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STRANGERS WHEN WE MET: THE INFLUENCE OF FOREIGN LABOR RELATIONS LAW AND ITS DOMESTICATION IN JAPAN

Ryuichi Yamakawa†

Abstract: This Article examines the influences of foreign law on Japanese labor relations law and the process by which foreign legal concepts have been domesticated, focusing in particular on the provisions, interpretation, and operation of the Trade Union Law of 1949. Acting on the constitutional right to organize and to bargain and act collectively, the Japanese Diet established the framework for Japanese labor relations law by enacting the Trade Union Law of 1945 which was subsequently amended in 1949. While European constitutions appear to be the model for the constitutional provision regarding the right of workers to organize and German influence has been substantial in the realm of statutory interpretation, American influence, as exerted through the General Headquarters during the Allied Occupation of Japan following World War II, was predominant in the final provisions of the Trade Union Law of 1949. Despite these foreign influences, however, there has been significant domestication in the substance of the legislation itself, and in its interpretation and actual operation. The less adversarial model of industrial relations has had a marked impact on domestication. Thus, the Japanese system offers a unique model of labor relations law from which other countries may learn.

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I. INTRODUCTION

Labor relations law is one of the most essential elements of labor law. It has played an important role as a means of achieving industrial peace in many countries including Japan. Since it was born and bred in the western tradition, it is natural to assume that Japanese labor relations law has been influenced by western legal systems. Moreover, as the process of introducing foreign law may vary from country to country, it is interesting to
analyze the influence of foreign law on Japanese labor relations law. On the other hand, there are many difficulties involved in transplanting a foreign legal system onto different soils because this process will necessarily be accompanied by some degree of domestication. Studying the process and background of such domestication is also important from the viewpoint of comparative labor law.

In this context, this Article examines the influences of foreign law on Japanese labor relations law. Part II briefly describes the contemporary framework of labor relations law in Japan. Next, Part III analyzes foreign influences on Japanese labor relations law and highlights several features of the Japanese experience. The analysis covers these influences on the legal framework itself as well as on its operation, such as statutory interpretation by the courts. Part IV then turns to the domestication of foreign labor relations law in Japan. Domestication in the process of legislation and domestication in the course of operation are analyzed separately. The background underlying each phase of domestication is also explored. Finally, this Article concludes by pointing out the need for international cooperation to search for a better legal framework of industrial relations.

II. THE FRAMEWORK OF JAPANESE LABOR RELATIONS LAW

A. The Right to Organize and to Bargain and Act Collectively (The Constitution)

Article 28 of the Constitution provides that "the right of workers to organize and to bargain and act collectively is guaranteed." The meaning of this constitutional protection of union rights is threefold. First, Article 28 prohibits legislation which, without compelling reason, denies or suppresses workers' rights to organize and to bargain and act collectively. Second, certain protected activities of unions and workers are immune from civil and criminal liabilities to which they would otherwise be subject. Third, this article declares Japan's policy to foster union rights. This is a policy that enables the Diet to legislate union rights statutes such as the

3 Id. at 19-20.
4 Id. at 18-19.
5 Id. at 19-20.
Trade Union Law. Moreover, this policy becomes a public order in the area of private law: if an employer engages in an activity that contravenes this public order, such as a discharge of its employee because of his/her union membership, the employer shall be liable under civil law for torts or breach of contract. Coupled with the statutory rights described below, the Constitution established the system of free collective bargaining as the basic framework of labor relations law.

B. Immunity from Civil and Criminal Liabilities

The Trade Union Law of 1945 was enacted only four months after the end of World War II. This law contained provisions that declared union immunity from certain civil and criminal liabilities. These provisions remained almost unchanged in the Trade Union Law of 1949, which amended the Law of 1945 and is essentially still in effect today. Regarding civil immunity, article 8 of the Trade Union Law of 1949 states, “an employer shall not be permitted to claim indemnity from a trade union or a member of the same for damages through a strike or other acts of dispute which are proper acts.” Also, according to article 1 of the Trade Union Law of 1949, article 35 of the Criminal Code, an exemption provision, “shall apply to collective bargaining and other acts of a trade union which are proper and have been performed for the attainment of the purposes of the [Law], provided, however, that in no event shall acts of violence be construed as proper acts of trade unions.”

C. The Effects of the Collective Bargaining Agreement

Article 16 of the Trade Union Law of 1949 provides that “any portion of an individual labor contract contravening the standards of work ... provided in the collective agreement shall be void. In such a case, the invalidated part of the individual labor contract shall be governed by the

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7 Sugeno, supra note 2, at 21-22.
8 Trade Union Law of 1949, supra note 6, art. 8, at 22-23.
9 Article 35 of the Criminal Code provides that “[n]o person shall be punished for an act done under law or ordinance or in the course of legitimate business.” KEIHO art. 35.
10 Trade Union Law of 1949, supra note 2, art. 1, para. 2, at 20. As explained above, these immunities are based upon Article 28 of the Constitution. Thus, articles 1 and 8 of the Trade Union Law of 1949 merely confirm the effects of the constitutional provision.
provisions of the standards." This preemption of the provisions of an individual labor contract by the collective agreement, called the "normative effect of a collective bargaining agreement," has its origin in article 21 of the Trade Union Law of 1945. In addition, the Trade Union Law of 1949 contains provisions for the extension of the effect of a collective bargaining agreement within a workplace as well as within a certain local region. As to the extension within the workplace, article 17 of the Law provides that the normative effect of a collective bargaining agreement shall be extended in a particular workplace to the same kind of workers as are covered by the agreement when three-fourths or more of the workers of the same kind employed in the workplace come under application of the agreement. Article 18 provides for the extension of a collective bargaining agreement within a local region. These provisions also have their origin in articles 23 and 24 of the Trade Union Law of 1945 respectively.

D. The Prohibition of Unfair Labor Practices

Article 11 of the Trade Union Law of 1945 already contained a provision that prohibited disparate treatment of an employee by an employer based upon the employee's being a member of a trade union, having tried to join or organize a trade union, or having performed proper acts of a trade union. But article 7 of the Trade Union Law of 1949 provided for a comprehensive prohibition of an employer's unfair labor practices. This provision prohibits: (1) disparate treatment as described above; (2) the refusal to bargain with a union without legitimate reason; and (3) domination of and assistance to union formation and management as well as certain financial support to a union. Furthermore, while the violation of article 11 was subject to criminal liability under the Trade Union Law of 1945, the

11 Id. art. 16, at 24.
12 Rōdō Kumiai Hō (Trade Union Law), Law No. 51 of 1945, art. 21 [hereinafter Trade Union Law of 1945].
13 Trade Union Law of 1949, supra note 6, art. 17, at 24.
14 Id. art. 18, at 24-25.
16 Id. at 11.
17 Trade Union Law of 1949, supra note 6, art. 7(1)-(3), at 22. Article 7(4) of the Trade Union Law of 1949 also prohibits as an unfair labor practice the disparate treatment of an employee by an employer based upon the employee's having filed a complaint with the Labor Commissions charging the employer's unfair labor practices or having participated in certain other aspects of the administrative process. Id. art. 7(4), at 22.
Trade Union Law of 1949 abolished this scheme and established a system of administrative relief for unfair labor practices through the procedures of the Labor Commissions as described below.

E. The Labor Commissions

The Trade Union Law of 1945 established the Labor Commission, a tripartite administrative agency with members representing workers, employers, and the public interest. Each prefecture has its Prefectural Labor Commission, and the Central Labor Commission supervises the Prefectural Commissions. Under the Law of 1945, the Commission engaged mainly in the adjustment of labor disputes as well as in requesting prosecutors to invoke criminal procedures against proscribed disparate treatment by employers. In addition to the duty of adjusting labor disputes, the Trade Union Law of 1949 charged the Labor Commissions with the task of dictating administrative remedies for unfair labor practices. When, after a hearing, the Commission finds that an employer committed an unfair labor practice, it may order the employer to cease such a practice, and if necessary, take appropriate remedial action such as reinstatement of the discharged employee with or without back pay.

F. Public Sector: Limitation on Union Rights

In the public sector, union rights are subject to considerable limitations under several statutes. The National Civil Servants Law prohibits employees of police and fire departments from organizing unions as well as from bargaining and acting collectively. Under the National Civil Servants Law and the Local Civil Servants Law, certain other categories of national and local civil servants do not have rights to enter into collective bargaining agreements, although they have a right to organize. Regarding the employees of national and local public enterprises, the National Enterprise Labor Relations Law and the Local Public Enterprise Labor

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18 Trade Union Law of 1945, supra note 12, art. 19; Trade Union Law of 1949, supra note 6, art. 19, at 25.
19 SUEHIRO, supra note 15, at 107-108. The latter function was not incorporated into the Trade Union Law of 1949.
20 Trade Union Law of 1949, supra note 6, art. 27(4), at 33.
21 See Kokka Kōmuin Hō (National Civil Servants Law), Law No. 120 of 1947, art. 108-2(5).
22 For national civil servants, see id. arts. 108-2(3) & 108-5(2). For local civil servants, see Chihō Kōmuin Hō (Local Civil Servants Law), Law No. 261 of 1950, arts. 52(3) & 55(2).
Relations Law allow them to enter into collective bargaining agreements, subject to certain limitations. All public employees, including those mentioned above, are prohibited from engaging in acts of dispute such as strikes. The Supreme Court of Japan has held that these restrictions do not violate Article 28 of the Constitution.

III. THE INFLUENCES OF FOREIGN LABOR RELATIONS LAW

After the Meiji Restoration, Japan imported foreign legal systems, among which the German system was predominant. This influence has made Japan a country of the civil law tradition. As far as labor relations law is concerned, however, post-World War II history is much more significant. Thus, Part III first introduces a historical overview of Japanese labor relations law and then analyzes the influences of foreign law by focusing on its post-war development.

A. Historical Overview

1. Pre-war Attempts to Enact Labor Relations Legislation

There was no union rights legislation in pre-war Japan. Although several attempts were made beginning as early as 1920 to enact laws that would protect and simultaneously regulate the organization and management of unions, such attempts failed due to strong opposition, mainly by management. Rather, union activities were suppressed with criminal punishment under such laws as the Public Order and Police Law. But the pre-war attempts for union rights legislation turned out to be helpful later in the post-war period. Still, the contents of the attempted legislation were not original but, as shown below, were in most respects influenced by the experience of foreign countries, including Germany and Great Britain.

24 Id. art. 17, at 53.
25 Judgment of May 4, 1977 (Nagoya Chūō Yūbin Kyoku), Saikōsai [Supreme Court], 31 Keishū 182.
27 Article 17 of the Public Order and Police Law penalized an inducement of workers to strike. TÔKYÔ DAIGAKU, supra note 26, at 9.
2. Trade Union Law of 1945 and its 1949 Amendment

After Japan lost World War II, the occupation by the Allied Powers began. The United States, the dominant country among the Allied Powers, issued the “U.S. Post-Surrender Policy for Japan” dated August 29, 1945. It declared the encouragement of workers’ organization as one of its policy goals. The Japanese government also started to prepare for union rights legislation by establishing a commission named the Rōmu Hōsei Shingi Kai (Council on Labor Law and Policy). This commission drafted a trade union bill, which, after several modifications, was submitted to and passed by the Diet in December 1945. In the course of legislation, the General Headquarters of the Allied Powers (“GHQ”) directed the government to modify the draft only in several minor respects. However, dissatisfaction with the Trade Union Law of 1945 grew within the GHQ.

First, the GHQ felt that this Law was excessively interfering with the establishment and management of unions. For example, article 6 required registration when trade unions were established. In addition, the government had the authority to order unions to dissolve themselves as well as to change their charters under certain circumstances. Next, as the union movement in Japan intensified and the Cold War began, the GHQ wanted Japanese unions to become “democratic,” i.e., free from dictatorship by top union officials and less politically motivated. They felt that the lack of democracy in union management provided a background for the political unionism induced by radical union leaders. Third, apparently concerned about company unions frequently established by employers at that time, the GHQ felt the need to strengthen union autonomy so that unions could be free from the influence of employers by prohibiting their assistance to unions more stringently. Lastly, the GHQ intended to introduce an administrative process for unfair labor practices which was combined with the idea of the exclusive representation and appropriate bargaining unit.

29 GOULD, JAPAN’S RESHAPING, supra note 28, at 17.
30 See id. at 27-30.
31 Trade Union Law of 1945, supra note 12, art. 6.
32 Id. art. 15.
33 Id. art. 8.
As a result of these developments, the Labor Section of the GHQ took
the initiative and made a recommendation as to the contents of the amend-
ment. The Ministry of Labor prepared a draft according to this
recommendation. After public hearings on this draft, however, the Labor
Section handed down another recommended draft which was remarkably
different from that of the Ministry of Labor. This new draft amended the
Trade Union Law of 1945 less drastically than the first. For example, it
gave up the idea of the exclusive representation system, although it still
contained unfair labor practice provisions. In doing this, the GHQ must
have taken into account the opposition by various interest groups including
trade unions, and it intended to minimize any modifications so that the Diet
would be able to pass the bill without much difficulty. With slight changes,
this draft became the government bill which was enacted into the Trade
Union Law of 1949.

3. Union Rights and their Restriction in the Public Sector

During a short period after World War II, public sector employees
(except those in the police and fire departments) had basically the same
union rights as other employees in the private sector. Then, the Labor
Relations Adjustment Law, enacted in October 1946 based on a recom-
mended draft by the GHQ, prohibited acts of dispute by public employees
engaging in judicial and administrative duties. Other public employees
continued to enjoy the right to strike. In 1948, however, the GHQ drasti-
cally changed its policy on public sector labor relations law. In July 1948, a
letter from General MacArthur, the Supreme Commander of the Allied
Powers, directed the Prime Minister of Japan to deny the right to strike to all
public employees. Soon afterwards the Japanese government issued
Government Order No. 201, which provisionally denied all public employ-
ees the rights to strike and bargain collectively. To implement this Order,
the Diet amended the National Civil Servants Law and enacted the Public
Corporations Labor Relations Law (after the privatization of the public

34 This draft is cited in SHIRYÔ NIHON SENRYÔ 2; RÔDÔ KAIKAKU TO RÔDÔ UNDO [MATERIALS ON
THE OCCUPATION OF JAPAN (2): LABOR REFORM AND LABOR MOVEMENT] 229 (Eiji Takemae et al. eds.,
1992) [hereinafter SHIRYÔ NIHON SENRYÔ].
35 ENDO, supra note 28, at 74-136, 193-283; TAKEMAE, supra note 28, at 157-176, 209-251; GOULD,
JAPAN'S RESHAPING, supra note 28, at 152-53.
36 Rôdô Kankei Chôsei Hö (Labor Relations Adjustment Law) Law No. 25 of 1946, translated in
corporations in recent years, the Public Corporations Labor Relations Law was amended and entitled the "National Enterprise Labor Relations Law" to cover only national enterprises). Thus, largely as a result GHQ pressure, public sector employees have more limited rights than their private sector counterparts.

B. Foreign Law Influences on Labor Relations Legislation

1. The Trade Union Law of 1945

As described above, the GHQ did not make recommendations or suggestions as to the contents of the Trade Union Law of 1945. They merely declared a policy of fostering unionism in Japan. Thus, the bill was drafted by the Rōmu Hōsei Shingi Kai with little influence by the GHQ regarding its contents. In other words, as opposed to other statutes regarding industrial relations, the contents of the Trade Union Law of 1945 were essentially Japan's own making. Some commentators point out that this was due to the fact that the GHQ had no official occupation policy at this time which was concrete enough to make recommendations on the contents of labor relations law. Thus, the occupation of Japan did not influence the Trade Union Law of 1945 except to the extent that it offered an opportunity for the GHQ to direct some minor modifications in the legislation. However, this is not to say that it was free from the influences of foreign law. The following are several important elements of the Law that have apparently been influenced by foreign experiences.

a. Immunity from civil and criminal liabilities

Some of the pre-war union rights bills had already contained a provision for the immunity of union activities from civil liability such as torts. This provision may have influenced the immunity provision in the Trade Union Law of 1945. But the idea of immunity from civil liability, including such a pre-war provision, apparently had its origin in British law. Those who were interested in union rights legislation must have been aware of British labor law history because Japan had virtually no experience in the suppression of union activities through civil actions. One of the most

38 Id. at 59.
39 See TÔKYÔ DAIGAKU, supra note 26, at 486-87.
famous incidents in British labor law history was the Taff Vale decision,\textsuperscript{40} which recognized tort liability of a union for striking, and the Trade Dispute Act of 1906 that overrode that decision. In 1945, one of the members of the \textit{Rōmu Hōsei Shingi Kai} mentioned these historical British incidents in emphasizing the need to incorporate the immunity provision into the trade union bill.\textsuperscript{41}

On the other hand, it is not clear how foreign law influenced the provision for immunity from criminal liability. The pre-war bills did not contain such a provision. Even though those who drafted the bill of the Trade Union Law of 1945 must have known the history of the British labor law regarding immunity from the criminal liability of a trade union, the content of the immunity was different from that of the Japanese provision. Immunity in the British sense was unions' freedom from the doctrine of criminal conspiracy, which did not exist in Japan. Thus, the idea of criminal immunity was not an importation from British law. Rather, it may have been the pre-war suppression of Japanese unions through such statutes as the Public Order and Police Law that the drafters had in mind when they incorporated the criminal immunity provision into the Trade Union Law of 1945.\textsuperscript{42}

\textbf{b. The effects of collective bargaining agreements}

As in the case of civil immunity, a provision regarding the normative effect of collective bargaining agreements was contained in the pre-war trade union bills.\textsuperscript{43} However, it appears that this notion was derived from German law. In 1918, Germany had an ordinance which provided for the normative effect, and Japanese labor law scholars introduced it to Japanese readers. This may also have been the case with the extension of the normative effect of a collective bargaining agreement within a local area.\textsuperscript{44} On the other hand, the origin of the extension of the effect within a workplace is not clear. The German statute on collective bargaining agreements contains

\begin{itemize}
\item \textsuperscript{40} Taff Vale Rail Co. v. Amalgamated Society of Railway Servants [1901] A.C. 426.
\item \textsuperscript{41} See KAZUO SUGENO, SÔGI KÔI TO SÔNGAI BAISHÔ [ACTS OF DISPUTE AND COMPENSATION FOR DAMAGES] 12 (1978) (citing a statement by Komakichi Matsuoka).
\item \textsuperscript{42} For a brief explanation on the history of the suppression, see TÔKYÔ DAIGAKU, supra note 26, at 9-10.
\item \textsuperscript{43} Id. at 14-15.
\item \textsuperscript{44} See supra text accompanying note 14.
\end{itemize}
a provision for the extension of the effect within local areas, but not for the extension within a workplace.\textsuperscript{45}

c. \textit{The prohibition of disparate treatment}

The prohibition of disparate treatment of an employee because of his/her union membership or proper union activities had its origin in some of the pre-war trade union bills.\textsuperscript{46} Although this notion appears to have originated from foreign law, it is difficult to specify the country which most directly influenced the drafting because a number of foreign countries had similar provisions at that time. Among the countries that were mentioned in the course of the discussion in preparing for one of the bills were Germany, Czechoslovakia, New Zealand, Romania, Brazil, and Australia (the State of West Australia).\textsuperscript{47}

d. \textit{The labor commissions}

The Labor Commission under the Trade Union Law of 1945 was charged mainly with the adjustment of labor disputes. Apparently the idea of this Commission came from Izutaro Suehiro, a member of the \textit{Rōmu Hōsei Shingi Kai}. In explaining this idea in the \textit{Shingi Kai}, he pointed out the need for an agency that would take over the duties of the Adjustment Commission under the Labor Dispute Adjustment Law in pre-war Japan.\textsuperscript{48} Thus, the Labor Commission succeeded to the functions that the Adjustmental Commission performed in pre-war days. However, some scholars point out an American influence on the organization of the Commission. They reason that one member of the \textit{Rōmu Hōsei Shingi Kai}, Iwao Ayusawa, suggested the idea of setting up an administrative agency, referring to the National Labor Board under the National Industrial


\textsuperscript{46} Tōkyō Daigaku, \textit{supra }note 26, at 11.


Recovery Act. The National Labor Board was also established as a tripartite agency. These scholars further contend that the tripartite composition of the Commission was also influenced by the tradition of International Labor Organization ("ILO") agencies.

2. The Trade Union Law of 1949

The initial recommended draft for the amendment of the Trade Union Law of 1945, which was prepared by the GHQ, contained some American labor law concepts. For example, the GHQ intended to introduce an exclusive representation system combined with the determination of a bargaining unit. Although the GHQ later changed its attitude and prepared another draft, which was not drastically different from the Trade Union Law of 1945, the influence of American labor law remained in some important respects. While the exclusive representation system was dropped, the deregulation of union management, the enhancement of union independence, and the prohibition of unfair labor practices combined with the administrative process of the Labor Commissions survived. Thus, the influence of American law is still significant.

a. The prohibition of unfair labor practices

As described above, article 7 of the Trade Union Law of 1949 prohibits as unfair labor practices of an employer: (1) disparate treatment because of union membership and protected union activities; (2) refusal to bargain with a union without proper reason; and (3) domination of and assistance to union formation or management as well as certain financial support to a union. It is clear that section 8(a) of the National Labor Relations Act ("NLRA") was the model for this provision. The GHQ consistently recommended incorporating this provision into the amendment. It must be noted, however, that item 1 of this article regarding the prohibition of disparate treatment has its origin in article 11 of the Trade Union Law of 1945.

49 Hokao, supra note 47, at 20.
50 Id.
51 Trade Union Law of 1949, supra note 6, art. 7, at 22.
53 ENDO, supra note 28, at 286-91, 304-07.
54 See supra text accompanying note 16.
b. **Administrative process for unfair labor practice cases**

The administrative process to provide relief for unfair labor practices was, at least in essence, also modeled after the NLRA. The recommendation of the GHQ suggested that the Labor Commission should have the authority to issue a remedial order against an employer who committed unfair labor practices, rather than to merely make a request for prosecution as under the prior scheme.\(^5^5\) However, the organization of the Commission was not changed to match the National Labor Relations Board ("NLRB") in the United States. For example, the Commission remained a tripartite agency with a certain local autonomy, although it is only the neutral members of the Commission who may decide unfair labor practice cases.\(^5^6\) In addition, as opposed to the NLRB, the Commission has continued to play its role as the adjustment-making agency of labor disputes.\(^5^7\)

c. **Deregulation of the establishment and management of unions**

The GHQ successfully recommended that the Japanese government delete provisions of the Trade Union Law of 1945 that allowed governmental intervention in the establishment and management of trade unions. Although these provisions originated from pre-war trade union bills,\(^5^8\) such an interfering policy as that of the Trade Union Law of 1945 had few precedents in the trade union laws of developed countries at the time of its enactment. In this sense, although the influences of foreign law are evident in the deregulation of internal union affairs in the 1949 amendment of the Trade Union Law, it is difficult to locate a specific origin that was a model for this amendment.

d. **The enhancement of union independence**

The notion that a trade union must be independent from the influence of an employer was already embodied in the Trade Union Law of 1945. Article 2 of the Law provided that a union that admits those who represent


\(^{56}\) Trade Union Law of 1949, *supra* note 6, art. 24, at 32. On the other hand, the NLRB is a centralized agency and does not have members representing labor or management.

\(^{57}\) Id. art. 20, at 31.

\(^{58}\) See TŌKYŌ DAIgAKU, *supra* note 26, at 11.
the interest of an employer or receives assistance from an employer for its major expenses shall not avail itself of protection under the Law. However, the GHQ recommended that the Japanese government enhance the requirement for union independence or "autonomy." In making this recommendation, the GHQ appears to have had the NLRA model in mind, which excludes supervisors from its coverage. This recommendation was incorporated into the amendment, and article 2(2) of the Trade Union Law of 1949 enlarged the scope of the exclusion regarding supervisory employees representing the interest of employers as well as an employer's assistance to unions in order to enhance union independence. Moreover, article 7(3) declared that an employer's financial assistance to union management constitutes an unfair labor practice. However, as explained below, this amendment has not necessarily functioned as the GHQ intended.

3. The Constitution: Right to Organize and to Bargain and Act Collectively

The current Constitution of Japan was promulgated on November 3, 1946. In the course of its making, the GHQ handed down a recommended draft to the Japanese government. Then, the government made a formal draft on the basis of the GHQ draft and submitted it to the Diet. The Diet passed this draft with slight modifications. Article 28 of the Constitution, which the initial draft by the GHQ had already contained, was drafted by the Subcommission on Human Rights within the Government Section of the GHQ. Although the U.S. Constitution has no provision on union rights, the members of this Subcommission must have been aware of the constitutions of European countries that have union rights provisions such as that of Germany during the Weimar period. In addition, the Rōmu Hōsei Shingi Kai, which drafted the Trade Union bill in 1945, prepared a draft for the union rights provision in the Constitution in cooperation with the Labor Section of the GHQ, and this draft may have had some influence on that of the Subcommission on Human Rights. Moreover, the members of the

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59 Trade Union Law of 1945, supra note 12, art. 2.
60 TAKEMAE, supra note 28, at 232-53.
62 Trade Union Law of 1949, supra note 6, art. 2(2), at 20.
63 Id. art. 7(2), at 22.
65 TAKEMAE, supra note 28, at 82-83.
Rōmu Hōsei Shingi Kai were also familiar with constitutional provisions on union rights in European countries and may have taken such provisions into consideration. Thus, European constitutions may have influenced article 28, even though only indirectly.66

4. Public Sector Labor Relations Law

As noted above,67 the restriction of public employees' union rights was based on the direction of the GHQ after its change of policy in 1948. The letter from MacArthur and Government Order No. 201 that followed denied all public employees the right to strike.68 Mr. Hoover, who took the lead in this policy change within the GHQ, was a famous expert on personnel administration in the public sector in the United States. Thus, it is natural that the GHQ's new policy was influenced by U.S. public sector labor law. Relying on this new policy, the GHQ drew up its recommendation for the bills that, with several modifications, were enacted into the Public Corporations Labor Relations Law and the National Civil Servants Law as amended. In addition to the prohibition of strikes, the Public Corporations Labor Relations Law contained a provision for an exclusive representation system similar to that under the NLRA.69 In this sense, as well, American law had its influence on the public sector labor relations law in Japan.

5. Amendment After the Occupation70

These labor relations statutes have been amended a number of times, with foreign and international labor law influencing some of these amendments. For example, in 1965 the Diet repealed one provision in the Public Corporations Labor Relations Law which had prohibited those who are not the employees of the public corporation from becoming union members and officers. This provision was in apparent conflict with the right of unions under the ILO Convention No. 87 to have representatives of their own

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66 It should also be pointed out that the Subcommission took into consideration a draft prepared by various political parties as well as other interested groups. See Charles L. Kades, The American Role in Revising Japan's Imperial Constitution, 104 POL. SCI. Q. 215, 227 (1989).
67 See supra text accompanying notes 35-37.
68 ENDO, supra note 28, at 193-219.
69 As explained below, this provision was repealed in 1956.
In 1957, the ILO Committee on the Freedom of Association pointed out this problem as well as others in the public sector in Japan, and reported afterwards that such a provision interferes with union rights. The repeal of the provision was influenced by this report and other subsequent recommendations of the ILO.

C. Foreign Law Influences on the Operation of Japanese Labor Relations Law—Influences on Statutory Interpretation

In addition to the direct influences of foreign laws on labor relations legislation, Japanese courts and scholars have studied foreign labor law and sometimes worked out interpretations that led to the same result as found under foreign law. In other words, foreign law has influenced the interpretation of Japanese industrial relations statutes. The following are some examples of such influence.

1. The Theory on Collective Bargaining Agreements

In Germany, labor law scholars have developed a comprehensive theory on collective bargaining agreements. According to their theory, a collective bargaining agreement has two effects: the normative effect and the contract obligation. The normative effect is a preemptive effect on the individual employment contract. This effect is no more than the effect of minimum standards: if working conditions provided for in an individual employment contract are more advantageous than those of the collective bargaining agreement, they are valid and not influenced by the collective bargaining agreement (the "advantageousness principle" or "Begünstigungsprinzip"). On the other hand, the contract-obligation effect creates an obligor-obligee relationship between parties to the agreement, except that the doctrine of contract law does not always apply due to the unique features of the collective bargaining agreement. After the expiration of a collective bargaining agreement, working conditions under the agreement remain in effect unless otherwise provided under other collective agreements, individual employment contracts, or workplace agreements.

72 See generally Tōkyō Daigaku, supra note 26, at 724-26.
This effect is called "after-effectiveness" or "Nachwirkung." In Germany, these doctrines have been incorporated into statutory provisions.

Although the Trade Union Law of 1949 provides for the normative effect under article 16, the Law remains silent as to the other German doctrines. But Japanese labor law scholars have learned much from German theory and developed similar doctrines, some of which have been adopted by Japanese courts. For example, some courts have held that working conditions provided for under collective bargaining agreements are incorporated into individual employment contracts and that such working conditions continue to exist as part of the contracts even after the expiration of collective agreements. This holding is obviously influenced by the German theory of the "after-effectiveness" or "Nachwirkung." Of course, there are differences in many respects. Nevertheless, it may be safe to say that the theory of the collective bargaining agreement in Japan has been influenced by German law.

2. The Duty to Bargain in Good Faith

Section 8(a)(5) of the NLRA makes it an unfair labor practice for an employer to "refuse to bargain collectively with the representatives of his employees." Section 8(d) goes on to define the duty to bargain collectively as the duty to "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment. . . ." In essence, this duty is the obligation to "participate actively in the deliberations so as to indicate a present intention to find a basis for agreement."76

On the other hand, article 7(2) of the Trade Union Law of 1949 merely prohibits an employer's refusal to bargain without proper reason, and there is no reference to the good faith requirement. However, Japanese scholars who have studied American labor law have introduced the doctrine of the duty to bargain in good faith.77 Now, the Labor Commissions and courts have agreed that an employer has this duty, the contents of which are

73 See, e.g., Judgment of Feb. 28, 1968 (Teizen Kotsu), Chisai [Tokyo Dist. Ct.], 516 HANREI JIHÔ.
76 NLRB v. Montgomery Ward & Co., 133 F.2d 676, 686 (9th Cir. 1943).
77 Sugeno, supra note 2, at 488.
essentially the same as those in the United States.\textsuperscript{78} Here, it is obvious that American labor law has influenced Japanese law regarding collective bargaining.

D. Summary

Although Japan had no union rights law before World War II, there were several attempts for such legislation. Some of the concepts in such attempts were influenced by German and British law. During the occupation of Japan after World War II, the basic framework of Japanese labor relations law was established. The influence of foreign law during this period has two distinct aspects. First, especially during the early period, the occupation brought about a democratic climate as a basis for union rights legislation. The Allied Powers even directed Japan to legislate labor statutes. During this early period, however, the Allied Powers did not control the contents of labor relations law. As in the case of the Trade Union law of 1945, they merely directed legislation or suggested slight modifications at best. The drafters of the Trade Union Law of 1945 took into consideration foreign law as well as pre-war bills, which were also influenced by foreign laws. Thus, the occupation facilitated Japan's enactment of labor relations legislation through a process of learning from foreign law experiences.

Later, the Allied Powers began to control the contents of industrial relations legislation by making suggestions and even by handing down its recommended drafts as in the case of the Trade Union Law of 1949. The main foreign law that influenced Japanese legislation in such situations was, as a matter of course, American law such as the NLRA. In this respect, although the occupation was carried out through indirect governance, its influence on labor relations legislation was direct. Even after the framework of labor relations law was established, foreign law has continued to influence Japanese law in terms of statutory interpretation.

In sum, the influence of foreign law on Japanese labor relations law is quite marked. But its process and nature are somewhat complex. Roughly speaking, Japanese labor relations law is a hybrid in nature. Some aspects originated from German and British law, while others were transplanted from American law.

\textsuperscript{78} See, e.g., Judgment of Sept. 22, 1989, Chisai [Tokyo Dist. Ct.], 548 \textit{RODO HANREI} 64.
IV. THE DOMESTICATION OF FOREIGN ELEMENTS IN LABOR RELATIONS LAW

The domestication of foreign law takes several forms. In some cases, legislative attempts to transplant foreign systems may fail because of indigenous factors. In other cases, even after the transplantation of foreign systems, courts or scholars may interpret statutes so that it will suit domestic circumstances. Moreover, the indigenous features of industrial relations may develop independently from the legal framework. Thus, this section describes these features and explores the background for each dimension of domestication: (1) domestication in the course of labor legislation; (2) domestication in the operation of labor relations law with reference to statutory interpretation and the function of the Labor Commissions; and (3) the development of the system of industrial relations.

A. Domestication in the Course of Labor Legislation: The Trade Union Law of 1949

The history of the legislation of the Trade Union Law of 1949 clearly indicates the domestication of foreign labor relations law in the course of enacting legislation. Plural unionism, the organization and procedures of the Labor Commissions, and the lack of provisions for union unfair labor practices are major examples.

1. Plural Unionism: Lack of Exclusive Representation System

The original draft of the Trade Union Law of 1949 prepared by the Ministry of Labor contained many more American elements than the final draft that was ultimately enacted into law. The original draft provided for the exclusive representation system based on the determination of an appropriate bargaining unit.\(^79\) This provision was clearly modeled after the system under the NLRA. But subsequently the GHQ changed its policy and deleted the provision from its recommended draft. As a result, Japanese labor relations law has a marked system of plural unionism as one of its fundamental features. When two unions represent separate portions of the employees of an employer, the employer must bargain with each union regardless of the number of employees they represent. Moreover, Japanese

79 See supra text accompanying notes 31-34.
courts have held that an employer has a duty to remain neutral: an employer may not discriminate against unions because of their policies.\(^{80}\)

One of the reasons for the GHQ's change in policy was union opposition to the incorporation of the exclusive representation system. The publication of one of the earlier drafts for the amendment of the Trade Union Law and a series of subsequent public hearings gave rise to a fierce union movement opposing the amendment for various reasons.\(^{81}\) For trade unions, the procedure to determine bargaining representatives was an undue burden because they had already engaged in collective bargaining after World War II. Moreover, unions contended that the exclusive representation system would not suit realities in Japan.

As this contention implies, a more significant factor in the policy change was the Japanese style of union organization. Typical unions in the United States are industrial or craft unions which are organized across boundaries of a single enterprise. Historically, such industrial or craft unions often competed with one another to represent workers at the enterprise level.\(^{82}\) Such disputes provided a background for the exclusive representation system. On the other hand, most unions in Japan are enterprise-based or company-based. Thus, in Japan, it was not generally necessary to set up a system for resolving such disputes. Even though there were cases where two or more unions were opposing one another within one enterprise or company, the introduction of the exclusive representation system would have deprived minority unions of an opportunity to bargain and thus would not have been acceptable. In addition, it would have been difficult in Japan to determine the appropriate bargaining unit. In the United States, one of the most important factors in determining the bargaining unit is job content.\(^{83}\) For example, there are units for production and maintenance workers, technical employees and the like. On the other hand, job definition in Japan is much more vague, which makes it difficult to divide employees according to their jobs.

For these reasons, the exclusive representation system based on the determination of a bargaining unit would not suit Japanese industrial relations. Unions, employers, and drafters of trade union bills must have had difficulty in understanding what this system really meant and how it functioned. The consequences of this problem are evident in the history of

\(^{80}\) See, e.g., Judgment of Apr. 23, 1985 (Nissan Jidōsha), Saikōsai [Supreme Court], 39 Minshū 730.

\(^{81}\) See Hokao, supra note 47, at 27-28.

\(^{82}\) WILLIAM B. GOULD, A PRIMER ON AMERICAN LABOR LAW 41 (2d ed., 1993).

the Public Enterprises Labor Relations Law: although the Law initially contained a provision for a bargaining unit system, it was abolished in 1956.

2. The Organization and Procedure of the Labor Commissions

Although the system of administrative relief for unfair labor practices under the Trade Union Law of 1949 was modeled after the NLRA, the organization and procedure of the Labor Commissions were very different from those of the NLRB. There are six major differences. First, while the NLRB has exclusive jurisdiction over unfair labor practice cases, courts in Japan have a concurrent jurisdiction along with the Commissions so long as unfair labor practices are "legal disputes" within the meaning of the Court Organization Law. Second, the Labor Commissions are charged with the duty to adjust labor disputes as well as the duty to adjudicate unfair labor practice cases, whereas the NLRB does not have the function of adjustment. Third, as opposed to the NLRB, whose members are all neutral and regular public officials, the Labor Commissions consist of part-time members representing labor, management, and the public interest. Fourth, unlike such centralized agencies as the NLRB, the Labor Commissions are established in each prefecture with some local autonomy, and each Commission may develop its own practices to a certain degree. Fifth, as to procedures, the Labor Commissions do not have a department for prosecution like the General Counsel of the NLRB. Thus, the parties before the Labor Commissions are workers (unions) and employers. Finally, unlike the NLRA, the Trade Union Law has no provision for the substantial evidence rule or other limitations on the judicial review of the orders issued by the Labor Commissions.

These domestic features in the organization and procedures of the Labor Commissions are, in most respects, due to the fact that the Trade Union Law of 1945 had already established the Commissions, which essentially succeeded to the adjustmental functions of the Adjustment Commissions under the pre-war Labor Dispute Adjustment Law. The Trade Union Law of 1949 merely charged the Labor Commissions with the additional function of remedying unfair labor practices. In the course of the legislation of the Law of 1949, the GHQ left the organization of the Labor

85 Saibansho Hô (Court Organization Law), Law No. 59 of 1947.
Commissions virtually untouched. Thus, the Labor Commissions started their activities as adjudicating agencies for unfair labor practices with their organization mostly unchanged from when they were merely adjustmental agencies.

As to procedures, although the GHQ in their early suggestions attempted to incorporate provisions into the amendment of the Trade Union Law of 1945 for some limitations on the judicial review of administrative orders, they withdrew this idea when they handed down their recommended drafts to the Japanese government.\textsuperscript{86} Apparently some officials in the Ministry of Justice opposed the GHQ's early suggestion.\textsuperscript{87} They seem to have contended that the American system for enforcement and judicial review did not suit the traditional judicial system in Japan. In fact, Japan had no preceding history of quasi-judicial agencies like the NLRB, much less the limitation on judicial review under the substantial evidence rule. As a result, Japanese courts have engaged in de novo review of the Commission's orders.

3. \textit{The Lack of Union Unfair Labor Practices}

Almost two years before the enactment of the Trade Union Law of 1949, the U. S. Congress drastically amended the NLRA. This amendment (the Taft-Hartley Act) introduced, inter alia, union unfair labor practices.\textsuperscript{88} This was a reaction to the increased power of unions under the NLRA (the Wagner Act). However, in making suggestions as to the amendment of the Trade Union Law of 1945, the GHQ did not regard union unfair labor practices as necessary for Japanese labor relations law. Although one of the drafts contained a provision implying that a union has a duty to bargain in good faith with an employer,\textsuperscript{89} this provision was deleted. Later, in 1951, the Ministry of Labor attempted to incorporate provisions for certain union unfair labor practices into the Trade Union Law.\textsuperscript{90} However, this attempt

\textsuperscript{86} The draft dated Feb. 14, 1949, contained a provision similar to the substantial evidence rule (Article 20(3)). \textit{See Shiryō Nihon Senryō, supra} note 34, at 235. But the subsequent draft did not contain such a provision.

\textsuperscript{87} ENDO, \textit{supra} note 28, at 301.

\textsuperscript{88} 29 U.S.C. § 158(b) (1988).

\textsuperscript{89} Article 23(2) of the draft dated Feb. 14, 1949. \textit{See Shiryō Nihon Senryō, supra} note 34, at 235.

\textsuperscript{90} The draft prepared by the Ministry of Labor is cited in MINISTRY OF LABOR, RÔDÔ KUMIAI HÔ/RÔDÔ KANKEI CHÔSEI HÔ [TRADE UNION LAW/LABOR RELATIONS ADJUSTMENT LAW] 145 (3d ed., 1988).
also failed. Thus, to this day, the prohibition of unfair labor practices has been solely directed toward employers.

There must have been little need for union unfair labor practice provisions at that time. Although union movements in the occupation period sometimes became fierce, unions were not so strong or powerful as to make it necessary to introduce prohibitions against union unfair labor practices.

B. The Operation of Labor Relations Law: Statutory Interpretation

In the area of statutory interpretation, domestic influences have had a considerable impact, especially with regard to the theory of collective bargaining agreements and the interpretation of the relationship between labor and management.

I. Collective Bargaining Agreements as the Norm of Enterprise

Despite the fact that Japanese legal theory on collective bargaining agreements was influenced by German law, Japanese courts and scholars have devised interpretations that are considerably different from those in Germany. For example, while German law has established the so-called "advantageousness principle" or "Begünstigungsprinzip" under which collective bargaining agreements provide for minimum working conditions for workers to whom they apply, it is not at all settled in Japan whether working conditions provided by collective agreements are minimum standards or exclude more advantageous provisions in individual employment contracts. Although case law is not clear on this issue, an increasing number of scholars have contended that the "advantageousness principle" does not generally apply. They reason that Japanese collective bargaining agreements are usually concluded on an enterprise-basis or company-basis, and therefore parties to the agreements tend to regard the conditions contained in them as uniform standards rather than minimum. It is clear that such a contention has its basis in company-based unionism in Japan. Once again, here is an example of a feature of Japanese industrial relations becoming the basis for a unique form of law through domestication.

91 Sugeno, supra note 2, at 514.
92 Id.
2. Elusive Demarcation between Labor and Management

Based on the suggestions by the GHQ, the Trade Union Law of 1949 provides for more comprehensive exclusion of representatives of an employer’s interest as well as for stricter prohibition of financial assistance from an employer than the Trade Union law of 1945. This policy apparently derives from the western notion that the labor-management relationship is an adversarial one.

Nevertheless, such an adversarial model has not taken root in Japan. As to the provision for union independence, many Japanese labor law scholars have attempted to narrowly construe the provision. For example, supervisors are held to be excluded from the coverage of the law only when they have direct authority in personnel decisions; an authority to make recommendations for such decisions is not sufficient. They reasoned that the scope of union membership should be determined by unions themselves without legal interference. This narrow construction is also evident in the interpretation of the provision prohibiting an employer’s financial assistance as an unfair labor practice. Many commentators share the view that even if certain assistance may seem to be within the scope of the proscription, it may not constitute an unfair labor practice unless it substantially disturbs the independence of unions. These interpretations may reflect the less adversarial nature of Japanese industrial relations. In Japan, labor and management are supposed to share a communal interest rather than be adversaries in a zero-sum game. Meanwhile, in the United States where an adversarial model has prevailed, the exclusion of managerial employees has been enforced more strictly.

3. Adjustmental Interpretation

Japanese labor law is abundant in adjustmental interpretation: an interpretation which attaches great importance to the balance of interests between labor and management on a case-by-case basis rather than through the establishment of definite rules. For example, with regard to the issue of

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93 See supra text accompanying notes 62-63.
94 See generally TÔKYO DAIGAKU, supra note 26, at 146.
95 See id. at 149.
96 Id. at 148.
97 Id. at 479.
98 See GOULD, JAPAN’S RESHAPING, supra note 28, at 3-6, 143.
under what circumstances an employer may avoid the obligation to pay wages to workers in case of a lockout, the Supreme Court has held that a lockout shall exempt an employer from the duty to pay wages:

if, in light of various circumstances such as the attitude taken in the relevant labor-management negotiations, their progress, the forms of dispute acts engaged in by the union, and the extent of their impact upon the employer, the lockout is viewed, from the equity in labor-management relations, as a proper means of defending the employer’s business against the union’s dispute acts.99

Thus, adjustmental interpretation facilitates a more equitable legal relationship between labor and management through consideration of all the circumstances and interests involved in a particular dispute.

This type of analysis is also applicable in the case of a conflict between an employer’s property rights and a union’s posting of handbills. Although the Supreme Court in a recent case held to the contrary,100 the Labor Commissions and many labor law scholars have taken the view that the posting of handbills shall be recognized as a proper union activity.101 Also, such posting shall not be a reason for disciplinary action if it is prompted by a great need on the part of the union and it does not cause substantial interference with the employer’s property rights in light of various factors including the character of the facilities, the extent of posting, the number, form and language of the handbills, and the method of posting.102 The Labor Commissions have often relied on a similar standard when determining whether the employer’s exercise of the property rights, e.g., a disciplinary warning or disbandment order, constitutes an unfair labor practice, although such determination needs the evaluation of the

99 Judgment of Apr. 25, 1975 (Marushima Suimon), Saikōsai [Supreme Court], 29 Minshū 481.
100 The Supreme Court held that a union activity on an employer’s property without the employer’s consent would not be protected unless the employer’s rejection to consent constitutes an abuse of its property right. Judgment of Oct. 30, 1979 (Kokutetsu Sapporo Uten Ku), Saikōsai [Supreme Court], 33 Minshū 647.
101 See generally Tōkyō Daigaku, supra note 26, at 542-43. Similar factors are listed in determining whether a union’s tactics of wearing ribbons, armbands, or badges are proper union activities. See id. at 542.
102 Id.
employer's practice in light of the policy of establishing sound industrial relations.\textsuperscript{103}

As a matter of course, keeping a balance of interests is more or less necessary in interpreting labor law in every country. But, to the extent that such adjustmental interpretations are relied upon so often, it appears to be one of the distinctive features of Japanese labor relations law. Moreover, given the standards of adjustment illustrated above, it appears that a philosophy underlying such interpretations is that legal protection should be granted when a situation is too disadvantageous to one of the parties in the industrial relationship. Once again, the basis of this philosophy may be the less adversarial model of industrial relations because an utterly one-sided situation undermines relations between labor and management. In the context of unfair labor practice law, where this philosophy also applies, Professor William Gould of Stanford University correctly points out:

\begin{quote}
[In Japan] the entire concept of unfair labor practices as it has evolved in the United States is less precise and different in its meaning. It suggests that there are not public rights or wrongs, but rather problems that need third-party assistance so that harmony and compatibility may be facilitated.\textsuperscript{104}
\end{quote}

Hence, the less adversarial Japanese model of industrial relations has created an interpretive framework under which laws are construed in a manner which is geared towards limiting conflict between labor and management.

\textbf{C. The Operation of Labor Relations Law: the Labor Commissions}

As stated earlier, the Labor Commissions are charged with the duty of remedying unfair labor practices as well as adjusting trade disputes.\textsuperscript{105}

Although the former function was basically modeled after the American scheme, its actual operation in Japan has varied considerably from that of its American counterpart.


\textsuperscript{104} GOULD, JAPAN'S RESSHENING, \textit{supra} note 28, at 43.

\textsuperscript{105} See \textit{supra} text accompanying notes 18-20.
For example, a large portion of unfair labor practice cases result in settlement. In 1990, seventy-two percent of the cases were settled in the Prefectural Labor Commissions.\textsuperscript{106} To be sure, the resolution of unfair labor practice cases through settlement quite often takes place even in the United States.\textsuperscript{107} However, since the NLRB (the General Counsel) is the complaining party in the procedure under the National Labor Relations Act, the Board can and often does reject, as opposing public policy, the private or non-Board settlements that are reached between employers and unions. Thus, the private settlement is subject to the public policy doctrine that unfair labor practices are a public wrong.\textsuperscript{108} In Japan, on the other hand, the resolution of cases through settlement is left entirely to employers and unions (workers) as parties to the procedure. In this sense, the operation of the unfair labor practice system is more adjustmental. This adjustmental feature is further enhanced by the fact that members of the Commissions representing labor and management may participate in the hearing and encourage settlements, and that the Labor Commissions have a department for adjusting disputes, which may handle pending unfair labor practice cases.

In addition, remedies ordered by the Labor Commissions are often adjustmental. In a number of cases, the Commissions, rather than determining the remedy by themselves, have ordered employers who committed unfair labor practices to consult or bargain with unions over certain remedies such as the conditions of reinstatement in a case of retaliatory discharge.\textsuperscript{109} Apparently this practice is based on the idea that such consultation would function better than direct remedies in establishing harmonious industrial relations. The Commissions also order what is called a conditional relief on an infrequent basis. When the Commission orders this form of relief, the employer is obligated to take remedial actions if and only if the union performs certain actions mentioned as a condition in the order, such as furnishing a document in which the union admits

\textsuperscript{106} 829 CHŪDÔ RÔDO JIBO 16 (1991).

\textsuperscript{107} In fiscal year 1988, 31.5% of the unfair labor practice cases closed consisted of settlements and adjustments. Among the rest of the closed cases, 30.9% ended up in withdrawals of charges, a substantial number of which must have been resulted from private settlements. NATIONAL LABOR RELATIONS BOARD, FIFTY-THIRD ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 5 (1990).

\textsuperscript{108} See, e.g., NLRB v. General Motors Corp., 116 F.2d 306, 312 (7th Cir. 1940).

 unacceptable behavior.\textsuperscript{110} Such an order also reflects the adjustmental feature of dispute resolution through the Labor Commissions.\textsuperscript{111}

\textbf{D. Industrial Relations: Joint-Consultation System}

Although the Trade Union Law of 1949 was enacted under the influence of American law, the grievance and arbitration procedure, which is one of the distinctive features of American industrial relations, has not taken root in Japan. The GHQ recommended the adoption of the grievance system in collective bargaining agreements and even suggested that the Trade Union Law of 1945 should be amended to provide that collective bargaining agreements shall contain provisions for a grievance procedure.\textsuperscript{112} Nevertheless, to this day, labor and management have rarely relied upon such a system.

Instead, Japanese industrial relations have now become famous for the joint-consultation system or labor-management consultation system. This system affords an opportunity for two-way communication as well as information sharing between labor and management.\textsuperscript{113} The subject matter covered includes not only mandatory bargaining subjects like the planning and the implementation of discharges and transfers but also certain management prerogatives. In 1989, 58.1\% of the enterprises where more than fifty employees are employed have this joint-consultation system.\textsuperscript{114}

One of the primary functions of the joint-consultation system is the prevention of labor disputes. Before certain personnel actions, such as transfers, are implemented, they are referred to consultation in order to minimize potential conflicts that may arise as a result. It must be noted that, roughly speaking, the better this system functions and prevents disputes, the less necessary it is to invoke the grievance system for resolving disputes.\textsuperscript{115} Obviously, from the viewpoint of maintaining peaceful industrial relations, preventing labor disputes is preferable to resolving them after they arise. In

\textsuperscript{110} Decision of Mar. 8, 1965 (Nobeoka Yūbin Kyoku), Pub. Corp. Lab. Comm., Koroi Meireishū
\textsuperscript{212.}
\textsuperscript{111} See Gould, Japan’s Reshaping, supra note 28, at 89-90.
\textsuperscript{112} See Takemae, supra note 28, at 260.
\textsuperscript{113} See generally Sugeno, supra note 2, at 475.
\textsuperscript{115} Noriaki Kojima, Kigyō Nai ni Okeru Funsō Kaiketsu [Dispute Resolution (DR) in the Enterprise], in 80 Nippon Rōdō Hō Gakkai Shi 42-44 (1992).
this sense, the joint-consultation system, like adjustmental interpretation, is based on the less adversarial nature of industrial relations in Japan.

E. Summary and Analysis

Indeed, there are various factors that have influenced the domestication of foreign labor relations law in Japan: the traditional legal system, the history and strength of unions, the pre-war Adjustment Commissions, enterprise-based unionism, and the employment practices of Japanese companies. The most distinctive factor, however, is the less adversarial model of Japanese industrial relations. It may explain many Japanese features in the operation of the labor relations law after its framework was established.

Then what is the origin of such a concept of industrial relations? To a certain degree, Japanese culture may be significant in that Japanese people generally prefer to avoid confrontation. However, it may be difficult to employ this argument to explain why the less adversarial feature of Japanese industrial relations was established almost twenty years after World War II. If Japanese culture were the determinative factor, such a model of industrial relations would have emerged earlier, or would have been fostered by the government and employers even before World War II. As a matter of fact, industrial relations in Japan had often been adversarial until the 1960s. This order of events also indicates that the company-based unionism, which came into being just after World War II, was not the determinative factor for the development of less adversarial industrial relations. Thus, there must have been additional domestic factors other than the Japanese culture.

One such factor may be the structure of corporate ownership in Japan. After World War II, many large stockholders who controlled management in large corporations disappeared for reasons such as the dissolution of the zaibatsu, the financial conglomerates in the pre-war period. Thus, in a number of large corporations, ownership was divided into much smaller segments, and large stockholders quite often turned out to be other corporations which were interested not in receiving fat dividends but in the prevention of takeovers. In addition, the Japanese economy just after World

War II was not sufficiently strong to provide a stock market where many individuals could buy stocks in order to profit from dividends. Thus, in large corporations, there were no conspicuous group of "capitalists" in the American or European sense who owned and controlled the corporations in order to increase their dividends. Indeed, one commentator contends that Japan is not a capitalist country in this sense. Therefore, control of such corporations is left to those who work there, whether they are management or labor. Since management in such corporations was not under stockholder control, the conflict of interests between labor and management were much less sharp. They found common interests in making profit with long term perspective as well as in maintaining stable employment. This is one of the reasons why Japanese employers have tried hard to avoid discharging workers even when they feel the need to cut costs or restructure their organization. At the same time, however, the lack of stockholder control has often caused the absence of a check from outside, which may lead to self-indulgence by labor and management. In any event, such a community of interests may explain the less adversarial nature of industrial relations which appeared in post-war Japan.

V. Conclusion: Future Prospects

Foreign law has had a considerable influence on Japanese labor relations law both in its formation and in its operation. The Allied Powers that occupied Japan not only afforded an opportunity for union rights legislation but sometimes made recommendations as to the contents of legislation. While such recommendations were often modeled after American systems, Japan in its modernization also learned significantly from other foreign countries such as Germany and Great Britain. However, Japan has domesticated some elements of imported union rights laws. Such domestication took place especially when the imported framework or theory did not suit the Japanese concept of industrial relations.

Is there nothing more to be learned from foreign countries? The answer is no. Foreign law has experienced further development since the occupation period and has produced new statutes and case law. Whether such experience is worth transplanting or not, it nevertheless offers a source of informative experiments. What must be noted at present is that European or American law is not the only foreign law from which to learn: the

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118 NISHIYAMA, supra note 117, at 66.
development of labor relations law in Asian and other countries is also informative.

On the other hand, it may be time for Asian countries including Japan to furnish other regions of the world with information on their own union rights laws. The United States and European countries are also searching for a new paradigm of industrial relations as well as a legal framework that will suit such a paradigm. Although it is not clear whether the Japanese (or Asian) model of industrial relations will become such a paradigm, at least it is worthwhile to share and analyze each other's experiences. Such a comparative analysis is an important step to search for better industrial relations.