Diversification of Working People and Voices at Work in Korea

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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.

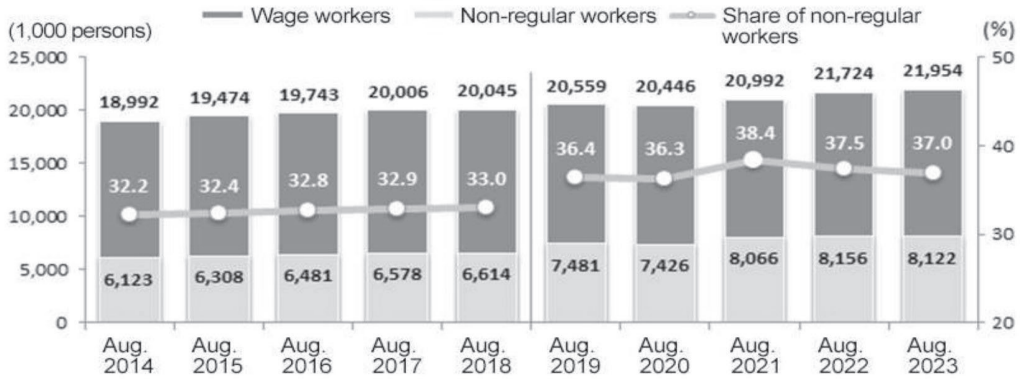
Here, the issues in collective conversation appear. Besides traditional issues regarding the labor law such as the concept of worker and employer, we have new tasks to navigate in the present situations. First, whom should workers talk with? Workers want to discuss their working conditions with the person 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

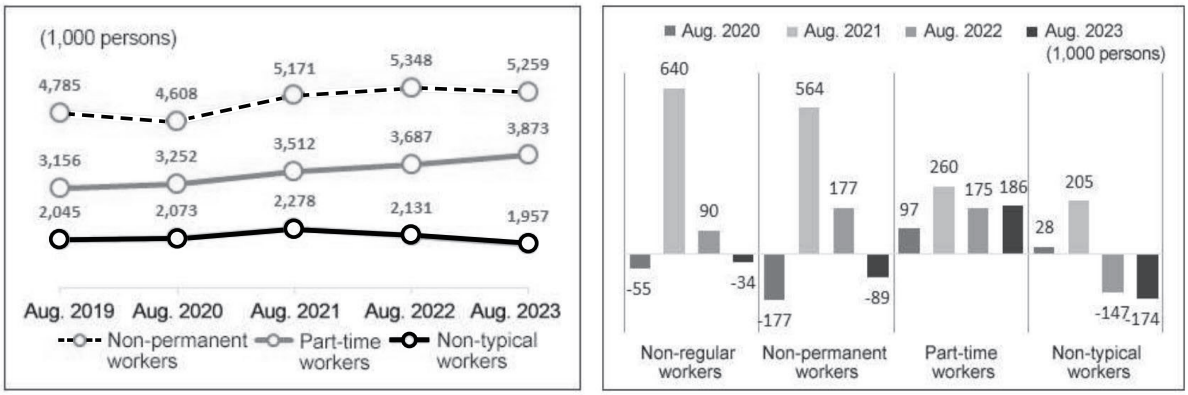
want even more.[1] Rapid development in Korea brought about issues in multiple aspects, not to mention those in the fields of employment and labor relations. The debates concerning the minimum wage is one example of conflicts rising from the dynamic transformation in Korea.

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.

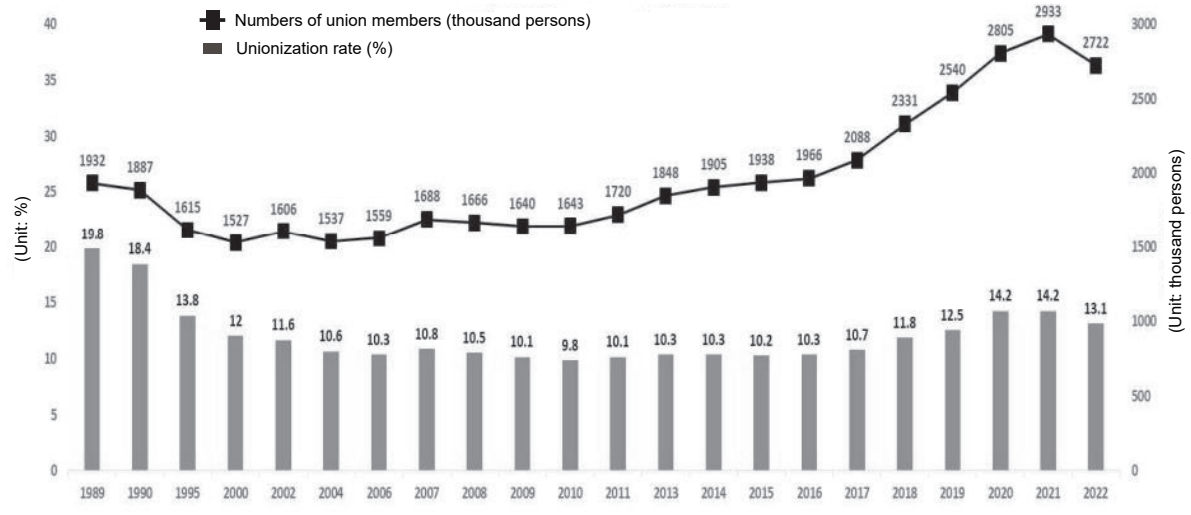
Figure 2. Size and change in non-regular workers by employment type

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).

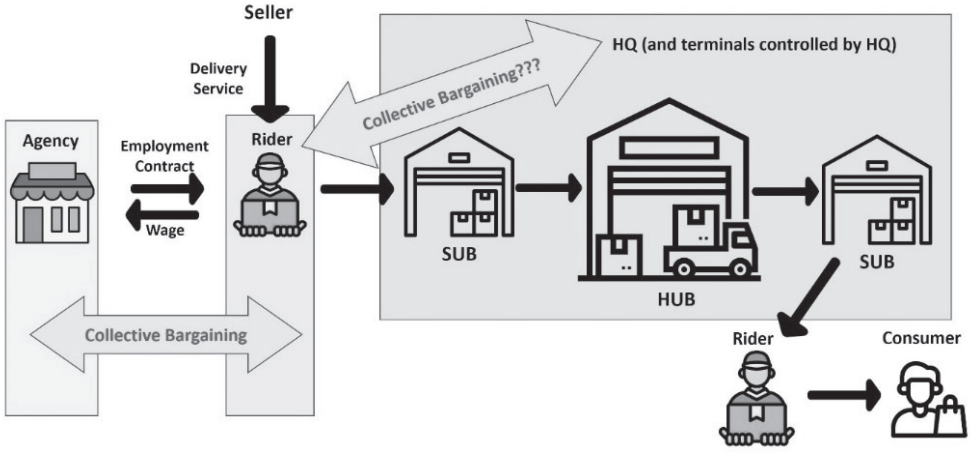
Although it partially restricts the rights of collective bargaining guaranteed by the Constitution, Korean labor law supplements these restrictions through the duty of fair representation and promotes the smooth progress of bargaining.[13] TULRA sets the duty of both employer and bargaining representative 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.

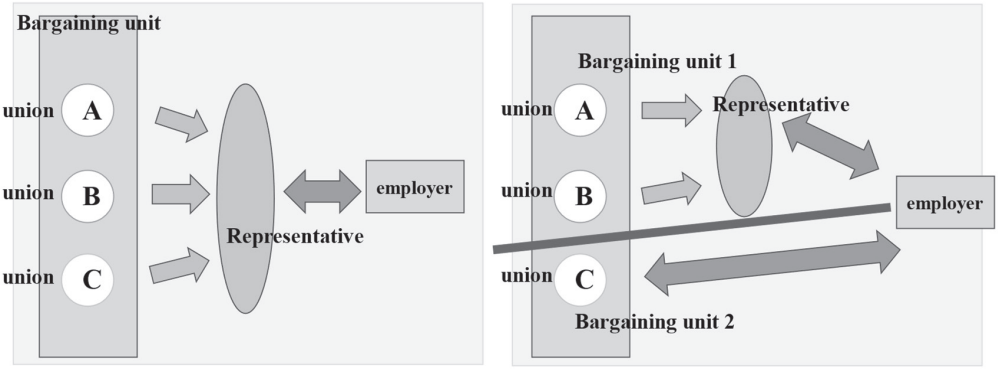
Platform workers, especially delivery riders, are interested in organizing unions, and they are succeeding occasionally. But the question of whether platform workers can be admitted as workers who can organize trade unions by TULRA is not that confirmable. Until now, it has been on a case-by-case basis,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