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The 7th JILPT Tokyo Comparative Labor Policy Seminar 2024
"*Challenges in Collective Labor Relations in the Context of Worker and Workstyle Diversification: Reassessing the Role of Labor Unions*"

The Japan Institute for Labour Policy and Training

Japan Labor Issues

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* Entries are arranged based on the seminar program.
* The responsibility for opinions expressed in signed reports rests solely with their authors, and publication does not constitute an endorsement by the Japan Institute for Labour Policy and Training of the opinions expressed in them.

Preface

The 7th JILPT Tokyo Comparative Labor Policy Seminar 2024

"Challenges in Collective Labor Relations in the Context of Worker and Workstyle Diversification: Reassessing the Role of Labor Unions"

The rapid advancement of technological innovation and the global COVID-19 pandemic have led to the expansion of new workstyles alongside worker's diversified attitude toward work. As workers' needs is increasingly diverse, it becomes difficult to set uniform protection by labor law, resulting in a growing reliance on labor-management negotiations for decent working conditions. Consolidating the diverse voices of workers into a unified entity is proving to be a formidable task with the unionization rates on the decline. The inequality in society is more serious than before. In such circumstances, the traditional role of labor unions in organizing workers, aggregating their needs and seeking improvements in working conditions and the working environment through collective bargaining and labor-management consultation remains paramount. Nevertheless, the problem of labor unions limiting their roles to a subset of workers has long persisted in number of Asian countries, characterized by dual labor market structures comprising standard/non-standard workers or formal/informal sectors. The issue of how to accommodate individuals with new workstyles, such as gig workers and freelancers in the platform economy, within the realm of labor unions poses new challenges. Some countries have been discussing alternative or complementary schemes, such as employee representative system, to collectively represent workers in workplaces, distinct from labor unions.

The 7th seminar aims to shed light on how labor-management relations are affected by the diversification of workers and work styles and how labor unions are responding to this trend, as well as the current state of labor-management relations and key issues in each region through international comparisons. In the following pages, readers will find a keynote lecture by President of ISLSSL and ten excellent reports presented by researchers from the Asia-Pacific regions. Taking this opportunity, JILPT would like to express our sincere gratitude to Prof. María Emilia Casas Baamonde for her contribution to insightful keynote lecture. JILPT is grateful to the chairpersons, Prof. Hideyuki Morito, Prof. Chikako Kanki, and Associate Prof. Itaru Nishimura for their outstanding comments. JILPT also would like to deeply thank Prof. Takashi Araki for his significant contribution to conclude the discussions.

Keynote Lecture

María Emilia CASAS BAAMONDE

We must deal with what we could call "the weight of the future" —in addition to the weight of the past—, which made David Lawrence, an English writer of modernity and industrialization, ask: why can't my future be a mere succession of days? Among other reasons, because this future has already imposed unavoidable challenges to economic and social development, to the lives of people and, specifically, to workers, with digitalization and climate change being unstoppable phenomena of universal impact. Furthermore, the future, which by hypothesis we will not be in, can never be a mere succession of days.

It makes me very happy that you are celebrating the 7th Tokyo Comparative Labor Policy Seminar in Tokyo in person, after four years without being able to do so, and you are doing it with researchers from Asia-Pacific countries for the international comparison on the topic and to build a network among researchers. My most enthusiastic congratulations and my best wishes for success in your work and in the construction of a network of researchers, not only very useful, but necessary for real knowledge of the problems and the consistent proposal of labor policies and standards.

The topic they have chosen for this 7th edition of the seminar could not be more appropriate, since the diversification of jobs and workers, very minor in the past industrial analogue world, is a reality of our days to which we cannot close our eyes, since it calls into question the collective of workers and their common interests, a "class" community that is the origin of the union as a contracting agent, in the theorization of the WEBB spouses in England at the end of the 19th century, and of the industrial company. Traditional Fordist based on the work of the collective of workers and on the hierarchical organization of processes of division of industrial labor to obtain results in production and in the market.

The coordinates of work diversification: time, place, skills, longevity

Work is essential to the human condition; "it is more than making a living," as the President of the European Commission said in her Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, of 14 January 2020, entitled *A Strong social Europe for just transitions*, as it offers "social relations and a place in society, as well as opportunities for personal and professional development," which must be able to be defended by workers' representatives, unions and other representatives, through dialogue and social agreement, collective bargaining and other techniques of conflictive action. However, this is only the case if the job "has fair and decent working conditions," if it is a decent job that allows a decent life, which entails "obtaining the necessary support to look for a job, having access to assistance affordable and quality healthcare, decent education and training and affordable housing, as well as being able to pay for essential goods and services, such as water, energy, transport or digital communications."

The ILO Declaration on Fundamental Principles and Rights at Work and their Follow-up, adopted at the 86th session of its International Conference in 1988 and amended at its 110th session in 2022, grants this fundamental legal status to the rights of freedom of association and freedom of association and the effective recognition of the right to collective bargaining, recognized in two of its eleven "fundamental" agreements, agreement numbers. 87 (1948) and 98 (1949), which bind all States regardless of their ratification.

However, these fundamental rights and agreements, without prejudice to the fact that they continue to be an invaluable guide to face the magnitude of the challenges and changes that are not easy in a present marked by a future that pushes you hastily, are applied today to diverse work realities and profoundly transformed, which call into question the effectiveness of union representation action and collective bargaining and that of the union subject itself in the face of the variety of jobs that refuse to be defined according to their traditional guidelines in force in the last century. The management of technological change, which must involve unions, must favor decent work.

It is said, and rightly so, that work is crossed by time. International institutions specialized in the analysis of labor markets and their legal regulations have agreed that the strategic use of working time in the Covid-19 pandemic contributed to mitigating its effects and promoting economic and social recovery (without prejudice to the incidence of subsequent crises). Currently, the European Union regulates (in its Directive (EU) 2019/1152 of the European Parliament and of the Council, of June 20, 2019, on transparent and predictable working conditions in the European Union) a right to predictability of employment. working time—there is also in the Law of the European Union a traditional instrument of working time, limiting that time to the benefit of "non-working time" —in the face of the uncontrollable growth of atypical jobs (of the atypicality and duality of the work) in which the form of organization of working time and its distribution are subject to patterns that may be determined, or indeterminate, or changeable, by decision of the employer, which, moreover, manifests itself, or may do so, through automated decision-making systems generated by artificial intelligence. Of course, the global transformations of the economy have distanced us from the "expansion of sovereignty" of workers over their own time, an excessive notion that not so long ago, in 2019, was defended by the ILO, its Global Commission for the Future of the Labor, in its report "*Working for a more promising future*" (January, 2019), favored by digitalization and technological change, with the aim of making work time compatible with family care time and making the rights of workers effective. reconciliation of work, family and personal life of working people. What it is about now is to ensure workers, certain atypical workers, numerous in all countries, a minimum predictability of their working time in the face of total uncertainty (in on-call work, in employment contracts 0 hours), which unions would have to avoid through collective bargaining.

The work is crossed by space. The single, traditional workplace has long been broken, replaced by numerous workplaces, unknown workplaces, and "non-work" places, such as virtual companies, which previously did not exist. Remote work, provided technologically (teleworking), agile work, smart work, digital nomads, digital platform workers, global supply chain workers... show a plural reality of jobs and workers, which, as the disappearance of unifying work time reveals a diversity to which unions and collective bargaining are not accustomed, but which they must penetrate if they want to be present in labor relations called for the growth of a previously unknown diversity.

Finally, work is also decisively affected by the adequacy of supply and demand, currently affected by serious imbalances; It has always been, but now the uncertainty, the unpredictability, has decisively extended to the professional qualifications of working people, qualifications that were previously thought to be acquired for a lifetime and today require continuous recycling, lifelong learning. Since the last decades of the last century, the possibility, then the evidence, of replacing the right to the stability of contractual work

life with a new right to mobility in the market and in training had been pointed out. In the new century, few people would have the same job throughout their lives and very few would have it in the same company. The work will not be provided—it is no longer provided—through a single contract, for a single company, during the working life of the worker. But that is not the only question. The point is that the "normality" of working life will experience transitions or changes, not only of tasks or functions, nor only of jobs in the occupation or profession, but of totally different professional occupations, and possibly not just one, but several throughout people's professional lives, requiring workers affected by the loss of skills to have new rights to continuous training and adaptation of their skills to the changing circumstances of the economy, technology and transition climate change and, where appropriate, social protection rights not only against job losses due to these imbalances, but also against the obsolescence of their professional skills during requalification processes.

The longevity of people, undoubtedly a progress of humanity, science and medicine, produces a shortage of professional skills in economic transition processes as rapid and as decisive as those we are experiencing driven by digitalization and the fight against the destruction of the planet. People's acquisition of new skills, their opportunities to complete and renew their professional qualifications, have strategic value for their own lives, and for a modern, productive and resource-efficient economy. This is the great issue of our time for unions and collective bargaining, which must deal, with the States, with recognizing and developing the training of adults as a true subjective right.

The effects of digitalization at work; new differences and inequalities

It is known that changes in work, in time, in space and in the skills of workers have accompanied the introduction of new technologies in the workplace since at least the first industrial revolution. It happens that the current technological impact has a greater and more intense capacity to affect work, in continuous acceleration. Automation, robotization, artificial intelligence, industry 4.0 on the way to communication and industry 5.0, create totally new qualifications, functions or tasks, jobs and jobs, new times and places to provide them, in permanent transformation, and destroy others. old, within the trend of decreasing human work in developed economies detected by all the projections about the future of work.

In its Report, already from 2016, on "*The future of employment: employment, skills and workforce strategy for the fourth industrial revolution*", the World Economic Forum, which attributed the forecast to a "popular estimate", considered that 65 % of girls and boys studying primary education in 2015 would work in jobs that did not exist at that time, which highlighted the need, in a context of great uncertainty, for a high capacity to adapt educational systems to demands required by the global technological transformation and creative jobs that machines could not replace, and, at the same time, by a greater need for personal services, which the educational policies of the States had to facilitate and seek.

The WEF, in its *Global Risks Report 2024*, published on January 10, has highlighted that climate change, demographic changes, technological acceleration, and geopolitical transformation are the dynamic "structural forces" that are undermining global stability. In the long term, developmental progress and living standards are at risk. Economic, environmental and technological trends are likely to reinforce existing challenges around labor and social mobility, hindering people's opportunities to obtain relevant skills for the digital world and, consequently, income and therefore, the ability to improve their economic situation (Chapter 2.5: End of development?). Lack of economic opportunity is one of the top 10 risks identified by respondents over the two-year period. The narrowing of individual paths to stability in livelihoods and work also affects human rights development, from poverty reduction to access to education and health care, and, of course, to rights to freedom of association and collective bargaining.

Already in its 2018 report—*The Future of Jobs*—, the WEF had predicted that technological advances—ubiquitous high-speed mobile internet, artificial intelligence, widespread adoption of big data analysis and cloud technology, internet of things and new energy technologies to move towards a greener global economy—would mean the loss of 75 million jobs, particularly routine and repetitive manual and cognitive jobs, and 50 million emerging jobs would be created, with growth in remote work (data analysts and scientists, software and application developers, specialists in e-commerce and social networks and in 'human' skills, such as creativity, originality, initiative, critical thinking, persuasion, negotiation, attention to detail, resilience , flexibility and complex problem solving), and that the average change would affect 42% of the job skills required in the period 2018-2022.

In the surveys carried out, employers expressed their option for requalifying only workers with high-value functions, with key, front-line, or high-performance functions, as a way of strengthening the strategic capacity of their companies, and in a proportion much lower, 33%, to serve workers at risk of skills obsolescence due to the impact of their jobs due to technological disruption. The WEF concluded in 2018 that those who needed it most were less likely to receive new training, while noting that the skills gap could hinder the incorporation of new technologies and business growth.

The McKinsey Global Institute had estimated between 400 and 800 million people who would be displaced from their jobs in 2030 due to automation, with the effects of unemployment and social inequality (*Technology, jobs, and the future of work*, May 24, 2017).

The subsequent McKinsey Global Institute report, *The future of work after COVID-19*, dated February 18, 2021, stated that "the challenge of retraining and repositioning workers in new occupations in the long term" would be "greater than that of adapting to the crisis" of Covid-19, "as it developed". It analyzed eight countries with diverse economic and labor market models: China, France, Germany, India, Japan, Spain, the United Kingdom, and the United States; Those eight countries, together, represented almost half of the world's population and 62% of GDP. The possibility of professional transitions would have increased considerably due to and after Covid-19: by 12% on average and by up to 25% in some advanced economies compared to the situation before the pandemic, affecting occupational changes to more than 100 million workers who are difficult to retrain in the eight countries by 2030.

Progressively complex automation, robotics and artificial intelligence would demand people with training in engineering, computer science, neuroscience, programming, control of algorithmic biases, expertise in communication and social networks, graphic design, renewable energies, energy efficiency and waste treatment; in general, health and pharmaceutical and personal care professionals, and digital and environmental ecosystems, and people with social and emotional skills. In its quantification planned for 2030, 500,000 more jobs with high salaries would be created, and 700,000 more jobs with medium salaries and 100,000 more jobs with low salaries would be destroyed. With these large-scale forced employment transitions disproportionately affecting women (3.9 times higher than for men in Spain, France and Germany), young people, the elderly, low-wage workers, people without university degrees and immigrants belonging to ethnic minorities.

For the IMF, in its Discussion Note on "*Artificial Intelligence and the Future of Work*", from January 2024, artificial intelligence, "a broad spectrum of technologies designed to allow machines to perceive, interpret, act and learn with the intention to emulate human cognitive abilities" is "called to profoundly change the world economy as a new industrial revolution." The IMF has questioned, in that Note, the generalized estimate that in high-quality jobs, with creative and non-routine skills, the substitution effect of robotics and artificial intelligence would be lower, and the complementation effect would prevail. As the IMF now predicts, almost 40% of global employment would be exposed to artificial intelligence, with the

exposure rate in advanced economies being higher, around 60%, due to "the prevalence of jobs oriented to cognitive tasks", although these economies are better prepared to benefit from artificial intelligence than emerging market and developing economies. The effects of artificial intelligence on employment are uncertain, as it can increase work productivity, while threatening to replace people in some jobs and complement them in others, causing greater income inequality between workers and countries. Only in the hypothesis of relevant increases in productivity, these increases could translate into greater growth and higher incomes for the majority of workers. The adoption of artificial intelligence could boost total income if it significantly complements human work in certain occupations with productivity gains. In this scenario, greater employment associated with artificial intelligence could offset its substitutive effect on human labor with an increase in labor income in the distribution of income and wealth through redistributive and fiscal policies.

The IMF insists on occupational displacements. Workers with university education are better prepared to move from jobs at risk of displacement to jobs with high complementarity, while workers without post-secondary education have reduced mobility. Younger workers who are adaptable and familiar with new technologies will also be better able to take advantage of new opportunities. On the other hand, older workers may be more vulnerable to the transformation of artificial intelligence and encounter difficulties in their recycling and reemployment, technological adaptation and training in new job skills.

Nobody is sure that the forecasts of the cited reports will be fulfilled. However, not addressing them and not contemplating a diverse and absolutely transformed reality of work, and with future forecasts of greater transformation, would be to close one's eyes to reality and encourage false illusions or ignorance, results absolutely incompatible with scientific research. the problems that concern us as specialists in labor relations. The ILO also warned, in 2023, that the evolution of the world of work, also driven by digitalization and the growing needs of the assistance or care economy, is altering the demand for professional skills in companies, which will give "It leads to an inadequacy of competencies, if these are not reinforced through the educational system and lifelong learning." For all economies, social safety nets and the retraining of workers susceptible to adapting to digital and climate change are crucial to ensure their social inclusion.

In short, the transformations of the economy and society, specifically the double green transition (Green New Deal) and digital (Digital Compass), will significantly impact work, the productive structure, the organization of companies, professional skills, converting them, in turn, into factors of transformation and the future, on our personal lives and the functioning and guarantees of the democratic institutions themselves.

The transformations in the functions of unions and collective bargaining in light of the diversification of work. The social justice of digital and environmental transitions and social dialogue

There is no doubt that the scenario of action of unions and collective bargaining has become enormously difficult, making them lose footing in their tasks of representation and defense of collective interests defined by their equal impact on the workers of a country, sector or company, which unions have been carrying out in different countries at least since the beginning of the 20th century.

Not only has the basis of representation changed, the human prototype on which the union subject was built has diversified and its old uniformity has been replaced by different workers (women, young people, older people, immigrants, highly qualified, unskilled, typical or atypical, unemployed, discouraged and other vulnerable groups...) and progressively diverse, unequal interests, of which it is increasingly difficult for unions to synthesize. It also happens that the time—the typical employment contracts for an indefinite period and with fixed hours—and the place—the factories or manufactures and the companies, that is, the

workplaces—of the representation of the unions have blurred, being replaced by varied times and places, which relocate the functions of union representation.

The management of work by a corporate management power, delegated on numerous occasions but previously identified or identifiable, has been combined or replaced by an algorithmic management of work, supposedly objective and even supposedly removed from human intervention, supposedly devoid of arbitrary biases and fair, and, as such, does not require the control of the unions, which are denied due information and transparency regarding the use of algorithms in making hiring, management, modification of working conditions, and termination decisions. contractual (dismissals). A kind of new divine justice against which there would be no room for any type of human defense.

The very representation capacity of unions, even in legal systems in which their affiliated entity of workers is not decisive in recognizing their status as social partner or subject of collective bargaining, is difficult to exercise in new forms of business. and work characterized by the individuality of jobs and workers, by new jobs and workers. How to represent workers who, in the field of digital platforms, provide services isolated from each other, remote workers, digital nomads or those who work in the closed areas of domestic and personal care? The European Union has just approved a *Directive on work on digital platforms* with the dual purpose of improving the working conditions of workers and regulating the algorithmic management of work. The European Union states that there were more than 28 million people working on digital platforms throughout the EU in 2022, setting its growth at 43 million workers by 2025; workers who carry out varied tasks, both on-site and remotely, such as delivery, translation, data entry, childcare, care for the elderly or taxi driving, for many constituting a second task.

Should unions resign themselves to remaining a residual figure in industrial and service companies with staff identified by the typical nature of their contract and work? Furthermore, should they be considered as institutions of the industrial past after having experienced the great change in the 1960s from the contractual union to the political union and the political function of collective bargaining being theorized? (A. Flanders, "*Collective Bargaining—A Theoretical Analysis*," 1968).

The continuous transformations of unionism, a space of not definitively defined components, must take place once again to embrace the force of digital change, which is absolute. Failure to address demands for change could exacerbate social tensions and lead to growing bifurcation, greater inequality, between workers and wages. Unions need to understand that a well-trained workforce equipped with the skills to adopt automation, robotization and artificial intelligence technologies will ensure that our economies enjoy greater productivity growth and that the talents of all workers are harnessed. The lack of training offered to workers and social dialogue with unions, combined with low salaries and low productivity, do not favor business innovation, nor the creation and retention of talent.

Unions must move towards what is called long-term representation, transversal representation, without detriment to specialized attention to certain professions and jobs that require it, specialization with foreseeable growth in innovative occupations arising from digitalization.

For its part, collective bargaining, as a privileged instrument of union action, must be enriched with new contents and functions and combine in a more complex way than in the past its approach to companies as areas of negotiation and to the sectors, essential in the individualized work, and with greater development at the intersectoral level, necessary to face the inevitable digital, climatic and demographic transitions, whose impact on human work is, as has been expressed in broad strokes in these brief lines, of great magnitude.

The European Union and the ILO insist that transitions must be carried out with social justice, a notion whose variations occupy an inexhaustible literature. The term "just transition" is a contribution from North American unions in the 1990s to demand the need for a support system aimed at workers unemployed by

environmental protection policies. The concept was accepted internationally by governments in different areas and by international organizations.

The European Union has been pointing out, since before the pandemic, and in its most recent economic governance documents, that the application of the pillar of social rights and solid social dialogue between business and union organizations and effective at different levels, from elaboration of European and state policies down to the business level, is a condition of social justice of these transformations. A just transition implies, according to the ILO, which approved in 2016 Policy Guidelines for a just transition towards environmentally sustainable economies and societies for all, maximizing the social and economic opportunities of digitalization or climate action, while minimizing and challenges are carefully managed, through effective social dialogue between all affected groups and respect for fundamental labor principles and rights, including those of freedom of association and collective bargaining.

Digital and energy transitions require collaboration with unions, although only 23% of the companies surveyed would opt for unions as collaborators in the transition processes, according to the WEF, 2018. With companies, which are the best As they know what is needed in their industrial ecosystems, unions and individual workers need to seek a deeper understanding of the new labor market and be prepared to take a proactive stance in the face of ongoing changes.

I reiterate that it has been and will always be a privilege for me to share with the JILPT the excitement of holding its annual comparative law seminar with a result that is always beneficial for everyone, based on the excellence of its project, a conscious project of distancing of mediocrity and the search for excellence, inserted in a progressively open and interdependent world that, therefore, needs to be compared through rigorous analysis.

María Emilia CASAS BAAMONDE
Complutense University of Madrid, Spain. President of International Society for Labour and Social Security Law (ISLSSL).

Australian Trade Union Density in Crisis: Precarious Work and Collective Bargaining

Eugene SCHOFIELD-GEORGESON

I. Introduction

In 2022, Australian trade union density declined yet again from 14.3% of 2020 to 12.5%.[1] This figure is far below the peak of Australian union density at around 65% in 1948,[2] and far below 1970s levels of around 51%.[3] The decline in density correlates with a reduction in the economic and cultural power of trade unions to redistribute wealth through collective bargaining and influence politics through egalitarianism. In fact, record low union density in 2022 paralleled the highest levels of Australian social inequality since 1950.[4] For decades, meanwhile, industrial relations scholars have linked union decline to systemic legal shifts from sectoral to enterprise bargaining, compulsory to voluntary association and increasingly individualised and precarious forms of employment.

Elected in 2022, a Federal Australian Labor Party (ALP) Government has wasted no time enacting a significant volume of reform to mitigate the crisis. These legislative measures include multi-employer bargaining, "gig economy" regulation, the criminalisation of deliberate underpayment of wages or "wage theft," as well as legally enforceable pathways for conversion from casual to ongoing employment. These measures may have some impact on stemming the decline in union density but are unlikely to generate any significant growth in union membership. In this respect, trade unions and industrial scholars are practicing and proposing a range of further solutions, variously involving default union membership, a return to sectoral bargaining and co-enforcement of labour law.

In accordance with the conventions of the Japan Institute for Labour Policy and Training (JILPT), this paper is largely descriptive. It outlines the causes of declining Australian trade union density; recently enacted legislative solutions; and latest trade union practice and ideas designed to grow union membership once more. Provided here is a snapshot of Australian labour market diversification; collective bargaining and union

1. ABS, "Trade Union Membership," August 2022, https://www.abs.gov.au/statistics/labour/earnings-and-working-conditions/trade-union-membership/latest-release#cite-window1.
2. Bradley Bowden, "The Rise and Decline of Australian Unionism: A History of Industrial Labour from the 1820s to 2010," *Labour History*, 100 (2011): 51, 63.
3. ABS, n 11.
4. Tom Burton, "Australia's Wealth Gap on the Rise with Inequality Worst since 1950," *Australian Financial Review*, April 30, 2023, https://www.afr.com/politics/federal/australia-s-wealth-gap-on-the-rise-with-inequality-worst-since-1950-20230428-p5d41b.

governance laws; union decline and challenges; along with State, institutional and union strategy in response. Note that most data in this paper is derived from the Australian Bureau of Statistics (ABS), which in turn quantifies data through large household surveys.

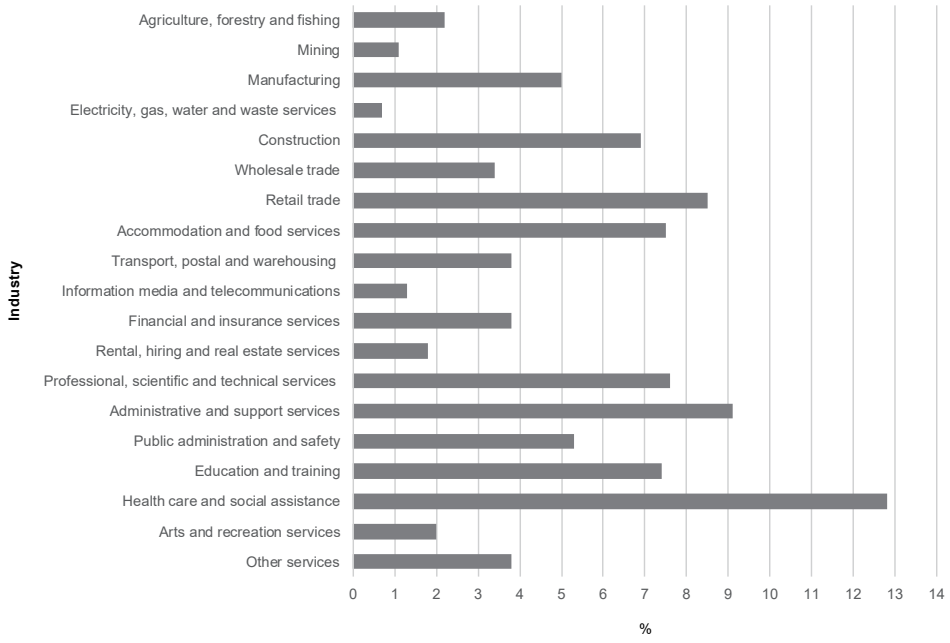
II. Labour market diversification

Overview and trends

From an overall population of 26.6 million, there are 14.36 million people in the Australian workforce.[5] Unemployment sits at a record low of 3.9% (since the 1980s), while the rate of underemployment remains steady at 6.4%.[6]

While work performed by men and women remains starkly gendered in occupational terms, there are currently only 7% more men in the workforce than women. This ratio has steadily declined over the past decade. In 2013, 12% more men were employed than women.[7]

Work remains concentrated in the services sector with health care and social assistance providing the largest number of jobs (12.8%), well in front of administrative and support services (9.1%) and retail trade (8.5%), which are the next largest industries.[8] A snapshot of the distribution of jobs by industry, 2020–21, is provided in Figure 1, below.



Source: ABS, "Jobs in Australia" (2020–21).

Figure 1. Distribution of jobs by industry in Australia (2020–21)[9]

5. ABS, "Jobs in Australia," December 6, 2024, https://www.abs.gov.au/statistics/labour/jobs/jobs-australia/latest-release.
6. Ibid.
7. Ibid.
8. Ibid.
9. Ibid.

Precarious work, including casual employment, independent contracting, fixed-term contract, and labour hire work, has increased at an alarming rate in Australia since the early 1990s. It is part of a market economic policy in which business risk has shifted from capital to labour.[10] With the exclusion of fixed-term employees, workers employed under such precarious arrangements are generally not entitled to paid leave. For the past few years, casual employment has plateaued at a rate of around 20–22.5% of the workforce, while contractors constitute around 7.5% of the labour force.[11] A further 3% of Australian workers are employed on fixed-term contracts, conventionally between 9 months to 1 year in duration.[12] Around 2.3% of workers are employed through labour hire firms, overwhelmingly in precarious employment without leave entitlements.[13] Significantly, the lowest paid 25% of workers (in Figure 2, below) are mostly employed casually and rarely have access to paid leave.[14]

There are currently around 1 million independent contractors in Australia. They are most commonly found in the agriculture, forestry, and fishing industries (54%) and construction (33%).[15] The Australian Council of Trade Unions has demonstrated that just over half of these are involved in "sham contracting" arrangements and cannot genuinely subcontract out their work—a key indicator of whether a contractor is truly independent.[16] Such workers earn dramatically less than genuine contractors.[17]

The rise in precarious work and the decline in union density, mentioned at the outset, have meant that in 2023, merely 15% of Australian workers had their pay and conditions set by a collective bargaining agreement.[18] By comparison, in 2000, 36.8% of Australian workers nevertheless enjoyed collectively bargained agreements.[19] Taken together, a trinity of growing workforce precarity, declining bargaining and union density have increased income and wealth inequality.

Figure 2 shows low, median, and high-income earnings. Median employee earnings were $1,300 per week or $67,600 (¥6,559,803) per annum.[20] The disparity between the top 90th and bottom 10 percentiles of income earners was $2,408 per week. These disparate patterns of income reflect a growth in social inequality, with the wealthiest 1% of individuals in Australia owning upwards of $8.25 million in assets—an amount that has doubled since 2021 and is set to increase by a further 40% by 2027.[21] The poorest 20%, meanwhile, own negligible assets and earn an average of $419 per week in social security payments, suffering poor health and educational outcomes.[22] Placed in historical perspective, mid-20th century Australia saw the bottom 90

10. David Peetz, "Are Australian Trade Unions Part of the Problem, or Part of the Solution?" *Australian Review of Public Affairs*, 2015, http://www.australianreview.net/digest/2015/02/peetz.html.
11. ABS, "Working Arrangements." August 2023, https://www.abs.gov.au/statistics/labour/earnings-and-working-conditions/working-arrangements/latest-release.
12. Ibid.
13. Labour hire is measured independently from other kinds of precarious employment. ABS, "Labour Hire," September 2023, https://www.abs.gov.au/statistics/labour/earnings-and-working-conditions/labour-hire-workers/latest-release.
14. Ibid.
15. ABS, n 11.
16. Australian Council of Trade Unions (ACTU), "Explosion in Sham Contracting Shows Reform Needed to Protect All Workers," Media Release, May 25, 2023.
17. Workers in sham contracting arrangements earn $242.80 less per week, or $12,644 less per annum. Ibid (ACTU).
18. Jim Stanford, "Paying for Collective Bargaining," December 13, 2023, https://futurework.org.au/post/paying-for-collective-bargaining/.
19. David Peetz and Serena Yu, "Research Report 4/2017: Explaining Recent Trends in Collective Bargaining," *Fair Work Commission*, February 2017: 5.
20. ABS, "Employee Earnings," December 13, 2023, https://www.abs.gov.au/statistics/labour/earnings-and-working-conditions/employee-earnings/latest-release.
21. John Collett, "How Much Do You Need to Be in Australia's Wealthiest 1 Per Cent?" *Sydney Morning Herald*, May 17 (2023).
22. Actuaries Institute (Aus), "Not A Level Playing Field, Green Paper," May 2023: 20–26.

per cent enjoy 96% of Australia's economic growth, with 4% going to the top 10%. Over the last decade, the bottom 90th percentile have enjoyed around 7 per cent of the country's economic growth, with 93% hoarded by the top 10%.[23]

	August 2023
10th Percentile	$412
25th Percentile	$820
50th Percentile	$1,300
75th Percentile	$1,975
90th Percentile	$2,820

Source: ABS, "Employee Earnings" (December 13, 2023).

Figure 2. Low, median, and high weekly earnings in Australia (August 2023) [24]

Expansion of "new forms of work"?

Contrary to popular belief about the extensive scale of the gig economy in Australia, the latest ABS data shows that contractors in the digital platform economy comprise just under 1% (0.96%) of the workforce.[25] Further data reveals that the average gig economy worker is male, does not rely on gig work for their main source of income, and performs gig work for less than one year.[26] Only 10% of gig economy workers operated outside transport and delivery sectors. Around half of these workers report that they regularly earn less than minimum wage.[27] Until recent legislative change in February 2024, it has been legal for gig platforms to evade paying minimum rates by lawfully classifying these workers as "contractors," rather than "employees." In sum, the emergence of gig work is problematic not because of its scale, but rather due to its potential to reshape the labour market in its own image, normalising the evasion of labour law.

"Diversification of workers" attitude to work

Almost half of women employed as digital platform workers have expressed a preference for more stable ongoing waged employment (42%), compared to 19% of men. Over a third (37%) of all platform workers would have preferred a more stable combination of waged and gig work.[28] These sentiments were shared by a

23. David Richardson and Matt Grundfos, "Inequality on Steroids: The Distribution of Economic Growth in Australia," Australia Institute, April 11, 2023.
24. ABS, n 20, "Distribution of Weekly Earnings in Main Job."
25. Ibid. This statistic is supported by the annual Australian HILDA Survey 2022 (Roger Wilkins et al, *The Household, Income and Labour Dynamics in Australia Survey*, Melbourne Institute, 2022: 89), which records 0.8% of workers, employed within the gig economy.
26. Ibid.
27. McKell Institute Queensland, "Tough Gig: Worker Perspectives on the Gig Economy," April 2023, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiYjoPd8aaEAxVUS2wGHZ_NCjEQFnoECCIQAQ&url=https%3A%2F%2Fmckellinstitute.org.au%2Fwp-content%2Fuploads%2F2023%2F03%2FMcKell-Tough-Gig-Report.pdf&usg=AOvVaw0Oq48SoNvPhm8gOkHtNTEA&opi=89978449.
28. ABS, "Platform Economy Motivations," November 13, 2023, https://www.abs.gov.au/articles/digital-platform-workers-australia.

similar proportion of casual workers, with around a third (29%–32%) wanting to shift to non-casual, ongoing employment.[29] These preferences are confirmed by a trade union study in the transport industry showing that only 47% of unionised contractors would prefer to be ongoing employees, with access to paid leave and other entitlements.[30]

III. Basic structure of collective labour relations law

Overview of trade union organising and collective bargaining laws

Freedom of Association and collective bargaining have been enshrined in Australian legislation since 1904. The original "conciliation and arbitration" system from this period required trade unions to register with the State to participate in a State-brokered system of compulsory collective bargaining at an industry-wide level. This system benefited trade unions and workers by compelling employers to bargain and ensuring that gains won by strong unions, representing workers in big business, were "flowed-on" to non-unionised workers in small business. This had the effect of incentivising union membership for small business employees, increasing union density to historically high levels across the workforce.[31]

The current Australian collective labour relations framework is known as the *Fair Work Act 2009 (Cth)*. Under this scheme, unions continue to benefit from registration with the state in order to compel employers to bargain. Following neoliberal structural adjustment policies from the early 1990s, however, bargaining devolved from an industry to an enterprise level. Since this time, collective bargaining has mostly been conducted at arms-length from the state, between trade unions and individual employers. And, without gains being flowed-on from strong unions to workers in a weaker bargaining position within a sector, the transition to enterprise bargaining has witnessed a largescale decline in union membership and collective bargaining across the workforce.[32]

Declining union density since the early 1990s, has also been accompanied by union regulation. "Voluntary association" laws have effectively outlawed "closed-shop" practices (prohibiting non-union members from working) since 1996.[33] The closed-shop was a staple of Australian industrial relations since the early 20th century. Indeed, it had been recognised by some of Australia's most conservative judges as serving a significant regulatory purpose in upholding a corporatist or tri-partite system of labour law enforcement premised upon bargaining between labour and capital, adjudicated by the state.[34]

From 2022, the Labor Government has revised the enterprise bargaining system by introducing multiple-enterprise agreements covering multiple employers. This system also enhances the recognition rights of trade unions, permits industrial action in respect to multiple employers and subjects intractable bargaining disputes to arbitration.[35] This revised system of multiple-enterprise bargaining might be seen as a half-way point between single employer enterprise bargaining and a return to industry-wide bargaining.

29. ABS, n 11.
30. Transport Workers' Union Study, cited in Michael Rawling and Joellen Riley, "Proposal for Legal Protections of On-Demand Gig Workers in the Road Transport Industry," Transit Education Audit Compliance Health Organisation, Final Report, 2021: 14.
31. Joe Isaac, "Why Australian Wages Are Lagging and What Can Be Done about it?" *Australian Economic Review* 51, 2 (2018):175, 182–3.
32. bid, 179.
33. *Workplace Relations Act 1996 (Cth)*, Part 16; *Fair Work Act 2009 (Cth)*, s340 and s772.
34. Eugene Schofield-Georgeson, *Contract, Labour Law and the Realities of Working Life*, Routledge, 2024 (forthcoming): Chapter 5.
35. *FW Act*, Part 2–4.

Worker representation other than trade unions

Significant decline in union density since the 1990s has corresponded with a decline in the enforcement of labour law. Unprecedented levels of "wage theft" and "vulnerable worker exploitation" scandals, alongside plummeting wages, have been frequent themes in Australian news-cycles for over a decade. In mid-20th-century Australia, trade unions enforced labour standards by prosecuting errant employers, but moreover, by deterring underpayment through strongly unionised workplaces. Over the past decade, such "collective" enforcement has largely been replaced by a system of individual labour law enforcement, policed by a state regulator, the Fair Work Ombudsman (FWO), in conjunction with trade unions, community legal centres and private legal representation.[36]

Individual enforcement is further entrenched by labour market fragmentation and the transition to precarious forms of work. Combined with institutional diversity in the enforcement "mix," worker representation is chaotic and disorganised. Adding to the chaos is that underpayment claims and other monetary breaches of labour law can be pursued in multiple different state and federal jurisdictions from local, district and federal civil claims courts to industrial tribunals. Skyrocketing volumes of "wage theft"[37] and soaring social inequality attest to the inefficacy of individual enforcement of labour law, particularly when compared to the former system of collective enforcement underpinned by industry-wide bargaining.

IV. Decline and challenges

Current status and trends in unionization rates

As mentioned at the outset, the most recent survey of Australian trade union density in 2022 showed that 12.5% of employees were trade union members.[38] As Figure 3 shows (below), Australian trade union density has decreased from 41% to 12.5% since 1992.

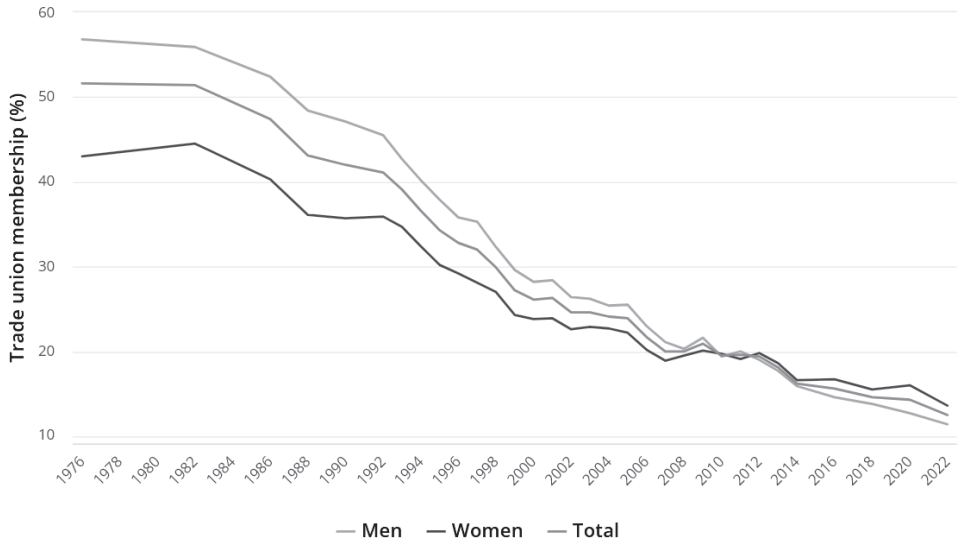
Currently, educated professionals, more women than men, have the highest rates of union membership (e.g. education and training industry (30%)).[39]

A great paradox surrounding the drastic decline in union density is that popular support for trade unions remains high, along with suspicion of corporate power, as shown by a recent Australian Electoral study in Figure 4, below.

These results were confirmed in 2020, by another poll showing that half of all Australians believed that workers would be better off with stronger unions.[40] Despite two decades of government sponsored anti-union campaigns since 1996, together with the establishment of entire government departments (such as the notorious Australian Building and Construction Commission) established for the purpose of busting the country's strongest trade unions, public support for and understanding of the legitimate role of trade unions remains high. What has changed, is the shift from industry to enterprise level bargaining along with an increase in precarious work.

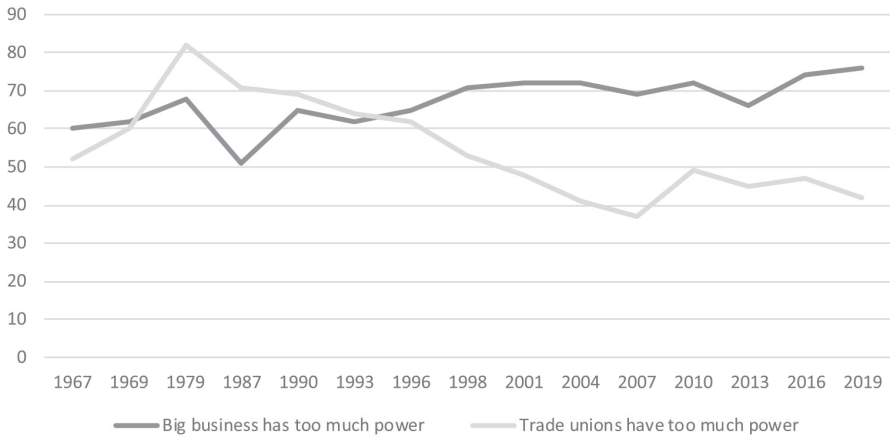
Decentralisation of bargaining, precarious work and declining density has impacted union representation.

36. Eugene Schofield-Georgeson, "Organisational Co-Enforcement in Australia: Trade Unions, Community Legal Centres and the Fair Work Ombudsman," *Australian Journal of Labour Law* 35, 1 (2022): 52.
37. An estimated one-third of Australian workers are underpaid: Select Committee on Wage Theft in South Australia, Interim Report, Parliament of South Australia, Adelaide, 2020: 6. These results have been replicated in similar studies across a variety of Australian jurisdictions.
38. ABS, n 1.
39. Ibid.
40. ACTU, "Support for Unions at Historic High: Essential Poll," June 16, 2020, https://www.actu.org.au/wp-content/uploads/2023/05/media1449148actu-media-release-200616-final-essential-poll.pdf.



Source: ABS, "Trade Union Membership" (August 2022).

Figure 3. Trade union membership by sex in Australia (1976–2022)[41]



Source: Australian National University, "Trends in Australian Political Opinion: Results from the Australian Electoral Study 1987-2019."

Figure 4. Voter's perceptions of the power of trade unions and big business in Australia (1967–2019)[42]

The switch from industry to enterprise bargaining means that union-bargained pay and conditions no longer extend to small business employees. Traditional trade union organising models are rarely compatible with a highly mobile workforce of casual workers and dependent contractors.

41. Ibid.
42. Sarah Cameron and Ian McAllister, "Trends in Australian Political Opinion: Results from the Australian Electoral Study 1987–2019," Australia National University.

Organising workers in "new" forms of work and challenges to determining worker status

Nevertheless, the Transport Workers Union (TWU) has been waging a long-term campaign to ensure union coverage of digital platform workers in the transport industry. The union has been supported in its work by a number of Australian labour lawyers who have variously called for the regulation of "gig economy" work through collective bargaining and industry standards.[43] Collective bargaining for independent contractors in the road transport industry (owner-driver truck drivers) has been a feature of Australia's largest state industrial jurisdiction of New South Wales since the mid-1990s. The *Industrial Relations Act* 1996 (New South Wales Government),[44] permits drivers, organised by the TWU, to collectively bargain with large freight and haulage companies within the supply chain, to whom they supply their services. The outcome of such negotiations has been to set fair industry-wide rates for haulage services between particular destinations. This has produced safer outcomes for truck drivers and road users, producing reliable outcomes for consumers and drivers, and reducing the "cut-throat" nature of sourcing fairly paid work within the industry.[45]

Between 2021 and 2022, union efforts to organise such workers were dealt a setback, however, when a conservative Australian High Court delivered three decisions, dramatically redefining the employee-contractor distinction and casual employment.[46] In respect to the employee-contractor distinction, the Court decided that only the employer's contract was determinative of employment status. Previously, a worker's perception of the employment relationship, objective reality, together with the employer's contract determined work status. Casual employment was also to be determined on the basis of the employer's label or "offer of employment".

However, in the latter half of 2023 and in early 2024, the Federal Labor Government reversed these decisions through legislation. This "closing loopholes" legislation has made the following additional interventions on behalf of precarious workers:

- Codifying the former legal test to distinguish between employees and independent contractors on the basis of "reality", the employer's contract, and the employment "relationship";[47]
- Introducing collective bargaining rights and minimum standards for "employee-like" gig or platform economy workers; as well as dependent contractors in the road transport industry;[48]
- Codifying the former legal test to distinguish between casual employees and ongoing employees on the basis of a "firm advance commitment to continuing and indefinite work";[49]
- Providing conversion rights from casual to ongoing employment after 6 months of ongoing casual employment;[50]
- Establishing an "unfair contracts" jurisdiction in which contractors can meaningfully challenge the terms of their engagement;[51]

43. Joellen Riley Munton and Michael Rawling, *Regulating Gig Work Decent Labour Standards in a World of On-demand Work*. Routledge, 2023; Anthony Forsyt, *The Future of Unions and Worker Representation: The Digital Picket Line*, Bloomsbury, 2022.
44. Ibid. Chapter 6.
45. Michael Rawling et al, "Australian Supply Chain Regulation: Practical Operation and Regulatory Effectiveness." Draft Report on Road Transport Sector Regulation, 2017.
46. *Workpac Pty Ltd v Rossato* [2021] HCA 23; 271 CLR 456; *Construction, Forestry, Maritime, Mining, Energy Union and Apor Appelants v Personnel Contracting Pty Ltd* [2022] HCA 1; 275 CLR; *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2; 275 CLR. Technically, the "employer-friendly" definition of casual employment triggered by one of these cases, *Rossato*, was enacted by a conservative Federal Government, shortly before the High Court delivered a similar judgment on the matter.
47. *FW Act*, s15AA.
48. *FW Act*, s15P and s15Q; s536JD and s536JL.
49. *FW Act*, s15A.
50. *FW Act*, ss66AAB-66AAC.
51. *FW Act*, Part 3A–5.

- Imposing criminal penalties of up to 10 years imprisonment for deliberate underpayment of wages (wage theft laws);[52]
- Regulating labour hire on a national scale.[53]

The most significant of these changes concern casual work. In this respect, the Australian Department of Employment and Workplace Relations anticipates that 10% of all regular casual employees (85,000 per year) will seek conversion to ongoing employment in the first five years, with 5% in the following five years.[54]

Challenges in collective bargaining and labour-management consultations

In 2021, an administrative regulator agreed to relax anti-cartel and competition laws to enable contractor bargaining.[55] Yet outside of the Australian transport industry, contractor bargaining has not yet met with widespread success. This is due to a host of legal and non-legal factors. Foremost, is the difficulty faced by miscellaneous workers' unions (for example, the United Workers' Union, UWU) in organising irregular, mobile and transient workers performing casual and seasonal work. Another problem is the way in which contractors understand the social relations of production, with many or most preferring not to be formal employees.[56] Yet another key issue inhibiting contractor bargaining is that contractors have no right to take industrial action to enforce their demands.

Organising precariously employed workers

Union campaigns to organise irregular and precarious workers have taken two key forms, involving flexible union membership on the one hand and migrant worker legal services on the other. Flexible membership has involved a host of reduced fee, subsidised, "on-demand" or monthly union membership plans, such as those introduced by the UWU. Migrant worker legal services, meanwhile, are designed to address core legal problems facing an overwhelming majority of low-paid and precariously employed workers in Australia who are also temporary or recent migrants. Many of these workers struggle to remain in the country against strict immigration laws, particularly if they report violations of labour law to federal regulatory authorities. By providing migrant workers with legal services for immigration matters, the Unions NSW and a strong Victorian State Labor Government, have supported these workers, in turn securing a steady recruitment stream.[57]

Overwhelming numbers of non-unionised precarious and migrant workers approach community legal services, rather than unions, for legal advice in employment matters.[58] Community legal centres in Australia have been chronically underfunded and short-staffed for many decades. Accordingly, recent work by the author and others in New South Wales and Victoria, has involved the trial of American "co-enforcement"

52. *FW Act*, s327A.
53. *FW Act*, Part 2–7A.
54. Workplace Express, "85,000 a Year Set to Use Casual Conversion Laws: DEWR." January 23, 2024, https://www.workplaceexpress.com.au/nl06_news_selected.php?act=2&nav=10&selkey=63031&utm_source=instant+email&utm_medium=email&utm_campaign=subscriber+email&utm_content=article+headline&utm_term=85%2C000%20a%20year%20set%20to%20use%20casual%20conversion%20laws%3A%20DEWR.
55. Competition and Consumer (Class Exemption – Collective Bargaining) Determination 2020, s7. The exemption permits clusters of small businesses to bargain with a large business, after notifying the Australian Competition and Consumer Commission (ACCC). The ACCC made the determination under the *Competition and Consumer Act 2010 (Cth)*, s95AA.
56. Transport Workers Union, n 30.
57. Unions NSW and Migrant Workers Centre Inc., *Not Just Numbers: A Blueprint for Visa Protections for Temporary Migrant Workers*, 2023, https://www.unionsnsw.org.au/wp-content/uploads/2023/08/Not-Just-Numbers_Report_FA4_WEB.pdf.
58. Schofield-Georgeson, n 36, 55.

practices in Australia.[59] In practice, this involves the referral of clients from community legal centres to trade unions, as well as trade union organising within community legal centres.

V. The State, institutions, and union strategy

Addressing the dual structure of labour market

The Australian State's most recent attempts to address precarious work or dual labour market structure are outlined above. These laws will likely reduce precarious work to a small degree. Union density may fractionally increase or, at least, plateau. A return to medium or high levels of union density, meanwhile would most likely involve a return to industry-wide bargaining and change to voluntary association laws to permit default union membership.[60]

Unions nevertheless remain oriented towards organising and collective bargaining, rather than servicing the needs of workers on an individual basis. Accordingly, the shift towards recategorizing certain groups of contractors as "employee-like" workers will assist the organisation and collective representation of these workers by trade unions. But individual enforcement will remain difficult for unions while membership remains low, diminishing union resources. The UWU remains at the forefront of Australian union campaigns to organise and represent precariously employed and miscellaneous workers across a range of diverse industries. Within the past five years it has tirelessly cycled through at least half a dozen approaches to appeal to this cohort of vulnerable workers.

Individual enforcement by the Government watchdog, the FWO, remains patchy and small-scale compared to the size of the problem. Its recent successful results have largely been premised upon self-reporting of underpayments by large corporations.

Responses to technological innovation and digital technologies (e.g., generative AI)

While the Australian Government has recently moved to regulate "platform" work, little has been accomplished in response to other technological innovations, such as generative AI that are set to augment or replace substantial numbers of jobs over the next couple of decades. Labour commentators responded by calling upon the State to prepare for digital disruption by enhancing redundancy laws in line with international standards such as those of German automotive union in the 1990s.[61] One Australian trade union has so far succeeded in bolstering redundancy clauses in collective agreements, in response to automation.[62] Another union in the Australian entertainment industry (the Media, Entertainment and Arts Alliance (MEAA)) have responded to technological change involving the influx of streaming services (e.g., Netflix, Amazon, Disney) by campaigning to change Australian media content laws. They demand that streaming services ensure that a fair percentage of content is Australian made and produced.[63]

59. Ibid, An American literature discusses "co-enforcement": see, for instance, Janice Fine et al, *No One Size Fits All: Worker Organization, Policy, and Movement in a New Economic Age*, Labour and Employment Relations Association, 2018.
60. Isaac, n 31; Mark Perica, "A Fair Say All Round," in James Fleming (ed.), *A New Work Relations Architecture*, Australian Institute of Employment Rights, 2022: 132, 144.
61. Eugene Schofield-Georgeson, "Regulating the Automation of Employment through Redundancy Law: A Comparative Policy Approach," *Australian Journal of Labour Law,* 32, 3 (2020): 263; McKell Institute, "Rethinking Redundancy for the Automation Age," 2021, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiV3YGslayEAxWdh1YBHa8bCbEQFnoECBgQAQ&url=https%3A%2F%2Fmckellinstitute.org.au%2Fwp-content%2Fuploads%2F2022%2F02%2FMcKell-Institute-Rethinking-Redundancy-2021.pdf&usg=AOvVaw2l0DGV_Oqvyby8A4d1BxZm&opi=89978449.
62. Hutchison Ports Australia (HPA) and Maritime Union of Australia (MUA) Enterprise Agreement 2021, Cl 8.4.
63. MEAA, "Make it Australian," 2017, https://www.meaa.org/campaigns/make-it-australian/.

Protection of freelancers through unionization: Conflict between collective bargaining and competition law

The MEAA is also spearheading a campaign to represent media freelancers, offering model services and insurance contracts, legal advice, and minimum rates.[64] Other measures to address collective bargaining for contractors have already been mentioned. These include classifying platform workers and road transport workers as "employee-like" workers, endowing them with collective bargaining rights; providing such workers access to an "unfair contracts" jurisdiction; and relaxing competition or "cartel conduct" laws for against other types of contractor bargaining (such as dependent contractors who seek to bargain with labour hirers).

Flexible working hours

Around a third of the Australian workforce work flexible hours on the basis of a formal agreement or request to do so.[65] Around the same number work from home, and this percentage is only 4% above pre-pandemic levels.[66] The Government's latest reforms also permit employees to seek administrative review of an employer's decision to decline a request to work flexible hours or from home.[67] As for other "flexible" or individual agreements, such as Australia's notorious "Australian Workplace Agreements" or AWAs, designed by the Howard Government in the 1990s to undercut collective bargaining terms and conditions, these were abolished in 2008 by a Labour Government. Similar individual agreements (known as "Individual Flexibility Agreements") are now determined through collective bargaining, covering a mere 5% of the workforce.[68]

VI. Conclusion

Within the last year, the Australian State has made an effort to broaden the collective bargaining process, away from isolated enterprises and singular workplaces, toward multiple enterprises. This expansion is designed to alter the course of single-enterprise bargaining and its correlative impact on declining union density, labour market precarity and social inequality. This step may also represent a renewed openness to industry-wide bargaining, a system that witnessed peak union density, job security and lower rates of social inequality during the mid-20th century.

The prospect of industry-wide bargaining nonetheless remains a long way off. Its realisation will be contingent upon a confluence of factors, not least of which will rely on strong trade union influence with government as well as alliance-building with like-minded community organisations and social movements. The capacity for trade unions to do so will involve trade unions organising precariously employed workers and vulnerable migrant workers and continuing to service existing members. These aspects of trade union work have been assisted by other significant legislative changes affecting the classification and bargaining rights of workers classified as independent contractors and casuals. The introduction of default union membership would also greatly enhance union efforts. Accordingly, it is clear that neither labour, nor the state can act alone in increasing union density, to ensure a fairer distribution of Australian wealth.

64. MEAA, "We Are Stronger Together," 2021, https://freelancers.org.au/.
65. ABS, n 11.
66. Ibid.
67. *FW Act*, ss65B–65C.
68. FWC, "General Manager's report into individual flexibility arrangements under section 653 of the Fair Work Act 2009," 2021: 10.

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Collective Labour Relations and Labour Law in a Changing World of Work

Yvonne OLDFIELD

I. Workers, the labour market, and the diversification of work

Overview and trends in the labour market

Aotearoa New Zealand (ANZ) has been described as "a small open economy, with large international labor flows and skilled immigrants."[1] In the first two decades of the 21st century, it experienced steady economic performance, based on primary industries (including dairy farming, forestry, and horticulture) and tourism.[2] Small but growing technology and film and television industries are helping to diversify the economy.[3]

Employment growth has been strong, and labour utilization rates high, but they have been accompanied by low investment in technology, disappointing productivity gains and low wage rates.[4] Use of immigration to address skill and labour shortages (alongside high levels of outward migration) has created a diverse workforce from "the Pacific, Asia, and elsewhere" but gender and ethnic pay gaps have persisted,[5] and unemployment dogs some parts of the community, including young workers, Māori and Pasifika.[6] Writing in 2019, Fletcher and Rasmussen asserted that "While many other OECD countries would envy the headline economic statistics, the embedded social, infrastructure and employment issues leave no room for complacency."[7] Against this background, in March 2020, ANZ entered a strict pandemic lockdown which had significant impacts on both labour supply and demand.[8] In her 2022 report to the Japan Institute for Labour Policy and Training (JILPT), Duncan noted that "due to the success of the elimination strategy … the most significant

1. Mare, David. 2018. "The Labor Market in NZ 2000–2017." *IZA World of Labor*, no. 427: 1.
2. Fletcher, Michael, and Erling Rasmussen. 2019. "Labour Market Change and Employee Protection New Zealand in Light of the 'Future of Work' Debate." *New Zealand Journal of Employment Relations* 44 (3): 32–33.
3. See, for example, https://www.stats.govt.nz/tools/which-industries-contributed-to-new-zealands-gdp/ (2020) and https://www.live-work.immigration.govt.nz/work-in-new-zealand/job-market-key-industries/information-technology/. Websites accessed 19/02/2024.
4. See Mare above n 1, and Fletcher and Rasmussen above n 2: 34.
5. Parker, Jane, Amanda Young-Hauser, Patricia Loga And Selu Paea. 2022. "Gender and Ethnic Equity in Aotearoa New Zealand's Public Service: Where is the Progress amid the Pandemic?" *Labour and Industry: A Journal of the Social and Economic Relations of Work* 32 (2): 156.
6. Mare, above n 1: 1.
7. Fletcher and Rasmussen, above n 2: 34.
8. Fletcher, Michael, Kate Prickett, and Simon Chapple. 2022. "Immediate Employment and Income Impacts of Covid-19 in New Zealand: Evidence from a Survey Conducted during the Alert Level 4 Lockdown." *NZ Economic Papers* 56 (1): 79.

negative effects on workers have come from the containment measures rather than the disease itself."[9] Although a comprehensive wage subsidy scheme was initiated immediately (and later extended to subsequent lockdowns) this did not prevent considerable job displacement and income reduction, with up to half the respondents in one survey experiencing "direct economic loss … when considered from a household perspective."[10]

Job losses were concentrated in travel and tourism (which employed 8% of the pre-pandemic workforce), hospitality and international education.[11] As well as women, the low paid generally were particularly hard hit,[12] and although the impact on unemployment rates was relatively short-lived, it occurred in a context where job displacement was known to have "substantial and long lasting" impacts including reduced earnings.[13] Finally, rising house prices and rents during the pandemic led to significant wealth transfer.[14] Coupled with growing inflation, these factors compounded the "embedded issues" identified by Fletcher and Rasmussen (2019) immediately prior to the pandemic so that "the relative economic prosperity of ANZ through the pandemic" hid "a massive increase in economic inequality."[15] Once border controls were lifted in mid-2022 net immigration "rebounded to record-high levels."[16] Along with this boost to labour supply, there was also an increase in labour demand, linked in part to the recovery in international tourism.[17] For a time, employment and wage levels rose, but so did inflation. After having been "relatively flat" at about 2% "for decades,"[18] inflation peaked at 7.3% in the June 2022 quarter.[19] High inflation and interest rates continue to create cost of living issues and unemployment is now forecast to increase from 3.2% in the June quarter 2023, to 5.2% by early 2025.[20]

Challenges related to the expansion of "new forms of work"

Writing in 2019, Fletcher and Rasmussen identified two key sets of issues for consideration in relation to discussions about the future of work in ANZ: the first related to the way work relationships are structured (including casualization, precarious employment and the gig economy, including dependent self-employment) the second, to technological change, structural labour market change, and the potential for job losses to result.[21] Their pre-pandemic analysis of ANZ data indicated that levels of non-standard work had been stable for almost two decades, accounting for the work arrangements of only a little over 20% of the

9. Duncan, Dawn. 2022. "Added Pressure: Exploring the Impacts of Covid-19 on Workers and Labour Laws in Aotearoa New Zealand." *Japan Labor Issues* 6 (40): 68.
10. Fletcher, Prickett, and Chapple, above n 8: 79.
11. Duncan above n 9: 70; quoting Annick Masselot and Maria Hayes. 2020. "Exposing Gender Inequalities: Impacts of Covid-19 on Aotearoa New Zealand Employment," *New Zealand Journal of Employment Relations* 45 (2): 57–69.
12. See above n 1: 1.
13. Hyslop, Dean, and Wilbur Townsend. 2019. "The Longer-term Impacts of Job Displacement on Labour Market Outcomes in New Zealand." *Australian Economic Review* 52 (2): 158.
14. Duncan, above n 9: 71.
15. Duncan, above n 9: 71. Duncan relies for this information on Official Statistics New Zealand, https://www.stats.govt.nz/indicators/unemployment-rate. Websites accessed 19/02/2024; figures are for the December 2021 Quarter.
16. The Treasury. 2023. "Half Year Economic and Fiscal Updates 2023" Economic outlook(7-26): 13, 21, https://www.treasury.govt.nz/sites/default/files/2023-12/hyefu23.pdf. Website accessed 19/02/2024.
17. The Treasury, above n 16.
18. Duncan, above n 9: 71. Duncan relies for information on inflation on "Monetary Policy Framework," https://www.rbnz.govt.nz/monetary-policy/about-monetary-policy/monetary-policy-framework. Website accessed 19/02/2024.
19. https://www.stats.govt.nz/news/annual-inflation-at-4-7-percent/.Website accessed 19/02/2024.
20. The Treasury, above n 16.
21. Fletcher and Rasmussen, above n 2: 32.

total workforce.[22] A further longitudinal study of non-standard work practices, published in 2022, confirmed the "relative stability in most of the well-established forms of flexible work practices over the last couple of decades" and suggested further research to identify why a predicted increase in such work arrangements had not occurred.[23]

As to the second issue, while Fletcher and Rasmussen (2019) concluded that "wholesale de-jobbing" was unlikely, they also noted the dearth of local research into the impact of new technologies.[24] Given indications that some sectors (such as driving and home-based care work) are increasingly using "platforms" as a means of organizing work, further research on the specific ANZ context would certainly be valuable now.[25] It could also be useful to look at how machine learning technologies may impact key sectors such as farming and tourism and the extent to which this may affect workers and the labour market.[26]

Workers' attitude toward changes in the world of work

There is a need for specific ANZ research on this topic also. A Productivity Commission 2020 review of attitudes to digital technologies found that New Zealanders were "relatively unconcerned that robots would "steal people's jobs,"[27] although 50% of those surveyed agreed that "robots and AI steal people's jobs."[28] Most of those surveyed considered themselves sufficiently skilled in the use of digital technologies to do their current job,[29] or to do another one in the near future,[30] and the researchers concluded that this confidence was well grounded.[31] Most New Zealanders agreed that "more jobs will disappear than new jobs will be created,"[32] but saw a need for robots to do jobs that were "too hard or too dangerous for people."[33]

In November 2023, a centre-right coalition government replaced the centre-left government which had been in place since 2017. In its otherwise comprehensive briefing to the incoming government, the New Zealand Council of Trade Unions Te Kauae Kaimahi (NZCTU) made no reference to the impact of recent technologies, suggesting that the trade union movement in ANZ does not see these issues as being the immediate priority of workers in this country.

II. Collective labour law: Regulation of trade unions and collective bargaining

Background to the labour law framework in ANZ

From the late nineteenth century onwards, ANZ had a highly regulated labour relations system which

22. Above n 2: 35, see figure 1 and table 1.
23. Ang, Huat Bin (Andy), and Erling Rasmussen. 2022. "A Longitudinal Study of Flexible Working Practices in New Zealand Organisations." *New Zealand Journal of Human Resources Management* 22 (2): 30.
24. Fletcher and Rasmussen, above n 2: 33.
25. https://www.mycare.co.nz/become-a-worker. Website accessed 19/02/2024.
26. See, for example, Henderson, Paul, 2023, "At the Cutting Edge: How Artificial Intelligence Will Change Our Primary Sector Forever." Maxim Institute Auckland (2023), and Wang, Pola. Q., "Personalizing Guest Experience with Generative AI in the Hotel Industry: There's More to It than Meets a Kiwi's Eye." *Current Issues in Tourism* DOI: 10.1080/13683500.2023.2300030.
27. Heatley, Dave. 2020. *New Zealander's Attitudes Towards Robots and AI*. Research note 2020/1, Productivity Commission, (page iii), https://www.treasury.govt.nz/sites/default/files/2024-05/pc-rp-research-note-nzers-attitudes-towards-robots-and-ai.pdf.
28. Heatley, above n 27: 14.
29. Heatley, above n 27: 6.
30. Heatley, above n 27: 7.
31. Heatley, above n 27: 9.
32. Heatley, above n 27: 10.
33. Heatley, above n 27: 13.

featured compulsory, state-run arbitration, and restrictions on the right to strike.[34] Under this system unions of workers and employers had limited rights to bargain directly and in the event that agreement could not be reached wages and conditions could be fixed on either an industry or occupational basis.

This system survived until confronted by the pressures of the 1960s oil shocks and Britain's entry into the European common market. Thereafter it underwent a series of reviews designed to facilitate wage bargaining in general and enterprise level bargaining in particular.[35] Although these reviews were initially tripartite in nature, consensus ultimately gave way to employer demands for complete deregulation, pursuant to the Employment Contracts Act 1991.[36] As its name suggests, this legislation dismantled collective bargaining procedures and curtailed trade union rights in favour of an emphasis on individual agreement of terms and conditions of work.

The Employment Relations Act 2000

At the start of the millennium another new government — this time of the centre-left — enacted fresh legislation: the Employment Relations Act (ERA).[37] This statute restored recognition of trade unions and imposed requirements of good faith dealing between employers, unions, and workers. It did not, however, return ANZ to the highly regulated system of earlier years. In 2008 when the government next changed to the centre-right, it opted against wholesale repeal the ERA, retaining the good faith requirements and making only (relatively) minor amendments to other aspects of it.[38]

The object of the ERA is to "build productive employment relationships" which are defined to include both individual and collective relationships between unions, employers, and employees.[39] The definition of 'employee' (which relied on the common law "contract of service") excludes volunteers but includes homeworkers and "persons intending to work" thereby enabling provisions such as those governing the negotiation of individual agreements to have effect.[40] In deciding whether a person is an employee for the purposes of the statute, the "real nature of the relationship" between the parties must be determined, having regard to "all relevant matters" including those indicating the intention of the parties.[41] Statements by the parties describing the nature of the relationship are not determinative.[42]

In addition to requirements of good faith, the Employment Relations Act supports collective bargaining by means of:

- Protection of freedom of association and voluntary union membership,[43]
- Recognition of trade unions, with rights of representation and access to worksites, and requirements relating to registration and independence,[44]
- Procedures to determine initiation and scope of bargaining, requirements for bargaining process agreements, ratification processes, and requirements to conclude a collective agreement,[45] and

34. Industrial Conciliation and Arbitration Act 1894.
35. Industrial Relations Act 1973 and Labour Relations Act 1987.
36. Employment Contracts Act 1991.
37. Employment Relations Act 2000.
38. Employment Relations Amendment Act 2008.
39. Employment Relations Act 2000, s 4.
40. Employment Relations Act 2000, s 6 (1).
41. Employment Relations Act 2000, s 6 (2).
42. Employment Relations Act 2000, s 6 (3).
43. Employment Relations Act 2000, s 7.
44. Employment Relations Act 2000, s 12.
45. Employment Relations Act 2000, s 31.

• Protections for lawful industrial action.[46]

Although the ERA permits multi-employer agreements these may only be executed with the agreement of all parties. In practice, since 1991, most collective bargaining occurs with only one employer, at the enterprise level, and usually only one or two unions involved.

The ERA specifically addresses some issues relating to non-standard employment. Limited worker entitlements to request flexible working arrangements were introduced to the statutory framework in 2007 and are to be found in Part 6AA of the ERA.[47] The object of Part 6AA is to provide employees with a statutory right to make a request for a variation of work arrangements including the place or hours of work, duties, or contact details to be provided to the employer.[48] Employers must respond within a month of receipt and may refuse only on the basis of a specified ground such as inability to reorganize work among existing staff.[49] If an employer does not meet its obligations the employee may refer the matter to a labour inspector, to mediation and ultimately to the Employment Relations Authority for determination.

In 2016 the issue of "zero hours" contracts was tackled through the insertion of provisions requiring individual and collective agreements to specify hours of work.[50] Restrictions were also imposed on "availability provisions."[51] These may only be included if the agreement has specified agreed and guaranteed hours of work, where the availability clause relates to hours which are additional to those specified hours, where the employer had genuine and reasonable grounds, and where there is consideration for the availability clause.[52]

Collective bargaining and employment status in the film and television industry

ANZ statutory anti-competition laws are also relevant to consideration of collective bargaining in ANZ. The Commerce Act prohibits contracts, arrangements or understandings that substantially lessen competition, and provides that no such agreement shall be enforced or given effect to.[53] This has been understood to have the effect of making it unlawful for the self-employed to bargain collectively, including making it unlawful to take strike action in connection with any such negotiations.[54]

The full implications of this were seen in 2009–2010 as an industrial dispute unfolded in the film industry in the capital, Wellington. It related to wages and conditions of workers involved in the production of the movie The Hobbit, a group that included both employees and others of possibly unclear status, since across the sector as a whole many workers were at least ostensibly self-employed. In 2010, in response to the workers' claims, Warner Bros made it publicly known that it was thinking about taking production of the movie outside ANZ. Despite opposition from Actors Equity, and the NZCTU, the government of the day responded by enacting legislation which excluded all persons engaged in any capacity in film production work from the definition of "employee" unless they were party to a written employment agreement — effectively taking such workers out of the ambit of the "real nature of the relationship" test and preventing them from bargaining collectively.[55]

46. Employment Relations Act 2000, s 80.
47. Employment Relations (Flexible Working Arrangements) Amendment Act 2007.
48. Employment Relations Act 2000, s 69AA.
49. Employment Relations Act 2000, s 69AAF.
50. Employment Relations Amendment Act 2016, s 67C.
51. Employment Relations Amendment Act 2016, s 67D.
52. Employment Relations Amendment Act 2016, s 67D (1).
53. Commerce Act 1986, s 27.
54. McCrystal, Shae. 2016."Independent Contractors and Strike Action in New Zealand" *NZ Universities Law Review* 27 (1):162.
55. Employment Relations (Film Production Work) Amendment Act 2010.

In 2022 a different government decided that, rather than repeal the 2010 amendment, it would provide the industry with its own customized legislation: the Screen Industry Workers Act (SIWA).[56] The SIWA governs a number of matters relating to work relationships. Employment status of production workers is to be determined pursuant to SIWA, and workers are still excluded from the "real nature of the relationship" test, in favour of a more black-letter approach.[57] SIWA imposes responsibilities on the "engager" entering into an individual contracts, and workers are free to organize and bargain collectively, pursuant to specific provisions of the SIWA rather than the ERA.[58] SIWA does not however permit strike action in support of collective bargaining.

III. Unions: Current state and challenges

Union density

Union density dropped markedly after the legislative changes of 1991 but has remained stable over the past two decades.[59] As of 31 March 2022, 400,309 workers in ANZ were union members (16.73% of employees).[60] Unions in the wider public sector (including workers in nursing, medicine, teaching and the public service) account for well over half the total number of union members nationally. In the unions that provided information as to gender, 62 percent of members were women.

Concerns have been raised that low union density contributes to declining wage rates in ANZ, because while there is "… no … statistical evidence of a definitive link between union membership decline and rising income inequality …" there has been "substantial overlap in the occurrence of each."[61] In response, an attempt has been made to generate a discussion about the value of a "union default" policy whereby new employees are required to actively opt out of union membership, rather than the other way round.[62]

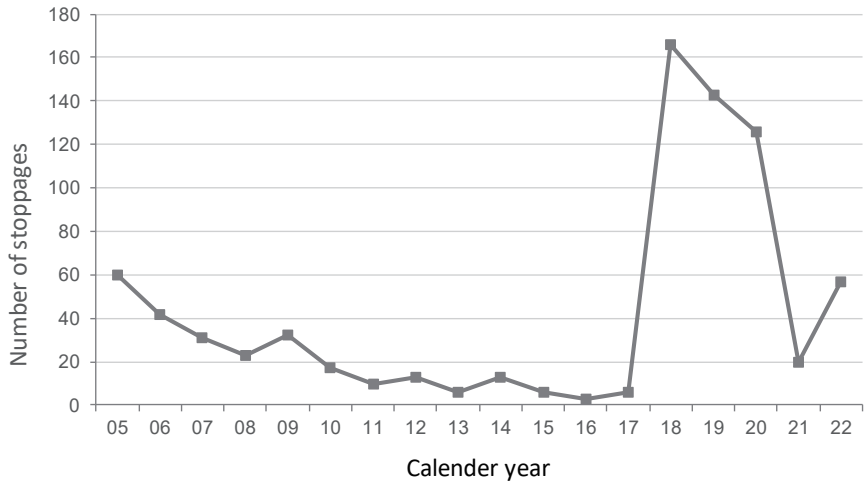
Industrial action

The number of work stoppages in ANZ has been consistently low for some time apart from a brief spike from 2017 as in Figure 1, possibly caused by a combination of labour shortages as discussed above, and a change of government in that year. [63]

Organisation of workers in non-standard work

While both private and public sector unions in ANZ include part-time, casual, fixed term and other non-standard work in broader campaigns and collective bargaining, campaigns specifically targeted at precarious workers (such as the large union-led campaign for legislation to address "zero hours contracts") provide direct organizing opportunities.[64] The NZCTU also engages in a number of initiatives which provide opportunities

56. SIWA 2022.
57. SIWA 2022, s 4.
58. SIWA 2022, s 4 (4) and 4 (5).
59. https://www.companiesoffice.govt.nz/all-registers/registered-unions/annual-return-membership-reports/. Website accessed 19/02/2024.
60. Companies' Office, above n 59.
61. Harcourt, Mark, Gregor Gall, Nisha Novell, and Margaret Wilson. 2019. "A Union Default Policy for New Zealand," *New Zealand Law Journal*, Feb 2019: 8–9.
62. Harcourt, Gall, Novell and Wilson, above n 59. See also: Harcourt, Mark, Gregor Gall, and Margaret Wilson. 2023. "The Union Default: Effects and Implications of Regulated Opting-in" *Industrial Relations Journal* 54 (2): 132.
63. https://www.employment.govt.nz/starting-employment/unions-and-bargaining/work-stoppages/. Website accessed 19/02/2024.
64. See, for example, https://www.unite.org.nz/. Website accessed 19/02/2024.



Source: Ministry of Business, Innovation & Employment, New Zealand Government.

Figure 1. Number of work stoppages, 2005 to 2022

to organize workers in non-standard work. Examples include the digital organizing tool "Together," and the Young Workers Resource Centre.[65]

Unions in ANZ have also made efforts to recruit and organize workers whose employment status is in dispute, including through the use of strategic litigation. Two private sector unions, FIRST Union Aotearoa (FIRST) and E Tu, recently supported a group of Uber drivers who sought declarations from the Employment Court as to their employment status. Two of the applicants were involved with Uber rideshares and two with Ubereats. The Employment Court confirmed that all four were employees pursuant to s. 6 of the ERA which, as noted above, requires an assessment of the "real nature" of the work relationship between the parties.[66]

However, the precedent value of this case remains uncertain. The judgment is expressed to relate only to the four specific individuals who brought the case and in a previous decision involving similar respondent parties the Employment Court came to a different decision. The first instance respondents in the recent case have also sought and obtained leave to appeal on questions of law relating to the application of s. 6 of the ERA and the Employment Courts findings in relation to the relationship between the different entities controlling the Uber drivers' work relationships.[67] At the time of writing this appeal had yet to be heard.

The ERA entitles unions to offer different classes of membership, not limited to employees (for example, many unions enable retirees to maintain membership).[68] Consistent with E Tu's initiatives in respect of Uber drivers, the membership rule of E Tu includes "Any person who … is a contractor or is employed or about to be employed" in any of the industries listed for union coverage.[69] The other union involved in the recent litigation, FIRST has not extended its membership rule beyond employees,[70] but it has used the Employment Court decision as an opportunity to launch a campaign to organise Uber drivers, offering a discounted

65. https://www.together.org.nz/campaigns. Website accessed 19/02/2024.
66. E Tu Incorporated and FIRST Union Incorporated v Rasier Operations BV [2022] NZEmpC 192.
67. Rasier Operations BV v E Tu Incorporated [2023] NZCA 21.
68. Employment Relations Act 2000, s18.
69. https://etu.nz/wp-content/uploads/2021/10/E-tu-Rules-2020-Signed-4-March-2021-ID-401294.pdf. Website accessed 19/02/2024.
70. For the rules of FIRST, or other unions, see the register of incorporated societies: https://app.businessregisters.govt.nz/. Website accessed 19/02/2024.

bargaining fee and initiating bargaining for a collective agreement.[71]

The Public Service Association, ANZ's largest union with over 90,000 members, has also attempted litigation in respect of non-standard workers, namely employees in triangular work relationships (albeit on this occasion the outcome did not support the union position).[72] Consistent with the endeavour to organise workers outside standard work relationships, it has also extended its membership rule to include "Individual independent contractors or groups of independent contractors" contracted to work in the areas covered by that union, including the public service, state sector, health sector community public services and local government.[73] This measure is designed enable carers engaged in publicly funded platform work (and other similar workers) to have access to union coverage.[74]

The situation in ANZ appears similar to that of countries in the global north where "… the main actions are the traditional unions seeking proper classification of these workers via the courts and collective bargaining" as opposed to "demonstrations and strikes … by … new platform worker unions …" as seen in the global south.[75] This may reflect the fact that platform workers have been the focus of organizing efforts by existing private sector unions, rather than new unions, which is itself unsurprising given the small size of the total ANZ workforce.[76]

IV. Where to next for labour law in ANZ?

Non-compliance with International Labour Organisation (ILO) fundamental rights

One of the objects of the ERA is:[77]

> To promote observance in New Zealand of the principles underlying International Labour Organisation Convention 87 on Freedom of Association, and Convention 98 on the Right to Organise and Bargain Collectively.

Convention 87 on Freedom of Association (1948) (C087) and Convention 98 on the Right to Organise and Bargain Collectively (1949) (C098) are of course two of the core conventions that underpin the ILO's 1998 Declaration of Fundamental Principles and Rights at Work (FPRW) and are deemed to bind all members of the ILO automatically.[78] ANZ ratified C098 in 2003, shortly after the ERA came into force, but has yet to ratify C087.[79] In the most recent ANZ country baseline report to the ILO the then Minister of Workplace Relations was quoted as explaining that "… our non-ratification reflects long held and considered policy positions regarding the scope of lawful strike action … which prevent compliance..."[80] The limited rights to

71. https://www.firstunion.org.nz/uber; and https://www.stuff.co.nz/business/131210436/uber-drivers-to-begin-collective-bargaining-after-landmark-court-ruling. Websites accessed 19/02/2024.
72. Keanu Head v Chief Executive of the Inland Revenue Department [2021] NZEmpC 69 [14 May 2021].
73. https://www.psa.org.nz/about-us/rules-regulations-and-sector-procedures/#P2. Website accessed 19/02/2024.
74. For an example in ANZ, see https://help.mycare.co.nz/hc/en-us/articles/360000497136-Your-responsibilities-as-a-worker-on-Mycare. Website accessed 19/02/2024. See also Alisa Trojansky "Towards the 'Uberisation' of Care: Platform Work in the Sector of Long-term Home Care and its Implications for Workers' Rights" (Visits and Publications Unit, European Economic and Social Committee, European Union, 2020).
75. ILO. 2022. "Decent Work in the Platform Economy." Geneva. https://www.ilo.org/sites/default/files/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_855048.pdf. https://www.ilo.org/resource/decent-work-platform-economy.
76. As of the December 2023 Quarter Statistics New Zealand, Tatauranga Aotearoa, recorded the number of employed persons at 2,939,000; see https://www.stats.govt.nz/indicators/employment-rate/. Website accessed 19/02/2024.
77. Employment Relations Act 2000, s 3 (b).
78. https://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453911:NO. Website accessed 19/02/2024.
79. https://www.ilo.org/dyn/normlex/en/. Website accessed 19/02/2024.
80. Country Baseline under the ILO Declaration Annual Review, New Zealand (2000–2019), https://www.ilo.org/wcmsp5/groups/

strike set out in the ERA would indeed appear inconsistent with the broader rights understood to be provided for by C087, although the scope of those rights is increasingly subject to challenge by the employer caucus within the ILO.[81]

This issue may soon need to be confronted as a result of the recent free trade agreement between ANZ and the European community (FTA) which is concluded although not yet in force.[82] The FTA expressly requires compliance with the core labour rights set out in the FPRW, including the right to a safe and healthy working environment.[83] It also identifies, as relevant context, the ILO Declaration on Social Justice for a Fair Globalisation adopted at Geneva on 10 June 2008 by the International Labour Conference at its 97th session, and the associated Decent Work Agenda.[84] The FTA's dispute resolution processes also require recourse to expert opinion of the ILO in certain circumstances.[85]

Political change and challenges to consensus

As earlier sections of this paper have indicated, the labour relations system in ANZ underwent a series of major changes in the latter part of the twentieth century. Then, as Anderson has described, the ERA ushered in a "period of … consensus …" which (at least for a time) "… stabilised economic and industrial relations between labour and capital."[86]

With the diversification of the world of work and the persistence of low wages and low productivity, Anderson has more recently suggested that some features of the system require review, recommending labour law reforms to include:[87]

> … the establishment of a clear set of fundamental employment standards applicable to workers rather than just employees; the construction of stronger, more effective rights of employees to union representation and voice in the workplace; the establishment of a realistic collective bargaining system; and (as noted above) greater statutory recognition of the rights of workers to be treated with respect and dignity.

In their 2019 paper Fletcher and Rasmussen identified the future of work, active labour market policy, and vocational education as further areas which were critical to labour policy development.[88]

Many of these issues were considered by the centre-left government which was in office between 2017 and 2023. In its briefing to the incoming (new) government in 2023 NZCTU commended the previous government for record low levels of unemployment, a 44% increase in the minimum wage, an increase in paid parental leave (to 26 weeks) and the doubling of statutory sick leave, from five days to ten.[89] (As already

public/---ed_norm/---normes/documents/publication/wcms_752621.pdf. Website accessed 19/02/2024.

81. International Labour Convention on Freedom of Association and Protection of the Right to Organise, C087 (1948), Article 11. For discussion of this point, see Gordon Anderson and Dawn Duncan, *Employment Law in Aotearoa New Zealand* (Lexis Nexis, Wellington, 2022): 540.
82. https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/new-zealand-european-union-free-trade-agreement/. Website accessed 19/02/2024.
83. Above n 82, Article 19.3 (3).
84. Above n 82, Article 19.1 (1) and Article 19.3 (1) and (2).
85. Above n 82, Article 26.21 (3).
86. Mitchell, Richard. 2019. "Forty Years of Labour Law Scholarship in New Zealand: A Reflection on the Contribution of Gordon Anderson." *Victoria University of Wellington Law Review* 50: 159–168, and Gordon Anderson, 2010, "'The Sky Didn't Fall In': An Emerging Consensus on the Shape of New Zealand Labour Law?" *Australian Journal of Labour Law* 23 (2): 94–120.
87. Mitchell, above n 86: 169, again referencing Anderson 2010.
88. Fletcher and Rasmussen, above n 2: 39.
89. NZCTU Te Kauae Kaimahi. 2023. "Briefing to the Incoming Government." https://union.org.nz/wp-content/uploads/2023/11/NZCTU-BiG-25-November-2023.2.pdf. Website accessed 19/02/2024.

noted, measures had also been put in place to address 'zero hours' contracts.)

Other policy initiatives, however, remained unfinished at the conclusion of that administration, and are not supported by the incoming government. One related to the development of a social insurance scheme to address the "systemic weaknesses in NZ support for displaced workers" that pandemic restrictions had brought to light.[90] Another of particular relevance to diversified work relationships concerned the regulation of "working arrangements at the intersection of "employment (employment law) and 'contracting' (commercial law)".[91] After public consultation, a tripartite working group (experts and representatives of the social partners) had been set up to "recommend a set of policy changes to improve … regulatory protections" for workers at this intersection.[92] In 2021 the group issued a report which recommended that:[93]

> … addressing the employee/contractor boundary issue must be … the priority. Accordingly, this report focuses on delineating a clearer boundary between employment relationships and contractor/principal relationships, both in the legislation itself and by making supportive changes to regulatory systems.

To this end, it suggested revision of the "legislative definition of 'employee' to include a strong sense of contradistinction to someone who is genuinely in business on his or her own account."[94] It also suggested that a duty must be imposed on "hiring entities" to "apply a robust decision-making process when considering worker classification" and take responsibility for making the correct decision.[95]

The recommendations were not progressed during the remainder of that government's time in office. In its 2023 briefing to the incoming government, NZCTU expressed concerns that the new government would in fact move in the opposite direction, away from the "real nature of the relationship test" towards a more black-letter law approach.[96] It argued that such an approach would "entrench the widespread problem of employees in low-paid and precarious industries being misclassified as contractors."[97] It recommended that the new Government preserve the tripartite approach and work with unions and business to develop a test which would avoid "misclassification [which] leaves many vulnerable workers, who, in terms of the 'real nature' of their work, are employees, without the rights and protections that they ought to have under the law."[98]

Yet other policy initiatives which had been progressed, such as a restructure of the tertiary education sector, were reversed in the first 100 days of the new government.[99]

Of particular relevance here was the repeal of the "fair pay" legislation enacted in 2022.[100] ANZ's low wage rates and poor growth in productivity are sometimes attributed to a "race to the bottom" in which small and medium employers compete by means of a low wage strategy in preference to enterprise bargaining and investment in technology.[101] On that basis, in June 2018, a tripartite working group was established to

90. Rosenberg, Bill. 2020. "Support for Workers in the Covid-19 Emergency." *Policy Quarterly* 16 (3): 67–70.
91. Ministry of Business, Innovation and Employment (MBIE), NZCTU Te Kauae Kaimahi, and Business New Zealand. 2021. "Tripartite Working Group on Better Protections for Contractors: Report to the Minister for Workplace Relations and Safety." https://www.mbie.govt.nz/assets/tripartite-working-group-on-better-protections-for-contractors-december-2021.pdf: 3. Website accessed 19/02/2024.
92. MBIE et al, above n 91: 3.
93. MBIE et al, above n 91: 3.
94. MBIE et al, above n 91: 3.
95. MBIE et al, above n 91: 3.
96. NZCTU, above n 89: 15.
97. NZCTU, above n 89: 15.
98. NZCTU, above n 89: 15.
99. https://www.beehive.govt.nz/release/disestablishment-te-p%C5%ABkenga-begins. Website accessed 19/02/2024.
100. Fair Pay Agreements Act 2022 (repealed).
101. https://www.mbie.govt.nz/business-and-employment/employment-and-skills/fair-pay-agreements/ and https://stats.oecd.org/index.aspx?DataSetCode=PDB_LV. Websites accessed 19/02/2024.

consider possible mechanisms for an industry-wide bargaining system.[102] Its work ultimately resulted in the Fair Pay Agreement Act 2022 (FPA) which had the purpose of providing "a framework for bargaining for fair pay agreements that specify industry or occupation-wide minimum employment terms" and, in certain circumstances, for determination of those minimum terms by the Employment Relations Authority.[103] Meanwhile by the time the legislation had come into effect, the employer lobby had withdrawn support for the new system. Progress on the first proposed fair pay agreements was slow. In late 2023, the incoming coalition government repealed the short-lived FPA despite protests from NZCTU and the rest of the union movement.

V. Conclusions

As a small economy dominated by primary industries, ANZ has yet to experience the full impact of change in the world of work, but where issues have arisen — such as in personal transport and delivery and the screen and television industry — the labour law framework has offered some support for a collective response. The ERA, for example, provides that the "real nature" of work relationships should prevail over a black letter law approach to determining employment status, thus giving unions an opportunity to use strategic litigation as a tool to organise Uber drivers. The SIWA similarly provides an organizing opportunity by enabling collective bargaining by contractors, although the question remains whether this represents a gain for contractors, or a loss of rights, overall, for workers who might otherwise have been classified as employees under a "real nature of the relationship" test.

The accommodations described here have arguably resulted from a twenty-year period of comparatively stable labour law, during which successive governments retained the core of the system set out in the Employment Relations Act 2000. However, the recent election of a government which includes a libertarian coalition partner (and Minister of Workplace Relations)[104] may jeopardise this stability and foreshadow a shift away from a collectivist approach in labour law policy.

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102. Above n 101.
103. Fair Pay Agreements Act 2022 (repealed), s 3.
104. http://www.beehive.govt.nz/minister/biography/brooke-van-velden.

Labor Unions in a Changing World of Work: The Philippine Experience

Ronahlee A. ASUNCION

Labor unions in the Philippines as it is today is a product of its political, social, and economic history. Their continuous struggle towards better and just labor conditions in the face of a changing world of work is a testament of their aspiration towards fully attaining decent work.

A union is "any labor organization or association of employees which exist in whole or in part for the purpose of collective bargaining agreements or dealing with employers concerning terms and conditions of employment." A collective bargaining agreement is "any negotiated contract between a legitimate labor organization and the employer concerning wages, hours of work, and all other terms and conditions of employment in a bargaining unit, including mandatory provisions for grievance and arbitration machinery" (Philippine Statistics Authority, LABSTAT Updates 2017).

I. The struggle for basic rights

The Spanish colonization of the Philippines from 1565–1898 subjected Filipinos to harsh working conditions, exploitation, and cultural oppression. The native Filipinos or the 'Indios' as they were called by the Spaniards were considered at the bottom of the social order. They were left with no choice but to serve those who were at the upper rung of the social hierarchy, specifically the 'peninsulares,' the 'insulares,' and the 'mestizos.' The 'peninsulares' were Spaniards born in Spain and were regarded at the top of the social order, followed by the 'insulares' or Spaniards born in the Philippines, and the 'mestizos' or those with mixed Filipino and Spanish ancestry (Agoncillo 2012).

One notable proof on the exploitation and harsh working conditions of Filipinos at that time was the practice of 'polo y servicios' or forced labor to Filipino males between 16 to 60 years old. For 40 days every year, they were assigned to various places locally where they build bridges, roads, churches, construct buildings, work in shipyards, cut timber, and serve during Spanish military expeditions. Abuses and injustices were rampant, injuries and death were common because of their hazardous working conditions, pay was low or worst, they were not being paid at all. As for Filipino women, they served as domestic workers to those who belong to the higher social order (Ibid.).

As an agricultural country, it is common for most Filipinos to engage in farming. The exploitation and abuses to Filipinos then extended to farm workers. They were forced to work in 'haciendas or large plantations owned by Spanish settlers or religious institutions where they had to endure excessive labor

demands, physical and verbal abuse, and economic oppression. It is no surprise therefore that the first strike ever recorded was staged by farm workers in Cebu who in 1565 stopped work by not tilling their fields (Scott 1992). Various forms of resistance were staged by Filipinos. Albo (n.d.) identified the Philippine revolts that took place against the Spanish colonizers. Among the notable mentions related to labor problems were: a) Sumuroy Revolt which lasted from 1649 to 1650, led by Juan Ponce Sumuroy from Samar in opposition to the sending of men from the Visayas for forced labor in the Cavite shipyards; b) Agrarian Revolt which started in Lian and Nasugbu in Batangas between 1745–1746 because of land-grabbing by the Spaniards; and c) Maniago Revolt led by Don Francisco Maniago to protest the 'polo' system and 'bandala' system where Filipinos were required to sell their products to the government who buy them way below the market prices.

As exploitation and abuses remain unabated, intense nationalism among Filipinos grew. Hence, revolts in various parts of the country continued. In addition to their aspiration to reclaim the land that was theirs in the first place and improve the plight of the poor peasants, comes the realization of their right to the fruits of their labor. Albo (n.d.) classified the revolt movements as related to land, politics, and culture. Workers already organized themselves through associations or groups called 'gremios.' However, Scott (1992) described trade unions at that time as "a tame fraternity of craftsmen in a particular shop or neighborhood formed primarily to provide aid in times of sickness and death." Nonetheless, the power of worker strike was tested in 1872, when workers in a printing shop in San Fernando, Pampanga staged a strike due to abuses committed by the Spanish foreman of the printing shop. Workers demanded for the suspension of the foreman, better working conditions, and higher wages (Ibid.).

With the emergence of the 'ilustrados,' they reinforced the sense of nationalism of Filipinos towards national identity and self-governance. The 'ilustrados' are sons of well-off Filipino families who were sent to Europe for further studies. Exposed to the liberal ideas in Europe, they sought reform in the country, advocated for democracy, human rights, and individual freedoms which contributed to a significant awakening of a national consciousness.

II. Laying the foundation for worker's rights and union activities

The defeat of the Spaniards against the American forces in 1898, led Spain to sell the Philippine archipelago for US$20 million to the United States. However, Filipino revolutionaries already declared Philippine Independence in Kawit, Cavite on June 12, 1898. That same year, on September 15, the Malolos Congress was held which paved the way for the first Philippine Constitution or the Malolos Constitution. It was approved on January 20, 1899, and gave birth to the First Philippine Republic (Agoncillo 2012).

February 2, 1902, is a very significant date for labor unions as the first Filipino labor union, the Union Obrera Democratica [UOD] (Democratic Workers Union) was founded under the leadership of Isabelo de los Reyes who is considered the Father of Philippine labor movement. The first set of officers of UOD were either printers, typesetters or lithographers except for de los Reyes, who served as its President. Its primary objective is the improvement of working conditions, salaries, treatment of workers, provision of work to those unemployed, support to their families, and free education to children of workers among others (Scott 1992).

With the growing nationalism among Filipinos, the colonization of the Americans of the country was naturally met with resistance. Notably, Emilio Aguinaldo led a conventional war against the Americans which lasted for ten months in 1899. Defeated, Filipinos then changed their warfare strategy to guerilla-style. However, because of lack of military resources and training among others, they were once again defeated (Office of the Historian n.d.).

With the Americans at the helm of governance in the Philippines, Filipinos were once more faced with social and economic issues. Labor movements during the American colonization in the country can be characterized as a period of struggle for Filipinos as they relentlessly fought for their rights at work, social justice, and better working conditions. For example, in July 1902, 70,000 Filipinos marched to demand the independence of the Philippines from the United States, and the following month, a national general strike was held because of the refusal of the American-led government to increase wages (Suralta 2023). Another strike which lasted for several months in 1926 was staged by 4,000 cigar workers from four big factories of La Flor de la Isabela, La Insular, Alhambra, and La Flor de Intal due to wage cuts (Chiba 2005). Labor unrests also broke in sugar and rice plantations in Pampanga, Iloilo, Panay, Bulacan and Tarlac who according to Dennison (1938) were basically due to demand for higher pay, decrease in work hours, and better working conditions.

Several strikes were staged by Filipino workers during the American colonization in the Philippines from 1898–1946. Hence, in an effort to balance the interest between labor and capital as well as address issues on unfair labor practices, legal reforms for both public and private sector workers and establishment of institutions were introduced by the Americans. Some of these were:

a) Public Law No. 5 or "An Act for the Establishment and Maintenance of an Efficient and Honest Civil Service in the Philippine Island" in 1900 by the Second Philippine Commission thereby establishing the civil service system in the country;
b) Formalization of the merit system for employment in the public sector through the Philippine Constitution of 1935;
c) Creation of the Bureau of Labor (BOL) on June 18, 1908, through Act No. 1868, which is tasked to study and address labor issues, collect data on wages, working conditions, and labor relations, and settle labor-employer disputes;
d) Eight Hour Labor Law or the Commonwealth Act No. 444 on June 3, 1939, setting the standard working hours in both government institutions and industrial establishments excluding farm laborers, workers paid on piece work basis, domestic workers, and members of the family of the employer who work for their family business;
e) Act No. 3428 that prescribes compensation to be received by employees for personal injuries, death or illness contracted in the performance of their duties which took effect on December 10, 1927;
f) Act No. 3071 approved on March 15, 1923, which is an act to regulate the employment of women and children in shops, factories, industrial, agricultural, and mercantile establishment, and other places of labor in the Philippine islands; to provide penalties for violations hereof, and for other purposes; and
g) Commonwealth Act No. 103 that took effect on October 29, 1936, which created the Court of Industrial Relations to determine the minimum wage for laborers, and maximum rental fees paid by tenants and the compulsory arbitration between employees or landlords, and employees or tenants, and prescribing penalties for violating the said Act.

The U.S. tolerated unionism among Filipino workers for as long as they do not engage or interfere in political activities (Bankoff 2005). Nonetheless, as Filipino workers pushed for their right to organize and collectively bargain, there was also the realization that social justice at work is intricately connected with politics. Hence, political militancy was inevitable.

III. Towards consolidation and growth

In solidarity with fellow Filipinos, strikes and demonstrations became a platform for labor unions to likewise express their desire for self-determination and national sovereignty. Being organized, they were a force to reckon with as they contributed to the widespread and unified movement. Together with political leaders and nationalists, labor unions steadfastly worked and supported the cry towards Philippine independence. It came after the Americans successfully liberated the Philippines from the Japanese occupation between 1942–1945. July 4, 1946, is a significant milestone in Philippine history as it was on this day where the country gained its independence from the United States (Agoncillo 2012).

Nonetheless, still driven by problems not only at the labor front but at the social, economic, and political spheres as well, labor unions became more active participants in social and political movements and continued on their struggle against exploitative employers, and unfair labor practices. One type of unionism which emerged after 1946 is what Dejillas (1994) described as revolutionary unionism. Examples of these are: a) Philippine Association of Free Labor Unions (PAFLU) organized by Cipriano Cid in June 1953, which was against the U.S. imperialism and advocated for socialism; b) National Association of Trade Unions (NATU) organized by Ignacio Lacsina whose ultimate goal is to free workers from the systemic oppression and exploitation; c) National Federation of Labor Unions (NAFLU) led by Felixberto S. Olalia Sr. whose organization is not just for social reform but for a total demolition of the capitalist system prevailing in the country; d) *Malayang Samahang Magsasaka* (MASAKA) or Free Peasants Organization formed in 1964 again by Olalia Sr. which aims for the dismantling of feudalism and capitalism, and the promotion of nationalist industrialization; and e) *Pagkakaisa ng mga Magbubukid sa Pilipinas* (PMP) born on March 20, 1969, who pushed for the total implementation of the Agricultural Land Reform Code and elimination of the practice of tenancy. In 1970, the Progressive Workers' Council was founded, bringing together the revolutionary labor leaders in the country (Ibid.). Today, it is the *Kilusang Mayo Uno* (KMU) who staunchly promote for the radical and revolutionary approach in labor unionism. It submitted to the International Trade Union Confederation (ITUC) an official membership of 115,000 in 2018 (Raymundo 2022).

The threat of the growing militancy of labor unions prompted the government of the Philippines in 1950 to establish the National Confederation of Trade Unions (NACTU). In the same year, Father Walter Hogan founded the Federation of Free Workers (FFW) who fought for freedom of trade unions from government control and companies. It became an alternative to revolutionary unionism, specifically, communism and is described by Dejillas (1994) as democratic and political type of unionism.

Unions which are primarily concerned with collective bargaining, grievance handling, and arbitration are categorized by Dejillas (1994) as economic unionism. These are exemplified by: a) National Labor Union (NLU) which reemerged on April 4, 1954; b) Associated Labor Union (ALU) formed on July 2, 1954; c) Philippine Labor Alliance Council (PLAC) established on August 9, 1967; and d) *Pambansang Kilusan ng Paggawa* (PKP) or National Movement of Workers created on June 12, 1969.

The Catholic church inspired the formation of sectoral groups with the use of Church teachings to labor problems. Moralist unionism as Dejillas (1994) described it are represented by: a) Federation of Free Farmers in 1953; b) Christian Social Movement; c) Young Christian Workers (YCW); d) *Khi Ro* composed of Catholic students and youth activists; e) National Union of Students of the Philippines (NUSP); f) Student Catholic Action (SCA); g) *Lakasdiwa* (Strength-Spirit); and h) *Kapulungan ng mga Sandigang Pilipino* (KASAPI) among others.

On December 14, 1975, under the leadership of labor leader Democrito Mendoza, 23 labor federations formed the Trade Union Congress of the Philippines (TUCP) with the purpose of becoming a strong and

dynamic labor center. At present, it has 480,000 members consisting of 42 labor federations and organizations which is considered as the largest labor coalition in the country.

Based on the foregoing, it is clear that there was a diversification of labor movements in the country in terms of their character, advocacies, and stand on issues. Through the years, they have become in the process inevitable key players in changing not only the plight of workers but also the political, social, and economic landscape of the country.

The combined efforts of labor unions and various stakeholders ultimately led to some of these landmark legislations:

a) Republic Act No. 875 is an act to promote industrial peace and for other purposes which was approved on June 17, 1953. It primarily recognizes the right of workers to self-organization for collective bargaining and promote their moral, social, and economic well-being;
b) Republic Act No. 1052, also known as the Termination Pay Law was approved on June 12, 1954; it is an act to provide for the manner of terminating employment without definite period in commercial, industrial, or agricultural establishment or enterprise; on June 21, 1957, Sections 1 and 2 of this Act were amended;
c) Republic Act No. 3844 is an act to ordain the Agricultural Land Reform Code and to institute land reforms in the Philippines, including the abolition of tenancy and the channeling of capital into industry, provide for the necessary implementing agencies, appropriate funds therefor and for other purposes, was approved on August 8, 1963;
d) Presidential Decree No. 442, as amended on May 1, 1974; it is a decree instituting a Labor Code thereby revising and consolidating labor and social laws to afford protection to labor, promote employment and human resources development and ensure industrial peace based on social justice;
e) Presidential Decree No. 851 was approved on December 16, 1976, requiring all employers to pay their employees a 13th-month pay;
f) Executive Order No. 180 was approved on June 1, 1987, providing guidelines for the exercise of the right to organize of government employees, creating a Public Sector Labor-Management Council, and for other purposes;
g) Republic Act No. 6715 approved on March 2, 1989, is an act to extend protection to labor, strengthen the constitutional rights of workers to self-organization, collective bargaining and peaceful concerted activities, foster industrial peace and harmony, promote the preferential use of voluntary modes of settling labor disputes, and reorganize the National Labor Relations Commission, amending for these purposes certain provisions of Presidential Decree No. 442, as amended, otherwise known as the Labor Code of the Philippines, appropriating funds therefor and for other purposes;
h) Republic Act No. 6727 approved on June 9, 1989, is an act to rationalize wage policy determination by establishing the mechanism and proper standards therefor, amending for the purpose Article 99 of, and incorporating Articles 120, 121, 122, 123, 124, 126, and 127 into, Presidential Decree No. 442, as amended, otherwise known as the Labor Code of the Philippines, fixing new wage rates, providing wage incentives for industrial dispersal to the countryside, and for other purposes;
i) Republic Act No. 9710 approved on August 14, 2009, is an act providing for the Magna Carta of Women;

j) Republic Act No. 10361 or the Domestic Workers Act or the *Kasambahay Law* was approved on January 18, 2013; it is an act for the protection and welfare of domestic workers;
k) Republic Act No. 10395 approved on March 14, 2013, is an act strengthening tripartism, amending for the purpose Article 275 of Presidential Decree No. 442, as amended, otherwise known as the "Labor Code of the Philippines;"
l) Republic Act No. 11058 approved on August 17, 2018, is an act strengthening compliance with occupational safety and health standards and providing penalties for violations thereof; and
m) Republic Act No. 9231 approved on December 19, 2003, is an act providing for the elimination of the worst forms of child labor and affording stronger protection for the working child, amending for this purpose Republic Act No. 7610, as amended, otherwise known as the "Special Protection of Children Against Child Abuse, Exploitation and Discrimination Act."

It should be noted that no less than the 1987 Philippine Constitution, considered the highest law of the land, recognizes the right of its people to form unions, associations, or societies as enshrined in Article III Bill of Rights Section 8. Further, Article XIII Section 3 stipulates that:

> *The State shall afford full protection to labor, local and overseas, organized and unorganized, and promote full employment and equality of employment opportunities for all.*
>
> *It shall guarantee the rights of all workers to self-organization, collective bargaining and negotiations, and peaceful concerted activities, including the right to strike in accordance with law. They shall be entitled to security of tenure, humane conditions of work, and a living wage. They shall also participate in policy and decision-making processes affecting their rights and benefits as may be provided by law.*
>
> *The State shall promote the principle of shared responsibility between workers and employers and the preferential use of voluntary modes in settling disputes, including conciliation, and shall enforce their mutual compliance therewith to foster industrial peace.*
>
> *The State shall regulate the relations between workers and employers, recognizing the right of labor to its just share in the fruits of production and the right of enterprises to reasonable returns on investments, and to expansion and growth.*

Reforms however were not just limited to the promulgation of laws but also institutions were established to specifically restore and maintain industrial peace. For example, the creation of the National Labor Relations Commission (NLRC) on November 1, 1974, under Article 213 of Presidential Decree No. 442 or the Labor Code of the Philippines and the establishment of the National Conciliation and Mediation Board (NCMB) on January 31, 1987, through Executive Order No. 126.

The NLRC is "*a quasi-judicial body tasked to promote and maintain industrial peace by resolving labor and management disputes involving both local and overseas workers through compulsory arbitration and alternative modes of dispute resolution.*" While the NCMB is mandated to, "*formulate policies, develop plans*

and programs and set standards and procedures relative to the promotion of conciliation and mediation of labor disputes through the preventive mediation, conciliation and voluntary arbitration; facilitation of labor-management cooperation through joint mechanisms for information sharing, effective communication and consultation and group-problem solving."

Outside of labor unions, there is the Tripartite Industrial Peace Council (TIPC) for private sector workers and employers. They are also encouraged to engage in activities that will help prevent and settle labor disputes and work towards peace and harmony at work. In the government sector, there is the Public Sector Labor-Management Council which likewise function as a venue to prevent and adjudicate employee-management disputes among others.

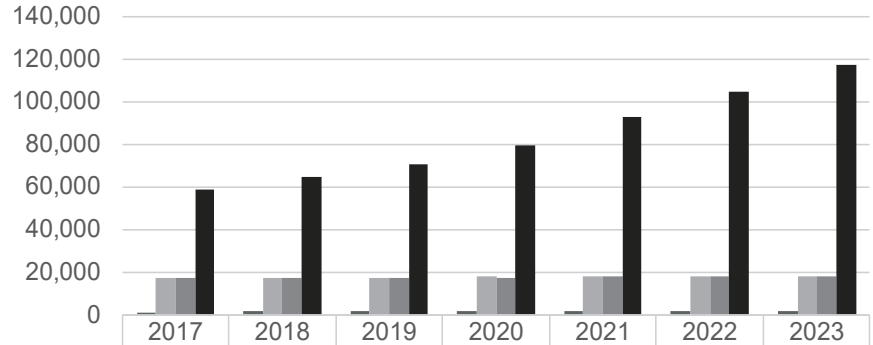
IV. Labor unions in the Philippines today

It is safe to say that labor unions in the Philippines have already made significant achievements not only at the labor front but also at the political, economic, and social aspects. Labor unions in the Philippines today exist both in public and private sectors with members coming from various industries and occupations.

The Bureau of Labor Relations reported that between the fourth quarter of 2017–2023, there is a steady increase in the number of registered labor organizations from all sectors as Figure 1 shows. It is comprised of:

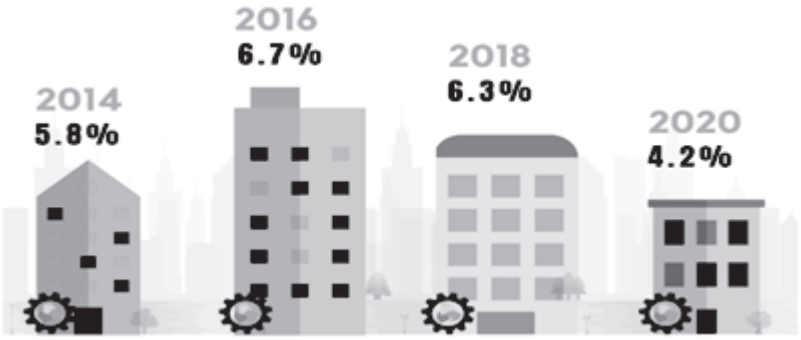
a) national government agencies, local government units, state universities and colleges, and government owned and controlled corporations for the public sector;
b) labor centers, federations, and industry unions for the private sector;
c) affiliates, chartered locals, and independent unions for enterprise based unions; and
d) those operating in one region or in more than one region for workers' associations.

Figure 1. Registered labor organizations in the Philippines, fourth quarter 2017–2023



	2017	2018	2019	2020	2021	2022	2023
Public sector	1,466	1,630	1,769	1,819	1,857	1,927	1,980
Private sector	17,576	17,715	17,850	17,976	18,190	18,357	18,587
Enterprise based unions	17,424	17,562	17,694	17,820	18,034	18,201	18,429
Workers associations	58,662	64,933	70,808	79,275	92,774	104,662	117,516

Source: Bureau of Labor Relations, Department of Labor and Employment (DOLE).



Source: Philippine Statistics Authority, 2013/2014, 2015/2016, 2017/2018, 2019/2020 *Integrated Survey on Labor and Employment*.

Figure 2. Percent share of registered unions in establishments employing 20 or more workers in the Philippines, 2014–2020

However, from 2014–2020, it is interesting to note as shown in Figure 2 that there is an obvious decline in terms of percent share of establishments with unions who employ 20 or more workers. According to the Philippine Statistics Authority (PSA), 4.2% or equivalent to 1,464 out of the 34,543 total number of establishments with 20 or more workers had registered unions in 2020, lower by 2.1 percentage points from 6.3% in 2018, and much lower compared with the 2014 percentage of 5.8%. Taken together, Figures 1 and 2 then suggest that there is a large gap in terms of the rate of increase of establishments versus the increase of registered unions.

The top three industry groups with the highest percentage of unionized establishments comes from electricity, gas, steam and air conditioning supply sector at 26.9% followed by water supply; sewerage, waste management and remediation activities at 14.9%, and manufacturing at 11.2%. Table 1 likewise reveals that large establishments with 200 or more workers are most likely unionized at 12.6%, have highest negotiated Collective Bargaining Agreement (CBA) at 12.6% and have highest percentage of Labor Management Cooperation. Taken as a whole though, out of the 1,464 unionized establishments in 2020, only 4.2% of establishments had CBAs.

Figure 3 shows a notable decline in 2020 in terms of union density rate. From 7.0% in 2018, it went down to 6.0% in 2020. According to the PSA, union density rate is the proportion of union membership to total paid employees. In terms of sex, male workers have a higher union density rate at 3.3% while it is 2.7% for female workers. This means that there are 33 unionized male workers for every 1,000 paid employees as the PSA describes. Further, the PSA reported that the top four industries with a union density rate of more than 20% are electricity, gas, steam and air conditioning supply at 24.9%; mining and quarrying at 24.4%; water supply; sewage, waste management and remediation activities at 22.0%; and arts, entertainment and recreation at 20.1%.

A 0.8 percentage points decrease in the CBA coverage rate was likewise noted in 2020 at 6.3% compared to 7.1% in 2018. This means that in 2020, only 333,776 were covered by the CBA out of the 5.29 million paid employees that year. In terms of sex, male workers have a higher percent share of CBA coverage at 3.4% or 34 in every 1,000 paid employees while it was 2.9% for female workers in 2020. However, even workers who are not members of a union also received CBA benefits as the PSA reported a total of 105.5% CBA coverage. Based on the same reference year, mining and quarrying industry posted the highest CBA coverage at 27.2%, followed by electricity, gas, steam and air conditioning supply at 26.2%, and water supply, sewerage, waste management and remediation activities at 24.3%.

Table 1. Number and percent share of establishments employing 20 or more workers with union, Collective Bargaining Agreement (CBA) and Labor Management Cooperation (LMC) by major industry group, and employment size in the Philippines as of June 2020

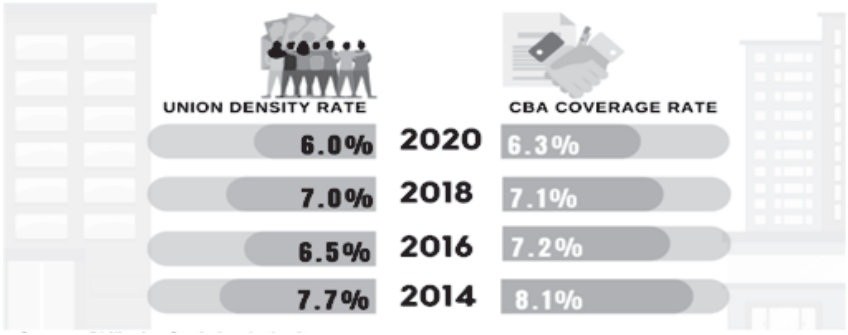
2009 PSIC	Major industry group and employment size	Total establishments	Establishments with union		Establishments with CBA		Establishments with LMC	
			Number	Percent share	Number	Percent share	Number	Percent share
	ALL INDUSTRIES	**34,543**	**1,464**	**4.2**	**1,451**	**4.2**	**2,437**	**7.1**
A	Agriculture, Forestry and Fishing	951	51	5.4	44	4.6	66	7.0
B	Mining and Quarrying	150	15	10.1	15	10.1	17	11.2
C	Manufacturing	5,923	664	11.2	663	11.2	628	10.6
D	Electricity, Gas, Steam and Air Conditioning Supply	263	71	26.9	71	26.9	71	26.9
E	Water Supply; Sewerage, Waste Management and Remediation Activities	331	49	14.9	49	14.9	42	12.8
F	Construction	1,193	3	0.2	3	0.2	15	1.2
G	Wholesale and Retail Trade; Repair of Motor Vehicles and Motorcycles	8,681	162	1.9	162	1.9	407	4.7
H	Transportation and Storage	1,043	53	5.1	53	5.1	42	4.0
I	Accommodation and Food Service Activities	4,070	194	4.8	194	4.8	296	7.3
J	Information and Communication	788	19	2.4	15	1.9	86	10.9
K	Financial and Insurance Activities	1,455	42	2.9	42	2.9	226	15.6
L	Real Estate Activities	613	5	0.8	5	0.8	11	1.9
M	Professional, Scientific and Technical Activities	846	4	0.5	4	0.5	8	1.0
N	Administrative and Support Service Activities	2,445	3	0.1	3	0.1	48	2.0
P	Education Except Public Education	3,894	69	1.8	69	1.8	380	9.8
Q	Human Health and Social Work Activities Except Public Health Activities	1,378	38	2.7	38	2.7	66	4.8
R	Arts, Entertainment and Recreation	202	21	10.5	21	10.5	11	5.3
S95/ S96	Repair of Computers and Personal and Household Goods; Other Personal Service Activities	317	–	–	–	–	16	5.1
	EMPLOYMENT SIZE							
	20 - 99	25,693	537	2.1	526	2.0	1,399	5.4
	100 - 199	4,303	354	8.2	353	8.2	419	9.7
	200 and over	4,546	572	12.6	572	12.6	619	13.6

Source: Philippine Statistics Authority, 2019–2020 *Integrated Survey on Labor and Employment*.
Note: Details may not add up to totals due to rounding.

Studies on the historical low trend in union density in the Philippines had been done by labor scholars. Aganon et al. (2009) reported a huge decrease of 63% in unionization rate in both private and public sectors from 1995 to 2007. According to them, this accounts for only 8.89% union membership in both sectors out of 21,583,111 employees who work for at least 40 hours in 2007. Lumactud (2019) likewise noted the low trend in trade union density with an average of 6.61% within a ten-year period from 2007 to 2017. She also voiced alarm on the 1.04% average CBA for the same period.

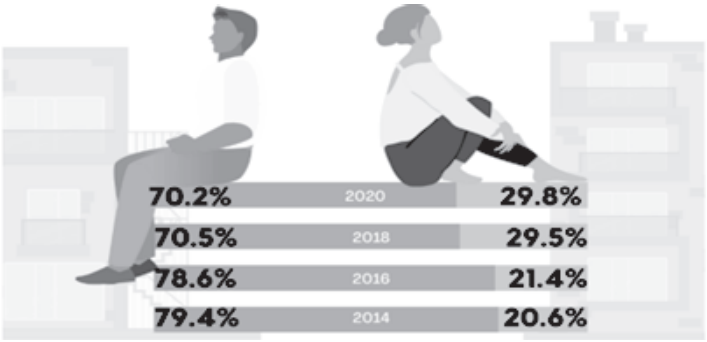
Figure 4 shows an increasing percent share of women as union officers. From 2014 to 2020, a 9.2 percentage points increase can be seen and the average increase for the same period is just 3.1 percentage points. Hence, there is still a large gap on the percent share of union officers between men and women with an average gap of 49.35 percentage points for the survey periods covered. Of the unionized establishments, 29.1% had a female president and union officers. This under representation of women in union leadership, may be due to their lack of confidence in their abilities (Delerio et al. 2019). However, in wholesale and retail trade; repair of motor vehicles and motorcycles there were more female union officers at 60.3% while the male union officers only account for 39.7%. This may be attributed to the number of female workers in this sector, as there is a concentration of women workers in the wholesale and retail trade, and food and accommodation sectors (Ibid.).

As a tool to foster harmonious relationship between workers and employees, establishments can form a Labor Management Cooperation (LMC). Through the LMC, management and workers can hold dialogues to



Source: Same as Figure 2.

Figure 3. Union density and CBA coverage rates in establishments employing 20 or more workers in the Philippines, 2014–2020



Source: Same as Figure 2.

Figure 4. Percent share of union officers by sex in establishments employing 20 or more workers in the Philippines, 2014–2020

discuss, consult, and negotiate so that concerns, issues, and problems at work can be addressed in a peaceful manner instead of being militant and adversarial. In 2020, of the 34,543 total number of establishments employing at least 20 workers or more, only 7.1% created an LMC (Table 1). Most of them come from establishments with more than 200 workers at 13.6% followed by those with 100–199 workers at 9.7% and 5.4% for those establishments with 20–99 workers. The electricity, gas, steam and air conditioning supply industry registered to have the highest share of LMC created in 2020.

V. Labor unions' challenges

The decline in the number of labor unions is not just unique in the country as it is considered a global phenomenon. There are many factors that come into play why is this happening.

Based on the study by Aganon et al. (2009), they identified the following factors or reasons: a) *increasing global economic competition and capital mobility*; b) *rapid pace of technological innovations in production*; c) *restructuring of national economies from manufacturing to services*; d) *privatization of public services*; e) *rise of contingent employment arrangements*; and f) *mounting resistance of employers to unionization* (pp. 1–2).

They further explained the difficulties in organizing unions in the 90s than in the 80s because of workers apathy for fear of reprisal from management if they will be identified as union sympathizers or leaders, and the importance given by workers to job security. This attitude of workers towards unions they said is a result of the employers' avoidance to union organizing which can be manifested from union registration to petition for election certification. In addition, they pointed out that management would resort to other means like hiring of outside consultants to help strategize on how unions can be avoided or busted; bribing, promoting or increasing wages, perks and benefits of union leaders or punishing them with preventive suspension, dismissals or worse, death threats.

Lumactud (2019) attributed the low trade union density rate and collective bargaining coverage rate to the: a) socio-economic situation of the country where majority of establishments are in micro, small and medium enterprises (MSMEs) with less than ten workers; b) increase of non-standard forms of employment which makes the employer-employee relationship unclear; c) changing employment relationships and hiring practices; and d) strategies made by employers themselves to stop or crush union organizing.

Referring to the statements made by various labor leaders, Medenilla (2018) reported the difficulty in organizing workers who have no security of tenure such as those who are non-regular, under probationary, and contractual. Management will not regularize them, or they will be fired from work or worse, face harassment, blacklisted, demoted or charged with a criminal case. Quoting Corporate Secretary Alberto R. Quimpo of the Employers' Confederation of the Philippines (ECOP), Medenilla (2018) stated that the reasons employers discourage unionizing is for fear of workers' challenging the authority of management and the unreasonable demands made by workers. To protect the welfare of workers, Article 248 of the Labor Code of the Philippines, identified the following acts by employers as unfair labor practices:

a) *to interfere with, restrain or coerce employees in the exercise of their right to self-organization;*
b) *to require as a condition of employment that a person or an employee shall not join a labor organization or shall withdraw from one to which he belongs;*
c) *to contract out services or functions being performed by union members when such will interfere with, restrain or coerce employees in the exercise of their right to self-organization;*

d) *to initiate, dominate, assist or otherwise interfere with the formation or administration of any labor organization, including the giving of financial or other support to it or its organizers or supporters;* and
e) *to discriminate in regard to wages, hours of work and other terms and conditions of employment in order to encourage or discourage membership in any labor organization.*

It further stipulates that, "*nothing in this Code or in any other law shall stop the parties from requiring membership in a recognized collective bargaining agent as a condition for employment, except those employees who are already members of another union at the time of the signing of the collective bargaining agreement.*"

With more Filipinos in informal work, organizing them can be a major challenge. Faced with a high 15.4% underemployment and 8.9% unemployment in September 2021, Filipinos are driven to engage in informal work. As of March 2022, informal workers are estimated to be more than 17 million (PSA).

Gig work is another challenge labor unions need to contend with. Developments in information and communication technology have enabled people to engage in gig work whose nature is described as short-term, flexible in terms of jobs and work schedule. Gig workers are often freelancers or independent contractors (Gigworker.com n.d.). According to Payoneer's 2019 Global Gig Economy Index, at 35% growth, the country is the sixth fastest-growing market in freelance earnings. These workers belong to Gen Zs, millennials, and Gen X or boomers at 33%, 22%, and 28% respectively. As it is now, there is an increasing number of Filipino Gen X-ers and millennials who would rather be an entrepreneur or work in companies that offer flexible work hours than be in a traditional work set up of 9 a.m. to 5 p.m. (Inquirer.net 2024).

VI. The labor unions' paradigm shift in a changing world of work

Labor unions in the Philippines have made significant successes. Drawing from the work of Perlman (1958) and Dejillas (1994) who characterized labor unions in the Philippines as belonging to five categories based on their ideological orientation. These are:

1. *revolutionary unions who are against capital domination and push for socialism;*
2. *economist or business unions whose objective is focused on economic issues;*
3. *ethical and moralist unions who advocate for changing the social structure anchored on religious and ethical norms;*
4. *democratic and political unions who promote increasing the political power as well as participation of workers in factory, industry, and society settings;* and
5. *protective or defensive unions who safeguard the interests of workers against abuses of employers and negative impacts of the economic system.*

The history of labor unions in the country points to their continuous struggle from repression in 1901–1907, recognition in 1908–1935 to regulation and protection in 1936–1953 (Wurfel 1959). However, the struggle is not yet over. Their survival depends on their ability to adapt and address the challenges brought about by the changing world of work as well as the conditions in political, social, economic, legal, and technological factors with which they operate. Establishments by their very nature are subject to internal and external forces. Hence, change is imperative, change is inevitable, and a paradigm shift is indispensable.

Aganon et al. (2009) saw the need for union revitalization anchored on strategic leverage and

organizational capacity. They explained that strategic leverage means that unions should expand its scope of influence or bargaining power outside of their structure such as structure of industries, employers' attitude towards unions, labor markets, nature of technology and work organization, labor law and social legislations, the state of regulation of labor policy, and availability of networks, etc. Organizational capacity they further explained refers to the internal structure of unions such as their organizational structure, elected people, staff, volunteer positions, and human resource system. It is the ability of unions to put into action its organizational goals. Further, they advocated for social movement unionism as a means to: a) strengthen positions of unions on certain issues; b) collaborate with other groups towards meeting mutual goals; c) being able to better protect and advance the rights and welfare of those in medium and small establishments, irregular workers and informal sector workers; and d) internationalize labor movements as boundaries of establishments extend local and national boundaries. Considering that issues on job outsourcing, global supply chains, and economic globalization are matters which impact on labor conditions, sharing of best practices, experiences, and strategies with unions worldwide can enhance their effectiveness in addressing global challenges associated with globalization.

Focusing on collective bargaining agreement, Lumactud (2019) suggested strengthening bipartism by increasing the awareness on the various interests of workers, as well as the need to innovate representation models for a more inclusive representation. With regard to increasing the participation of women in enterprise based unions (EBUs), Delerio et al. (2019) made the following suggestions to unions, government, and social partners: a) incorporate gender equality in the Union constitution; b) increase women participation in recruitment, membership, and organizing activities; c) implement gender quota for leadership; d) designate a gender equality officer to help enhance women's participation in union activities; e) formulate policy framework/guidelines to improve role of women in unions and integrate gender issues across union structures and processes; and f) implement targeted training programs to promote gender sensitivity and leadership skills.

Labor unions should then continue its alliance building with various groups such as the civil society, strengthen its informal sector organizing, and adopt community-based organizing not just working within workplaces. To make unionism inclusive, labor unions should maximize the use of social media to increase awareness of people on labor issues as well as coordinate campaigns. Online platforms are a venue to organize gig workers towards collective actions. With Industry 4.0 in our midst, where establishments integrate new technologies at work such as the Internet of Things, (IoT), cloud computing and analytics, and AI and machine learning in their operations, labor unions should ensure that workers' competencies are still relevant in the changing world of work. Their advocacy for comprehensive skills development program and lifelong learning opportunities should be strengthened and given priority.

Labor unions have indeed evolved outside of the framework of traditional unions. With changes at work come opportunities and challenges. In short, the struggle towards social justice and decent work is not yet over. Adaptation, advocacy, and collaboration are therefore crucial for labor unions to survive and navigate the dynamic landscape of work.

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Minimum Wages for Laborers and Maximum Rentals to be Paid by Tenants, and to Enforce Compulsory Arbitration Between Employees or Landlords, and Employees or Tenants, Respectively; and by Prescribing Penalties for the Violation of Its Orders. https://laws.chanrobles.com/. Accessed on January 22, 2024.

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Evolving Workstyles, Evolving Challenges: A Malaysian Perspective on Gig Labour Relations

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I. Introduction

The gig economy in Malaysia has experienced rapid expansion due to the substantial impact of digital platforms, leading to a transformation of traditional employment structures and posing challenges to current legal frameworks. A report by McKinsey & Company in 2016 projected that the gig economy is expected to make a contribution of USD 2.7 trillion to the global economy by 2025, which corresponds to around 2 percent of the total global economy.[1] The gig economy has been identified as a new source of economic growth and is incorporated into the 12th Malaysia Plan, as announced by Tun Dr. Mahathir Mohamad in 2019.[2] Data from the World Bank show that freelancers account for approximately 26 percent of Malaysia's 15.3 million workforce, and the tendency is increasing.[3]

The rise of gig workers in Malaysia poses significant challenges for policymakers and lawmakers, as their current legal classification denies them essential employment rights, such as collective bargaining. Classified as 'independent contractors' or 'self-employed', they lack protection under existing employment laws. Despite offering flexibility, the gig economy presents complex challenges requiring strategic solutions. This paper analyses Malaysia's employment laws and the obstacles faced by gig workers in accessing collective representation through trade unions, aiming to shed light on the complexities of gig labour relations in Malaysia.

II. Conceptualising gig economy landscape in Malaysia

Despite the growing prevalence of gig work and the references to it in official government announcements and mainstream media,[4] gig work lacks a legal definition in Malaysia.

1. Manyika, J., Lund, S., Bughin, J., Robinson, K., Mischke, J., and Mahajan, D. 2016. "Independent Work: Choice, Necessity and the Gig Economy." McKinsey Global Institute. https://apo.org.au/node/201601.
2. Ahmad, N. 2021. "Gig Workers: The New Employment Form in the New Economy." *Ulum Islamiyyah*, 33 (S4), 131–145. https://doi.org/10.33102/uij.vol33nos4.419.
3. Ibid.
4. The term "gig worker" gained prominence in newspaper headlines in Malaysia during the COVID-19 pandemic. It gained popularity when ride-sharing platforms like Uber and Grab entered the Malaysian market.

Malaysia is not alone in this. Globally, there is a recognised gap in defining and measuring gig workers[5] which is critical for effective policymaking so that regulations governing gig workers are adapted to their unique needs and vulnerabilities.[6]

In the absence of a legally accepted definition of gig workers in Malaysia, existing literature is referred to in an attempt to conceptualise the application of the term 'gig workers' in the Malaysian context.

Generally, the term 'gig' in the gig economy refers to the short-term arrangements used in musical events (gig work), which have parallels in the gig economy.[7] Gig economy refers to an economic shift in which employment is becoming more temporary, unstable and patchworked.[8] The tasks underlying the gig economy are also typically short-term, temporary, precarious and unpredictable, with access depending on good performance and reputation.[9]

Tina Brown, a journalist for The Daily Beast, first used the term "gig economy" in 2009 to refer to the trend of workers pursuing 'a bunch of free-floating projects, consultancies and part-time bits and pieces while they transacted in a digital marketplace.'[10] The phrase 'the demand and supply of working activities are matched through online platforms or via mobile work on-demand via apps' is frequently used to describe this phenomenon, along with the terms 'on-demand economy,' 'platform economy,' and 'sharing economy'.[11]

At the international level, research conducted within the International Labour Organisation (ILO) employs the concept of "digital labour platforms" which "include both web-based platforms, where work is outsourced through an open call to a geographically dispersed crowd ('crowdwork') and location-based applications that allocate work to individuals in a specific geographical area."[12]

In Malaysia, gig workers are often classified as independent contractors by the Department of Statistics Malaysia (DOSM) due to their independent and often informal work nature.[13] DOSM categorises gig workers under the umbrella term 'own-account workers', referring to individuals who operate their own businesses without hiring paid workers. This classification is based on data collected through the Labour Force Survey (LFS), which aims to gather information on the labour force, employment, and unemployment in Malaysia.[14]

Regardless of the lack of a unified definition for gig workers, the paper will focus on the term 'gig economy' in the context of labour markets characterised by independent contracting that occurs through, via, and on digital platforms, and participants in the gig economy as 'gig workers' in accordance with ILO classification. In this context, the wide range of activities that are executed through 'online platforms' and 'work on-demand via apps' can be categorised into two task-oriented platforms:

5. Harun, N., Ali, N. M., and Khan, N. L. M. A. 2020. "An Experimental Measure of Malaysia's Gig Workers Using Labour Force Survey." *Statistical Journal of the IAOS*, 36 (4), 969–977."
6. Goh, E., and Omar, N. 2020. "Not All 'Gig Workers' Are the Same." *The Centre*, November 20, 2020. https://www.centre.my/post/gig-workers-are-not-all-the-same.
7. Woodcock, J., and Graham, M. 2019. *The Gig Economy: A Critical Introduction*. Cambridge: Polity.
8. Ibid.
9. Ibid.
10. Gani, H. 2020. "Article: The Gig Economy: Platformisation and Fragmentation of Work." *Institute for Labour Market Information and Analysis* (ILMIA). https://www.ilmia.gov.my/index.php/en/component/zoo/item/article-the-gig-economy-platformisation-and-fragmentation-of-work.
11. De Stefano, V. 2015. "The Rise of the Just-In-Time Workforce: On-Demand Work, Crowdwork, and Labor Protection in the Gig-Economy." *Comp. Lab. L. & Pol'y J., 37*, 471.
12. Valerio, D. S. 2021. Platform Work and the Employment Relationship. http://hdl.handle.net/10419/263093.
13. Department of Statistics Malaysia. 2020. "Gig Workers in Malaysia: A Review of Definitions & Estimation. DOSM's Newsletter 2020." https://statsdw.dosm.gov.my/wp-content/uploads/2021/11/DOSM_MBLS_1-2020_Series-8.pdf.
14. Department of Statistics Malaysia. 2019. Labour Force Survey Report 2018. In https://newss.statistics.gov.my/.

(a) **Crowdwork** or **cloudwork**[15] is web-based, on-demand labour, where tasks are completed behind a computer anywhere. Some of the examples are copywriting, translating and coding work.

(b) **Gig work** or **geographically tethered work**[16] is platform-mediated, location-based labour, where selected individuals are connected to tasks by a platform or work-on-demand app, and the work is completed offline. For instance, e-hailing, food delivery and household services.

Despite efforts to categorise gig workers, challenges persist in quantifying their numbers accurately,[17] even in Malaysia. Data from Malaysia Digital Economy Corporation (MDEC)[18] primarily covers registered formal establishments operating digital platforms, potentially underrepresenting self-employed workers operating informally on digital platforms.[19]

According to DOSM statistics for 2018, 2,859.2 thousand people were self-employed or own-account workers, making up 19.6% of Malaysia's 14.8 million employed people.[20] Approximately 4 million freelancers, or 26 percent of Malaysia's total labour force of 15.3 million, are employed in the gig economy[21] primarily through online-to-offline on-demand apps like ride-hailing and food delivery.[22] According to reports from 2019, there are over 160,000 e-hailing drivers working in Malaysia's gig economy, and there are 13,000 Foodpanda and 10,000 Grab Food riders in the Klang Valley alone.[23]

In order to try to establish an experimental measure to quantify gig workers in Malaysia, a study utilised data from LFS to cover all types of gig employment,[24] where the study calculated that gig workers accounted for 18.4% of the total of 3,043.3 thousand of own-account or private part-time workers, or 559.9 thousand people.[25] According to a 2020 study by Zurich Insurance Group and the Smith School of Enterprise and the Environment at the University of Oxford, 38% of respondents in Malaysia who are currently employed full-time plan to join the gig economy within the next 12 months.[26]

The gig economy has fundamentally transformed the employment landscape, offering flexibility but also leading to negative outcomes such as low pay, precarity, and a lack of employment protections for workers resulting in a 'raw deal' for workers.[27]

Despite the growing number of workers finding employment through digital platforms and the introduction of various schemes to address the immediate lack of social protection for gig workers in Malaysia, gig workers still do not have a strong collective voice, raising significant concerns about their

15. Ibid.
16. Woodcock, *supra* note 7.
17. Harun, N., Ali, N. M., & Khan, N. L. M. A. 2020. "An Experimental Measure of Malaysia's Gig Workers Using Labour Force Survey." *Statistical Journal of the IAOS*, 36(4), 969–977.
18. MDEC is Malsaysia's key agency for digital transformation.
19. Ibid.
20. Department of Statistics Malaysia, *supra* note 13. https://v1.dosm.gov.my/v1/uploads/files/6_Newsletter/Newsletter%202020/DOSM_MBLS_1-2020_Series-8.pdf.
21. Ibid.
22. Uchiyama, Y. 2023. "Exploited and Unprotected: Life as a Gig Worker." https://doi.org/10.54377/4075-297b.
23. Buang, S. 2019. "Regulating the Gig Economy." New Straits Times, November 1, 2019. https://www.nst.com.my/opinion/columnists/2019/11/534683/regulating-gig-economy#google_vignette.
24. Harun, N., Ali, N. M., and Khan, N. L. M. A. 2020. "An Experimental Measure of Malaysia's Gig Workers Using Labour Force Survey." *Statistical Journal of the IAOS,* 36 (4), 969–977. This includes part-timers working fewer than thirty hours per week, freelancers like tutors, tuition teachers, photographers, videographers, tour guides, and technology-based jobs like web designers, software developers, drivers (Grab, MyCar, etc.), and delivery riders (GrabFood, Foodpanda).
25. Ibid.
26. Zurich. 2020. "Zurich-University of Oxford Agile Workforce Study: Gig Economy Rises in Malaysia, Income Protection Lags." Retrieved January 29, 2024, from https://www.zurich.com.my/en/about-zurich/zurich-in-the-news/2020/2020-01-16.
27. Woodcock, *supra* note 7.

capacity to organise and bargain collectively with the digital platforms[28] to adequately address the nature of gig work revolving around delivery fares, payment schedules, rating systems and general issues on social protection.[29]

This highlights the need for legislative reforms to address the challenges faced by gig workers and ensure their rights and well-being are protected in Malaysia's evolving labour market.

III. Legal and regulatory framework in Malaysia and challenges faced by gig workers in Malaysia

Pre-Amendment of Employment Act 1955: Status of Gig Workers in Malaysia and the case of *Loh Guet Ching v Menteri Sumber Manusia & Ors*[30]

An employee's employment status dictates their access to existing employment, labour and social protection in many jurisdictions[31] including Malaysia. Aside from case laws, employment relationships and industrial relations in Malaysia are mainly governed by three main legislations: Employment Act 1955 ("EA 1955"), Trade Unions Act 1959 ("TUA 1959") and Industrial Relations Act 1967 ("IRA 1967").

Under EA 1955 and IRA 1967, a person will be considered an employee or a workman if he or she is under a contract of service or contract of employment.[32] An employee or a workman enjoys certain statutory rights and benefits such as the right against unfair dismissal under IRA 1967,[33] the right to collective bargaining under TUA 1959[34] and IRA 1967, entitlement to minimum terms and conditions of employment under EA 1955,[35] entitlement to minimum wages, retirement fund,[36] social security protections,[37] minimum retirement age under various social legislation.[38]

The issue of whether a person is an employee or an independent contractor is a question of both fact and

28. Woodcock, *supra* note 7.
29. Mail, M. 2022. "Responses to Delivery Riders Missing the Bigger Picture — Edwin Goh." *Malay Mail*, August 29, 2022. https://www.malaymail.com/news/what-you-think/2022/08/29/responses-to-delivery-riders-missing-the-bigger-picture-edwin-goh/25316.
30. The High Court decision can be found at [2022] CLJU 2388. As of 23 November 2023, the Court of Appeal has reaffirmed the decision of the High Court but at the point of writing, the ground of judgment is not available to the public yet.
31. Valerio, D. S. 2021. "Platform Work and the Employment Relationship." https://www.ilo.org/sites/default/files/wcmsp5/groups/public/@ed_protect/@protrav/@travail/documents/publication/wcms_777866.pdf.
32. Schedule 1 of Employment Act 1955 and Section 2 of Industrial Relations Act 1967.
33. Section 20 of Industrial Relations Act 1967 (Act 177) provides where an employee considers he has been dismissed without just cause or excuse by his employer he may make representations in writing to the Digital General (DG) to be reinstated in his former employment within 60 days of the date of dismissal. In the event the representations referred is not settled, the DG shall refer the representations to the Industrial Court for an award.
34. Trade Unions Act 1959 (Act 262). https://www.mdi.gov.my/index.php/legislation/laws/1334-act-262-trade-unions-act-1959.
35. Employment Act 1955 (Act 265). https://www.centralhr.my/wp-content/uploads/2023/08/Act-265_FINAL_as-at-1-Jan-2023-30.3.23.pdf.
36. i-Saraan: Securing Retirement with Voluntary Contribution. (January 17, 2024). Kumpulan Wang Simpanan Pekerja (KWSP). https://www.kwsp.gov.my/en/member/contribution/i-saraan. Gig workers have the option to contribute to their retirement savings through the i-Saraan initiative under the Employee Provident Fund (EPF).
37. "Self-Employment Social Security Scheme" (n.d.). https://www.perkeso.gov.my/uncategorised/51-social-security-protection/818-self-employment-social-security-scheme.html. Currently, self-employed individuals including gig workers are mandatorily covered by the Self-Employment Social Security Scheme administered by the Social Security Organisation (SOCSO).
38. Minimum Wages Order 2022 (PU(A) 140/2022) provides for minimum wage of RM1,500 (USD315.00); Employees Provident Fund 1991 (Act 452) provides for employees' retirement funds, Employees' Social Security Act 1969 (Act 4) provides for social security protection for employees and Minimum Retirement Age Act 2012 (Act 753) provides for minimum retirement age upon attaining the age of sixty years.

law.[39] It is determined by the conduct of the contract's parties and the inferences drawn from them, as well as the terms contained in the contract in question.[40] The Privy Council in *Lee Ting Sang v. Chung Chi Keung* [1990] 2 AC 382[41] had to determine the test to apply to answer the question and cited *Market Investigations Ltd v. Minister of Social Security* [1969] 2 QB 173 in support:

> *"The fundamental test to be applied is this: 'Is the person who has engaged himself to perform these services performing them as a person in business on his own account?' If the answer to that question is 'yes', then the contract is a contract for services. If the answer is 'no', then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors which may be of importance are such matters as whether the man performing the services provided his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task."*

In the "*Industrial Relation in Malaysia Law and Practice*" 3rd Edition,[42] Dunston Ayadurai outlines three tests for discerning the contract of employment/contract of service.[43]

(a) the 'traditional' or 'control' test;
(b) the 'organisation' or 'integration' test; and
(c) the 'mixed' or 'multiple' test.

Even before the ambiguity surrounding gig workers come into question, Malaysian courts have a long history of dealing with businesses evading their obligations as employers leading to the creation of the tests listed above to determine the true nature of the relationship between the parties.

Out of the tests highlighted above, the application of the "control test" as laid down by the apex court of Malaysia, in *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1996] 4 CLJ 687[44] is an important indicator of an employment contract as follows:

> *"... In all cases where it becomes necessary to determine whether a contract is one of service or one for services, the* ***degree of control*** *(bolded and underlined by author) which an employer*

39. *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1996] 4 CLJ 687.
40. The Federal Court in *Hoh Kiang Ngan v. Industrial Court* [1996] 4 CLJ 687 affirmed the Federal Court position in *Assunta Hospital v Dr A Dutt* [1981] 1 LNS 5 which held that: "The correct test to be applied in determining whether a person is a workman under the Industrial Relation Act is that enunciated by Chang Ming Tat FJ in Dr. A. Dutt v. Assunta Hospital [1981] 1 LNS 5; [1981] 1 MLJ 304 (Federal Court). We are accordingly of the view that a "workman" under the Act is one who is engaged under a contract of service. An independent contractor who is engaged under a contract for service is not a workman under the Act."
41. [1990] 2 AC 382 PC.
42. Ayadurai, D. 1992. *Industrial Relations in Malaysia: Law and Practice* (3rd Edition). Kuala Lumpur, Butterworths Asia.
43. While the traditional and organisation tests have limitations in modern industrial relationships, the 'multiple' or 'mixed' test, grounded in economic reality, is preferred by courts. This test evaluates whether the contract provisions align with entrepreneurship rather than employment. Ayadurai stresses that no single test is conclusive, and courts consider various elements such as the employer's control, integration of the employee into the business, chance of profit, and risk of loss. Additionally, factors like ownership of tools, entitlement to exclusive service, payment structure, and power dynamics influence the determination of the employment relationship. Ayadurai emphasises that parties' intentions and agreements are pivotal in cases of doubt or ambiguity regarding the nature of the relationship.
44. [1996] 4 CLJ 687 FC.

exercises over a claimant is an important factor, although it may not be the sole criterion..."

The courts will identify the amount of control in which the employer has over the particular employee in order to ascertain whether a person is an employee or an independent contractor.[45] No test is conclusive and the weight attached to the same varies from case to case.[46]

Where gig workers are concerned however, the case of Ms. Loh Guet Ching is the first of its kind in Malaysia against a digital platform, Grab[47] ("Grab"). In 2021, the High Court[48] held that e-hailing drivers are not employees or workmen within the strict parameters of the IRA 1967 and therefore the Industrial Court rightfully did not have the jurisdiction to entertain her claim for unfair dismissal under Section 20(1) of IRA 1967 and so, the Malaysian Minister of Human Resources (MOHR) had correctly declined to refer the claim for hearing[49] at the Industrial Court.[50]

For context, Loh filed a complaint against Grab with the Malaysian Industrial Relations Department under Section 20(1) of IRA 1967, alleging unfair termination from the platform. She claimed she was barred from driving for Grab following a disagreement with passengers at Senai International Airport in Johor in November 2018.[51] Subsequently, the passengers expressed their displeasure and publicised the issue on social media. Grab then suspended her account, ultimately terminating it on 5.11.2019.[52]

The High Court's judgment considered several key points to establish the absence of an employer-employee relationship between Loh and Grab:

(a) There is no employment contract signed between Loh and Grab;
(b) She did not receive a salary but instead Grab received a commission cut of 20% from Loh based on the profit she earned from driving passengers via the digital platform provided by Grab;
(c) Grab did not contribute to her retirement fund, Employment Injury Scheme and Invalidity Scheme under SOCSO and Employment insurance Scheme (EIS);
(d) Grab did not provide her with an income tax statement for purpose of Loh's income tax;
(e) Grab did not control Loh, instead, she was free to use the digital platform provided at her convenience and she was not prevented from using other digital platforms;
(f) Grab only provided a platform for its independent contractor/driver which they termed as "Grab-Driver Partner" where they are contracted to engage and drive passengers/customers via its digital platform; and
(g) In her own affidavit filed to the High Court, she referred herself as Grab-Driver Partner.

When the High Court was invited to consider the trend of cases decided in other countries including the United Kingdom and Europe that recognised the status of e-hailing drivers as employees of the e-hailing

45. [1996] 4 CLJ 687 FC.
46. *Tandiko Dalusin v Elovest Furniture* and *Woodwork Sdn Bhd* [2010] ILRU 0811 (Industrial Court).
47. Buckley, J. 2023. "A Brief History of Grab in Southeast Asia: Transnationality, Dominance and Resistance." *Asian Labour Review*, February 27, 2023. https://labourreview.org/grab-in-southeast-asia/.
48. *Loh Guet Ching v Minister of Human Resource & Ors* [2022] CLJU 2388, High Court.
49. "Employment Act to Be Amended to Cover E-hailing Drivers." *Free Malaysia Today*, December 2, 2021. https://www.dailyexpress.com.my/news/182681/employment-act-to-be-amended-to-cover-e-hailing-drivers/.
50. The employment tribunal in Malaysia pursuant to IRA 1967 which hears matters relating to, among others, unfair dismissal of a workman or trade disputes.
51. She said the passenger booked two vehicles on the Just Grab tier, the cheapest on the platform, although there were seven of them altogether, each with a bag. She told them she could only take three passengers with their three pieces of luggage; anything else would be an overload, but they were upset because they wanted a fourth family member to also hop into her car. The other Grab driver had apparently told the fourth passenger to ride in her vehicle because his car was smaller than hers, but she refused.
52. Anbalagan, V. 2023. "E-hailing Drivers Not Employees, Court Reaffirms." *Free Malaysia Today*, November 27, 2023. https://www.freemalaysiatoday.com/category/nation/2023/11/27/court-of-appeal-affirms-that-e-hailing-drivers-are-not-employees/.

companies, the Court, having regard to the existing written law in Malaysia held that there are no legal provisions in Malaysia that recognised e-hailing drivers as an employee and therefore, an employment relationship between Grab and Loh does not exist.

In November last year, the Court of Appeal reaffirmed the decision of the High Court.[53] At the point of writing, the grounds of judgment from the Court of Appeal are yet to be released.[54]

Section 103C of the Employment (Amendment) Act 2020[55]

With the passing of the recent amendments to EA 1955,[56] the control test above has been formally codified and provided under Section 103C of EA 1955 as follows:

(1) In any proceeding for an offence under this Act, in the absence of a written contract of service relating to any category of employee under the First Schedule, it shall be presumed until the contrary is proved that a person is an employee-

(a) where his manner of work is subject to the control or direction of another person;

(b) where his hours of work are subject to the control or direction of another person;

(c) where he is provided with tools, materials or equipment by another person to execute work;

(d) where his work constitutes an integral part of another person's business;

(e) where his work is performed solely for the benefit of another person; or

(f) where payment is made to him in return for work done by him at regular intervals and such payment constitutes the majority of his income.

(2) For the purpose of subsection (1), it shall be presumed until the contrary is proved that a person is an employer-

(a) where he controls or directs the manner of work of another person;

(b) where he controls or directs the hours of work of another person;

(c) where he provides tools, materials or equipment to another person to execute work;

(d) where the work of another person constitutes an integral part of his business;

(e) where another person performs work solely for his benefit; or

(f) whether or not payment is made by him in return for work done for him by another person.

(3) The first-mentioned person in subsection (2) includes the agent, manager or factor of such first-mentioned person.

The decision of the Court of Appeal in *Loh*'s case is concerning, particularly because the Malaysian Deputy Human Resources indicated in the parliamentary session on 2 December 2021 that the codification of the control test under Section 103C of EA 1955 was intended to include gig workers in the definition of "employees" under the Act.[57]

Although an argument could be made that *Loh*'s case[58] was lodged pre-amendment and therefore would not be a true reflection of the application of the newly introduced Section 103C of EA 1955.[59] As the

53. Anbalagan, *supra* note 52.

54. Loh has yet to exhaust her legal recourse yet as she could still seek for leave to appeal to the highest court in Malaysia, which is Federal Court.

55. Act A1651.

56. Employment (Amendment) Act 2020 (Act A1651).

57. Dewan Rakyat. 2021. *Penyata Rasmi Parlimen Dewan Rakyat* [Hansard]. (Vol. 41), December 2, 2021. https://www.parlimen.gov.my/files/hindex/pdf/DR-02122021.pdf#page=27&zoom=100&search=akta%20kerja.

58. *Loh Guet Ching v Minister of Human Resource & Ors* [2022] CLJU 2388, High Court.

59. Section 35(1) of Industrial Relations (Amendment) Act 2020 (Act A1615) is a savings and transitional provision which provides, among others, for representations for reinstatement under Section 20 of IRA 1967 and proceedings that have commenced by the

amendments to the EA 1955 are still in their embryonic stages, it remains to be seen whether the Malaysian courts will adopt the legislative intent in their interpretation of the Section 103C of the EA 1955 to classify gig workers as employees.[60]

IV. Gig workers' access to collective bargaining in Malaysia

Freedom of association is a fundamental right enshrined under the Malaysian Federal Constitution[61] and internationally recognised under the ILO. Unions play a vital role in improving workers' rights, pay, working conditions and provide them the right to express work-related grievances[62] through the recognisable right of trade unions to collective bargaining.[63]

Employment laws in Malaysia not only provide for minimum rights to employees, but the laws also recognise the right of those employees to collectively negotiate or bargain an agreement with their employer on the terms and conditions of their employment.[64]

As highlighted above, access to these rights is dependent on their employment status – if they are an employee, then they are entitled to those rights. As the employment status of gig workers remains uncertain in light of the Court of Appeal position in *Loh Guet Ching*[65] above, gig workers are arguably still prevented from establishing and joining a trade union to collectively bargain with the digital platforms in Malaysia.

Section 8 of the EA 1955 provides that nothing in any contract of service shall in any manner restrict the right of any employee who is a party to such contract to (a) join a registered trade union (b) to participate in the activities of a registered trade union, whether as an officer of such union or otherwise or (c) to associate with any other persons for the purpose of organising a trade union in accordance with the TUA 1959.

The recognition of an employee's right to establish and participate in trade union activities, however, is not without its restrictions. In light of Malaysia's bloody association of trade unions with communist activities in the past, restrictions have been imposed on the trade union movement in Malaysia in the succeeding years, which has long been noted to result in the dwindling union membership as, among others, the complicated process for recognition impeded the trade union's right to collective bargaining.

At present, Malaysia's unionisation rate has been declining over the last four decades. According to the most recent data from the Department of Trade Union Affairs, there were 767 trade unions in 2022, representing only 5.8% of the Malaysian workforce, with less than 2% of all employees covered by collective agreements.[66]

In 2023, Trade Unions (Amendment) Bill 2023 (the "Amendment") has been passed.[67] The Amendment,

Industrial Court of awards made before the Industrial Court in relation to a reference by the Minister of Human Resources (MOHR), these matters shall proceed and have effect as if the IRA had not been amended by the Industrial Relations (Amendment) Act 2020.

60. In Malaysia, the courts utilised several methods of judicial interpretation in interpretation of statutes such as literal rule, mischief rule, golden rule and lastly, purposive rule by reference to the purpose underlying the legislation.
61. Article 10 of Federal Constitution of Malaysia.
62. Amin, N. S. M. 2023. "Balancing the Right of Gig Economy Workers in the Context of Collective Bargaining." *IIUM Law Journal*, 31 (1), 169–202. https://doi.org/10.31436/iiumlj.v31i1.834.
63. Section 13 of IRA 1967 provides for the right of trade union to collective bargaining.
64. Section 8 of EA 1955.
65. *Loh Guet Ching v Minister of Human Resource & Ors* [2022] CLJU 2388, High Court.
66. Goh, E., Ooi, K. H., and Ahmad, K. 2023. "What You Need to Know About Unionisation in Malaysia" *The Centre*, May 26, 2023. https://www.centre.my/post/what-you-need-to-know-about-unionisation-in-malaysia.
67. Trade Unions (Amendment) Act 2024 (Act A1700). https://themalaysianlawyer.com/wp-content/uploads/2024/05/Companies-Amendment-Act-2024.pdf.

although gazetted, have yet to come into force.[68] One of the key amendments to the TUA 1959 is the removal of the restrictions on the formation of trade unions based on specific establishments or similarity in trade, occupations or industries[69] to allow and encourage formation of multiple trade unions in any establishment, trade, occupation or industry.[70]

In line with the objectives of the Amendment, union membership has been expanded to allow a workman (including any workman who has been dismissed, discharged, retrenched or retired) to be a member of any trade union, provided that the rules of the particular trade union allow for it, regardless of the establishment, trade, occupation or industry in respect of which the trade union is registered.[71]

Premised on the above, the right to establish and participate in a trade union remains exclusive to those who meet the definition of a "workman" under the employment laws in Malaysia.

As it stands today, the law remains uncertain as far as the status of gig workers is concerned. Despite the amendments to the main employment legislation in Malaysia, the inadequacy of existing legal and regulatory parameters curtailed their access to statutory rights provided for those who fall under the status of employees in Malaysia, particularly the freedom of association through trade unions and the associated right to collective bargaining.

Their relative lack of collective voice for gig workers hinders their ability[72] to adequately address the nature of gig work revolving around delivery fares, payment schedules, rating systems and general issues of social protection, which remain lacking.[73]

An important lesson can also be drawn from *Loh*'s case above. The exclusion of gig workers from the category of employee results in them having no available grievance mechanism under the existing employment jurisprudence that would allow them the room to challenge any decision of the digital platforms including terminating them from the digital platforms in question.

V. Conclusion

When the gig economy through digital platforms was first recognised as a growing phenomenon, many remarked that traditional forms of worker representation would no longer be appropriate or adequate to protect these workers. The widespread use by platforms of self-employed independent contractor status not only creates the condition of low pay and precarious working conditions, but it also creates significant barriers to traditional forms of trade unionism.[74]

As highlighted above, the existing legal and regulatory framework remains ambiguous in relation to gig workers, and the newly introduced amendments are still in their infancy, so their impact on the development of better legislative and regulatory protections for gig workers will require further observation.

Despite legal limitations barring gig workers from collectively voicing through conventional trade unions, new forms of worker organisation exist that allow them to collectively demand better working conditions.

68. Ibid.
69. Section 2 of Trade Unions (Amendment) Act 2024 (Act A1700).
70. Ragu, D. 2023. "Dewan Rakyat Passes Controversial Amendment to Trade Unions Act." *Free Malaysia Today*, October 10, 2023. https://www.freemalaysiatoday.com/category/nation/2023/10/10/dewan-rakyat-passes-controversial-amendment-to-trade-unions-act/.
71. Amendment to Section 26 of TUA 1959.
72. Woodcock, *supra* note 7.
73. Mail, M. 2022. "Responses to Delivery Riders Missing the Bigger Picture — Edwin Goh." *Malay Mail,* August 29, 2022. https://www.malaymail.com/news/what-you-think/2022/08/29/responses-to-delivery-riders-missing-the-bigger-picture-edwin-goh/25316.
74. Woodcock, *supra* note 7.

Irrespective of whether gig workers can participate in trade unions, it is important for them to have a collective voice, allowing them to raise concerns and negotiate collectively rather than individually.[75]

The usage of digital platforms in the gig economy makes many jobs falling under the category increasingly invincible. In the absence of a collective voice, digital platforms are more likely to act unilaterally without the checks of collective bargaining or negotiation.

In new forms of work like digital labour, innovations are required to successfully organise, finding new weaknesses in the control of work.[76] There are emerging models of unionisation that are specifically designed to support gig workers.

In Malaysia, there are emerging efforts to organise and support gig workers such as the Malaysian P-Hailing Riders' Association (*Penghantar*) to advocate for the rights of gig workers and promote greater social protections and benefits. In fact, there are recommendations to push for an alternative body to protect the interests of gig workers and to act as the main stakeholders in the gig economy.[77]

In addition to current policies concerning gig workers in Malaysia, the government is set to deliberate on the proposal of establishing a Gig Economy Commission with the aim to address issues within the informal work sector and develop initiatives to safeguard the welfare of various stakeholders, including consumers, vendors, traders, workers, and service platform providers.[78]

Given the above, rather than solely focusing on new labour laws for the gig economy, the ILO proposes two universal labour guarantees for all workers:

(a) Fundamental workers' rights: freedom of association and the effective recognition of the right to collective bargaining and freedom from forced labour, child labour and discrimination; and
(b) A set of basic working conditions: (i) adequate living wage (ii) limits on hours of work and (iii) safe and healthy workplaces.

This approach ensures equal labour protection for all workers, regardless of their employment status, without the need for specific laws tailored to the gig economy.[79]

Edwin Goh at The Centre advocates for a Fair Work Act[80] that encompasses gig workers alongside traditional employees, aiming to safeguard the rights and well-being of all workers. He emphasises the need to clarify employment classification to reflect the evolving dynamics of employment in Malaysia.[81] Through the implementation of a holistic strategy with a view of establishing a sustainable labour market, it would enable gig workers to express their grievances, negotiate improved terms, and contribute to sustainable economic development.

It is imperative to adopt a comprehensive approach encompassing legal reforms, innovative organisational structures, and unified advocacy efforts, ultimately aiming to prioritise the rights and well-being of all workers and thereby fostering an inclusive and equitable labour market to resolve the challenges encountered

75. Uchiyama, Y. 2023. "Exploited and Unprotected: Life as a Gig Worker." https://doi.org/10.54377/4075-297b.
76. Ibid.
77. Radzi, M. S. N. M., Bidin, A., Musa, M. K., and Hamid, N. A. 2022. "Protecting Gig Workers' Interests in Malaysia through Registered Association under Societies Act 1966." *IIUM Law Journal*, 30, 157.
78. Ibrahim, J. 2024. "DPM: We'll Look After Gig Workers." *The Star*, January 22, 2024. https://www.thestar.com.my/news/nation/2024/01/22/dpm-well-look-after-gig-workers.
79. International Labour Organization. 2019. "Global Commission on the Future of Work–Work for a Brighter Future." https://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/publication/wcms_662410.pdf.
80. Goh, E., and Omar, N. 2021. "The Case for a Fair Work Act, Part 1." *The Centre*, April 15, 2021. https://www.centre.my/post/the-case-for-a-fair-work-act-part-1.
81. In some cases, having overly broad definitions for "gig worker" resulted in unanticipated consequences; for example, in California, many freelancers lost their jobs after the passage of AB 5, as their "employers" could not afford to reclassify them as employees as mandated by the new law (which was later overturned).

by gig workers in Malaysia.

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The State of Indonesian Labor Unions: Navigating Labor Dynamics and Challenges

Ike FARIDA

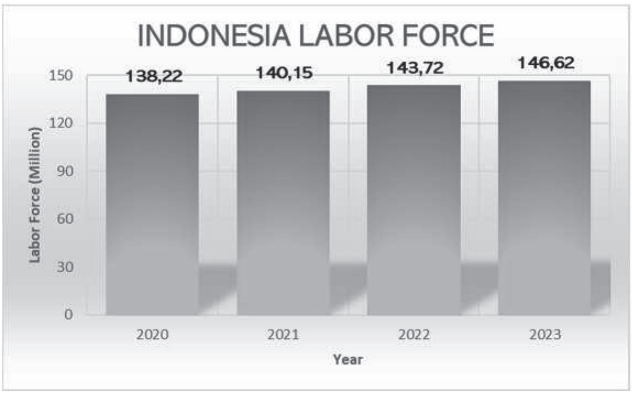
I. Introduction: Current state of Indonesian labor market, workers, and work trends

Over the past two decades, Indonesia has experienced consistent economic growth. Indonesia is in its demographic bonus state,[1] where the majority of the population is in its productive age (15 to 64 years old), which has been seen as an opportunity for Indonesia to transition from a developing country into a developed country.[2] The *National Labor Force Survey* (*Sakernas*) by the Central Bureau of Statistics (BPS) reported in August 2023 that the total population in the working age reached 212.59 million people. From this figure, Indonesia has 146.62 million labor force with details as follows.

The Indonesian labor force shown in Figure 1 below demonstrates an interesting trend in the labor force. There is a significant increase from year to year. The composition of the labor force in 2020 was 138,221,938 workers with a composition of 128.45 million employed and 9.7 million unemployed persons. Continuing to 2021, the labor force increased by 1.93 million from the previous year. Until 2023, the Indonesian labor force reached its highest of 146.62 million with a labor force participation rate of 69.48%. This growing labor force indicates that the population and economic activity continues to grow.

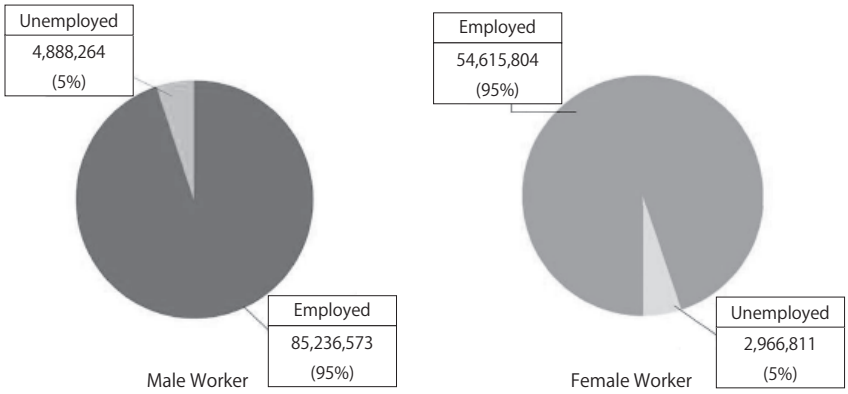
Examining the division of labor by gender, there is an imbalance in employment opportunities between male and female workers. From the Figure 2, there are more than 85 million male workers which is higher at 61% compared to female workers. Meanwhile, those who are not in the labor force, consisting of individuals (both male and female) aged 15 years and above engaged in activities such as attending school, housekeeping, and other activities, totaled 7,855,075 people. Indonesia's labor force has various employment types, such as formal employment, informal labor, gig work, and remote work. Formal employment includes business status with the help of permanent workers. For example, government workers, health service workers, manufacturing workers and others. In Indonesia, the formal sector is considered relatively safe from turnover/layoffs due to its strong capital base.[3]

1. Achmad Nur Sutikno, "Bonus Demographi Di Indonesia" [Demographic Bonus in Indonesia], VISIONER: *Jurnal Pemerintahan Daerah Di Indonesia* 12, no.2 (December 2020): 421–439.
2. Zulkarnain Ibrahim, "Eksistensi Serikat Pekerja/Serikat Buruh Dalam Upaya Mensejahterakan Pekerja" [The Existence of Trade Unions: Labor Unions in the Efforts to Improve Workers' Welfare], *Jurnal Media Hukum* 23, no.2 (December 2016): 150–161, https://doi.org/10.18196/jmh.2016.0076.150-161.
3. Dewi Middia Martanti, Florentz Magdalena, Natalia Pipit D. Ariska, Nia Setiyawati, and Waydewin C. B. Rumboirusi, "Dampak



Source: Central Bureau of Statistics 2023.

Figure 1. Trend of the Indonesian labor force from 2020 to 2023[4] (million persons)



Source: Central Bureau of Statistics 2023.

Figure 2. Indonesian labor force by gender, August 2023[5] (million persons)

Meanwhile, informal labor is labor with self-employment status and unpaid labor in the agriculture and non-agriculture sectors. In the current evolving digital era, the gig economy phenomenon creates new forms of work. It produces gig workers/freelancers with more flexible jobs which attract many people. The presence of gig workers serves as an oasis amidst Indonesia's labor structure which is dominated by informal workers, accounting for 59.11% of the total workforce.[6]

Gig work is generally known for its flexibility and minimal entry requirements, allowing individuals without formal qualifications to secure work, income, and greater control over their work. Since the

Pandemi Covid-19 Terhadap Tenaga Kerja Formal di Indonesia" [The Impact of Covid-19 Pandemic on Formal Labor in Indonesia], *Populasi* 28, no.2 (2020): 34, https://doi.org/10.22146/jp.63345.

4. Central Bureau of Statistics, *Kadaan Angkatan Kerja Di Indonesia* [Labor Force Situation in Indonesia: February 2023] (Jakarta: Badan Pusat Statistics Indonesia, 2023), accessed March 12, 2024, https://www.bps.go.id/en/publication/2023/06/09/5ce5c75f3ffabce2d6423c4a/laborforce-situation-in-indonesia-february-2023.html.
5. Central Bureau of Statistics, *supra* note 4, 7–11.
6. Central Bureau of Statistics. *Booklet Survei Angkatan Kerja Nasional Agustus 2023*, volume 6, nomor 2 [National Labor Force Survey Booklet August 2023, vol.6, no.2], (Jakarta: Badan Pusat Statistik, 2023), accessed March 12, 2024.

emergence of the gig economy, the open unemployment rate in major cities in Indonesia has decreased significantly.[7] In Jakarta, for example, the unemployment rate decreased significantly from 2011 to 2014 by 5.79 percemtage points, reaching just 11%. Amidst the gig economy, remote work also became popular, working with flexible working hours, and maximizing the use of technology such as virtual meeting applications, chat applications, and others.[8] The phenomenon suggests that the diversification of work styles in Indonesia can be an opportunity to reduce unemployment rates.

These employment types and their new forms of work need to be balanced with the protection of workers' rights through the role of labor unions. Labor unions, which play a protective role for workers, are sometimes viewed as threats by certain employers, leading to workers often face threats from employers.[9] The government's commitment to protect workers' rights is realized through the enactment of the Law No. 21 of 2000 concerning Labor Unions. The legalization of labor unions under the law is because labor unions are one of the world's largest representative organizations, with more than 251 million members worldwide, which could assist with balancing out the much- needed bargaining power.[10] Additionally, labor unions also play a significant role in combating workplace discrimination, thereby ensuring greater protection for workers.[11] Hence, for an emerging economy such as Indonesia with its developing law, labor unions are important in ensuring that employers does not violate or mistreat their workers.

Unfortunately, the current Law No. 21 of 2000 concerning Labor Unions has failed to address the needs of new forms of workers such as gig workers and remote workers. The law, which is supposed to be a stage for all kinds of workers to get security, focuses more on formal labor rather than informal labor or other workers. For example, the Media and Creative Industry Workers Union for Democracy (*Sindikasi*) has revealed that the vulnerability of freelance workers' status in Indonesia's legal framework makes companies prefer to hire freelancers rather than permanent employees.[12] Instead of giving freelancers a breathing space in this volatile economy, companies are looking for loopholes to minimize disputes between workers and employers. Employers take advantage of the fragmented work style of freelancers, leading many workers to adopt a passive stance when confronting employers with issues such as violations of rights.

In addition to freelancers, gig workers from several app-based online drivers such as *Gojek*, *Grab*, *Maxim*, *inDrive*, and others play a significant role. In 2023 alone, the number of app-based drivers involved in the online transportation sector reached 4 million individuals. Hence, with their increasing numbers and strategic functions, society relies on these service providers. However, it is regrettable that the category

7. Central Bureau of Statistics, *Keadaan Angkatan Kerja di Indonesia Agustus 2015* [Labor Force Situation in Indonesia: August 2015], (Jakarta: Badan Pusat Statistik, 2015), accessed March 12, 2024, https://www.bps.go.id/id/publication/2015/11/30/311dc33e7624d47529ec4800/keadaan-angkatan-kerja-di-indonesia-agustus-2015.html.
8. Centia Sabrina Nuriskia, and Andriyanto Adhi Nugroho, "Perlindungan Hukum Pekerja Dalam Penerapan Sistem Remote Working Sebagai Pembaharuan Sistem Kerja" [Legal Protection of Workers in the Application of Remote Working System as a Work System Renewal], *Jurnal Usm Law Review* 5, no.2 (2022): 679, https://doi.org/10.26623/julr.v5i2.5555.
9. Charina Lucky Pratiwi, and Aries Harianto, "Pencatatan Serikat Pekerja/Serikat Buruh Berdasakan Asas Kebebasan Berserikat" [Registration of Trade Unions Based on the Principle of Freedom of Association], *Interdisciplinary Journal on Law, Social Sciences and Humanities* 2, no.1(May 2021): 3, https://doi.org/10.19184/ijl.v1i2.21975.
10. International Labor Organization (ILO), "How Are Trade Unions Adapting to Changes in The World of Work?" last modified June 2, 2023, accessed March 11, 2024, https://www.ilo.org/actrav/media-center/news/WCMS_883756/lang--en/index.htm.
11. Iqbal Faza Ahmad, and Syaefuddin Ahrom Al Ayubbi, "Kronik Gerakan Serikat Buruh di Indonesia: Peta Dan Sejarah" [Chronicles of the Trade Union Movement in Indonesia: Map and History]. *Journal of Social Movements* 1, no1. (2024): 12, https://doi.org/10.62491/jsm.v1i1.2024.1.
12. Rio Apinino, "Meningkatkan Kekuatan Freelancer dengan Berserikat" [Increasing the Power of Freelancers by Unionising], *Indoprogress*, March 9, 2022, accessed March 12, 2024, https://indoprogress.com/2022/03/meningkatkan-kekuatan-freelancer-dengan-berserikat/.

of informal worker acts as a barrier for online drivers to have the opportunity to unionize. Moreover, the relationship between online drivers and corporations, which is limited to partnerships, restricts them to form official unions.[13]

The above explanation could illustrate challenges faced by workers in non-traditional employment arrangements. The lack of employment and social protection for workers is a major shortcoming of the Law No.21 of 2000 concerning the Labor Unions. This Law focuses more on workers under legitimate employment agreements such as formal worker while there are many new forms of work nowadays. Therefore, the Law No.21 of 2000 concerning Labor Unions and the Law No. 13 of 2003 concerning Manpower are unable to accommodate the diverse developments in the world of work.

The adaptation of policies is necessary due to the dynamic nature of today's working environment. There has been a notable shift in attitudes towards work-life balance, flexibility and career mobility. The implementation of work-life balance designed to reduce work-life conflict has become a current trend, with the aim of improving workers' effectiveness in performing their jobs.[14] This shift reflects modern workers' evolving expectations for greater work-life balance, while valuing flexibility, and career advancement. The impact of these changes affects labor unions' ability to represent and mobilize workers effectively. To remain relevant and impactful, labor unions must adapt to these changes by exploring innovative strategies. For instance, in Jordan, the government has set up an office within the labor union to help refugees obtain work permits.[15] Labor unions should include the concerns of current and future worker in their social dialogue and broader agendas.

II. Labor Relations Laws in Indonesia

From a legal perspective, prior to the enactment of labor union regulations, in protecting and ensuring the basic rights of workers and ensuring equal treatment opportunities without any discrimination to achieve workers' welfare, workers were given the right to associate as stated, in Article 28E of the 1945 Constitution of the Republic of Indonesia. Specifically, the rights protected by the Constitution are the "freedom to associate, assemble, and express opinions."

During the leadership of Indonesia's first president, President Sukarno, the government issued the Law No. 21 of 1954 concerning Labor Agreements between Labor Unions and Employers. This regulation became the first legal basis after Indonesia's independence, regulating the relationship between labor unions and employers.[16] A year later, the government issued Ministerial Decree No. 90 of 1955 concerning the Registration of Labor Unions.

The government's commitment to safeguard labor rights became more evident when it ratified International Labour Organization (ILO) Convention No. 87/1948 concerning Freedom of Association and Protection of the Right to Organize through Presidential Decree No. 83 of 1998. Additionally, it ratified ILO Convention No. 98/1949 concerning the Right to Organize and Collective Bargaining, which was also ratified by the Indonesian government through the Law No. 18 of 1956 concerning the Ratification of ILO

13. Oka Halilintarsyah, "*Ojek* (motorcycle) Online, *Pekerja atau Mitra?*" [Online Ojek, Worker or Partner?], *Jurnal Persaingan Usaha* 1, no 2 (2021) :54¬–73, https://doi.org/10.55869/kppu.v2i.24.
14. Zeni Rahmawati, and Janti Gunawan, "Hubungan Job-related Factors, Work-life Balance dan Kepuasan Kerja pada Pekerja Generasi Milenial" [The Relationship Between Job-related Factors, Work-Life Balance and Job Satisfaction in Millennial Generation Workers], *Jurnal Sains dan Seni ITS* 8, no.2 (2019): 419, https://doi.org/10.12962/j23373520.v8i2.47782.
15. ILO, *supra* note 10.
16. Arifuddin Muda Harahap, *Introduction to Labor Law* (Malang: Literasi Nusantara, 2020), 27.

Convention No. 98 of 1949 on the Right to Organize and Collective Bargaining. This commitment was further solidified by the enactment of the Law No. 21 of 2000 concerning Labor Unions, which aimed to modernize labor relations in Indonesia. Under this law, labor unions are recognized as independent and democratic organizations dedicated to advocating for workers' rights and improving their welfare. The legislation ensures that the formation and registration of labor unions remain free from interference by companies, government entities, or political parties, allowing workers to exercise their organizational rights without constraint.

Additionally, the Law No. 21 of 2000 concerning Labor Unions explicitly prohibits any actions that obstruct or coerce workers from forming or joining unions, protecting them from various forms of retaliation or discrimination. Article 28 of the law outlines specific prohibitions, including termination of employment, wage withholding, intimidation, or anti-union campaigns. By establishing these protections, the government aims to foster a more equitable and respectful work environment where workers can freely associate and engage in collective bargaining without fear of reprisal.

While the Law No. 21 of 2000 concerning Labor Unions in Indonesia recognizes the ability of workers to unionize, there are still some regulations that is deemed to be strict on labor union movement. First, the law still present barriers for workers to organize. For example, Article 5 of the Law No. 21 of 2000 concerning Labor Unions requires that a union can only be formed if it has at least 10 members. Informal workers, on the other hand, generally have less than 10 members and are therefore not required to form a union.[17] Further restrictions can be found in Articles 14 and 16 of the Law No. 21 of 2000 concerning Labor Unions, which set out restrictions on the relationship between workers, trade unions, federations and confederations. The clause restricts workers from being members of more than one trade/labor union in the same workplace. Secondly, the clause states that a union can only be affiliated to one trade/labor union federation, and one federation of trade/labor union can only be affiliated to one trade/labor union confederation.

Furthermore, the Law No. 21 of 2000 concerning Labor Unions creates a barrier to the recognition of collective bargaining agents. According to Article 25, the prior consent or approval of the authority is required to engage in collective bargaining. Therefore, labor unions must be registered to exercise their statutory negotiation rights. Additionally, there are excessive requirements regarding labor union representativeness, or the minimum number of members required to engage in collective bargaining.

Labor Unions are also regulated by the Law No. 13 of 2003 concerning Manpower, specifically stipulated in Article 104 of this law. Article 104 of the Law No.13 of 2003 concerning Manpower grants every worker the right to establish and become a member of a labor union. The permissive climate in the formation of labor unions facilitates workers in establishing a labor union. The formation of labor unions is regulated in detail by Minister of Manpower and Transmigration Decree No. KEP.16/MEN/2001 concerning Procedures for the Registration of Workers Union/Labor Unions. This ministerial decree was issued in response to the numerous labor unions that disregarded the proper procedures for their formation, leading to instances where members of labor unions often pursued their rights independently.[18]

The presence of labor unions plays a crucial role in advocating for workers' welfare. One of these roles is stipulated in Article 116 of the Law No. 13 of 2003 concerning Manpower, which states that the function of labor unions is to negotiate collective labor agreements with employers. Through these collective agreements, labor unions can advocate for workers' interests such as wages, working hours, leave, and other matters.

17. Ibrahim, *supra* note 2, 152.

18. Pahrur Rizal, Habibi Habibi, and I Putu Pasek Bagiartha W, "Urgensi Serikat Pekerja Dalam Mewujudkan Kesejahteraan Pekerja" [The Urgency of Trade Unions in Realising Workers' Welfare], *Jurnal Hukum Agama Hindu Widya Kerta* 5, no.2 (November 2022): 103, https://e-journal.iahn-gdepudja.ac.id/index.php/WK/article/view/763.

Despite the close relationship between labor unions and employers, disputes between them are inevitable. Therefore, the government regulates procedures for resolving disputes between labor unions and employers in the Law No. 2 of 2004 concerning Settlement of Industrial Relations Dispute.

III. The state of labor union in Indonesia and the challenges they face

After independence, the dynamics of labor union formation in society became increasingly widespread. Understandably, the formation of labor unions stemmed from the deterioration of working conditions under Dutch colonial rule. As a result, workers organized collectively, giving birth to labor unions.[19] Among the many labor unions formed during the post-independence period, there were at least 4 major federations of labor unions. These were the Central All-Indonesian Workers Organization (*Sentral Organisasi Buruh Seluruh Indonesia*, SOBSI) with 2,661,970 members in 1956, the All Indonesia Labor Congress (*Kongres Buruh Seluruh Indonesia*, KBSI) with 800,000 members in 1953, the Indonesian Islamic Labor Union (*Serikat Buruh Islam Indonesia*, SBII) with 275,000 members in 1956, and the Indonesian People's Labor Union (*Kesatuan Buruh Kerakyatan Indonesia*, KBKI) with 95,000 members in 1955.[20] Overall, the number of unionized workers in the 1950s was estimated at 3–4 million.

In the New Order era (1966–1998, second Indonesian President Suharto from his rise to power until his resignation), the dynamics of governance at the time influenced labor unions in Indonesia. In 1969, the Minister of Manpower of the Republic of Indonesia established the Indonesian Labor Consultative Assembly (*Majelis Permusyaratan Buruh Indonesia*, MPBI) with the intention of unifying the forum for the struggle of Indonesian workers.[21] However, the presence of the MPBI was perceived as insufficient to address labor issues at the time.

Moreover, the workers often engaged in actions that were interpreted as subversive acts of rebellion against the state rather than expressions of democratic political reality.[22] As a result the All-Indonesian Workers Federation (Federasi Buruh Seluruh Indonesia, FBSI) was established in 1973 and later changed its name to the All-Indonesian Workers Union (*Serikat Pekerja Seluruh Indonesia*, SPSI). The birth of SPSI raised new hopes for a free, independent, and the democratic labor organization. This aligns with one of the goals of forming a labor union, which is to influence the parliament, the government, and the public administration to support the workers.[23]

The development of labor unions further expanded after the fall of the New Order regime. Labor unions became increasingly active not only in the realm of labor relations but also actively voiced their opinions on Indonesia's social and political situation.[24] Moreover, workers became increasingly diligent in consolidating their efforts after the enactment of the Law No.21 of 2000 concerning Labor Unions. Article 5 of this Law allows workers to form labor unions in every business unit with a minimum of only 10 members.

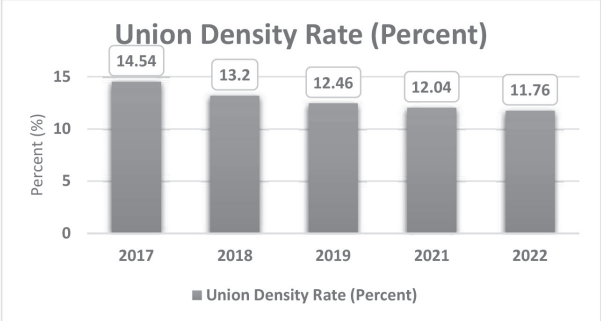
The development of labor unions can be observed through the data compiled annually by the Central

19. Ahmad and Al Ayubbi, *supra* note 11, 4.
20. Sazalil Kirom, "Buruh dan Kekuasaan: Dinamika Perkembangan Gerakan Serikat Pekeria di Indonesia (Masa Kolonial-Orde Lama)" [Labor and Power: The Dynamics of the Development of the Trade Union Movement in Indonesia (Colonial-Old Order Period)], *Avatara* 1, no.1 (January 2013): 14, https://ejournal.unesa.ac.id/index.php/avatara/article/view/1083.
21. Ahmad and Al Ayubbi, *supra* note 11, 9.
22. Muhammad Zuhdan, "Perjuangan Gerakan Buruh Tidak Sekedar Upah Melacak Perkembangan Isu Gerakan Buruh di Indonesia Pasca Reformasi" [The Struggle of the Labor Movement is Not Just about Wages Tracking the Development of Labor Movement Issues in Post-Reform Indonesia], *Jurnal Ilmu Sosial dan Ilmu Politik* 17, no. 3 (2014): 274, https://doi.org/10.22146/jsp.13086.
23. Ibrahim, *supra* note 2, 154.
24. Zuhdan, *supra* note 22.

Bureau of Statistics Indonesia.

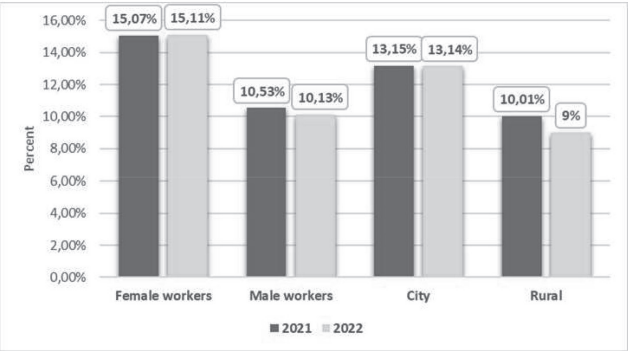
The Figure 3 provided by the Central Bureau of Statistics illustrates the dynamics of unionized workers, or Union Density Rate (UDR). When considering the growth of labor unions from the perspective of workers with the status of laborers/employees/staff and self-employed workers, the enthusiasm of workers towards labor unions has also decreased. This can be observed from the following figure.

The results of the *National Labor Force Survey* of the Central Bureau of Statistics show the development of labor unions within the scope of workers with employee status and self-employed workers specifically. From the figure below, it can be seen that the percentage of unionized male workers was 10.53% in 2021 and decreased to 10.13% in 2022. Similar to male workers, female workers have also experienced a decrease in union participation. In total, the Central Bureau of Statistics reports that around 7.53 million workers, or 12.94% of the workforce participated in labor unions. However, this number decreased in 2022 with only 7.50 million, or 11.76%, of workers being union members. In other words, in 2022, approximately 12 out of 100 workers with employee and self-employed status were union members.



Source: Central Bureau of Statistics 2023.

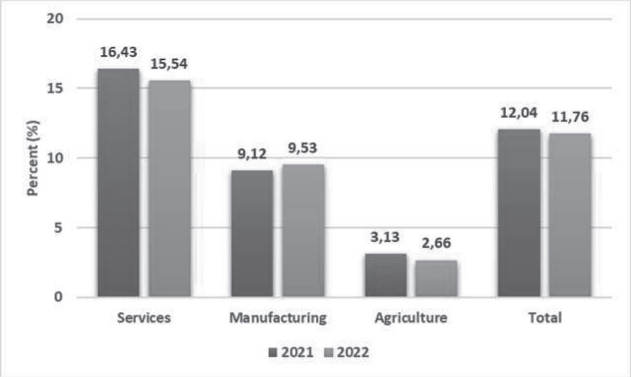
Figure 3. Indonesia's union density rate from 2018 to 2022[25] (%)



Source: Central Bureau of Statistics 2022.

Figure 4. Indonesia's union density rate by gender, 2021–2022[26] (%)

25. Monavia Ayu Rizaty, "Baru 11,76 % Buruh Indonesia Berserikat pada 2022" [Only 11.76% of Indonesian Workers Will Be Unionised by 2022], *Dataindonesia.id*., May 11, 2023, accessed March 15, 2024, https://dataindonesia.id/tenaga-kerja/detail/baru-1176-buruh-indonesia-berserikat-pada-2022.
26. Central Bureau of Statistics, *Indikator Pekerjaan Layak di Indonesia Tahun* 2022 [Indicators of Decent Work in Indonesia by 2022] (Jakarta: Badan Pusat Statistik, 2022), https://www.bps.go.id/en/publication/2023/04/17/65695a2b5a039c58071d23b6/decent



Source: Central Bureau of Statistics 2023.

Figure 5. Union density rate by industry, 2021–2022[27] (%)

By industry, the Figure 5 shows that workers in the service sector have the highest number of labor union members compared to other sectors, with a membership of 5,350,899 workers, or 16.43% out of the total of 32,572,678 workers in 2021. However, there was a drastic decrease in the number of labor union members in the service sector in 2022, with only 5,256,254 workers, or 15.54% of the workforce. A similar trend was observed in the agriculture sector, which also experienced a decline in 2022. In contrast, the manufacturing sector saw an increase in labor union membership in 2022, reaching 2,018,194 workers, or 9.53% of the workforce out of a total of 21,187,598 workers. In the previous year, the proportion of labor union membership in the manufacturing sector was only around 9.12%, or 1,894,146 workers.

The fluctuations in union membership over time can be influenced by various factors. As independent organizations, labor unions are affected by changes in the labor market. For example, advances in technology and the green economy are creating opportunities for new work styles such as the rise of remote work. In addition, as the green economy leads to the emergence of new employment sectors, such as renewable energy, unions can fight for the rights of workers in these new sectors. However, these new sectors also pose challenges for labor unions to continue standing up for workers' rights.[28] Moreover, the number of young workers joining labor unions in Indonesia has declined over the past 5 years. One reason for this is the changing work styles of today's workers, who tend to prefer non-binding employment relationships with companies such as freelance work.[29] Overall, these shifts underscore the need for labor unions to adapt and evolve in response to changing labor market dynamics to effectively represent and advocate for workers' interests.

Changes in work styles have also made union membership less popular among young workers. Young workers tend to see earning an income as the primary goal of work, rather than joining a union.[30] This situation should be an opportunity for labor unions to intensify their recruitment efforts with an approach tailored to the trends among young workers. However, this phenomenon is not unique to Indonesia.

-work-indicators-in-indonesia-2022.html.

27. Erlina F. Santika, "Pekerja yang Gabung Serikat Buruh di Indonesia Mengalami Penurunan pada 2022" [Workers Joining Labor Unions in Indonesia to Decline in 2022], *Databoks*, April 18, 2023, accessed March 15, 2024, https://databoks.katadata.co.id/datapublish/2023/04/18/pekerja-yang-gabung-serikat-buruh-di-indonesia-mengalami-penurunan-pada-2022.
28. ILO, *supra* note 10.
29. Oleh Mediana, "Pekerja Muda Enggan Bergabung ke Serikat Pekerja" [Young workers' reluctance to join unions], *Kompas.id*., January 8, 2024, accessed March 12, 2024, https://www.kompas.id/baca/ekonomi/2024/01/08/pekerja-muda-enggan-bergabung-di-serikat-pekerja.
30. *id*.

Superpowers like the United States have experienced similar trends. According to the U.S Bureau of Labor Statistics, it noted that the union membership rate fell from a record low of 10.1% to 10.0 % in 2022.[31]

Indonesia's new employment relation system, which began in early 2010, is also a reason for the decreasing union density rate. The growing prevalence of short-term or non-permanent contract work in recent years has discourages workers from joining labor unions.[32] Contract workers, who often have received fewer rights and benefits compared to permanent employees, have the perception that involvement with a labor union will not provide substantial advantages. On top of that, the high turnover rate also makes it difficult for contract workers to build a stable membership base.

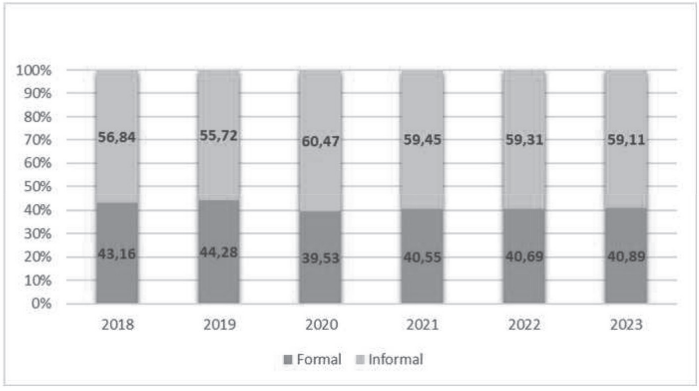
From a regulatory perspective, the presence of the Law No. 21 of 2000 concerning Labor Unions has indeed raised issues for labor unions.[33] The issue that arises is the restriction on workers' right to organize. In such situations, companies view workers' involvement in labor unions as potential impediment to productivity.[34] As a result, many workers face pressure and even restrictions from their companies to refrain from involving themselves with labor unions.[35] From the 230,000 registered companies, only 7000, or almost 3% of companies have labor unions.[36] There is a huge disparity between the number of companies and labor unions in Indonesia.

Another challenge in establishing labor unions is the fragmentation of organizations based on the interests of companies. However, Article 3 of the Law No. 21 of 2000 concerning Labor Unions has emphasized one of the principles to be held in the establishment of labor unions, which is the principle of freedom of association. This principle ensures that members of the labor unions can carry out their activities without pressure or interference from any party, be it employers, the government, or political parties. Additionally, the existence of the Law No. 21 of 2000 concerning Labor Unions is seen as failing to protect the interests of informal workers and gig workers such as online drivers. In fact, the scale of informal labor in Indonesia dominates over the formal sector, as shown in the Figure 6.

The growing share of informal workers in Indonesia was the largest contributor to the country's labor force. In 2022 alone, there were 59.31%, or 80.24 million informal workers. This, together with the low level of education in the country,[37] makes informal activities an important part of improving living standards from an economic, social and political perspective. However, the Law No. 21 of 2000 concerning Labor Unions, which is supposed to be a framework for informal workers to receive protection, focuses more on workers under legitimate employment agreements such as formal workers. Meanwhile, informal workers such as daily wage laborers and online motorcycle taxi drivers do not receive the same protections, including the opportunity to establish labor unions.[38]

31. Dan Burns, "US Union Membership Rate Hits Fresh Record Low in 2023-Labor Dept," *Reuters*, January 24, 2024, accessed March 12, 2024, https://www.reuters.com/markets/us/us-union-membership-rate-hits-fresh-record-low-2023-labor-dept-2024-01-23/.
32. ILO, "Chapter 7: Stability and Security of Work," in *Decent Work County Profile Indonesia* (Geneva: ILO, 2011), 41–46.
33. Abdul Rachmad Budiono, "Hak Kebebasan Berserikat Bagi Pekerja Sebagai Hak Konstitusional" [The Right to Freedom of Association for Labour as a Constitutional Right], *Jurnal Konstitusi* 13, no.4 (December 2016): 792, https://media.neliti.com/media/publications/113585-ID-hak-kebebasan-berserikat-bagi-pekerja-se.pdf.
34. Syaefuddin Ahrom Al Ayubbi, and Maryani Maryani, "Permasalahan Implementasi UU 21 Tahun 2000 Tentang Serikat Pekerja/Serikat Buruh" [Implementation Issues of Law 21, Year 2000 on Trade Unions/Labor Unions], *Journal of Social Movements* 1, no.1(January 2024): 41–69.
35. Pratiwi and Harianto, *supra* note 9, 1–27.
36. Mondiaal FNV and Danish Trade Union Development, *Labor Market Profile* 2020 (Copenhagen: Danish Trade Union Development, 2020), 1. https://www.ulandssekretariatet.dk/wpcontent/uploads/2020/04/lmp_indonesia_2020_final_version-1.pdf.
37. *id*.
38. Al Ayubbi and Maryani, supra note 34, 42.

Similar inequalities are also endured by informal and migrant workers.[39] Whereas the Law No.21 of 2000 concerning Labor Unions tends to focus more on formal workers with valid employment agreements, consequently leaving informal workers, such as freelancers and even app-based drivers, in an informal labor status. There is a need for special attention from the government to provide protection for migrant workers, including granting them legal and social opportunities or conditions to unionize. Moreover, as a country, "one of the largest contributors of migrant workers in Southeast Asia,"[40] migrant workers living in Indonesia are often subjected to abusive treatment.[41] Certainly, this has implications for the bargaining position of labor unions, especially in protecting their members while also serving as controllers of the quality of Indonesia's human resources.[42]



Source: Central Bureau of Statistics 2022.

Figure 6. Share of formal and informal workers in Indonesia, 2018–2023[43] (%)

IV. The role of the state, labor unions, and other worker representatives

4.1. The role of government in the dual-structure labor market

Currently, the disparities between formal and informal workers in Indonesia persist due to insufficient programs by the government. Generally, formal workers are more protected in terms of their wages, benefits, job security and social protection than informal workers. For example, in terms of social security, it is governed through the Law No. 40 of 2004 concerning National Social Security System and the Law No. 24 of 2011 concerning Social Security Agency. For non-formal workers, including informal workers, the government has opened a healthcare program called BPJS *Bukan Penerima Upah* (BPU). While BPU still covers death benefits and work accident, it does not have a retirement fund program which is covered in

39. Ibrahim, *supra* note 2, 153.
40. Erna Setijaningrum, Asiyah Kassim, Rochyati Triana, and Reza Dzulfikri, "Going Back with Glee: A Case Study of Indonesian Migrant Workers Engaging in Circular Migration," *Journal of ASEAN Studies* 11, no.1(2023): 219¬-243. https://journal.binus.ac.id/index.php/jas/article/view/8610.
41. Ministry of Manpower, *Employment in Data Edition 2 Year 2023* (Indonesia: Centre for Manpower Data and Information Technology, 2023).
42. Patrick Quinn, "Freedom of Association and Collective Bargaining: A Study of Indonesian Experience 1998–2003," ILO Working Papers 993665633402646 (September 2003), accessed March 11, 2024, https://webapps.ilo.org/public/libdoc/ilo/2003/103B09_291_engl.pdf.
43. Ridhwan Mustajab, "Mayoritas Tenaga kerja RI dari Sector Informal pada Agustus" [Majority of Indonesian Workers were in the Informal Sector in August 2022], *Dataindonesia.id*., November 30,2022, accessed March 10, 2024, https://dataindonesia.id/tenaga-kerja/detail/mayoritastenaga-kerja-ri-dari-sektor-Informal-pada-agustus-2022 and Booklet Sakernas BPS August 2023.

the healthcare program for formal workers. The premium (regular payment in order to maintain coverage under a social security or insurance program) is also at a fixed rate and fully paid by the beneficiary. In terms of workers' ability and willingness to pay, a survey about 1,709 informal workers in 2016 shows that their ability and willingness to pay is below the fixed rate.[44] Based on the qualitative interview of the study, it reveals that the main reason a worker does not continue their BPU is due to their income irregularities and different needs over time. As a result, informal workers are at risk of not having a secure retirement. In fact, there is a growing preference for gig work over contractual position since contract work doesn't always lead to permanent position, and the barrier to entry is lower.[45] Additionally given the precarious nature of gig work, there is a risk that an increasing share of the population will lack adequate retirement plans unless the government implements a targeted program for those with limited willingness or ability to pay.

The formalization of informal sectors has also been a popular theme in policymaking as this addresses one of the roots of the problem. In general, an informal economy is perceived as net loss mainly due to the tax revenue loss for the government, which leads to negative social security contributions for the rest.[46] One of the hurdles in collecting taxes on informal businesses is that collecting taxes on the informal economy in developing countries could raise costs higher than the tax revenue itself.[47] In regard to the tax revenue loss, an evaluation of the Indonesian economy from 2001–2013 concluded with an estimated potential tax loss of Rp. 11,172.86 billion (approximately 725.51 million US dollars) on average, or almost one percent of the GDP. With Indonesia's current demographic bonus, it also underscores the importance of such formalization to avoid further losses to the economy as informal sectors become more prevalent. Thus, it emphasizes the role of the Indonesian government in providing incentives for informal businesses to formalize. In Brazil, where the proportion of informal workers year of 2003 to 2014 decreased from 58% to 44%, a substantial growth of formalization has also been recorded, attributed to its *Simples Nacional* program.[48] A study argues that the main drivers of the program's success are the simplification of registration procedures, reduced taxes for small businesses and the implementation of organizational changes for labor inspectors and reform of their incentive structures.[49] An example of such reform is adding individual and group performance as a determinant of an inspector's wages. As such, further study of the best practices of countries that have implemented formalization programs may bring new perspectives for Indonesia.

4.2 The role of labor union in tackling current labor issues

As a collective, labor unions generally use collective bargaining, advocacy, and collaboration (including lobbying) to address labor concerns in the worker context. However, this report has found that union

44. Muttaqien Muttaqien, Hermawati Setiyaningsih, Vini Aristianti, Harry Laurence Selby Coleman, Muhammud Syamsu Hidayat, Erzan Dhanalvin, Dedy Revelino Siregar, Ali Ghfuron Mukti, and Maarten Olivier Kok, "Why did Informal Sector Workers Stop Paying for Health Insurance in Indonesia? Exploring Enrollees' Ability and Willingness To Pay," *Plos One* 16, no.6 (June 2021), https://doi.org/10.1371/journal.pone.0252708.
45. Alex De Ruyter and Riani Rachmawati, "Understanding the Working Conditions of Gig Workers and Decent work: Evidence from Indonesia's Online *Ojek* Riders," *Sozialpolitik*, no.2, Article 2.4 (February 2020): 2–4, https://doi.org/10.18753/2297-8224-159.
46. Jayanty Nada Shofa, "Y20 Summit: ILO Calls for Formalization of Informal Economy," *Jakarta Globe*, July 20, 2022, accessed March 11, 2024, https://jakartaglobe.id/business/y20-summit-ilo-calls-for-formalization-of-informal-economy.
47. Tutik Rachmawati, "Informal Sector and Local Government Revenue: The Contribution of Street Vendors," *Jurnal Administrasi Publik* 11, no.1 (April 2014), https://media.neliti.com/media/publications/73011-EN-informal-sector-and-local-government-rev.pdf.
48. Marcelo Manzano, José Dari Krein, and Ludmila C. Abílio, "The Dynamics of Labour Informality in Brazil, 2003–2019," *Global Labour Journal* 12, no.3 (September 2021), https://doi.org/10.15173/glj.v12i3.4434.
49. Roxana Maurizio and Gustavo Vásquez, "Formal Salaried Employment Generation and Transition to Formality in Developing Countries: The Case of Latin America" (Employment Working Paper no.251, Employment Policy Department, ILO, Geneva, 2019). https://www.ilo.org/publications/formal-salaried-employment-generation-and-transition-formality-developing.

membership trend has been decreasing. As previously discussed, recent density rate in Indonesia is at 11.76%, which has followed a downward trend compared to previous years. The rise of an increasingly diverse informal workforce has contributed to this trend, as the very nature of the informal sector makes it more difficult for informal workers to organize and form unions. Other factors identified in this report include Law No. 21 of 2000 concerning Labor Unions that remains restrictive, although it recognizes freedom of association.

For gig workers, despite the barriers they face, labor unions can have an impactful role in helping to organize these workers. Even though gig workers are not entitled for forming a union by law, this does not stop them from advocating for the rights of gig workers.[50] For example, gig workers have joined the Aerospace and Transportation Workers division of the Federation of Indonesian Metal Workers' Union (*Serikat Pekerja Digantara dan Transportasi Federasi Serikat Pekerja Metal Indonesia*, SPDT-FSPMI), which is a labor union for workers employed in the aerospace sector and similar businesses. SPDT-FSPMI saw a lack of protection for app-based drivers by the government and employers, so they expanded the scope of their organization to include the land transportation sector so that app-based drivers could join.[51] Now, SPDT-FSPMI is the only labor union that serves app-based drivers, enabling them to advance workers' rights in the app-based transportation sector.

Joining the SPDT-FSPMI has many significant benefits for app-based drivers. First of all, membership in this union allows online *ojek* (motorcycle) drivers to have access to hearings with the Ministry of Manpower, which allows them to voice their problems and needs directly to the authorities.[52] In addition, membership in this union also provides an opportunity to conduct hearings with the Ministry of Transportation, which can assist in the discussion and formulation of policies relating to the online transport sector. Furthermore, membership in the union has also enabled the drivers to conduct a judicial review of the Law No. 22 of 2009 concerning Road Traffic and Transportation, which provides a legal means to fight for their rights constitutionally.[53] Thus, the joining the SPDT-FSPMI provides a strong platform for a common struggle to improve their working conditions and rights in the online transport industry for app-based drivers.

Labor unions are also actively involved in proposing regulatory changes to the government to promote workers' welfare. For example, when the Law No. 11 of 2020 concerning Job Creation was enacted, 15 unions united to make various efforts and approaches to the government and policymakers to highlight the negative impact of the law on workers.[54] The Confederation of Indonesian Labour Unions (KSPI), one of the

50. Riani Rachmawati, Safitri, Luthfianti Zakia, Ayu Lupita, and Alex De Ruyter, "Urban Gig Workers in Indonesia during COVID-19: The Experience of Online '*ojek*' drivers," *Work Organisation, Labour & Globalisation* 15, no.1 (2021): 31–45, https://www.jstor.org/stable/10.13169/workorgalaboglob.15.1.0031.
51. Editor of the *Koran Perdjoangan*, "Mengenal Serikat Pekerja Dirgantara dan Transportasi (SPDT-FSPMI)"[Get to Know the Aerospace and Transportation Workers Union (SPDT-FSPMI)], *Koran Perdjoangan*, March 26, 2017, accessed 14 March 2024, https://www.koranperdjoeangan.com/mengenal-serikat-pekerja-dirgantara-dan-transportasi-fspmi/.
52. Cab Bekashi, "Hasil Penelitan Universitas Indonesia Tentang Nasib OJOL di NKRI Membuat Hati Dr. Riani dan Masyrakat Terharu" [The Results of Research at the University of Indonesia on the Fate of ojol in NKRI Touched Dr Riani's Heart and The Community," *Mutiara Indo Tv*., May 31, 2021, accessed March 12, 2024, https://mutiaraindotv.com/hasil-penelitian-universitas-indonesia-tentang-nasib-ojol-di-nkri-membuat-hati-dr-riani-dan-masyarakat-terharu/.
53. Hanifer Sartika Putri and Amalia Diamantina, "Perlindungan Hukum Terhadap Keselamatan Dan Keamanan Pengemudi Ojek Online Untuk Kepentingan Masyarakat" [Legal Protection for the Safety and Security of Online Motorcycle Taxi Drivers for the Interest of the Community], *Jurnal Pembangunan Hukum Indonesia* 1, no.3 (September 2019): 393, https://doi.org/10.14710/jphi.v1i3.392-403.
54. Ni Luh Anggela, "Sederet Catatan Serikat Pekerja 2023, Perpu Cipta Kerja hingga PHK" [A Series of Trade union notes in 2023, Perpu Job Creation to Layoffs], *Bisnis.com*, January 1, 2024, accessed March 12, 2024, https://ekonomi.bisnis.com/read/20240101/12/1728535/sederet-catatan-serikatpekerja-2023-perpu-cipta-kerja-hingga-phk.

plaintiffs, filed 5 judicial reviews against the Law No. 11 of 2020 concerning Job Creation in November 2021. KSPI considers that the Job Creation Law eliminates guarantees of job security, wages and social security for workers, and makes it easier for foreign workers to enter Indonesia. As a result, the Constitutional Court declared the law "conditionally unconstitutional." Labor unions see that this ruling affects not only formal workers but also informal workers such as farmers for the next 30 years.[55] The union's efforts highlight the importance of active participation in policy-making processes and the protection of the rights of workers and other vulnerable groups in society.

V. Conclusion

In summary, Indonesia's labor market has seen significant changes lately due to shifts in demographics, technology, and work patterns. Despite economic growth and a large working age population, there are still inequalities in job opportunities, especially between men and women across different types of employment. The rise of gig work and remote jobs offers flexibility but also raises concerns about workers' rights and protections. Labor unions, which are essential for advocating for workers, face challenges in representing workers in these non-traditional employment arrangements. The current Law No. 21 of 2000 concerning Labor Unions mainly focuses on formal workers, leaving informal workers vulnerable to exploitation and lacking in collective bargaining power.

Despite these obstacles, labor unions have shown resilience by reaching out to gig workers and advocating for their rights. For instance, the SPDT-FSPMI has been instrumental in representing gig workers in the online transportation sector. However, labor unions continue to struggle with declining membership rates and restrictive laws. To address these issues, the government needs to promote formalization of employment and provide better social protections for all workers. Additionally, labor unions must adapt to changes in the labor market, such as the growth of remote work and the gig economy, in order to effectively represent workers' interests.

In conclusion, while Indonesia's labor market faces challenges, labor unions need to hold their ground in the face of the growing informal economy. Therefore, it is important for unionism to shift focus toward integrating informal workers, who are increasingly representing a larger share of the labor market, and to ensure their continued engagement and advancement of workers' interests. Other than that, political function of the labor unions should also be used, as it has been in the past, to mobilize informal workers and advocate for labor reforms. The government also needs to review their labor regulation in controlling informal sectors, particularly since the growth of informal economy does not only negatively impact tax revenue but also the workers welfare.

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55. BBC, "MK tolak lima gugatan serikat buruh dan kukuhkan UU Cipta Kerja: Apa yang digugat dan mengapa regulasi ini terus ditentang?"[MK Rejects Five Labor Union Challenges and Upholds Job Creation Law: What Is Being Challenged and Why Is This Regulation Being Challenged?], *BBC News Indonesia*, October 2, 2023, accessed March 14, 2024, https://www.bbc.com/indonesia/articles/cn0q33n9p1qo.

Exploring the Current Situation and Issues of Labor-Management Relations in Japan

Shinya IWATSUKI

I. Introduction

The purpose of this paper is to overview the diversification of work styles, major legal systems related to labor-management relations, and the current situation and challenges of labor unions and labor-management relations in Japan. The diversification of work styles is summarized based on statistical data such as labor force and the number of employees by type of employment. As for legal systems involving labor-management relations, the basics are outlined. Regarding the current situation and challenges of labor unions, the paper confirms changes in the unionization rate and presents comments of union officials. Their initiatives and challenges are examined through the way labor and management have responded to Artificial Intelligence (AI) technology in recent years.

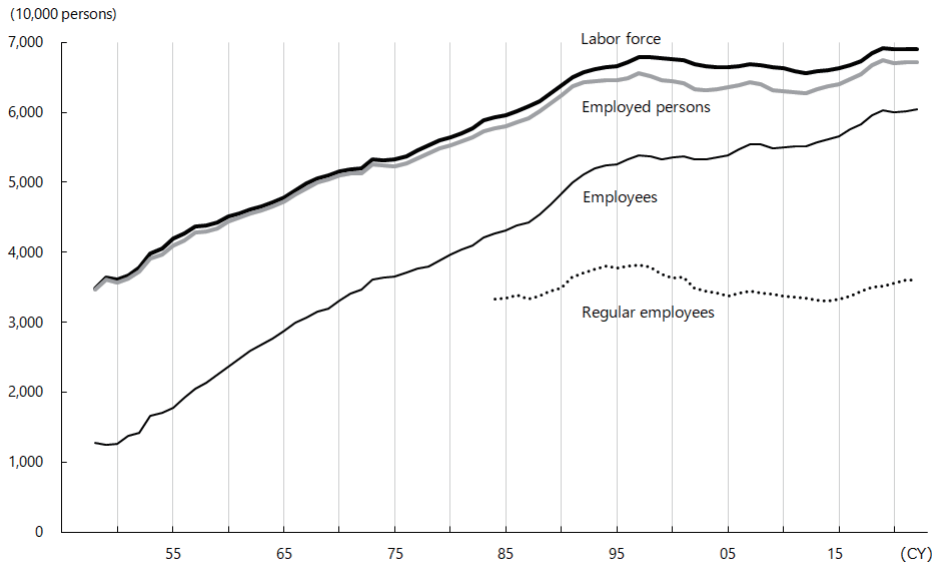
II. Diversification of work styles

Let us first overview the diversification of work styles. The following discusses changes in labor force and in the number of employees by type of employment, and the diversification of regular employees.

1. Labor force and other trends

Labor force and other trends indicate that while the "labor force," "employed persons," and "employees" have increased, "regular employees" have remained more or less unchanged (Figure 1). The Ministry of Internal Affairs and Communications (MIC)'s *Labour Force Survey* defines these terms, and this paper adheres to these definitions.[1]

1. "Labor force," "Employed person," "Employee," "Regular employee," and similar terms used in this paper are based on the definitions provided by the Ministry of Internal Affairs and Communications in *Labour Force Survey* as follows.
Labour force: "Employed person" and "Unemployed person" among population aged 15 years old and over.
Employed person: "Employed person at work" and "Employed person not at work."
Unemployed person: Person who satisfies the following conditions: i) with no job and did no work at all during the reference week (other than "Employed person"); ii) ready to work if work is available; and iii) did any job seeking activity or was preparing to start a business during the reference week (including waiting on the outcome of job seeking activity done in the past).
Employee: Person who work for wages or salaries as employees of companies, associations, governments or unincorporated enterprises. It is noted that among Employee, "Employees excluding executives of company or corporation" are classified into seven



Source: This figure is based on the Japan Institute for Labour Policy and Training (JILPT 2023b), "Figure 2-1 Labor force, employed persons, employees, permanent employees, regular employees between 1948 and 2022 (annual average)." https://www.jil.go.jp/kokunai/statistics/timeseries/html/g0202_01.html. (Last accessed March 19, 2024). Original source is Statistics Bureau, MIC, *Labour Force Survey*.
Notes: 1. As the term "permanent employees" is no longer used as a survey item, we have excluded it from the figure.
2. The number of regular employees in each year before 2002 is for February.

Figure 1. Labor force, employed persons, employees, and regular employees (1948–2022, annual average)

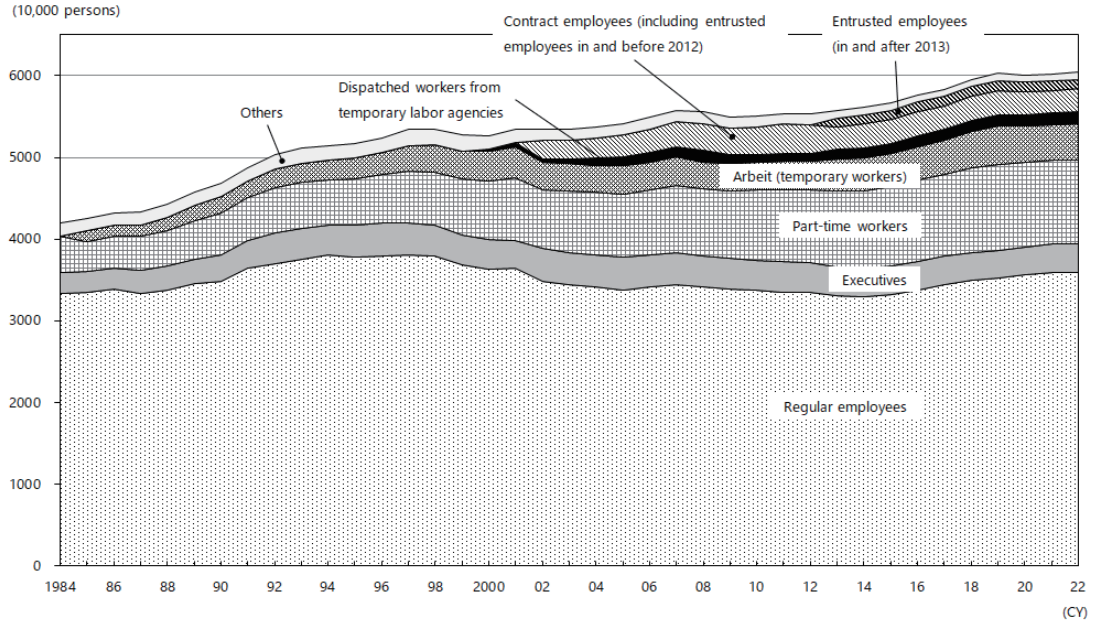
Labor force peaked in 1998, declined moderately until 2004, and remained more or less flat before increasing from 2013. The number of employed persons peaked in 1997, declined moderately until 2003, and then remained more or less flat before increasing from 2013. Employees have continued to increase. However, the number of regular employees (among employees) has remained generally unchanged.

2. Employees by type of employment

In order to examine the changes in the breakdown of employees in more detail, let us review the number of employees by type of employment. Figure 2 shows the number of all employees (regular and non-regular employees) and those of "non-regular employees" by type of employment, in total of men and women. It indicates that the number of non-regular employees (covering "part-time worker," "*arbeit* (temporary worker)," "dispatched worker from temporary labor agency," "contract employee," "entrusted employee," and "others") has continued to increase. Among non-regular employees, part-time workers have increased conspicuously.

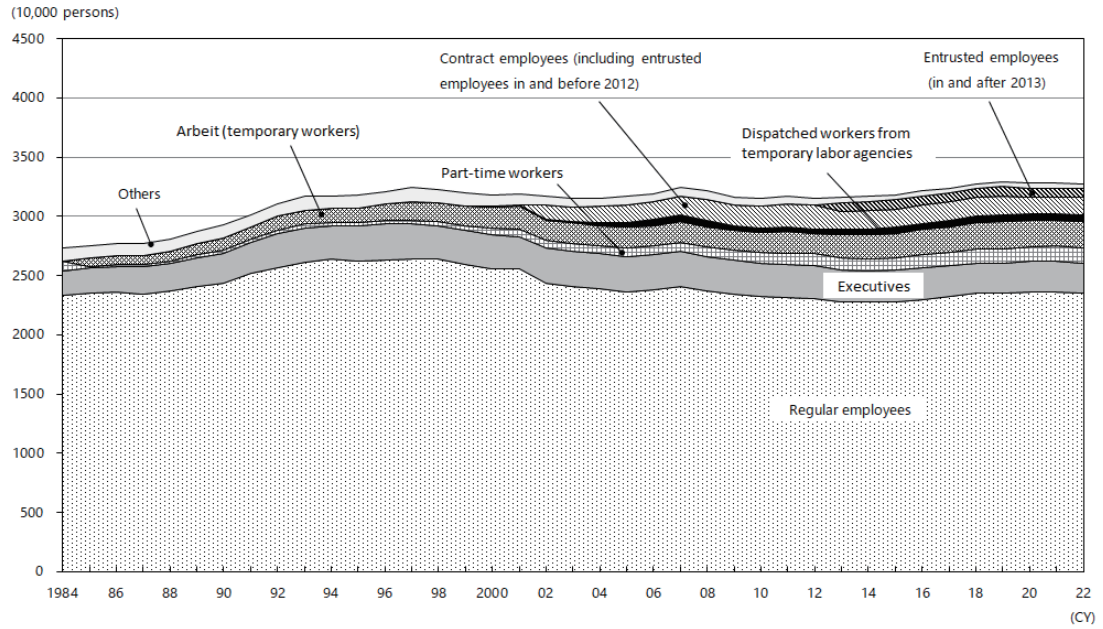
The trends of employees by type of employment among males (Figure 3) show that the number of regular employees has remained generally unchanged although some changes have been observed. That of male non-regular employees has continued to increase moderately.

categories: "Regular employee," "Part-time worker," "*Arbeit* (temporary worker)," "Dispatched worker from temporary labour agency," "Contract employee," "Entrusted employee" and "Other," according to how they are called at their workplaces. These categories, except "Regular employee," are classified into "Non-regular employee." https://www.stat.go.jp/english/data/roudou/pdf/definite.pdf. (Last accessed July 13, 2024).



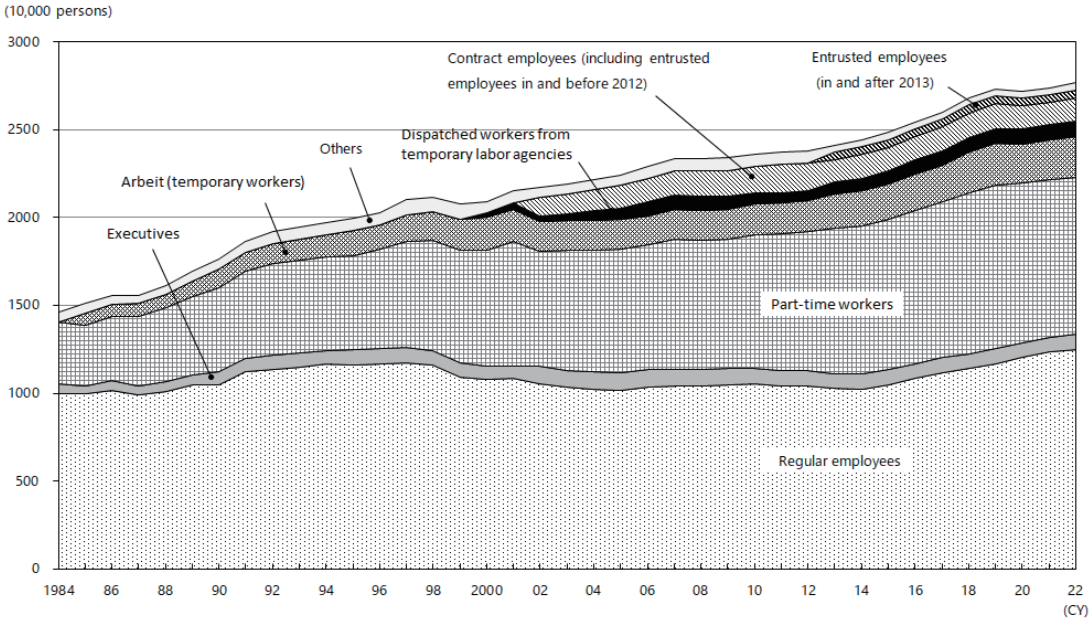
Source: JILPT 2023b, "Figure 8-1 Male and female employees by type of employment between 1984 and 2022," https://www.jil.go.jp/kokunai/statistics/timeseries/html/g0208.html (Last accessed March 19, 2024). Original source is MIC, *Labour Force Survey.*
Notes: 1. *Labour Force Survey* (basic aggregation, annual average) for data from 2013.
2. *Labour Force Survey* (detailed aggregation, annual average) for data between 2002 and 2012.
3. *Special Labour Force Survey* (February) for data in and before 2001.

Figure 2. Male and female employees by type of employment (1984–2022)



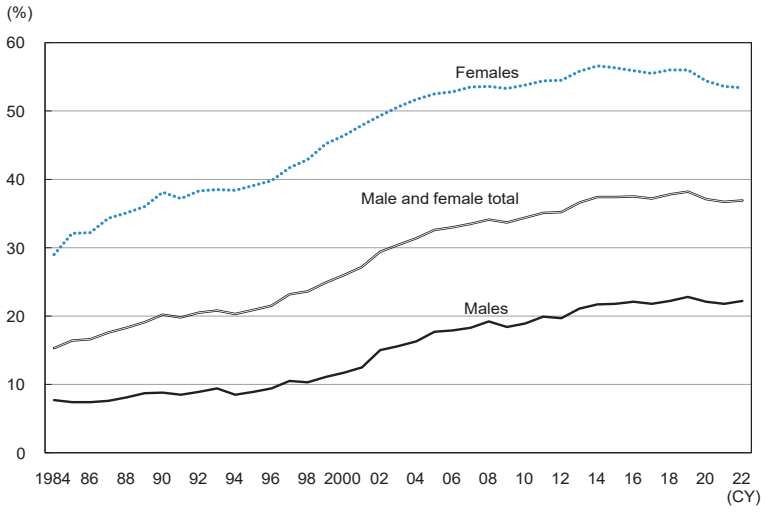
Source: JILPT 2023b, "Figure 8-2 Male employees by type of employment between 1984 and 2022," https://www.jil.go.jp/kokunai/statistics/timeseries/html/g0208.html. (Last accessed March 19, 2024). Original source is MIC, *Labour Force Survey.*
Note: Same as Figure 2.

Figure 3. Male employees by type of employment (1984–2022)



Source: JILPT 2023b, "Figure 8-3 Female employees by type of employment (1984–2022)." https://www.jil.go.jp/kokunai/statistics/timeseries/html/g0208.html. (Last accessed March 19, 2024). Original source is MIC, *Labour Force Survey.*
Note: Same as Figure 2.

Figure 4. Female employees by type of employment (1984–2022)



Source: JILPT 2023b, "Figure 8-4 Employees by type of employment: Shares for non-regular employees between 1984 and 2022," https://www.jil.go.jp/kokunai/statistics/timeseries/html/g0208.html. (Last accessed March 19, 2024). Original source is MIC, *Labour Force Survey*.
Note: Same as Figure 2.

Figure 5. Non-regular employees (excluding executives) by gender (1984–2022)

The trends of employees by type of employment among females (Figure 4) show that the number of female employees in total has continued to increase significantly. While that of female regular employees has

increased since 2015, the remarkable trend is an almost consistent increase in female non-regular employees. By type of employment, part-time workers have increased most significantly among female non-regular employees. Figure 5 looks at the share of non-regular employees among all employees (excluding executives) by gender. It shows that the share for female is remarkable.

3. Diverse regular employees

While there has been an increase in the number of non-regular employees, the diversification of regular employees has become controversial. Traditionally, job descriptions, work locations, and working hours had been unlimited for regular employees in Japan. However, there have been researches underway since around 2003 to classify regular employees into "job-limited regular employees," "location-limited regular employees," and "time-limited regular employees."[2]

III. Legal systems related to labor-management relations

As for legal systems related to labor-management relations, this section discusses Article 28 of the Constitution of Japan, the Labor Union Act, and the role of the majority representative of workers at a workplace without any labor union.

1. Article 28 of the Constitution: Three labor rights

In Japan, Article 28 of the Constitution guarantees three labor rights: the right of workers to organize, to bargain collectively, and to act collectively.[3] The right of workers to organize is the right of workers to freely form labor unions. The right of workers to bargain collectively is the right of workers to negotiate collectively with employers through labor unions. Labor unions can collectively bargain wages and working conditions with employers.

The right of workers to act collectively is divided into two: the right to engage in labor disputes (the right to strike) and the right to engage in union activities. Labor disputes include strike, slowdown, picketing[4] and other acts that are used by labor unions to interfere with employers' normal business operation, and thus to press employers to accept labor demands in collective bargaining (see Article 7 of the Labor Relations Adjustment Act). Union activities are ordinary ones such as distributing and pasting leaflets and union meetings that labor unions carry out without interfering with normal business operations.

2. Key points of the Labor Union Act

While the three labor rights are guaranteed by Article 28 of the Constitution as mentioned above, the Labor Union Act gives effectiveness to the guarantee. As key points of the Act, the following discusses the normative effect and general binding force of collective agreements, and the unfair labor practice relief system.

2. Kawaguchi (2023) states that "Hisamoto (2003) is an early study that asserted the importance of diverse regular employees" (Kawaguchi 2023, 29).
3. Referred to Morito (2023, 274) for the right to organize, Morito (2023, 282–283) for the right to bargain collectively, and Morito (2023, 293–294) for the right to act collectively.
4. Picketing literally refers to "picketing, including striking workers' surveillance, calling, persuasion, and the like at company entrances to urge other workers, business partners, customers, and people on the employer's side to stop working or doing business in order to maintain and enhance strikes" (Morito 2023, 298).

(1) Normative effect and general binding force of collective agreements[5]

A collective agreement is concluded between a labor union and an employer as a result of their collective bargaining. If a collective agreement satisfies the requirements of Article 14[6] of the Labor Union Act, it has a normative effect under Article 16 of the Labor Union Act. Article 16 of the Labor Union Act stipulates the normative effect as follows: Any part of an individual labor contract that contravenes the standards concerning working conditions and other matters provided in the collective agreement is void and replaced with those standards (Article 16 of the Labor Union Act). This is the normative effect.

The Labor Union Act also provides for a mechanism for the extended application of collective agreements (Articles 17 and 18 of the Labor Union Act). When three-fourths or more of "the workers of the same kind"[7] regularly employed in "a particular factory or workplace"[8] come under application of a particular collective agreement, the agreement also applies to the remaining workers of the same kind employed in the factory or the workplace (Article 17 of the Labor Union Act). Such effect is the general binding force of a collective agreement (on a workplace-by-workplace basis).

(2) Unfair labor practice relief system[9]

The Labor Union Act defines acts that infringe on the rights of labor unions, such as those to organize, bargain collectively, and strike, as unfair labor practices and establishes procedures for their relief through a body called the Prefectural Labour Relations Commission.

Unfair labor practices are not generally defined in law, but are the acts listed in Article 7, Items 1 to 4 of the Labor Union Act, such as disadvantageous treatment, collective bargaining refusal, and control on or interference with the formation or management of a labor union. Disadvantageous treatment is to dismiss or otherwise treat in a disadvantageous manner a worker by reason of the worker (i) being a member of a labor union, (ii) having tried to join or organize a labor union, or (iii) having performed justifiable acts of a labor union (the first half of the text of Article 7, Item 1 of the Labor Union Act). With regard to collective bargaining refusal, it is an unfair labor practice for an employer to refuse to bargain collectively with the representatives of the workers employed by the employer without legitimate grounds (Labor Union Act, Article 7, Item 2). It is also an unfair labor practice for an employer to control on or interfere with the formation or management of a labor union by workers (the first half of the text of Article 7, Item 3 of the Labor Union Act).

Next, let us take a look at the relief procedures for unfair labor practices. A worker or a labor union who believes that a worker or a labor union has been subjected to an unfair labor practice may file a motion for relief with a Prefectural Labour Relations Commission. A Labour Relations Commission is composed of equal numbers of persons representing employers (recommended by employers' organizations), persons representing workers (recommended by labor unions), and persons representing the public interest (such as scholars and lawyers) (Labor Union Act, Article 19, Item 1). After a worker or labor union files a motion for relief, the Prefectural Labour Relations Commission that receives the motion conducts an investigation

5. Referred to Morito (2023, 289–293) for the normative effect of collective agreements and for the general binding force.
6. Article 14 of the Labor Union Law stipulates that "a collective agreement between a labor union and an employer or an employers' organization concerning working conditions and other matters becomes effective when the agreement is put in writing and is either signed by or affixed with the names and seals by both of the parties concerned."
7. "Whether specific workers are of the same kind is determined according to workers subject to a collective agreement. In the case of a collective agreement for pilots, for example, the number of pilots in a workplace is counted. In the case of an agreement for both clerical and technical workers, both are counted." (Morito 2023, 290).
8. "A particular factory or workplace" means an individual "factory," "branch," etc. (Morito 2023, 290).
9. The unfair labor practice remedy system is based on Morito (2023, 305–319).

and hearing (Labor Union Act, Article 27, Item 1). After examinations by the commission's panel of public interest members, the commission issues an order for relief if there is a reason for the motion, or an order to dismiss the motion if there is no reason (Labor Union Act, Article 27-12, Item 1). In fact, many cases end in settlement.[10]

(3) Role of the majority representative of workers at a workplace without any labor union

The unionization rate is declining. Before discussing in the next section, we confirm the role of the majority representatives of workers in a workplace where there is no labor union. There is a mechanism in which the majority representative of these workers is involved in determining and changing working conditions.[11]

The majority representative of workers is defined as a person who represents a majority of workers at a workplace that has no labor union representing the majority (Hamamura, et al. 2023, 30).[12] The majority representative must be elected among workers other than those in a position of supervision or management under Article 41, Item 2 of the Labor Standards Act, through democratic procedures such as voting and a show of hands. Disadvantageous treatment of a worker who attempts to become the majority representative or conduct legitimate acts as majority representative is prohibited (Article 6–2 of the Ordinance for Enforcement of the Labor Standards Act).

The majority representative is typically involved in the conclusion of a labor-management agreement based on Article 36 of the Labor Standards Act (called Article 36 agreement) to lift the statutory upper limit on working hours (8 hours per day or 40 hours per week).[13] Even if an employer leads an employee to work beyond the statutory upper limit on working hours, the employer may not be held as violating the Labor Standards Act as far as the employee's working hours remain under the limit stipulated in the Article 36 agreement. If the employer forces an employee to work overtime or on holidays without concluding the Article 36 agreement or work more than the limit under the Article 36 agreement, however, the employer will be held as violating Article 32 of the Labor Standards Act. Unless the majority representative concludes the Article 36 agreement, the employer cannot lead employees to work beyond the statutory upper limit on working hours.

In this way, the majority representative of workers in a workplace without any labor union is given a certain role that is limited almost to the conclusion of special agreements to lift the minimum standard regulations.[14] The majority representative is temporarily established for the conclusion of the Article 36

10. Parties who are dissatisfied with a Prefectural Labour Relations Commission's first order can take further procedures. Dissatisfied parties may request the Central Labour Relations Commission to reexamine Prefectural Labour Relations Commission orders (Article 27–15 of the Labor Union Act). The Central Labour Relations Commission has full authority to rescind, approve, or modify Prefectural Labour Relations Commission orders (Labor Union Act, Article 25, Item 2). Given that orders issued by a Prefectural Labour Relations Commission, or the Central Labour Relations Commission are administrative sanctions, parties who are dissatisfied with such orders may file lawsuits for their revocation in accordance with the Administrative Case Litigation Act. They can file such lawsuits without requesting the Central Labour Relations Commission to reexamine Prefectural Labour Relations Commission orders. The district court having jurisdiction over the relevant Prefectural Labour Relations Commission becomes the court of first instance. In some cases, "there may be a full-course 'five-trial system': the Tokyo Metropolitan Government Labour Relations Commission→ the Central Labour Relations Commission→ the Tokyo District Court→ the Tokyo High Court→ the Supreme Court." (Morito 2023, 319).
11. As for majority representatives of workers, referred mainly to Hamamura, et al. (2023).
12. If there is a labor union organized by a majority of workers at a workplace, the union (majority union) will be the majority representative of workers (Hamamura, et al. 2023, 30).
13. For the Article 36 agreement, referred to Hamamura, et al. (2023, 117–118).
14. Hamamura, et al. (2023, 281).

agreement and the expression of specific opinions, differing from any permanent post.[15]

IV. Labor unions' current situation and initiatives to address issues

This section examines the unionization rate regarding labor unions' current situation and issues. Based on comments by labor union officials, we analyze the labor unions' initiatives to organize non-regular employees and promote women's participation in union officials.

1. Unionization rate trend

The "unionization rate"[16] has followed a downtrend, hitting a record low of 16.5% in 2022 (Figure 6). In 2023, the unionization rate dropped further to 16.3%. The decline in the unionization rate has been one of the challenges for labor unions. Conceivable factors behind the downtrend of the unionization rate include the increasing number of non-regular employees and the difficulty of organizing them.

Next, let us review the "unionization rate of part-time employees."[17] The rate is as low as less than 10%, indicating another issue for labor unions (Figure 6). However, the rate is rising, showing progress in organizing part-time employees.

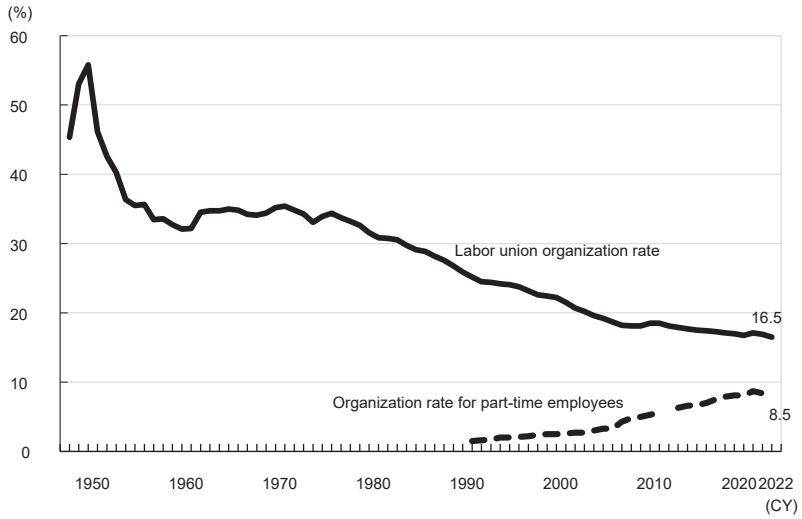
2. Comments by labor union officials

Regarding the decline in the unionization rate, let us examine how labor union officials perceive the current situation of labor unions and what initiatives they are taking. This section refers to a forum titled "Discussing the Present and Future of Labor Unions"[18] held with labor union officials and academics, recorded and published in 2023 in a journal, *Japanese Journal of Labour Studies* (Shuto, et al. 2023). The four union officials participated in this forum: two of them (hereinafter "A" and "B") were from industrial unions, one ("C") from a national center of labor unions, and one ("D") from a company-based labor union. In the following, we analyze their comments on their efforts to organize non-regular employees as well as on women's participation in labor unions, and presents implications from the findings.

(1) Initiatives to organize non-regular employees

All the union officials participated in the forum states of the need to organize non-regular employees.

15. Sugeno (2021, 20).
16. "Unionization rate" is based on the definition provided by the MHLW's "Basic Survey on Labour Unions" as follows: "The result derived by dividing the number of union members identified by this survey by the number of employees based on the "Labour Force Survey" which is implemented by the Statistics Bureau of the Ministry of Internal Affairs and Communications." https://www.mhlw.go.jp/english/database/db-l/dl/2017bslu-definitions.pdf. (Last accessed July 13, 2024).
17. According to the MHLW's "Basic Survey on Labour Unions," the "unionization rate of part-time employees" is based on as follows. A "part-time employee" is a non-regular staff with reduced working hours, i.e. a person with shorter scheduled daily hours of work or with the same scheduled daily hours of work but shorter scheduled weekly hours of work than an ordinary worker at the same establishment, and a person who is termed a part-time worker, etc. at the establishment. The raw (unadjusted) figures in the *Labour Force Survey* published every June are used for the "numbers of short-time employees." The "numbers of short-time employees" are obtained by subtracting the "numbers of regular employees" from the numbers of employees with working hours of less than 35 hours and adding the "numbers of part-time employees" with working hours of 35 hours or more per week to those numbers. The "unionization rates of part-time employees" are obtained by dividing the numbers of labor union members who are "part-time employees" by the "numbers of short-time employees." https://www.mhlw.go.jp/english/database/db-l/dl/2017table5.pdf. (Last accessed July 17, 2024). Additionally, in other words, the "short-time employees" also include executives of companies and organizations who work less than 35 hours per week.
18. Shuto, et al. (2023).



Source: This figure is based on data from JILPT 2023b, "Figure 1-1-2 unionization rate trend between 1947 and 2022 (as of June 30 for each year)," https://www.jil.go.jp/kokunai/statistics/timeseries/html/g0701_01.html. (Last accessed March 19, 2024). Original source is the Ministry of Health, Labour and Welfare (MHLW), "Basic Survey on Labour Unions."
Notes: 1. The rates in and before 1951 are based on the number of unit trade union members.
2. The rate of part-time employees is based on an old definition for years to 2012 and on a new definition for years from 2013. The rate for 2011 has not been computed.

Figure 6. Unionization rate trend (1947-2022) (as of June 30 for each year)

Some of their unions have organized them successfully. A and B acknowledge that they will promote the organization of non-regular employees. A: "I think the principle is to organize all who work at the company" (Shuto, et al. 2023, 44). B: "I think we should organize all, including non-regular employees" (Shuto, et al. 2023, 45).

B describes the difficulty of organizing as follows: "Our industry includes some sectors where the organization of workers has failed to progress. Although tourism industry workers have been organized considerably, the unionization rate is very low especially in the accommodation sector. I think this is partly due to the fact that there are many non-regular employees, with labor unions failing to be recognized. Currently, we are making efforts to organize workers, while failing to make much progress...We are well aware that we need to move forward with organization, but the reality is that we are struggling to make progress" (Shuto, et al. 2023, 45).

C recognizes that there are cases where the organization of non-regular employees has progressed and where the progress has been limited. C: "I come from the retail and supermarket industry. .....Our union made proactive efforts to organize part-timers in the 1980s and 1990s. We tried to organize even part-timers who work less than 20 hours per week. As a result, the unionization rate is probably in the 85-90% range. I think labor unions as a whole have lagged behind in organizing non-regular employees. There are only a limited number of industrial unions that have made progress in organizing non-regular employees" (Shuto, et al. 2023, 45).

D is also of the position that all employees should be organized. D: "Our position is that employees who are directly employed by a company should join a single labor union, regardless of whether their employment terms are definite or indefinite" (Shuto, et al. 2023, 46). D's organization has shifted to a union shop[19] that

19. Morito (2023) describes the union shop as follows: "In an agreement with a labor union, an employer promises to dismiss those who fail to join the labor union and those who are no longer members of the union. This is a union shop agreement (Morito 2023,

covers not only regular employees but also non-regular ones. D: "My organization has a slightly special historical background that may differ from backgrounds of other organizations. It had originally been a union shop for regular employees and became an open shop due to a company merger. After a while, we shifted to the current union shop that covers non-regular employees as well" (Shuto, et al. 2023, 46). Although details of this shift are not given, this case indicates some progress in the organization of non-regular employees.

(2) Increasing female labor union officials

The forum participants point out that labor union officials are plagued with the issue of how to balance work, family, and union activities, making it difficult for female members to participate in union leadership. On the other hand, they partly note an increase in the number of female labor union officials.

A: "At a member labor union, a woman has become the chair of a branch. The chairwoman began to change practices. First of all, she drastically shortened the length of each executive committee meeting. She also reduced overnight meetings extremely. She abolished banquet parties in principle. When she has no choice but to have some party, she holds a buffet-style party. Through such practice changes, the number of female union officials has increased significantly" (Shuto, et al. 2023, 52). The implication from this case is that when labor union officials including female members are considered, activities of union officials must be reconsidered.

V. Current situation and issues regarding labor-management relations

Even while the unionization rate is declining, the environment surrounding labor is changing. This section considers the current situation and issues regarding labor-management relations through an analysis of how labor and management have responded to the use of AI technology that has become controversial in recent years.

From 2021 to 2022, the Japan Institute for Labour Policy and Training (JILPT) studied cases for four financial and five manufacturing companies in Japan, of which results are presented in the following (also summarized in research materials: JILPT (2022) for the financial companies and JILPT (2023a) for the manufacturing companies).[20] Labor unions have been organized for these case companies other than Financial Company A. Among companies for which labor unions are organized, Financial Companies B and C, and Manufacturing Company F have been identified as having labor unions that have organized not only indefinite-term regular employees but also other employees.[21]

1. Labor-management response to AI technology: Briefings within divisions rather than at collective labor-management consultation

While AI technology introduced at workplaces has had some impacts on the tasks of workers in any cases, no collective labor-management consultations have been held on the development, introduction, and operation of AI technology. The first reason for this is that AI technology is used by workers in a limited scope of sectors rather than all workers. The second reason is that the use of AI technology has not affected working conditions such as employment and wages so far.

275)." However, "there are many companies that fall short of dismissing those who withdraw from labor unions (and many unions tolerate such shortfall) (Morito 2023, 276)."

20. The study does not cover Chat GPT, a generative AI that has developed remarkably in recent years.

21. Referred to JILPT (2022, 34) for Financial Company B, JILPT (2022, 60) for Financial Company C, and JILPT (2023a, 35) for Manufacturing Company F.

Although collective labor-management consultations on the development, introduction, and operation of AI technology have not been conducted, managers of divisions using AI technology and officials in charge of AI technology introduction consult with workers through briefings within such divisions, regardless of whether there are labor unions. Such briefings have been identified as focusing on the purposes of AI technology introduction, and functions and usages of AI technology.

In some cases (Financial Companies B and C, and Manufacturing Company H), however, workers initially expressed concern that their jobs might be taken away or indicated distrust of AI technology. In response to such concern and distrust among workers, officials in charge of AI technology introduction held briefings for workers to alleviate their concern and distrust. As a result, a consensus has been formed on the use of AI technology.[22] At the workplace level, efforts are being made to build consensus among workers affected by AI technology.

2. Labor-management relations issue 1: Similarity of labor and management statements

Labor unions' statements on AI technology are similar to those of management, indicating that the similarity is an issue with labor-management relations in Japan. Labor unions are partly concerned about AI technology's future impact on employment. For example, labor unions express concerns about workers who are worried about what will happen to their jobs (Financial Company B[23]), whether workers' employment can be protected (Manufacturing Company E[24]), how to transfer workers while preventing them from leaving their jobs (Manufacturing Company[25]), and how to secure employment for workers (Manufacturing Company I[26]). However, these concerns do not lead to the denial of the use of AI technology.

On the other hand, labor unions welcome AI technology as improving business efficiency and productivity. The following reasons were cited for having a positive view: Providing added value to customers (Financial Company B[27]), improving quality, productivity, and business efficiency (Financial Company C[28]), speeding up work (Manufacturing Company E[29]), improving business efficiency (Manufacturing Company F[30]), increasing profits (Manufacturing Company G[31]), and improving productivity (Manufacturing Company I[32]). These words of labor unions are those stated by management for expressing concerns about profitability, symbolizing the similarity between the words of labor unions and management.

We can imagine the following needs rooted in the daily lives of workers: Wanting to spend time with families, picking up and dropping off children and preparing meals, caring for parents, and enjoying their

22. Referred to JILPT (2022, 38–39) for Financial Company B, JILPT (2022, 64) Financial Company C, and JILPT (2023a, 82) for Manufacturing Company H.
23. Quoted (and translated by the author) from a representative of Labor Union of Financial Company B (JILPT 2022, 53).
24. Quoted (and translated by the author) from General Secretary of Labor Union of Manufacturing Company E (JILPT 2023a, 27).
25. Quoted (and translated by the author) from Executive Committee Chairperson of Labor Union of Manufacturing Company F (JILPT 2023a, 46).
26. Quoted (and translated by the author) from Executive Committee Chairperson of Labor Union of Manufacturing Company I (JILPT 2023a, 105).
27. Quoted (and translated by the author) from a representative of Labor Union of Financial Company B (JILPT 2022, 52).
28. Quoted (and translated by the author) from a representative of Labor Union of Financial Company C (JILPT 2022, 71).
29. Quoted (and translated by the author) from General Secretary of Labor Union of Manufacturing Company E (JILPT 2023a, 27).
30. Quoted (and translated by the author) from Executive Committee Chairperson of Labor Union of Manufacturing Company F (JILPT 2023a, 46).
31. Quoted (and translated by the author) from Vice Executive Committee Chairperson of Labor Union of Manufacturing Company G (JILPT 2023a, 69).
32. Quoted (and translated by the author) from Executive Committee Chairperson of Labor Union of Manufacturing Company I (JILPT 2023a, 105).

spare time. These needs are a long way from the profitability of business. If labor unions are to realize the needs of workers that are rooted in their daily lives, the words spoken by labor unions may be different from those of management. However, this does not appear to be the case. Here may be an issue with labor-management relations in Japan.

Labor unions cannot completely ignore the profitability of business. Unless they place more emphasis on ideas rooted in workers' daily lives, however, it may be difficult for them to realize the needs of diverse workers including non-regular employees, or to organize them.

While further research is needed to determine the extent to which labor unions grasp and reflect the needs rooted in workers' daily lives, the similarity between words spoken by labor unions and management is a matter of concern.

3. Labor-management relations issue 2: System of worker representation

The previous sections have discussed labor-management relations at companies where labor unions have been organized. While labor unions are important for building consensus between labor and management on wages and working conditions, the unionization rate continues to decline, as noted above. Efforts to organize non-regular employees, though being made, have not progressed sufficiently. How labor and management should negotiate and agree on wages and working conditions on an equal basis at companies that have no labor unions is a major issue regarding labor-management relations in Japan.

One way to solve this issue is to continue efforts to increase the unionization rate. In particular, the organization of non-regular employees is an important challenge. Japan has no choice but to promote such efforts steadily. Another way to solve the issue is to seriously consider the roles, powers, and permanent establishment of worker representatives at companies without majority labor unions, instead of waiting for the unionization rate to increase.

In Japan today, the fate of the debate on worker representation in the absence of any majority labor union is worthy of attention. This is because the Japan Trade Union Confederation (hereinafter referred to as "JTUC-Rengo"), a representative organization of the labor side, and the Japan Business Federation (hereinafter referred to as "Keidanren"), a representative organization of the management side, have officially announced recommendations to establish worker representatives and grant them some powers.

On August 26, 2021, JTUC-Rengo released a recommendation for worker representation legislation. It mentions the establishment of worker representatives. "A legal framework should be developed to establish worker representatives for the conclusion of agreements with employers and the presentation of opinions under labor law at workplaces lacking majority labor unions and ensure their independent and democratic operation and their equal footing with employers."[33] In addition, JTUC-Rengo listed "Construction and Strengthening of Collective Industrial Relations that Include Diverse Types of Workers" as one of the priorities of the "FY2024-FY2025 Action Policies" (JTUC-Rengo 2023). It refers to the introduction of legislation for worker representation. "Toward building collective industrial relations in all workplaces, we will act to strengthen organizing and the organization in a way that leads to a strengthening of the base, and to ensure that the majority representation system is appropriately and thoroughly implemented, and the rules tightened in workplaces, with a view to the future introduction of legislation for worker representation."[34]

On January 16, 2024, Keidanren announced its recommendations for labor legislation centered on labor-management autonomy. The recommendations specifically call for revising labor law to establish a labor-

33. JTUC-Rengo 2021.
34. JTUC-Rengo 2023.

management co-creation consultation system (an optional system) for companies that have no majority labor unions. The system may conditionally grant certain powers to worker representatives at companies that have no majority labor unions. The recommendation states: "Although the specifics need to be further considered in the future, it is conceivable that each company that has no majority labor union may elect multiple representatives from among all workers, including fixed-term employees, through democratic procedures, acquire an administrative agency's approval on the election, provide necessary and sufficient information to and hold regular talks with the representatives, give the representatives convenience as necessary for their activities, and grant the representatives powers to conclude contracts with the company representative to govern individual workers, such as an agreement to improve working conditions for fixed-term and other employees to meet legislation related to the equal pay for equal work. The worker representatives may also be allowed to estimate the reasonableness of work rules and derogate a working hour system under stricter conditions. ..... To ensure the effectiveness of labor-management autonomy, the labor-management co-creation consultation system should be an optional one based on the judgment of labor and management at each company."[35]

In this way, JTUC-Rengo and Keidanren refer to worker representation at companies that have no majority labor unions. While it is uncertain how their talks on the matter will develop, both labor and management are believed to be in a stage where they cannot ignore the system of worker representation. We should pay attention to the future course of their talks.

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35. Keidanren 2024.

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Diversification of Working People and Voices at Work in Korea

Sukhwan CHOI

I. Introduction

Employment and labor relations in Korea have been experiencing dynamic changes. Diversification is progressing in many aspects surrounding working people and the places where they work. The structure of industry and the way to hire and utilize employees have become complicated. Working style is more and more diversified as well, seen among various types of non-regular workers such as freelancers (independent contract workers) and those using platforms for their work. These trends naturally suggest a diversity of interests. Various interests in various generations and various situations raise new debates—such as work-life balance, self-realization, and preparation for the second stage of life—which contrast with the traditional one on wages.

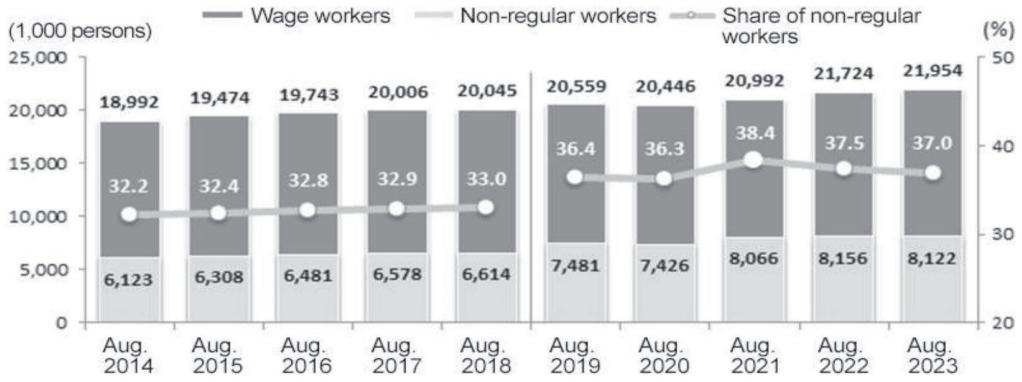
Here, the issues in collective conversation appear. Besides traditional issues regarding the labor law such as the concept of worker and employer, we have new tasks to navigate in the present situations. First, whom should workers talk with? Workers want to discuss their working conditions with the person who actually and practically has the power to determine them. The traditional, classical way of assuming the authority to deal with collective conversation does not always make it possible. Second, how should they talk? Workers seeks the best way to represent their own voices, in many cases, various voices. The collective bargaining system and its efficiency are not always compatible with the workers' various wishes and their implementation. In a way, we have tried to handle these problems in changing situations through practical examples and legislations. I will discuss here the Korean way of responding to such issues, as well as the key points bearing improvement.

II. Situations in Korea

In Korea, the Minimum Wage Act was legislated in December 1986. The first minimum wage prescribed by this act was 462.5 South Korean won (KRW) per hour in the year of the 1988 Seoul Olympic Games. It has risen to 9,860 KRW in 2024, more than 20 times compared with that of 36 years before. We did not even have a minimum wage guaranteed by the mandatory law 37 years ago. Recently people have been expecting 10,000 won, and Minimum Wage Commission of Korea actually determined 10,030 won as the minimum wage in 2025. Of course, the employers' side always insists that the increase is too fast, while employees and unions

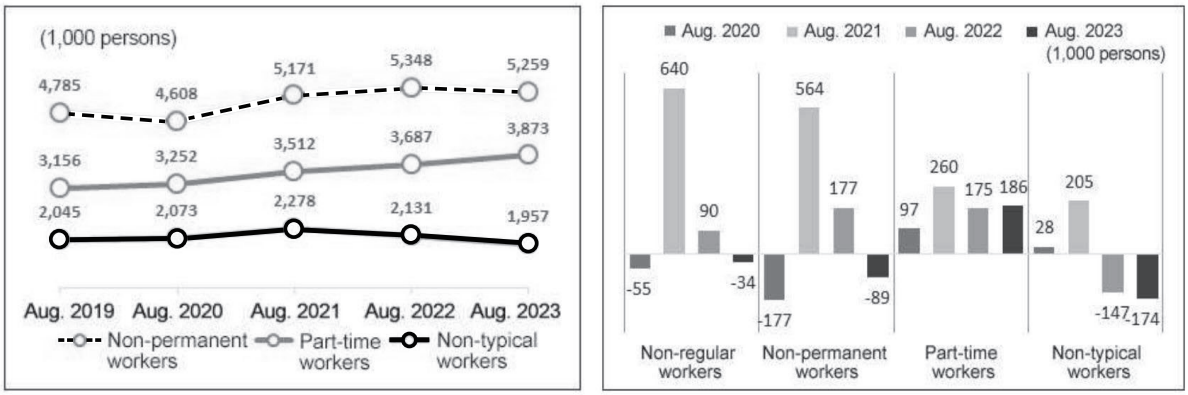
want even more.[1] Rapid development in Korea brought about issues in multiple aspects, not to mention those in the fields of employment and labor relations. The debates concerning the minimum wage is one example of conflicts rising from the dynamic transformation in Korea.

According to the recent survey[2] (Figures 1 and 2), as of August 2023, total wage workers were 21,954 thousand persons. The regular workers totaled 13,832 thousand persons, which rose by 264 thousand persons year-on-year. Non-regular workers totaled 8,122 thousand persons, which fell by 34 thousand persons from the same month of the previous year. The non-regular workers comprised 37.0% of the total wage workers. 65.6% of them chose their employment type voluntarily (figure omitted). The average monthly wage and



Source: Statistics Korea (see note 2 of this report).

Figure 1. Size and share of non-regular workers among wage workers



Source: Same as Figure 1.
Note: Figures on the right show the difference from the previous year, respectively.

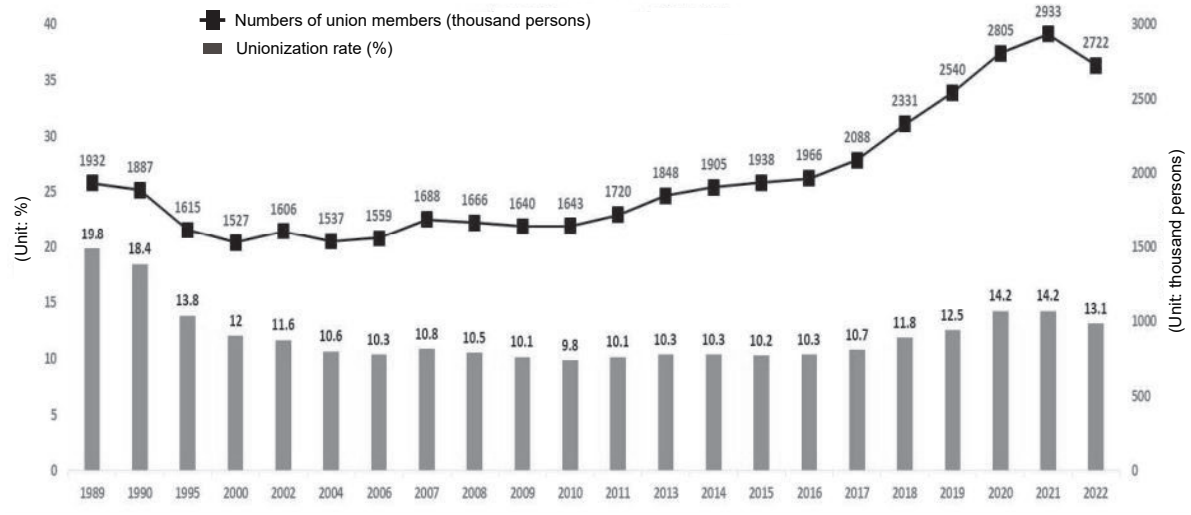
Figure 2. Size and change in non-regular workers by employment type

1. Jun Ji-hye, "Labor, Management at Odds over Adopting Sector-specific Minimum Wage," *The Korea Times*, June 30, 2024, https://www.koreatimes.co.kr/www/nation/2024/08/113_377733.html.
2. Statistics Korea, "Supplementary Results of the Economically Active Population Survey by Employment Type in Aug. 2023," https://kostat.go.kr/board.es?mid=a20105050000&bid=11735&act=view&list_no=427851.

salaries of non-regular workers for the past three months marked 1.957 million won. When excluding part-time workers, the average monthly wages and salaries of non-regular workers stood at 2.761 million won, an increase of 151,000 won, while regular workers received the average monthly salary of 3.623 million won. The gap between regular and non-regular workers is becoming wider, from 1.282 million won in 2017 to 1.666 million won in 2023.

As for industrial relations, the organization rate in 2022 was 13.1% with total union members of 2,720 thousand, which was a decrease of 1.1 percentage points, 210 thousand members, from 14.2%, 2,930 thousand members in 2021 (Figure 3). This was the first year-on-year decline in 12 years. The Ministry of Employment and Labor (MOEL) reported that 431 unions were established, and 72 thousand members were newly added in 2022, while the total number of organized workers and the unionization rate decreased due to the membership reductions in the construction sector as well as the correction of statistical errors.[3]

The decrease in unionization rate in 2022 was the first time in seven years as shown in Figure 3. The rate rose between 2016 and 2021 from 10.3% to 14.2%. The two main national centers for trade unions in Korea, the Federation of Korean Trade unions (FKTU) and the Korean Confederation of Trade unions (KCTU), had 1.12 million and 1.1 million members, respectively, with 483,000 members unaffiliated. Among their members, 1.641 million (60.3%) were those of industrial unions, sectoral unions and regional unions, while 1.081 million (39.7%) were those of enterprise-level unions.[4] By corporate size, the unionization rate stood at 36.9% at workplaces with more than 300 employees, 5.7% at those with 100 to 299 employees, and 1.3% at those with 30 to 99 employees.[5]



Source: MOEL (see note 3).

Figure 3. Rate of union membership and number of union members

3. MOEL, 2023. "The National Trade Union Organizational Status 2022," https://www.moel.go.kr/policy/policydata/view.do?bbs_seq=20240400372 [in Korean]; MOEL press release, 2024, Jan. 23., https://www.moel.go.kr/news/enews/report/enewsView.do?news_seq=16108 [in Korean].
4. MOEL, *supra* note 3, p. 22.
5. MOEL, *supra* note 3, p. 15.

New forms of work are spreading rapidly in Korea. In 2022, there are approximately 0.795 million platform workers who provide labor via platforms that affect the allocation of work through methods such as customer satisfaction evaluation. The number, which is equivalent to 3.0% of the employed aged 15 to 69 years old, rose with an increase of 0.134 million (20.3%) from 661,000 persons in 2021.[6] There are approximately 2.919 million platform workers in a broad sense, including workers who have obtained work through simple introduction or mediation of online platforms (smartphone apps or websites) in 2022, which marked an increase of 722,000 persons (32.9%) from 2.197 million in 2021.[7] In this survey, 513,000 persons were reported working for delivery and driving, 53,000 for housekeeping, cleaning, and caring, and 85,000 for professional services (interpretation, translation, consultation, etc.).[8]

III. Basic structure of the collective labor relations law[9]

The Constitution of Korea prescribes three basic rights to workers. To enhance working conditions, workers shall have the right to organize, have collective bargaining, and take collective action (art. XXXIII). Since its enactment in 1948, these rights to protect workers have remained unchanged. The basic rights to work are also prescribed by the Constitution: that all citizens shall have the right to work, and the state shall endeavor to promote the employment of workers, guarantee optimum wages through social and economic means, and enforce a minimum wage system under the conditions (art. XXXII para. 1), which accompanies the duty to work (art. XXXII para. 2). The standards of working conditions shall be determined by legislation in such a way as to guarantee human dignity (art. XXXII para. 3), and special protection shall be accorded to working women and working children. Especially working women shall not be subject to unjust discrimination in terms of employment, wages, and working conditions (art. XXXII para. 4–5).

With this background in the Constitution, the Trade union and Labor Relations Adjustment Act (TULRA) prescribes detailed rights and duties in collective labor relations. First, workers shall be free to organize or join a trade union (art. 5 para. 1). Here, the term "worker" means a person who lives on wages, a salary, or any other income equivalent thereto, regardless of the person's occupation (art. 12 nr. 1), and the term "employer" means a business owner, a person responsible for the management of a business, or a person who deals with matters concerning workers in the business on behalf of a business owner (art. 12 nr. 2).

In Korea, the range of workers protected by TULRA is wider than that of those in the context of the Labor Standards Act (LSA). The Supreme Court of Korea stated in a decision that "…the Labor Standards Act was enacted for the purpose of regulating individual labor-management relations in terms of the need for direct protection by state management and supervision of those who provide labor. However, TULRA was enacted to define labor-management relations, from the perspective of whether there is a need to guarantee the right to independently associate among labor suppliers…the two laws define the concept of workers differently according to their legislative purposes…".[10] As a result, the court takes the concept of workers by TULRA rather broadly. In another case that dealt with the trade union consisting of foreigners without proper employment qualifications, the Supreme Court said that, under the TULRA, a worker refers not only to the

6. Kim, Joon-Young, KEIS, 2023, "Changes and implications of recent platform workers and labor market," Employment Trend Brief 2023, no. 1, p. 5, https://www.keis.or.kr/user/extra/main/3878/publication/reportList/jsp/LayOutPage.do?categoryIdx=126&pubIdx=9533&reportIdx=6062 [in Korean].
7. Kim, *supra* note 6, p. 5.
8. Kim, *supra* note 6, p. 7.
9. Mainly based on the part from publications by Choi, Sukhwan. 2024. *Labor and Employment Law*, Seoul National University Asia-Pacific Law Institute (Ed.), *Understanding Korean Law*, Seoul National University Press.
10. Supreme Court of Korea, 2004. 2. 27. 2001DU8568.

person who provides work and receives wages in return and is employed by a specific employer, but also to the person who needs to be guaranteed three basic labor rights, including those temporarily unemployed or job seekers. In addition, while the Immigration Act prohibits the actual employment of foreigners without the right to stay (who do not have employment qualifications), this does not mean that it prohibits legal effects such as the rights to work provided by foreigners without employment qualifications, not to mention their status as workers. Therefore, a person who provides work and receives wages in return under the TULRA can be a worker.[11]

A trade union is organized in a voluntary and collective manner upon the workers' initiative for the purpose of maintaining and improving their working conditions as well as enhancing their economic and social status (TULRA art. 2 nr. 4). Under the legal structure with the constitutional basic rights of collective bargaining (art. 33), TULRA has the clause for the bargain in good faith (art. 29-4) for both the employer and union sides. When the employer refuses to bargain without reasonable grounds, they will be accused of the unfair labor practices (art. 81), which can result in a criminal penalty. The determination of whether there is a good reason for the employer's refusal or neglect of collective bargaining should be based on whether it is deemed difficult to expect the employer to fulfill the collective bargaining obligation by considering the bargaining authority, bargaining place, bargaining attitude, etc., comprehensively.[12]

If there are more than two unions or union branches in a business and the employer does not want to bargain with each union, the situation becomes complicated. Even though we have the constitutional basic rights of collective bargaining, the actual process of collective bargaining is not always fully carried out for every single (or branch) union. In this case, we must follow the procedure for "simplification of the bargaining window," which prescribes the rules for the setting bargaining channels. This means that the union organization can be basically set out in any type, for example enterprise-based unions, industrial unions, and occupational unions can be established. In the stage of collective bargaining, however, a group of workers who share interests in response to specific employers forms a bargaining unit and elects a representative to negotiate. That is, where at least two trade unions established or joined by workers exist in one business or one place of work, regardless of the type of organization, trade unions shall determine a bargaining representative among them and request to bargain (TULRA art. 29-2 para. 1). First, all the trade unions that have participated in the procedures for the determination of a bargaining representative shall make the determination autonomously within 14 days (TULRA art. 29-2 para. 3, Presidential Decree art. 14-6). Second, when the trade unions fail to determine a bargaining representative, a union organized by a majority of the entire members of the trade unions that participated in procedures for the simplification of bargaining channels (including cases where at least two trade unions become the majority of the entire members of the trade unions that participated in the procedures by delegation, coalition, etc.) shall become the bargaining representative (art. 29-2 para. 4). Third, if the majority union does not exist, every trade union that participated in the procedures for the simplification shall jointly organize a bargaining delegation (art. 29-2 para. 5).

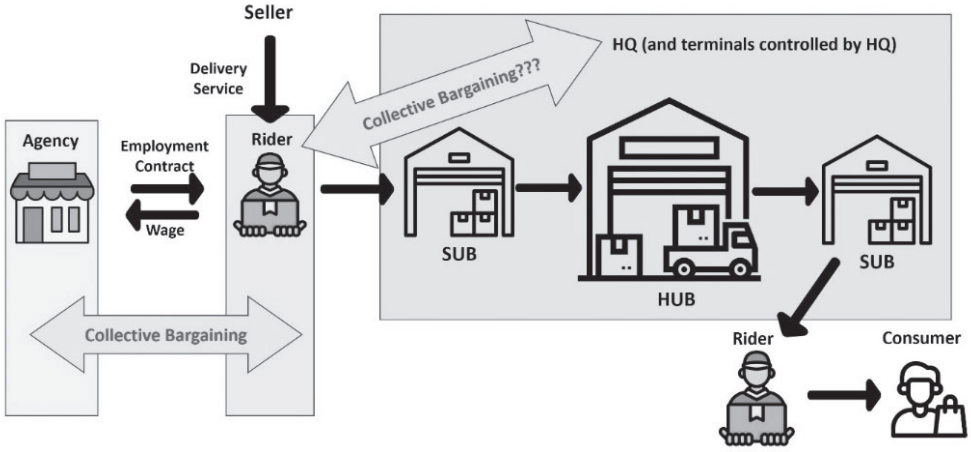
Although it partially restricts the rights of collective bargaining guaranteed by the Constitution, Korean labor law supplements these restrictions through the duty of fair representation and promotes the smooth progress of bargaining.[13] TULRA sets the duty of both employer and bargaining representative union that they should not discriminate among trade unions participating in procedures for the simplification of bargaining channels or members thereof without reasonable grounds (art. 29-4 para. 1).

11. Supreme Court of Korea, 2015. 6. 25. 2007DU4995.
12. Supreme Court of Korea, 2006. 2. 24. 2005DO8606.
13. Constitutional Court of Korea, 2012. 4. 24. 2011HUNMA338; Constitutional Court of Korea, 2024. 6. 27. 2020HUNMA237, etc.

IV. Whom to talk with?

: Expansion of the employer in collective bargaining

With the complicated structure much attributable to outsourcing and a multi layered contract network, workers are seeking their "real" partner to discuss their working conditions, whether he or she has an employment contract with that specific person or not. It appears vividly in the cases of subcontracting relations (Figure 4). In a recent case, employees of the subcontractor (agency) company organized a trade union and at first requested collective bargaining with the subcontractor (i.e., their employer) regarding the working conditions of their workplace, which is the parcel delivery terminal. The employer answered that he does not own the right to control the conditions of terminal, and then the union turned to the primary contractor for bargaining, which was refused by the primary contractor (the headquarter who controls the parcel service business). Delivery is an essential and indispensable task for this parcel service business company, and the right to determine working conditions by dominating and controlling the facility and terminal belongs to the primary contractor. Here, should the primary contractor, who do not have a direct employment contract with the subcontractor's employee, sit at the collective bargaining table, replying to the requests of the union organized by the employees of the subcontract company? As a labor law scholar in Korea pointed out,[14] this can be described as "a legal attempt to overcome the walls of individual companies called primary contractors and subcontractors." It was thought that the duty to bargain in good faith exists only when there is a direct employment contract between the members of the subcontractor's union and the primary contractor. But recently, we have seen changes in the cases and legislation, too.



Created by the author and Hyewon Youn (Graduate School of Law, Seoul National University).

Figure 4. Possibility of collective bargaining under the subcontracting relation

In the unfair labor practice system, the one who doesn't have an employment contract could have been regarded as the 'employer' who performs domination and intervention.[15] In addition to this, recent cases are

14. Kim, Lin. 2023. "A Glance at Dual Structure of Labor Market in South Korea." *Japan Labor Issues*, vol. 7, no. 45 (Special Issue): 60.
15. Supreme Court of Korea, 2010. 3. 25. 2007DU8881.

saying that this expanded notion of employer can also be applied to collective bargaining, though so far at the trial and appellate courts level. The Seoul High Court of Korea said that "…it should be interpreted that the employer under art. 81 para. 1 nr. 3 of the TULRA (the unfair labor practice of violation of duty to bargain in good faith) includes those who are able to control and determine working conditions, to the extent that they are supposed to be in charge of some of the authority and responsibilities as employers who employ workers, just as the employer under nr. 4 (the unfair labor practice of domination and intervention) …the purpose of the unfair labor practice system is to specifically secure the three basic rights of labor prescribed by the Constitution, and is recognized not only for unfair labor practices (nr. 4) of domination and intervention related to the right to unite but also for unfair labor practices (nr. 3) related to the refusal or negligence of collective bargaining…".[16] For the reasoning, the court said that more contractors, other than the original employer, who have a superior position in transactions, use the labor of workers belonging to the original employer under his or her own control or influence, and this situation makes hierarchical and multifaceted labor relations. With this, the court conceived that the right to control and decide the working conditions of the worker can be different in multiple ways, and the original employer can only have the authority and responsibility for limited working conditions. Under these circumstances, without the primary contractor's duty to bargain, workers cannot fully retain the three basic labor rights.[17]

It has been a long time since intervention in unfair labor practices impacted people in this position, but the rulings in the lower court of the case also indicated the movement to enable collective communication legally or institutionally through collective bargaining[18] too. It was submitted as a legislative bill (the so-called "yellow envelope bill") as well and passed the National Assembly,[19] but it was not promulgated as a valid law due to the president's exercise of veto power. The proposed bill prescribed that, even if he or she is not a party to the employment contract, a person who is able to control and determine the working conditions of a worker shall be deemed an employer within the scope (proposed bill art. 2 nr. 2).[20]

The argument that collective bargaining should be allowed only on those conditions, even if there is no direct contractual relationship, if the working conditions can be substantially and concretely controlled and determined, looks attractive, but the primary contractor is having difficulty determining the working conditions of the workers who are not legally connected with them, especially considering the complex relations of working conditions. Subcontractors are also complaining about their freedom and rights to be disturbed.

With this trend, we can say that the collective bargaining system in Korea is considering that the responsibility of the employer (user) side could expand the scope of control, whether there is a direct contractual relationship or not. This is different from the traditional way of deciding employee or worker, in that instead of contractual relationship, it puts weight on those who have practical decision-making authority. The recent development of the internet and communication tools seems to make this expansion in another direction, making less of a concrete location and time. Sometimes command seems to have been excluded by not directly saying a word, not sharing common physical space, with the assistance of technology. But it inevitably requires the resurrection of traditional labor laws. It may raise another question: who the

16. Seoul High Court, 2024. 1. 24. 2023NU34646.
17. Ibid.
18. Seoul Administrative Court, 2023. 1. 12. 2021GUHAP71748.
19. Bill No. 2123038. https://likms.assembly.go.kr/bill/billDetail.do?billId=PRC_B2C3U0X2E1S6F1T2J2Q5C0N7U0B6B6 [in Korean].
20. Current law states that "employer" means a business owner, a person responsible for the management of a business, or a person who acts on behalf of a business owner regarding matters concerning workers in the business (art. 2 nr. 2), and in a considerable number of cases, this was thought to be the party to the employment contract.

representative should be, along with who should have the responsibility of sitting at the table of collective bargaining.[21]

V. How to talk?

: Various attempts of collective bargaining in the changing situation

With the diversification of working styles and interests in the complex class of workers, workers are also trying to cope with new types of labor-management relations. Delivery platforms refused to engage in collective bargaining at first, without reasoning about whether they are employers in the sense of TULRA. However, there are various attempts to start collective bargaining and other forms of dialogue to reach a meaningful agreement on the working conditions of platform workers. For example, the rider union[22] is national-level industrial trade union with members of the delivery industry. They are collectively bargaining with the multiple delivery platforms. The main issues are expanding qualifications for industrial accident insurance and handling grievances such as maximum delivery time and penalty systems. There are also attempts at regional agreements in a specific district concerning safety and minimum rewards. These types of industrial-level and regional-level agreements are not familiar models in Korea so far, which means that they still suggest remaining concerns over the legal effect and practical operation.

Other attempts are agreements by social dialogue, not typical collective agreements. Platform companies, unions, and professional advisors, including scholars, started to succeed in signing an agreement to develop the platform economy and to protect the rights of platform workers. Although the Labor Standards Act (LSA) did not recognize riders as employees, some protections were provided including occupational safety and health issues, the right to refuse work with unexpected risks, and the right to recognize each other as a bargaining partner. This is a kind of social agreement– not a collective agreement that has a normative effect by TULRA, but rather aims for social consensus and, if possible, legislation from a macro perspective.

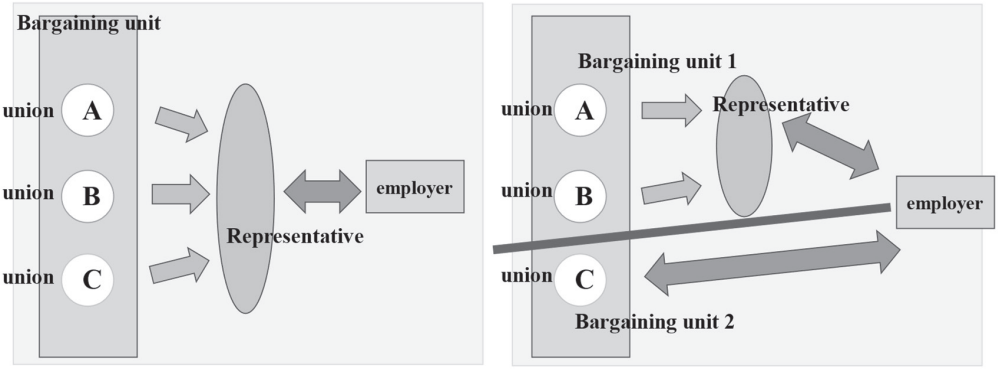
Platform workers, especially delivery riders, are interested in organizing unions, and they are succeeding occasionally. But the question of whether platform workers can be admitted as workers who can organize trade unions by TULRA is not that confirmable. Until now, it has been on a case-by-case basis, with some still considered independent contractors.

Another issue related with the labor relation is who should represent the workers' voice. Workers want to insist on their own wish, making the counterpart party in the collective bargaining listen to what he says. When there are more than two unions in a company, a representative union and an employer shall not discriminate among trade unions participating in procedures for the simplification of bargaining channels or members thereof without reasonable grounds, as we have seen before. If the employer does not agree with individual bargaining, the unions should make one representative, usually a majority union. However, with various requests and interests among the workers as well as the diversification of their working styles, the majority union has difficulty representing union members' voices.

For this, we have the system of determining and separating bargaining units (TULRA art. 29-3 para. 1 and 2). A bargaining unit that shall determine a bargaining representative is one business or one place of business. But where it is deemed necessary to divide a bargaining unit or to unite separated bargaining units, in consideration of a wide difference in working conditions, type of employment, customary practices of bargaining, or such in one business or one place of business, the Labor Relations Commission may decide

21. Choi, Sukhwan. 2023. "Remote work and Redistribution of Responsibility in Korean Labor Law." A paper presented at remote work conference, Pompeu Fabra University, Dec. 2023.
22. https://riderunion.org/.

to divide a bargaining unit or to unite separated bargaining units at the request of both parties to labor relations or either one party (Figure 5). So, workers who think that the majority union cannot represent their own interests can form separate unions and request dividing the bargaining unit. This system is a double-edged sword in that, in a way, it can reflect the very points of the persons who share common interests, but at the same time, it necessarily divides the group of workers, decreasing the size of the individual union and undermining solidarity.



Source: Created by the author and Hyewon Youn (Graduate School of Law, Seoul National University).

Figure 5. Simplification of bargaining channels procedure

VI. Further to consider

There are people who still have difficulty discussing working conditions with employers and requesting the improvement of their situation. The organized voice and collective bargaining (in whatever form) are important in the age of diversification. "Online-based unions," where workers join through online and participate in activities mainly online, can be a brand-new attempt to jump over this hurdle and may have the organization shift from the one pursuing the "continuing and strong binding" unions to the one with more "casual and ad-hoc" characteristics. From the viewpoint of handling the issue in the conversation, the recent Supreme Court decision will suggest a new insight. As is the case with Japan, we have been using rules of employment regulated by employers as a tool for regulating numerous numbers of conditions for employees (Labor Standards Act, art. 93–97). When the rules of employment need to be changed in a way that is disadvantageous for the employee, the LSA prescribes that "…in case of amending the rules of employment unfavorably to employees, the employer shall obtain the consent of a trade union if there is such a trade union composed of the majority of the employees in the business or workplace concerned, or otherwise the consent of the majority of the employees if there is no trade union composed of the majority of the employee" (art. 94 para. 1). Until now, the Korean Supreme Court has stated that even without the consent of the majority union or majority of the employees, if the change is reasonable in view of social norms, and even when it is disadvantageous to employees, the change can be valid.[23] But a recent case by Supreme Court full bench decision[24] held that, if there do not exist special circumstances to conclude that the union or employees

23. Supreme Court of Korea, 1998. 5. 10. 87DAKA2853.
24. Supreme Court of Korea, 2023. 5. 11. 2017DA35588

abused their collective consent right, the disadvantageous change shall not be regarded as valid only because it is reasonable in view of social norms. This seems to reinforce the role of the collective voice in Korea regarding the working conditions of employees. It surely is a signal of supporting conversation rather than regulation.

Of course, there are additional and exceptional measures by the government and local authorities regarding social security, health, and safety for people working in various environments. With the revision of the Unemployment Insurance Act (art. 77-6), some of the protections shall apply to a person, even though he or she is not an employee under LSA, in the following conditions: (1) not an employee; (2) engaged in the types of work prescribed by Presidential Decree; (3) entering into a contract under which he or she provides labor (i) in person; (ii) without using a third party; (iii) for other person's business; and (iv) receives certain remuneration from a business owner or person who provided with labor. At the same time, the Industrial Accident Compensation Insurance Act (IACIA art. 91-15) tries to expand the coverage by prescribing the notion of "labor provider" (those who provide labor for other people and receive rewards for the labor) so that they can be protected under the IACIA. The Act doesn't presuppose exclusivity to a specific business but defines and regulates the notion of "platform" and "platform workers," who are included in the notion of "labor provider."[25]

It seems that these are attempts by the government, narrowing the gap that traditional organized voices cannot cover and guaranteeing minimum safety for all working people. But at the same time, the government tries to regulate the collective voice and especially the actions of those who are not categorized as an employee. The Korea Fair Trade Committee (KFTC) recently strongly sanctioned independent contractors' collective action or even agreement as violating competition law.[26] Appropriate policies between collective voices and governmental intervention will be another task for the labor relation, or at least the relationship between those who work and those who utilize labor in Korea.

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25. Choi, Sukhwan. 2022. "Giving a New Present or Returning the Original Share: New Insight about Law and Policy for Working People in Korea," *Japan Labor Issues*, vol. 6, no. 40 (November): 65.
26. KFTC made decision to consult prosecution office as a criminal suit for independent contractors' association by truck drivers for the violation of obstructing investigation.

Navigating the Changing Landscape: Labor Unions in Taiwan amidst Contemporary Challenges

Guan-Chiau CHIOU

I. Introduction

In today's changing world, labor unions are like ships guiding members through storms, symbolizing unity and hope. They protect and support their members against challenges, with laws serving as maps and blueprints for their journey. This paper explores how unions navigate these challenges, using legal frameworks to ensure their stability and protect their members' rights.

II. The current status and evolution of Taiwan's labor market

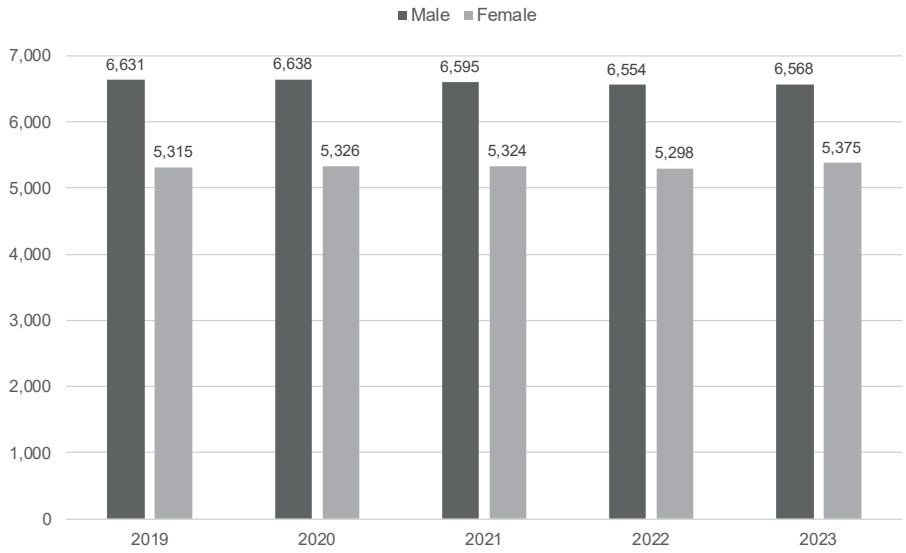
Before World War II, Taiwan's economy was mainly agricultural, with 46% of workers in farming by 1945. In the 1950s, Taiwan shifted towards industrialization and export-oriented industries, moving workers from agriculture to manufacturing. From the 1970s to the 1990s, the focus shifted again to heavy industries and high-tech, such as semiconductors and electronics, attracting talent. Since the 1990s, the service sector, including finance and tourism, has become key, shifting labor demand from manufacturing to services.

Figure 1, based on government statistics, shows a trend towards gender parity in the labor force over the past five years, reflecting efforts to promote workplace equality.

Figure 2 highlights Taiwan's labor force status by age group from 2019 to 2023. While Taiwan became an aged society in 2018 (14.6%) and is on track to become super-aged by 2025 (20%),[1] the figure specifically shows the population by age group between 2019 and 2023. The 2019 Middle-aged and Elderly Employment Promotion Act, effective 2020, allows fixed-term contracts for workers aged 65 and over, influencing an uptick in their employment.

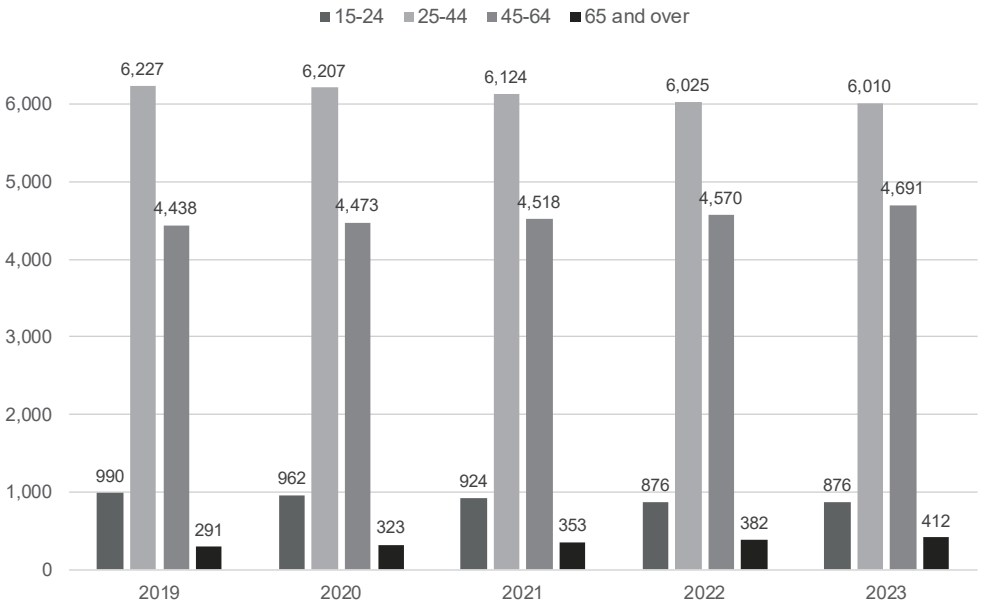
Figure 3 and Table 1 show the employment status across three major sectors in Taiwan's economy: the service sector, which remains the largest, along with the industry and agriculture sectors, both of which are declining. The pandemic and technology changes have greatly impacted the service sector, especially platform delivery, where workers' rights are now a major legal issue.

1. National Development Council. "Population Projections for the Republic of China (Taiwan) 2022–2070: V. Timeline of Aging," https://www.ndc.gov.tw/Content_List.aspx?n=2688C8F5935982DC (last visited July 8, 2024).



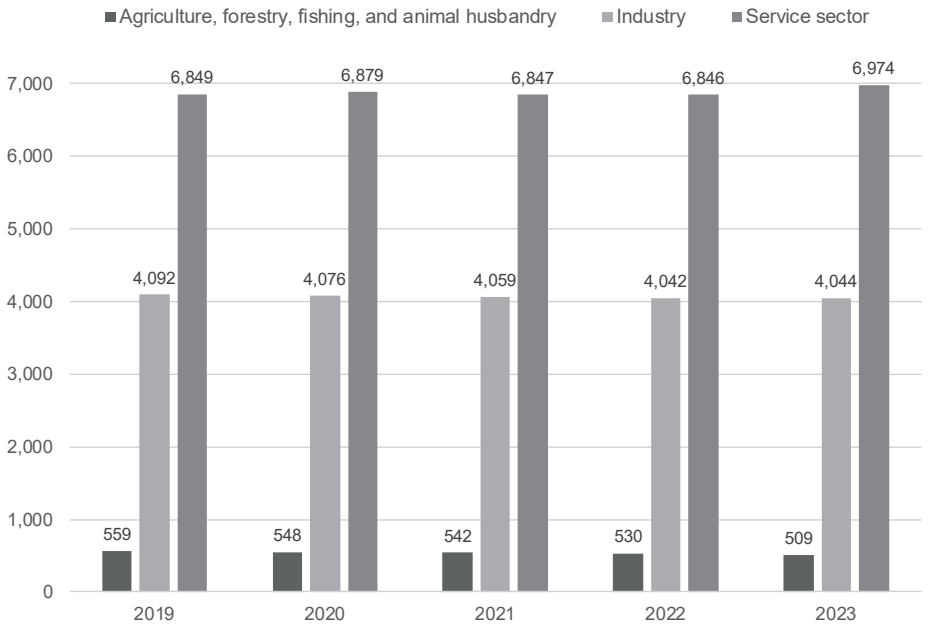
Source: Created by the author based on Directorate-General of Budget, Accounting and Statistics, Executive Yuan "Manpower Survey" (February 2024).

Figure 1. Labor force status by gender in Taiwan, 2019–2023 (unit: 1,000 persons)



Source: Same as Figure 1.

Figure 2. Labor force status by age group in Taiwan, 2019–2023 (unit: 1,000 persons)



Source: Same as Figure 1.

Figure 3. Employment status by industry sector in Taiwan, 2019–2023 (unit: 1,000 persons)

Table 1. Workforce statistics for various delivery platform operators in Taiwan

(Unit: Number of persons)

Delivery platform operators	January 2023	December 2022	December 2021	March 2021
Uber Eats	84,968	83,281	73,136	71,171
Foodpanda	74,356	78,149	58,094	44,804
Lalamove	19,284	18,497	11,443	23,077
Global Express	5,380	5,420	742*	490

Source: Highway Bureau, Ministry of Transportation and Communications (2023).
Note: *The figure is as of November 2021.

The expansion of new forms of work

Recent years have seen a dramatic rise in the gig economy, fueled by technological advancements and shifting labor market demands. Gig work, facilitated by digital platforms, caters to specific, task-oriented jobs such as delivery services, driving, and home cleaning, emphasizing labor market flexibility and the efficient use of time.[2] Key drivers of this trend include the proliferation of digital technologies, widespread smartphone access, and changing social-economic structures that favor work flexibility and autonomy.

This shift towards gig work presents new challenges for labor protections, notably in terms of unionization and rights for non-traditional workers. Taiwan's labor market has transitioned from its agricultural roots to a

2. ILO (International Labour Organization). Digital Labour Platform, https://www.ilo.org/digital-labour-platform (last visited July 8, 2024).

service-oriented economy powered by technology. This transformation highlights the necessity of thoroughly understanding existing collective labor legislation to determine if it adequately addresses the rapid changes of the era, particularly in relation to the unique needs of gig workers. The emergence of the gig economy underscores the urgency of evaluating our legal frameworks to ensure they remain relevant and effective in protecting the rights of non-traditional workers amidst the digital economy's growth.

III. Evolving dynamics of labor unions in Taiwan: Historical challenges and legal advances

Historically, Taiwan's approach to labor unions was conservative, influenced by the Nationalist Government's defeat in the civil war, a focus on economic development, and a 38-year period of martial law from 1949 to 1987, which limited unions' growth and political activities. The turning point came in 2011, following the enactment of the Act to Implement the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights in 2009 and subsequent amendments to key labor laws including the Labor Union Act, the Collective Agreement Act, and the Act for Settlement of Labor-Management Disputes (hereafter referred to as "ASLD"), collectively known as the "Three Labor Laws." These changes sparked a resurgence in the labor movement, leading to a more dynamic union landscape with increased union formation and industrial actions.

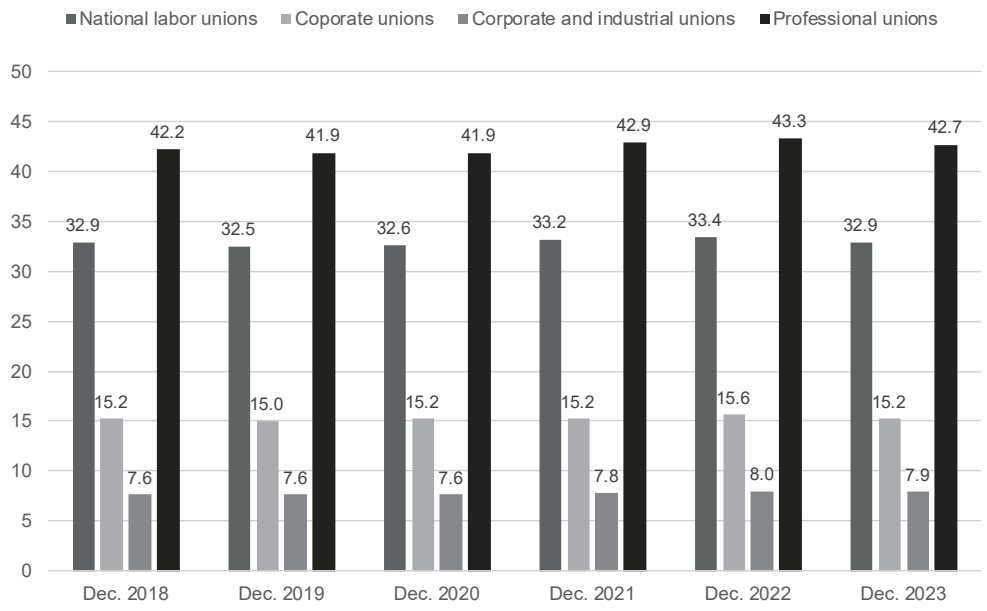
1. Organization and formation of unions

In Taiwan, labor unions are categorized into corporate, industrial, and professional unions as per Paragraph (1) of Article 6 of the Labor Union Act.[3] By the end of 2023, Taiwan had 949 corporate unions, 262 industrial unions, and 4,334 professional unions.[4] Despite the overall union organization rate reaching 32.9%[5] as indicated in Figure 4, this rate is misleading. Regarding the 42.7% organization rate among professional unions in 2023, in reality, only a few unions are actively engaged in meaningful union movements such as the Taoyuan Union of Pilots or the Taoyuan Flight Attendants Union known for their active and high-profile strikes. In reality, the majority of professional unions focus on providing services such as labor and health insurance assistance, rather than engaging in substantial union activities. When professional unions are excluded, the organization rates for both corporate and industrial unions are notably low, under 10%, with corporate unions at a marginally higher rate of 15.2%. This clarifies that, contrary to the inflated overall rate, the true strength and influence of union activities in Taiwan, especially outside of these notable exceptions, remain limited and fall short of international norms.

3. According to the official English version of the legislation from the National Laws and Regulations Database (maintained by the Ministry of Justice), Paragraph (1) of Article 6 of the Labor Union Act states: *Labor unions can be classified into the following three types; however, teachers can only organize and join the labor unions referred to in Subparagraphs (2) and (3): 1. Corporate union: a labor union organized by employees of the same factory or workplace, of the same business entity, of enterprises with controlling and subordinate relationship between each other in accordance with the Company Act, or of a financial holding company and its subsidiaries in accordance with the Financial Holding Company Act,*
2. Industrial union: a labor union organized by workers in the industry, and.
3. Professional union: a labor union organized by workers with the same professional skills.
Although some literature refers to the three types of unions as enterprise union, industrial union, and craft union, this paper adheres to the official translation, thus using the terms corporate union, industrial union, and professional union.

4. Ministry of Labor Statistics. Labor Relations - Trade Unions, https://statdb.mol.gov.tw/statiscla/webMain.aspx?sys=100&kind=10&type=1&funid=q0501&rdm=egLaqIhx (last visited July 8, 2024).

5. Ministry of Labor Statistics. Union Organization Rate, https://statdb.mol.gov.tw/statiscla/webMain.aspx?sy=220&ym=10700&ymt=11200&kind=21&type=1&funid=q05014&cycle=4&outmode=0&compmode=0&outkind=11&rdm=R88024 (last visited July 8, 2024).



Source: Department of Employment Relations, Ministry of Labor (July 2024).

Figure 4. Union organization rate in Taiwan, 2018–2023 (%)

The Labor Union Act mandates that forming a union requires a petition with over 30 worker signatures for registration.[6] This rule, updated from a permit to a registration system post-1949, may not suit Taiwan's landscape dominated by small and medium-sized enterprises.[7] Reevaluating this minimum requirement could lead to laws better aligned with today's economic conditions, improving labor rights protections.

(1) Corporate unions

A corporate union refers to a labor union organized by workers within the same factory or workplace, the same business entity, enterprises that have a controlling and subordinate relationship with each other as defined by the Company Act, or a financial holding company and its subsidiaries as defined by the Financial Holding Company Act.

Single union system

In accordance with Paragraph (1) of Article 9 of the Labor Union Act, the number of corporate unions organized under Article 6 shall be limited to one. This provision means that within the same enterprise, all workers can only establish a single corporate union. Although there can be only one union for the same factory, business unit, enterprise with a controlling and subordinate relationship, or within the same financial holding company and its subsidiaries, from the perspective of a larger-scale enterprise, it is still possible for more than one corporate union to coexist within the same company.

6. Paragraph (1) of Article 11: *A labor union shall be organized by the signatures of no less than thirty workers. A preparatory committee shall be set up to openly recruit members, draft union charter, and convene the inaugural general meeting*.
7. Huang Yueh-Chin. 2012. *New Perspectives on Labor Law* (5th Edition). Edited by Huang Ding-You. Taipei: Hanlu Book Publishing Co., Ltd., p. 423.

Mandatory membership provision

Article 7 of the Labor Union Act mandates that "Employees shall join the corporate union organized in accordance with Paragraph (1) (i) of Article 6." Although a minority view holds that, to uphold and practice the objectives and purposes of the Labor Union Act, which are to promote worker solidarity, elevate the status of workers, and improve their lives, this provision should be interpreted as mandatory.[8] However, since the Labor Union Act does not prescribe any penalties for violating Article 7, thereby lacking substantive coercive power, and since mandatory membership might contravene the provisions on freedom of association in the two Covenants, it is appropriate to consider that the aforementioned article is not a mandatory provision.[9] Furthermore, some scholars have pointed out that this provision, requiring workers to mandatorily join a single union, not only deprives them of the opportunity to choose to form or join other union groups but also of the freedom not to join any union at all, thereby stripping workers of their freedom of choice, which also raises concerns regarding its constitutionality.[10]

(2) Industrial and professional unions

Industrial unions are organized by workers within a related industry. Professional unions, on the other hand, are organized by workers with related occupational skills. It is stipulated that professional unions should organize within the same special municipality or county (city) as their organizational region. In accordance with Paragraph (3) of Article 6 of the Enforcement Rules of the Labor Union Act, the names of industrial and professional unions should, in principle, clearly indicate the organizational region and type. For example, such as Kaohsiung City Education Industry Union, or Taipei City Internet Platform Delivery Workers Professional Union.

According to statistics, as of the third quarter of 2023, the total number of unions in Taiwan is 5,808, of which 946 are corporate unions, 259 are industrial unions, and 4,328 are professional unions.[11] In terms of union numbers, professional unions account for 74.52% of the total number of unions, while corporate unions represent 16.29%. The majority of professional unions in Taiwan are considered to not perform the functions of a union, but rather act as entities commissioned by the government to handle social insurance-related matters (such as labor insurance and national health insurance). Therefore, it is generally believed that corporate unions still dominate in Taiwan, though recently a small number of professional unions have gradually begun to show their strength in collective union actions.

(3) Sources of union expenditures

Union expenditures derive from various sources such as initiation fees, regular membership dues, business profits, consignment revenues, donations, and government subsidies. Paragraph (2) of Article 28 of the Taiwan Labor Union Act mandates that initiation fees cannot be lower than a day's wage, and regular dues must be at least 0.5% of a member's monthly wage (amended in 2011). This ensures dues are set to support the union's autonomy and meet its needs without financial constraints hindering activities.

Despite the lack of penalties for not adhering to Article 28, the emphasis on financial health remains critical for union operations. Adequate finances support member services, legal advocacy, training programs, and negotiation strength. Thus, financial stability is fundamental for maintaining operations, fostering

8. Taiwan Taipei District Court, 107th Year of the Republic, Labor Lawsuit No. 191 Simple Labor Judgment (05/16/2019).
9. Taiwan High Court, 104th Year of the Republic, Labor Lawsuit No. 775 Major Appeal Judgment (08/16/2016).
10. Chen Ching-Hsiou. "Exploration of the Right to Collective Bargaining by Union Groups: Focused on the Constitutional Dispute of the Provision in Paragraph (1) of Article 32 of the Labor Standards Act," *Rooted Magazine* Vol. 38, No. 4, p. 136, April 2022.
11. Department of Employment Relations, Ministry of Labor, https://statdb.mol.gov.tw/html/mon/23010.pdf.

unity, improving representation, and achieving strategic goals. Therefore, a moderate increase in regular membership dues should be considered a reasonable legislative amendment.

2. Regulations on industrial actions

The framework governing the legitimacy of strikes within Taiwan is based on a conceptual approach similar to Japan's, categorizing the criteria for legitimacy into four distinct aspects: the subject initiating the strike, the objectives behind the strike, the procedures followed, and the means employed.

(1) Legitimacy of the subject

Under Paragraph (1) of Article 54 of the ASLD, the exclusive authority to initiate strikes is granted solely to unions, thereby bestowing upon them the sole right to carry out such industrial actions. This regulation is strategically designed to prevent the occurrence of strikes in a disorganized and capricious manner by ensuring the presence of an entity that is both accountable and capable of oversight. Consequently, this framework provides employers with a definitive entity for the negotiation of strike-related issues.[12]

(2) Legitimacy of the purpose

Generally, the premise for a strike is that there must be an existing labor dispute, and the disputed issue must relate to matters of interests, with strikes not permitted over issues already covered by existing collective agreements. Taiwan differentiates labor disputes into rights disputes and interests disputes. According to Paragraph (2) and (3) of Article 5 of the ASLD, rights disputes denote to the disputes over the rights and obligations under the laws, regulations, collective agreements, or labor contracts between employers and workers. Interests disputes denote to the disputes between employers and workers with respect to maintaining or changing the terms and conditions of employment. Rights disputes can, in principle, be resolved through legal or contractual claims and adjudicated by the courts; interests disputes concern the enhancement of labor conditions, achievable only through the collective efforts of workers, and are not subject to court intervention. Consequently, the latter part of Paragraph (1) of Article 53 specifies, "For the rights dispute, a strike is not allowed."

(3) Legitimacy of the procedure

(a) Pre-mediation requirement

According to the first part of Article 53 (1) of the ASLD: "Industrial actions cannot be undertaken unless a mediation of labor-management dispute is not successfully concluded." The rationale behind such a stipulation may stem from the labor administrative authority's belief that utilizing the government's authority and status might more likely facilitate the achievement of a negotiated settlement between labor and management, thereby preventing the occurrence of strikes.

(b) Strike vote

Paragraph (1) of Article 54 of the ASLD stipulates that "A labor union shall not call a strike and set up a picket line unless the strike has been approved by no less than one half of the members in total via direct and secret balloting." It means, a union wishing to declare a strike or establish a picket line must do so with the approval of more than half of its members through a direct and anonymous vote.

(c) Essential service clause

Paragraph (3) of Article 54 of the ASLD specifies that unions in critical services like water, power,

12. Huang Cheng-Guan. "An Exploration of the Legal Requirements for Strikes in Our Country," *The Taiwan Law Review* No. 107, p. 47, April 2004.

hospitals, and financial transaction processing must negotiate an essential service clause before striking, to safeguard public safety and interests. Failing to agree triggers an option for arbitration under Paragraph (2) of Article 25, especially for disputes in these critical industries.

(d) Prohibition of strikes during cooling-off and disaster prevention periods

Article 8 of the ASLD prohibits strikes (and other employer or employee adverse actions) during mediation, arbitration, or unfair labor practice decision processes, aiming to maintain operational continuity and fairness.

(4) Legitimacy of the means

Paragraph (1) of Article 55 of the ASLD mandates that industrial actions must be carried out in good faith and without abusing rights, ensuring they do not compromise safety, health, or public security. This includes the obligation to keep safety and health equipment operational in the workplace. Article 56 further specifies that during industrial actions, both parties involved must ensure the continuous normal functioning of safety and sanitary equipment, reinforcing the principle of rights not being abused.

Table 2. Status of collective agreements of enterprises in Taiwan

(Unit: Number of agreements)

Items	Corporate unions	Industrial unions	Professional unions	Total
2011	54	4	1	59
2012	68	5	1	74
2013	85	6	1	92
2014	97	4	191	292
2015	121	343*	191	655
2016	151	343	195	689
2017	156	348	5	509
2018	160	354	196	710
2019	204	360	195	759
2020	222	378	208	808
2021	223	382	29	634
2022	178	659	35	872
2023	182	668	27	877
2024 Q1	180	667	27	874
New Taipei City	13	10	—	23
Taipei City	30	3	2	35
Taoyuan City	17	4	2	23
Taichung City	12	16	1	29
Tainan City	28	1	—	29
Kaohsiung City	43	629	3	675
Other cities	30	4	19	53

Source: Department of Employment Relations, Ministry of Labor.
Notes: 1. The data series from the collective agreement only includes the number of establishments that were operational during the specified period.
2. *The industrial union in Kaohsiung City signed an indefinite collective agreement with 339 employers' groups in 2015, which significantly increased the number of collective agreements. In October 2022, the same industrial union signed another 275 collective agreements. However, this data may not indicate a significant growth or status of industrial unions in Taiwan and should be considered an exceptional case.

3. On the signing of collective agreements in Taiwan

Furthermore, as of the first quarter of 2024, according to statistics on the number of currently valid collective agreements in our country, there are 180 collective agreements signed by corporate unions, while professional unions have only signed 27 (Table 2). In terms of the proportion of unions by type, corporate unions have a collective agreement signing rate of approximately 18.9% (180/953), whereas professional unions have a mere 0.6% (27/4,337) rate of signing collective agreements.[13] This indicates that the majority of professional unions do not truly possess the function of collective bargaining and collective action.

IV. The wave of union movements and strikes: From challenges to achievements

Since the legislative reforms of 2011, Taiwanese workers have become increasingly bold in resorting to strikes as a means to address labor disputes. This shift is evident in a series of notable strikes, including the Hua Jie Laundry Union strike in June 2015 (26 hours), the Nan Shan Life Insurance Union strike in December 2015 (three days), the China Airlines Flight Attendants Union strike in June 2016 (three days), the Homebox Union strike in November 2017 (five days), the Miramar Golf and Country Club Enterprise Union's first strike in January 2018 (12 days), the Hsing-Fu Golf Club Union strike in April 2018 (52 hours), the Fuji Xerox Labor Union strike in October 2018 (11 days), the China Airlines Pilots Union strike in February 2019 (seven days), the EVA Air Flight Attendants Union strike in June 2019 (17 days), and the Miramar Golf and Country Club Enterprise Union's second strike in May 2021 (105 days). These events have gradually convinced employers that unions are serious about striking. Consequently, from last year, even the mere preparation for a strike (completing strike votes and preparing for action) by groups such as the Taiwan Railways Union, Taiwan High Speed Rail Union, or the EVA Air Pilots Union have achieved significant results. The ultimate showdown between labor and management has seemingly shifted from the act of striking itself to the warning of a strike, indicating a new phase in labor relations where the mere threat of a strike can lead to meaningful negotiations and outcomes.

Taking the January 2024 EVA Air Pilots Union's strike as an example, the pilots' union initiated a strike vote in December 2023, with the voting eligibility set for "active members of the EVA Air branch," originally scheduled to close on January 4. However, the Ministry of Labor indicated that all union members should be considered eligible voters. To avoid any post-vote disputes, the pilots' union abruptly announced a change to include all members in the vote, extending the voting period until January 22 before counting the votes. Out of a total of 1,398 members, 910 collected their ballots, with the final count showing 900 in favor of the strike and 10 against. Notably, among the EVA Air staff members, 552 collected their ballots, with 543 votes in favor, translating to a striking approval rate of 98%.

This incident sparked a discussion: Why did the pilots' union set the voting eligibility to "active members of the EVA Air branch?" This approach stemmed from a precedent set by the Taipei District Court (Taipei District Court, 106th Year of the Republic, Labor Lawsuit No. 224 Civil Judgment) in the case of the strike vote by the Taoyuan Flight Attendants Union (against China Airlines), where the court noted, "When a professional union acts as the striking body, a purposive restrictive interpretation should be adopted, meaning that the members eligible to vote should be limited to union members employed by the company involved in the labor dispute. A strike can be declared based on a direct and anonymous vote by such members, with approval from over half of these members, aiming to protect workers' right to unity." In other words, the

13. The total number of unions can be found on the Ministry of Labor's statistics website: https://statdb.mol.gov.tw/statiscla/webMain.aspx?sys=220&ym=11200&ymt=11303&kind=21&type=1&funid=q050112&cycle=42&outmode=0&compmode=0&outkind=11&fldspc=1,11,13,12,&rdm=R51392 (last visited July 8, 2024).

Taipei District Court held that within professional unions, only those who can genuinely participate in the strike should be eligible to vote.

V. Conclusion

In concluding our journey through this paper, we revisit our foundational belief: no matter how the external environment shifts, if we remain steadfast on this ark, trust in our charted course, and stand united, we will reach our destination. This exploration of Taiwan's labor market's current state and union-related laws highlights the critical importance of the solid foundation that collective labor law provides in navigating the seas of change. Like every sailor in a voyage, maintaining unity, effectively recruiting members, and demonstrating the ability to negotiate with employers or even strike when necessary, ensures that any challenge can be overcome.

The transformations of our times should not be a cause for panic. Instead, they should inspire us to resolve issues with steadiness and adapt to changes. The strength shown by professional unions, such as those in Taoyuan City, demonstrates that professional unions can transcend their traditional roles as mere "insurance unions" and wield significant power in protecting their members' labor rights. Facing the challenges and opportunities brought by globalization and technological advancements, Taiwan's labor market and union movement are at a pivotal turning point. By embracing digital trends, enhancing organizational efficiency, and forging deep connections with society and the public, unions can carve out new pathways to survival amidst these challenges.

As we look ahead, Taiwan's unions must not only navigate through the changing landscapes but also become vanguards of change. Through continuous self-renewal and adherence to core principles, unions will transform into arks that not only safeguard members' rights but also navigate steadily through societal shifts. This ark, laden with hope and dreams, sails towards a future that is more equitable and just.

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The Digital Trade Union in China: A New Form of Workers' Organization Targeting the New Forms of Work

Tianyu WANG

I. The scale of platform labor and labor security issues in China

With the popularization of the Internet, the platform economy has become an important new economic form in China, and platform labor has accordingly become an important new employment form with the rapid growth of the population of platform flexible workers such as food delivery riders, couriers, and app-based drivers, a form of labor relying on the Internet for employment that has been called a new employment form in China.

According to the International Labor Organization report, the number of practitioners providing services on platforms has been increasing, growing from 50 million in 2015 to 75 million in 2018, and the proportion of China's employed population has risen from 6.5% in 2015 to 9.7% in 2018, according to the report. Compared with other countries, platform practitioners in the United Kingdom only account for about 4% of the employed population; the United States has not exceeded 1%.[1] As shown in Table 1, the scale of practitioners on digital labor platforms in China is the largest in terms of both the absolute number and the proportion of the employed population. In addition, according to data from the National Information Center's Sharing Economy Research Center, in 2019, the number of sharing economy service providers in China reached 78 million, and the number of platform enterprise workers was 6.23 million.[2] In the first half of 2020, the number of riders who received income through Meituan alone amounted to 2.952 million, a year-on-year increase of 16.4%.[3]

The working hours of digital labor platform workers are more flexible and the time of going to work and resting can be decided by the individual, and this work flexibility makes it difficult for platform workers to be protected by the existing labor laws. The Ministry of Human Resources and Social Security's Response to Proposal No. 3391 of the Third Session of the 13th National Committee of the Chinese People's Political Consultative Conference (CPPCC) pointed out that: "Most of the workers in the new employment pattern independently take orders to undertake work tasks through the platforms, with a low threshold of entry and

1. ILO, "China's Digital Labor Platform and Workers' Rights Protection." Working paper 11. https://www.ilo.org/static/chinese/intserv/working-papers/wp011/index.html#ID0ECC. [in Chinese]
2. Sharing Economy Research Center of the State Information Center, "China Sharing Economy Development Report." 2020. http://www.sic.gov.cn/News/568/10429.htm. [in Chinese]
3. Meituan Research Institute, "Rider Industry: Employment Report of Riders in the First Half of 2020." https://www.sohu.com/a/434818363_120505321. [in Chinese]

Table 1. Share of digital labor platform workers in employment by country[4]

Country	Percentage (%)	Indicator or qualifier
Denmark	1.0	Platform workers earning money at least once over the previous 12 months, 2017
Finland	0.3	Population aged 15–74 who had earned more than 25% of their income from work-related and non-work-related platform activities during the previous 12 months, 2017
Germany	1.8	Population aged 15 and older registered as platform workers in January 2017
Sweden	2.5	Working-age population who performed platform work, 2017
UK	4.0	People performing tasks online, providing transport or delivering food or other goods at least once over the previous 12 months, 2017
USA	0.4-0.6	Number of workers on the platform, 2016
China	9.7	Personnel engaged in providing services, 2019

Source: ILO, "China's Digital Labor Platform and Workers' Rights Protection." Working paper 11. https://www.ilo.org/static/chinese/intserv/working-papers/wp011/index.html#ID0ECC. [in Chinese]

exit, relatively free working hours, and a direct share of the labor income from the fees paid by the consumers, and that their relationship with the platforms is different from that with traditional 'enterprise and employee' model, resulting in a situation where workers in new employment patterns find it difficult to enter the scope of protection under the existing labor laws and regulations."[5]

Prominent issues of labor rights and interests for platform workers are long working hours and the lack of the right to participate in labor pricing. A survey of food delivery riders shows that only 13% of riders work less than 8 hours a day; 49.5% work more than 10 hours; and 30% work more than 10 hours a day in a week. There is a significant difference between the daily working hours of full-time and part-time riders, with only 8.8% of full-time riders working less than 8 hours, compared to 36.6% of part-time riders; full-time riders work 0.85 times more hours per week than part-time riders.[6]

A similar situation exists with crowdsourcing platforms. For practitioners who work on platforms as their main source of income, the number of hours of paid work, unpaid work and total hours worked per week are 24.56, 11 and 35.56, respectively; and for those who do not work on platforms as their main source of income, the number of hours is 13.2, 7.45 and 20.7, respectively.[7]

A comparable situation exists for app-based drivers and crowdsourcing platform practitioners. A 2018 study showed that app-based drivers spend 46% of their working hours taking orders for service, which means that they spend more than half of their day waiting for orders at the roadside or driving empty on the road. Crowdsourcing practitioners work an average of 15.6 hours per week with pay and 8.26 hours without

4. See note 1 above.
5. Ministry of Human Resources and Social Security, "Proposal No. 3391." Third Session of the Thirteenth National Committee of the Chinese People's Political Consultative Conference. http://www.mohrss.gov.cn/xxgk2020/fdzdgknr/zhgl/jytabl/tadf/202101/t20210113_407557. html. [in Chinese]
6. Qingjun Wu and Zhen Li, "Labor Control and Work Autonomy in the Sharing Economy—a Mixed Study on the Work of App-based Drivers", *Sociological Research* 33, 4 (2018): 137–162, 244–245.
7. ILO, "China's Digital Labor Platform and Workers' Rights Protection." Working paper 24. https://www.ilo.org/static/chinese/intserv/working-papers/wp024/index.html. [in Chinese]

pay.[8]

In terms of labor compensation, most digital platform practitioners have adopted a bottomless piece-rate pay structure, and their income level is vulnerable to adjustments in platform trading rules, low and high demand seasons, and platform drawdowns, which leads to longer working hours. Although they are able to earn a higher income, their income lacks stability and predictability. According to the survey data of the All-China Federation, 56.95% of platform workers considered unstable income to be their biggest concern in 2017.[9]

II. Institutional safeguards for digital trade union construction

Whether platform workers can be included in the scope of collective labor law is a key topic of labor protection in many countries around the world. Taking European countries as an example, the specific situation is divided into two categories: the first is the group of platform workers who have already obtained the right of collective bargaining in legislation, including riders with employee status in Spain, riders with quasi-subordinate worker status in Italy, and platform workers with judicially recognized worker status in the UK. A more special case is that of France, where the *El Khomri Law* for the first time puts self-employed workers on the same level as employees in collective bargaining matters.[10]

The second category of platform workers with the status of self-employed are not entitled to collective bargaining. In the framework of the EU labor laws, collective bargaining is the exclusive right of employees. Based on the protection of free competition under Article 101 of the Treaty on the Functioning of the European Union (TFEU), collective bargaining for the self-employed is considered a "cartel preventing, restricting, or distorting competition." In the face of the challenges of platform labor, the European Commission has cautiously explored the extension of collective bargaining to platform labor, stating in its Report on the first phase of the Social Partners' Consultation that "competition rules should not prevent collective bargaining for individual self-employed workers," and specifically stating that this initiative is not an attempt "to bring collective bargaining within the scope of the EU competition rules." This initiative does not bring collective bargaining within the scope of EU competition rules.[11] By the second stage of the consultation, the European Commission had made it clear that it would introduce a separate initiative aimed at ensuring that EU competition law did not prevent self-employed workers from needing to bargain collectively, while other aspects of competition law would still apply to self-employed workers and platforms.[12]

Before the rise of platform labor, there was also discussion in China about the scope of collective labor law. China's Provisions on Collective Agreements stipulate that the subject of collective bargaining is "employees," but some scholars argue that the concept of "employee" has the stigma of the times, and that

8. Chenggang Zhang, "Sharing Economy Platform Workers' Employment and Labor Relations Status Quo—A Survey Study Based on Multiple Platforms in Beijing." *Journal of China Institute of Labor Relations* 32, 3 (2018): 61–70.
9. Yufu Li, *The Eighth Survey on the Status of Chinese Workers*, edited by Yufu Li, November 2017. Beijing: China Workers Publishing House. [in Chinese]
10. Isabella Daugareilh, "The Legal Status of Platform Workers In France." *Comparative Labor Law and Policy Journal* 41, 2 (2020): 104–120.
11. European Commission, "First Phase Consultation of Social Partners Under Article 154 TFEU on Possible Action Addressing the Challenges Related to Working Conditions in Platform Work." https://ec.europa.eu/social/main.jsp?langId=en&catId=522&furtherNews=yes&newsId=9932.
12. European Commission, "Staff Working Document Accompanying the Consultation on Working Conditions in Platform Work." 2021. https://ec.europa.eu/ social/main.jsp?langId=en&catId=522&furtherNews=yes&newsId=10025.

after the full implementation of the labor contract system, it should be equated with the workers under the employment relationship, and thus the self-employed do not have the right to collective bargaining.[13] With the large-scale development of platform labor and various forms of flexible employment, the need for such workers to be protected by collective labor law has become increasingly urgent.

The Opinions on Supporting Multi-Channel Flexible Employment issued by China's State Council on July 31, 2020, proposes to clarify the responsibilities of Internet platform enterprises in the protection of workers' rights and interests, to guide Internet platform enterprises and affiliated enterprises to negotiate with workers to determine labor compensation, rest and vacation, and occupational safety and security, and to guide industrial (sectoral and local) trade unions to negotiate with industry associations or representatives of platform enterprises to formulate industry norms such as industry labor quota standards, working hour standards, incomes and punishments, and other industry norms.[14]

On July 12, 2021, the All-China Federation of Trade Unions (ACFTU) issued the Opinions on Effectively Safeguarding the Labor Security Rights and Interests of Workers in New Employment Patterns, which proposed to "focus on promoting the universal establishment of trade union organizations in key industries, especially top platform enterprises and their affiliated enterprises, in accordance with the law, and actively exploring ways to establish trade union organizations that accommodate the different occupational characteristics of app-based drivers, couriers, and food delivery riders, and expanding the coverage of trade union organizations in various ways, such as through individual, joint, industrial, and regional trade union organizations, in order to maximize the number of workers in new forms of employment who can be attracted to join the union."

With regard to safeguarding the labor rights and interests of platform workers, this policy proposed that "industrial trade unions should play a role in actively negotiating with industry associations, top platform enterprises or enterprise representative organizations on the industry's piece-rate unit price, order distribution, commission rate, labor quotas, remuneration payment methods, rules for entering and exiting platforms, working hours, rest and vacation, labor protection, and the system of rewards and punishments, in order to safeguard the labor and economic rights and interests of workers in new forms of employment. Supervise platform enterprises to strictly comply with laws and regulations in formulating rules and regulations, algorithms, and other major matters, and to listen to the opinions and demands of workers through democratic management forms such as staff congresses and labor-management forums to safeguard the democratic and political rights of workers. Supervise platform enterprises to fulfill their social responsibilities, and promote decent work, comfortable work, and all-round development for workers in new employment patterns. Strengthen labor law supervision by labor unions and cooperate with the government and its relevant departments in monitoring and enforcing the law."[15]

The Guiding Opinions on Safeguarding the Labor Security Rights and Interests of Workers in New Employment Patterns, jointly issued by the Ministry of Human Resources and Social Security and seven other departments on July 16, 2021, stipulates the workers in new employment patterns should be actively recruited to join trade unions. Supervise enterprises to fulfill their employment responsibilities and safeguard the rights and interests of workers. Trade unions should actively carry out consultations with industry associations, top platform enterprises or enterprises representative organizations, achieve industry collective

13. Gan Li, "The Identity Positioning of App-based Drivers in Collective Labor Law." *Journal of China Institute of Labor Relations* 1, 1 (2017): 45.
14. https://www.gov.cn/zhengce/content/2020-07/31/content_5531613.htm. [in Chinese]
15. https://www.gdftu.org.cn/xxgk/ghwj/content/post_650179.html. [in Chinese]

agreements, and promote the formulation of industry labor standards.[16]

The Trade Union Law was amended in December 2021, stipulating that "trade unions shall adapt to the development and changes in the form of enterprise organization, the structure of the workforce, labor relations, and employment patterns, and safeguard the rights of workers to join and organize trade unions in accordance with the law." This clarifies the right of workers in new forms of employment to participate in and organize trade unions, without making labor relations a prerequisite, and includes workers in flexible employment in the collective bargaining mechanism. Accordingly, the coverage of "workers" has been expanded to include flexibly employed workers on platforms, breaking through the limitations of the employment relationship, solving the problem of conflicting norms of collective bargaining on platforms, and confirming the right to collective labor in the field of non-employment relations.[17]

III. Parallel countermeasures of "digitization of trade unions themselves" and "trade unions and digital labor platforms"

Although there are institutional guarantees for platform workers to join and organize trade unions, the traditional trade union organization model is difficult to effectively deal with the highly mobile and flexible platform workers, so digital trade unions have gradually become a new form of worker organization in response to changes in working patterns.

The first digitalization option is for trade unions to build their own platforms to digitize and cloud-enable their work. In September 2023, ACFTU released the "Work Program for Accelerating the Digitalization of Trade Unions" with the following three main goals: 1) to build a "nationwide" service terminal; 2) to build an integrated set of "national standards and local characteristics"; and 3) to build a "national standards and local characteristics" system. The four main objectives of the program include: 1) building a "nationwide" service terminal; 2) building a set of "national standard and local characteristics" integrated service contents, including standard services common to the whole country and local characteristic services tailored to local conditions; 3) building a set of "standard unique, unified and shared" trade union digitalization work foundation system, including system design, technical architecture, interface and business standards, analysis and operation, and maintenance standards, data standards and basic codes; 4) and building a "standard unique, unified and shared" trade union digitization work foundation system. It includes system design, technical architecture, interface and business standards, analysis and operation, and maintenance standards, data standards and basic codes; it also builds a "12351" workers' rights protection hotline platform that is "connected nationwide and converged by the National Federation, centralized in all provinces and hosted at all levels," including voice services and online services. It has also built a digital office system that is "connected nationwide and operates everywhere" and has established a grand digital media matrix that integrates the "All-China Federation and localities, media and service terminals."[18]

Trade unions around the country have been exploring digitalization. In Anhui, trade unions have launched a series of online universal service activities through the "Wan Trade Union" cloud platform, for example, by accurately locating 6,328 active new employment forms in the summer and giving cool coupons to the users.[19] In Xiamen, Fujian Province, the "Xiamen Trade Union" APP can accept applications for membership

16. https://www.gov.cn/zhengce/zhengceku/2021-07/23/content_5626761.htm. [in Chinese]
17. Xiaohui Ban, "Beyond Labor Relations: the Expansion of Collective Labor Rights and Paths under the Platform Economy." *Jurisprudence* 8. 2020: 172.
18. https://www.gdftu.org.cn/ztzl/shiba/content/post_1129199.html. [in Chinese]
19. https://www.workercn.cn/c/2023-08-28/7960340.shtml. [in Chinese]

through the trade union's WeChat public entrance, and in less than half an hour after the application has been approved, applicant worker can receive a trade union card at a chosen nearby bank branch; applicant worker can also apply for medical mutual aid online to receive a maximum of 30,000 yuan in subsidies for major illnesses; and in the event of a labor dispute, applicant worker can go through the "Smart Mediation and Arbitration" information management system to seek help online.[20] Trade unions in Shenzhen, Guangdong Province have basically realized the main trade union business of "one network," trade union services "one key to get," trade union data "one screen overview," forming a "smart trade union" with the integration of online and offline development. It has formed an ecosystem of "intelligent trade unions" that integrates online and offline development and has built the "Shenzhen I Work" online service front desk that provides "one-stop" services to employees and members, bringing together more than 20 service functions.[21]

The second digitalization option is for the trade unions to conduct collective negotiations with the main labor platform enterprises, and to conclude a collective agreement that covers all workers on the line, regardless of region. In July 2023, 175 network-wide employee representatives from seven regions of the Ele.me platform gathered in Shanghai for the first session of the Employee Representative Council (Expanded) of the Ele.me platform (the entire network) and deliberated on the adoption of the collective agreement of the entire network as well as three special collective agreements, which covered the platform's own employees and more than 3 million riders at 11,000 delivery stations across the country. This marks the birth of the first all-network labor council and the first all-network collective agreement in the national food delivery industry.[22]

Combing through the practice of collective consultation in the field of new industries over the past few years, the development trend of expanding the scope of consultation, more standardized forms of consultation, and more binding effectiveness of consultation can be clearly seen. The first to emerge was the collective bargaining in some main enterprises of the express delivery industry with employment relations, forming a protective rule in line with the characteristics of the platform employment, and opening a precedent for collective bargaining in the field of the new industry. For example, the collective bargaining of the Jingdong Group is of this form. Subsequently, some top enterprises and representatives of workers in certain regions carried out bargaining activities on relevant labor conditions and signed collective agreements. These consultations in the form of symposium have, on the one hand, broken through the restriction that an employment relationship must exist between the employing parties, and on the other hand, the representatives participating in the symposium include not only employees directly registered on the platform, but also those of franchisees and outsourcers. For example, the negotiation forums for the app-based drivers of DDT (Beijing), the negotiation forums for the riders of Meituan (Beijing), and the negotiation forums between the platform of Ele.me and the food delivery riders all belong to this form. Based on regional negotiation activities, some regions have started to strengthen the effectiveness of negotiation agreements through the introduction of standardized democratic management procedures such as employee councils, for example the first employee congress (joint) meeting of Meituan (Shanghai) held in August 2022, which was promoted by Shanghai trade union. On one hand, the introduction of the procedures provides a relatively standardized institutional tool for collective bargaining in new industries, and on the other hand, it strengthens the legitimacy of the agreement between the parties as well as its binding force.

The digital trade union organization model represented by the Ele.me network-wide collective agreement is that the workers employed on the platform of the entire network form a workers' congress through

20. Ibid.
21. https://www.gdftu.org.cn/ztzl/shiba/gh/content/post_1127221.html. [in Chinese]
22. https://www.sohu.com/a/700786706_465282. [in Chinese]

the election of representatives, and the rules of procedure are formed through the workers' congress; the representatives of the negotiation are elected to carry out the collective negotiation and sign the collective agreement of the entire network, which is then considered and adopted by the workers' congress. This practice makes full use of the institutional framework of "collective consultation, work council and collective agreement" under the current law, which not only ensures the legitimacy of the content of the collective agreement, but also ensures the effectiveness of the collective agreement, and ultimately provides relevant rights and interests protection for all new forms of employment of workers on the platform.

Facing the future development of the digital era, artificial intelligence has been included in the vision of the construction of digital trade unions. On December 22, 2023, ACFTU launched the Applied Artificial Intelligence Initiative and formulated the "National Federation of Trade Unions Widely Applied Artificial Intelligence Initiative" with the following goals: in 2024, it will actively apply the intelligent APP "Workers' Home" to serve hundreds of millions of workers on a trial basis, and initially provide full-dimensional, full-time, and intelligent services to workers; initially realize the intelligent transformation of trade union work online and offline, and significantly improve the total efficiency and capacity of the trade union system. In 2025, it will be widely applied. Normal operation of the intelligent APP "Workers' Home" serving hundreds of millions of workers, basically achieving full-dimensional, full-time, and intelligent service for workers; basically, realizing the overall efficiency and capacity of the trade union system.[23]

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23. https://www.workercn.cn/c/2024-01-04/8101445.shtml. [in Chinese]

Informal Worker's Struggle for Labor Relations Rights and the Recent Legislative Development in Thailand

Panthip PRUKSACHOLAVIT

I. The situation of labor market, workers, and workstyle diversification

Based on data provided by the Ministry of Labor, the workforce comprised 40,530,000 individuals in 2023, with approximately 54% being male and 46% female (Figure 1). While the number of workers in the informal sector in 2022 was slightly lower than in the formal sector, it has since increased to constitute more than half of the entire workforce. The distribution of workers across age groups between 20 and 59 years old is relatively even. However, only 12% of individuals aged 60 and above are currently employed (Figure 2).[1]

Employment within the informal sector is not a recent phenomenon in Thailand. In fact, more than half of the country's workforce has been engaged in informal sector activities. However, following the pandemic, there has been a notable surge in the prevalence of new forms of work. This demographic of workers faces similar challenges to their counterparts in other nations, including their non-employee status. Nevertheless, it is evident that the nature of these emerging forms of work has undergone significant changes. Take the case of food delivery riders. Prior to the proliferation of food delivery services, platform workers operated solely as self-employed individuals. They enjoyed considerable flexibility and independence in their work arrangements. However, the dynamics of this new work model have evolved, introducing a greater degree of inflexibility.[2] Platform workers are now obligated to adhere to minimum hour requirements, follow their predetermined schedules, and heavily rely on customer feedback because of the use of algorithms to organize, supervise or evaluate work.[3] According to the ILO report on the platform economy in 2024, it concludes that "[t]hese challenges relate to different dimensions of decent work, including the employment status of the workers, their remuneration and working time, their access to social security and occupational safety and health, their representation and access to social dialogue and the termination/deactivation and access to dispute resolution mechanisms. This includes the lack of access by workers and their representatives to information concerning how algorithms affect their working conditions, and in this respect, the extent to which the use of algorithms results in fair outcomes."

1. "Labor Statistics," Ministry of Labor, accessed January 10, 2024, https://www.mol.go.th/academician/.
2. Nanthaphon Putthapong, "Legal Measures for Protecting Digital Platform Workers: A Case Study of Food Delivery Businesses in Thailand," *Ramkhamhaeng Law Journal* 11, no. 1 (June 2022): 271; Bavet Yanapisoot, "The Legal Problem and Legal Measures for Labor Protection of Food Delivery Platform in Thailand," *Journal of MCU Haripunchai Review* 8, no. 1 (March 2024): 161-162.
3. International Labor Organization, *Realizing decent work in the platform economy*, para. 290 (ILC.113/Report V(1) 2024), https://www.ilo.org/resource/conference-paper/realizing-decent-work-platform-economy.

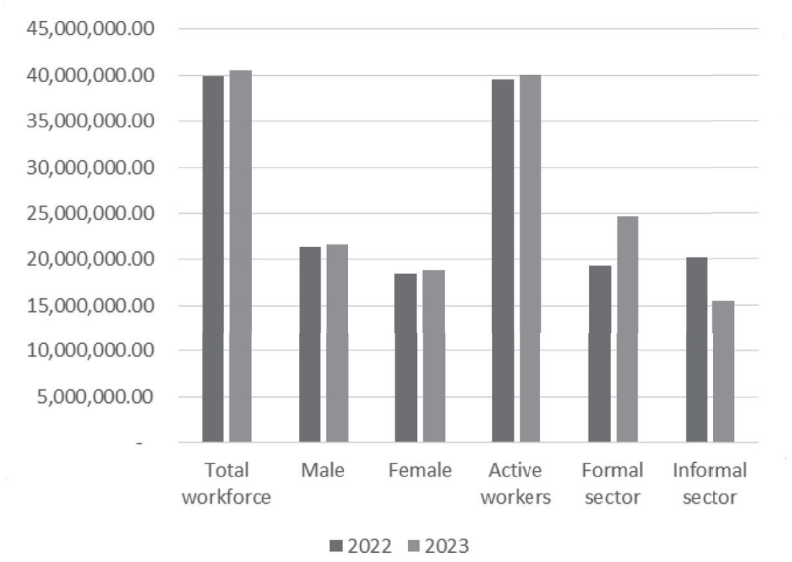

Figure 1. Number of people in Thai labor market in 2022–2023 by sector and gender

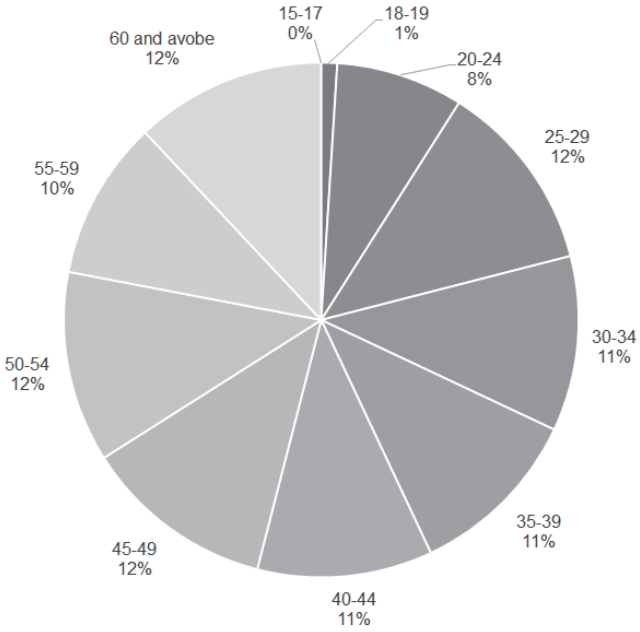

Figure 2. Labor force participation rate in Thailand by age group (2023)

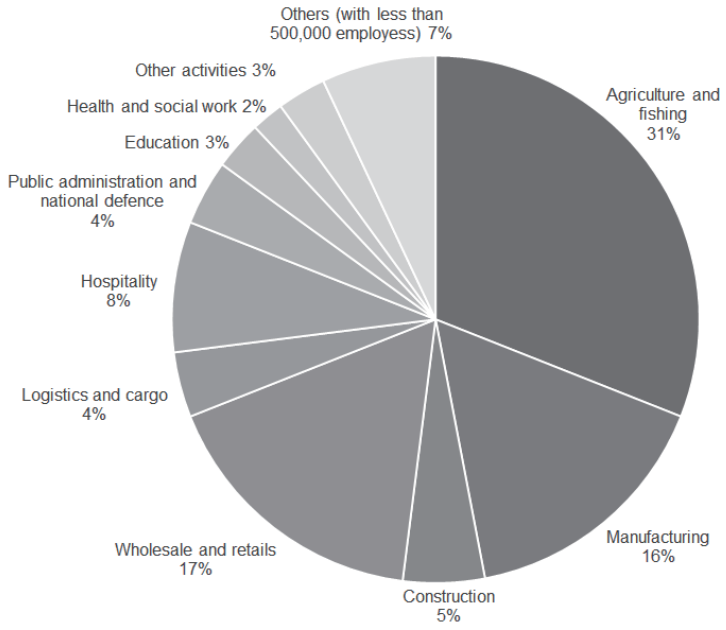

Figure 3. Share of workers by industry in Thailand (2023)

II. Basic structure of the Collective Labor Relations Law

Although Thailand has yet ratified ILO Conventions 87 and 98, the right to organize has been granted to employees in the private sector through legislative instruments for quite some time.[4] In the early days, employees in employment relationships were mostly Chinese immigrant workers. At that time, Thais preferred to work as self-employed and enjoy their freedom. Consequently, the law was primarily utilized by immigrant employees who worked under employment contracts.[5]

The current Labor Relations Act in Thailand has been in force since 1975. It is the main instrument regulating collective bargaining and all industrial actions. Its provisions cover labor dispute resolution, industrial actions, and the procedure for forming a labor union. The Act requires each labor union to protect employees' interests in regard to their working condition. The objectives of the union must also include the promotion of a better relationship between the employer and employees. In order to establish a union, at least 10 eligible persons must submit a written application, together with rules of the union, to the register officer.[6] The Labor Relations Act requires that eligible persons who may form a union must be employees who hold Thai citizenship, at the age of majority or older, who work for the same employer or at least in the same industry.[7]

Once a labor union is established, the Act grants unions the following powers and duties:[8]

- requesting negotiation, negotiating, and concluding collective agreements;
- managing and performing any act for the benefit of their members, subject to the labor union's

4. Earnest L. Fogg, "Labor Organization in Thailand," *Industrial and Labor Relations Review* 6, no. 3 (April 1953): 368–377.
5. Earnest L. Fogg, "Labor Organization in Thailand," 368 & 375.
6. Section 89, Labor Relations Act.
7. Section 88, Labor Relations Act.
8. Section 98, Labor Relations Act.

objectives;
- providing information services to facilitate job searches for their members;
- advising members and representing them in work-related disputes or complaints;
- providing services related to the allocation of money or properties for the welfare of their members or the public interest;
- collecting membership fees and dues at the rate determined by the union's regulations.

One of the most important functions of labor unions is to negotiate in the collective agreements. The Act requires that both employers and unions shall start the process of negotiation once the other party expresses their request to negotiate on collective agreement.[9] The Act sets the details regarding timeframes and requirements for strikes and lock outs.[10] All industrial activities are protected against unfair labor practices which include dismissal.[11]

However, this legal provision solely pertains to employees within the private sector.[12] Despite industrial actions being permitted among civil servants, public sector employees, and state enterprise employees, they are regulated by distinct legal statutes. Consequently, due to this constraint, the majority of workers in emerging forms of work, such as platform workers, lack the right to organize under the Labor Relations Act.

Apart from a labor union, the Act allows employees in workplaces with 50 or more employees, by their own choosing, to establish an employee committee.[13] The employee committee is a representative body of employees who are not affiliated with a labor union. Unlike unions, employee committees represent all employees in the workplace, whether or not they are member of any labor unions. The functions of an employee committee also differ from those of a union. The employee committee aims to demand better benefits and resolve any disputes between the employer and the employees. However, the committee does not have the right to engage in any labor relations activities. Under the Labor Relations Act, employers are required to meet with the employment committee every three months in order to review the terms of benefits, discuss working regulations, hear employees' complaints, and settle any labor disputes. The Act also empowers the committee to file a complaint with the Labor Court if the committee determines that any of the employer's actions are unfair or cause damage to employees.

Unless permission is granted from the Labor Court, the members of the employment committee also have immunity from dismissal, wage reduction, discipline, or any other act that forces a committee member to resign.[14] In addition, in order to prevent prejudice, an employer may not give or promise to give any monetary benefits to committee members, except their wages, overtime pay, bonus, and other benefits that the committee members are entitled to as regular employees.[15]

III. The current state and challenges of labor unions

According to data provided by the Labor Relations Bureau, Department of Labor Protection and Welfare, only 530,202 employees in Thailand were union members in 2023 (Table 1). This figure represents 2.1%

9. Section 15 & 16 Labor Relations Act.
10. Section 22–26 and 34, Labor Relations Act.
11. Section 31, 121–124, Labor Relations Act.
12. Section 4, Labor Relations Act.
13. Section 45, Labor Relations Act.
14. Section 52, Labor Relations Act.
15. Section 53, Labor Relations Act.

Table 1. Number of unions and union members in Thailand between 2019–2023

(As of the end of each year)

Year	2023	2022	2021	2020	2019
Number of state enterprise unions	45	45	45	47	48
Number of state enterprise union members	142,143	144,514	152,338	153,876	170,599
Number of private sector unions	1,292	1,424	1,432	1,422	1,401
Number of private sector union members	388,059	509,020	458,052	454,539	449,371
Total	530,202	653,534	610,390	608,415	619,970

of formal sector employment, marking a decrease from 3.4% in 2022.[16] The percentage has consistently remained very low for many decades since the inception of labor unions. This positions Thailand as the country with the lowest labor union rate in the world.

Despite the enactment of the Labor Relations Act in 1975, various challenges persist in the implementation of industrial activities. These challenges include:

Firstly, workers in the public sector, including civil servants and employees of governmental agencies, remain unable to establish a labor union. Despite constitutional guarantees affirming the right to organize for all individuals, there is a lack of specific legislation delineating the scope of their bargaining rights with their employer, namely the government. Consequently, no labor union exclusive to public sector employees has been formed to date.

Secondly, the Labor Relations Act requires that the union founder need to hold Thai nationality. Consequently, although foreign workers are permitted to join union membership, they lack the autonomy to form unions independently.[17] This specific legal provision contradicts the fundamental principle of freedom of association, which grants every worker and employee the right to establish a labor union irrespective of nationality.[18]

Thirdly, although the right to strike is allowed in Thailand, only private sector employees can exercise it. A notable portion of union members, approximately 30%, who are state enterprise employees, encounters limitations on exercising fundamental industrial activities, such as striking.[19] This constraint hampers the efficacy of collective bargaining and undermines its effectiveness as a mechanism.

Lastly, as previously mentioned, a considerable number of workers in emerging forms of employment are precluded from unionization due to their non-employee status. The Labor Relations Act provides protection solely to employees with formal employment relationships, thereby excluding these workers from its coverage.[20]

These challenges collectively impede the full realization of industrial rights for many workers in Thailand, particularly those in the public sector, state enterprises, and the informal sector. Consequently, workers in these sectors encounter barriers to fully engaging in collective bargaining with their employers.

16. "Number of Labor Organization in Thailand," Labor Relations Bureau, Department of Labor Protection and Welfare, accessed January 10, 2024, https://relation.labour.go.th./2017-08-25-04-50-47.
17. Section 88, Labor Relations Act.
18. *See* Article 2, ILO Convention no. 87 - Freedom of Association and Protection of the Right to Organise Convention, 1948 (Workers and employers, without distinction whatsoever, shall have the right to establish and…).
19. Section 33, State Enterprise Labor Relations Act.
20. Section 4 & 5, Labor Relations Act.

IV. The role of the state, labor unions and other worker representatives in the era of diversified workers

The informal sector workforce now accounts for approximately half of the total workforce. Historically, this group of workers has received limited rights and protections from the government. Although informal workers have the option to voluntarily contribute to the Social Security Fund,[21] the benefits offered, albeit supplemented by partial subsidies, do not encompass essential healthcare provisions, which are important. Moreover, there have been no legal provisions safeguarding wages, job security, occupational safety, or worker's compensation for these individuals working in the informal sector. However, these issues have gained more attention from both society and governments globally, especially in light of technological advancements and the widespread adoption of digital technologies, which have catalyzed a shift in work trends.

In December 2021, the Cabinet endorsed the Ministry of Labor's proposal for drafting legislation aimed at safeguarding independent workers. As of March 2024, the time when this paper is written, Thailand is in the process of revising the Draft law on Promotion and Protection of Independent Workers. The introduction of this Draft law signifies the Thai government's acknowledgment of labor protection issues facing workers in emerging forms of work. Unprecedentedly, this Draft law introduces various protections for independent workers, including:

- Specifying a minimum working age of 15 years.[22]
- Mandating clear wage agreements in written contracts.[23]
- Outlining procedures for freelancers and independent workers to form unions, requiring a minimum of 15 workers for union formation.[24]
- Endowing independent workers' unions with significant powers, including the ability to collectively bargain with employers on behalf of their members.[25]
- Enabling independent workers to initiate negotiation processes for labor disputes by submitting requests to independent labor inspectors.[26]
- Prohibiting unjustifiable work suspensions for independent workers.[27]
- Granting state intervention in cases of unfair collective agreements.[28]
- Establishing an independent worker fund to support independent workers.[29]
- Imposing non-criminal penalties, except for in cases involving the employment of workers below the age of 15 where criminal penalties may apply.[30]

In general, it is evident that this Draft law aims to establish protections for workers in the emerging forms of work. Apart from addressing issues related to wages and safety, the Draft law grants rights to organize and collectively bargain with employers. This shows that the law in Thailand is moving in the same direction as international trends. The ILO Centenary Declaration for the Future of Work, adopted by the International

21. Section 40, Social Security Act.
22. Section 30, Draft law on Promotion and Protection of Independent Workers.
23. Section 36, Draft law on Promotion and Protection of Independent Workers.
24. Section 14, Draft law on Promotion and Protection of Independent Workers.
25. Section 18, Draft law on Promotion and Protection of Independent Workers.
26. Section 48, Draft law on Promotion and Protection of Independent Workers.
27. Section 51, Draft law on Promotion and Protection of Independent Workers.
28. Section 42, Draft law on Promotion and Protection of Independent Workers.
29. Section 71, Draft law on Promotion and Protection of Independent Workers.
30. Section 115, Draft law on Promotion and Protection of Independent Workers.

Labour Conference at its 108th Session (2019), calls on all ILO Member States to put in place "policies and measures that ensure appropriate privacy and personal data protection, and respond to challenges and opportunities in the world of work relating to the digital transformation of work, including platform work."[31] Since its initiation, the ILO has been working hard towards the adopting an International Labor Standards on platform workers and aims to complete them in the next couple of years.

According to the study by the ILO on "41 legislative instruments from around the world that deal explicitly with aspects of decent work on digital platforms,"[32] one can conclude that countries regulate platform work differently, but broadly encompasses which could be divided into 4 groups:[33]

(a) amendments to existing labor legislation to include platform work (for example, in Belgium, Chile, Croatia, France, Italy and Portugal);
(b) specific standalone legislation on platform work (for example, in China and the Canadian Province of Ontario);
(c) sector-based legislation (for example City of Seattle and Washington State, United States); and
(d) specialized laws that extend labor and/or social protections to platform work (for example, the social security laws of India and the Republic of Korea).

Thailand is moving in the same direction as China and the Canadian province of Ontario, both of which are passing specific standalone legislation on platform work. Although the issues covered in the Draft law are important and were mentioned in the ILO report (1948), the Draft is, however, still missing many other significant issues.

The Draft law and its proposed provisions have attracted much criticism and there is still ongoing debate regarding their appropriateness. Nonetheless, the government recognizes the importance of safeguarding this group of the workforce while also acknowledging the necessity for adaptability within this evolving forms of work. This contemporary work model not only enhances consumer access to services at reasonable prices, but also generates employment opportunities for a significant portion of the workforce. Without this sector, many individuals would face unemployment, and the government cannot ensure employment in the formal sector for all. Consequently, the Draft law was drafted to provide protection while ensuring the viability of enterprises. This indicates that the Draft law aims to avoid imposing excessive burdens on enterprises, and it does not include criminal punishments.[34]

Hence, in addition to the obligations incumbent upon enterprises regarding worker compensation, the Draft law stipulates that the government assumes the responsibility of promoting registered independent workers through various means. These include vocational training, job creation and security, job consulting services, occupational safety, social security, and rights to organize.[35] Furthermore, the independent fund is mandated to offer personal loans, accident insurance, and health insurance.[36] Platform workers are entitled to supplementary protection in the form of accident insurance and workmen's compensation.[37]

Of all the rights and protections outlined in the Draft law, the right to organize stands out as particularly noteworthy. As previously mentioned, Thailand's labor union rate in private sector ranks among the lowest in the world. It is hard to imagine a significant increase in labor union participation within the informal sector,

31. International Labour Organization, *Realizing decent work in the platform economy*, para. 1.
32. International Labour Organization, *Realizing decent work in the platform economy*, para. 98.
33. International Labour Organization, *Realizing decent work in the platform economy*, para. 99.
34. Section 117–124, Draft law on Promotion and Protection of Independent Workers.
35. Section 25, Draft law on Promotion and Protection of Independent Workers.
36. Section 26, Draft law on Promotion and Protection of Independent Workers.
37. Section 27, Draft law on Promotion and Protection of Independent Workers.

even with the legal affirmation of the right to unionize. Therefore, after the law is passed, the primary concern is whether independent workers' rights would be effectively protected if collective bargaining mechanisms prove unsuccessful. Moreover, if collective bargaining is not the primary method of safeguarding informal workers, it prompts consideration of whether we should diminish reliance on the freedom of the platform and workers to negotiate and instead implement labor standards through legislative instruments covering comprehensive protection in all aspects.

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The 7th JILPT Tokyo Comparative Labor Policy Seminar 2024

"Challenges in Collective Labor Relations in the Context of Worker and Workstyle Diversification—Reassessing the Role of Labor Unions"

Organizer The Japan Institute for Labour Policy and Training (JILPT)
Date March 27, 2024
Venue The Japan Institute for Labour Policy and Training, Tokyo, Japan

PROGRAM

Opening Remarks and Keynote Lectures

Opening Remarks and Keynote Lecture:
Hiroyuki FUJIMURA, President, JILPT
Keynote Lecture (sharing the lecture text only):
María Emilia CASAS BAAMONDE, President, International Society for Labour and Social Security Law (ISLSSL)

Session 1: Research Presentations, Part 1

Chair: Chikako KANKI, Professor, The University of Tokyo Graduate Schools for Law and Politics

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"Australian Trade Union Density in Crisis: Precarious Work and Collective Bargaining,"
Eugene SCHOFIELD-GEORGESON, Senior Lecturer, Faculty of Law, University of Technology Sydney
Discussant: Koji KAMEDA, Associate Professor, Faculty of Law, Kokushikan University

» **Presentation 2 New Zealand**
"Collective Labour Relations and Labour Law in a Changing World of Work,"
Yvonne OLDFIELD, Teaching Fellow and PhD Candidate, Victoria University of Wellington
Discussant: Shun ISHIGURO, Research Associate, The University of Tokyo Graduate Schools for Law and Politics

» **Presentation 3 Philippines**
"Labor Unions in a Changing World of Work: The Philippine Experience,"
Ronahlee A. ASUNCION, Professor, School of Labor and Industrial Relations, University of the Philippines Diliman
Discussant: Reiko NISHIDA, JSPS Postdoctoral Fellow, Institute of Social Science, The University of Tokyo

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R. Ravindra KUMAR, President, Malaysian Society for Labour and Social Security Law (MSLSSL)
Discussant: Yojiro SHIBATA, Professor, School of Law, Chukyo University

» **Presentation 5 Indonesia**
"The State of Indonesian Labor Unions: Navigating Labor Dynamics and Challenges,"
Ike FARIDA, Founder and Managing Partner, Farida Law Office
Discussant: Akira ARIIZUMI, Research Associate, The University of Tokyo Graduate Schools for Law and Politics

» **Chair's Comments**

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Chair: Itaru NISHIMURA, Assistant Professor, Faculty of Commerce, Chuo University

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Shinya IWATSUKI, Researcher, JILPT
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Sukhwan CHOI, Associate Professor, School of Law, Seoul National University
Discussant: Ziwei LI, Graduate Student, The University of Tokyo Graduate Schools for Law and Politics

» **Presentation 8 Taiwan**
"Navigating the Changing Landscape: Labor Unions in Taiwan amidst Contemporary Challenges,"
Guan-Chiau CHIOU, Assistant Professor, School of Law, Chung Yuan Christian University
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» **Presentation 9 China**
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Tianyu WANG, Professor, Institute of Law, Chinese Academy of Social Sciences (CASS)
Discussant: Qi ZHONG, Vice Senior Researcher, JILPT

» **Presentation 10 Thailand**
"Informal Worker's Struggle for Labour Relations Rights and the Recent Legislative Development in Thailand,"
Panthip PRUKSACHOLAVIT, Associate Professor, Faculty of Law, Chulalongkorn University
Discussant: Pi-Chu TSAI, PhD Student, The University of Tokyo Graduate Schools for Law and Politics

» **Chair's Comment**

Concluding Discussion

Commentators: Takashi ARAKI, Professor,
The University of Tokyo Graduate Schools for Law and Politics
Hiroyuki FUJIMURA, President, JILPT
Moderator: Hideyuki MORITO, Professor,
Law School, Keio University

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