CAPTIVE AUDIENCE SPEECHES IN JAPAN: FREEDOM OF SPEECH OF EMPLOYERS V. WORKERS' RIGHTS AND FREEDOMS

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INTRODUCTION

Anti-union opinions expressed by employers have long been debated in Japanese labor law. This problem arose shortly after the enactment of the Labor Union Act of 1949 (LUA),[1] which prohibits certain employer conduct as "unfair labor practices."[2] Under the unfair labor practices system of the LUA, whether anti-union speeches by employers, including those delivered at meetings in which the employees are a "captive" audience (i.e., employees are obligated to participate in and listen to anti-union speeches) constitute unfair labor practices, namely, control over or interference in the formation or management of a labor union by workers (LUA, Article 7, item 3) has been rigorously debated. Discussion has focused on the relationship between the freedom of speech (the Constitution of Japan, Article 21, paragraph 1)[3] of employers and the workers' right to organize.[4] In section one, after examining examples of anti-union expression by employers, including their ability to make speeches to "captive" audiences of employees, this paper will address how anti-union "captive audience speeches" as well as other forms of anti-

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1. RŌDŌ KUMIAI HŌ [LABOR UNION ACT], Law No. 174 of 1949, English translation *available at* http://www.cas.go.jp/jp/seisaku/hourei/data/lua_2.pdf (last accessed June 12, 2007). English translations of other Japanese statutes, including the Labor Standards Act of 1947, are *available at* http://www.cas.go.jp/jp/seisaku/hourei/data2.html.

2. *See, e.g.*, Yamaoka Nainenki, 8 Minshū 990 (Sup. Ct., May 28, 1953), discussed *infra note* 9 and accompanying text. In this case, the anti-union speech discussed by the Labor Commission and the courts was delivered only six months after the enactment of the LUA.

3. NIHONKOKU KENPŌ [CONSTITUTION OF JAPAN] (hereinafter KENP), art. 21, ¶ 1, English translation *available at* http://www.kantei.go.jp/foreign/constitution_and_government_of_japan/constitution_e.html (last accessed June 12, 2007).

4. *Id.* Art. 28.

union speeches have been dealt with under Japanese constitutional guarantees.

Occasionally, in addition to anti-union speeches, political or religious speeches are delivered by employers (or those acting on their behalf) to "captive" audiences. Section II will address these cases. Here again, the relationship between the freedom of speech of the employer and the workers' constitutional freedoms will be examined.

I. ANTI-UNION SPEECHES

A. *The Ways in Which an Employer Expresses Anti-union Messages*

In Japan, anti-union speeches are made in a variety of situations. An employer might, for example, oppose the formation of a union by questioning the merit of a proposed union before it is organized. Even after a union is formed, an employer might criticize what he or she perceives as its militant, non-cooperative policies, or the conduct of the union, such as its desire to affiliate with a leftist confederation or call a strike, or an employer might try to abort the activities of the union and its members. An employer might also try to persuade union members to pull out of a union or dissuade nonunion employees from joining the union. If a militant union and a cooperative one co-exist in the same workplace,[5] an employer might blame the former and praise the latter in the hope of suppressing the activities of the former.

The ways in which anti-union speeches are made are also diverse. Employers may send anti-union messages by notices or letters to individual employees, or voice their opinions at assemblies arranged for the sole purpose of providing a platform for anti-union speeches, at morning assemblies or at training sessions.

The variety of such situations and the diversity of ways in which employers deliver anti-union speeches (including "captive" ones, discussed later), can be explained by the fact that, unlike in the United States, an exclusive representation system has not been adopted in Japan. Because an exclusive representation system does not exist, nor is there representation election, workers can designate which union represents them and bargain collectively with their employer based on their own opinion, simply by organizing or joining the union. Workers are also able to change their representative union, at any time, by

5. *See infra* note 6.

leaving one union and joining (or organizing) another union,[6] or choose to bargain individually by not joining any union. This means that employers have an incentive to make anti-union speeches in any way and at all times, in order to thwart the formation of or affiliation with what management perceives as an undesirable union.

The following discusses typical ways employers use to express their anti-union messages; detailed attention will be given to creating and addressing "captive" audiences of employees with careful regard to orders of the Labor Commissions[7] and relevant court cases. The legality of anti-union speeches, including "captive" ones, will be examined in the next subsection.

1. Individual Interviews

Employers sometimes meet with their employees individually, during or after working hours, in order to express their critical opinion about the union directly. This sort of one-to-one contact is often used to urge union members to leave their union. For example, in the *Shinjuku Yūbinkyoku* case,[8] one head of a post office criticized the militant policy of the existing union while socializing with several of his employees at his house, at a time when there was critical group within the union that was about to organize a new union. The Supreme Court held that although the appropriateness of his comments was questionable, they still fell short of control and interference in light of the content of his speech and other circumstances.

2. Special Assemblies for Anti-union Speeches

In some cases, employers hold a specially arranged assembly to make anti-union speeches. In the *Yamaoka Nainenki* case,[9] the

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6. As a corollary of non-existence of an exclusive representation system under the Labor Union Act in Japan, multiple unions can coexist at one workplace, each as the representative of its own members. This system is called "plural unionism" or a "multiple representation system."

7. The Labor Commissions are independent administrative committees established by the LUA. Under the LUA, unfair labor practice cases are first dealt with by the Local Labor Commissions, instituted in each prefecture (therefore there are forty-seven Local Labor Commissions in Japan). If an employer or a union is not satisfied with the order of the Local Labor Commission, they can appeal to the Central Labor Commission for review (they can also appeal to the District Court in each prefecture, bypassing the Central Labor Commission, if they want). Either party, if dissatisfied with the order of the Central Labor Commission (or that of Local Labor Commission, in cases that bypassed the Central Labor Commission) can seek judicial review. In examining the law on unfair practices, it is important to review both the orders of the Labor Commissions and the court cases.

8. Shinjuku Yūbinkyoku, 1102 HANREI JIHŌ 140 (Sup. Ct., Dec. 20, 1983).

9. 8 MINSHŪ 990 (Sup. Ct., May 28, 1953).

president of a company held a meeting with the employees (and their parents).[10] In the meeting, the president criticized the union at the plant, which had been organized by the employees of that plant, for joining the federation of the unions of the entire company. He said that if the union did not resign from the federation, there would be redundancy at the plant. The Supreme Court held that the president's speech contained criticism of the union and the threat of unfavorable treatment and therefore constituted the unfair labor practice of control over and interference in union activity, violating section 7, item 3 of the Labor Union Act.

In the *Nihon Schering* case,[11] a company and a union were in fierce conflict with each other over working conditions, and the union called a strike. The next day, the president of the company delivered a speech to all the employees at the headquarter office during working hours, via the company's public address system. He blamed the union for having called a strike and indicated that if the union continued calling for strikes, the parent company would shift production and sales work to another firm. Letters to the same effect were also delivered to all the employees of the main office. The Central Labor Commission pointed out that the purpose of the speech was to disturb union members who were on strike and weaken the union; the Commission thus decided that the speech constituted undue control and interference.

3. Morning Assemblies

Many companies, especially small- and medium- sized companies, hold a morning assembly called *chōrei*. Managers usually hold these meetings to give instructions on the business of the day or to deliver a moral lecture. Because it is held as a part of business, employees are usually obligated to participate in it, and failure to attend could lead to a lower evaluation or even disciplinary action.

Though it is held primarily for business purposes, employers sometimes take the opportunity to deliver anti-union speeches, because it is more convenient to do so when employees are already assembled than to arrange a special meeting for anti-union speeches. In the *JBE* case,[12] an assistant manager of a company defamed a union

10. It is not clear from the decision whether *all* the employees at the plant were called to the meeting. Nor is it clear whether participation in the meeting was mandatory, though it seems it was.

11. 63 MEIREISHŪ 529 (Cent. Labor Comm'n, Mar. 15, 1987).

12. 113 MEIREISHŪ 310 (Saitama Labor Comm'n, Mar. 25, 1999), *aff'd*, 118 MEIREISHŪ 52 (Cent. Labor Comm'n, Dec. 20, 2000).

at the morning assembly at which about half of the firm's employees attended, saying that the union knew nothing about labor law and that it was crushing the company. He also said that union members should quit the company. In deciding that the speech made by the assistant manager went beyond the boundaries of permissible countervailing measures and constituted control and interference, the Labor Commission pointed out that the speech was made at a morning assembly that employees were obliged to attend.

In some cases, aside from routine morning assemblies, a special morning assembly is held in order to deliver anti-union speeches. For example, in the *Nihon Chiba-Geigy* case,[13] morning assemblies were held at the beginning of each month. However, a few days after the company was notified that a union was being organized at one of its plants, a manager of the company held an extraordinary morning assembly in the middle of the month, ordered all the employees at the plant to attend it, criticized the union's militant policy and urged union members to leave the union. The Labor Commission held that the manager's speech at the extraordinary morning assembly constituted control and interference.

4. Education and Training

In Japan, given the practice of long-term employment, employers invest in a wide range of educational programs and training sessions for their employees, in order to make the labor force as effective as possible. Recognizing the importance of conducting extensive educational and training programs so that employees can adapt themselves to changing working environments, the court[14] acknowledges and gives wide latitude to the employer's right to order employees to participate in educational and training programs.

Employers sometimes take advantage of this broadly acknowledged authority to order their employees to participate in

13. 57 MEIREISHŪ 65 (Osaka Labor Comm'n, Oct. 17, 1975), *aff'd*, 64 MEIREISHŪ 757 (Cent. Labor Comm'n, Jul. 5, 1978). The decision of the Central Labor Commission was further approved by Nihon Chiba-Geigy v. Cent. Labor Comm'n, 36 RŌMINSHŪ 237 (Tokyo D. Ct., Apr. 25, 1985), 36 RŌMINSHŪ 785 (Tokyo High Ct., Dec. 24, 1985), and 533 RŌDŌ HANREI 7 (Sup. Ct., Jan. 19, 1989).

14. *See*, *e.g.,* Kokutetsu Shizuoka Tetsudō Kanrikyoku, 24 RŌMINSHŪ 374 (Shizuoka D. Ct., Jun. 29, 1973). In this case, the court held that an employer can order employees to participate in education and training sessions designed to cultivate cooperativeness and develop discipline, as well as those aimed at enhancing the skills and knowledge needed for specific work. The employer's authority, however, is not without limit. For example, an employer cannot compel employees to participate in political or religious education, since it violates public policy (*see infra* Section II.C.). Also, an employer may not compel an employee to participate in a training session in which an anti-union speech is delivered, if it amounts to an unfair labor practice.

education and training sessions that serve as a forum for anti-union speeches. For example, in the *Sanoyasu Senkyo* case,[15] a company conducted training sessions in order to enhance productivity. In the training, the president of the company and managers delivered lectures detailing what sort of "desirable" labor-management relationship would lead to enhanced productivity. The lecturers emphasized that cooperative labor-management relationships were entering the mainstream and criticized leftist, militant union policies that their current enterprise union adhered to as being out of fashion. In deciding that the training constituted control and interference, the Central Labor Commission pointed out that employees were obliged to participate in it, that participants were not allowed to leave the meeting and that they were not allowed to offer countercharges during the lectures, thus indicating that the training was conducted in a "captive" manner.

5. Letters and Notices

In addition to delivering speeches, employers sometimes send letters to their employees or post notices in order to convey their anti-union message. In the *Purima Hamu* case,[16] after a bargaining impasse, a document, which was addressed to all employees, was posted at every establishment of the company. In that document, the president of the company, anticipating a strike, expressed his "serious determination" to fight against it and urged the employees to restrain themselves. The court held that the notice amounted to control over and interference in an internal union matter of deciding whether the union should go on strike and therefore constituted unfair labor practice.

6. Captive Audience Speeches in the Japanese Context

As already mentioned, in Japan there is no exclusive representation system, nor is there representation election. Therefore, U.S.-style "captive audience speeches," which are held before a representation election, do not exist in Japan.

However, as shown above, there certainly exist a variety of meetings that employees are obliged to participate in and listen to

15. Sanoyasu Senkyo, 59 MEIREISHŪ 394 (Cent. Labor Comm'n, Aug. 4, 1976), *aff'g* 54 MEIREISHŪ 580 (Osaka Labor Comm'n, Dec. 27, 1974).

16. 1134 RŌKEISOKU 5 (Tokyo High Ct., Sep. 27, 1981) *aff'd*, 1134 RŌKEISOKU 5 (Sup. Ct., Sep. 10, 1982).

anti-union speeches. Such meetings include morning assemblies[17] and training and educational forums[18] as well as meetings specially arranged for anti-union purposes.[19] As shown especially in the cases of morning assemblies and training sessions, employers often take advantage of meetings that are held in the course of normal business operations to deliver anti-union speeches to a "captive" audience. This reflects, as already mentioned,[20] the fact that employers have an incentive to make anti-union speeches in the hope of thwarting "undesirable" unions, in any way and at all times, not only before but also after unions are organized.

B. Legal Analysis of Employers' Anti-union Speeches: Freedom of Expression or Worker's Right to Organize?

Anti-union speeches made by employers present complex problems regarding restrictions to their freedom of expression posed by the LUA prohibition of unfair labor practices. Since the Labor Commissions and the courts examine whether a "captive audience speech" constitutes unfair labor practice according to the same criterion as is applied to other forms of anti-union expressions by employers, first the legality of anti-union speeches in general as well as its grounds will be discussed in subsections 1 and 2 below. After that, the legality of "captive audience speeches" will be explored in subsection 3 below.

1. The Legality of Anti-union Speeches: In General[21]

The Japanese Constitution guarantees freedom of expression.[22] The Constitution also guarantees "the right of workers to organize and to bargain and act collectively."[23] To effectuate this constitutional guarantee of worker's rights, the LUA was enacted. The LUA established an unfair labor practice system modeled after the Wagner

17. *See supra* Section I.A.3.
18. *See supra* Section I.A.4.
19. *See supra* Section I.A.2.
20. *See supra* Section I.A.1.
21. *See generally* Hisashi Okuno, *Shiyōsha no Genron no Jiyū to Shihai Kainyū (Employer's Freedom of Speech and Control over and Interference in Union Activities)*, *in* RŌDŌHŌ NO SŌTEN DAI-3-HAN (ISSUES ON LABOR AND EMPLOYMENT LAW) 60 (Sumida, Kunishige et al. eds., 3d ed. 2004) (reviewing the discussions of scholars and decisions of the courts and the Labor Commissions on anti-union speeches made by employers).
22. KENP, art. 21, ¶ 1.
23. *Id.* art. 28, English translation *available at* http://www.kantei.go.jp/foreign/constitution_and_government_of_japan/constitution_e.html.

Act of the United States.[24] Article 7, item 3 of the LUA prohibits employers from controlling or interfering with the formation or management of labor unions, as a form of unfair labor practices. Thus, an anti-union speech by an employer is seemingly protected by the constitutional right to freedom of expression on the one hand, but, at the same time, prohibited under the unfair labor practice system if it amounts to control or interference. Given this juxtaposition, the Labor Commissions and the courts as well as scholars have explored to what extent employers' anti-union speeches may be limited by the LUA's prohibition of controlling or interfering with the formation or management of labor unions.

Some commentators insist that freedom of expression be interpreted as broadly as possible since it is a fundamental freedom guaranteed by the Constitution. They argue that in principle an anti-union speech by an employer does not constitute an unfair labor practice of control or interference unless it contains a threat of reprisal or force or promise of benefit,[25] even though the LUA lacks a provision that corresponds to section 8(c) of the National Labor Relations Act (hereinafter NLRA) of the United States.[26] Many scholars, however, suggest regulating employers' anti-union speeches more stringently. They contend that whether or not an employer's speech affects the formation or management of a union should be decided by reviewing the totality of the situations. They further argue that as far as an employer's speech may affect the formation or management of a union by referring to internal union matters that a union and its members should decide independently from the employer, such conduct constitutes an unfair labor practice even if it does not explicitly pose a threat of reprisal or force or promise of benefit.[27]

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24. TAKASHI ARAKI, LABOR AND EMPLOYMENT LAW IN JAPAN 207 (2002). Though an unfair labor practice system was established in 1949, unfair labor practices of unions, which were introduced in the United States by the Taft-Hartley Amendment in 1947, was not incorporated in Japan. *See id*. at 192.

25. Kichiemon Ishikawa, *Shihai Kainyū* (*Controlling and Interference*), *in* RŌDŌHŌ ENSHŪ (LABOR LAW PRACTICES) 50, 57-58 (Teruhisa Ishii & Toru Ariizumi eds., 1961); KOICHIRO YAMAGUCHI, RŌDŌ KUMIAI HŌ (LABOR UNION LAW) 103 (2d ed. 1996).

26. National Labor Relations Act, 29 U.S.C. § 158(c) (2007) ("[t]he expressing of any views, argument, or opinion . . . shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.").

27. SŌYA AOKI, RŌSHI NO GENRON SEIJI BUNKA KATSUDŌ (THE VIEWS AND POLITICAL AND CULTURAL ACTIVITIES OF LABOR AND MANAGEMENT) 113 (1970); KEN'ICHI HOKAO, RŌDŌ DANTAI HŌ (LABOR LAW) 294 (1975); SATOSHI NISHITANI, RŌDŌ KUMIAI HŌ (LABOR UNION LAW) 202–03 (2d ed. 2006); Hayato Kubota, *Genron no Jiyū to Futō Rōdō Kōi (Freedom of Expression and Unfair Labor Practice)*, 39 MINSYŌHŌ ZASSHI 841, 863–64 (1959); Tsuneki Momii, *Shiyōsha no Genron to Futō Rōdō Kōi no Seihi (Speech of Employers and Unfair Labor*

The Japanese Supreme Court's position on this problem is not clear. In the *Yamaoka Nainenki* case,[28] the Supreme Court pointed out that the president's speech at the meeting contained a threat of unfavorable treatment and held that the president's speech constituted unfair labor practice. But since it is a case in which the threat of unfavorable treatment did exist, it is not certain how the Supreme Court would judge in a case in which such a clear cut element were not present. In the *Shinjuku Yūbinkyoku* case,[29] although the Supreme Court held that employers are entitled to freedom of expression, the Court also held that the expression of opinions should be made in a "fair and appropriate" manner. It seems that the Supreme Court wishes to pose some level of limitation on an employer's right to make an anti-union speech, but the details governing such limitations remain unclear.

In practice, the Labor Commissions and the lower courts have developed a criterion for examining anti-union speeches made by employers. The Labor Commissions and the courts decide, just like the majority of legal commentators, whether an employer's speech constitutes an unfair labor practice of control and interference by examining the totality of the circumstances under which the speech is made. This includes the contents of the speech, the manner in which the speech is delivered, the timing of the speech, the position of the speaker (in the managerial hierarchy) and the effect the speech has on employees, the union, and its members. The Labor Commissions and the courts hold the speech to constitute unfair labor practice if, after considering these factors, they find that the speech, even if it contains no express threat of reprisal or force or promise of benefit, had a chilling effect on union members and therefore influenced or had the possibility of influencing the formation or the management of the union.[30]

Practice), 48 KIKAN RŌDŌHŌ 23, 40–43 (1963); Akira Okuyama, *Shiyōsha no Genron (Speeches of Employers)*, 8 GENDAI RŌDŌHŌ KŌZA (MODERN LECTURES ON LABOR LAW) (FUTŌ RŌDŌ KŌI (UNFAIR LABOR PRACTICES) 27, 55 (Nihon Rōdōhō Gakkai (the Japan Labor Law Association) ed., 1982).

28. 8 MINSHŪ 990 (Sup. Ct., May 28, 1953). For the facts of the case, *see supra* note 9 and accompanying text.

29. Shinjuku Yūbinkyoku, 1102 HANREI JIHŌ 140 (Sup. Ct., Dec. 20, 1983). *See supra* note 8 and accompanying text for the facts of the case.

30. For court cases, *see*, *e.g.*, Kita Nihon Sōko Kōun, 372 RŌDŌ HANREI 58 (Sapporo D. Ct., May 8, 1981); Purima Hamu, 1134 RŌKEISOKU 5 (Tokyo High Ct., Sep. 27, 1981) *aff'd*, 1134 RŌKEISOKU 5 (Sup. Ct., Sep. 10, 1982); Seishin Tetora Pakku, 779 RŌDŌ HANREI 47 (Tokyo High Ct., Dec. 22, 1999); Wakayama Shin'yō Kinko, 19 RŌMINSHŪ 1536 (Wakayama D. Ct., Dec. 13, 1968). For orders of the Labor Commissions, *see*, *e.g.*, Nobeoka Gakuen, 119 MEIREISHŪ 1002 (Cent. Labor. Comm'n, Jan. 10, 2001); Torisen, 116 MEIREISHŪ 507 (Gunma Labor

Under this criterion, the Labor Commissions and the courts often find employers commit unfair labor practices when they deliver speeches on internal union matters that the union and its members should decide independent of the employer. For example, employers' speeches on such matters as to which industrial and national federation the union should affiliate with,[31] who will be selected as the union officials,[32] whether the union should go on strike or not,[33] or whether the employees should remain union members or not,[34] were frequently found to constitute unfair labor practices as they influenced the formation or the management of the union.

In sum, the Labor Commissions and the courts as well as a majority of scholars do not support the view that an employer's speech does not constitute unfair labor practice unless it contains the threat of reprisal or force or promise of benefit. Rather, they examine the totality of the situation and find unfair labor practice as far as an employer's speech influences the formation or the management of a union, even if it lacks a threat of reprisal or force or promise of benefit, especially when the speech refers to internal union affairs.

2. Grounds for Limited Anti-union Speech

The Labor Commissions and the courts in Japan take a stricter stance on an employer's anti-union speeches (including "captive" ones) than the NLRB and the courts in the United States which do not find such employer's anti-union speeches to constitute unfair labor practice unless such speeches contain threat of reprisal or force or promise of benefit.[35] This can be explained by the following three reasons.

First, in Japan, the worker's right to organize and to bargain and act collectively, is guaranteed by the Constitution.[36] This article is

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Comm'n, Mar. 9, 2000); Atomu Medikaru, 111 MEIREISHŪ 110 (Saitama Labor Comm'n, Jul. 9, 1998).

31. *See*, *e.g.*, Nobeoka Gakuen, 119 MEIREISHŪ 1002 (Cent. Labor. Comm'n, Jan. 10, 2001).

32. *See*, *e.g.*, Chūrōi (Asahi Kasai Kaijō Hoken), 862 RŌDŌ HANREI 41 (Tokyo High Ct., Sep. 30, 2003).

33. *See*, *e.g.*, Kita Nihon Sōko Kōun, 372 RŌDŌ HANREI 58 (Sapporo D. Ct., May 8, 1981); Purima Hamu, 1134 RŌKEISOKU 5 (Tokyo High Ct., Sep. 27, 1981) *aff'd*, 1134 RŌKEISOKU 5 (Sup. Ct., Sep. 10, 1982); Seishin Tetora Pakku, 779 RŌDŌ HANREI 47 (Tokyo High Ct., Dec. 22, 1999); Wakayama Shin'yō Kinko, 19 RŌMINSHŪ 1536 (Wakayama D. Ct., Dec. 13, 1968); Atomu Medikaru, 111 MEIREISHŪ 110 (Saitama Labor Comm'n, Jul. 9, 1998).

34. *See*, *e.g.*, Torisen, 116 MEIREISHŪ 507 (Gunma Labor Comm'n, Mar. 9, 2000).

35. As to the situation in the United States, see, for example, Alan Story, *Employer Speech, Union Representation Elections, and the First Amendment*, 16 BERKELEY J. EMPL. & LAB. L. 356 (1995); ROBERT A. GORMAN & MATTHEW W. FINKIN, BASIC TEXT ON LABOR LAW 175–206 (2nd ed. 2004).

36. KENP, art. 28.

understood to be derived from Article 159 of the *Weimer* Constitution of 1919, which guaranteed freedom of association to safeguard and improve working and economic conditions and declared that all agreements and measures limiting or impairing this freedom are illegal.[37] Thus, as legal commentators point out, Article 28 of the Japanese Constitution protects a worker's right to organize, to bargain, and to act collectively from infringement not only by the nation, but also by an employer.[38] In other words, the Constitution requires employers not to impair the worker's rights guaranteed therein. This constitutional guarantee of worker's right provides the fundamental basis for regulating any employer's anti-union speech that affects the formation and management of unions, especially those referring to internal union affairs that should be decided by the union and its members independent of the employer. Although employers are also guaranteed their constitutional right to freedom of speech (Article 21), they are not free from the restrictions posed by Article 28 of the Constitution.[39]

Second, in Japan, there is no statutory provision that corresponds to section 8(c) of the NLRA in the United States which stipulates that "[t]he expressing of any views, argument, or opinion . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit."[40] Therefore, there is no statutory limitation to regulate an employer's anti-union speech. This, together with the constitutional guarantee of a worker's right, presents another ground upon which to more strictly restrict an employer's anti-union speech.

Third, the reality of labor-management relations that a union and its members are more readily affected by speeches made by employers provides still another reason for limiting anti-union remarks by employers. In Japan, nearly 90% of unionized workers are organized by enterprise unions and they account for more than 95% of all

37. ARAKI, *supra* note 24, at 9; KAZUO SUGENO, RŌDŌHŌ (LABOR AND EMPLOYMENT LAW) 21 (7th rev. ed., 2006); NISHITANI, *supra* note 27, at 29. Though Article 159 of the *Weimar* Constitution guaranteed the freedom of association of *both* employees and employers (see MANFRED WEISS & MARLENE SCHMIDT, LABOUR LAW AND INDUSTRIAL RELATIONS IN GERMANY 136 (3d revised ed. 2000)), Article 28 of the Constitution of Japan guarantees *only* the *worker*'s right to organize.

38. Sugeno, *supra*; Nishitani, *supra*, at 47.

39. Many commentators have pointed out that this constitutional guarantee of the worker's right to organize provides the basis for rigidly regulating the employer's freedom of speech with regard to making an anti-union speech. *See, e.g.*, Momii, *supra note* 27, at 31-32; Aoki, *supra note* 27, at 111-113; Okuyama, *supra note* 27 at 55; Nishitani, *supra note* 27 at 203.

40. National Labor Relations Act, 29 U.S.C. § 158(c) (2007).

unions in Japan.[41] Enterprise unions, as the name indicates, are organized and operate on a company (or plant) basis. Union membership is limited to the employees of a particular firm (or plant) and managed by officials elected from the union members who are employees of the company. Though many of the enterprise unions are affiliated with industrial alliances, and through them, national centers, control by industrial alliances or a national center over enterprise unions are quite limited. Because unions are organized and administered by employees of a particular company, an enterprise union as well as its member employees are prone to be influenced by the employer's speech and behavior. This reality provides still another reason to regulate employer's speeches more strictly.

3. Captive Audience Speeches and Worker's Constitutional Right

As already mentioned, the question of whether "captive audience speeches" by employers, such as those delivered at morning assemblies, training sessions, and specially arranged meetings for that purpose, constitute unfair labor practice is decided according to the criterion explained in subsection 1 above, i.e., based on the totality of the circumstances, just as other forms of anti-union expression made by the employer.[42]

Therefore, although no Labor Commissions or courts have held an employer's speech to constitute an unfair labor practice solely because it is delivered to a "captive" audience, they do sometimes[43] consider whether the speech was presented to an audience in a "captive" situation (i.e., the fact that employees were forced to attend it or that employees were prohibited from asking questions) in examining the totality of the situation, as one of the indicating factors that the speech went beyond the permissible limitation and influenced the formation or the management of a union.[44] For example, in the

41. ARAKI, *supra* note 24, at 165.

42. Since the LUA of Japan did not institute a representation election system, unlike that of the United States, there arises no problem of whether a "captive audience speech" (or any other form of an employer's expression of opinion) can lead to the setting aside of an election.

43. Though the Labor Commissions and the courts do not always refer to the fact that the speech was delivered in a "captive" manner, it seems to be due to the fact that other circumstances satisfy the finding of control or interference. There is no case in which the Labor Commissions or the courts held that the fact that the speech was delivered in a "captive" manner shall not be viewed as evidence of control or interference.

44. In addition to the *Sanoyasu Senkyo* case mentioned in the text, *see*, *e.g.*, Todaya, 60 MEIREISHŪ 1002 (Nagano Labor. Comm'n, Dec. 1, 1976); JBE, 113 MEIREISHŪ 310 (Saitama Labor Comm'n, Mar. 25, 1999), *aff'd*, 118 MEIREISHŪ 52 (Cent. Labor Comm'n, Dec. 20, 2000).

Sanoyasu Senkyo case,[45] in addition to the fact that at the training sessions the employer delivered speeches that suggested the union should change its leftist, militant policy, the Central Labor Commission pointed out that the employees were obliged by the employer to participate in the training sessions, that participants were not allowed to leave it and that they were not allowed to countercharge against the lectures, all considered as evidence to support the Central Labor Commission's decision that the employer controlled and interfered in the operation of the union and thus committed an unfair labor practice.

Neither the Labor Commissions nor the courts have clarified why they consider a speech made in a "captive" fashion as one of the indicia of control and interference. Their negative attitudes toward "captive audience speeches," however, can be explained, again, by the constitutional guarantee of workers' right to organize as described in subsection 2 above. Because the very fact that employees at "captive audience speeches" are forced to assemble by order of the employer and compelled to listen to anti-union speeches delivered by the employer underscores the strong posture of the employer against unions, employees at such speeches are far more easily influenced than they are by other forms of expression of anti-union opinion by the employer. Thus, "captive audience speeches" are assumed to more seriously infringe on the workers' constitutional right to organize, i.e., the right to organize and manage a union by themselves, free from an employer's influence. The constitutional guarantee of workers' right to organize, together with other reasons mentioned in subsection 2 above, provide the basis for the negative evaluation of "captive audience speeches."[46]

In sum, in Japan although the practice of "captive audience speeches" delivered via morning assemblies, education and training sessions, as well as meetings specially arranged for the purpose of delivering anti-union speeches persist, they are viewed negatively by the Labor Commissions and the courts, as strong indicia of infringement by the employer on workers' right to organize guaranteed by the Constitution.

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45. Sanoyasu Senkyo, 59 MEIREISHŪ 394 (Cent. Labor Comm'n, Aug. 4, 1976), *aff'g* 54 MEIREISHŪ 580 (Osaka Labor Comm'n, Dec. 27, 1974). *See supra* note 15 and accompanying text for the facts of the case.

46. *See* Momii, *supra* note 27, at 36–37 (arguing that the right to organize includes the freedom of workers to organize and manage a union based on their own will and that it would be a restriction of this freedom for an employer to compel its employees to participate in training sessions and to deliver speeches on union matters).

II. POLITICAL OR RELIGIOUS SPEECHES

As examined in Section I.A.6, employers often take advantage of meetings such as morning assemblies and training sessions to express their anti-union views to their "captive" employee audience. These meetings present, however, not only an opportunity for employers (or someone acting on behalf of employers) to voice anti-union sentiment, but also a venue to voice concerns on other matters as well. In the following, examples of political and religious speeches made to a "captive" audience are explored (Sections II.A and II.B below). Afterwards, the legality of these speeches is examined in subsection C below.

A. Political Speeches

It is often pointed out by journalists that companies (as well as labor unions) engage in organized activities that support a candidate for national or local election.[47] Such activities may include, among others, engaging employees in campaign activities and urging employees' and affiliated companies to support (and vote for) the candidate.[48]

As part of these supporting activities, employers sometimes let a candidate they support deliver a speech at company meetings (such as the morning assembly) in which the audience is held in a "captive" manner. Such a political version of "captive audience speech" is clearly illustrated in one court decision.[49] In this case, at the request of a longstanding patron, and thinking it beneficial to the company to have a tie with a politician, the president of a company determined to place his organization behind a candidate for a prefectural assembly election. As a way to assist the campaign of the candidate, he decided to invite the candidate to their morning assembly as an opportunity to garner support among the employees. Employees were ordered to attend the morning assembly. At it, after the president discussed

47. *See*, *e.g.*, Takao Saito, *Nihon no Jyōshiki "Kigyou Gurumi Senkyo" Saizensen (Forefront of corporate support for campaign activities)*, 107 CHŪŌ KŌRON 44 (1992).

48. *See* Saito, *supra* note 47, at 44–51. *See also* Prosecutor of Sendai High Public Prosecutors Office v. Moriuchi, 49 KŌMINSHŪ 38 (Sendai High Ct., Jul. 8, 1996), discussed *infra* note 49 and accompanying text.

49. Prosecutor of Sendai High Public Prosecutors Office v. Moriuchi, 49 KŌMINSHŪ 38 (Sendai High Ct., Jul. 8, 1996), *aff'd*, Moriuchi v. Prosecutor General, 51 MINSHŪ 1453 (Sup. Ct. Mar. 13, 1997). This case dealt with whether a winner of a prefectural assembly election would lose his seat under the "guilty-by-association" system of the Public Office Election Act in conjunction with a violation of the Act by a company officer and managerial employees who served food and drinks to people as a payoff for procuring votes. The legality of the "captive" morning assembly was not disputed.

production and performance issues, he introduced the candidate and told them that the company had decided to support the candidate. Then, the candidate delivered a speech and enlisted support. The president of the company also urged his employees to support the candidate.[50] At another morning assembly, held one day before the election, the manager of the company told his employees "not to abstain from voting," hinting they should vote for the candidate.[51] As this case clearly illustrates morning assemblies—intrinsically held for business purposes—are sometimes exploited for political purposes.

B. Religious Speeches

Although no cases are known in which employers have delivered religious speeches, one can find cases in which employers make their employees participate in certain mental training exercises that include religious rites and lectures. As already mentioned in Section I.A.4, under the long-term employment system, employers conduct a variety of educational programs and training sessions, and as part of these, some employers urge or order employees to participate in mental exercises, hoping that their employees will cultivate desirable characteristics and become more motivated, willing workers.

The *Mie Ube Namakon* case[52] addresses the ramifications of such a mental training session. In this case, an employee was ordered by his employer to participate in a mental training session conducted by the organization. The fee for the training session was paid for by the company. Though the employee was told by the employer that the training had nothing to do with religion, at the trial it was revealed that the hosting organization espoused Shinto-like doctrines and the lecture in the session included explanations on tenets of the organization and criticism of a Buddhist sect in which the employee believed. The session also included worship before a Shinto shrine. Though the company fired the employee for refusing to take part in these religious lectures and rituals, the court held that the dismissal was null and void. As shown in this case, though employers seem more intent on shaping a better workforce than in providing religious education, religious speeches sometimes become part of employees' mental training.

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50. *Id.* at 64–65, 68–69.
51. *Id.* at 71.
52. 14 RŌMINSHŪ 668 (Nagoya D. Ct., Apr. 26, 1963).

C. The Legality of Captive Audience Speeches on Political or Religious Matters

As a matter of fact, though in some cases employers (or those acting for employers) deliver political or religious speeches at meetings in which employees are held "captive," the courts hold it illegal for an employer to force his or her employees to attend such meetings.

In the *Dainintekku* case,[53] an employee brought an action for damages against a company for being forced to attend morning meetings and to listen to political speeches delivered by candidates for national or local election. The court held that the employer infringed on the employee's freedom to decide whether or not he would listen to election speech, i.e., the right of self-determination that derives from political freedom or freedom of expression, and ordered the employer to pay damages.

Similarly, in the *Mie Ube Namakon* case,[54] the court held it impermissible to fire an employee for refusing to take part in lectures and rituals of a religion that he did not believe in, pointing out that under the Constitution of Japan, freedom of religion is guaranteed to everybody.

Legal commentators agree with the courts and insist that employers are not allowed to hold "captive audience speeches" on political or religious affairs.[55] They point out that the Japanese Constitution guarantees the freedom of thought and conscience (Article 19), the freedom of religion (Article 20), and these freedoms constitute public policy (Civil Code, Article 90). These freedoms are understood to include the freedom from imposition or recommendation of certain ideas and religious beliefs against one's will.[56] Since political or religious speeches made to a "captive" audience strongly infringe upon these freedoms guaranteed by public policy and ultimately by the Constitution, and since there is no reason to justify the imposition of certain political or religious ideas in employment relationships (i.e., a worker's political or religious view

53. Dainintekku, 1072 HANREI TAIMUZU 185 (Osaka D. Ct., Aug. 20, 1999).

54. Mie Ube Namakon, 14 RŌMINSHŪ 668 (Nagoya D. Ct., Apr. 26, 1963). For details of the case, *see supra* note 52 and accompanying text.

55. Hideo Takeshita, *Jūgyōin Kyōiku (Education and Training of Employees)*, 8 GENDAI RŌDŌHŌ KŌZA (MODERN LECTURES ON LABOR LAW) (FUTŌ RŌDŌ KŌI (UNFAIR LABOR PRACTICES)) 2, 11–13 (Nihon Rōdōhō Gakkai (the Japan Labor Law Association) ed., 1982); CHŪSYAKU RŌDŌ KIJYUN HŌ (COMMENTARY ON LABOR STANDARDS ACT) 839 (Tokyo Daigaku Rōdōhō Kenkyukai ed., 2003); Sugeno, *supra* note 37, at 382.

56. KIHONHŌ KONMENTĀRU KENPŌ (COMMENTARY ON BASIC LAW: THE CONSTITUTION) 125, 134–35 (Kosuke Kobayashi and Akira Serizawa eds., 2006).

has nothing to do with the accomplishment of the work), "captive" speeches on these matters are not permitted. Employers' freedom of expression cannot, as far as it encroaches on these freedoms, be free from restriction.

CONCLUSION

In Japan, employers express their opinions about unions in a variety of ways, ranging from individual interviews, specially arranged meetings to deliver anti-union speeches, and morning assemblies to training sessions, posting of notices and distribution of letters. In some of these situations, namely, specially arranged meetings for the sole purpose of delivering anti-union speeches, morning assemblies and training sessions, employers compel their employees to participate in and listen to anti-union speeches delivered by employers. In other words, though not exactly the same as those held in the United States, employers do hold "captive audience speeches" in order to make their employees listen to their anti-union opinions. Some employers take advantage of morning assemblies to make their employees listen to political speeches delivered by them or candidates running for election whom they support. In some cases, employees are compelled to listen to religious speeches during training sessions.

The courts and the Labor Commissions as well as most legal commentators view the legality of these "captive" meetings negatively. Although freedom of speech is guaranteed by the Constitution, the workers' right to organize, freedom of thought and conscience, as well as the freedom of religion are also guaranteed by the Constitution. The workers' right to organize encompasses the right to form and manage a union by themselves, free from the employer's influence. Similarly, the freedom of thought and conscience and freedom of religion include freedom from imposition of certain ideas and religious beliefs. These rights and freedoms work as counterbalances to and limitations of the freedom of expression that employers enjoy. Because of their coercive nature, "captive audience speeches" on anti-union, political, or religious matters seriously infringe on these rights and freedoms and are therefore viewed negatively. In Japan, employers' anti-union speeches as well as political or religious speeches are discussed and dealt with not only from the viewpoint of the freedom of expression of the employer, but also from the viewpoint of the right and freedom that workers enjoy, all of which are guaranteed by the Constitution.