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Protection of Fundamental Labor Rights and Improvement in Power Balance between Labor and Management

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Ⅰ. Introduction

Labor-management autonomy means that the two parties form and implement rules of just conduct by themselves. That autonomy is possible only when the power between labor and management is balanced. An equal relationship between labor and management is prerequisite to the realization of labor-management autonomy. The three basic labor rights - right of association, collective bargaining, and collective action - pursuant to the Constitution lay the legal foundation for equality and a balanced power between labor and management. However, either abuse of or excessive restrictions on the three basic rights will result in imbalance of power, which in turn will undermine labor-management autonomy. This article aims to identify factors in the current system and practices which can abuse or unnecessarily restrict the three basic labor rights and seeks solutions to the problems.

Research subjects include some of the trade union provisions that the International Labor Organization (ILO) has recommended be revised or repealed (restrictions on the qualifications of trade union members, a ban on wage payment to union officials, and third-party intervention in collective bargaining)[1], because they are deemed to violate the freedom of association principles. Some other subjects include other factors that can act as an abuse of or excessive restriction on the three basic labor rights, such as the scope of recognition of association members, makeup of a union's internal organization, union shop, a single bargaining channel, adoption of adjustment procedures before an industrial action, and replacements in the case of an industrial action. In the following, the two categories of rights above classified as association and collective bargaining/industrial acts are covered along with discussions

1) Besides, the ILO requested the Korean government to guarantee the right of association for public servants, officials, to recognize enterprise level union pluralism, to revise the provision on obstruction of business, and to revise the scope of essential services, all of which are dealt with in other sessions.

of the current status in Korea, the ILO's position, examples of other nations, and desirable systems and solutions or alternatives to problems.

Ⅱ. Equality and Balance of Power between Labor and Management in the Areas of Association

This section reviews restrictions on union membership, freedom of association membership and internal organization, facilities afforded to union officials, and union shops.

1. Restrictions on the Scope of Union Membership

(1) The Current Provisions and Postpone of Revision

Section 2(4)(d) of the Trade Union and Labor Relations Adjustment Act (TULRAA) does not recognize an organization as a trade union if the organization allows a non-worker to join, provided that a dismissed person shall not be regarded as a non-worker, until a review decision is made by the National Labor Relations Commission when he/she makes an application to the Labor Relations Commission for remedies for unfair labor practices. Section 23 of the TULRAA restricts union officials to being elected only from union members with tenure of not more than three years.

A revised bill by the Tripartite Agreement, which allows a dismissed worker to sustain union membership in case of above-enterprise level union, was presented to the National Assembly in February, 1998, but it was not enacted[2]. The Assembly, however, decided to positively consider a revision of relevant provisions concerning a dismissed worker's membership to an above-enterprise level union, taking into

2) Environment Labor Committee of the Assembly decided not to revise the current provision because it considered that the revised bill was in contradiction to the definition of a worker in Section 2(1) of the TULRAA, which is a core concept comprising a trade union.

consideration of the Tripartite Agreement.

(2) Jurisprudence and Academic Theories in Korea

The provision regarding the denial of dismissed and unemployed workers to keep their union membership aims at securing the identity and independence of a trade union. Yet, a problem lies in the scope of a 'non-worker'. Most academic theories argue 1) concepts of a 'worker' contained in the Labor Standards Act (LSA) and the TULRAA are different with the latter having a broader sense, including dismissed and unemployed workers, and 2) in case of an enterprise-level union that has employees as members, 'non-workers' refer to those who are not contracted to the company, while in the TULRAA, dismissed workers are exceptionally allowed to union membership[3]. Jurisprudence has recognized the concepts of a 'worker' in the two laws as the same[4]. But it should be noted that all of these precedents are concerned with the enterprise-level unions, or with the right to organize of labor providers that can not be included to workers defined in the LSA (for example, commissioned sellers of dried fisheries and caddies at golf courses). There is a lower court decision that ruled a temporarily unemployed worker or a person who is seeking a job is also a 'worker' whose three basic labor rights should be secured[5].

(3) ILO's Position and Cases of Other Nations

The ILO has requested the Korean government several times to repeal the provisions concerning the restriction on union membership and officials. The

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3) Kim Yoo-sung, "Labor Laws II", Beomoonsa, 1997, p.62. ; Lee Byong-tae, "Latest Labor Laws", Joongang Economy, 2001, pp.126-127. ; Lee Sang-yoon, "Labor Laws", 3rd Ed., Beomoonsa, 1999, p.529. ; Lim Jong-ryool, "Labor Laws", 3rd Ed., Pakyoungsa, 2002, pp.29-40. ; The Judicial Research & Training Institute, "Trade Union and Labor Relations Adjustment Act", 2001, p.67.

4) Supreme Court Decision No. 90Nu9438 dated May 26, 1992 ; Seoul Higher Court Decision No. 2001Ra183 dated Dec. 28, 2001 ; Seoul Administrative Court Decision No. 2001Gu6783 dated Sept. 4, 2001 ; Seoul Administrative Court Decision No. 2001Gu48374 dated April 30, 2002.

5) Seoul Administrative Court Decision No. 2000Gu30925 dated Jan. 16, 2001.

Committee on Freedom of Association (CFA) cited major reasons for the recommendation as follows: 1) the provisions entail the risk of acts of anti-union discrimination being carried out to the extent that the dismissal of a trade union activist would prevent him from continuing his trade union activities within his organization[6], 2)the provisions can lead to the questioning of the validity of, or the refusal to register, an organization on the pretext that the persons in the union executive bodies are not qualified to be members[7], 3) the determination of conditions of eligibility of union membership or union office is a matter that should be left to the discretion of union by-laws and the public authorities should refrain from any intervention which might impair the exercise of this right by trade union organizations[8].

In France, according to section L.411-7 of the French Labor Code (Code du Travail) a person who has been worked at a certain job for more than a year can join a union organization or keep his union membership even after quitting the work. Section 2(3) of the National Labor Relations Act (NLRA) of America does not confine the concept of an 'employee' to a person who works for an employer. In addition, the term 'employee' shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially employment. In the section 296(1) of the Trade Union and Labor Relations (Consolidation) Act of the U.K., 'worker' means an individual who works, or normally works or seeks to work under a contract of employment, or under any other contract whereby he undertakes to do or perform personally any work or services for another party to the contract who is not a professional client of his.

6) CFA Report No. 306, Case No. 1865, Document: Vol. LXXX, 1997, Series B, No.1, para. 333.
7) CFA Report No. 307, Case No. 1865, Document: Vol. LXXX, 1997, Series B, No. 2, para. 224.
8) CFA Report No. 309, Case No. 1865, para. 153, Document: Vol. LXXXI, 1998, Series B, No. 1, para. 153.

(4) Desirable Policy Approach

- Expansion of the recognition of union membership and regulation on union activities within the company by a union member who is not an employee

Unlike other nations where above-enterprise level unions such as industrial union are common, enterprise-level unions are prevalent in Korea despite a diversification of union organization types. A sampling survey of 507 businesses conducted by the Korea Labor Institute from September and October, 2002 showed that 69.2% of the companies had an enterprise-level union. Even in those companies with industrial unions, the unions had mostly been converted from the previous enterprise-level union. So it can be said that union activities are centered around an enterprise-level. The current law restricting non-employee union membership reflects this characteristic of Korean trade unions. Courts and labor administrative institutions have interpreted the concept of a 'worker' on the assumption that a worker who is a union member of the company must be an employee of the company. But since an unfair labor practice by an employer can undermine the establishment and continuance of a union, a special provision was enacted to recognize union membership of dismissed workers under certain conditions[9]. However, this provision helped some justly dismissed workers, once they applied for relief, to maintain their membership and thereby enter company premise and intervene in union activities, unstabilizing labor-management relationship in the company.

Differences in interpreting the concept of a 'worker' according to a union organization level cause confusion in legal system and interpretation. Confinement of union membership to employed persons (employees) only because enterprise-level unions are common is not appropriate considering freedom of union establishment (section 5 of the TULRAA), ILO's freedom of association, and legal cases in other nations. Yet, problems that can arise when an unemployed or dismissed worker can maintain union membership should be taken into consideration at the same time since,

9) Supreme Court Decision No. 91Da14413 dated March 31, 1992 ; Supreme Court Decision No. 92Da42354 dated June 8, 1993.

when non-workers of a company get access to company premise, it is highly likely that freedom of the company and the employer's property right will be infringed on. Therefore, when the broader sense of a 'worker' is recognized in law, the employer's rights and freedom should also be protected, so that power between labor and management is balanced and the relationship is stable. Concerning the union activities, the ILO considers that governments should guarantee access of trade union representatives to workplace, with due respect for the rights of property and management[10]. In America, stricter regulations are applied to union activities within the company by outsiders of the company than by employees. The employer holds the right to prohibit union organizational activities within the company by outsiders of the company such as a union organizer[11].

In conclusion, union membership of an unemployed or dismissed worker should be recognized while union activities by outsiders of the company are possible only with the consent of the employer, considering the unique situation in Korea where enterprise-level unions are prevalent and union activities take place mostly within the company[12].

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10) ILO, *Freedom of Association : Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fourth(revised) edition, 1996, para. 954. (This document is referred as ILO (1996) in this article.)

11) U.S. Federal Supreme Court emphasizes the necessity of appropriate adjustment between freedom of association and the employer's property rights. The Court ruled that when the union have other ways to access to the employee by resonable efforts and when the employer is not discriminating only against the union activities, the persuasion and booklet distribution within the company by outsiders of the company can be prohibited. Referred from Nakakubo Yuya, "The U.S. Labor Laws", Koubundou, 1995, pp.49-52.

12) To be more specific, it would be appropriate to repeal section 2(4)(d) of the TULRAA and to create a new provision concerning union activities within the company to ensure that 1) union activities within the company take place outside working hours in accordance with reasonable rules and restrictions stemming from the employers' property management rights, as long as there is no consent of the employer or there are no fair and urgent cause or alternatives 2) non-employees (those without a direct employment relationship to the company or the workplace) can participate in union activities only when the employer agrees, as long as the non-employee is not a union representative.

2. Establishment of Federations of Unions and Organization of Union

(1) Problems of Restrictions on the Establishment of Federations of Unions and Solutions

Section 10(2) of the TULRAA recognizes a federation as comprised of trade unions in the same industry and a confederation as comprised of federations or trade unions by industry nationwide.

However, this provision should be reviewed. The scope of occupational interests for workers that a federation advocates is for the federation's own choosing. Legislation restricting the scope of federations is incompatible with freedom of establishment and the joining of trade unions. Article 5 of the ILO's Convention No. 87 upholds the right of worker organization to establish and join federations and confederations. The ILO clarified that 1) a worker organization should have the right to join the federation and confederation of its own choosing, subject to the rules of the organizations concerned, and without any previous authorization[13], 2) legislation which prevents the establishment of federations and confederations bringing together the trade unions or federations of different activities in a specific locality or area is incompatible with Article 5 of Convention No. 87[14], 3) any restriction, either direct or indirect, on the right of unions to establish and join associations of unions belonging to the same or different trades would not be in conformity with the principles of freedom of association[15]. In France, a trade union can be established when occupational interests are uniform, similar, or relevant, but associations of unions have no such restrictions to establish and indeed, a critical factor in organization association is whether the disposition of the member unions is similar.

To conclude, it is desirable to repeal section 10(2) of the TULRAA, which restricts the scope of association of unions, because the provision is not in conformity

13) ILO(1996), para. 608.
14) ILO(1996), para. 612.
15) ILO(1996), para. 618.

with the right of association guaranteed by the Constitution and the principles of freedom of association of the ILO. And also this is a matter that legislation should not intervene or restrict on.

(2) Principles of Freedom of Organization of Trade Unions and Characteristics of Korea Labor-Management Relationship

Article 7 of the TULRAA Enforcement Decree stipulates that a labor organization that is established at an independent business or workplace which has the right to determine the working conditions may, notwithstanding its name such as section, report on the establishment of a trade union.

A question on the desirability of the provision may arise in view of the fact that it is entirely an internal matter of the union to decide the extent of the rights and autonomy of the union section. And Article 7 of the TULRAA Enforcement Decree could consolidate the current trend of enterprise level unions, because in law it guarantees independence of union sections in relations with above-enterprise level trade union[16]. The ILO also includes rule making and internal functioning in the principles of freedom of association and restrictions on this principle should have the sole objective of protecting the interests of members and guaranteeing the democratic functioning of organizations[17]. However, the Supreme Court ruled that when a section of a trade union acts as an independent organization with its own functioning and administration in matters uniquely related to the organization or its members, independent collective bargaining can be carried out and therefore a collective agreement can be reached, which is not affected by whether or not the section

16) This provision will entail the risk of inducing to enterprise-level unions or affiliate organizations of the company (while having an effect to reduce establishment of above-enterprise level unions). It is also incompatible with section 5 of the TULRAA, which guarantees free organization of trade union. In addition, some criticise that this provision is not in conformity with jurisprudence that union's sections are not subject to register because they are not trade unions. Regarding this criticism, refer to Lim Jong-ryool, op. cit., p.44 and Kim Hyong-bae, "Labor Laws", 12nd Ed., Pakyoungsa, 2001, p.560.

17) ILO(1996), para. 331.

reported the establishment of the organization in accordance with Article 7[18]. This reflects a characteristic of Korean labor-management relations where many unions transformed into industrial unions, while, in reality, they are acted as if they are an enterprise union in terms of union activities and collective bargaining. Industrial unions have failed to excercise leadership over their sections and those who converted from enterprise unions did not give up their vested interests while trying to put pressure on the employers with the industrial union system. Some may dismiss this current trend as a temporary symptom of the transitory period, but tortured labor-management relations can lead to prolonged unstable relationship.

In conclusion, it is desirable to repeal Article 7 of the TULRAA, which is incompatible with freedom of establishment of trade union guaranteed by the TULRAA and the principles of freedom of association of the ILO. The court rules, which now reflect the unstable labor-management relations, are expected to change in line with the settlement and development of reasonable labor-management relations.

3. Provision of Facilities to Workers' Representative

(1) Ban on Wage Payment to Union Officials by the Employer and ILO's Positions

Sections 24(2) and 81(4) ban wage payment for full-time officials of a trade union and considers this act as an unfair labor practice, provided that the application of the law be delayed until 2006. The ILO has requested the Korean government to repeal section 24(2) as wage payment should not be subject to legislative interference. It also considers that abandoning such a widespread, longstanding practice as the payment of wages of full-time unions officials by employers may lead to financial difficulties for unions and entail the risk of considerably hindering their functioning[19].

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18) Supreme Court Decision No. 2000Do4299 dated Feb. 23, 2001.
19) CFA Report No. 307, Case No. 1865, Document: Vol. LXXX, 1997, Series B, No. 2, para. 225.

(2) ILO's Standards on Facilities Afforded to Workers' Representatives and Cases of Other Nations

With regard to granting facilities to workers' representatives in the undertaking, Article 2 of Convention No. 135[20] and Paragraph 10 of Recommendation No. 143[21] stipulate that workers' representatives (trade union representatives or elected employees' representatives) should be afforded the necessary time off from work without loss of pay. Since reasonable limits can be set on the amount of time off, it need not be full time off and account should be taken of the characteristics of the industrial relations system of the country and the needs, size and capabilities of the undertaking concerned, and the granting of such facilities should not impair the efficient operation of the undertaking concerned.

In France, a person who acts as the representative of the union which has appointed him vis-à-vis the employer (called 'union delegates') is guaranteed a certain amount of paid time off per month in proportion to the size of the company. In the U.K., a member who is acting as a representative of a recognised union is granted time off but there is no requirement that union members or representatives be paid for time off taken on trade union activities[22].

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20) The Article stipulates that 1) facilities in the undertaking shall be afforded to workers' representatives as may be appropriate in order to enable them to carry out their functions promptly and efficiently, 2) in this connection account shall be taken of the characteristics of the industrial relations system of the country and the needs, size and capabilities of the undertaking concerned, and 3) the granting of such facilities shall not impair the efficient operation of the undertaking concerned.

21) The Recommendation stipulates workers' representatives in the undertaking should be afforded the necessary time off from work, without loss of pay or social and fringe benefits, for carrying out their representation functions in the undertaking, 2) in the absence of appropriate provisions, a workers' representative may be required to obtain permission from his immediate supervisor or another appropriate representative of management designated for this purpose before he takes time off from work, such permission not to be unreasonably withheld, and 3) reasonable limits may be set on the amount of time off which is granted to workers' representatives.

22) ACAS, *Time off for trade union duties and activities*, ACAS code of practice 3, 1998, pp. 16-17.

(3) Desirable Policy Approach

- Settlement of the principles of union activity costs covered by union and the enhancement of the status of employees' representative in work council

Conflicts between labor and management have intensified as trade unions have demanded more full time union officials be paid for time off while management has been opposed to it. Hence, the issue of full time union officials' payment was one of the factors unstabilizing labor-management relationships. Therefore, the TULRAA deferred the decision to ban the payment of wages to full time union officials so that trade unions could become financially self-sufficient during the period. The question is whether it is desirable to prohibit the payment by law. In dealing with labor-management relations within a company, employers want a capable and reasonable workers' representative as a counterpart in dialogue. Also, for a workers' representative to carry out his function, the employer should grant facilities to him to some extent. In Korea, however, it is a grave problem that labor and management lack a reasonable framework of rules regarding the number of full time union workers, the amount of time off, and the level of payment. Both sides are to blame for this. While the unions' demands for payment to full time union officials are excessive and unreasonable, it is not a just solution to prohibit outright the payment to those officials.

To conclude, payment to full time union workers should be permitted in order to induce and lay the foundation for financial self-sufficiency of unions. But there may be restrictions on the scope and the number of full time officials and the amount of time off should be set by the law, within which labor and management can reach an agreement autonomously. In addition, when union pluralism will be recognized within a company, a more desirable policy approach would be to guarantee a certain amount of paid time off to employees' representative members, who act on behalf of all employees because, as mentioned in the standards of the ILO, trade unions are not the only subjects to be granted with facilities.

4. Union Shop and Limitations of Trade Union Security

(1) Current Laws That Exceptionally Approve Union Shops

Section 81(2) bans forcing an employee to join a trade union but with some exceptions. That is, 'employment of a worker on the condition that the worker should not join or should withdraw from a trade union, or should join a particular trade union' is an unfair labor practice. However, 'in cases where a trade union is representing more than two-thirds of the workers employed in the same business, a conclusion of a collective agreement under which a person is employed on condition that he/she becomes a member of the trade union shall not discriminate against the worker for reasons that he withdraws from the trade union.'

(2) Analysis of Survey Results

A sampling survey of 576 businesses conducted by the Korea Labor Institute from September and October, 2002 showed that 43.8% of trade unions (68.6% of region-based general unions, 47.4% of associated enterprise unions, 43.8% of enterprise unions, and 36.4% of industrial unions) adopted union shops.

Table 1. Types of Union (Shop System)

(numbers) %

	Total	Union Types				
		Enterprise Union	Industrial Union	Associated Enterprise Union	Region-based General Union	No Response
Respondents	(576)	(223)	(143)	(171)	(35)	(4)
(1) Open Shop	53.8	56.1	58.0	50.9	31.4	100
(2) Union Shop	43.8	42.6	36.4	47.4	68.6	
(3) Closed Shop	1.9	0.9	4.9	1.2	-	
No Response	0.5	0.4	0.7	0.6	-	

In terms of an umbrella organization, 45.4% of the Federation of Korean Trade Unions (FKTU), 43.3% of the Korean Confederation of Trade Unions (KCTU), and 27.3% of the unions that did not belong to any organization adopted the union shop system. Unions that belong to a national center showed a bigger extent of union security, regardless of either nationwide organization.

Table 2. Types of Union (Shop System)

(numbers) %

	Nationwide Central Organization			
	FKTU	KCTU	None	No Response
Respondents	(348)	(210)	(11)	(7)
(1) Open Shop	52.3	54.3	72.7	85.7
(2) Union Shop	45.4	43.3	27.3	-
(3) Closed Shop	2.3	1.0	-	14.3
No Response	-	1.4	-	-

(3) ILO's Positions and Cases of Other Nations

The ILO distinguishes between union security clauses *allowed* by law and those *imposed* by law, only the latter of which appear to result in a trade union monopoly system contrary to the principles of freedom of association[23]. The ILO also considers that problems related to union security clauses should be resolved at the national level, in conformity with national practice and the industrial relations system in each country. In other words, both situations where union security clauses are authorized and those where these are prohibited can be considered to be in conformity with ILO principles and standards on freedom of association[24]. Hence, whether or not to recognize forced association is subject to domestic laws. And legislation that recognizes the right of an employee not to join a trade union is not incompatible with freedom of association.

In France, the Constitution principle guarantees not only 'the freedom to join a

23) ILO(1996), para. 321.
24) ILO(1996), para. 323.

union' but also 'the freedom not to join unions and to withdraw freely'[25]. Union security clauses are forbidden. In the U.K., the shop system where an employee is asked to be a union member regardless of pre- or post-employment is called a closed shop, which is illegal[26]. In the U.S., under certain conditions[27], an employer can make a union shop agreement to require union membership as a condition of employment (Section 8(a)(3) of the NLRA). However, employees' opinions are respected by ruling out the application of the agreement if a majority of employees are against it.

(4) Desirable Policy Approach

- Securing the right to choose freely unions, the freedom not to join unions for a minority, and the neutral duty of employers to unions

While it is controversial whether the right to organize includes the right not to join, it is clear that the right to choose the union he wants to join should be actively guaranteed for workers. However many employees support a trade union, this right of minority employees should not be infringed on. If, when trade union pluralism is recognized at an enterprise level, an employer requires membership to a certain union for employment or sustaining employment, it can be discrimination against the other unions. Besides, a union shop agreement hinders fair competition among multiple

25) Gérard Couturier, *Droit du travail 2*, 2e éd., PUF, 1994, p.314.

26) All workers have the rights not to be dismissed for not belonging to a trade union or for refusing to join one; not to have other action taken against them by their employer to compel them to be or become members of a trade union; and not to be chosen for redundancy because they are not members of a trade union. (Department of Trade and Industry, *Union membership : Rights of members and non-members*, PL 871(Rev 7), DTI, 2002, p.13.)

27) The conditions are 1) if the labor organization is the representative of the employees, in the appropriate collective-bargaining unit covered by such agreement when made, 2) unless following an election one year preceding the effective date of such agreement the Board shall have certified that at least a majority of the employees eligible to vote in such election, by an application of more than 30% of employees, have voted to rescind the authority of such labor organization to make such an agreement, 3) the agreement takes effect after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later.

unions, whose goals are to protect employees' interests. Therefore, if trade union pluralism is permitted at an enterprise level in the future, the current law recognizing union shop agreements under certain conditions should be reviewed.

Ⅱ. Equality and Balance of Power in Collective Bargaining/Industrial Acts

1. Single Bargaining Channel

(1) Current Laws That Plan to Permit Union Pluralism with Condition of Single Bargaining Channel

In 1997, the TULRAA notified of the recognition of multiple unions at the enterprise level from the year 2002. In 2001, however, a revised law postponed it for five years based on the Tripartite Agreement. Therefore, currently, a trade union cannot be set up within a company if its member targets are the same as the existing union. And the Minister of Labor, by the end of 2006, should come up with a framework and methods of collective bargaining for a single bargaining channel.

(2) Intensifying Conflicts over Multiple Unions Created by Diversification of Union Organization Types

Even under the current TULRAA, multiple unions can exist within the company, for example, in cases where two companies with two separate unions merge, two different unions of different job categories (i.e. production and office work) are set up, and if an above-enterprise level union (i.e. industrial union) coexists with an enterprise union. With union movement toward industrial union, in particular, the likelihood of multiple unions at an enterprise level has significantly increased. Also on the rise are conflicts over methods and procedures of bargaining between multiple employers and industrial union. (For instance, while industrial unions insist on

collective bargaining at the same table, employers want separate bargaining.)

(3) Need for Single Bargaining Channel for Balance of Power and Stable System in Bargaining

The purpose of the current legislation permitting multiple unions under the condition of a single bargaining channel is to put in place a stable bargaining system under union pluralism and to minimize the cost of bargaining for both labor and management. A single bargaining channel is advantageous for workers because the fragmentation of unions can reduce bargaining power on the workers' part. At the same time, it also serves management well as employers will be able to avoid overlapping bargaining and apply uniform working conditions. As a result, a single bargaining channel contributes to balance of power between multiple unions and individual employers.

According to a method of unifying bargaining channels, the right of collective bargaining of unions can be restricted to some extent. Discussions so far have included an American-style exclusive bargaining representation method, a union's autonomous unification of bargaining representatives, and proportional representation of union members. The ILO considers that the system granting bargaining rights exclusively to a certain trade union would not be incompatible with the principles of freedom of association provided that it is based on objective and predetermined criteria[28]. Therefore, the method itself to permit multiple unions under the condition of a single bargaining channel cannot be seen as incompatible with the principles of freedom of association[29]. Of course, according to contents of the single channel system, the extent of restriction on the right of collective bargaining guaranteed by the Constitution can be different. Therefore, it would be ultimately desirable to come up

28) ILO(1996), paras. 311~315.

29) The ILO has requested the Korean government to speed up the process of legalizing trade union pluralism at the enterprise level and to this end promote the implementation of a stable collective bargaining system. (CFA Report No.320, Case No.1865, Vol. LXXXIII, 2000, Series B, No. 1, para. 512.)

with a method that minimizes the extent.

2. Bargaining in Good Faith and Adjustment of Industrial Acts

(1) Current Laws Requiring Good Faith and Putting Adjustment Prior to Industrial Acts

Section 30 of the TULRAA stipulates that a trade union as well as an employer should bargain in good faith with each other and should not exceed their authority. It also bans the two parties from refusing or delaying, without just causes, bargaining or concluding collective agreements. An employer can be held responsible for violating these rules through the unfair labor practice system. Unlike in the U.S., however, in Korea, unfair labor practices by trade unions are not recognized. Section 45(2) of the TULRAA stipulates that industrial action shall not be taken without completing adjustment (conciliation or arbitration) procedures and if this is violated, there is a penalty.

(2) Analysis of Survey Results on Labor-Management Satisfaction and Current Situation

The Korea Labor Institute, from September and October, 2002, conducted a survey of 700 businesses on labor-management satisfaction on bargaining and industrial dispute adjustment. The results are as follows.

First, 63.6% of employers and 51.3% of unions responded that they were (very) satisfied with the other's attitude. More unions are not satisfied with employers' bargaining attitudes. 34.1% of employers of enterprise unions were not satisfied with employees' attitudes, compared to 39.8% of the counterpart industrial unions, with the latter showing higher unsatisfaction.

Table 3. Satisfaction on the Other's Bargaining Attitude

(numbers) %

		Total	Union Types				
			Enterprise Union	Industrial Union	Associated Enterprise Union	Region-based General Union	No Response
Respondents		(700)	(246)	(181)	(226)	(40)	(7)
(1) Very Satisfied	Mana-gement	4.0	6.1	2.8	3.5	-	-
	Labor	2.6	2.8	2.3	2.6	2.4	-
(2) Satisfied	M	59.6	58.9	56.4	61.9	65.0	57.1
	L	48.7	48.1	48.3	48.7	59.5	16.7
(3) Unsatisfied	M	30.9	31.3	30.4	31.0	32.5	14.3
	L	39.3	41.4	34.7	40.8	33.3	66.7
(4) Very Unsatisfied	M	4.4	2.8	9.4	2.2	2.5	14.3
	L	8.1	7.0	12.5	6.3	4.8	16.7
No Response	M	1.2	0.8	1.1	1.3	-	14.3
	L	1.3	0.7	2.2	1.6	-	-

Second, when management refuses or is not willing to take demands of a union, 55% of the unions responded they file an adjustment application to the Labor Relations Commission, 27.7% responded they continue the bargaining while avoiding industrial actions until the demands are accepted, 7.9% answered they enter into industrial actions right away regardless of legal procedures, and 8.3% said they negotiated in an appropriate manner. In most cases (62.9%), unions stuck to their demands through industrial actions with or without adjustment procedures, while a relatively small number of unions (36%) tried to resolve conflicts in a peaceful way by continuing bargaining or negotiation.

Table 4. Desirable Methods When Management Refuses Union's Demands

(numbers) %

	Total	Union Types				
		Enterprise Union	Industrial Union	Associated Enterprise Union	Region-based General Union	No Response
Respondents	(700)	(245)	(176)	(191)	(42)	(6)
(1) continue the bargaining while avoiding industrial actions until the demand are accepted	27.7	28.1	26.1	28.3	26.2	50.0
(2) file an adjustment application to the Labor Relations Commission	55.0	55.1	55.1	55.0	54.8	50.0
(3) enter into industrial actions right away regardless of legal procedures	7.9	8.8	8.0	7.3	4.8	-
(4) negotiate	8.3	6.7	10.2	7.9	14.3	-
No Response	1.1	1.4	0.6	1.6	-	-

Third, as to whether the requirement of the Labor Relations Commission's adjustment procedures before a strike is 'very necessary' or 'necessary and effective', 64.7% of management answered positively, while 40.3% of labor did so. Regarding the system of putting adjustment before industrial actions, more than half of labor considers it 'unnecessary' (22.7%) or 'necessary but inefficient' (36.1%).

Table 5. Evaluation on Requirement of Adjustment Procedure by Labor Relations Commission

(numbers) %

		Total	Union Types				
			Enterprise Union	Industrial Union	Associated Enterprise Union	Region-based General Union	No Response
Respondents		(700)	(246)	(181)	(226)	(40)	(7)
(1) very necessary	Mana-gement	33.7	36.6	30.9	34.1	25.0	42.9
	Labor	19.0	20.0	18.2	14.7	38.1	-
(2) necessary and efficient	M	31.0	25.2	35.9	31.0	45.0	28.6
	L	21.3	17.9	26.7	22.5	16.7	16.7
(3) necessary but inefficient	M	31.1	33.3	28.7	31.4	27.5	28.6
	L	36.1	38.9	30.7	39.3	23.8	50.0
(4) unnecessary	M	3.7	4.9	3.3	3.1	2.5	-
	L	22.7	22.5	23.9	22.5	19.0	33.3
No Response	M	0.4	-	1.1	0.4	-	-
	L	0.9	0.7	0.6	1.0	2.4	-

Fourth, for reasons for the unnecessity or inefficiency of the labor dispute adjustment system, management cited the lack of awareness of the Commission members of the labor's or company's situation (41.4%) or passive attitude by labor in the process of adjustment (41%), while labor said that they cannot trust the Commission members (33.7%), that the members are not well aware of the company's situation (32%), and that management are passive in the process of adjustment (28.4%). Setting aside lack of expertise and knowledge on the company's situation of the Commission members, management fault labor's passive attitude, while labor faults the unreliability of the members.

Table 6. Reasons for Unnecessity/Inefficiency of Labor Dispute Adjustment System [Management]

(numbers) %

	Total	Union Types				
		Enterprise Union	Industrial Union	Associated Enterprise Union	Region-based General Union	No Response
Respondents	(244)	(94)	(58)	(78)	(12)	(2)
(1) we cannot trust the Commission members	11.5	5.3	10.3	17.9	25.0	-
(2) Commission members don't know about labor or the company's situation	41.4	39.4	37.9	46.2	50.0	-
(3) the adjustment period is too short	2.9	1.1	5.2	3.8	-	-
(4) either labor or management is passive in the process	41.0	51.1	44.8	26.9	25.0	100.0
(5) the process is only formal	1.6	1.1	1.7	2.6	-	-
(6) the adjustment period is too long	0.4	1.1	-	-	-	-
No Response	1.2	1.1	-	2.6	-	-

Table 7. Reasons for Unnecessity/Inefficiency of Labor Dispute Adjustment System [Labor]

(numbers) %

	Total	Union Types				
		Enterprise Union	Industrial Union	Associated Enterprise Union	Region-based General Union	No Response
Respondents	(412)	(175)	(96)	(118)	(18)	(5)
(1) we cannot trust the Commission members	33.7	31.4	37.5	37.3	16.7	20.0
(2) Commission members don't know about labor or the company's situation	32.0	32.6	28.1	32.2	38.9	60.0
(3) the adjustment period is too short	1.9	3.4	2.1	-	-	-
(4) either labor or management is passive in the process	28.4	30.3	25.0	28.0	33.3	20.0
(5) the adjustment period is too long	2.5	0.6	3.1	0.8	5.6	-
(6) the right to strike is infringed on	0.5	0.6	1.0	-	-	-
(7) the adjustment process itself is not objective	0.5	0.6	-	-	5.6	-
(8) the representatives of the two parties should participate by law	0.2	0.6	-	-	-	-
No Response	1.2	-	3.1	1.7	-	-

(3) ILO's Position and Cases of Other Nations

The ILO puts an emphasis on bargaining in good faith for the maintenance of the harmonious development of labor relations. In addition, the ILO considers that 'provisons which, for instance, require the parties to exhaust mediation or conciliation procedures or workers' organizations to observe certain procedural rules before launching a strike are admissible, provided that they do not make the exercise of the right to strike impossible or very difficult in practice'[30] and generally approves the ban on strikes during the process of adjustment.

In Germany, where procedures in collective bargaining are highly formalized, jurisprudence and theories hold that a strike can only be used as a last resort, when

30) ILO, *Freedom of Association and Collective Bargaining*, 1994, para. 179.

all other possibilities for reaching agreement have been exhausted (*ultima ratio* principle). In America, a trade union which has an exclusive bargaining right has a duty of good faith in bargaining, and refusing bargaining with the other party is considered as an unfair labor act. Therefore, entering into industrial actions without bargaining in good faith with employer is seen as an unfair labor practice.

(4) Necessity of Prior Adjustment Procedure to Secure Bargaining in Good Faith and Administrative Instruction of the Labor Relations Commissions

The current TULRAA adopted the adjustment prior to industrial action system and abolished the industrial action notice and cooling-off period system, in order to secure the efficiency of adjustment procedure and promote efforts to resolve conflicts in a peaceful manner. Under the current law, an industrial action without adjustment procedures is illegal and the Labor Relations Commission, which is in charge of adjustment service, requires the two parties to further continue with autonomous bargaining when efforts to undertake bargaining are considered not enough, which is called administrative instruction. However, the adjustment system, combined with administrative instruction, entails a risk of abuse by both labor and management. Either labor or management could not bargain in good faith. When management refuses bargaining without a just cause or is not faithful in bargaining, the adjustment system can act as a restriction on right to strike. Therefore, the Commission do not carry out administrative instruction and proceed adjustment in this case. In the meantime, when a trade union files an adjustment application to the Commission without participating in bargaining with faith, efficiency of adjustment cannot be secured, and in some cases, adjustment itself is impossible, which leads to a situation where, if not properly controlled, the adjustment system acts merely as a perfunctory step for industrial actions.

The violation by employers of the obligation to bargain in good faith is subject to regulation because it is considered an unfair labor practice. Yet, there is no legal regulation that prevents such violation by labor. Under this circumstance, the

Commission's administrative instruction is the only practical way to check and oversee, at least indirectly, whether the duty of bargaining in good faith is being well fulfilled by unions.

The current law is clear about the fact that adjustment application should be filed after all the possible bargaining is completed. An adjustment application without finishing all bargaining procedures is a violation of section 30 of the TULRAA (Ban on Delay of Bargaining without Bargaining in Good Faith or without Just Causes). Therefore, the Commission should be able to carry out administrative instruction if labor and management do not conduct bargaining fully and in good faith, if the failure is not attributable to management, and if the situation continues even after the Commission's adjustment efforts. And if the administrative instruction is carried out, it can't be said that adjustment procedures have been undertaken. Also, the procedures of an industrial action cannot be considered as just if it takes place despite administrative instruction. Otherwise, 1) a problem may arise because the current law's aim to leave industrial actions as the last resort will not be fulfilled (because union may hastily declare that bargaining has failed and enter into industrial actions after formally passing though adjustment procedures), 2) the employer's right to refuse illegal and unreasonable demands by union can be infringed on, 3) the adjustment period that is aimed at promoting bargaining (presenting each party's opinions and searching for agreement) can be used as a preparation period for the union to make the other party give in by threatening with a strike.

3. Notification of Third-Party Intervention in Collective Bargaining and Industrial Disputes

(1) Contents of Current Law and Intention of Legislation

According to section 40 of the TULRAA, a trade union and an employer may be supported by 1) industrial federations or a national confederation of which the trade union is a member, 2) an employer's association of which the employer is a

member, 3) a person who has been notified of to the Administrative Authorities by the trade union or the employer concerned to obtain support, or 4) a person who is entitled to provide support under other relevant laws or regulations, provided that persons other than those mentioned above shall not intervene in, manipulate, or instigate collective bargaining or industrial action. Anyone who violates section 40 is subject to imprisonment of up to three years, or a fine of up to 30 million won. Any trade union or employer who intends to report should submit to the Administrative Authorities the papers, entering personal particulars, matters in respect of which assistance is required, and the method of providing assistance at least three days before the date on which it or he seeks assistance in relation to the collective bargaining or the industrial action in question (section 19 of the Enforcement Decree of the TULRAA).

The requirement to notify to the Ministry of Labor the identity of third parties aims at securing labor-management autonomy in collective bargaining and in resolving industrial disputes by excluding third party intervention in bargaining or industrial actions. Administrative authorities can neither turn down nor refuse the registration because the notification of the identity of third parties is to distinguish those notified from those not, not to give authorization[31].

(2) ILO's Positions

With regard to the notification system, the ILO Committee says it understands that this measure does not constitute a requirement of previous authorization[32], but the Committee requested the government several times to abolish the notification requirement. It cited for reasons 1) that the measure is onerous on unions and unjustified, 2) that it would appear to the Committee that this measure is not a pure formality since non-notified persons who intervene in collective bargaining are liable

31) Lim Jong-ryool, Ibid. p.195

32) CFA Report No. 307, Case No. 1865, Document: Vol. LXXX, 1997, Series B, No. 2, para. 218.

to a penalty, and 3) the provisions entail serious risk of abuse and are a grave threat to freedom of association[33].

(3) Desirable Policy Approach

- Exclusion of a possibility of abuse and regulation on actions that undermine labor-management autonomy

Unjust intervention of governments in labor-management relations is incompatible with the principles of labor-management autonomy. So is unjust intervention of third parties. The purpose of the notification requirement is to guarantee and promote substantial labor-management autonomy. And the current measure does not restrict the scope of third parties. A union can be supported by a third party after notification although employer does not want the third party. And administrative authorities cannot refuse notification.

As the ILO pointed out, the requirement itself can be onerous on unions. However, the notification period (three days prior to support) and contents of notification (personal particulars, methods and contents of support) should not be too big a burden in light of benefits for unions when they get support from the third party that employers do not want. The problem, then, lies in the possibility that the penalty provision is abused. Imprisonment of up to three years or a fine of up to three million won is indeed a heavy penalty. Since the purpose of the notification requirement is to ensure labor-management autonomy, penalties for un-notified intervention and support is restrictions and infringement on freedom of unions to get support from outside. Meanwhile, the notification itself is not a critical factor because even though a third party's identity is notified, the third party's actions cannot be tolerated if they undermine labor-management autonomy. Those illegal actions are subject to legal sanction regardless of notification. Therefore, the purpose of the notification requirement can be achieved without the penalty provisions.

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33) CFA Report No. 309, Case No. 1865, Document: Vol. LXXXI, 1998, Series B, No.1, para. 147.

4. Replacement of strikers as Counter Measure to Industrial Actions

(1) Restriction on Replacements and Its Purpose

Section 43 of the TULRAA bans hiring persons who are not related to their business operations, using replacements so as to continue works which have been stopped by industrial action, or contracting or subcontracting works which have been suspended during a period of industrial action. And section 16(1) of the Workers' Dispatch Act prohibit an employer of dispatch workers from sending his workers to continue works that have been stopped by industrial action.

The purpose of these restrictions is to ensure the efficiency of industrial action by unions[34]. It should be noted, however, that replacements by 'persons who are not related to the business operations' are banned, and replacements by 'those who are related' are permitted. That is, hiring employees and replacements from other companies are banned, but replacements are possible if they are employees of the business concerned whether or not they are union members or belong to other workplaces[35]. Although there has not been a court decision as to whether the restriction on replacements can be applied when industrial action is carried out illegally, some view that it should be applied regardless of industrial action's legalit y[36].

(2) ILO's Positions and Cases of Other Nations

The ILO Committee considers the replacement of strikers to be justified in the event of a strike in an essential service in which strikes are forbidden by law, and when a situation of acute national crisis arises[37]. Specific contents are as follows.

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34) Supreme Court Decision No. 91Da43800 dated July 14, 1992
35) Kim Yoo-sung, op. cit., p.292.
36) Lim Jong-ryool, op. cit., p.164.
37) Bernard Gernigon, Alberto Odero and Horacio Guido, *ILO principles concerning the right to strike*, International Labour Office, 2000, p.46.

- The hiring of workers to break a strike in a sector which cannot be regarded as an essential sector in the strict sense of the term, and hence one in which strikes might be forbidden, constitutes a serious violation of freedom of association[38].
- If a strike is legal, recourse to the use of labor drawn from outside the undertaking to replace the strikers for an indeterminate period entails a form of derogation from the right to strike, which may affect the free exercise of trade union rights[39].
- Whenever a total and prolonged strike in a vital sector of the economy might cause a situation in which the life, health, or personal safety of the population might be endangered, a back-to-work order might be lawful, if duration could cause such a situation. However, a back-to-work requirement outside such cases is contrary to the principles of freedom of association[40].

The U.S. is a typical nation where replacements are actively recognized. the National Labor Relations Act guarantees the right to strike and prohibits an employer from discharging striking employees. The U.S. jurisprudence show that as a balance to the right to strike, employers have the legal right to continue operations during a strike, including the right to hire replacements temporarily or permanently for their striking employees. In the case of an economic strike (related to terms and conditions of employment), permanent replacements are possible. The Federal Supreme Court set up this doctrine in 1938. If the disputes involves economic demands which the employer is unable or unwilling to meet, the employer may hire permanent replacement workers to fill the jobs of employees who choose not to work[41]. Employers insist that trade unions and their members would be more likely to engage in a strike if permanent replacements are not permitted and strikers would be assured

38) ILO(1996), para. 570.
39) ILO(1996), para. 571.
40) ILO(1996), para. 572.
41) CFA, Report No. 278, Case No. 1543 (Complaint against the Government of the United States presented by the American Federation of Labor and Congress of Industrial Organizations), para. 73.

of their jobs once the strike is over[42]. However, if any employer causes or prolongs a strike by committing an unfair labor practice (i.e. by violating the NLRA), it is not allowed to exacerbate the breach by permanently replacing its striking employees.[43]

(3) Desirable Policy Approach

- Balance between the right to strike, the freedom of enterprise and the protection of public interest

During a period of industrial action, an employer has the freedom to continue operations, which, in principle, includes the freedom of hiring. The current TULRAA restricts hiring or replacements of persons who are not related to the business concerned (hereinafter called 'outsider'). Also, in view of the fact that a strike makes the employment relationship temporarily suspended, not permanently ceased, workers are ensured the continuance of their jobs after strike. However, a fine balance should be kept between the right to strike and the freedom of enterprise (operation) or protection of public interest, and there should be no excess restriction or infringement on either side. Taking account of these factors, it would be desirable to permit temporary replacements of outsiders under the following conditions.

First, if, in case of illegal strike, replacements are banned, it is a substantial restriction and infringement on freedom of continuing operation. Replacements should be possible if industrial action continues even though the Court issued the injunction against a striking trade union. Replacements should also be possible, during a period of strike, if an operation or a facility that should be continued is suspended. Cases in point would be examples contained in sections 38(2) and 42(2) of the TULRAA (works to prevent operational equipment from being damaged, or to prevent raw materials or manufactured goods from being impaired or deteriorated, and the normal maintenance and operation of security facilities of a workplace). In addition, if an

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42) Fred Witney and Benjamin J. Taylor, *Labor Relations Law*, 7th edition, Prentice Hall, 1996, p.284

43) CFA, Report No. 278, Case No. 1543, para. 73.

interruption of service would endanger the life, safety or health of persons, and if collective agreement has designated certain operations in which a strike cannot be called but it is violated, replacements must be possible.

Second, even though industrial action started with just cause, if its method and form jeopardize a company's existence, replacements should be possible by the Court's interim measures because the right to strike is not the right to put the company in danger. Therefore, in this case, replacement can act as a countermeasure by an employer against abuse of the right of industrial action.

Third, replacements should be permitted in essential services presented by the ILO in the strict sense (those, if suspended, would endanger the life, personal safety or health of the whole or part of the population). It would be also desirable to designate services that are not essential but should be maintained in the event of a strike so as to satisfy the basic needs of the users of these services by collective agreement, and if violated, replacements should be permitted.

Ⅳ. Conclusion

Korean labor laws have gradually progressed in regard to freedom of association, which is evidenced by the permission of organizations of teachers and of trade union pluralism at the national and industrial levels. However, problems persist over such controversial issues as the right of association of public servants, membership of dismissed workers, multiple unions within a company, wage payment to full-time union officials, and essential pubic services. Under these circumstances, we need to better understand the ILO's positions and put into the perspective of the present and future of the labor relations law and labor-management relationship is required. As a member nation of the ILO, Korea has the duty to abide by the ILO principles that guarantee freedom of association. It is urgent to review some of the problems of the current system and practices that could undermine labor-management autonomy and to come up with desirable policies. This research will serve as part of these efforts. Through further discussion, today's event will mark the beginning to establish systems and practices that serve labor-management autonomy and that labor, management, and government could be all satisfied with.