

System of Employee Representation at the Enterprise in Korea

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I. Introduction

Korea is a rare example in Asia where economic development and political democracy was achieved simultaneously in a relatively short time. At the core of such a rapid development lies contribution of labor law and labor relations. The nationwide labor campaign, which was initiated by the pro-democracy protest in June 1987, has brought about both quantitative and qualitative changes in the labor movement of Korea. The changes in labor law this period substantially removed influences from the authoritarian regime (the Fifth Republic). In 1997, further amendments in labor law reflected globalization of economy and changing working environment. Presidential committees were set up to encourage social dialogue between the labor and management; examples include Presidential Commission on Industrial Relations Reform (PCIRR) and The Tripartite Commission.

Employee representation system has gone through many changes with the dynamic process of labor law development. Today, three kinds of representative systems coexist at the enterprise level under current Korean labor law: Trade Union, Labor-Management Committee and the Employee Representative under Labor Standard Act (“LSA”). Trade union, based on freedom of organization, has been the primary representative body that enjoyed constitutional protection of collective rights. On the other hand, Employee Representative under LSA is a temporary representing system for certain limited items prescribed by the law that requires majority consent of the employees. Labor-Management Committee is a statutory body that promotes consultation between the workers and the management. These systems are regulated under its own respective legislation.

The primary purpose of this article is to introduce the current law and status regarding the three representative systems. Chapter II describes main features of the legislation and current usage of each system. Chapter III focuses on a critical analysis of the three systems, pointing out legal issues and problems that arise from the relationship of the systems. Lastly, Chapter IV concludes with suggestion for an alternative model that corrects and improves the problems of current system which better suits Korean labor law scheme and workplace realities.

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II. Three kinds of employee representative system in Korea: Trade Union, Labor-Management Committee, and Employee Representative under LSA

A. Trade Union

1. General framework of Korean labor law

To begin with, a general understanding of Korean labor law structure would be necessary before moving on to the details of trade union. The labor law of Korea consists of two categories: individual labor laws and collective labor laws. Individual labor laws have their constitutional basis in Article 32, Section 3 of the Constitution of Korea, which provides that the standards of working conditions shall be determined by law in such a way as to guarantee human dignity. Individual labor laws are concerned mainly with the particulars of the employment contract: the rights and duties of the parties concerned, wages, working hours, leave, holidays, annual vacation, the safety and welfare of employees, accident compensation, employment security, protection against discrimination, vocational training, and labor inspection.

Collective labor laws have their constitutional basis in Article 33 of the Constitution which provides that to enhance working conditions, workers shall have the right to independent association, collective bargaining and collective action. Since these workers' rights are regarded as an element of fundamental human rights, they cannot be violated or infringed upon by the state or by employers. Any laws or orders which deny this constitutional guarantee would be deemed unconstitutional and declared null and void by the courts. Collective labor laws reinforce individual labor laws with the same purpose of improving workers social and economic welfare. However in achieving their goals, the former uses the organized power of workers while the latter modifies the traditional principles of the civil law. Thus, the collective labor law is a body of rules governing the collective relationship between employers and workers (or representative organizations, typically trade unions), such Labor Relations Commission Act, the Trade Union and Labor Relations Adjustment Act, etc.

More precisely, the collective labor law is concerned mainly with trade unions' freedom or right to organize, relationships between trade unions and workers or their associations at workplace and at industrial and national level, collective bargaining, labor disputes, and the settlement of labor disputes. These two categories of the labor law are closely related not only legally but also in practice. Collective agreements made under the collective labor law take precedence over labor contracts and conditions agreed on under the individual labor law. Thus the activities of labor unions and the outcome of such activities do affect the working conditions of individual workers.

Furthermore, a new area of labor law deserves attention. A statutory body called the Labor-Management Committee was introduced so as to relieve aggressiveness of collective bargaining and to promote employee's participation in the management. The Act on Promotion of Worker Participation and Cooperation (hereinafter, "APWPC") regulates the Committee's composition and its main functions.

2. Basic concepts of the trade union in Korea

Art. 33. Sec. 1 of the Constitution declares that "to enhance working conditions,

workers shall have the right to independent association, collective bargaining, and collective action.” As the subject of collective labor rights, trade union in Korea is supposed to enjoy constitutional protection. Legislation or practices that unduly limit or infringes upon the rights of the trade union is likely to be ruled unconstitutional.

Trade union is regulated under the Trade Union and Labor Relations Adjustment Act (“TULRAA”). Art. 5 of TULRAA clearly states that workers have the freedom to form or join a union, but in the past authoritarian regimes, the government has made various attempts to suppress the unionization of workers through the amendment of the law and with the labor policy. The oppressive policies are now abolished through amendments.

To establish a labor union, the union must meet procedural and substantive requirements under the law. TULRAA specifies the following situations as conditions for disqualification, based on which the Ministry of Employment and Labor examines each application: when participation in unions by the employer or persons who always act for the benefit of the employer is allowed; when a union receives assistance mainly from the employer in the payment of the expenses thereof; when the purpose of union is only to promote mutual benefits, moral culture, and welfare undertakings; when membership of union is granted to those who are not workers; and when the aims of the organization are mainly directed at political movements (Article 2. Sec. 4 of TULRAA).

Before the 1997 amendment, a second union that represents the same category or unit of workers with the existing union was forbidden (namely, the prohibition of multiple unions). The 1997 amendment has made it possible to organize multiple unions at above the enterprise level, but due to a heated debate of pros and cons, grace period was given so that multiple unions would be implemented as of July 2011.

3. Collective bargaining and collective agreement

A trade union may demand that an employer meet at reasonable times and confer in good faith about pending problems concerning working conditions. If the right to bargain is exercised fairly, the trade union is exempted from civil and criminal liability. The employer cannot reject reasonable demands of the trade union. If he refuses to bargain with the trade union without justifiable reasons, the employer is subject to punishment under unfair labor practice provision (Art. 81. Sec. 2 of TULRAA).

A collective agreement shall be in writing and both parties concerned shall sign and affix their seals thereto, and the parties to a collective agreement shall report to the administrative authority within fifteen days from the date of execution of a collective agreement. The administrative authority may order changes to or cancellation of the Labor Relations Commission if they are illegal or unjustifiable (Art. 31 of TULRAA). No collective agreement shall provide for a valid term exceeding two years (Art. 32 of TULRAA).

In Korea, collective agreements are given “normative effect” – i.e. an overarching legal binding force that overrules other kinds of workplace agreements. If any portion of a works agreement or a labor contract violates standards concerning conditions of employment and other treatment of workers specified in a collective agreement, such a portion is null and void. In this case, invalidated matters shall be presided over by the standards set in a collective agreement (Art. 33 of TULRAA). Collective agreements are also given “general binding force.” Where a collective agreement applies to at least half of the ordinary number of workers performing the same kind of job and employed in a single business or a workplace, it shall also apply to other workers performing the same

kind of job and employed in the same business or workplace (Art. 35 of TULRAA).

According to a survey, collective agreement coverage is estimated at approximately 12% (which slightly exceeds union density: 10%).¹ Taking into consideration the usual practice of Korean trade unions to negotiate at enterprise-level, and the effect of general binding force which impacts unorganized employees as well, actual coverage would amount to 30% of Korean enterprises.²

4. Recent trend in trade union density

The size and organization rate of labor unions has multiplied rapidly between the 1987 major labor campaign and 1989, reaching a peak in 1990, after which it began to decrease to current 9.8% as of 2010. Table 1 shows steady decrease of union density from 2002 to 2010.

Table 1. Union density and union membership (Ministry of Employment and labor, 2010)

	2002	2003	2004	2005	2006	2007	2008	2009	2010
Union Density (%)	11.6	11	10.6	10.3	10.3	10.8	10.5	10.1	9.8
Number of Unions	6,506	6,257	6,017	5,971	5,889	5,099	4,886	4,689	4,420
Number of Union Members (*1,000)	1,606	1,550	1,537	1,506	1,559	1,688	1,666	1,640	1,643
Total workforce	13,839	14,144	14,538	14,692	15,072	15,651	15,847	16,196	16,804

5. Transition of trade unions from enterprise-level to industry-level

During the last decade, trade unions have gone through a dynamic transition from company-based unions to industry-based union. The economic crisis in the late 90's with the IMF bailout was a catalyst that exposed the weaknesses of company unions (or enterprise-level unions).

Before the change, over 90% of Korean labor unions were enterprise-level unions. The enterprise-level union in Korea was not a voluntary choice made by workers, but either advocated (under President Park's administration before 1979) or forced (under the Fifth Republic, 1980-1987) upon workers. During this era, enterprise-level union structure resulted in differences of wages and working conditions based on the size of business establishments; the coalition of trade unions was discouraged.

However, after the crisis, the labor side initiated far-reaching reform towards industry based unions. The reform is often referred to as "The Second-Round Transition Movement" by union activists; "Second-Round" transition as opposed to the previous "First-Round" transition to enterprise-level unions, forced by the authoritarian government policies. The most remarkable aspect of this transition is that, the transition was initiated by a strategic, intentional choice of the unions. The labor side recognized that the government, rather than individual employers, will play a more substantial role in stabilizing current job insecurity. To induce the Korean government to implement Active

¹ Danielle Venn (2009), *Legislation, collective bargaining and enforcement: Updating the OECD employment protection indicators*, www.oecd.org/els/workingpapers.

² Park Ji-Soon (2010), *A Comparative Review on Collective Agreement Coverage*, Working Paper for the Ministry of Employment and Labor.

Labor Market Policy (ALMP), the union activists believe that a transition from enterprise to industry level is indispensable so that trade union will gain more leverage and the enhance professional ability of its staffs.

Recent trends show that unions and federations are merging to form a larger entity. Within large confederations, the merging of craft unions and small federations is taking place concurrently. According to statistics from Ministry of Employment and Labor, industry-based union membership amounts to 52.9% of the total union members as of 2009 – showing a considerable growth in a relatively short time span.³

The transition has brought about substantial changes in and out of the union; i.e. the shift of representing authority in terms of collective bargaining, changes in the financing structure, human resource management of the union staffs, the change in the title of the union, and a qualitative change in the system, etc. In light of these changes, various legal issues need to be revisited to effectively cope with new kinds of disputes arising out of such changes. What deserves special attention here is that the relationship between such industry-level unions and the employee representative systems within a workplace (company union, Labor-Management Committee and Employee Representative under LSA) requires clarification.⁴

B. Labor-Management Committee under APWPC

1. Introduction

In Korea, enterprises with over 30 employees are legally obligated to establish a statutory body called the Labor-Management Committee (hereinafter, the “Committee”).⁵ The Committee is established and regulated according to the Act on the Promotion of Worker Participation and Cooperation (hereinafter, “APWPC”). It is a consultative body formed to promote the welfare of workers and seek the sound development of the business through the participation and cooperation of workers and employers (Art. 3. Sec. 1. of APWPC).

The Committee was first introduced in 1980’s during the Fifth Republic. The original intent of the authoritative government was to oppress the collective voice of the workers. By mandating the companies to implement a statutory body which on its face promotes “cooperation” between the labor and management, the government expected a chilling effect on the activities of existing trade union. In other words, the Committee was largely intended as a substitute for trade unions. For these reasons, the labor side demanded abolition or amendment of the law.

During the period of major labor law amendment in late 90’s, the title of the law was changed to “Act on the Promotion of Worker Participation and Cooperation”, which is the current law.⁶ The Act was amended in a way that the Committee would indeed function as a body that encourages employee participation. For example, the law obligates the

³ See Cheol Soo Lee (2011), *Transition to Industry-based Labor Union System and Revisiting the Legal Issues*, Labor Law Review Vol.30, SNU Society of Labor Law.

⁴ For more detailed analysis on this topic, see Cheol Soo Lee (2011), *Transition to Industry-based Labor Union System and Revisiting the Legal Issues*, Labor Law Review Vol.30, SNU Society of Labor Law.

⁵ According to the official English version of the APWPC from the Korean Ministry of Legislation, the terminology for Labor-Management Committee is “Labor-Management Council.” However, looking more closely into the purpose, role and function of this statutory body, the term “council” is inaccurate; especially when considering that the Committee has the authority to pass resolution in its workplace. “Committee” better conveys the legal characteristics of the body as intended by APWPC. Hence, the author will use the term “Labor-Management Committee” instead of “Council.”

⁶ Note that the title of the initial legislation in 1980 was “Labor Management Council Act.”

employer to seek resolution in certain matters prescribed by the law (Art.21. of APWPC). Today, the Labor-Management Committee is expected to play a supplementary role to represent employee interests, especially in unorganized workplace.

2. The Committee's relationship with Trade Union

Under Korean labor law scheme, the legal characteristic of the Committee fundamentally differs from that of a trade union. Trade union is a voluntary organization which enjoys constitutional protection; the Committee is a statutory body. The Committee's authority is contoured in APWPC, limited to the extent of what is prescribed in the law. To ensure that the activities of the Committee will not infringe on constitutional rights of trade union, Art. 5. of APWPC states that "collective bargaining or any other activity of a trade union shall not be affected by this Act."

In addition, the Act grants trade union an exclusive right to appoint employee side of the members of the Committee. Art. 6. Sec. 2. provides that if there is a trade union composed of majority of workers, the representative of the trade union and persons appointed by the trade union shall be the employee's members. For this reason, although the trade union and the Labor-Management Committee is a separate entity regulated under different law, in practice trade unions tend to take control of the Committee.

3. Composition and main functions of the Committee

1) Composition of the Committee

The Committee shall be composed of equal numbers of members representing the employer and members representing the employee. The number of each side shall not be less than three, but not exceed ten (Art. 6. Sec. 1). As for the method of election, members representing the employees shall be elected by direct, secret and unsigned ballot (Art. 3. Sec. 1. of Enforcement Decree of APWPC). If a majority union exists, the union's representatives and persons appointed by the union shall be the members for the Committee.

Regarding the election of the members, the Enforcement Decree of APWPC allows indirect ballot when it is deemed unavoidable due to a "special characteristic" of the workplace (Art.3. Dec.1. 2nd para. of Enforcement Decree of APWCW). The law is silent on what are the special characteristics so as to exempt direct ballot; whether the indirect ballot was lawful is left to case-by-case decision.

2) Main functions of the Committee

The Committee's primary purpose is to promote the common interests of labor and management through the participation and cooperation of both employees and employers (Art.1). For this purpose, employers and employees are expected to consult with each other in good faith and on the basis of mutual trust (Art.2). The Committee is legally obligated to hold regular meetings every three month (Art.12. Sec.1). Specifically, following items are subject to consultation at the Committee meeting (Art. 20. Sec. 1.):

- Productivity improvement and gain sharing;
- Recruitment, placement, education and training of workers;
- Handling of workers' grievances;
- Improvement of occupational safety and health and other work environments and promotion of workers' health;
- Improvement of personnel and labor management systems;

- General rules for employment adjustment, such as assignment and transfer, retraining and dismissal of workers for managerial or technological reasons, etc.;
 - Administration of working hours and recess hours;
 - Improvement of wage payment methods, wage structure, wage system, etc;
 - Introduction of new machines and technologies or improvement of work processes;
 - Establishment or revision of work rules;
 - Employees' stock ownership plans and other supports for the creation of workers' wealth;
 - Matters concerning rewards given to workers for their work-related inventions, etc.
13. Promotion of workers' welfare;
- Installation of employee surveillance equipment within a workplace;
 - Matters concerning the maternity protection of female workers and support for reconciliation between work and family life;
 - Other matters concerning labor-management cooperation.

In addition to consultation, the employer is obligated to seek resolution of the Committee in certain matters (Art. 21). For this purpose, the employer shall report or explain matters concerning overall management plans and results, quarterly production plans and results, the company's financial condition, etc. In case the employer fails to report or explain these matters, the Committee members representing the employees may request the employer to provide information in writing (Art.22).

Once a resolution is passed by the Committee, the members must promptly notify it to the employees (Art. 23). Following is the matters prescribed in Art. 21. that requires resolution:

- Establishment of basic plans for the education and training and skills development of workers;
- Setting up and management of welfare facilities;
- Establishment of an employee welfare fund ;
- Matters not resolved by the grievance handling committee;
- Establishment of various labor-management cooperative committees.

Interpretations vary on the scope and legal effect of a resolution passed by the Committee. Art. 24 states that both employees and employers shall implement the resolution of the Committee in good faith, but the law is silent on how to enforce the resolution. Art. 25 does provide dispute resolution mechanism by voluntary arbitration but, whether the parties will have a cause of action to enforce the resolution in court is unclear.⁷

4. Current usage of the Labor-Management Committee

According to statistics, the total number of the workplace which established the Committee shows a steady grow. As shown in Figure 1 below, the total number of the Committee has almost doubled during the last decade. (29,626 Committees in 2001; 46,702 as of 2010.) Table 2 shows that at least 70% of workplace that are mandated to

⁷ Specifically, when the contents of collective agreement and the Committee's resolution is in conflict, the resolution is likely to be stricken when considering the "normative effect" of collective agreement under Korean labor law. Thus, in terms of interpreting the resolution's legal effect, scholars suggest that under current legal scheme the resolution is likely to be a mere gentleman's agreement.

establish the Committee (over 30 employees) have complied to the regulation; in enterprises with over 500 employees, 95.1% have established the workplace.

Figure 1. Total number of enterprises that established the Labor-Management Committee (Ministry of Employment and Labor, 2001-2010)

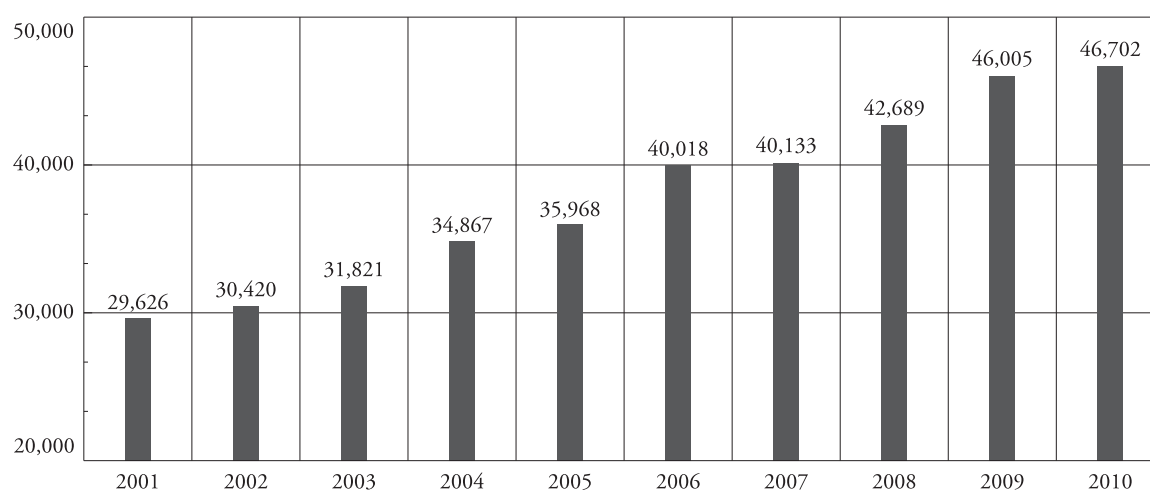


Table 2. Percentage of unorganized enterprises that established the Labor-Management Committee (KLI, 2008)

	Categories	Total number of employees & Service sector	Percentage of Enterprise that established the Committee (%)
Unorganized workplaces	Size of the enterprise	30 – 99	70.3
		100 – 299	89.3
		300 – 499	94.5
		Over 500	95.1
	Industry	Manufacturing	78.0
		Construction	49.2
		Service sector	68.4
Average: 72.0			
Organized workplaces	Average: 92.4		

However, according to more in-depth surveys, election procedures of the Committee members proved problematic in many unorganized enterprises. Among the enterprises that answered the questionnaire, only 45.0% were complying with the legal requirement of direct, secret and unsigned ballot. In 24.8% of the enterprises, candidates of the Committee member were being appointed by the employers. 15.7% were conducting indirect ballot; in the remaining 14.1% enterprises, employers appointed the Committee

members. Moreover, according to other item in the same survey, 20% of the Committees did not hold the consultation meetings over three times a year.⁸

The results from these surveys suggest that while the number of Labor-Management Committee has steadily increased in recent years, its operation in reality (esp. in unorganized enterprises) may not be as effective as the APWCP has intended. The legitimacy of the Committee members leaves room for doubt, influenced by the employer side in many instances; the meetings for consultation are a mere formality in some workplace.

C. Employee Representative under the Labor Standard Act

1. Introduction

In addition to the Labor-Management Committee, another non-union mechanism that represent employee's interest in certain matters exist under individual labor law scheme; namely, the Employee Representative under the Labor Standard Act (hereinafter, "LSA"). The Employee Representative under LSA was introduced in the late 90's during the period of major labor law revision. Its main intention is to protect the interests of the employees in matters relating to managerial dismissal and flexible working hour; to make sure that a works agreement (in writing)⁹ was entered into between the employer and the Employee Representative.

The most unique aspect of the Employee Representative under LSA is that, unlike the Labor-Management Committee, this is not a permanent body with members, rules and procedures. The Employee Representative is "triggered" only when the event prescribed by the law occurs (the events include managerial dismissal and working hour system under the LSA). In other words, Employee Representative under LSA is a temporary body; its concept is rather evasive.

2. Composition of the Employee Representative under LSA

As to how the Employee Representative is composed, the law does not provide a clear-cut answer. Art. 24. Sec. 3. of LSA states that "with regard to the possible methods for avoiding dismissal and the criteria for dismissal, an employer shall give a notice to a trade union which is formed by the consent of the majority of all employees in the business or workplace (or to a person representing the majority of all employees if such a trade union does not exist, hereinafter "the Employee Representative") and have good faith consultation." From this provision, it is inferred that (1) a majority union may play the role of the Employee Representative under LSA, or (2) if such a majority union does not exist, the person who represents a majority of all employees will act as the Employee Representative.

Since the law is silent on how to select the Employee Representative, i.e. adequate procedure to elect the person who will represent a majority of employees, the legitimacy of the Representative is questioned. Without a safeguard measure that enables the employees to elect in a democratic way, confusion on as to who is eligible as the

⁸ Survey conducted by Korean Labor Institute, 2008.

⁹ According to the official English version of the Labor Standard Act (translation provided by Ministry of Legislation), the terminology for the agreement between the employer and the Employee Representative is "written agreement." This seems to be an inaccurate translation, since other kinds of written agreement exist in the workplaces (e.g. collective agreement). Hence, the author will instead use the term "works agreement" rather than written agreement.

Representative is destined to arise. The Employee Representative is subject to employer intervention – even worse, for the purpose of signing the works agreement, the employer may appoint one of the employees as the Representative without the rest of the employees' consent. Consequently, this results in raising doubt as to whether the written works agreement is an authentic one which truly reflects the employee's interests.

In practice, dispute arises on the validity and legal effect of the works agreement, and also in determination of the eligible Representative. In a Supreme Court decision in 2004, where managerial dismissal became an issue, it was held that the works agreement entered into by the Labor-Management Committee on behalf of the “majority of all workers” under LSA was valid.¹⁰ However, the decision shows lack of precise understanding of the two systems; it seems like even the court is confused on the purpose and functions of the Employee Representative under LSA. An Employee Representative may not be substituted by the Committee member of the Labor-Management Committee; the Committee is not a mechanism where majority support is guaranteed. The legislative intent of the LSA is to guarantee that where majority trade union does not exist, an alternative representative must make sure that a majority of all employees within the workplace has agreed to the items of the works agreement.

3. Main functions of the Employee Representative under LSA

1) Consultative function

In matters relating to dismissal for managerial reasons, the employer must consult in good faith with the Employee Representative under LSA. With regard to the possible methods for avoiding dismissal and the criteria for dismissal, employer shall give notice to the Employee Representative and have good faith consultation (Art. 24. Sec. 3. of LSA). In matters relating to night and holiday work for pregnant female employee, the employer shall consult in good faith with Employee Representative as to whether there will be night work or holiday work, and its implementation methods for workers' health and maternity protection (Art. 70. Sec. 3 of LSA).

2) Party to the written works agreement

In addition, the employer shall reach an agreement in writing with the Employee Representative in the following matters: when the employer operates flexible working hour system (Art. 51. Sec. 2), selective working hour system (Art. 52), using leave as a compensation for extended, night and holiday work (Art. 57), special computation of working hours (Art. 58), excess work hours and change of recess hours in certain enumerated business (transportation, goods sale, movie production, medical, hotel, beauty parlor, etc; Art. 59), and Substitution of paid leave (Art. 62).

3) Functions in other legislations

Employee Representative system is adopted in a few other legislations besides the Labor Standard Act. If an employer intends to set up or change a retirement benefit scheme, s/he shall receive consent from the Employee Representative (Art. 4. Sec. 3. of the Employee Retirement Benefit Security Act). In case an employer intends to use a dispatched worker, the employer must conduct a sincere consultation in advance with the Employee Representative (Art.5.Sec.4 of Act on the Protection of Dispatched Workers).

¹⁰ Supreme Court of Korea, 2001-DU-1154 (Oct 15, 2004).

In matters relating to workplace safety and health, the Employee's Representative may request relevant information to the employer (Art. 11 of Occupational Safety and Health Act).

4. Usage in of the Employee Representative in reality

Due to its temporary and evasive nature, no comprehensive data is found as to the usage of Employee Representative under LSA in the workplace. Assuming that the employers who adopted flexible, selective or discretionary working hour system has complied with the legal requirement of LSA (i.e. written consent from the Employee Representative), it can be inferred that the usage of Employee Representative not widespread. As shown in Table 3 below, the usage of flexible hour working system remains at a relatively low percentage.

Table 3. Rate of adoption for flexible, selective and discretionary working hour system (Ministry of Employment and Labor, 2004)

		Flexible working hour (%)	Selective working hour (%)	Discretionary working hour (%)
Size (number of employees)	100-299	11.76	2.15	2.64
	300-999	12.73	3.70	-
	Over 1,000	9.23	3.13	-
Industry	Manufacturing	13.38	1.94	0.64
	Utility	-	-	-
	Construction	14.81	3.7	-
	Hotels and restaurants	30.00	-	-
	Transportation	5.41	2.7	5.88
	Telecommunication	7.14	7.14	13.33
	Finance	7.41	-	-
	Education	8.33	-	8.33
Social service	7.14	-	-	

D. Summary – Comparison of the three systems in a glance

To summarize, the table below compares the main characteristics of the three systems of employee representation described above.

Table 4. Comparison between Trade Union, Labor-Management Committee, and Employee Representative under LSA

	Trade Union	Labor-Management Committee under APWPC	Employee Representative under LSA
Purpose	Maintaining and improving the terms of employment; Improving the social and economic conditions of the workers.	Promoting the welfare of workers and seek the sound development of the business through the participation and cooperation of labor and the management.	If the event prescribed by the law occurs, and majority union does not exist, Employee Representative is formed temporarily.
Relevant law	The Constitution and the Trade Union and Labor Relations Adjustment Act (TULRAA)	Act on the Promotion of Worker Participation and Cooperation (APWPC)	Labor Standard Act (and other laws, i.e. Occupational Safety and Health Act, Employment Insurance Act, etc.)
Main functions	Collective bargaining and collective agreement	Mainly consultative functions; the consultation may lead to a resolution. (Art. 19, 20, 21)	Enter into written works agreement with the employer regarding some matters prescribed by law.
Election Procedure	Freedom to organize/ join the union is guaranteed under TULRAA. Should meet prescribed conditions/ receive certificate issued from competent authorities. (Art.5)	Composed of same numbers of Committee members from each side; the workers elect their own members. In case a majority union exists, the union shall appoint the Committee members.	No regulation exists regarding election.

III. A critical analysis on the current employee representation system

Employee representative system in Korea is in need of a comprehensive review. In the past, during the era of Fordism, workers shared similar concerns and issues and it were natural that trade union was the main representative body of the workplace. Today's labor is being diversified, individualized and segmented; union density shows constant decrease. Against this background, a system that reflects diverse employee voice is needed. As described above current Korean labor law provides three kinds of representative system: Trade Union, the Labor-Management Committee and Employee Representative under LSA. The legal characteristics of the two non-union bodies are rather ambiguous. The co-existence of the three systems causes confusion in many workplaces. In certain points where the trade union and other bodies intersect, the constitutional rights of trade union are sometimes infringed upon. With these realities in mind, a critical analysis on the systems is required.

1. Problems of the two non-union representative system – Employee Representative under LSA and the Labor-Management Committee

1) Ambiguities of the Employee Representative under LSA

Employee Representative under LSA was first introduced in late 1990's amendments of the Labor Standards Act, and then was transplanted to various other work related legislations. (e.g. Employee Retirement Benefit Security Act, Act on the Protection of Dispatched Workers, Occupational Safety and Health Act, Act on Prohibition of Age Discrimination in Employment and Promotion, etc.) However, the Employee Representative under LSA did not smoothly integrate to existing Korean labor law. Due to the lack of specific provisions regarding its precise legal concept or election procedure, many legal issues remain unresolved.

Basically, the primary purpose of the Employee Representative under LSA is to obtain written agreement from the representative for specific items (items that are not covered by collective agreement or rules of employment; for details, see Chapter II, Section C) prescribed in the LSA. However, the LSA is silent on the exact definition of the representative, its legal elements, procedure for election, its main function, and ways to protect its activities, etc. From this deficiency arise the following issues: What is the appropriate scope of employees that falls within the definition of a 'majority'? What is the legal characteristic of 'written agreement' by the representative, and how to determine priority in case of conflict with existing collective agreement or work rules? How to ensure that the representative under LSA was fairly elected through a democratic measure? Since answers to these legal issues are not found from the provisions of LSA, confusion arises as to the operation of the representative system.

2) Effectiveness of the Labor-Management Committee

Meanwhile, the Act on the Promotion of Worker Participation and Cooperation (APWPC) mandates that workplace with over 30 employees shall establish the Labor-Management Committee ("the Committee").

The main role of the Committee is to encourage consultation between the labor and the management within the workplace through "participation and cooperation of both workers and employers (Art.1. of APWPC)." Since multiple unions within a workplace are now allowed as of 2011, much confusion will arise regarding its operation. In this time of confusion, the Committee, which is a legally mandated consultative body, is expected to contribute in resolving workplace disputes and grievances in an effective manner.

Unfortunately in many cases, the Committee in reality is no more than a formality, established by reluctant employers to merely avoid violating the requirements of the Act. Looking at the realities of the Committee, these issues deserve attention: Is it appropriate at all, in the first place, to allow the majority union to monopolize selection of the Committee members? What are the ways to actually enforce the Committee's resolution? Unless these questions are answered, the Committee is likely to remain impotent in many workplaces.

2. Trade union today – the challenges and changes to its role

Meanwhile, trade union today finds itself in crisis. First, union density in Korea is very low. Due to the fact that public servants and school teachers – the groups that could not enjoy freedom to organize in past authoritarian regimes – are now organizing union,

the total number of union members did not went through much change. However, in terms of union density, the percentage peaked 25.4% in 1977; and then showed a continuous decrease to 10% as of 2010.

Second, trade unions are not able to provide adequate protection to irregular workers (temporary, part-time workers). Traditionally, trade unions represent full-time workers mainly. Union membership does not extend to irregular workers; no appropriate mechanism exists that represents the irregular workers. The union density of the irregular worker is estimated at a very low level – approximately 2%.¹¹ While irregular workers continue increasing in the total working population, trade union cannot protect their rights and interests in the workplace.

Third, the terms of employment are being individualized today. Rather than insisting on the conventional seniority principle, performance-based payment system is prevalent in many workplaces. With this trend, the *raison d'être* of the trade union – i.e. reflecting the collective voice of the workers and negotiating a uniform terms of employment – is being shaken from its root.

Fourth, low economic growth rate is another factor in weakening the bargaining power of trade union. Rather than demanding increased wage or shortened work hours, trade unions are content with securing the job itself. The legality of a concession bargaining has been recognized under Korean labor law.

3. Confusion arising from relationship between the three representative systems

The confusion caused by coexistence of the three representative systems within a workplace and legal issues arising out of such confusion awaits clarification.

If there is a trade union composed of a majority of the workers in the workplace, such a majority union is given vast authority over the employee representation. In addition to exercising its original function as a trade union, the union is not only granted with the power to appoint employee side members of the Labor-Management Committee (Art. 6. Sec. 2. of APWPC), but also acts as the Employee Representative under LSA. On the contrary, if the number of trade union members do not reach a majority of the workplace (i.e. minority union), the union may neither appoint the members for the Committee nor become the Employee Representative under LSA. In other words, the minority union has no chance to participate in the course of determination in the level of enterprise. Here, a constitutional question arises: while Korean Constitution ensures strong protection for the trade union, which is supposed to take priority over non-union entities, in reality the status of the minority union is even weaker than that of the Employee representative under LSA or the Committee members.

While the laws relating to the non-union representative system (the LSA and APWPC) intended separate purpose and functions for the Employee Representative under LSA and the Committee under APWPC, it seems like the legislator failed to foresee its legal consequence. In short, the laws were not designed elaborate enough to clearly define the system's appropriate relationship with the trade union. As long as the three decision-making bodies continue existing in the same workplace under current legislation, such confusion will remain unresolved.

¹¹ Dongwon Kim (2005), *A study on Irregular Worker's Union Membership Status and Labor-Management Relationship*, Working Paper for the Ministry of Employment and Labor.

4. Minority union in a deadlock in the era of union pluralism

Besides the ‘stifling’ effect on the minority union by the two non-union representative bodies, there is one more factor which further threatens trade unions today. Under previous Korean labor law, plural unions within a business or workplace were prohibited as illegal. When there is a pre-existing trade union, the administrative authority would not issue a certificate to a newly organized union. Such trade union could not enjoy legal protections for its activities.

After much heated debate, the relevant provisions of Trade Union and Labor Relations Amendment Adjustment Act (TULRAA) were amended in a way that allows multiple unions. Free organization of trade union is allowed as of July 2011 regardless of existence of pre-existing unions. As an exchange for this freedom, multiple unions coexisting within a workplace are now obligated to appoint a bargaining representative. To demand a collective bargaining, the unions must first choose which one of them will be the “single channel” that will sit for the bargaining table. The newly inserted Art. 29-2. Sec. 1 of TULRAA provides that “If there are two trade unions or more which are established or joined by workers in a business or workplace regardless of the type of organization, the trade unions shall determine the bargaining representative union (including the bargaining representative body composed of members of two different trade unions or more; hereinafter the same shall apply) and then demand bargaining.”

This leads to the conclusion that the minority union (i.e. a union that falls short of the majority support of the whole union members)’s constitutional right to collective bargaining will be significantly limited. It means that the single channel bargaining system could possibly be struck in the near future as unconstitutional. Moreover, under current laws relating to Employee Representative of LSA and the Labor-Management Committee, the minority union has no channel at all to raise its voice in the workplace decision-making process.

In the meantime, the majority union obtains not only an exclusive right to collective bargaining, but also monopolizes representative right of Employee Representative and the Committee as well. This is an excessive limitation to the constitutional rights of minority unions. In the end, workers may be discouraged from establishing unions; unless it obtains majority support, the union will be powerless anyway.

5. Solution: The need for a permanent non-union representative system

In light of the above mentioned problems of current Employee Representative System, two track approaches could be considered to address this problem. The first track is to rely on court decisions as dispute arises regarding the relationship between these representative bodies. This bears the risk of adding up even more confusion, since different courts may opine differently on the same question. The second track is to amend existing labor law legislations. This is more desirable when considering that Korean legal system follows civil law tradition.

Following the second track, an underlying question must be addressed first: Why do we need a non-union representative body in the first place? What are the fundamental reasons that amendment of existing legislation or perhaps a new one is needed for a new employee representative body?

Even though the constitutional protection for trade union stands firm, very unlikely to be shaken unless an overall constitutional amendment occurs, looking at the above mentioned realities of workplace one cannot deny the dire need for a permanent

representing body which really works to reflect employee voice. Detailed reasons are as follows.

First, trade union is not a statutory body. As long as unionization is left at the hands of the free will of the workers, trade union exposes its intrinsic weakness; it cannot represent diverse voices within the workplace. As shown above, more than 90% of the Korean enterprises remain unorganized. With the allowing of multiple unions in a workplace and the exclusive right of the majority union to bargain as the single channel, small unions are even more likely to get stifled in raising their voice. In addition, the recent trend toward transition to industry-level unionization adds up to the crisis of unions at enterprise level.

Second, even where trade union exists, the union puts priority in representing its own members; unorganized workers, usually the irregular, part-time employees, fall outside the realm of union protection. Under current Korean labor law, no adequate system or mechanism exists to represent these groups of employees.

Third, in matters which require uniform regulation to all workers within the workplace, there is a need for a body that represents the interest of all workers regardless of their union membership status. Under current labor law, trade union is not a mechanism that could ensure a fair representation of all employees in the workplace.

In light of this view, the conclusion is rather straightforward. The need for a permanent representative body which protects all employees is indisputable. Such a body must ensure that the representatives are elected through a fair and democratic election. The policymaker must bear in mind that once a body is mandated by legislation, and the employees are 'automatically' included as its members, the legitimacy of its representative will always be subject to question. (cf. whereas, in case of trade union, the union leader's legitimacy is guaranteed by direct ballot.) Therefore, the new legislation must ensure that while the body itself is mandated by law, its representatives are elected in a democratic way by the employees.

6. The basis for a non-union representative system: ILO Labor Standards

For a more concrete basis for a non-union representative system, international norms on these issues would be worth reviewing. International Labor Organization (ILO) allows much room for openness and flexibility on the concept of employee representative system. In its conventions, ILO makes clear distinction between the usage of "trade union" and "labor organization"; the latter is a broader concept which encompasses trade union.¹² The term "trade union" is used in a more specific, limited sense. In addition, "worker's representative" is a broad concept which includes both union leader and other representatives who are elected by unorganized employees. Convention No. 135 distinguishes the role and function of union leader and other kinds of workers' representatives.¹³

Convention No.154 on collective bargaining makes it clear that the concept of "organization" is not limited to trade unions; it includes non-union employee representative may participate in collective bargaining. Art. 5. Sec. 2. of the Convention provides that "collective bargaining should be made possible for all employers and all

¹² C87 Convention concerning Freedom of Association and Protection of the Right to Organize, International Labor Organization (1948).

¹³ C135 Workers' Representatives Convention, International Labor Organization (1971).

groups of workers in the branches of activity covered by this Convention.”¹⁴ In addition, the ILO Digest on Freedom of Association points out that the workers have the right to establish more than one “worker’s organizations of their own choosing.”¹⁵ From this provision, it leaves room for interpretation that not only trade unions but also a consultative body such as the Labor-Management Committee may participate in the collective bargaining process.

To conclude, it could be inferred from the norms of international labor standard that collective bargaining is not an exclusive activity of trade union. Various conventions and ILO Digest on freedom of association provide that “labor organization” or “workers organization” could include diverse groups of employees within the workplace.

IV. Conclusion: Toward a Uniform System of Employee Representation

From the discussions above, the imperative need for a permanent non-union employee representative system cannot be denied. The body should be one that supplements the defects of the Labor-Management Committee and Employee Representative under LSA, contributing to a uniform decision-making in the workplace. The attitude of ILO conventions reinforces the idea that employee representative mechanism must not be necessarily limited to trade union.

A detailed description of the new system would be beyond the scope of this paper but, a draft blueprint could be proposed here. Below are several essential elements of the new representative system:

- The representative must obtain support from a majority of the employees.
- Election must be conducted in a democratic manner.
- All employees should be fairly represented, regardless of their unit and position within the workplace.
- A procedure must exist which enables employees to raise objection to the legitimacy of the elected representative.
- Undue influence from the employer must be prevented through adequate mechanism.

In addition to these requirements, the legislator must make sure that the authorities given to this new body shall not infringe on the collective rights of trade union. Again, constitutional protection on trade union cannot be denied unless a constitutional revision occurs. The relationship between trade union and the new permanent body should be well harmonized within the Korean labor law scheme so that conflicts and confusions would be minimized. With the trend of transition to industry-based unions, the union leaders must make sure that authorities of the union should be coordinated with the non-union bodies, so that the rights and interests of all employees will be fairly represented.

¹⁴ C154 Collective Bargaining Convention, International Labor Organization (1981).

¹⁵ The right of workers to establish organizations of their own choosing implies, in particular, the effective possibility to create - if the workers so choose - more than one workers’ organization per enterprise. See *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth (revised) edition, International Labour Office, 2006, para. 315.