purpose and significance of the key structural provisions of the Act had become opaque to the very Agency charged with its enforcement.

That would not long remain true. By the early 1990s, scholarly research, commentary, and extensive debate among those generally affected brought the NLRB to a new and more informed consideration of the issues raised by Section 8(a)(2). In its much anticipated 1993 *Electromation*<sup>14</sup> decision, the Board revisited the area and established an approach that since has governed its consideration of the legality of worker participative devices.

In *Electromation*, the employer established five “action committees” on which six employees and one or two members of management would serve. Employees were limited to serving on one committee and the employer determined the number of employees permitted to serve. Employee members were not elected, but volunteered. The five committees were to address respectively the company’s absenteeism policy; smoking regulations; communication network; pay policies; and its attendance bonus program. The company also encouraged employee committee members to act as a channel of communication between the workforce and the committees. Shortly after the committees began their work, the employer became aware of a union-organizing effort and it announced that members of management would have to cease their participation on the committees, but that employees would be free to continue to meet should they choose.

After reviewing some of the statutory history behind Sections 2(5) and 8(a)(2), as well as some of the cases construing their terms, the NLRB concluded that the action committees were unlawfully dominated labor organizations. On the facts presented, the Board’s ruling in this matter appears unremarkable. In the course of its decision, it reminded both that employer intent is not a requisite to finding a violation and that it was not necessary for a body to engage in formal bargaining to violate the Act’s terms. In an important footnote, however, the Board made a significant qualification to the Supreme Court’s *Cabot Carbon* holding. “Referring again to the abuses Congress meant to proscribe in enacting the Wagner Act,” the Board explained, “we view ‘dealing with’ as a bilateral mechanism involving proposals from the employee committee concerning the subjects listed in Section 2(5), coupled with real or apparent consideration of those proposals by management.”

The Board then discussed its *General Foods*, *Mercy-Memorial Hospital*, and *Spark’s Nugget* decisions, indicating that they remained good law. In reliance on those cases, and notwithstanding the broad definition the term “dealing with” had received in *Cabot Carbon*, the NLRB declared, “it is also true that an organization whose purpose is limited to

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<sup>14</sup> 309 NLRB 990 (1993).

performing essentially a managerial or adjudicative function is not a labor organization under Section 2(5).” In another footnote, the Board majority also observed that it had found “no basis in this record to conclude that the purpose of the Action Committees was limited to achieving ‘quality’ or ‘efficiency’ or that they were designed to be a ‘communication device’ to promote generally the interests of quality or efficiency.” The case generated three separate concurrences, each of which emphasized the authors’ views that the NLRA could be read in a fashion to permit some forms of employer-sponsored participative devices.

Those views received further explication in the NLRB’s *E.I. Du Pont*<sup>15</sup> decision, written by the three Board members who had concurred separately in the *Electromation* case, and issued shortly after *Electromation*’s appearance. There, the Board concluded that six safety committees and one physical fitness committee constituted unlawfully dominated labor organizations. Citing *Cabot Carbon*, the Board once more observed that the term “dealing with” is broader than the term “bargaining with.” The latter term, the Board stated, connotes a process by which the parties “must seek to compromise their differences and arrive at an agreement.” In contrast, explained the Board, the term “dealing” does not require that parties “seek to compromise their differences.” It only involves the existence of a “bilateral mechanism” between them. A bilateral mechanism, the Board explained

ordinarily entails a pattern or practice in which a group of employees, over time, makes proposals to management, management responds to these proposals by acceptance or rejection by word or deed, and compromise is not required. If the evidence establishes such a pattern or practice, or that the group exists for a purpose of following such a pattern or practice, the element of dealing is present.

Because employee and management representatives participated on the committees in *Du Pont* and discussed working conditions in a manner that left their adoption within the discretion of management, the Board found that they constituted labor organizations that were “dealing with” the company.

Further developing its distinction between bargaining and dealing, the Board then indicated that the Act permitted a distinction to be drawn between dealing and not dealing. A “brainstorming” group which makes no proposals but simply offers “a whole host of ideas,” the Board declared, is not engaged in dealing as that term is used in the Act. Likewise, a committee that gathers and shares information with the employer, but makes no proposals concerning it, is not dealing with the employer, and does not constitute a labor organization. A “suggestion box” procedure where individuals offer specific proposals similarly does not constitute dealing, the Board stated, because the recommendations are made individually and not on a group basis.

In its 1999 decision in *Polaroid Corp.*<sup>16</sup>, the Board restated its commitment to the interpretation of the statutory term “dealing with” that it had developed in *Electromation* and *Du Pont*. Citing *Cabot Carbon* and its decision in *Electromation*, the Board instructed that the “principal distinction between an independent labor organization” and an unlawfully dominated one “lies in the unfettered power of the independent organization to determine its own actions.” After reiterating the definition of “dealing with” that it developed in *Du Pont*, the Board stated that it had “articulated certain ‘safe havens’ in order to provide guidance” to parties seeking “to implement lawful employee involvement programs.” It had “underscored these safe havens,” the Board explained, “to demonstrate that there is room” under the Act for such devices. “The Board supports an interpretation of the Act,” it proclaimed, “which would not discourage employee participation programs in their various forms.”

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<sup>15</sup> 311 NLRB 893 (1993).

<sup>16</sup> 329 NLRB 444 (1999).

The facts of the *Du Pont* case, the Board continued, “provide a good example of how an employer can involve employees in important workplace matters, such as plant safety, without running afoul of the Act.” The day-long safety conferences that Du Pont held in which employees were encouraged to make suggestions about workplace safety and “to talk about their experiences with safety issues,” the Board declared, represent permissible “brainstorming” activities. Such meetings, stated the Board, did not constitute dealing because the employer “did not structure the conference as a bilateral mechanism designed to make and respond to specific proposals.”

In contrast, the “employee owner influence councils” that Polaroid established did constitute bilateral mechanisms because their employee members made proposals to management concerning matters like health insurance, policies governing the disposition of funds from the employee stock ownership plan, and family leave. Management also polled the committee members to determine majority sentiment. After hearing discussion and proposals, management would respond to them, indicating its decision or making counter-proposals for further consideration. Because the committees at issue in Polaroid did not fall within what the Board now terms a “safe haven,” they were found to be unlawfully dominated.

In its 2001 *Crown Cork & Seal Co.*<sup>17</sup> decision, the Board once again relied on *Electromation* as well as its 1977 *General Foods* decision. There, the employer organized the workforce at its aluminum can manufacturing facility into four semi-autonomous work teams. Each of the teams consisted of a team leader (a member of management) and 32 production employees. Each team as a group made determinations about production, quality, training, attendance, safety, maintenance and discipline issues. The teams also considered individual employee’s requests for time off and determined whether an individual’s absence from work should be excused. Additionally, teams investigated accidents and had the authority to remedy safety problems. Teams also had the authority to decide what disciplinary action to impose on their members. Discipline may range from “counseling,” which might require the failing member to enter into a “social contract,” to recommending a suspension or discharge.

Above the four teams were three further teams, whose members included several members of management and two members from each of the four production teams. One of these teams, the “organizational review board,” evaluated disciplinary recommendations from the production teams. It also made recommendations about working hours, layoff procedures, vacation policies, and other matters concerning terms and conditions of work. The recommendations from this team were forwarded to the plant management team or the plant’s manager for final approval. The “safety committee” similarly reviewed the production teams’ accident reports and safety recommendations. Their reports also were subject to final review by the highest levels of plant management. The last of the three teams reviewed whether production employees satisfied the company’s requirements for wage increases pursuant to its pay for skills program. Its recommendations also were reviewed by the plant manager.

In concluding that the various teams at issue did not constitute labor organizations for the purposes of the Act, the Board once again relied on its *Electromation* decision’s definition of “dealing with” as contemplating a “bilateral mechanism” involving proposals from employees “coupled with real or apparent consideration of those proposals by management.” It then reviewed the facts of its *General Foods* decision and its conclusion that since managerial functions in that case had been “flatly delegated” to the teams, they did not “deal with” the employer.

The *General Foods* case, the Board found, controlled the facts involved in the instant matter. Because the seven committees at the Crown Cork facility performed managerial functions, stated the Board, they do not constitute labor organizations and they do not “deal

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<sup>17</sup> 334 NLRB 699 (2001).

with” the employer. Instead, the teams jointly exercise managerial authority that is delegated to them, which the Board likened to the sort of authority possessed by a first-line supervisor. The review by higher levels of management of the recommendations of the seven committees at the Crown Cork facility, also involve no problems of dealing. Rather, the Board stated, what occurred at Crown Cork involves nothing more than higher levels of management reviewing the conclusions reached at lower levels of responsibility. “Higher-management review of a recommendation made by lower management,” instructed the Board, cannot be equated with the sort of “dealing” between an employer and employee representative that the Act contemplates. The Board’s most recent decisions in this area follow the pattern established by the cases discussed here.

The use of employee participative schemes by unionized employers has a very long history in the United States, and where the union has consented to their use, they raise no legal issues. In a few recent cases, however, some unusual problems involving the overlap between the union and participative efforts have arisen. In *Permanente Medical Group*,<sup>18</sup> for example, the employer sought to develop a new “member focused care” approach in response to declining patient satisfaction with its services. Among other things, this project proposed to reorganize the way Permanente’s unionized nursing staff provided patient care. As part of this process, and over the objection of the nurses’ union, Permanente established a number of “design groups.” In evaluating and recommending how work would be performed, design group members were urged to relate the views and suggestions of fellow employees along with their own. At the close of the process, management urged design group members to inform their coworkers about the advantages of the new approach. After passing through several levels of review, during which “several of the design team recommendations were accepted by management,” Permanente presented the program to the unions for bargaining.

Over a strong dissent, the Board dismissed the Union’s charges that Permanente’s actions violated the statutory duty to bargain by avoiding the Union and communicating directly with employees. In response to the dissent, the Board’s majority also concluded that the use of the design groups to develop proposals to be presented to the union for bargaining did not constitute “dealing with” an employee committee for the purposes of Section 8(a)(2).

### **C. Assessment: Non-Union Employee Representation Systems and the NLRA**

Does U.S. law allow non-union systems of employee representation? As the reader can appreciate, the answer to that question is a bit complicated. In one sense, it depends upon what one means by the term representation and whether one equates participation with representation. From the standpoint of Board law, outcomes appear to turn on structure. In *Electromation*, the NLRB specifically left open the question of whether the finding that an employee group acted in a representative capacity is requisite to concluding that it is a labor organization for the purposes of the Act. As the cases have indicated, however, where an employee group does act in a representative capacity and where the discussions between the group and members of management assume a propositional character, the conclusion that the group constitutes a labor organization follows. Such a body would seem to constitute a “bilateral mechanism.” Consequently, a works council patterned after the German model, for instance, undoubtedly would constitute a labor organization and would violate the terms of Section 8(a)(2) if instituted by an American employer.

In contrast, if as in *General Foods*, *Mercy Memorial* or *Crown Cork & Seal*, the employer establishes bodies in which employees and management jointly address and resolve work assignments, grievances, training and disciplinary matters and like issues concerning terms

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<sup>18</sup> 332 NLRB 1143 (2000).

and working conditions, but in which the employees do not purport to speak for others, then it appears under current Board law that these bodies do not constitute “labor organizations” because they do not constitute “bilateral mechanisms.” Similarly, bodies on which employees express views or offer ideas or suggestions concerning the performance of work or services, production methods, safety issues, and the like, and where the employer “simply gathers the information and does what it wishes” with it, without the employees making proposals to which management responds “by acceptance or rejection by work or deed,” then the bodies are not labor organizations because they do not “deal with” the employer for the purposes of Section 2(5).

One can fairly ask whether these cases erect form over substance and whether the Sixth Circuit came closest to the truth in its *Scott & Fetzer* opinion when it observed that the “difference between communication of ideas” which is legally permissible, and “a course of dealings” which is not, is a line that “at times is seemingly indistinct.” In all events, the recent line of cases seems flatly inconsistent with the Act’s terms and to distort the model of representation that it endorsed. Reading *Cabot Carbon* as the Board did in its *Electromation* decision to equate “dealing” with the existence of a “bilateral mechanism” hardly appears consistent with the Supreme Court’s holding in that case. In effect, *Electromation* confines the holding of *Cabot Carbon* to its facts. Likewise, the “statutory test of independence” of employee groups from the employment relationship, emphasized by Senator Wagner during the hearings over the Act and confirmed in the Supreme Court’s *Newport News* opinion seems to have gone forgotten in the mists of time.

A variety of speculative possibilities offer themselves as explanations for the course that the NLRB has followed in this area since *Electromation*. Some of the Board members, I suspect, have feared that a strict interpretation of the language of Sections 2(5) and 8(a)(2) might lead Congress to repeal them or to do away with the NLRA altogether. Others of a similar “accommodationist” attitude regarded these terms as dated and inconsistent with the demands of a globalized economy and sought to reconcile them, as much as possible, with contemporary practices. Still others may be unconvinced that Congress possibly could have intended in 1935 to endorse but one system of group dealing.

In 1994, the Commission on the Future of Worker-Management Relations, a body appointed during the Clinton administration by the then Secretaries of Labor and Commerce, made a wide-ranging report and series of recommendations for the reform of American employment law and policies.<sup>19</sup> Among its recommendations, the Commission suggested that “Congress clarify Section 8(a)(2)” to provide that “non-union employee participation programs should not be unlawful simply because they involve discussion of terms or conditions of work where such discussion is incidental to the broad purposes of these programs.” In the Commission’s view, employee involvement programs “do not violate the basic purposes of Section 8(a)(2)” and the law should facilitate their expansion. The Commission also recommended that the ban against company unions continue, using the example of the committees like the ones used by Polaroid Corp. “Such joint groups,” the Commission stated, “are representative in character and count among their primary function handling employee grievances and advising senior management about pay, work rules and benefits.” As such, “[t]hey go well beyond incidental involvement in issues traditionally reserved to independent labor organizations.”

Douglas A. Fraser, a Commission member and a former president of the United Automobile Workers, strongly dissented to this recommendation. “Section 8(a)(2) stands as a bulwark against forms of representation which are inherently illegitimate because they deny

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<sup>19</sup> See, *Report and Recommendations, Commission on the Future of Worker-Management Relations* (U.S. Dept’ of Labor, U.S. Dep’t of Commerce, Dec. 1994).

workers the right to a voice through independent representatives of their own choosing,” he wrote. Stressing that the Commission had “not proposed any wholesale revision or exemption to Section 8(a)(2),” Fraser nevertheless stated that because of his commitment “to the principle of work place democracy, I cannot join in any statement that proclaims that you can have fully effective worker management cooperation programs” in the absence of the “workers having an independent voice.”

While wide-ranging, Congress acted on none of the Commission’s recommendations and the Report subsequently has vanished from public discussion. In 1996, President Clinton vetoed the Teamwork for Employees and Managers Act (TEAM Act), that would have amended Section 8(a)(2) to permit employers to implement certain forms of employee representation plans. Although the TEAM act has been reintroduced in Congress, to date, neither it nor any other bills to amend Sections 2(5) or 8(a)(2) have emerged.

Once a matter of hot debate and considerable discussion, employee participation has faded from the attention of both the public and of Congress. Given the current world situation, Congress seems unlikely to return to the issue or to the matter of employment law reform generally anytime in the near future. In the last fiscal year, incidentally, 152 complaints alleging violations of Section 8(a)(2) were filed with the NLRB, which constituted 0.8 per cent of the Board’s caseload for that period.<sup>20</sup> It is impossible to say how widespread the use of participatory or representative schemes is in the United States, but at least at the time the Commission on the Future of Worker-Management Relations issued its Report, it found that 52 per cent of the employees it surveyed “reported that some form of employee participation program operates in their workplace and thirty-one per cent indicate that they participate” in such a program. Given the low level of union density in the United States and what appears to be the wide use of participative programs, perhaps the significance of Section 8(a)(2) has been resolved on a *de facto*, if not a *de jure* basis.

#### **D. Union Density in the United States**

As noted earlier, union density rates in the United States have declined from a high of about 35 per cent in the mid- to late 1950s to a rate of 7.9 per cent in the private sector today.<sup>21</sup> Including the public sector, 12.5 per cent of wage and salary earners in the United States are union members, a rate unchanged since 2004. At 36.5 per cent, the rate of unionization for public sector employees is considerably higher than the rate for employees in the private sector.

Within the public sector, local government workers held the highest union membership rates, at 41.9 per cent. This cohort includes teachers, police and fire fighters, which remain heavily unionized occupations. In the private sector, the most heavily unionized occupations, at 24 per cent, were in transportation and utilities. Following them were workers in information industries, construction and manufacturing, with rates at about 13 per cent. Within the information industry, employees in telecommunications held the highest density rates, at 21.4 per cent. At 2.3 per cent, financial services had the lowest rates of unionization.

In terms of demographics, men (at 13.5 per cent) remained more likely to be union members than women (11.3 per cent). The differences between the sexes have narrowed considerably since 1983, when the rate for men stood 10 points higher than for women.

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<sup>20</sup> Sixty-Ninth Annual Report of the National Labor Relations Board at 204 (Sept. 30, 2004).

<sup>21</sup> All figures come from the Bureau of Labor Statistics, 2005 Union Members Summary, USDL 06-99 (Jan. 20, 2006) (available from the BLS website, <[www.bls.gov/cps/](http://www.bls.gov/cps/)>).

<sup>21</sup> All figures come from the Bureau of Labor Statistics, 2005 Union Members Summary, USDL 06-99 (Jan. 20, 2006) (available from the BLS website, <[www.bls.gov/cps/](http://www.bls.gov/cps/)>).

According to the U.S. Bureau of Labor Statistics, the more rapid decline of union membership rates among men accounts for the diminishing difference that current rates demonstrate. Presently, African-Americans (at 15.1 per cent) are more likely to be union members than are whites (12.1 per cent), Asians (11.2 per cent) or Latinos (10.4 per cent). Employees between 45 and 64 years old were the most likely to be union members (16.5 per cent) and those between 16 to 24 the least (4.6 per cent).

Union membership rates also vary widely geographically. The states with the highest union density rates in 2005 are New York (26.1 per cent), Hawaii (25.8 per cent), Alaska (22.8 per cent), Michigan and New Jersey (each with 20.5 per cent). Washington State had the fifth-highest density figures, at 19.1 per cent. States with the lowest rates include South Carolina (2.3 per cent), North Carolina (2.9 per cent), Arkansas and Virginia (both at 4.8 per cent), and Utah (4.9 per cent). A bit more than half of the Nation's union members live in just six states: California, New York, Illinois, Michigan, Ohio, and New Jersey.

As mentioned above, in the past year, several major unions disaffiliated themselves from the AFL-CIO, the umbrella union organization. These unions, the International Brotherhood of Teamsters (1.4 million members), the Laborers International Union of North America (800,000 members), UNITE HERE (400,000 members), the SEIU (1.8 million members), the United Food and Commercial Workers (1.4 million members), and the United Brotherhood of Carpenters and Joiners (520,000 members), along with the United Farm Workers have organized a new union federation that among other things plans to undertake aggressive and innovative organizing efforts and that plans to build a global labor movement. The new organization will hold its first organizing convention in March. Tellingly, all of these unions represent workers in sectors of the economy that are insulated from having their work transferred overseas.

## **E. Conclusion: Some Comparative Reflections on Decentralization and its Significance**

As I indicated at the outset, decentralization is a long-standing condition of the American labor relations scheme. It is embedded in our labor relations system and it characterizes many of our institutional arrangements generally. To the extent that decentralization implies the displacement or the substitution of collective bargaining with alternative systems of representation or participation, the term describes a development that may be fairly widespread among American employers.

Decentralization in the employment context has some further characteristics as well. As the practice of collective bargaining has waned in the United States, risks increasingly have been shifted to individual employees. Traditional defined benefit pensions for retirees, for example, once a typical feature of employment with any mid-size or large employer, quickly are vanishing. Their replacement are defined contribution plans, known in the United States as 401(k) plans, a reference to an Internal Revenue Code section governing their use. Under a defined contribution plan, the employer makes a certain contribution to match that made by its employees, who in turn bear the risk of investing and managing their portfolios. Money in 401(k) plans now outstrips the total in traditional pension plans, a change that will require younger workers to plan for their retirements with care.<sup>22</sup> Some also see a threat to traditional employer-based health insurance schemes in so-called medical savings account plans that give individuals a tax incentive to save their own funds to underwrite medical expenses.

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<sup>22</sup> See, Money in 401(k) Plans Outstrips Pension Totals, N.Y. Times (Feb. 2, 2006) (Available on the Times web site, <[www.NYTimes.com](http://www.NYTimes.com)>).



In the American case,<sup>23</sup> decentralization really means a thoroughgoing return to a regime of individual bargaining, at least for employees in the private sector. Of course, most American employees have never known anything different, even when union density rates stood at their zenith. Unions do not exist in a vacuum, however. As organized voices in the political sphere, unions speak for and represent interests that go well beyond those of their members alone. Just as the presence of unions affects patterns of income distribution within a society and influences the terms and conditions available to those without union representation, so their weakening and disappearance has considerable significance for those who never held union membership.<sup>24</sup>

About a decade ago, the Swedish comparativist, Reinhold Fahlbeck, published a provocative essay in which he reflected on “the un-American character of American labor law.”<sup>25</sup> The NLRA, Fahlbeck argued, with its emphasis on collective action and on the formation of associations stands in such stark contrast to the attitudes of the “archetypal American” as to make the law appear, as Fahlbeck put it, “somehow un-American.”<sup>26</sup> From the perspective of the average American, Fahlbeck observed, “Those people who want and need concerted action and unions are not quite reliable. They are not like Americans-at-large.”<sup>27</sup>

Fahlbeck has a point. As its framers suggested, the NLRA did represent an experiment, one that for a complicated series of reasons, never did fit well into the character of American society, and one that given the deep-seated trends of modernity, was a long-shot from the start.<sup>28</sup>

Union decline, however, hardly constitutes a phenomenon unique to the United States. It is going forward everywhere at an increasingly rapid pace, even in societies like Germany and Japan which traditionally have put a far greater emphasis on “communal” practices and habits than have we, and that have legal regimes that have been friendlier to collective bargaining than is ours. Is there a common thread? What can we learn from all this?

This is a big topic, one that cannot be exhaustively discussed here. I only want to point out that union decline is more than a function of changes in economic arrangements or the result of inhospitable legal regimes, although these factors certainly play a role. As Alexis de Tocqueville long ago reminded us, our mores—our “habits of the heart”—are far more important than the law and our political and economic arrangements. Over the past few decades, our mores undeniably have changed. Union decline is part of a far greater decline that has affected every aspect of associational life. Not only unions, but sodalities of all descriptions, including everything from grass roots political clubs, to religious groups, to civic and social organizations have hemorrhaged members, and not only in the United States. Marriage and birth rates in developed nations presently stand at the lowest levels ever recorded, even in times of famine and war. At the same time, the numbers of people living alone around the world stand at levels never before seen. For example, in 1950, single-person households made up just over 9 per cent of U.S. total. In 2000, in contrast, persons living alone constituted over a quarter of American households. Today, the number of people living alone in the United States exceeds the number of households comprised of a married couple

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<sup>23</sup> I strongly suspect that this will be the case for other systems as well.

<sup>24</sup> This includes managerial employees as well.

<sup>25</sup> Reinhold Fahlbeck, *The Demise of Collective Bargaining in the U.S.A.: Reflections on the Un-American Character of American Labor Law*, 15 BERKELEY J. EMP. & LAB. L. 307 (1994).

<sup>26</sup> *Id.* at 323-24.

<sup>27</sup> *Id.* at 326.

<sup>28</sup> For a discussion of this point, see, Thomas C. Kohler, *The Notion of Solidarity and the Secret History of American Labor Law*, 53 Buffalo L. Rev. 883 (2005).

living with their biological children.<sup>29</sup> When marriage and the family, which since the time of the Greeks have been regarded as the fundamental social institutions, appear to be dissolving one cannot be surprised that institutions like unions have foundered as well.

Tocqueville thought that democracy and the “progress of equality” represented forces that could not be stopped. Whether he was right about all this has yet to be seen. At the heart of these forces, however is a certain sort of individualism, a certain form of political and philosophical nominalism that increasingly has made the concept of membership in anything opaque to us.<sup>30</sup>

The collapse of unions accounts for much of the trend toward decentralization and for the accelerating instability of employment ordering systems around the industrialized world. That collapse, however, has implications that go far beyond these themes and that raise basic questions about our human character and the arrangements by which we seek to make life more fully and authentically human.

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<sup>29</sup> David B. Caruso, *Census says Manhattan First in Single-Person Households—Numbers on Rise across Nation*, *The Boston Globe*, Sept. 3, 2005 (summarizing U.S. Bureau of Census figures).

<sup>30</sup> On this theme, see the discussion in Kohler, *supra* note 29.

# Decentralisation and ‘Deregulation’ of Labour Relations through ‘Ultra-Regulation’: Australia’s 2005 Labour Law Reforms

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## 1. Introduction and Background to the ‘Work Choices’ Act 2005

Over the last fifteen years, Australia’s labour relations system has been totally transformed – from a highly centralised system based primarily on the determination of wages and working conditions through industrial tribunals, to one centred on decentralised bargaining at the workplace or enterprise level.<sup>1</sup> In the early stages of this transition, ‘enterprise bargaining’ remained overwhelmingly *collective* in nature. Increasingly, however, it has taken on an *individualist* orientation. These changes, and the move away from Australia’s traditional approach to regulating employment relations through prescriptive ‘awards’ and the conciliation and arbitration of industrial disputes, have been facilitated by legislative reforms at both Federal and State levels. Conservative (or ‘Coalition’) and Labor governments alike have sponsored the reform process, although the Coalition has driven it more vigorously and more radically – especially since its election to Federal Government in 1996.

Through its ‘first wave’ of labour law changes – the *Workplace Relations Act 1996* (Cth) (‘1996 Act’) – the Howard Coalition Government implemented several key elements of its (notionally) deregulatory labour relations reform agenda.<sup>2</sup> These included:

- limits on the dispute-settlement powers of the Federal industrial tribunal, the Australian Industrial Relations Commission (‘AIRC’)
- restrictions on the scope and reach of award regulation
- encouraging the further development of enterprise bargaining and allowing, for the first time under Federal law, employers and employees to enter into individual agreements known as Australian Workplace Agreements (‘AWAs’)
- removing many of the institutional and legal supports traditionally provided to trade unions
- substantial new constraints on the right to strike.

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<sup>1</sup> For more detailed information about these developments, see the discussion and references in Anthony Forsyth, *Re-Regulatory Tendencies in Australian and New Zealand Labour Law*, Japan International Labour Law Forum Special Series No. 14, March 2001, pp. 2-4; see also Joe Isaac, ‘The Deregulation of the Australian Labour Market’ in Joe Isaac and Russell Lansbury (eds), *Labour Market Deregulation: Rewriting the Rules*, The Federation Press, Sydney, 2005, p. 1.

<sup>2</sup> For detail, see eg Richard Mitchell, ‘Juridification and Labour Law: A Legal response to the Flexibility Debate in Australia’ (1998) 14 *International Journal of Comparative Labour Law and Industrial Relations* 113.

However, because it did not control the Senate (the Upper House of the Australian Parliament), the Government was forced to compromise on its originally more extreme reform proposals. Hence, while it secured passage of the 1996 Act, the Government's labour relations reform ambitions remained unfulfilled, and this dynamic continued over the following eight years. The Government repeatedly submitted further legislative proposals to the Parliament, and apart from the passage of several less controversial measures, the Senate rejected them. However, in October 2004, the Coalition Government was re-elected for a fourth successive term of office – and importantly, at that election, the Government finally obtained control of the Senate.

From late 2004, the Government very quickly embarked on formulating proposals for a major re-shaping of Australia's workplace relations framework, with a view to having these laws passed by Parliament after the Government's Senate majority took effect on 1 July 2005. The overall shape of the proposed reforms was announced by the Prime Minister in a Statement on 26 May 2005,<sup>3</sup> in which he outlined the Government's plans to create a new national labour law system that would largely override the industrial relations systems of the Australian States. The AIRC's traditional role in setting minimum wages would be transferred to a new body, the Australian Fair Pay Commission ('AFPC'). Collective and individual workplace agreements would need to contain only five basic employment conditions, rather than meeting the 'no disadvantage' test which had previously ensured fairness compared to relevant industrial awards. And workers in firms with less than 100 employees would no longer be able to bring 'unfair dismissal' claims.

There then followed several months of intense debate about the Government's proposals, including a concerted campaign of opposition by the Australian Council of Trade Unions ('ACTU'), and religious and community groups.<sup>4</sup> However, business lobby groups such as the Australian Chamber of Commerce and Industry and the Business Council of Australia continued to argue strongly for fundamental workplace relations changes of the type proposed by the Government. These and other proponents of the reform agenda claimed that Australia's future economic prosperity and international competitiveness depended on further 'deregulation' of the labour relations system, just as the shift to enterprise bargaining in the 1990s had brought significant economic benefits.<sup>5</sup>

Undeterred by mounting public concern about its proposals, the Government announced further details with the release of its 'Work Choices' document on 9 October 2005.<sup>6</sup> Then, on 2 November 2005, the *Workplace Relations Amendment (Work Choices) Bill 2005* was introduced into Federal Parliament. A short Senate Committee inquiry was held into the proposed legislation,<sup>7</sup> following which the Government introduced some (mostly minor) amendments to the Bill. Finally, the *Workplace Relations Amendment (Work Choices) Act*

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<sup>3</sup> Parliament of Australia, *Prime Ministerial Statement: Workplace Relations*, 26 May 2005, available at <http://www.workplace.gov.au/workplace/Category/PolicyReviews/WorkplaceRelationsReforms/>.

<sup>4</sup> See eg <http://www.rightsatwork.com.au/>; Neale Towart, 'Framing the Debate: The Unions' Campaign' (2005) 56 *Journal of Australian Political Economy* 269 (this article, and others from the special edition of the *Journal of Australian Political Economy* on the 2005 reforms, are available on-line at <http://www.jape.org/>).

<sup>5</sup> For a recent, critical assessment of enterprise bargaining at the Federal level, see Ron Callus, 'The Re-Regulation of Australian Industrial Relations: The Role of the Hancock Inquiry' in Isaac and Lansbury 2005, p. 111.

<sup>6</sup> Commonwealth of Australia, *WorkChoices: A New Workplace Relations System ('WorkChoices')*, 9 October 2005, available at <https://www.workchoices.gov.au/>.

<sup>7</sup> The Committee's Report, in which (predictably) Government Senators approved the passage of the controversial legislation with minor amendments while Opposition Senators strongly condemned it, is available at [http://www.aph.gov.au/Senate/committee/eet\\_ctte/wr\\_workchoices05/report/index.htm](http://www.aph.gov.au/Senate/committee/eet_ctte/wr_workchoices05/report/index.htm).

2005 (Cth) (2005 Act) was passed by Parliament on 7 December 2005.<sup>8</sup> Most of the provisions of the 2005 Act will take effect in March 2006, while the detail of many aspects of the new legislation will be implemented by regulations that have not yet been publicly released.

True to the Government's promise, the 2005 Act effects the most far-reaching changes to Australia's laws and institutions for regulating industrial relations, since the establishment of the conciliation and arbitration system in 1904.<sup>9</sup> Indeed, state-sponsored arbitration in Australia has been virtually extinguished by the passage of these new laws. However, it is important to appreciate that the 2005 Act, and the various other statutory and policy measures that preceded it, do *not* amount to the 'deregulation' of Australian labour relations. While the Coalition Government has drawn heavily on the rhetoric of 'freedom', 'choice', and removing 'unwarranted third party intervention' (in the form of unions and industrial tribunals), its initiatives since 1996 have left Australia with a more regulated – and certainly more complex – workplace relations system.<sup>10</sup> This remains so after the 2005 Act, which arguably takes the levels of detail and complexity in regulation to a whole new level.<sup>11</sup>

The remainder of this paper provides a general overview<sup>12</sup> of the main aspects of the new national workplace relations system introduced by the 2005 Act,<sup>13</sup> with particular attention to how these latest legislative changes will affect the role and influence of collective bargaining and trade unions.<sup>14</sup>

## 2. The Constitutional Basis and Coverage of the National Workplace Relations System

Traditionally, Australia's industrial laws have been based on the 'labour power' in the Australian Constitution, which supported a particular form of regulation – the establishment of machinery for the prevention and settlement of interstate industrial disputes through the processes of conciliation and arbitration (ie through the AIRC and its predecessors).<sup>15</sup> However, the constitutional labour power would not support the enactment of laws regulating employment or industrial relations generally, or setting minimum wages or other employment conditions. Therefore, in seeking to establish a general scheme of labour regulation under Federal law (including the statutory prescription of certain minimum employment standards), the Government has relied instead on the 'corporations' power in the Constitution. This head

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<sup>8</sup> The 2005 Act substantially amends the 1996 Act; a consolidation and re-numbering of the 1996 Act, consequent upon these amendments, is due to occur by mid-2006.

<sup>9</sup> For a recent appraisal, see Joe Isaac and Stuart Macintyre (eds), *The New Province for Law and Order: 100 Years of Australian Industrial Conciliation and Arbitration*, Cambridge University Press, Cambridge, 2004.

<sup>10</sup> See eg Forsyth 2001, p. 1; Isaac 2005, p. 1; Callus 2005, pp. 113-114; John Howe, 'Deregulation' of Labour Relations in Australia: *Toward Command and Control*, Working Paper No. 34, Centre for Employment and Labour Relations Law, University of Melbourne, 2005.

<sup>11</sup> See Andrew Stewart, 'A Simple Plan for Reform? The Problem of Complexity in Workplace Regulation' (2005) 31 *Australian Bulletin of Labour* 210.

<sup>12</sup> For further discussion and analysis, see eg Stewart 2005; David Peetz, 'Coming Soon to a Workplace Near You – the New Industrial Relations Revolution' (2005) 31 *Australian Bulletin of Labour* 90; John Howe, Richard Mitchell, Jill Murray, Anthony O'Donnell and Glenn Patmore, 'The Coalition's Proposed Industrial Relations Changes: an Interim Assessment' (2005) 31 *Australian Bulletin of Labour* 189.

<sup>13</sup> Unless otherwise stated, legislative references in the discussion that follows are to the 1996 Act, as amended by the 2005 Act.

<sup>14</sup> Due to space and time constraints, it is not possible to cover the changes to unfair dismissal laws in this paper; see further Howe et al 2005, pp. 197-199; Benoit Freyens and Paul Oslington, 'The Likely Employment Impact of Removing Unfair Dismissal Protection' (2005) 56 *Journal of Australian Political Economy* 56.

<sup>15</sup> See generally Breen Creighton, 'One Hundred Years of the Conciliation and Arbitration Power: A Province Lost?' (2000) 24 *Melbourne University Law Review* 839.

of power enables the Federal Government to pass laws regulating the activities of trading, financial and foreign corporations – including their employment and industrial relationships, although it remains to be seen how far the permissible scope of such regulation extends.<sup>16</sup>

The national workplace relations system introduced by the 2005 Act primarily covers employers that are ‘constitutional corporations’ (ie companies of the types mentioned above) and their employees; as well as employers and employees in the Federal public service, and those in the State of Victoria (which referred its industrial relations powers to the Federal Government in 1996), the Australian Capital Territory and the Northern Territory.<sup>17</sup> As a result, the Government estimates that around 85 per cent of Australian employees now fall within the coverage of the national system.<sup>18</sup> Importantly, these include many employees of constitutional corporations previously covered by State industrial relations systems in New South Wales, Queensland, Western Australia, South Australia and Tasmania, because the new national system overrides State industrial laws, awards and workplace agreements.<sup>19</sup> In future, therefore, the State systems will only cover unincorporated businesses (eg sole traders, partnerships) and their employees; and employees in State government departments and agencies.

In mounting a ‘hostile takeover’ of State laws through the 2005 Act, the Federal Government’s strategy is to render the State industrial relations systems effectively irrelevant, so that the State governments feel compelled to ‘refer’ their industrial relations powers to the Federal Government. However, this outcome remains unlikely for the foreseeable future. In fact, the Labor Governments of several States have already initiated constitutional challenges in the High Court of Australia, in which they will essentially argue that the corporations power does not permit the Federal Government to implement a comprehensive ‘code’ of labour regulation of the type introduced by the 2005 Act.

### 3. The Australian Fair Pay and Conditions Standard and the AFPC

The 2005 Act introduces, for the first time under Federal legislation, statutory minimum employment conditions for *all* employees of employers covered by the national workplace relations system. These minimum entitlements form the Australian Fair Pay and Conditions Standard (‘AFPCS’),<sup>20</sup> which acts as a ‘floor’ below which awards, workplace agreements, and employment contracts may not fall (ie employees must generally be accorded employment conditions that are equal to or better than the AFPCS). The AFPCS consists of the following minimum entitlements:

- *hourly rates of pay* based on either an ‘Australian Pay and Classifications Scale’ (ie the pay rate to which an employee was entitled under a previously applicable Federal or State award); or the new Federal Minimum Wage of A\$12.75 per hour<sup>21</sup>
- maximum *ordinary hours of work* of 38 hours per week (although this can be ‘averaged’ over a period of up to 12 months; and an employee can be required to work ‘reasonable additional hours’, determined by reference to factors including the worker’s personal circumstances/family responsibilities and the operational

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<sup>16</sup> See eg Stewart 2005, pp. 220-227; Peter Prince and Thomas John, *The Constitution and Industrial Relations: Is a Unitary System Achievable?* Parliament of Australia, Parliamentary Library, Research Brief, no. 8, 2005-06, 28 November 2005; Jeff Shaw and Monika Ciolek, ‘The Constitutional Question’ in *The State of Industrial Relations: The State of the States 2005*, Evatt Foundation, Sydney, 2005, p 45.

<sup>17</sup> 1996 Act, sections 4AA-4AB.

<sup>18</sup> See Stewart 2005, p. 224, suggesting that the true figure may be somewhat lower than the Government’s estimate.

<sup>19</sup> 1996 Act, sections 7C-7E.

<sup>20</sup> 1996 Act, Part VA.

<sup>21</sup> Wage rates are now to be set and adjusted by the AFPC, see further below.

- requirements of the business)
- four weeks' paid *annual leave* (although employees may 'cash out' up to two weeks of their annual leave entitlement each year)
  - 10 days' paid personal leave (ie sick leave or carer's leave) per year (and up to two additional days' unpaid carer's leave per year, and two days' paid compassionate leave per occasion)
  - 52 weeks' unpaid *parental leave* at the time of birth or adoption of a child.

On one view, the introduction of a body of statutory minimum employment standards under Federal law is a welcome development – for example, it means that many award-free or contract-based employees now have a basic level of legal protection. However, for the majority of Australian workers who are engaged under awards and workplace agreements, the AFPCS has the potential to lead to a significant erosion of existing employment conditions.<sup>22</sup> Such an outcome is considered to be a likely consequence of the substitution of the five AFPCS conditions as the 'benchmark' for negotiating new individual and collective agreements, in place of the comprehensive no disadvantage test (see further Part 5 below).

The determination of minimum wages applicable under Federal awards in Australia has for many years been a primary function of the AIRC. However, as part of the Government's objective of marginalising the AIRC (see further Part 4 below), its wage-setting function has been transferred to the newly-created AFPC.<sup>23</sup> This independent regulatory body, made up of a Chair and four Commissioners, is responsible for setting and adjusting rates of pay to operate under the AFPCS. In doing so, the AFPC is required to give high priority to the effects of increases in minimum wages on economy-wide employment and competitiveness, and the desirability of ensuring that the unemployed and low paid workers can obtain and keep jobs.

An academic financial economist has been appointed as Chair of the AFPC, which has considerable freedom to determine the timing and frequency of its wage reviews, how they are to be conducted, and when its decisions will take effect. The Government wishes the new body to move away from the legalistic and adversarial approach to determining minimum wages adopted in the past by the AIRC, and instead to engage in consultative processes with a broad range of stakeholders.<sup>24</sup> In this and several other respects, the Government has sought to model the AFPC on the Low Pay Commission established by the Blair Labour Government in the UK. However, the UK comparison is strongly contested. For example, in May's view, the Low Pay Commission was set up to introduce a minimum wage system in the UK where none existed, whereas the legislative 'point of reference' for the AFPC is that 'wages at the lower end of the labour market must be set competitively ..., with the strong inference that they are already set too high.' On this basis, she argues that: '[I]t is reasonable to assume that the impact of the AFPC will be to *lower* the minimum wage over time, principally by holding the level constant ..., thus reducing its real value.'<sup>25</sup> Whether these concerns are realised will become clearer when the AFPC hands down its first minimum wage decision under the new legislation, scheduled for Spring 2006.

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<sup>22</sup> See Peter Waring, Alex de Ruyter and John Burgess, 'Advancing Australia Fair: The Australian Fair Pay and Conditions Standard' (2005) 56 *Journal of Australian Political Economy* 105.

<sup>23</sup> 1996 Act, Part IA.

<sup>24</sup> *WorkChoices*, p 14.

<sup>25</sup> Robyn May, 'The British Low Pay Commission and the Proposed Australian Fair Pay Commission' (2005) 56 *Journal of Australian Political Economy* 92, at p. 99 (emphasis added); see also Howe et al 2005, pp. 191-194; Workplace Express, 'FPC differs from UK model, may lower minimum wage, says academic', 25 January 2006, available at [www.workplaceexpress.com.au](http://www.workplaceexpress.com.au); Mark Wooden, 'Minimum Wage Setting and the Australian Fair Pay Commission' (2005) 56 *Journal of Australian Political Economy* 81.

#### 4. Awards and the AIRC

Having been the dominant instrument of Australian labour regulation for most of the last century, awards will play a far less influential role in the new national workplace relations system. The 2005 Act continues the shift, which commenced in the early 1990s, away from award regulation and towards workplace-level bargaining. Most importantly, employers will be able to utilise the various workplace agreement options under the legislation to oust the operation of awards, and undercut award terms and conditions (see further Part 5 below).

Awards setting down minimum wages and comprehensive terms and conditions of employment covered around 80 per cent of the Australian workforce in the early 1980s. Now, the wages and conditions of only 20 per cent of employees are determined solely by awards.<sup>26</sup> The original 1996 Act restricted the content of Federal awards to twenty ‘allowable matters’ (eg wages, hours of work, various types of leave, penalty rates, and allowances) and mandated a process of ‘simplifying’ awards to eliminate any non-allowable provisions (eg preferential treatment of trade union members, consultation over workplace change or redundancies, and health and safety issues). These limits are taken substantially further by the latest amendments,<sup>27</sup> which reduce the number of allowable award matters to thirteen, and designate a range of additional provisions as non-allowable matters (eg conditions governed by the AFPCS, and restrictions on an employer’s use of part-time, casual or labour-hire workers or independent contractors).

Over the next few years, awards will not only be far more limited in scope – the number of awards will also be reduced considerably, as a result of the ‘award rationalisation’ process to be undertaken by another new regulatory body, the Award Review Taskforce (‘ART’). The ART is made up of representatives from the fields of business, vocational training, and human resource management, along with a former union official. Its task is to recommend an approach for rationalising the more than 4,000 Federal and State awards, down to a much smaller number of awards that might possibly apply on an ‘industry sector’ basis (eg mining, manufacturing, construction, retail trade, financial and insurance services, public administration).<sup>28</sup> The ART must also review award ‘classification structures’ (ie job descriptions in existing awards that will be used to determine minimum wage rates for award-based employees under the AFPCS), to provide a more simplified structure of wage rates and classifications suited to modern workplaces.<sup>29</sup> Following a report to the Minister for Workplace Relations (due by the end of January 2006), the ART will share responsibility for implementation of the award rationalisation process with the AIRC.

This will be one of the very few functions to be performed by the AIRC, which has seen its role and standing greatly diminished by the workplace relations reform process over the last fifteen years<sup>30</sup> – and which has been denuded of most of its remaining powers by the 2005 Act. In addition to transferring its wage-setting function to the AFPC, the Government has removed the AIRC’s role in approving workplace agreements; significantly constrained its powers to make or vary awards (ie generally, this can only be done as part of the award rationalisation process); and done away with its powers to settle industrial disputes by conciliation and arbitration.

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<sup>26</sup> Isaac 2005, p. 2; note that most of the further 38 per cent of workers engaged under collective agreements are also covered by an ‘underpinning’ award, see further Part 5 below.

<sup>27</sup> See now 1996 Act, Part VI.

<sup>28</sup> See Award Review Taskforce Secretariat, *Award Rationalisation*, Award Review Taskforce Discussion Paper, December 2005.

<sup>29</sup> See *WorkChoices*, pp. 34-35, 61-62.

<sup>30</sup> For differing accounts, see Braham Dabscheck, ‘The Slow and Agonising Death of the Australian Experiment with Conciliation and Arbitration’ (2001) 43 *Journal of Industrial Relations* 277; Helen Forbes-Mewett, Gerry Griffin and Don McKenzie, ‘The Australian Industrial Relations Commission: Adapting or Dying?’ (2003) 11 *International Journal of Employment Studies* 1.



Instead, the AIRC's main role in future will be to provide 'voluntary dispute resolution' services, in competition with private providers of such services (eg accredited mediators and arbitrators).<sup>31</sup> Parties involved in workplace disputes – including disputes about employee entitlements under the AFPCS, disputes arising under the terms of workplace agreements, and bargaining disputes – will be able to choose whether to have the AIRC, or an alternative dispute resolution provider, assist them in settling the dispute. However, if the parties elect to involve the AIRC, its powers will generally be limited to those that the parties agree to confer on it. The AIRC will not be able to exercise any of the broad dispute-settling powers that it has continued to draw upon in recent years, despite the restrictions introduced by the original 1996 Act.<sup>32</sup>

Overall, it seems that the changes introduced by the 2005 Act are intended to achieve the abolition of the AIRC 'by stealth'. That is, while the Government has not abolished the institution outright, it has so extensively stripped the AIRC of any meaningful role as to render it, potentially, irrelevant. However, the ongoing 'dependency' of industrial relations parties on the AIRC,<sup>33</sup> and the determination of its members to preserve its independence and influence, may be the keys to its future survival.<sup>34</sup>

## 5. Collective Bargaining

The shift to enterprise bargaining under the Labor Federal Government in the early 1990s was a response to the sustained attack on Australia's centralised labour relations system from the mid-1980s, and the quest for greater labour flexibility and international economic competitiveness. While facilitating this departure from traditional award arrangements, Labor's reforms contained two important safeguards for workers: first, agreements were subject to close scrutiny by the AIRC, to ensure fair treatment of employees in both the making and content of agreements; and secondly, enterprise agreements could not result in any overall disadvantage to employees compared to their terms and conditions under relevant awards (ie the 'no disadvantage' test). Further, enterprise or 'certified agreements' had to be *collective* in nature: although, controversially, Labor's 1993 reform legislation permitted the making of non-union certified agreements, as well as those between employers and trade unions.

The Coalition Government's 1996 legislative changes contained several measures to enhance the take-up rate of enterprise bargaining, including the new option of *individual* agreements or AWAs.<sup>35</sup> While the Government also retained the union and non-union certified agreement streams, in various ways it has steered parties towards individualised bargaining – such as through the promotional activities of the Office of the Employment Advocate ('OEA'),<sup>36</sup> a regulatory agency created by the 1996 Act to approve AWAs and enforce the 'freedom of association' laws (see Part 6 below). In addition, the protections afforded to employees by the no disadvantage test were reduced, primarily by allowing the approval of 'sub-standard'

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<sup>31</sup> See 1996 Act, Part VIIA.

<sup>32</sup> See eg Anthony Forsyth, *The Revival of Arbitration? Recent Experience in the AIRC*, Paper for the Legal Edge Seminar Series, Centre for Commercial Law, Australian National University, Canberra, 5 August 2003; Andrew Stewart, 'The AIRC's Evolving Role in Policing Bargaining' (2004) 17 *Australian Journal of Labour Law*, 245; Carolyn Sutherland, 'By Invitation Only: The Role of the AIRC in Private Arbitration' (2005) 18 *Australian Journal of Labour Law* 53.

<sup>33</sup> See Helen Forbes-Mewett, Gerry Griffin, Jamie Griffin, and Don McKenzie, 'The Role and Usage of Conciliation and Mediation in the Australian Industrial Relations Commission' (2005) 31 *Australian Bulletin of Labour*, 171.

<sup>34</sup> See further Anthony Forsyth, 'Arbitration Extinguished: The Impact of the Work Choices Legislation on the Australian Industrial Relations Commission', (2006) 32 *Australian Bulletin of Labour* (forthcoming).

<sup>35</sup> For detail, see Marilyn Pittard, 'Collective Employment Relationships: Reforms to Arbitrated Awards and Certified Agreements' (1997) 10 *Australian Journal of Labour Law* 62; Ron McCallum, 'Australian Workplace Agreements – An Analysis' (1997) 10 *Australian Journal of Labour Law* 50.

<sup>36</sup> See <http://www.oea.gov.au/graphics.asp?showdoc=/home/default.asp>.

agreements if this was necessary to ensure the survival of struggling businesses.<sup>37</sup>

Despite the Government's efforts to promote individual and non-union agreements over the last ten years, collective agreements with unions remain highly influential mechanisms for regulating the employment conditions of Australian workers. For example, 73% of the collective agreements certified by the AIRC in 2004-2005 were union agreements; the remaining 27% were non-union agreements.<sup>38</sup> As at May 2004, only 2.4% of Australian employees were covered by registered individual agreements (eg AWAs), while 38% had their pay and conditions determined by registered collective agreements.<sup>39</sup> Combined with the 20% of employees covered solely by awards, this puts the overall coverage of collectively-determined employment conditions in Australia at just under 60% of the workforce – a relatively high level, given the extent of the legislative assault on collectivism by Federal and State governments over the last fifteen years.

No doubt concerned by these data, the Government has implemented an array of measures (through the 2005 Act) aimed at simplifying the processes for making, lodging, varying and terminating workplace agreements.<sup>40</sup> The most significant of these changes are as follows:<sup>41</sup>

- Six different types of agreements are now available – AWAs, union collective agreements, employee (ie non-union) collective agreements, multiple-business agreements, and union or employer 'greenfields' agreements.<sup>42</sup> Most agreements can operate for periods of up to five years.
- Employees can be represented by a bargaining agent (eg a union) when negotiating employee collective agreements or AWAs with their employer. However, union rights of intervention in non-union agreements have been removed, and an employer is not obliged to recognise or bargain in good faith with a union representing employees in negotiations for employee or union collective agreements.
- All workplace agreements take effect upon lodgement with the OEA. There are no longer any formal processes for the approval of agreements, and in fact the OEA is not required to properly scrutinise agreements to ensure compliance with relevant statutory requirements.
- The no disadvantage test has been abolished, leaving employers free (at least, legally) to introduce workplace agreements that remove award entitlements to penalty rates, overtime and shift loadings, rest breaks, allowances and so on, without providing any wage increase or other benefits. As indicated in Part 3 above, workplace agreements need only contain the five minimum conditions set out in the AFPCS. A further seven specified award conditions are designated as 'protected', meaning that an employer must explicitly state that they are being modified or removed by a workplace agreement (although the 'protection' this offers to employees is clearly illusory).

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<sup>37</sup> The effectiveness of this test as a protective measure for employees has been increasingly questioned in recent years: see eg Omar Merlo, 'Flexibility and Stretching Rights: The No Disadvantage Test in Enterprise Bargaining' (2000) 13 AJLL 207; Richard Mitchell et al, 'What's Going On with the 'No Disadvantage Test'? An Analysis of Outcomes and Processes Under the *Workplace Relations Act 1996* (Cth)' (2005) 47 JIR 393; Waring et al 2005, pp. 107-110.

<sup>38</sup> AIRC, *Annual Report of President of the Australian Industrial Relations Commission, 2004/2005*, p. 12 (available at [www.airc.gov.au/](http://www.airc.gov.au/)).

<sup>39</sup> Australian Bureau of Statistics ('ABS'), *Employee Earnings and Hours, May 2004* (cat. no. 6306.0), cited in Mark Wooden, *Australia's Industrial Relations Reform Agenda*, Paper to the 34<sup>th</sup> Conference of Economists, University of Melbourne, 26-28 September 2005, pp. 3-4.

<sup>40</sup> See now 1996 Act, Part VB.

<sup>41</sup> For further detail, see Anthony Forsyth and Carolyn Sutherland, 'Collective Labour Relations under Siege: The Work Choices Legislation and Collective Bargaining' (2006) 19 *Australian Journal of Labour Law* (forthcoming).

<sup>42</sup> The employer greenfields agreement is in fact not an 'agreement' at all, but rather a set of employment conditions unilaterally determined by an employer for a new business project or venture.

- Certain matters are to be designated as 'prohibited content' that may *not* be included in agreements, such as clauses preventing the use of AWAs, restrictions on the engagement of labour-hire or independent contractors, clauses providing remedies for unfair dismissal,<sup>43</sup> and various provisions for union support or encouragement. Further, civil penalties may be imposed on parties that seek to include prohibited content in agreements.
- Parties continue to have the right to take 'protected' industrial action in support of claims made in a 'bargaining period' when negotiating employee or union collective agreements. However, a range of new limits and detailed requirements for taking protected industrial action may substantially blunt the effectiveness of these 'rights' for trade unions and their members.<sup>44</sup>
- Workplace agreements may be terminated unilaterally by either party giving 90 days' written notice to the other party, after the nominal expiry date of the agreement. Thereafter, the working conditions of employees formerly covered by the agreement are the five AFPCS minimum conditions, and the seven 'protected' award conditions (see above). Importantly, the employees do *not* fall back onto the more comprehensive conditions in an award or agreement that may have previously operated in respect of their employment.

These new arrangements for workplace agreements – especially the abolition of the no disadvantage test, the lack of independent scrutiny of agreements, the prohibited content rules, and the ability of employers to unilaterally terminate expired agreements – will significantly strengthen the bargaining power of employers.<sup>45</sup> In particular, these provisions will make it much easier for employers to shift employees off collective agreements, and onto AWAs that provide inferior wages and conditions. Overall, the new statutory framework for agreement-making poses serious threats to the future role of collective bargaining in Australia's workplace relations system, raising significant concerns about the potential for diminution of workers' wages, employment conditions and living standards over time.<sup>46</sup>

## 6. Trade Unions and Non-Union Employee Representation Systems

Australian unions held a pivotal position under the conciliation and arbitration system from its inception in 1904. Under this system, registered unions were subjected to high levels of legal regulation, but they also obtained considerable legal rights and institutional support. This contributed greatly to the growth and organisational security of Australian unions over the course of the twentieth century – such that by 1953, trade union membership had reached 63% of the total labour force, and remained around 50% until the early 1980s.<sup>47</sup> Since then,

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<sup>43</sup> Here, the Government is determined to ensure that employees are not able to find alternative avenues for seeking redress against unfair dismissal, given the major limits on unfair dismissal claims introduced by the 2005 Act.

<sup>44</sup> See now 1996 Act, Part VC; for example, no protected action can be taken in support of claims for 'prohibited content' in agreements, and all protected action must now be approved in a secret ballot of employees; detailed discussion of the extensive provisions of the 2005 Act relating to industrial action is also beyond the scope of this paper, see further Chris White, 'Workchoices: Removing the Right to Strike' (2005) 56 *Journal of Australian Political Economy* 66.

<sup>45</sup> See further Chris Briggs, Rae Cooper and Bradon Ellem, 'What About Collective Bargaining?' in Evatt Foundation 2005, p. 66.

<sup>46</sup> On the implications of the 2005 Act more generally in these respects, see eg *Research Evidence about the Effects of the 'Work Choices' Bill*, Senate Inquiry Submission by A Group of One Hundred and Fifty Industrial Relations, Labour Market, and Legal Academics; C Briggs, *Federal IR Reform: The Shape of Things to Come*, ACIRRT, University of Sydney, November 2005.

<sup>47</sup> See Malcolm Rimmer, 'Unions and Arbitration' in Isaac and Macintyre 2004, p. 275; Michael Crosby, *Power at Work: Rebuilding the Australian Union Movement*, The Federation Press, Sydney, 2005, pp. 12, 42-43.

however, the level of trade union membership in Australia has fallen by almost 30%, as the following table illustrates:<sup>48</sup>

Year	1982	1986	1990	1994	1996	1998	2000	2001	2002	2003	2004
Union Density %	49.5	45.6	40.5	35.0	31.1	28.1	24.7	24.5	23.1	23.0	22.7

On the latest available figures, union density in the public sector is 46.4%, while in the private sector only 17.4% of the workforce are union members.<sup>49</sup> Factors contributing to the dramatic drop in union membership over the last twenty-five years include the massive reduction in highly-unionised manufacturing employment, arising from the economic reform process; the growth of casual, part-time and ‘contract’ labour arrangements; and (commencing in the early 1990s) the increasing adoption of aggressive ‘individualisation’ and ‘de-unionisation’ strategies by employers.<sup>50</sup> In addition, of course, the legal rights traditionally accorded to unions have been significantly wound back as part of the ‘de-collectivist’ labour laws that have been introduced around Australia.

The 1996 Act, in particular, contained various measures aimed at destabilising established union structures, encouraging competition between unions, and bolstering the rights of non-unionists.<sup>51</sup> These included provisions for the creation of new ‘enterprise unions’, and for disaffected union members to ‘disamalgamate’ from large industry unions. The monopoly representation rights of unions were weakened, and award and enterprise agreement provisions for ‘closed shops’ and other forms of union security were banned. Union ‘rights of entry’ for recruitment and award enforcement purposes were limited through the introduction of permit and notice requirements. And the concept of ‘freedom of association’ (including legal protections for union members from victimisation) was extended to *non*-members.

Union officials have also been subjected to increased levels of financial accountability through the new Registration and Accountability of Organisations Schedule (‘Schedule 1B’), inserted in the 1996 Act in 2002. Further, the Government has pursued a range of initiatives to break the strength of unions in specific industry sectors – such as the maritime industry,<sup>52</sup> the Federal public service,<sup>53</sup> higher education institutions,<sup>54</sup> and the building and construction industry (which now has its own specialist regulator, the Australian Building and Construction Commission (‘ABCC’)).<sup>55</sup>

<sup>48</sup> These figures are drawn from Rae Cooper, ‘Life in the Old Dog Yet? ‘Deregulation’ and Trade Unionism in Australia’ in Isaac and Lansbury 2005, p. 93 at 96; and ABS, *Employee Earnings, Benefits and Trade Union Membership, August 2004* (cat. no. 6310.0).

<sup>49</sup> ABS, *Employee Earnings, Benefits and Trade Union Membership, August 2004* (cat. no. 6310.0).

<sup>50</sup> See further Stephen Deery and Janet Walsh, ‘Unionism in Australian Workplaces: An Anatomy of Decline’ (1999) 12 *Australian Journal of Labour Law* 21; Stephen Deery and Richard Mitchell (eds), *Employment Relations: Individualisation and Union Exclusion – An International Study*, The Federation Press, Sydney, 1999; Crosby 2005.

<sup>51</sup> For detail, see Richard Naughton, ‘Sailing into Uncharted Seas: The Role of Unions Under the Workplace Relations Act 1996 (Cth)’ (1997) 10 *Australian Journal of Labour Law* 112.

<sup>52</sup> See Graeme Orr, ‘Conspiracy on the Waterfront’ (1998) 11 *Australian Journal of Labour Law* 159.

<sup>53</sup> See Phillipa Weeks, ‘Reconstituting the Employment Relationship in the Australian Public Service’ in Deery and Mitchell 1999, p. 69.

<sup>54</sup> See Stuart Rosewarne, ‘Workplace ‘Reform’ and the Restructuring of Higher Education’ (2005) 56 *Journal of Australian Political Economy* 186.

<sup>55</sup> See Howe 2005; Liz Ross, ‘Building Unions and Government ‘Reform’: The Challenge for Unions’ (2005) 56 *Journal of Australian Political Economy* 172.

Not surprisingly, the 2005 Act contains provisions aimed at further advancing the Government's ideological opposition to trade unionism. These new provisions<sup>56</sup> also seek to address certain aspects of the original 1996 Act that failed to fulfil the Government's intended purposes. The key provisions of the 2005 Act affecting trade unions are as follows:<sup>57</sup>

- As a result of the shift in constitutional support for the legislation from the labour power to the corporations power (see Part 2 above), significant changes have been made to the provisions regarding the types of representative organisations of employees and employers that may be or remain registered under Schedule 1B. Trade unions must now be '*federally registrable employee associations*', meaning that either (1) they are a constitutional corporation, or (2) the majority of their members are 'federal system employees' (ie primarily, employees of constitutional corporations). While many unions will satisfy the second requirement, several may not because the majority of their members are employed by State government departments or agencies. Whether unions can, legally, incorporate under Australian law (and so satisfy the first requirement) is unclear. To further complicate the situation, there is significant doubt as to whether the new registration provisions in Schedule 1B are constitutionally valid. The system for regulation of registered organisations was long considered 'incidental' to the establishment of the conciliation and arbitration system, but the same can not be said with any certainty in respect of the new workplace relations system founded on the corporations power.
- Substantial new restrictions have been imposed on the powers of union officials to enter workplaces for purposes of recruiting new members, and investigating breaches of employment legislation, awards and agreements (known in Australia as union '*right of entry*').<sup>58</sup> As before, union officials must hold a right of entry permit, and must give an employer at least 24 hours' notice of an intention to enter the employer's premises for the purposes stated above. Under the new provisions, union officials must satisfy a 'fit and proper person' test before obtaining a permit (eg the official must not have previously breached any Federal or State right of entry laws). Officials will have no right of entry for recruitment purposes in workplaces where all employees are engaged under AWAs. And the grounds on which an official's entry permit can be suspended or revoked have been expanded (eg this can occur when an official has 'misrepresented' his or her entry powers to an employer, or 'abused' entry rights by exercising them 'excessively').
- The introduction of protections for non-union members from discrimination or victimisation by unions or employers was a major feature of the 1996 legislative changes, forming part of the '*freedom of association*' rights also accorded to unionists. The aggressive 'policing' of the provisions on behalf of non-unionists by the OEA has no doubt led to a moderation of overt union tactics to enforce union membership in Australian workplaces. However, in practice, the freedom of association provisions have been more effectively utilised by unions over the last ten years, to thwart employer restructuring and individualisation strategies that could be shown to be 'tainted' by illegal anti-union or de-collectivist objectives.<sup>59</sup> Responding to these developments, the Government has amended the freedom of association provisions<sup>60</sup> to make it more difficult for unions to obtain interim injunctions against

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<sup>56</sup> Most of the provisions are found in Schedule 1B of the amended 1996 Act.

<sup>57</sup> For further detail, see Anthony Forsyth and Carolyn Sutherland, 'From 'Uncharted Seas' to 'Stormy Waters': How Will Trade Unions Fare under the Work Choices Legislation?' (2006) *Economic and Labour Relations Review* (forthcoming).

<sup>58</sup> See 1996 Act, Part IX.

<sup>59</sup> For a thorough discussion of the relevant statutory provisions and case law, and a more critical assessment of judicial approaches to the provisions, see David Quinn, 'To Be or Not to Be a Member – Is That the Only Question? Freedom of Association under the Workplace Relations Act', (2004) 17 *Australian Journal of Labour Law* 1.

<sup>60</sup> See now 1996 Act, Part XA.

employers for breaches of the provisions. The prohibitions on union conduct have also been expanded (eg unions and their members and officials must not pressure employees into joining in industrial action, or force employers to enter into union collective agreements). The prohibitions on employer conduct essentially remain the same – they must not engage in ‘prohibited conduct’ (eg dismissing an employee, or changing employment conditions), for a ‘prohibited reason’ or for reasons that include a prohibited reason (eg an employee’s membership or non-membership of a union; or the fact that an employee is covered by an award or workplace agreement, or has engaged in lawful industrial action). ‘Inducing’ an employee to join or (more likely) not to join a union, or to cease being a union member, also remain prohibited.

In summary, the provisions of the 2005 Act discussed above represent the most serious threat to Australian unions yet – especially when they are viewed alongside the agreement-making provisions, which seek to undermine union-based collective bargaining, and the extensive new restrictions on the right to strike. This latest legislative attack on the role and legitimacy of unions will clearly not assist them in their efforts to halt the membership decline of recent years. Interestingly, however, some unions have reported a surge in new memberships in the last six months, as the ACTU-led campaign against the Government’s new legislation has attracted increasing community support.

*Non-union employee representation systems* have not traditionally played a role in Australian labour relations. Although the 1970s and 1980s saw ‘bursts’ of interest in industrial democracy and employee participation schemes, there has been little experimentation in Australia with European-style works councils or ‘codetermination’ as a form of workplace decision-making.<sup>61</sup> This is explained by factors including the dominance of the conciliation and arbitration system; the strong attachment of unions to that system, and their suspicion of alternative employee representation structures and joint decision-making with management; and employer resistance to any intrusion on the strongly-entrenched notion of ‘managerial prerogative’.

In the last twenty years or so, workplace-based employee representative structures have emerged to deal with specific issues, such as ‘enterprise bargaining committees’<sup>62</sup> and ‘occupational health and safety committees’<sup>63</sup> – although these have generally been controlled by the trade unions. In addition, ‘joint consultation committees’ have become increasingly common workplace-based mechanisms for addressing issues arising under enterprise agreements and broader matters of business strategy.<sup>64</sup>

Since 1995, there has been increasing debate among Australian unions about the merits of works councils based on the German model, as vehicles for addressing two major issues: (1) the decline in union membership, with advocates of works councils suggesting that these

<sup>61</sup> See Department of Employment and Industrial Relations, *Industrial Democracy and Employee Participation – A Policy Discussion Paper*, Australian Government Publishing Service, Canberra, 1986.

<sup>62</sup> See eg Richard Mitchell, Richard Naughton and Rolf Sorensen, ‘The Law and Employee Participation – Evidence from the Federal Enterprise Agreements Process’ (1997) 39 *Journal of Industrial Relations* 196.

<sup>63</sup> These committees were found in 43% of workplaces in 1995: Alison Morehead et al, *Changes at Work: The 1995 Australian Workplace Industrial Relations Survey*, 1997, pp. 123, 453; more generally, see David Walters, ‘Workplace Arrangements for Worker Participation in OHS’ in Liz Bluff, Neil Gunningham and Richard Johnstone, *OHS Regulation for a Changing World of Work*, The Federation Press, Sydney, 2004, p. 68.

<sup>64</sup> 45% of Federal enterprise agreements over the period 1991-2003 made provision for the establishment of these committees: Shelley Marshall and Richard Mitchell, ‘Enterprise Bargaining, Managerial Prerogative and the Protection of Workers Rights: An Argument on the Role of Law and Regulatory Strategy in Australia under the *Workplace Relations Act 1996* (Cth)’, 2005, pp. 17-18. The latest figures on the *overall* incidence of joint consultative committees indicate that they were present in 33% of workplaces in 1995: Morehead et al 1997, pp. 188-189.

could provide a 'springboard' for union organisation in non-union workplaces;<sup>65</sup> and (2) a series of company collapses and restructures in which thousands of workers have lost their jobs with little warning, highlighting the general absence of legal rights for Australian employees to information or consultation about business restructuring issues.<sup>66</sup> The present ACTU leadership has led this debate and appears moderately supportive of the works councils concept – as long as such bodies are established only for information and consultation purposes, and do not intrude upon union-based collective bargaining.<sup>67</sup>

However, it is highly unlikely that an institutionalised system of workplace-based employee representation, along the lines of the German model, will take hold in Australia in the next few years – because several key unions remain strongly opposed to such an approach;<sup>68</sup> and because this would not fit with the Federal Coalition Government's workplace relations agenda. As indicated above, the Government introduced provisions in the original 1996 Act for employees to form small 'enterprise associations'. These were intended to entice employees away from the large industry unions that emerged from the union amalgamation process of the 1980s and 1990s. In practice, there has been very little interest in the formation of enterprise unions since 1996, with only a few applications (and even less that have succeeded) under the relevant statutory provisions. Therefore, the 2005 amendments lowered the minimum number of members required to form an enterprise association from 50 to 20. This may not lead to any significant increase in the number of enterprise unions. In any case, it is important to appreciate that the 'enterprise union' concept being promoted by the Government is very different from the strong form of enterprise unionism found in countries like Japan.

## 7. Conclusion

It should be evident from the discussion in this paper that the Federal Coalition Government's 2005 labour law reforms will '[engineer] a fundamental shift in power from labour to capital' in Australia.<sup>69</sup> It should also be clear that with these new laws continue the trend towards the highly prescriptive regulation of workplace relations in the name of 'deregulation'. In addition to the micro-regulation of specific sectors (eg the building industry, the public service, and universities), there is now a plethora of regulatory bodies in the workplace relations field (most of which have been discussed in this paper, eg AIRC, AFPC, ABCC, OEA and ART). What has in fact occurred is that the Government has simply replaced certain forms of regulation that it finds objectionable (eg industrial tribunals) with forms that are acceptable to it, or over which it can exercise greater control. In conclusion, it is indeed strange that a Government which extols the virtues of 'deregulation' and removing 'outside intervention' could have presided over the state of 'ultra-regulation' of Australian labour relations that has been attained with the passage of the 2005 Act.

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<sup>65</sup> See eg Martin Foley, 'Democratising the Workplace: Unions and Works Councils' in Paul Gollan, Ray Markey and Iain Ross, *Works Councils in Australia: Future Prospects and Possibilities*, The Federation Press, Sydney, 2002 p. 37.

<sup>66</sup> See eg Anthony Forsyth, 'Giving Employees a Voice over Business Restructuring: A Role for Works Councils in Australia' in Paul Gollan and Glenn Patmore, *Partnership at Work: The Challenge of Employee Democracy*, Pluto Press, 2003, p. 140.

<sup>67</sup> See eg Greg Combet, 'Employee Consultation in an Australian Context: The Works Council Debate and Trade Unions' in Gollan and Patmore 2003, p. 134. For a significant recent contribution to this debate, see Ron McCallum, 'Industrial Citizenship' in Isaac and Lansbury 2005, p. 15.

<sup>68</sup> See eg Doug Cameron, 'The Representation Gap in Australia' in Anthony Forsyth (ed), *Works Councils in the Australian Context*, RMIT Community Advocacy Unit, Melbourne, 2001, p. 81.

<sup>69</sup> Howe et al 2005, p. 206.

# The Roles of Labor Unions and Employee Representatives in Taiwan

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## I. Features of the Labor Union Law and Labor Union in Taiwan

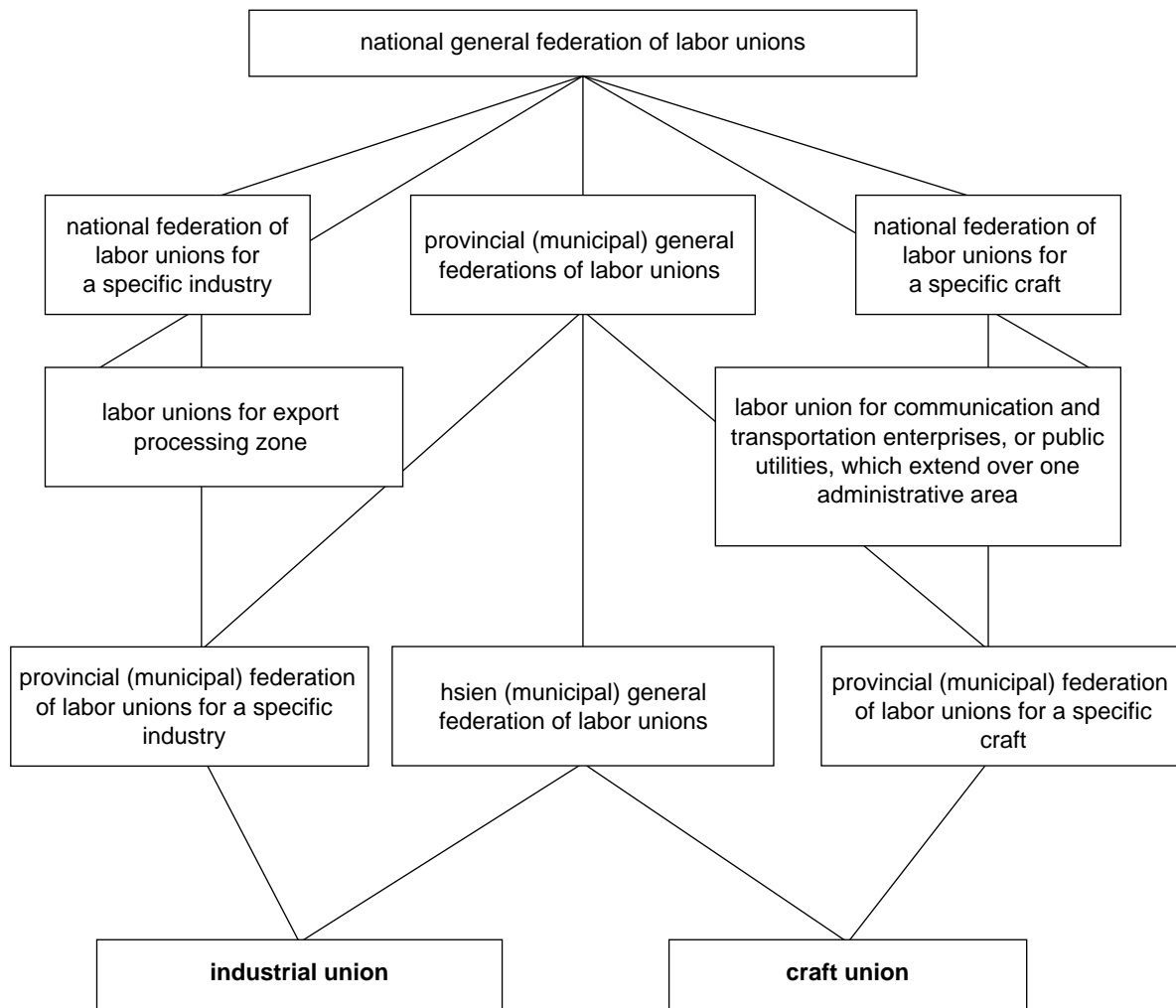
Taiwan's *Labor Union Law* (hereinafter the "*Labor Union Law*") was enacted in 1929, of which the main features include: (1) Doctrine of Compulsory Organization of Labor Union, whereby an industrial union or a craft union should be organized in accordance with the law for those workers attaining full twenty years of age, of the same industry in the same area or in the same craft, and exceeding the number of thirty (See Article 6 of the *Labor Union Law*); (2) Doctrine of Compulsory Association to the Labor Union, whereby all workers having attained full sixteen years of age shall be obliged to join and become a member of the labor union (See Article 12 of the *Labor Union Law*); (3) Doctrine of Enterprise Union, whereby the formation of a industrial union is limited only to those workers hired by the same enterprise or factory (See Article 6 of the *Labor Union Law*); (4) Doctrine of Single Labor Union, whereby only one labor union is allowed to form for each and every industry or craft (i.e. "One Factory One Union Only"). Under this doctrine, in each and every one administrative area, only one labor union shall be organized (Article 8 the *Labor Union Law*). Hence, ranging from the basic-level enterprise union or craft union, to the upper-level Hsien (city) or municipal general federation of labor unions, or even to the national-level labor union, only one labor union of its corresponding level shall be organized in accordance to the law (See Table 1).

It should be noted that first, the Doctrine of Compulsory Organization of Labor Union and regulations pertaining to Compulsory Association to the Labor Union only apply to public-sector enterprises while private-sector enterprises are basically exempt from such rules. That is to say, it is not compulsory for private-sector enterprises having workers exceeding the number of 30 to form an enterprise union—even if a labor union is organized, workers belonging to that industry still have the rights to weigh their options of whether or not to join the enterprise union. Secondly, the Labor Union Law limits the scope of industrial labor union to generally include those of industries or factories; therefore, it is fair to say that the term "industrial union" in the *Labor Union Law* actually refers to "enterprise union" in most cases.

Since late 1980s, democratic movements have invigorated in Taiwan, marking the end of an authoritarian era. As the society has moved towards high levels of democracy and plurality, the un-satisfaction of the out-dated *Labor Union Law* expressed by the workers, combined with Taiwanese government's endeavor to respond to the calls for democratizing industries, these factors contribute to the amendments of *Labor Union Law*, *Collective Agreement Law*, and *The Settlement of Labor Disputes Law*, despite revisions of such laws have not yet completed. For the past decade, as Taiwanese society has been democratized, changes are also reflected in labor unions. For example, even though according to the *Labor Union Law*, only one single National Labor Union shall be organized, nonetheless, as a result of the break-up of the National Labor Union, such organization has multiplied itself to seven,



Table 1. Organizational System for Labor Unions in Taiwan



as announced by the government. Likewise, in a few Hsien (city)/(municipalities), the labor union corresponding to that level is also numbered more than one. That being said, as the upper-level and lower-level labor unions are loosely connected, the upper level labor unions often fail to cement the support from those of lower level, which in turn leads to the failure of the upper level labor unions, be they at the national or regional level, in holding big-scaled collective bargaining. By the same token, it is rarely seen that the upper-level labor unions would participate or assist in the collective bargaining intended to achieve by those of lower-levels or by the enterprise unions<sup>1</sup>.

In the year of 2004, the total number of enterprises in Taiwan amounted to 1.19 million, of which, categorized by industrial scale, small-to-medium-sized enterprises totaled 1,164,000, comprising 97.80% of the total number of enterprises. In contrast, the number of big-scaled enterprises accounted for 26,000, comprising 2.20% of the total number of enterprises. In 2004, the number of workers totaled 10.24 million, among which, the employment numbers were 9.786 million, the jobless 0.454 million, and those being hired 7.131 million, making the rate for labor participation being 57.66% and the rate for unemployment 4.44%. Statistics

<sup>1</sup> Yung Sheng Chen, "Studies on the Joint Organization of Labor Unions in Our Country" (1998), p. 83 ff.

above also shows that the number of people being employed by the small-to-medium sized businesses has increased to reach 4.903 million, at the ratio of 68.75%<sup>2</sup>. It is fair to say that the small-to-medium sized businesses constitute as the main productive force in Taiwan, with nearly 70% of workers are employed by them.

By year 2004, labor unions at various levels numbered 4,290, with 2.965 million individual members involved. Of which number, industrial unions speak for 1,109, having members of 594,000; craft unions represent another 3,024, having members of 2.371 million (See Tables 2 & 3). The number of craft unions almost triples that of industrial unions, while membership to the former almost quadruples that to the latter. In addition, as of year 2002 through 2004, the number of industrial unions maintains around 1,100 while the number of membership had increased from 560,000 to 590,000. The power of the industrial unions roughly maintains at the current level, without any particular changes.

With respect to the official statistics provided by Taiwanese government, there are three emphases to be made:

1. In spite of the numbers of craft unions and their membership base are greater than those of industrial unions, nonetheless, due to the idiosyncratic feature of Taiwan's legal system, except for some craft unions belonging to docks workers, the craft unions' business concerns mainly the dealing of labor insurance and national health care insurance, which in turn means that the craft unions in Taiwan do not generally carry the meaning of labor unions and hence does not exert any influence.
2. The stage of Taiwan's collective employer-worker relationship is extended to individual business. In the light of this, the enterprise union comes about to become the true force of labor union, with its influence strengthened by the protectionism through two doctrines pertaining to "compulsory organization of labor union" and "compulsory association to the labor union". As a result of this, such unions enjoy benefits from huge membership base as well as wield considerable influence over collective employer-worker relationship<sup>3</sup>. Small-to-medium sized businesses are the main productive force in Taiwan, and on such a basis their enterprise unions are construed. Accordingly, the enterprise unions tend to be on a small-to-medium scale, too. To this end, a small number of memberships combined with a weak financial base are considered to contribute to the conservativeness of the laborers' collective actions. The employer-worker relationship is generally amicable; consequently, initiatives prompted by workers themselves to institute a labor union would generally be construed by their employers as an act that would hinder industrial development<sup>4</sup>. Small-scaled enterprise unions are weakened by their collective negotiation power, to this effect, by the end of 2004, there were only 260 entities having entered into collective agreements, through either craft unions or business units. Of which, 241 entities were industrial unions and the other 19, craft unions (See Table 4).

<sup>2</sup> See "The 2004 White-Covered Book Regarding Taiwan's Small-to-Medium Sized Businesses", edited by Office of the Ministry of Economics Governing Small-to-Medium Business. The term "Small-to-Medium Sized Businesses" is defined, in the White-Covered Book, as those among the following three industries—manufacturing, construction, and mining and quarrying—with an outstanding capital of under New Taiwanese Dollars (N.T.\$) 80 million, which usually hires less than 200 people. For other industries, it refers to those businesses with revenue from previous year of less than N.T.\$100 million, or usually hiring under 50 people.

<sup>3</sup> Due to the lobbying of public-sector enterprise labor unions, Article 35 of the *Regulation Pertaining to the Management of State-Owned Businesses* prescribes that "among the general council members and supervisory council members of a state-owned business, shares representing the government should be held for no less than 1/5, and the government representatives are to be delegated by representatives of labor unions having been appointed by the competent authorities of the state-owned businesses.

<sup>4</sup> See page 6 of "Research Report entrusted by the Council of Labor Affairs of the Executive Yuan", in "Topical Analyses on the Current Situations of both the Internal Group Negotiation within Enterprises of our Country and the Labor-Management Conference", a program hosted in 2003 by Ing-Zhong Huang.

3. Labor unions of all-levels in Taiwan account for a number of 4,290, from there deducted by the number of 3,024 pertaining to craft unions, the remaining 1,109 stands for the number of industrial unions. Compared with Taiwan's overall number of enterprises totaled 1.19 million, that means only 0.1% of businesses in Taiwan have actually formed labor unions. Furthermore, members for industrial unions consist 594,000, compared to those 7.131 million being hired, the actual rate for forming such association only accounts for 8.2%.

Table 2. Situations in Labor Unions of Each Level

Class of Labor Unions	Number of Labor Unions			Individual Number of Members (/1000)		
	End of 2002	End of 2003	End of 2004	End of 2002	End of 2003	End of 2004
Total	4,093	4,158	4,290	2,860	2,902	2,965
General Federation of Labor Unions	39	48	53	-	-	-
Federation of Industrial unions	22	23	23	-	-	-
Federation of Craft Unions	80	82	81	-	-	-
Industrial unions	1,104	1,103	1,109	561	558	594
Craft Unions	2,848	2,902	3,024	2,299	2,344	2,371

Source of Information: The Council of Labor Affairs of the Executive Yuan, *Report of Year 2005 Annual Statistics*.

Table 3. Numbers for Industrial unions, Craft unions, and Respective Members

Unit: Union, People

Industrial Unions	Number of Unions	Number of People	Craft Unions	Number of Unions	Number of People
Total	1,109	593,907	Total	3,024	2,370,70

Source of Information: The Council of Labor Affairs of the Executive Yuan, *Report of Year 2005 Annual Statistics*.

## II. Major Models Concerning Enterprises' Decisions on the Conditions of Labor

Models concerning Taiwanese enterprises' decisions on the conditions of labor hinge fundamentally on the working rules set by the employer; other methods for such decision-making include the collective agreement, the labor-management conference, and the employees' welfare committee. Details are as follows:

### 1. Model for Work Rules

The *Labor Standards Act* prescribes that where workers of 30 or greater than that number are being hired, the employer shall set work rules concerning relevant conditions of labor based on the nature of enterprise. These work rules shall be publicly announced after being approved by the competent authority (See Article 70). The employer, while setting work rules, does not need to consult with his/her employees neither do such work rules need to be consented by workers, that means the employer holds great power in determining the conditions of labor. In order to prevent unfairness caused by the arbitrariness of the employer, this Article requires the employer report work rules to the competent authority for approval. According to an interpretation made by the Ministry of the Interior, work rules would not

come into effect without first being approved by the competent authority<sup>5</sup>. It is observed that this Article carries significant legislative meaning as it grants power to the competent authority to examine the fairness of the unilateral work rules set by the employer. To fully implement the policy, should the employer fail to submit work rules for the competent authority's approval, an administrative fine ranging from N.T. 2,000 to 20,000 can apply to the employer, as imposed by the competent authority. The administrative fine can be imposed continuously (Article 79). However, according to a Supreme Court judgment, as long as work rules are not against the compulsory or prohibited clauses prescribed by the law or against other collective agreement applicable and pertaining to that line of business, such work rules are still held effective even without the competent authority's approval<sup>6</sup>. According to this, in practice, the employer is allowed to determine, unitarily, the conditions of labor.

Having the employer unitarily determine the work rules is the model most prevalent in Taiwan. Such practice, despite convenient for the employer, disregards the workers' will and is, from a legislative point of view, contrary to the principles of democracy. Hence, it has been widely criticized.

One question is worth noting—If an enterprise were to face recessions or encounter operational crisis, under such circumstances, could its employer unilaterally change the conditions of labor to its workers' disadvantage? The *Labor Standards Act* is silent on this matter, and the situation is clarified through the rationale underlying judicial decisions. Supreme Court's interpretation has it that once work rules have been announced and come into effect, they become part of the bilateral agreement between the employer and the workers; later on, should the employer wish to change the work rules to the workers' disadvantage, such changes in principal should be consented by the workers. Nonetheless, where reasonability falls into place, even if the workers did not consent or if the workers opposed to disadvantageous changes, adverse changes are exceptionally acceptable and can have binding force on the workers<sup>7</sup>. This Supreme Court decision creates leeway for the employer to unilaterally adjust conditions of labor, nevertheless, the court maintains a very strict attitude while applying the rule of exemption; in turn, reasonability is rarely recognized by the court while examining adverse changes unilaterally made by the employer.<sup>8</sup>

To sum up, according to the *Labor Standards Act*, even though the employer enjoys a great deal of leeway in making changes to the conditions of labor through (re)setting work rules; in legal effect, once the work rules have been announced and come into effect, unless the workers' consent is obtained, it is extremely difficult for the employer to unilaterally change the conditions of labor to the workers' disadvantage.

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<sup>5</sup> Letter No.#415571 provided by the Ministry of the Interior on June 25, 1986.

<sup>6</sup> No. #2492 of Supreme Court Judgment, granted in 1992.

<sup>7</sup> No. #1696 of Supreme Court Judgment, granted in 1999. This judgment is heavily influenced by the court decisions made in Japan. References are available in Neng Juen Wang, *Studies on the Rationale behind the Precedents regarding Working Rules*, p. 250 ff., and Chih-Poung Liou, "The Legality of Working Rules and its Effect towards Disadvantageous Changes", in *Labor Law Theories and Studies* (2000), p. 259 ff.

<sup>8</sup> No. #30 of Taipei District Judgment on Labor Law Claims, granted in 1998, which states that "Salary can be fairly suggested as the most important element in the conditions of labor. Adverse changes in salaries, if intended to have a binding force on the workers, it demands high level of necessity. In this case, the employer recklessly changes the salary structure in the hope of seeking a breakthrough for business operations, the employer failed to claim neither did he prove his company's finance or operation had worsened to such an extent that unless by changing the original salary payable to their manager, otherwise the company were not able to continue. In the light of this, based on the information made available by the defendant at the court, it can hardly come to the conclusion that such disadvantageous changes have high level of necessity."

## 2. Model for Collective Bargaining

### (1) Current Situation for Collective Agreement

The respective numbers of collective agreements settled by Taiwan's labor unions are as follows: 302 (in 2002) and 274 (in 2003). By the end of 2004, the number of labor unions of all levels stands for 4,290—of which, 260 agreements were settled by industrial unions, craft unions, and business units, on such premise, it indicates that the number of collective agreements has been dwindling.

What interesting is a survey—concerning comparative analyses between the level (of labor protection) in collective agreements vs. legislative standards—indicates that of all these collective agreements, 16% of which are more favorable than legislative standards, 22% coinciding with legislative standards, 44% merely attaining the labor standards, and the remaining 18%<sup>9</sup> basing the rules set by respective businesses. Among a few business entities that have signed collective agreements, limited function of collective agreements is observed in providing favorable terms of the conditions of labor. In a 1993 essay concerning the collective agreements having been signed in Taiwan, two features were being noted: (i) In most cases enterprise unions are the parties of the collective agreement; in this line of thought, as the enterprise unions are subject to the influence of their employers, the contents of collective agreements are usually influenced by the employers; (ii) Content-wise, such as wages, working hours, overtime payments and holidays are usually of the same terms and conditions prescribed in the *Labor Standards Act*, while management participation and dispute settlement, terms and conditions ascribing to collective employer-worker relationship, are rarely touched. These two features indicate that the contents of collective agreements are merely a formality<sup>10</sup>. Furthermore, a research in 1995 regarding the results of public-sector enterprises' collective agreements also indicates that of all the terms and conditions herein, their significance, in most cases, is only on paper. Even if there exists some substantial meaning—on topics concerning wages, hiring & lay-offs, and commendation & punishment—in practice, the negotiation room is quite limited; whereas, some peculiarity is seen on terms and conditions relating to other issues such as safety, sanitation, and employer-worker settlement & cooperation. As to the hard-to-reach issues, which include working time, wages, warfare and benefits, participation by labor unions is expected<sup>11</sup>. In addition, based on another investigation conducted in 2003, with respect to terms and conditions in collective agreements, of concerns from both parties (i.e. the employer and the workers) are working time, warfare measures, hiring, dismissal, lay-offs, separation, retirement, and wages. Labor unions also did not show high-level of interest in management participation<sup>12</sup>.

Overall, in Taiwan, collective bargaining between the employers and unions have not secured enough popularity. Collective bargaining models are mostly adopted by public-sector enterprises and private-sector enterprises of big scale. Of all contents signed in collective agreements, most of them are duplicates of the *Labor Standards Act* or the internal rules set by individual enterprises; and in actual effect fail to govern collective workers. Little distinction could be made for such a phenomenon, regardless of whether they are within

<sup>9</sup> Tsi-Huei Wu, "Research on the System of Taiwan's Collective Agreements—with Pragmatic Studies on Taipei Hsien and Taipei City", in 1993 Masters' Thesis from the Labor-Law Graduate Program of National Cheng-Chi University, p. 93 ff.

<sup>10</sup> Sheng Shiu Chen, "Analyses of the Contents of the Collective Agreement in Our Country", in 1993 Masters' Thesis from the Labor-Law Graduate Program of National Chung-Zheng University, p. 51 ff.

<sup>11</sup> Ke Yi Ren, "Studies on the Result of Collective Agreement by Our Country's Public-sector enterprises—Analyses From Strategic Policy Perspective" in 1995 Doctoral Dissertation from the Public Administrative Law, Graduate Program of National Cheng-Chi University, p. 121.

<sup>12</sup> Ing Chung Wu, *supra* Note 3, p. 69 ff.

public-sector or private-sector enterprises.

## (2) Reasons for Analyzing the Inefficiency of Collective Bargaining

The *Collective Agreement Law* was enacted amidst December 1930, and came into effect in 1933. At the time of the enactment, Taiwan's *Collective Agreement Law* reflects entirely its equivalent German law, by introducing and legalizing the most popular thoughts in Germany's Weimar Era. To that end, Taiwan's *Collective Agreement Law* was deemed very advanced<sup>13</sup>, compared with the equivalent laws of other countries in the world. By now, as the 1933 *Collective Agreement Law* becomes quite out-dated, it does not reflect the actual practice within Taiwan's business and labor union organizations. For this reason, Taiwanese government has drafted amendments to the *Collective Agreement Law*, which is scheduled for Congress' Review in 2006.

The *Collective Agreement Law* prescribes that the labor party of a collective agreement must be a labor party having legal person status (i.e. the labor union). The *Labor Union Law* in the 1930s stipulated that a labor union shall be organized under circumstances where workers must attain full 20 years of age, of the same industry in the same area, exceeding the number of 50. Due to the lengthy and complicated process and other restrictions, in 1945, prior to the Nationalist Party (also known as "Kumindong") retreated to Taiwan, there were very few qualifying for the organization of labor unions. Accordingly, the function of collective agreement in governing the collective conditions of labor was curtailed to a very low level.

Why are there so few collective agreements in Taiwan? Reasons can be found through analyzing the features of both the labor union organization and labor law in Taiwan.

First of all, features of Taiwan's labor union organization indicate the reasons to include: (a) A Lack of Ideology among Workers—that is, except for some craft unions belonging to docks workers, the craft unions' business concerns mainly the dealing of labor insurance and national health care insurance, and it is for the exact same reason workers join labor unions to become members; (b) Very Few Number of Labor Unions—as most workers are employed by small-to-medium sized businesses, where the workers intend to form a labor union would generally be construed by their employers as an act that would hinder industrial development. Therefore, such actions would be halted strongly by their employers, and also feared by the workers averting to get on this path; (c) Labor Union's Low Negotiation Power—that is to say, the function of labor unions bases mainly on providing services (such as labor education and labor warfare), rather than making collective negotiation; (d) There is a lack of understanding by the workers towards the meaning and function of collective agreement. As a result, collective agreement is viewed as harmful to the harmonious relationship between the employer and the workers<sup>14</sup>.

Secondly, the features in Taiwan's labor law suggesting the *Collective Agreement's* failing to progress include: (a) Taiwan's labor law policy emphasizes the protection of individual workers. Conditions of labor, such as wages, working hours, vocational injuries, and workers' pension, are put into legislation in a comprehensive fashion. These legally recognized conditions of labor do not necessarily stand for the basic standards. As such, the obligations imposed on the employers by the labor law are beyond the scope of acceptance for most small-to-medium sized businesses with only small capital base; following that the collective negotiation room becomes narrowed between the employer and labor unions<sup>15</sup>. For instance, the *Labor Standards*

<sup>13</sup> Cheng Guan Huang, "Collective Agreement", p. 6. This paper was presented in Taiwan Legal Academic Forum in 2005.

<sup>14</sup> Tsi-Hui Wu, *supra* note 9, p. 73 ff.

<sup>15</sup> Shih Wei Pan, "Preliminary Proposal to Make Sound of Our Country's System for Collective Negotiations", in 2003, National Policy Research Foundation (an Assets-Backed Legal Person).

*Act* stipulates that a worker may apply for voluntary retirement under either one of the following conditions: (i) where the worker attains the age of fifty-five and has worked for fifteen years (ii) where the worker has worked for more than twenty-five years. This requirement may subject the employer to pay a lump sum equaling forty-five units of the worker's average salary, thus creating a huge financial burden on the employer<sup>16</sup>. (b) Aside from labor unions, the employee's welfare committees and the labor-management conference have simultaneously been set up, allowing them to participate in the determination of employees' welfare and conditions of labor. This creates a delicate relationship for competition, as the employees' welfare committees and the labor-management conference even replace the original function pertaining to the labor unions. Details will be further provided as below.

### **(3) Layers, Procedures, and Items of/for Collective Negotiations**

#### **(a) Layers of Collective Negotiations**

The *Collective Agreement Law* prescribes that "the term 'collective agreement' as used in this law refers to a written contract concluded between an employer or an incorporated organization of employers (with legal person status) on the one hand, and an incorporated organization of workers (with legal person status) on the other hand, for the purpose of specifying labor relations (See Article 1)." In detail, "the Employer Party" can be either individual employer or an incorporated organization of employers with legal person status (such as "same business union" or its federated organizations), whereas, "the Worker Party" is generally considered to include the labor union with legal person status<sup>17</sup> or the federated organizations of labor unions. Accordingly, the collective negotiation can be undertaken by the federated labor unions and the employer or the incorporated organization of employers. Furthermore, the *Collective Agreement Law* states that "the Worker Party" is limited to include only the labor unions with legal person status; consequently, other workers' representatives should not possess the rights to negotiate with the employer for a collective agreement.

As aforesaid, the main force of Taiwan's enterprises lies within the enterprise labor unions, and the relationship between upper-level labor unions and the enterprise labor unions is loosely connected. Therefore, in practice, almost all the collective agreements are completed internally within the enterprise, undertaken by the employer party of the enterprise and the enterprise labor union (factory labor union)<sup>18</sup>. Even though by now, the government announces to have seven national labor unions in Taiwan, nonetheless, as these newly added national labor unions do not directly participate in the internal enterprise collective negotiation, this does not change the fact that the scope of collective agreement is still limited to that within the enterprises; accordingly, the parties subject to the collective agreement are only the management and labor parties within each individual business unit.

#### **(b) Procedures for Collective Negotiations**

The *Collective Agreement Law* does not provide the procedures for collective

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<sup>16</sup> The *Workers' Pension Act*, which came into effect on July 1, 2005 and fundamentally changes the workers' pension system set forth in the *Labor Standards Act*, aims to lessen the heavy financial burden rested on the employer.

<sup>17</sup> See Article 2 of the *Labor Union Law*, which states that "a labor union shall be a legal person." As a result, the labor union recognized by the *Labor Union Law* is limited to those with legal person status.

<sup>18</sup> Tsi-Huei Wu, *supra* note 9, p. 86.

negotiation<sup>19</sup>. In regards to the practice of the collective negotiation, according to a survey on Taipei Hsien and Taipei City, of the 10 business units receiving interviews, most of them expressed that a draft collective agreement would usually be put forth by the labor union. Furthermore, in order to make the draft collective agreement, the labor union would usually refer to the current related laws and regulations, as well as other collective agreements that have been signed, and finally to the model contract entitled “How to enter into a Collective Agreement” and prepared by the Labor Bureau of the Hsien (City). For the labor union, while in preparing for the draft agreement, the most troublesome aspect of which lies in the difficulty of obtaining enough information. In turn, the draft agreement provided by the labor union is often criticized by the employers as “unacceptable” and “rapacious”. In situations where the negotiation went into a deadlock, the interviewed private business labor union would often say that “Our goal is to sign on the collective agreement first, which would then become the first base for founding the rights and for further amendments. Therefore, whenever there is a deadlock, as long as the management party would not insist on something that is totally unacceptable to us, quite often, we would settle for the deal.” However, in publicly-operated enterprises, as the authority conferred to the management’s representatives is often limited, deadlocks are almost inevitable during the course of negotiation. In such a circumstance, turning petition to the upper-level competent authority is often observed<sup>20</sup>.

#### (c) Items for Collective Negotiation

In order to facilitate the over-all economic development, the *Collective Agreement Law*, while enacted in the 1930s, placed restrictions on the contents of the collective agreement due to the concerns of over-tipping the power of labor union, otherwise. For instance, “any provision in a collective agreement placing restrictions upon the employer in respect of the use of a new type of machinery or the improvement of the method of production or the purchase of refined or processed products shall be null and void (See Article 13).” However, due to the Taiwanese enterprise union’s weak negotiation power, a collective agreement involving forcefully interfering with the employer’s management cannot yet be seen so far. Most of the collective agreement mainly concerns with the conditions of labor (including but not limited to wages, working hours, and safety & hygiene); nevertheless, as to the hard-core matters concerning the employer’s management, could they also become the subjects of a collective agreement? Most scholars view that personnel matters (e.g.: the dismissal and transfer of labor union members, which should be consented by the labor union) and production management matters (e.g.: business transfer, material investment, or renewal of equipment) should become the subjects of a collective agreement as they deeply affect the rights of laborers, even though such subject matters belong to the scope of management<sup>21</sup>.

#### (4) Priority for Application in Collective Agreement

Collective Agreement has not gained its popularity in Taiwan. Therefore, it is rarely seen to have both the management and worker parties adjust flexibly the conditions of labor via

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<sup>19</sup> The *Collective Agreement Law* does not touch on issues of negotiation duties, principles of honesty, and procedures during the process of negotiation, as well as the obtainment of negotiation information. In the draft *Collective Agreement Law* reviewed by the Legislative Yuan in 2004, such problems had been discussed. Legislative ordinance was also intended in trying to solve these issues, however the legislation process has not yet been completed. By now, the Council of Labor Affairs of the Executive Yuan is reviewing drafts of the collective labor laws, including the *Collective Agreement Law*, *Labor Union Law*, and *The Settlement of Labor Disputes Law*. They are scheduled to be reviewed by the Legislative Yuan again this year (in 2006).

<sup>20</sup> Tsi-Huei Wu, supra note 9, p. 110.

<sup>21</sup> Ling Huei Kuo, “Collective Agreement and Collective Negotiation”. This paper was presented in Tai-wan Legal Academic Forum in 2005.



collective agreement. Most extant collective agreements having been signed are only those within individual enterprises. Collective agreements signed at the regional level are rarely seen, either. Accordingly, in practice, there is not yet a single case that demands the resolution of conflict settlement between the individual enterprise collective agreement and the regional collective agreement.

Rather yet, in Article 5 of the *Collective Agreement Law*, it states that “When two or more collective agreements deal with the same labor relation and there is no provision in any of these collective agreements as to priority of application, the collective agreement affecting the smaller scope of craft shall apply first; or, if the collective agreements are not on a craft basis, the agreement covering a wider scope of area or greater number of persons shall apply first.” Based on this, where two or more collective agreements can apply simultaneously, the order of priority should be determined upon whether there is a special provision provided in the former collective agreement which has an earlier effective date. If a special provision is in place, then it should be applied directly, whereas, if there is no special provision available, then the situation can be further divided into two: (i) if the collective agreements are on a craft basis, then, the collective agreement affecting the smaller scope of craft shall apply first; (ii) if the collective agreements are not on a craft basis, the agreement covering a wider scope of area or greater number of persons shall apply first.<sup>22</sup>

The *Collective Agreement Law* is silent on whether the conditions of labor ascribing to the individual enterprise collective agreement can be lower than those standards set in other regional-or-national level collective agreements? There is not yet such a case existing in Taiwan. However, should there be a simultaneous application between the individual enterprise collective agreement and other regional-or-national level collective agreements, then, for the sake of argument, Article 5 of the *Collective Agreement Law* should apply to conciliate the differences. In the light of this, if the individual enterprise collective agreement has an earlier effective date, and its specifically provisioned contents (conditions of labor) are lower than those standards set in regional-or-national level collective agreements, then, such lower standards should be permissible by the *Collective Agreement Law*.

#### **(5) The Effect of the Collective Agreement**

Article 16 of the *Collective Agreement Law* provides that “The conditions of labor laid down in a collective agreement shall as a matter of course constitute part of a labor contract concluded between an employer and a worker who are subject to the collective agreement. If any provisions of such labor contract vary with the conditions of labor laid down by the collective agreement, such provisions shall be null and void, and shall be replaced by the pertinent provisions of the collective agreement; provided, that the variances, if permissible by the collective agreement or purported for the benefit of the workers and in the absence of express banning provisions in the collective agreement, shall remain valid.” Based on this, it can be concluded that (a) the collective agreement is enforceable—that is to say, the conditions of labor ascribing to the collective agreement become automatically part and partial of the contents contained in the labor contract, regardless of whether parties to the labor contract are aware of or have consented to these contents; (b) “favorable principle” is recognized—in other words, in the absence of express banning provisions in the collective agreement, it is permissible for the employer and the worker to specify conditions of labor that are more favorable than those provisions within the collective agreement; (c) in terms of “the variances, if permissible by the collective agreement”, as provided in this Article, it actually enables parties of the collective agreement to abandon part or all of the enforcement effect pertaining to the collective agreement. By the same token, this term can also work to change

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<sup>22</sup> Cheng Huei Huang, *Labor Law* (2000), p. 349.

the conditions of labor to the workers' disadvantage once the consent has been obtained<sup>23</sup>. That being said, none of a similar case has happened yet so far.

### **3. The Labor-Management Conference**

#### **(1) Legal Base for the Establishment**

The *Labor Standards Act* provides that "A business entity shall hold labor-management conference to coordinate worker-employer relationships and promote worker-employer cooperation and increase work efficiency." With the authorization by this Article, the government lays down the *Convention Rules of the Labor-Management Conference*, aiming to provide some standards for the industry to call for such meetings. Under the structure of worker-employer cooperation, the Labor-Management Conference is designed to enable both parties (the employer and the workers) to discuss various affairs concerning the worker-employer relationships, in order to reach a resolution based on majority consent, coordinate worker-employer relationships and improve conditions of labor.

According to the *Convention Rules of the Labor-Management Conference*, "a business entity shall convene labor-management conference in accordance with the provisions of these Rules. If a branch organization of such entity exceeds 30 employees, a separate conference may be convened for the branch (See Article 2)." Despite this, no punishment provisions are in place as to punishing those business entities not holding the labor-management conference according to the convention rules. In turn, each business entity can determine whether to hold the labor-management conference or not. However, the government, in order to promote the business entities' holding of labor-management conferences, takes the holding of such conferences as one standard for reviewing the applications by the business enterprises for trading on the market or over the counter. Due to such practice, the labor-management conference has a huge development over recent years and has become a common internal communications system within Taiwan's publicly-listing or over-the-counter companies.

In addition, as the purpose of the labor-management conference is to coordinate worker-employer relationships and the members of which include both parties' representatives (from the workers and the employer), therefore, it goes without saying that the labor-management conference does not enjoy the rights for strike.

#### **(2) The Structure of Labor-Management Conference**

According to the *Convention Rules of the Labor-Management Conference*, "the labor-management conference shall have an equal number of representatives from the workers and the employer. There shall be a number of 2 to 15 representatives from each side according to the size of the employment base of the business entity. However, if business entity has an employment base of 100 or more, the number of representatives from each side shall be no less than 5" (See Article 3); and "management representatives of the labor-management conference shall be chosen by an employer from those who are well-versed in the business & labor affairs of the business entity" (See Article 4); furthermore, "labor representatives of the labor-management conference shall be elected by union members or union assembly if there is a labor union in the business entity. In case there is no labor union, they shall be elected directly by all workers (See Article 5). What needs to be pointed out is "members of the general council as well as members of the supervisory council of a labor union in the business entity may be elected as the workers' representatives at the labor-management conference, provided that the number of such representatives shall not exceed two thirds of the total number of the workers' representatives (See Article 6)".

<sup>23</sup> Ling Huei Kuo, *supra* note 21, p. 15.

### **(3) The Election of the Labor-Management Conference Representatives**

“The election of workers’ representatives shall be conducted by the labor union, if any, in the business entity. In cases where no labor union is yet organized, the business entity shall publish a notice to request the workers to elect their own representatives. Expenses incurred by such election shall be borne by the business entity (See Article 9)”.

“A worker who has attained the age of 20 and has continuously worked in the same business entity for one year or more may be elected as workers’ representative at the labor-management conference (See Article 7)”; and “the highest ranking executive officers who are authorized to conduct management on behalf of the employer cannot act as the workers’ representatives (See Article 8)”.

### **(4) Scope of Matters for (Labor-Management) Conference Discussion**

The functions of labor management conference include the following:

- (a) Reports
  - (i) on the execution of the decisions made in the last conference;
  - (ii) on labor turnover;
  - (iii) on production plans and business conditions;
  - (iv) on other matters
- (b) Discussion
  - (i) on matters relating to the harmonization of labor relations and labor-management cooperation;
  - (ii) on matters relating to labor conditions;
  - (iii) on the planning of labor welfare;
  - (iv) on the increase of labor productivity
- (c) Suggestions

### **(5) Rules for Representing in the (Labor-Management) Conference**

“Representatives of labor-management conference shall do their utmost to exercise the spirit of harmony and cooperation during the conference. Management representatives shall be responsible to the employer, and workers’ representatives elected by a labor union shall be responsible to the labor union for their respective opinions expressed in the conference (See Article 12)”. And, “a meeting of the labor-management conference must be attended by the majority of the representatives from the workers’ side as well as the management’s side. The decision of such meeting must be made with the approval from more than three quarters of the representatives present at the meeting (See Article 19)”.

### **(6) The Effect of the Labor-Management Conference**

“The decisions made at the labor-management conference shall be forwarded by the business entity to the labor union or to the department concerned for implementation. In case the decisions made are un-implementable, they may be referred back to the next meeting for further consideration (See Article 22)”.

### **(7) Current Practice and Effect of Implementing the Labor-Management Conference**

As mentioned earlier, the respective numbers of collective agreements settled by Taiwan’s labor unions are as follows: 302 (in 2002), 274 (in 2003), and only 260 (in 2004). It indicates that the number of collective agreements has been dwindling. On the other hand, the numbers of business entities holding the labor-management conference are as follows: 2,701 (in 2002), 3,469 (in 2003), and 4,386 (in 2004), signifying its growth at a very fast pace. Take the year of 2004 for example, the number of publicly-operated enterprises having held the labor-management conference is 947, compared to the previous year’s number, the increase is

by 282 or at a growth rate of 42.41%. In parallel, the number of privately-operated enterprises having held the labor-management conference is 3,439, compared to the number of past year, the increase is by 675 or at a growth rate of 24.42%.

According to the “Year 2002 Report of Survey on the Industrial Unions’ Current Situations” by the Council of Labor Affairs of the Executive Yuan, of all having held the labor-management conference, 95% of which has conversed on the matters pertaining to the scope of conference discussion, while 89.08% of which on the conditions of labor; 85.49% of which on labor welfare; and 82.61% of which on the labor-management relationships. Only 32.47% of which has discussed on the matters concerning the increase of labor productivity. Details of the aforesaid four categories of discussion are provided as below:

(a) On Matters Relating to the Labor-Employer Relationship

With the highest frequency, 67.30% of discussion centers on “participation of personnel management job”; followed by 59.48% on “improvement of work procedures”; 53.56% on “improvement of production technology”; and 40.35% on “other cooperation matters”.

(b) On Matters Relating to the Conditions of Labor

With the highest frequency, 59.19% of discussion centers on “year-end bonus”; followed by 56.45% on “wages”; 48.87% on “time-off”; 48.55% on “overtime pay”, 48.38% on “working hours”; 46.30% on “pension”, 38.88% on “shifts”, and 17.74 on “others”.

(c) On Matters Relating to Labor Welfare

With the highest frequency, 72.27% of discussion centers on “employee welfare facilities”; followed by 68.73% on “leisure activities”; 62.18% on “education training”; and 13.62% on “others”.

(d) On Matters Relating to the Increase of Labor Productivity

Observed by different line of businesses, except for the “public administration business” failing to enter into a discussion, the “industrial and commerce businesses” tops on the frequency of holding discussions (at 100% rate); followed by the “construction business” (at 60%); the “mining and quarrying business” (at 50%), “water, electricity, & gas supply businesses” (at 46.15%), and others (at between 20-34%).

As to the labor-management conference’s implementation effect, 94.97% of the industrial unions consider it having effective results, signifying the importance of labor-management communications. The respective items having attained the implementation effect include 67.10% (with the highest rating) on “the improvement of the labor-management relationship”; followed by 60.92% (with the 2<sup>nd</sup> highest rating) on “promoting labor welfare”; 55.46% (with the 3<sup>rd</sup> highest rating) on “advancing the degree of labor-management cooperation”; 47.70% on “increasing the labor productivity”; 46.70% on “increasing the centripetal force of the employees”; and 40.37% on “raising the conditions of labor”.

## (8) The Relationship between the Labor-Management Conference and the Collective Bargaining

The Labor-Management Conference has thrived in recent years and has played an ever active role within the industry. However, there are some shortcomings pertaining to the labor-management conference:

(a) The Labor-Management Conference’s Low Legal Status

Article 83 of the *Labor Standards Act* provides the base for the establishment of the labor-management conference. However, no provisions of punishment are in place for business unit failure in implementing the labor-management conference, as so

Table 4. Current Situation of Labor-Management Relationship System  
(Categorized and Counted by the Respective Business Units)

Item	Collective Agreement						Labor-Management Conference	
	Total		Industry		Craft		Publicly-Operated	Privately-Operated
	Publicly-Operated	Privately-Operated	Publicly-Operated	Privately-Operated	Publicly-Operated	Privately-Operated		
By End of 2002	108	175	108	173	-	2	630	2,071
By End of 2003	100	174	100	172	-	2	665	2,764
By End of 2004	98	162	87	154	11	8	947	3,439

Source: Labor Vital Statistics, *Annual Report of Year 2005*, by the Council of Labor Affairs of the Executive Yuan.

required by the same Article of the same Act. Consequently, the establishment of the labor-management conference very much hinges on the discretion of the respective business entity. In the light of this, except for those companies applying to become publicly-listed or go over-the-counter, implementation of the labor-management conference in other industries is hard to achieve.

(b) The Labor-Management Conference's Low Binding Force

"The decisions made at the labor-management conference shall be forwarded by the business entity to the labor union or to the department concerned for implementation. In case the decisions made are un-implementable, they may be referred back to the next meeting for further consideration (See Article 22)". Despite this, are there convocation rules for "the next meeting for further consideration"? Also, what if no decision could be made in "the next meeting for further consideration"? if so, what should be dealt with? All these issues are not yet put into regulation and therefore there is very low binding force on both parties (i.e. the employer and the workers).

(c) Blurry Distinction between the Labor-Management Conference and the Collective Bargaining

The nature of the labor-management conference is for the harmonization of labor relations and labor-management cooperation, while the nature of the collective negotiation is exemplified by the antagonistic relationship between the employer and the labor union; both are subject to different systems. However, according to the *Convocation Rules of the Labor-Management Conference*, in case a labor union has been organized within a business unit, the workers' representatives shall be elected by representatives of labor union members and shall be responsible to the labor union for their respective opinions expressed in the conference; in the mean while, representatives of the management shall also be responsible to the business unit. By such rule, even though both the business unit and the labor union can exercise supervision power over representatives from both parties (i.e. the workers and the management), this inevitably intensifies the antagonism between the business unit and the labor union to the labor-management conference system<sup>24</sup>, contrary to what

<sup>24</sup> Ji Sheng Chen etc., "Legal System Research Concerning the Participation of the Business Management by Workers of Our Country", in 1993, a research entrusted by the Council of Labor Affairs of the Executive Yuan.

the labor-management conference has originally objected itself in harmonizing the employer-labor relationship. Furthermore, items such as labor-management relationship, conditions of labor, and labor welfare are originally subject to the scope of collective negotiation by the labor union. It is viewed accordingly that the tasks of the labor-management conference and the collective negotiation are overlapped, which may explain why the relationship between the labor-management conference and the collective negotiation has been blurred.

#### (9) Increased Function of the Labor-Management Conference—on “Working Hours”

Before the amendment of the *Labor Standards Act* in 2002, if the employer intends to implement the system of “Averaging Working Hours over a Two-Week Period” or “Averaging Working Hours over a Four-Week Period”, majority consent from either the labor union or the workers should be sought. The legislative concern may be that first, as Taiwan’s *Labor Union Law* adopts the structure of both “the doctrine of compulsory organization” and “the doctrine of compulsory association”, therefore, if the employer has obtained the labor union’s consent for implementing the working-hours averaging system, the scope of application should cover all labor union members (i.e. the business entity’s employed laborers altogether, under the doctrine of compulsory association). Secondly, in cases where no labor union is yet organized, the minority opinion would be negated via the democratic principle of majority votes (meaning having the minority conform to the majority). What needs to be pointed out here is, as mentioned earlier, “the doctrine of compulsory association” has not yet been fully implemented; consequently, even if a labor union does exist, not all workers have become its members. In turn, even if the labor union has consented to the working-hours averaging system, theoretically speaking, it can only have binding force on its members only and which cannot be extended to the non-members. Furthermore, some essays also note that Taiwan’s enterprise union has a weak nature, therefore it is suggested that the employer can circumvent paying overtime by forcing the weak labor union to consent to the implementation of the working-hours averaging system. Other questions also include: what enables the employer to implement the working-hours averaging system simply by obtaining majority consent from the workers? Is this a fair treatment to other workers who do not consent to that?<sup>25</sup>

The amendment of the *Labor Standards Act* was made in December 2002, which states that if the enterprise intends to implement modified working time system, extend working hours, or have female workers perform her work at night, in cases where no labor union is yet organized, then consent should be obtained through the labor-management conference (See Table 1-5).

The underlying reasons for this amendment are: it is not without question as to whether majority consent from the workers can truly reflect their intentions; furthermore, as representatives of the workers are elected by the workers themselves, the opinion of the contingent can better represent that of the labor union. The labor-management conference is led into the system<sup>26</sup>, in order to consolidate the spirit of labor autonomy. Following the amendment of the *Labor Standards Act*, the labor-management conference, once was regarded as merely a platform for labor-management communication, has now turned into a system that can exercise the right to consent on modified working time, extension of working hours and female workers’ working at night.

<sup>25</sup> Yu Chuan Lee, “Research on Issues of the Legal System Pertaining to Working Hours in Our Country and its Further Prospect”, in 2000 Master’s Thesis from the Labor-Law Graduate Program of Culture University, p. 77 ff. In page 88 of this thesis, it is also suggested that should the employer intend to implement the working-hours averaging system, such a decision can consider to be made through the labor-management conference. Under such a system, the workers would possess autonomy in regards to the working-hours averaging system.

<sup>26</sup> Juan Yen Chiou, “Working hours”, in *Interpretations of the Labor Standards Act—20-Year-Anniversary of its Implementation, in Retrospect, and its Future Prospect* (2005), p. 308.

Table 5. Comparison between Old and New Regulations

	Old Regime	New Regime (as of December, 2002)
Averaging Working Hours over a Two-Week Period (Article 30, Paragraph 2, of the <i>Labor Standards Act</i> )	Majority Consent from the Labor Union or the Workers	(i) Consent from the Labor Union (ii) Consent from the Labor-Management Conference (in cases where no labor union is yet organized)
Averaging Working Hours over a Four-Week Period (Article 30-1, of the <i>Labor Standards Act</i> )	Majority Consent from the Labor Union or the Workers	(i) Consent from the Labor Union (ii) Consent from the Labor-Management Conference (in cases where no labor union is yet organized)
Extension of Working Hours (Article 32 of the <i>Labor Standards Act</i> )	Consent from either the Labor Union or the Workers	(i) Consent from the Labor Union (ii) Consent from the Labor-Management Conference (in cases where no labor union is yet organized)
Female Workers' Working at Night (Article 49 of the <i>Labor Standards Act</i> )	Consent from either the Labor Union or the Workers	(i) Consent from the Labor Union (ii) Consent from the Labor-Management Conference (in cases where no labor union is yet organized)

#### (10) Increased Function of the Labor-Management Conference—on the *Protective Act for Mass Redundancy of Employees*

Over the past decade, Taiwan's business entities faced fierce competition among their global counterparts. In order to survive, quite a few businesses opted to invest in China and other places, while others staying in Taiwan also sought to streamline their industrial organization. During the process of undergoing management adjustment, disputes arise as a result of business closure, which then leads to massive lay-offs. To settle disputes, the Taiwanese government in February 2003 promulgated the *Protective Act for Mass Redundancy of Employees*.

According to this Act, the term "mass redundancy of employees" shall refer to the circumstance where a business entity has a need to lay off its employees on account of any of the conditions set forth in Article 11 of the *Labor Standards Act* (including suspension of business, long-term business loss, or merger). Such circumstances include where a site in the business entity having fewer than 30 employees intends to lay off over 10 employees within 60 days; or where a site in the business entity having more than 200 employees intends to lay off more than 1/3 of the total number of its employees within 60 days, or more than 50 employees within one day. To implement massive lay-offs, the business entity shall, at least 60 days prior to the occurrence, inform the officials of the competent authority and other relevant agencies of its plan for lay-offs, through written notice and publicly announcing it (See Article 4, Paragraph 1). Notice to be given to relevant authorities/agencies shall include the following matters in order: (a) the labor union to which the employees to be laid off belong; (b) the labor representatives of the labor-management conference; (c) the entire employees of the business entity (See Article 4, Paragraph 2). The massive lay-off plan to be submitted by the business entity shall contain the following particulars: (a) the cause of such massive lay-offs; (b) the

department to be affected by such massive lay-offs; (c) the scheduled effective date of such massive lay-offs; (d) the number of employees to be laid off; (e) the criteria for selecting the subjects of such massive lay-offs; (f) the method for calculating the severance payment and the job transition assistance project.

Within 10 days from the date of submission of the massive lay-off plan, the workers and the employer shall enter into negotiations in the spirit of autonomy (See Article 5, Paragraph 1). In the event the workers and the employer refuses to enter into negotiations or cannot reach an agreement, the competent authority shall, within 10 days, invite the workers and the employer to form a Negotiation Committee to negotiate the terms for the massive lay-offs and propose alternatives whenever appropriate (See Article 5, Paragraph 2).

The Negotiation Committee shall have five to eleven (5-11) members. Chairman of the Negotiation Committee is designated by the competent authority. Representatives of the employer shall be designated by the employer. Representatives of the workers shall be designated by the labor union(s); if there is no labor union but a labor-management conference has been formed, the representatives of the workers shall be designated by the labor representatives of the labor-management conference. If there is neither a labor union nor a labor-management conference, the representatives of the workers shall be elected by the entire employees. In the case where the workers and the employer cannot designate or select their respective representatives before the lapse of 10-day deadline, such representatives shall be designated by the competent authority ex officio within 5 days following the expiration of the deadline (See Article 6, Paragraphs 1&2). The agreement reached by the Negotiation Committee shall have binding force on the employees (See Article 7, Paragraph 1). The agreement concluded by the Negotiation Committee shall be put in writing (See Article 7, Paragraph 2). The competent authority shall, within 7 days from the date of conclusion of the agreement, submit the written agreement to the court having competent jurisdiction for its examination and approval (See Article 7, Paragraph 3). In the case the written agreement approved by the court prescribes the payment of a specific sum of money, any other substitute, or valuable securities, such agreement may serve as the title for compulsory execution (See Article 7, Paragraph 5).

There are some features pertaining to the Negotiation System in the *Protective Act for Mass Redundancy of Employees*:

- (a) The negotiation set forth in the Act is compulsory by its nature and is divided into two stages. At the first stage, the negotiation parties are represented by representatives of both the workers and the employer. If the first stage of negotiation fails to go through, government representatives step in and work as the chairperson of the negotiation committee; therefore, the negotiation is conducted by three parties.
- (b) The object of the negotiation is the lay-off plan submitted by the employer. The scope of negotiation covers the lay-off plan's ought-to-be particulars: (i) the cause of such massive lay-offs; (ii) the department to be affected by such massive lay-offs; (iii) the scheduled effective date of such massive lay-offs; (iv) the number of employees to be laid off; (v) the criteria for selecting the subjects of such massive lay-offs; and (vi) the method for calculating the severance payment and the job transition assistance project (See Article 4, Paragraph 4). The lay-off plan actually records the relevant conditions of labor whereby the massive lay-off is involved.

The negotiation system embodied in the *Protective Act for Mass Redundancy of Employees* is aimed to bring together both the workers and the employer for them to negotiate the relevant conditions for lay-offs. The legislation, despite full of good intentions, remains doubtful in its design of the system:

- (a) The negotiation process is led by the competent authority; in turn, the negotiation committee is chaired by the representative delegated by the competent authority. The appropriateness of the competent authority's forceful interference into the negotiation



is not without a doubt.

- (b) Representatives of the workers shall be designated by the labor union(s), attend the negotiation committee, and negotiate the lay-off plan with the employer. What needs to be pointed out though is, in cases where reasons for massive lay-offs arise, the labor union could request for negotiating with the employer for the purpose of entering into a collective agreement, without going through the labor-management conference. Accordingly, in theory, the processes for labor-management conference negotiation and the collective negotiation can possibly co-exist. In circumstances like this, what is the distinction between the two?

On the other hand, re-examination is also required for—the case where the negotiation, represented by the labor union’s representatives and the employer’s representatives respectively, has reached an agreement on the massive lay-off plan by the Negotiation Committee; it shall have binding force on the employees (See Article 7, Paragraph 1). And, the agreement concluded by the Negotiation Committee shall be put in writing, and signed by all members of the Negotiation Committee or affixed with their seals (See Article 7, Paragraph 2). Questions arise as to (i) Is the negotiation agreement of the same nature as the collective agreement? (ii) Why can the negotiation agreement bind those general workers who are not members of the labor union? These are not without questions.

- (c) Representatives of the workers shall be designated by the labor union(s); if there is no labor union but a labor-management conference has been formed, the representatives of the workers shall be designated by the labor representatives of the labor-management conference. That being said, the labor representatives of the labor-management conference are elected for the purpose of harmonizing labor relations, rather than negotiating conditions of labor with the employer. In the light of this, their purpose of existence is completely different from that of representatives of the labor union for collective negotiation.
- (d) The workers, while electing their representatives for the labor-management conference, only did so by authorizing their representatives to attend matters concerning the labor-management communication and cooperation, as set forth in the *Convocation Rules of the Labor-Management Conference*. At that time of authorization, the workers usually could not foresee the massive lay-offs in the industry later on. As special authorization is not granted to representatives of the workers (intended only for the labor-management conference) to participate in the negotiation of the lay-off plan, questions then arise as to (i) Without such special authorization, in effect meaning having exceeded the original scope of authorization, why can representatives of the workers directly participate in the negotiation of the lay-off plan with representatives of the employer? (ii) How could their agreement on the massive lay-off plan oblige the workers? These again are not without questions.
- (e) The agreement reached by the Negotiation Committee shall bind individual employees (See Article 7, Paragraph 1). Accordingly, the workers’ dissenting rights towards the lay-off plan are deprived—whether or not it is appropriate is worth reconsidering<sup>27</sup>.

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<sup>27</sup> Ling Hwei Kuo, “The Measures Taken by Administrative Power and Its Actual Practice towards Massive Lay-Offs of Workers in Our Country” in *Compilations of Academic Papers on the Protective Act for Mass Redundancy of Employees* (2005), p. 347.

#### 4. The Employees' Welfare Committee(s)

*The Employee's Welfare Funds Act* was promulgated in 1943. According to this Act, all factories, mines in the public and private sectors, or other enterprise organizations shall set-aside and allocate employees' welfare funds to process and handle employees' welfare businesses (See Article 1).

The main tasks of the employees' welfare committees include: (a) matters concerning the examination and supervision of employee welfare businesses; (b) matters concerning the planning, safekeeping and usage of the employees' welfare funds; (c) matters concerning the distribution, auditing and reporting of incomes and outlays of the expenses of the employees' welfare businesses; (d) other matters concerning employees' welfare (See Article 11 of the *Organizational Rules of the Employees' Welfare Committees*).

The employees' welfare funds come mainly from: (a) 5% of the total amount of capitals at the time of the employer's establishment of the business; in addition, 0.05% to 0.15% of the total monthly business income shall also be set-aside and allocated towards the employees' welfare funds; (b) 0.5% percent of the monthly salaries or wages of each staff member or workers (See Article 2 of *Employees' Welfare Funds Act*). The custody and usage of the employees' welfare funds shall be processed and handled by the labor unions established pursuant to related laws, and the employees' welfare committees jointly established by factories, mines, or other enterprise organizations themselves. Representatives from labor unions shall not be less than two-thirds of the total number of members of the employees' welfare committee. The Employees' Welfare Committee shall have seven to twenty-one members. However, if the number of staff members and workers is over one thousand people, the number of these members can be increased to thirty-one. As to the constituency of the employees' welfare committee, business entities shall designate one person as ex officio member of these committees and the remainder shall be elected from representatives of staff members who are not allowed to join labor unions in accordance with related laws and members of the labor unions, pursuant to the measures of election prescribed by business entities and labor unions. However, committee members elected from members of labor unions shall not be less than two-thirds of total membership of the committees. When business entities do not have labor unions, their employees' welfare committees shall have one business executive as an ex officio member, and the remainder shall be elected jointly by staff members and workers themselves (See Articles 3 & 4 of the *Organizational Rules of the Employees' Welfare Committees*).

Employees' welfare committees shall have one presiding member to handle generally committee affairs. They may also have one deputy presiding member. Both of them shall be elected among members of the committee themselves. Members of the committees do not get paid. Their terms range from one to three years (See Article 6 of the *Organizational Rules of the Employees' Welfare Committees*).

As the task of the labor union necessarily includes the negotiation with the employer of matters concerning employee welfare, consequently, it is indeed a redundancy by setting additionally an employees' welfare committee. Based on the *Employee's Welfare Funds Act*, in case where there already exists a labor union in the business entity, representatives from the workers can be elected by the labor union and their number shall not be less than one-third of total number of members. In the light of this, in case where there is already a labor union, the establishment of the employees' welfare committee is seemingly redundant. On the other hand, even in the case where no labor union exists within the business entity, the workers can still elect for their representatives to participate in the employees' welfare committee. Accordingly, this would only reduce the necessity as well as the motivation for the workers to organize a labor union.

### **III. Conclusion**

Taiwanese society has achieved high level of democracy, nonetheless, amendments of collective labor laws have been delayed and failed to come to place. The current collective labor laws inherit the system under the authoritarian regime, which basically upholding a suppressive policy towards the labor union. The enterprise unions organized under the small-to-medium sized business structure tend to be small in scale, hence without much power entering into the collective negotiation with the employer. Accordingly, collective agreements are rarely consolidated and in turn fail to implement the due function attached to the collective agreement in prescribing the conditions of labor. By now, most business entities still rely on the employer to determine the conditions of labor by unilaterally prescribing working rules. On the other hand, the process of democracy in Taiwan indirectly contributes to the break-up of the general federations of labor unions, at both the national and hsien-(municipal) levels, which does not help either to raise the strength of the collective negotiation power of the labor union. Overall speaking, in recent years, the number of collective agreements has been in decline.

Interestingly, with government promotion, lately, the labor-management conference has material break-through. In addition to its original role in negotiating labor relations with the employer, it is now also empowered to consent, on behalf of the workers, on the implementation of the flexible working time system, as well as on the massive lay-off plans. As the power of the labor-management conference has increased, the demarcation between the enterprise union and the labor-management conference also becomes blurry.

# Employee Representation System in South Korea

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## 1. Introduction

Recently, the decentralization of industrial relations appears to be a common issue around the world. The main concerns are individualization and flexibility, and decentralized industrial relations are often demanded as a sign of a global standard. But things are not that simple in South Korea, where currently there is a need for centralized bargaining systems to decide working conditions.

In South Korea, the traditional social-economic influence of a trade union has not been decisive, with cooperative enterprise level unions being the typical type of labor organization. But since the democratization years of the 1980s, labor unions have obviously played significant roles, and have become more active in not only improving working conditions but also making their voice heard when it comes to devising labor laws and policies. There are opinions (mainly from the employers' side) that they are sometimes too competitively aggressive.

Since 1998, there have been two major union federations, whose guaranteed legal status has given them influential power in the creation of social policies by participating in the Tripartite Commission. The Tripartite Commission was established to cope with the foreign currency crisis in South Korea, and is a rare example of a social deliberation committee in which representatives from the workers, employers and government discuss and make social contracts. Though the optimism is not as strong as when first founded — particularly after one of the two employee representatives (the South Korean Confederation of Trade Unions, KCTU) disaffiliated from the Commission in February 1999 — the body is still one of the most important mechanisms in labor relations. However, in general, industrial level unions tend to be supported due to expectations that these lead to strong bargaining power, and other employee representation systems appear to stand at the crossroads.

Another significant change in labor relations is that multiple unions in a single workplace will be possible from 2007. In addenda amended by Act No. 6456 on March 28, 2001, Article 5 (1) states that when a trade union exists in a business or workplace, a new trade union which has the same organizational jurisdiction as existing the trade unions shall not be formed before December 31, 2006. This transitional measure was severely criticized by scholars, because it ignored the provision of Article 5 of the Trade Union and Labor Relations Adjustment Act (TULRA) which allowed for the freedom of establishment and union recognition.<sup>1</sup> Anyway, the multiple union system is still somewhat unusual in South Korea, having never been actively practiced, and many problems are expected, particularly during the bargaining process. And because representation systems mainly have been matters at the

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<sup>1</sup> Basically, it can be a violation of the constitutional right to organize, stipulated by the Constitution of South Korea, Art. 33.

enterprise level, multiple representatives insisting their own goods can surely suggest the problems of effectiveness during bargaining process.

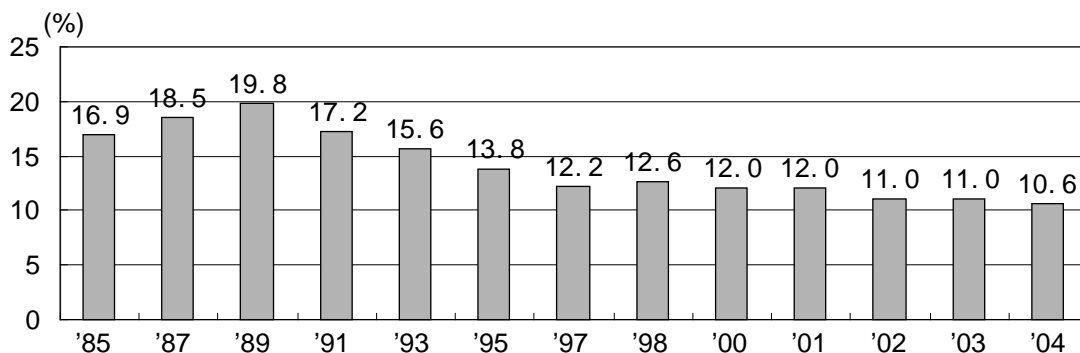
This article aims to introduce the employee representation system in South Korea. There are two different systems in addition to trade unions, but the bargaining structure and role of these systems are more or less ambiguous and controversial. In South Korea, the bad effects of decentralized, enterprise level decision making has resulted in opposition to the current tendency to decentralize collective bargaining in favor of strengthening industrial level bargaining and agreement. In this article we will examine the present situation and the major changes that are taking place in South Korean industrial relation systems and rules, and compare two employee representative systems with trade unions. Later, we will discuss some suggestions to reform and improve industrial relations, as well as labor laws.

## 2. General Background

### 2.1 Present Situation

Union density has been declining for 15 years after hitting a peak in 1989 at 19.8 percent. For example, the average for the years 1997 to 2001 was 12 percent, and for 2002 to 2003 it recorded 11 percent. The number of salaried workers is increasing, but the number of union members has not changed significantly. Comparing the year 2004 with 2003, union density as a whole is declining. The organization rate in South Korea was 10.6 percent<sup>2</sup> at the end of 2004, a drop from the 11 percent in 2003. The number of unions was 6,017, a 3.8 percent decline from the 6,257 registered in 2003, with the number of union members totaling 1,537,000, a decrease of 13,106.

Fig. 1. Union Organization Rate (Ministry of Labor, 2005a)



The low organization rate is more serious among temporary and part-time workers. While 22.5 percent of regular workers are union members, only 1.5 percent of temporary and 0.4 percent of part-time workers are organized.<sup>3</sup> The bylaws of many unions do not allow atypical workers to join, resulting in a remarkable gap in salaries among workers doing same job, and leaving atypical workers suffering from instability at work and no collective bargaining protection. The low collective bargaining coverage ratio, like the organization rate, is a unique feature of South Korean labor relations. The collective bargaining coverage in South Korea was about 12 percent, the lowest among OECD countries.<sup>4</sup> It has been argued that these phenomena in part originate from the enterprise level union system in South Korea.

<sup>2</sup> Organization rate = the total member of union members (1,537,000)/ total number of salaried workers (15,109,000) – number of officials prohibited from joining a union (571,000) x 100.

<sup>3</sup> Hur Chan Young (2000), pp.78-79.

<sup>4</sup> OECD (2004).

Enterprise level unions are still the main type of union in South Korea. Various surveys<sup>5</sup> show that fewer than 25 percent of organized workers are members of industrial level unions, and collective bargaining on that level is very low. But mainstream opinion in South Korean labor relations can be summarized by the fact that industrial level unions are in demand, and the KCTU states that the formation of industrial unions is one of its main goals.<sup>6</sup>

One survey<sup>7</sup> shows that company branches of industrial unions carry out additional bargaining with employers, and in many cases industrial level collective agreements act only as a reference point due to the deep-rooted traditions of enterprise level collective bargaining. In addition, branches can also bargain independently as their constitutional right.

With enterprise level agreements commonplace, and industrial level unions still immature, social contracts can serve as an alternative for national-level, policy making and legal revisions, a concept that is not familiar in South Korea, and difficult to get everyone to agree on. The absence of information disclosure, adhesion to vested rights, and cultural tradition make it difficult to reach agreement to draw up a social agreement.<sup>8</sup>

## **2.2 Regulations**

The right to organize, bargain and act collectively is regulated by the constitution, and because these are basic rights that have the strongest and most direct effect, they make the status of other non-union organizations vague, a reason why there is conflict between collective agreements and other resolutions made between employers and employees.

The 1980 amendment to the Trade Union Act contained a new clause, later abolished in 1987, setting out the requirements for enterprise level unions. But even before 1980, industrial level unions were not common, and after the clause was abolished in 1987, the main type of union remained the enterprise level union. Another important legal change concerns multiple unions in one company. Art.3 (5) of the Trade Union Act (changed to TUTRA) banned multiple unions in one company from having the same organizational jurisdiction as an existing trade union until 1996. This ban was abolished, but it still remains as the addenda. (This means that there can be plural unions in one company which do not have the same organizational jurisdiction, so branches of an industrial level union and an enterprise level union can coexist in one company now.) Therefore, 2007 will be first time that plural unions which have the same organizational jurisdiction at an enterprise level will be allowed to exist, and together with a social atmosphere of desiring the formation of industrial level unions, the age of plural unions with plural representatives is about to begin. Originally, enterprise level unions were not the will of the workers, but a situation forced on them out of political considerations and legislation that ran counter to the constitution. This has resulted in a tendency to favor Labor Management Councils or any other enterprise level organization, push competitive struggle for hegemony among the unions, enforce workers' preference for industrial level unions, and build distrust in enterprise level organizations.

In general, industrial level collective bargaining is often connected with collective agreements as a minimum standard; naturally better terms and conditions through individual contracts do not matter. But in South Korea, enterprise level agreements are not concerned with minimum standards but with the standards of the labor force as a whole. In many cases, companies without unions are relatively small and have inferior conditions, so the collective agreements at large companies can in a sense be regarded as having higher labor standards. Case law does not hesitate to recognize branches of industrial level unions as independent unions that have their own right to bargain collectively and make collective agreements which means even with the introduction of industrial

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<sup>5</sup> Ministry of Labor (2005a).

<sup>6</sup> Accessible at <http://www.nodong.org/>

<sup>7</sup> Lee Joo Hee, Lee Seung Hyup (2005).

<sup>8</sup> Lim Sang Hoon (2005), p. 48.

level unions, bargaining and collective agreements still take place at the enterprise level.

### 3. Non-union Employee Representative System

Basically, trade unions are the most powerful organization endowed with the constitutional rights mentioned above. Non-union organizations do not have special protection under the constitution, so they are empowered by separate legislation, which are likely to contain ambiguous wording. So, when the concrete scope or power of employee representing bodies is argued, often there is a conflict with constitutional rights.

We can roughly classify the main legal sources in South Korean labor law roughly as:

Fig. 2. Main legal sources of South Korean labor law, reconstructed from Park Je Song (2003a)

	Individual	Collective
Regulation	Employment rules	Compulsory laws
Autonomy	Employment contract	Collective bargaining

#### 3.1 Workers' Representatives

##### 3.1.1 Basic Structure

Looking at Fig. 2, we can say that there are some provisions regulating terms of employment, and naturally concerns are moving to the priority of application of various legal sources. An employment contract which establishes conditions of employment which do not meet the standards provided for in the Labor Standards Act (LSA) shall be null and void to that extent (LSA Art.22 (1)), and the sections of employment contracts containing working conditions not meeting the standards regulated in employment rules are void (LSA Art.100). For collective agreements, the sections of employment contracts or employment rules that violate working conditions regulated by collective agreements are void (Trade Union and Labor Relations Adjustment Act (TULRA), Art. 33(1)).

Written agreements between an employer and a “workers’ representative” can first be seen in Art. 31(3) of the LSA. Technically, words of provisions are not actually the same ones, but three provisions that regulate workers’ representative are similar as a whole. First, when employees agree to lower originally regulated standards set by the LSA, mainly regarding extension of working hours<sup>9</sup>, a written agreement with the workers’ representative is required. Second, the concept of a workers’ representative can be seen during consultations regarding dismissals for managerial reasons.<sup>10</sup> Finally, a similar structure can be found regarding unfavorable modifications of employment rules.<sup>11</sup>

Written agreements with a workers’ representative is a new concept in South Korea. It serves two roles simultaneously: 1) deviating from the minimum standards, and 2) placing

<sup>9</sup> LSA Art. 50 (2) When an employer reaches an agreement with a workers’ representative, in writing ... an employer may have a worker work for a specific week in excess of working hours pursuant to Art. 49 (1), or for a specific day in excess of working hours pursuant to Art. 49 (2), on condition that average working hours per week in a certain unit period of not more than three months do not exceed working hours under Art. 49 (1).

<sup>10</sup> LSA ART. 31 (3) With regard to the possible methods for avoiding dismissal and the criteria for dismissal..., an employer shall give notice 60 days prior to the day of dismissal to a trade union which is formed by the consent of the majority of all workers in the business or workplace concerned (or to a person representing the majority of all workers if such trade union does not exist, hereinafter referred to as a “workers’ representative”) and undertake sincere consultation.

<sup>11</sup> LSA Art. 97 (1) Provided...that the rules of employment are modified unfavorably to workers, the employer shall obtain the consent of a trade union, if there is a trade union composed of the majority of the workers in the workplace concerned, or that of the majority of workers if there is no trade union composed of the majority of the workers.

employees under an agreement made by consent. These two features were somewhat controversial in terms of the traditional functions of collective bargaining, because collective bargaining did not expect any deviation from the law, and in principle, it is applied to union members.

Here we should examine some examples of the legal effects of agreements made by a workers' representative, dividing the cases according to the union situation.

1) Can a written agreement with a workers' representative be made prior to collective bargaining? Majority unions substantially perform the same role as collective agreements and at companies with majority unions they are often confirmed as collective agreements. However, what about the possibility of deciding conditions through collective agreements instead of written agreements, as stipulated by law? The essence of collective agreements may confuse collective autonomy and disharmony by allowing minimum standards to deviate from the LSA, but in reality, the result will be same.

2) In cases where there is no majority union, a union member can be faced with a situation in which there is a conflict between written agreements and collective agreements. If an employer insists on the written agreement, it can disturb the right to organize.

3) In cases where there is no union in the enterprise, written agreements can be directly applied to the employees. (Some insist<sup>12</sup> that for these agreements to be directly applied to individual employees there needs to be an additional clause inserted in the employment rules or collective agreements. In this context, written agreements are regarded as having no more power other than exemption of penal provision. But this seems to overlook the legislative intention of a written agreement.)

Therefore, written agreements with a workers' representative cannot take precedence over collective bargaining in situations where a union and a collective agreement exist. In these cases, written agreements usually tend to later become collective agreements. Written agreements are more meaningful in companies without a union<sup>13</sup> and not covered by collective bargaining. In these cases written agreements are more dangerous, and can be used in a crooked way.

### **3.1.2 Problems with Employment Rules**

Employment rules in South Korea labor relations are used as an important way to regulate working conditions, and contain many questionable sections. Employment rules deal with a wide range of working conditions: daily start and finish time, breaks, holidays, leaves and shifts; determination of wages, calculation of wages, means of payment, closing of payment, time of payment and wage increases; calculation of family allowances and means of payment; retirement; retirement allowances, bonuses and minimum wage; meal allowances and expenses of operational tools or necessities and other expenses; educational facilities for workers; safety and health; support for occupational or non-occupational accidents.<sup>14</sup>

All these matters, which are actually almost the whole working conditions, have to be prepared and submitted by an employer ordinarily employing more than 10 workers. These rules are set by the employer, and the LSA stipulates that unfavorable modifications must be consented to by the workers. But the provisions do not regulate election of representatives, which is entrusted to case law. The Supreme Court notes that in instances where there is no majority union, a "conference type" of collective consent is needed by "the majority of workers."<sup>15</sup> At this point, representing system about employment rules slightly differs from

<sup>12</sup> Lee Seung Wook (1998), pp.108-110.

<sup>13</sup> Also properly mentioned in Park Je Song (2003b).

<sup>14</sup> LSA Art. 96.

<sup>15</sup> Supreme Court 1992. 2. 25. 91da25005.



that of the other two representing systems of LSA. That is, for the working hours and managerial dismissal, when there is no majority union, the consent of the person who represents the majority of all workers is enough.

The problem is that most union bylaws include a description of union members, and the present system necessarily results in nonunion workers who are represented by a majority union receiving unfavorable modifications to their terms of employment. In principle these are workers who have not agreed to the union representing them, and it seems unreasonable that they should be put at a disadvantage.

Technically, there can be a way to ensure that nonunion members concerned with proper matters are allowed to participate in the decision making process,<sup>16</sup> and some cases appear to be considering this. But unfavorable modifications to employment rules seem to be in the area of individual regulations, and these rules set only by employers. So, collective agreements can have prior effects to employment rules, and securing any chances for them to participate in the bargaining process can be more fundamental solution.

### **3.1.3. Conclusion**

A workers representative as stipulated in the LSA does not have much significance in places where there is a majority union. The majority union is always at the center of this representation system, and the voice of the individual worker cannot be heard. It appears that a workers' representative can play an independent role in the absence of a union, and the Labor-Management Council exists for that reason. But the relationship between these two representing systems is not clear, so situations develop in different ways.

## **3.2 Labor-Management Councils**

### **3.2.1 Background**

Labor-Management Councils (LMC) were first introduced as an amendment in 1963 to the Labor Union Act. Later they were independently legislated under the Act of Labor Management Councils (ALMC) in 1980, and in 1996 were covered under the Act on the Promotion of Workers' Participation and Cooperation (APWPC). Originally LMC representatives were authorized to have the right to represent at collective bargaining sessions, but this was abolished in 1973 with the Act of LMC restricting their role within the collective agreement and employment rules. This short history is intended to show that LMCs were first intended as an instrument to suppress union activities,<sup>17</sup> trying to co-opt organizations which do not have constitutional rights in place of unions.

LMCs are supposed to perform the roles of workers' participation along with the role of decision of working conditions. In South Korea, where enterprise level unions are widely accepted, it is very often the case that the representatives for collective bargaining and LMC representatives are the same, both in subject and object. Terms directly-indirectly impacting working conditions should be discussed by the LMC, so particularly in companies without unions, quasi bargaining is performed by LMC.

Through almost the entire process, it is not always clear what effect and power the LMC system has — including the election of workers' members, consultation and resolution. And many times they collide with union and workers representatives.

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<sup>16</sup> Park Jong Hee (2003).

<sup>17</sup> APWPC Art. 5 says, "Collective bargaining of a trade union and all the other activities thereof shall not be affected by this Act." This provision suggests the main role of LMCs now.

### 3.2.2 Act on Promotion of Workers' Participation and Cooperation

According to law, each workplace with more than 30 employees must have an LMC. They are composed of an equal number of members representing employers and workers, and there shall be no less than three and not more than 10 members. Members representing employees are elected by employees, but in cases where a trade union is formed by a majority of the workers, the trade union representatives or those recommended by a trade union shall be the council's members representing the employees. The Presidential Decree, which stipulates secret vote of employees, determines the election and designation of members representing both employees and employers. Meetings must be held once every three months and open to a majority of representatives of the workers and employers. A resolution shall be passed by a vote of more than two-thirds of all members present.

Below are the types of matters which the LMCs take up.

- Matters Subject to Consultation (Art. 19)
  - productivity improvement and profit sharing, hiring, deploying, and training of workers, improvement of working environment (safety, health, etc.) and promotion of workers' health, improvement in personnel and labor management systems, general guidelines regarding employment adjustment, such as dismissals, management of working hours and breaks, improvement in wage payment method, system, and structure, introduction of new machines and technologies and improvement of work processes, establishment and revision of employment rules, support for employee stock ownership plans and workers' other wealth accumulation, workers' welfare improvement
- Matters Subject to Resolution (Art. 20)
  - establishment of a basic plan to train workers and for competency development, establishment and management of welfare facilities, establishment of an in-house labor welfare fund, matters not resolved by the Grievance Handling Committee, establishment of various labor-management committees
- Matters Subject to Report (Art. 21)
  - matters regarding overall management plans and performance, matters concerning quarterly production plans and performance, matters concerning personnel plans, the company's economic and financial situation

Fig 3. Ratio of LMCs Established (as of Dec. 31. 2004), Ministry of Labor (2005a)

	Total	30~49	50~99	100~199	200~499	500~999	1000~
Total Workplaces	41,133	19,249	12,339	5,733	2,708	899	405
Workplaces with 30 or more employees (a)	35,601	16,295	10,788	5,071	2,400	667	380
Workplaces with LMC (b)	34,867	15,668	10,735	5,030	2,388	666	380
Percentage (b/a)	97.9	96.2	99.5	99.28	99.5	99.9	100

Fig 4. Number of LMCs (as of Dec. 31. 2004), Ministry of Labor (2005a)

Number of employees	Total	30~49	50~99	100~199	200~499	500~999	1000~
Number of LMC	34,867	15,668	10,735	5,030	2,388	666	380
Percentage	100	45.1	30.6	14.4	6.9	4.2	1.1

### 3.2.3 Promoting the Role of LMCs?

Because the establishment of LMCs was stipulated by law requiring that they met regularly, it would seem that these bodies would meet frequently when the organization rate is low and a small ratio of workers is covered by collective agreements. However, reality shows that this is not the case.

Here the problems are:

- 1) Mandating that workplaces with 30 or more employees must have an LMC is a failure to understand that small scale companies — where the organization rate is extremely low and the need for an LMC is relatively higher — need LMCs.<sup>18</sup> At the same time, small scale workplaces do not have the ability to deal with matters that should be discussed by the LMC, consequently, they cannot be covered with the legal source that LMC can make.<sup>19</sup>
- 2) The right of a majority union obviously diminishes the significance of an LMC.<sup>20</sup> For an employee to be elected to this body, (when there isn't a majority union), he/she must be recommended by more than 10 workers and the vote is a secret ballot. In many cases, non-organized employees and members of minority unions cannot be represented by an LMC, and proper consideration toward other groups — such as atypical workers, disabled workers, and female workers — should not be overlooked. A way needs to be found for this later group of workers to express their will in the decision making process.

A recent research report from KLI (“Reform Measures for Advanced Industrial Relations Laws and Systems”) proposed that a majority union’s right to entrust worker members to LMC should be abolished and workers themselves should be able to elect their members in all workplaces. The report also emphasized that dispatched workers and workers from subcontracting companies should be given an opportunity to voice their opinions at a LMC. When there is no majority union, which will happen more and more with the introduction of multiple unions on the enterprise level, the employee representative on an LMC should be considered such under the Labor Standards Act. Other alternatives are using a proportional representation or quota system.<sup>21</sup>

- 3) In fact, the big issues concerning working conditions are included in consultation matters, and most of these overlap with Article 96 of the LSA (compulsory matters for employment rules). When consultations are not successful, there is no alternative. This brings about waste in the consultation process, and it become more difficult to reflect the will of the workers.
- 4) Unlike consultation matters, LMC-derived resolutions need agreements, but what if the employer proceeds without agreement? An employer has the responsibility to carry out his/her duties in good faith (Art. 23), and can be fined (Art. 30(2)), but the absence of agreement doesn't make the resolution (made by employer only) void.

Expanding the number of issues requiring resolution by an LMC inevitably brings about conflict with a union’s right to bargain, particularly the terms of employment. Actually, the APWPC doesn't contain provisions for enforcing resolutions, which means that a resolution handed down by an LMC does not affect collective bargaining. If the body fails to reach a resolution, voluntary arbitration can be suggested. But they cannot deal with the problem through the mediation system in TURLA. Regarding

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<sup>18</sup> Kim Hyung Bae (2001), p. 814.

<sup>19</sup> Park Jong Hee (supra note 16), p. 128.

<sup>20</sup> Kim Hoon, Lee Seung Wook (2000), p. 20; Ministry of Labor (2005b) pp. 35-36.

<sup>21</sup> Ministry of Labor (2005b) pp. 37-38.

decisions related to working conditions, problems arise over how to prioritize enforcement of decisions resulting from collective bargaining, employment rules and LMC deliberations, since such decisions have no provisions about validity or effectiveness.

Consultation matters can proceed to resolution, and the effectiveness of the resolution calls into question: does it have legal binding force on an individual employee, despite his/her contract? The answer is “No,” because an employee does not have the choice of joining or withdrawing from an LMC, unlike a union, and there are no legal grounds upon which the employee’s representative can be endowed with personal rights from individual employee. This also means that the resolution does not have preferential power over employment rules and collective bargaining. It is expected to be observed indirectly by fine-provision (APWPC Art.30 (2)), so even if the terms of employment were settled at the LMC level, neither an individual employee nor an employee representative can insist on any legal rights, and it thus remains a gentlemen’s agreement.

But it is strange that LMC resolutions have are not backed up with legal power, as they are agreed to by both labor and management. It seems that these resolutions fall somewhere between employment rules regulated only by the employer and collective agreements.<sup>22</sup>

Because of this, workers argue that the scope of matters subject to decision be expanded and that LMC decisions take priority over employment rules or employment contracts, whereas management insists that the scope of matters subject to decision be greatly reduced.

- 5) Workers’ representatives can request relevant documents and employers shall respond in good faith to such requests. Data inspection rights are becoming more important, especially with the tendency toward contract-based annual salary systems. Fairness in evaluating accomplishments requires fairness at the procedural level as well as the substantive level, and this presupposes participation by the employee side will be better dealt with at LMCs than during a collective bargaining procedure<sup>23</sup> because of its co-operational character. But actually this rarely happens because employers understand that when cooperation breaks down, matters always lead to collective bargaining. Employers are not motivated to share their information due to fear of being placed at a disadvantage during collective bargaining by the information they have already revealed.

### **3.3 Recent Approaches**

The biggest problem with LMCs at the present time is that cooperative labor relations (LMC) / struggling labor relations (collective bargaining) are carried out by the same bodies at the same level.<sup>24</sup> There have been noticeable suggestions recently to reconstruct South Korean labor law in line with changing industrial relations.<sup>25</sup> These suggestions emphasize the need to centralize labor relations, suggesting a dualistic system of labor relations. Specifically, collective bargaining should be separate from LMCs, carried out outside the company, while cooperation and consultation should be made inside the company. As a result, labor unions must become nonenterprise level unions. This is to insist that the dual system can strengthen

<sup>22</sup> Kim Hoon, Lee Seung Wook (supra note 20), pp. 16-17.

<sup>23</sup> Supra, pp. 19-21.

<sup>24</sup> Uh Soo Bong (1995), p. 78-82.

<sup>25</sup> supra, p. 67.

solidarity and uphold equality among employees as well as strengthen the organization; it can guarantee the professionalism of labor relations which will aid smooth co-operation at the enterprise level; the government will respect enterprise level autonomy, and at the same time macro-level participation and agreement from both sides as partners in policy making will be secured; and the role-sharing between workplace and society can be accomplished economically. For this to happen, a strongly centralized union is essential to dualize labor relations, separating matters handled through co-operation from those dealt with through bargaining.

## 4. New Challenges

### 4.1 Changes in bargaining process

Collective bargaining and collective agreements mainly take place at the *chaebol* level, so collective agreements and social contracts have many gaps. The recent report, “Reform Measures for Advanced Industrial Relations Laws and Systems,” notes that the position of the majority union will be difficult with the legalization of multiple unions on the enterprise level from 2007. The shift to industrial unions is expected to overcome the vulnerable points of enterprise level agreements. With industrial level bargaining in place, branches at the enterprise level in principle usually will not have power to bargain independently, except when there is delegation. Currently, branches have been more active in collective bargaining whether or not there is a delegation<sup>26</sup>, and this brings workers in the same industry into conflict with one another.

Both major union federations (the KCTU and FKTU) try to organize industrial unions. Considering the present situation of employer-biased labor relations, the employers’ refusal to recognize industrial unions is unreasonable. Enterprise level unions are criticized for only paying attention to their own self interests, lacking an ability to cope with changes in the labor environment and not being interested in social roles.<sup>27</sup> What is worse, conflicts among workers are becoming more serious, with stable, large firms offering high salaries and unstable (atypical), small firms paying low salaries, a vicious circle which it appears will not disappear soon. These two extremities are serious problems, and it is becoming worse. Consequently, there is a fear that labor unions cannot play any role as a social partner. Actually, job instability and an increase in atypical workers will shrink the territory of enterprise level unions, relatively broadening that of centralized unions.

### 4.2 Review of the Employee Representation System

The framework of employment rules that enable employer to make unilateral decisions, including even to lower the terms of employment seems unfair, compared with the workers’ representative system. Both have been playing more or less negative roles with employee not having a chance to reflect their opinions, rather than positive roles. This happens more clearly when considering the unique situation of enterprise level unions. To regard workers’ representatives on the LMC as worker’s representative under the LSA, and to guarantee a democratic basis to this structure, could be an alternative, and maybe a decent one. Originally such decentralization does not presuppose a social basis for agreement, but is aimed at making use of the weak bargaining power at the enterprise level, so this may be a bottom line

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<sup>26</sup> The subcommittee on Industrial Relations, South Korea Tripartite Commission (2004) shows good examples of these tendencies from almost all industry fields. Still centralization is not mature, and branches have many complaints about the policies of the central organization.

<sup>27</sup> Supra.

to change the environment in bargaining as compensational efforts.

As for the role of LMCs, union activities shall not be affected by AWP, and it is not clear whether this provision means labor union cannot interfere with areas usually under the jurisdiction of LMCs. Excluding matters requiring resolution (Art. 20), most of the matters discussed at LMCs end up with reports or consultations, so it does not appear that the two bodies collide with each other. But if collective bargaining by labor unions can deal with matters usually taken up by LMCs, the legal status of the LMC will become unstable, often useless. This is part of the reason why the LMC system does not work very well even though it is a legally established body.

Courts also confuse the status of different employee representative. In one case the judgment was that the LMC representative was recognized as having the power to make collective agreements<sup>28</sup>. In another case, LMC representatives can play the role of a worker's representative under the LSA<sup>29</sup>, while the LMC resolution was denied when it involved unfavorable modification of employment rules<sup>30</sup>. Even taking into consideration special factors, these cases appear to show that a unified understanding of these systems does not exist.

Usually enterprise level unions consist of the majority, so LMCs cannot play an independent role, but only are concerned with prior consultations. In places where an enterprise union is not established, the LMC in reality plays the role of a union.<sup>31</sup> Therefore the roles of labor unions, LMCs and employee representatives (under the LSA) are not organized, often resulting in weakening the power of the union. At least a proper distribution of rights and power should be arrived at, and of course an institutional reexamination about the process of LMC resolutions and the effects of such resolutions must be included.

## **5. Conclusion**

In South Korea, workers' representatives and Labor Management Councils are the main types of employee representing systems that have replaced trade unions.

Regarding the former, the absence of apparent power and, to some extent, even vagueness in its definition, makes the system hollow. As far as the latter is concerned, despite new legislation of APWPC, the system itself is not considered to have made substantial progress, and only remains as an employer biased organization. Actually, this is just to share the functions of a trade union with a workers' representative under the enterprise-level union system, and relations between the two are not clear due to vagueness in provisions and interpretation. What is more, the right of workers' representatives to extend statutory working hours is just within the range of the standards set by the LSA. But considering the status of LMC representatives with that of workers' representatives, they have some features in common, while also having differences.

The 1980 amendment to the South Korean labor law forced the formation of unions as enterprise level union. In 1987 this was abolished and unions were free to organize at any level. But enterprise level unions occupied a dominant percentage prior to 1987, with almost all unions cooperating with the employers, inexperienced and accustomed to dealing with and struggling with them. In such a situation, employees wanted to have unions that had strong bargaining power, and was one initiative to organize industrial level unions. With this, the Tripartite Commission agreed to allow the unemployed to join non-enterprise level trade

<sup>28</sup> Supreme Court 2002. 11. 8, 2001 da 15729.

<sup>29</sup> Supreme Court 2005. 3. 11, 2003 da 27429.

<sup>30</sup> Seoul Administrative Court, 2002.12.13, 2002 guhap12519.

<sup>31</sup> Hur (supra note 3) pp. 65-66.

unions in 1998. But the legislation has been postponed. The International Labour Organisation has recommended amending the regulations restricting the qualifications for union membership. As is properly indicated by the recent report of “Reform Measures for Advanced Industrial Relations Laws and Systems” issued by the Ministry of Labor, allowing the unemployed to join unions raises an important issue, consequently guaranteeing the basic constitutional rights of workers. Industrial level unions can be expected to be a solution to this.

Aggressive union struggle after 1987 made workers indifferent/hostile to LMCs, which functioned more or less on the employers’ side. Unions were considered to be the only way to promote working conditions in enterprise union based labor relations. Now things are going to change with industry-level bargaining and multiple unions allowed in one company, weakening the highly concentrated and monopolized powers of enterprise level unions. Various types of bargaining will be held at various levels by various units, and the characters involved in collective bargaining will not be same, nor will workers’ representative or LMCs. Shall these three representing bodies be indifferent to each other or cooperate with one another?

The recent trends toward individualization and decentralization in industrial relations in Western countries can be an alternative to overcome the rigid structure of industry level decision making, but this process is not expected to proceed in the same way in South Korea. Despite the decline of union density, unions still appear to be in the tradition of centralized industrial relations, which makes it possible to rely on collective bargaining as a social resolution and minimum standard. In South Korea, trials to make industrial level labor relations regular and general still faces the hurdle of overcoming the reality of enterprise level bargaining.

Different directions does not always mean different destinations, especially with different starting points and backgrounds. We can expect to reach common good results in the end, even though we are chasing different ways.<sup>32</sup> In South Korea, an employee representation system at the enterprise level does not look optimistic without the success of a centralized union. The focal point seems to be located at the level of centralization, which can guarantee fair standards of working conditions in South Korea. Reasonable and fair rules, autonomy and responsibility can be implemented by placing at the right place what has to be there, making clear and fully guaranteeing what is stipulated by law.

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<sup>32</sup> Lim Sang Hoon (2006), pp.148-153. He says the direction between South Korea and Western countries seems reverse, but they are similar in pursuing flexible control between industrial/ enterprise level bargaining. He also insists that the tasks of South Korea labor relations should be 1) weakening the role of enterprise-level organizations and bargaining, and 2) clarifying the roles of labor unions and LMCs.

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