

# Introduction

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## The Theme and Its Background

The Japan Institute for Labor Policy and Training hosted its 11th Comparative Labor Law Seminar (Tokyo Seminar) on February 28th and 29th, 2012. As the organizers of the seminar, we chose the theme of “System of Employee Representation at the Enterprise” and invited 10 distinguished scholars from Australia, China, France, Germany, Japan, Korea (ROK), Sweden, Taiwan, the U.K. and the U.S. to present reports on their respective countries. The following memo was sent to these participants to explain the theme.

*The employee representation system is firmly established by law in continental European countries, such as the Betriebsrat in Germany and the comité d'entreprise in France. It coexists with the framework of collective bargaining at the industry or regional level and seems to have been assuming a greater role in recent years amid the trend towards decentralized industrial relations. At the other end of the spectrum, employee representation schemes are likely to be held to be illegal in the U.S., being seen as a tool to thwart genuine collective bargaining, although there are voices calling for a change in the law to cast off the legacy of the New Deal era.*

*In Japan, there is no full-fledged employee representation system. However, the Labor Standards Act and some other statutes have a mechanism under which certain deviations from the minimum labor standards are permitted if there is a written agreement to this effect between the employer and the representative of the majority workers at the establishment. A majority union, if there is one, automatically becomes such a representative; otherwise, a person should be elected by some means by the workers of the establishment as their majority representative. There is a concern, however, as to whether such a person can deal with the employer properly without organizational support behind him/her. On the other hand, the unionization rate has declined to less than 20% (currently 18.5%) in Japan, and it may not be realistic to look to labor unions to represent the interests of workers at an enterprise. Moreover, we are witnessing a rapid increase in non-standard employees, such as fixed-term and part-time workers (currently such non-standard employees account for one-third of the Japanese workforce), who have been excluded from membership of traditional enterprise-based unions. Accordingly, there is a growing interest in the issue and some people are calling for the introduction of a brave new system of employee representation.*

*We believe a comparative study of the employee representation system would be timely and beneficial. It would be exciting to exchange information and opinions concerning how the voices of employees should be institutionalized in today's workplace.*

## Proposed Outlines

Together with the explanation of the theme, we provided the following guidelines to the representatives from each country, to ensure consistency in the composition of their papers.

1. *Description of the employee representation system (if any)*
  - *Is there a legal framework for an employee representation system, such as a works council, at enterprises?*
  - *If so, please provide basic information about it, e.g.*
    - *Historical development*
    - *Unit of representation (group of enterprises, enterprise, establishment, etc.)*
    - *Role and power of the representative body*
    - *Formation of the representative body*
    - *Method of electing the representatives (if there is a legal mechanism preventing intervention by the employer, please describe it. In addition, please give information as to how non-standard employees are involved in the election procedures)*
    - *Methods of deliberation and decision-making of the representative body*
    - *Protection for the activities of the representatives*
    - *Bearer of the cost (e.g. financial support from the employer)*
    - *Rate of adoption in reality (does it differ significantly between industries?)*
  - *If not, please explain why not.*
    - *Historical background*
    - *Legal status of voluntary employee representation system*
    - *Prevalence of the voluntary employee representation system*
    - *Attitudes on the part of labor, management, and the general public*
    - *Is there a movement for change?*
  - *Is there a mechanism for employee representation on corporate boards? If so, please describe this briefly.*
2. *Relationship with collective bargaining*
  - *Please provide a very concise description of unionization and collective bargaining today.*
  - *Do labor unions exert special influence upon the selection or working of employee representatives?*
  - *Is there a limit to the authority of employee representatives when there are collective bargaining agreements?*
  - *Can (or does) the employee representative system supersede the functions of collective bargaining?*
3. *Function and dysfunction of the employee representative system*
  - *What are the main functions of employee representatives? (Establishing terms and conditions of employment; codetermination of important employment issues; flexibilization of or derogation from statutory regulations; communication between labor and management; resolution of conflicts arising from employment relations; representation of diversified voices in the workplace; or other functions).*
  - *If possible, please show typical ways in which the employee representative system works, taking concrete examples such as dismissal, wage determination and equal*

- treatment of non-standard employees.*
- *What are the defects of the current employee representative system in your country?*

#### 4. *Evaluation and trends*

- *How would you evaluate the working of the current employee representation system (or the lack of such a system)?*
- *Are there particular issues to tackle with regard to employee representation?*
- *What is the future direction of employee representation in a broader sense?*

## **Papers and Discussion**

At the seminar, those delivering the national reports gave excellent presentations based on their papers, and lively discussions followed. The papers are contained in the following chapters, with several revisions to reflect the seminar discussions. Our readers will appreciate their rich content. It is impossible to summarize them here, but what impressed us most was the great variety between the countries.

As we stated in the memo explaining the theme, Germany and France are both characterized by “dualism” – works councils and labor unions. However, there are notable differences between them, starting from such basic features as the formation of works councils (company managers form part of these in France, but not in Germany). It is also interesting to see the impact of a 2008 French law which may blur the distinction between the two systems. On the other hand, the U.K. and Sweden adopt a single-channel representation system through labor unions. EU directives have had minimal influence on these countries in this regard, though it is true that U.K laws have become quite complicated because of them.

Outside Europe, the U.S. has the ultimate form of single channel representation through majority labor unions and, in spite of attempts to modify the law or its construction, remains hostile to any other scheme of employee representation. However, given the decline in union density, it clearly needs changes to enable greater participation by employees. Australia is another country with a single-channel representation system through labor unions, although the locus of collective bargaining has shifted from industries to individual enterprises through volatile legislative reforms.

Turning to East Asia, South Korea is similar to Japan in that it has a system of majority unions/representatives at an establishment for the purpose of certain derogations under the Labor Standards Act. Yet South Korea also has a system of mandatory labor-management committees, and there are problems between these systems that need to be solved. Taiwan also mandates the establishment of labor-management councils, but in reality such councils are rare and ineffective, as are labor unions and the practice of collective bargaining. Finally, China has a unique representation system utilizing staff congresses, which underwent considerable reforms after 1992, based on the current regime of market economy under socialism.

## **Observations**

At the end of the seminar, we concluded the fruitful discussions with the following points. We hope that they will provide useful analytical viewpoints to accompany the fascinating national papers.

Firstly, the issue of employee representation at enterprises is inevitably intertwined with the conditions of labor unions and collective bargaining. Whether they are based on

the industry level or not would certainly affect the need for a separate system of representation at the enterprise level. How much they are accepted is also a significant factor. After all, Sweden may well be happy with its single-channel system given its extremely high unionization rate (71% in 2008).

Secondly, attention should be paid to the source of the legitimacy of the representative body. The employee-members of works councils or labor-management committees are elected directly by the employees, and the procedures and mechanisms of such elections are an important part of the system. In the case of labor unions, individual employees authorize the union to represent them by joining it. However, the majority union may be entitled by law to represent even non-members, such as the exclusive bargaining system of the U.S. and, to a lesser extent, the derogation agreements in Japan.

Thirdly, the concrete form of the representative body matters. Labor unions are presumably able to deal with employers effectively utilizing their resources. Members of works councils are not necessarily experienced nor unified, but it is not uncommon for them to include union staff and agents. The members also usually enjoy special protection and support provided by the law. When the representative is an individual employee, like majority representatives in Japan, there is a question as to how well he/she can function. Beyond this lies the issue of what “representation” is for, and thus the recent trend for direct methods of communication in the U.K. is quite interesting.

Fourthly, another issue of importance is the subjects tackled by the representative system. While a broad range of employment conditions and other matters are open to collective bargaining by labor unions, the subjects for works councils and labor-management committees are usually enumerated by law, often with varying degrees of participation rights (information, consultation, discussion, codetermination, etc.) depending on the nature of the matter. Even among the countries with a single-channel representation system, some subjects, such as safety and health, may be assigned to a special joint committee.

Fifthly, there is the problem of discrepancies between law and reality. Despite legal mandates, works councils may be nonexistent or malfunctioning in real workplaces. This depends on the history, culture, legal system, economic conditions, attitude of labor unions, and many other elements in each country, but it would be a worthwhile task to explore a model of employee representation that is practicable and adaptable.

Finally, we believe that there should be some kind of channel through which employees can be heard and their interests represented, whether it is via a labor union, works council, or any other type of participatory mechanism. If there is a representation gap, efforts should be made to fill it. Given the universal trends of declining union density found in most advanced countries, it is especially important to secure a channel for those employees who are not represented by labor unions at the workplace level. The increase in non-standard or atypical employees, who are less likely to belong to labor unions, highlights this as a pressing issue in contemporary labor policies. The national reports, which elaborate on the conditions and new developments in regard to this important issue, would provide ample basis on which to build a better system of employee representation in the era of diversified workforces in the globalized market.