

The Changes in Enterprise Organization and Labor Law in Japan: An Historical Exploration

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I. Introduction

After the collapse of the bubble economy in the early 1990s, Japan experienced an unprecedented economy slump. To cope with the inanimate Japanese economy and the intensified competition in the globalized market, Japanese companies began restructuring their enterprise organizations. The Japanese Government introduced a series of new laws to encourage and facilitate the changes in enterprise organizations.

I set for myself three tasks with this article. First is to predict to an extent the way in which enterprise organizations will change henceforth; second is to examine from an historical perspective how that change differs from the dynamic between enterprise organization and labor law existing heretofore; and third is, based on the foregoing, to determine what impacts the changes in enterprise organization will have on labor law.

II. What Is “Enterprise Organization” to Labor Law?

To examine the connection between enterprise organization changes and labor law throughout history, we must first answer this question: When we try to find what “enterprise organization” means to labor law, what are we asking? What I shall do here is to begin with the concept of an enterprise, and get a good idea of what “enterprise organization” is to labor law.

Incidentally, the very question “What is an enterprise?” is a hard one

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to answer, but it is safe to say that an enterprise in the sociological sense, which people generally perceive to be an enterprise, is “an independent profit-making economic unit.”⁽¹⁾ In a broad sense this means “an independent economic unit that conducts the same kind of economic actions in a continuous and planned manner,” while in a narrow sense it means “a private enterprise operated with the purpose of pursuing profit.”⁽²⁾

By contrast, the legal concept of an enterprise is a “company” with an independent corporate status, and it is normally defined as “a profit-making corporation established pursuant to commercial law.”⁽³⁾ An enterprise as a legal concept boils down to a “company” under commercial law, but this is not to be construed that researchers have adequately elucidated the relationship between the enterprise as a sociological concept and the enterprise as a legal concept, or whether, apart from the “company” under commercial law, it is possible to assume the concept of “enterprise” under labor law. Still, one must take note that both the sociological and legal concepts of the enterprise employed until now incorporate the implication and the assumption that an enterprise is an organization based on ties among a number of people.

The next question, then, is: What is the “organization” tacitly integrated into the concept of the enterprise? According to Japanese sociologist, Kazuo Moriyama, the prevailing concept of an organization has been “a system of collaboration by people working together to achieve a common goal, with that collaboration normally sustained by a system of authority based on commands and obedience.”⁽⁴⁾ Hence an organization has a scope demarcated by “a common goal,” “collaboration,” and “a system of authority based on commands and obedience.” An organization has a peculiar boundary that demarcates inside from outside, and the members that make up that organization are on the inside of its boundary. Therefore the matter of what “organization” is to an enterprise

(1) Takeuchi, A., “‘Kigyo to Shakai’ (Enterprise and Society)’ in Kihon Hogaku (Fundamental Jurisprudence), (Tokyo, Iwanami-shoten, 1983) vol. 7, 6.

(2) Takeuchi A., Matsuo K., Shiono H., (eds.), Shin Horitsugaku Jiten (New Law Dictionary) (Tokyo, Yuhikaku, 1991), 209–210.

(3) Ibid., 113.

(4) Moriyama K., Seidoron no Kozu (Structure of Institutional Theory) (Tokyo, Sobunsha, 1995), 18.

breaks down into two questions. First is the question of scope: What is the inside of an enterprise that differentiates it from the outside? Second is the question of members: Who are the members making up the organization?

This shows that the matter of what an enterprise organization is to labor law involves two questions. First, as far as labor law is concerned, where is the boundary between the inside and outside of an enterprise's organization (its scope under labor law)? Second, who are the members who compose the inside of the organization (its members under labor law)?

III. Enterprise Organizations: Change and Aspect

Based on the foregoing discussion, I will explore how enterprise organizations are currently changing. Specifically, I will show what is changing, and how it is changing. To begin with the what, it is the traditional form of the enterprise organization, which is now under pressure to change. Below I will show what the traditional form of the enterprise organization is, and then deal with how it is changing.

1. The Traditional Form of the Enterprise Organization

The traditional form of the enterprise organization, which is now under pressure to change, can be succinctly described as an organization defined completely by corporate status. Such being the case, the enterprise organization as a legal concept and that as a sociological concept are, from the perspective of labor law, differences in the same organization as seen from different angles. Thus the scope of the enterprise organization (i.e., the boundary between the inside and outside) is demarcated by its corporate status, and its members are the workers who have entered into the contracts of employment with their corporate employers.

2. Changes in the Traditional Enterprise Organization: Two Aspects

This traditional enterprise organization is undergoing change in two aspects.

First is the aspect of organization scope. This can be seen by the appearance in recent years of many enterprise organizations which, unlike the traditional form of enterprise organization, are not defined completely by corporate status. This is the phenomenon known as “group management” or “group enterprises.” In this arrangement, multiple independent enterprises having corporate status function in an integrated manner as a single enterprise organization with “a common goal” and “a system of authority based on commands and obedience.”

There have been two ways of creating such enterprise organizations: One is a vertically integrated form with a strong “command and obedience” system, and the other is a network type with a weak “dependence and subordination” system. In either case, changes have occurred in the traditional enterprise organization defined by corporate status, so that, as a matter of organization scope, there is a divergence between the enterprise organization as a legal concept defined by corporate status, and that as a sociological concept, which is a unit actually conducting economic activities. This change in the scope of enterprise organizations have been encouraged by lifting the ban on non-operating holding companies⁽⁵⁾ and creating a legal system for company splits⁽⁶⁾. And to counterbalance the significant impact of the company split scheme, the Labor Contract

⁽⁵⁾ In June 1997, the revision of the Anti-Monopoly Law liberalized genuine holding companies.

⁽⁶⁾ Prior to the 2000 revision of the Commercial Code, company split was carried out through transfer of business or undertakings. However, in order to transfer business, the company (transferor) had to obtain individual consent of all creditors as well as those workers transferred to the transferee company. Such cumbersome procedures were thought to hinder company restructuring in Japan. Therefore, the revision of the Commercial Code introduced simplified procedures for the split of company. When a company split plan is approved by the shareholders meeting by special resolution, company split becomes legally binding to all parties concerned without obtaining their individual consent, although dissenting creditors can express objection and seek liquidation.

Succession Law (LCSL) was enacted in 2001⁽⁷⁾.

Second is the aspect of enterprise organization members. In the traditional form of enterprise organization these members have been primarily regular employees who have signed labor contracts having no fixed term. Among members there have always been part-timers, dispatched workers, and other non-regular employees, as well as in-house subcontracted workers, but the advance of information technology has recently increased the use of teleworkers⁽⁸⁾ (people working away from a company) and outsourcing that entails close cooperation, in turn bringing about fluidization of the extension and intention of the traditional form of enterprise organizations.

In conjunction with the diversification in labor supply contracts, this trend brings up an issue in traditional enterprise organizations, namely, who are the members of the organization? This change in the members of enterprise organizations have been encouraged by factors including the amendment of the Worker Dispatching Law (WDL) in 1999⁽⁹⁾.

⁽⁷⁾ When the legislative movement to introduce the company split scheme into the Commercial Code surfaced, Rengo (Japanese Trade Unions Confederation) and opposition parties strongly opposed such a movement. They contended that the proposed company split scheme could be easily abused for downsizing of redundant workers and employment security would be severely damaged. If the scheme were not accompanied by workers protective measures, they feared, employers might divide an profitable section or department from the company, allow the split legal entity to go bankrupt, and evade any employer's liability for the dismissed workers by contending that the dismissed workers are no longer workers of the original company but of the split and bankrupted company. Therefore, there was some protection against this potential misuse. However, since the proposed scheme still allowed automatic transfer of contracts of employment without workers' consent and arbitrary exclusion of workers form transfers, the necessity of striking a balance between the necessity of company reorganization and the protection of workers' interests was considered. Thus, the government proposed protective measures for workers in the event of a company split, and the LCSL was enacted along with the amendment of the Commercial Code. For the backgrounds and the details of LCSL, see Araki, T., *Labor and Employment Law in Japan* (Tokyo, Japan Institute of Labor, 2002), pp. 144–148.

⁽⁸⁾ For the details of teleworkers in Japan, see Spinks, W. A., *Telework no Seiki* (The Century of Telework) (Tokyo, Japan Institute of Labor 1998).

⁽⁹⁾ The 1999 revisions of the WDL generally liberalized workers dispatching by lifting the general prohibition. In other words, the statute reversed the system. Rather than only occupations which remain prohibited. Art. 4 Para. 1 of the 1999 WDL lists port transport, construction, guard services and others designated by the Cabinet Order as

IV. Historical Overview of Labor Law in Enterprise Organizations

How does the situation engendered by these recent changes in enterprise organizations differ from the previous situation? To answer this question, I will historically examine the changes that have occurred in enterprise organizations, with attention to the connection with labor law. To make this as easy to understand as possible, I will drastically simplify and diagram the situation.

1. First Stage: Before Labor Law

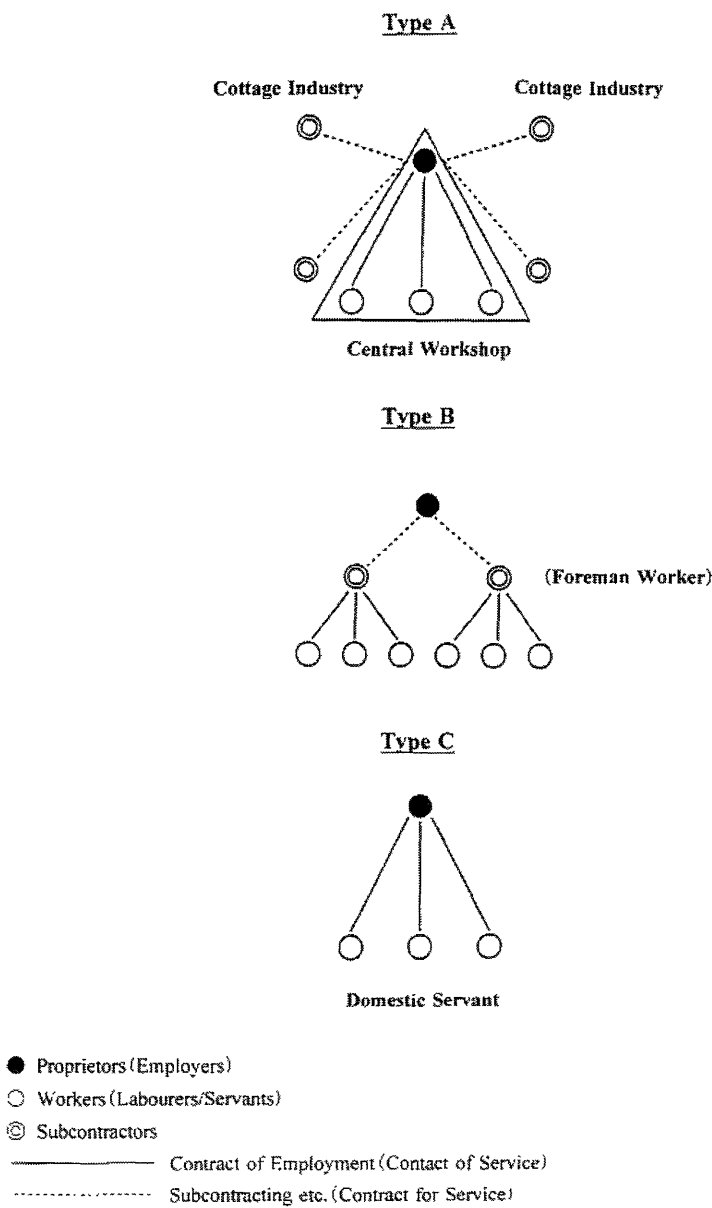
The first stage is the initial stage of capitalism before the appearance of modern labor law. At this stage various forms of enterprise organizations (types A, B, and C) having different scopes and member compositions existed concurrently (Figure 1)⁽¹⁰⁾.

Typical of type A is the textile industry. The form of production in the early days had a dual configuration comprising a central workshop and rural cottage industries. As a reflection of this, there were two different forms of employment. People working at central workshops were directly employed, making the relationship one of an employment labor supply contract, while rural cottage industry workers were indirectly hired, making the relationship one of a subcontracted labor supply contract. Typical of type B was coal mining, in which in-house indirect employment prevailed. The proprietor entered into a contract with a foreman worker who performed a certain job on an output payment basis, and that foreman in turn directly hired other people to work under him.

occupations for which workers dispatching is prohibited. Art. 4 of the Supplementary Provisions of the revised WDL also prohibits production work "for the time being". Therefore, worker dispatching is permitted for any occupation not explicitly enumerated in the WDL and Cabinet Order.

⁽¹⁰⁾ For the details of the First Stage, see Ishida M., *Kindai Kyo-keiyaku-Ho no Keisei* (The Development of the Modern Law of Contract of Employment) (Tokyo, Nippon Hyoronsha 1994), Bendix, R., *Work and Authority in Industry, Ideologies of Management in the Course of Industrialization* (Berkely, University of California Press 1974) Ch. 2.

[Figure 1] First Stage: Labor Law Regime before Modern Labor Law



The relationship between the proprietor and foreman was subcontracting, while that between the foreman and his subordinates was that of employment. Finally there is type C, small-scale cottage industry employment, in which workers were directly employed under employment labor supply contracts.

As this shows, owing to the limitations of the small technical base of industry at that time, it assumed a variety of forms with respect to both organization scope and member composition. This also affected the labor supply contract relationship between enterprises (proprietors) and workers, because a single enterprise organization would use several different kinds of labor supply contracts including subcontracting and employment.

2. Second Stage: The Labor Law Era

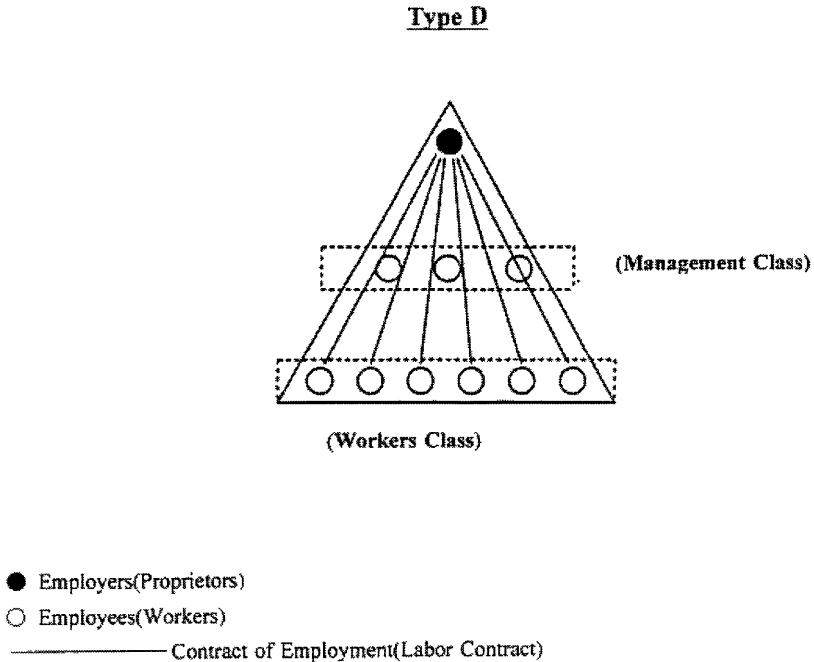
During the second stage the Industrial Revolution came, and large-scale mechanized industry arose. To paraphrase Ronald Coase⁽¹¹⁾, it was a time when modern enterprises as islands of conscious authority appeared in the market as a sea of unconscious cooperative work, and it was also a time when the modern system of labor law was formed.

Development of the stock company system in this stage made it possible to separate ownership from management, and enterprise organizations enlarged very quickly. By taking advantage of the company system, type A and B proprietors underwent a transformation from entrepreneurs as functional capitalists who made their own investments, into entrepreneurs as business managers who were distinguished from owners, and enterprise organizations converged primarily into type D (Figure 2; of course this does not mean that types A and B totally disappeared). In particular, use of the company system defined the scope of enterprise organization as that of corporate status.

Additionally, the labor supply contracts between enterprises (proprietors) and workers in type D enterprise organizations were mainly labor contracts for subordinate labor (employment), as distinguished

⁽¹¹⁾ Coase, R. H., "The Nature of the Firm" in *The Firm, the Market, and the Law* (Chicago, The University of Chicago Press 1988) Ch. 2.

[Figure 2] Second Stage: Modern Labor Law Era



from subcontracting and commissioning, and as a rule labor law formed around the labor contract relationships within a corporation. Oliver Williamson uses the term “labor contract under internal labor market⁽¹²⁾” to describe the type of labor contract that animates second-stage enterprise organizations. The term signifies a labor contract governed by collective bargaining and labor agreements.

This shows that basically modern labor law, which appeared during the second stage, is most concerned with protecting workers in the internal labor market. That market is defined by the differentiation of the internal and the external that occurs under corporate status.

⁽¹²⁾ Williamson, O. E., *Markets and Hierarchies* (New York, Free Press 1975) Ch. 4.

3. Third Stage: A Time of Change for Labor Law?

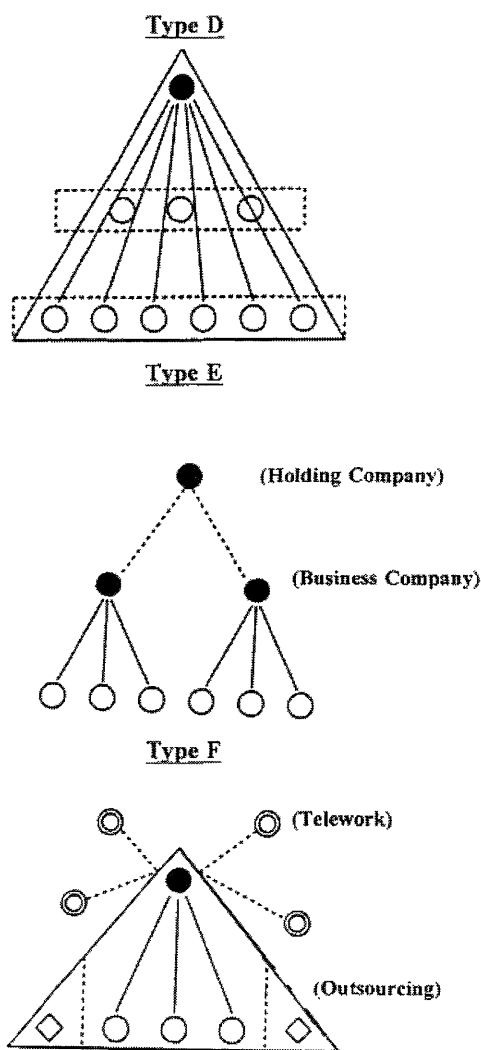
The third stage is the present. Although we still have type D, which is the form of enterprise organization that prevailed during the previous stage, there have emerged two new forms that are transformations of type D.

First is type E, which is connected with changes in the scope of enterprise organizations, i.e., the first aspect of change (Figure 3). The holding company is typical of type E, which is symbolic of “group management” or “group enterprises.” For type E, in the case of both operating holding companies and non-operating holding companies, parent companies have control over the business activities of their subsidiaries through possession of stock, and by this means a parent company and its subsidiaries form an economic unit that functions as an integrated whole. As a matter of form, however, the relationship between the proprietors of the parent company and subsidiaries is often one of delegation, while the relationship between each subsidiary and its employees is based on labor contracts.

The second new form is type F, which is related to the changes in the internal arrangements of enterprise organizations, the second aspect of change. Seen from the history of enterprise organizations, this appears to be a return to type A of the first stage because a single enterprise organization uses different forms of employment and labor supply contracts (employment and subcontracting/delegation) at the same time. Yet, in the sense that telework is a product of advancements in information technology, it is not a return to the cottage industries in type A. And while outsourcing resembles type B of the first stage, it did not happen because of the limitations arising from the “small technical base” of the past. Rather, it directly reflects the rationale of capital in its pursuit of efficiency.

Thus if we can define the present as a third and new stage in the history of the enterprise organization and labor law, the labor law system and labor law theory predicated on the enterprise organizations of the second stage will naturally face pressures to change. Such being the case, what kind of changes are pressing in? The following section is a brief discussion.

〔Figure 3〕 Third Stage: New Labor Law Regimes?



- Employers (Proprietors)
- Workers (Employees)
- ◇ Dispatched Workers
- ⊙ Subcontractors, Teleworkers
- Contract of Employment
- Subcontracting etc.

V. Changes in Enterprise Organizations and the Impact on Labor Law

1. Limitations to the Traditional Labor Law Model

If we assume as above that the present is the third stage in the history of enterprise organizations and labor law, then changes in enterprise organizations will expose the limitations of the labor law system and labor law theory predicated on the enterprise organizations that prevailed in the second stage.

First, the traditional labor law model, which covers the scope of a single incorporated organization, cannot adequately address the problems that arise in a group-managed enterprise organization whose links transcend corporate status. Until now this has been debated as “a matter of having the nature of an employer or of a worker” or “a matter of employer responsibility,” but now with the support of a legal system that encourages enterprise reorganization, enterprise groups repeatedly combine and break up, and we therefore need a labor law system and theory that see such groups as single enterprise organizations, and that protect their members.

Second, the labor law system and theory that have been structured primarily around labor contracts (i.e., employment) cannot sufficiently cope with the situation created by different kinds of labor supply contracts in an enterprise organization. Discussion of a “Contract Labor Convention” in the ILO⁽¹³⁾ seems to have such situations in mind, and in Japan too labor supply contracts other than labor contracts (i.e., employment) will at this new stage have to be given a new place in the overall labor law scheme — a new place that is needed for both the labor law system and labor law theory.

⁽¹³⁾ For the discussion of “Contract Labor” in ILO, see Kamata, K., *Keiyak-rodo wo meguru Shomondai* (Some Issues on Contract Labor) 92 Rodo-ho (Labor Law) 213.

2. A New Approach in Labor Law

First of all, guaranteeing worker employment in modern enterprise organizations requires surmounting the barrier of corporate status. Now that many enterprises are forming enterprise groups, the honest perception among those on the scene is that workers and employees have a feeling of a clearly defined “inside and outside,” and they create boundaries for the “enterprise” that transcend formal corporate status. By lifting the ban on non-operating holding companies and creating a legal system for company splits, enterprise groups transcending corporate status will increasingly function as units of consolidated enterprise organizations. This is because, if we take non-operating holding companies as an example, their functional characteristics include: (1) reinforcing holding companies’ control over their subsidiaries, (2) spinning off operating divisions (creating subsidiaries), (3) assigning subsidiaries’ executive personnel and procuring capital, and (4) developing subsidiaries’ long-term plans and budgets, monitoring their goals, and assessing their performance⁽¹⁴⁾. Until now labor law theory has structured legal principles on the protection of worker employment while attaching great significance to differences according to corporate status, but from now on it will be necessary to assume the scope of enterprise organization that is legally meaningful to workers, and study how employment should be guaranteed there. Already proposals have been made for “legal principles on employment assurance in group units⁽¹⁵⁾” and “theory on *de facto* single enterprises,⁽¹⁶⁾” but the focus is on legally elucidating what it is that transcends formal corporate status and defines the scope of an enterprise organization (the “inside” and “outside” of an enterprise).

Second, diversification of labor supply contracts in modern

⁽¹⁴⁾ Morimoto, S., ‘Mochikabu Kaisha to Kaisha-ho’ (Holding Company and Company Law), 47 *Hoso Jiho* (Legal Profession Journal) No. 12 p. 14.

⁽¹⁵⁾ Tsuchida, M., *Junsui Mochikabu Kaisha to Rodoho-jo no Shomondai* (Non-operating Holding Company and Labor Law Issues) 451 *Japanese Journal of Labour Studies* 10.

⁽¹⁶⁾ Yoshida, T., *Junsui Mochikabu Kaisha no Kaikin to Rodoho-jo no Shomondai* (Livertating Non-operating Holding Company and Labor Law Issues) 188 *Kikan Rodoho* (Labor Law Quartary) 115.

enterprise organizations necessitates a theory that transcends conventional labor contract theory. As noted previously, changes in enterprise organizations have prompted diversification in the labor supply contracts of the members composing those organizations, so this means that diverse labor supply contracts are being implemented enterprise organizations as the venue. Assuming for the moment that contracts other than for employment, such as for subcontracting and commissioning, were also implemented in the venue of enterprise organizations, such labor supply contracts would take on the aspect of “organization-type” contracts, not one-time, single “market-type” contracts. If that were to happen, such labor supply contracts would require legal regulations and interpretation principles that are suited to “organization-type” contracts.