JAPAN

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I. Definition

In Japan, there is no official definition of *strikes*. Some legislative provisions mention "dispute acts" including strikes, which are protected by Art.28 of Constitution, but there is no legal definition of a "strike" itself. In judicial doctrine, a "strike" is generally defined as a complete cessation of work simultaneously conducted by a group of workers[1].

II. Legal framework

II.1 legal sources

Art.28 of the Constitution guarantees "the right of workers…to act collectively". The important content of this right is "dispute acts" of workers and the right to strike is constitutionally secured as the most representative means of dispute acts. Bolstering this constitutional guarantee are the three legal protections provided by the Trade Union Law (TUL) for "proper" dispute acts: (1) exemption from criminal liability (Art.1 Para.2), (2) exemption from civil liability or liability for damages caused by dispute acts (Art.8), and (3) prohibition of disadvantageous treatment, such as retaliatory discharge or disciplinary action (Art.7 No.1).

II.2 The system of immunities

In Japan, the right to strike is basically built on a system of immunities:

(1) "Proper" dispute acts will not constitute violations of the criminal law or be subject to criminal punishment (Art. 35 of the Penal Code, TUL Art.1 Para.2).

(2) An employer shall not be permitted to claim indemnity from a trade union or its member for damages caused by a strike or other acts of dispute which are proper acts (TUL Art.8).

(3) An employer's discharge, discipline or other disadvantageous treatment of workers because of their participation in proper dispute acts is null and void. Those disadvantageous treatments violate the public policy of Art.90 of the Civil Code which implements the intention of Art.28 of the Constitution.

II.3 Procedures

Since only "proper" acts of dispute are provided the three legal protections, the main legal issue

[1] Satoshi Nishitani, *Rodo Kumiai Ho* (Labor Union Law), Yuhikaku, 2006, 435-436.

concerning dispute acts is the determination of their propriety. The TUL remains silent on the criteria for determining propriety, and thus judicial interpretation controls it. According to the established interpretation, the following four elements are examined in a determination of "propriety": (1) the parties to the dispute acts, (2) their purposes, (3) procedures used to initiate the acts, and (4) their means.

In this paper, firstly the propriety of the procedures is on issue. Strikes can be regarded as improper because of their timing or their failure to comply with requisite procedures.

(a) First of all, strikes do not need to be the last resort. There is no principle of *ultima ratio* in Japan. Once negotiations have started, it is up to the union to decide at what stage it will resort to strikes even while negotiations are still in progress. However, strikes without previous collective bargaining are understood to be improper.

(b) Art.5 Par.2 No.8 of the TUL provides that a union constitution should include a direct secret ballot vote of the members or their delegates to approve the start of a strike. However, this provision merely shows one of the requirements to get TUL's remedies for unfair labor practices or dispute acts, and the approval of the strike by the workers' rank and file is not necessary to get the propriety of the strike. It means: the TUL prohibits three types of anti-union acts by employers (disadvantageous treatment / refusal to bargain / domination and interference in union administration) and the Labor Commissions provide administrative remedies for unfair labor practice. Art.5 Par.2 No.8 of the TUL is only a requirement for a union to get special remedies in the TUL, but it does not determine the criteria of the propriety of strikes guaranteed by the Constitution.

On the other hand, in practice, most union constitutions require a direct secret vote before starting a strike. Whether the strike in violation of such union procedures can be proper has been discussed. Most of the judicial doctrines and courts say that they are no more than defects in internal union formalities for launching strikes which should have no effect on the question of propriety in connection with external responsibility.

(c) Parties in public welfare undertakings, namely those in transportation, post or telecommunications, water, electricity or gas supply, medical treatment or public health (Labor Relations Adjustment Law (LRAL) Art.8), must notify the Labor Commission and the Health, Labor and Welfare Minister or the prefectural governor at least 10 days prior to the day on which the dispute act is to be commenced (LRAL Art.37).

In other cases, there is no legal obligation to prior notice. Sudden attacks in the course of bargaining are principally proper. Where a collective agreement requires prior notice, the violation of this can lead to the finding that the dispute act is improper.

II .4 Parties to the dispute acts

According to the general view, the right to dispute acts, which is guaranteed by the Constitution, is understood as ensuring equality between employers and workers in collective bargaining and as a means of overcoming deadlocked negotiations. Therefore, for a dispute act to be recognized as proper, it must be conducted by an organization that can be a party to collective bargaining.

(a)(b) A party to a strike, namely a party to a collective bargaining must be a union in the meaning of Art.28 of the Constitution (so-called *constitutional union*). The basic definition of a constitutional union is written in the main text of Art.2 of the TUL. According to this, the labor organization must be (1) primarily formed by workers, (2) independent of the employer, and (3) its main purpose must be to maintain and improve the working conditions and to raise the economic status of the workers. A union or a coalition of unions meeting all these requirements enjoys the protection of the right to collective bargaining and strikes. Majority support of the workers is not required in Japan.

(c)/(e)/(f) According to most academics, the workers in general are not entitled to strikes. Therefore, wildcat strikes or strikes conducted by factions within a union without the approval of the union's competent organs are improper. However, where an unorganized group of workers (dispute group) selects a person as its representative and prepares a bargaining structure, it has the right to strikes protected by Art.28 of the Constitution.

Workplace organizations which lack the essentials of a union (an independent constitutional base, an independent organizational base and an independent financial base) do not possess their own collective bargaining and strike right. They can engage in collective bargaining and start strikes only with respect to specific matters that have been ensured to them for that purpose by the basic-unit union.

(d) In Japan, a basic-unit union is a basic party to collective bargaining and dispute acts. However, the parent organizations (federations) of basic-unit unions also have their own right to collective bargaining and strikes over their independent organizational concerns, as long as they come within the basic definition of a union in Art.2 of the TUL and have power of control over their member unions.

II. 5 Participants

Persons who belong to another trade union than the union which is the party to the strike or persons who do not belong to any trade union are not entitled to participate in the strike. When a strike conducted by a trade union is understood to be proper, the legal protection for that can be given only to its union members.

II.6-1 Peace obligation

(a)(b) Parties to a collective agreement have the duty not to resort to dispute acts during the period of validity of the agreement in order to change matters that have been fixed by it. It is generally understood that this "relative peace obligation" is inherent in all collective agreements even if there is no explicit provision in the agreement. In contrast, the duty not to resort to strike as to all matters (absolute peace obligation) arises only when the parties to a collective agreement have explicitly regulated this in the agreement.

It is much debated whether a strike which violates the peace obligation is proper. Some legal theorists intend the basic character of a collective agreement as a contract and contend that violations of that duty are only contract violations which should not be regarded as improper for that reason alone. However, others insist that the propriety of a strike against the peace obligation should be negatively evaluated in its procedures because of the important function of the peace obligation that stabilizes the rules which have been fixed in the collective agreement.

(c)i. The absolute peace obligation does not arise without a special provision in a collective agreement. But the question can be asked whether the relative peace obligation can be excluded by a special clause in the agreement. Some judicial doctrines emphasize the contractual character of a collective agreement and allow parties to set aside that duty. However, there is also another position that such a clause is invalid because it ignores the important function of the relative peace obligation to stabilize the conditions that have been settled in the collective agreement. The discussion still continues.

ii-v The part of a collective agreement where the peace obligation is regulated doesn't create any normative effect on individual employment contracts, but creates only a contract-obligation effect. Thus, both parties to the collective agreement have contractual rights and obligations. The beginning and end of that obligation correspond to those of the existing collective agreement concerned.

vi The peace obligation means firstly the duty for the trade union (or employer) itself not to conduct strikes; the duty not to call upon and launch a strike and to refuse to provide support for strikes conducted by its members. Secondly, it contains the "positive" duty; the duty to try to prevent its members from resorting to a strike violating the peace obligation and to appeal to them to stop such a strike if they are engaging in it.

II.6-2 Purposes

(d)-(j) The main purpose of Art.28 of the Constitution is to provide the principal foundation for labor-management autonomy und to guarantee the dispute right as a way of making the collective bargaining process function. Therefore, the dispute must be aimed at achieving an object of collective bargaining. Strikes aiming at bringing about a collective agreement are proper.

In Japan, employers are obliged to negotiate in some matters pursuant to the TUL and most strikes occur within this area. These mandatory bargaining subjects are generally viewed as areas that are within the employer's control and that concern working conditions or other treatment of union members and the management of collective labor relations. The mandatory subjects of collective bargaining contain not only interests disputes but also rights disputes. Personnel matters or right disputes such as a transfer or dismissal of a specified union member are also understood to be subject of collective bargaining and thus, strikes resulting from the right disputes are proper. Also, strikes aiming at stopping an employer from violating a collective agreement and to produce the employer's compliance with that agreement will be deemed proper in their purpose.

On the other hand, strikes relating to issues that cannot be settled by the parties to collective bargaining are improper. From this point, the Supreme Court has held that political strikes lack propriety and warrant no legal protection[2]. Strikes to announce certain concerns to the public will be also improper.

The propriety of strikes concerned about so-called management prerogatives depends on to what extent the demands are related to working conditions and other treatment of workers. For example, even though calls to remove the chief officer of a mine appears at first glance to interfere in management's personnel sphere, they are deemed proper if their true meaning is recognized as a demand for the improvement of working conditions[3].

II.7 Improper modalities of dispute acts

First, sympathy strikes and secondary strikes are improper in their purpose because they cannot be resolved in collective bargaining.

Second, an exclusive workplace occupation infringes the employer's property rights and is thus improper. On the other hand, in Japan, sit-downs or occupation of the workplace are deemed to be proper if the workers engaging in the sit-down merely "stay" on the employer's premises and do not hinder business operations. Although such sit-down strikes infringe the employer's property interest, the predominant opinion among courts and academics seems to take into consideration the fact that, in the context of Japan' enterprise unionism, union offices are usually located on the employers' premises and that holding union meetings or engaging in other union activities on those premises is a common practice during peacetime.

Third, according to the Supreme Court, picketing is a proper act, as long as it remains within the confines of peaceful verbal persuasion[4]. When it exceeds such limitations, i.e., in case of persuasion by speech coupled with group demonstrations (e.g., the organization of a crowd of people, the

[2] E.g. The *Tokyo Chuo Yubinkyoku* case, Supr. Ct., Grand Bench, Oct.26,1966, 20 Crim.Cases, 901.
[3] The *Ohama Tanko* case, Supr. Ct., 2nd Petty Bench, Apr.23,1949, 3 Crim.Cases, 592.
[4] The *Asahi Shinbunsha* case, Supr. Ct., Grand Bench, Oct.22,1952, 6 Civ.Cases, 857.

establishment of a picket line, loud singing), or a certain amount of coercion or physical force (e.g., jostling by pickets [blockades], stopping people in order to persuade them), it will be deemed improper in its means.

Fourth, a "product boycott" is generally deemed to be proper, but if it is accompanied by violence, threat or defamatory (i.e., false) statements, it is improper.

Fifth, a union's production management, which means that a union deprives the employer of its managerial right and starts production activities independently, infringes employer's property rights and is therefore improper[5].

II.8 Strike ban

Although Art.28 of the Constitution guarantees the right to strike for all workers, all civil servants, whether on-site or clerical, are prohibited from engaging in strikes by legislation[6]. The employees of the National Forestry Enterprise directly managed by the government may not resort to strike as well[7]. The same strike ban applies for all the employees in the local public enterprises[8]. In addition, strikes of the employees in the independent public agencies are forbidden[9]. The Supreme Court affirmed the constitutionality of the dispute-act prohibition for the civil servants of national and local governments[10].

In the private sector, several restrictions to the dispute right are stipulated in the LRAL, such as the prohibitions on dispute acts which hamper or cause the stoppage of normal maintenance or operation of safety equipment (Art.36). As for the electricity and coal mining industries, a special legislation called "Strike Regulation Law" of 1953 prohibits dispute acts that hamper the normal supply of electricity and normal operation of security and safety measures in coal mines.

II.9 Other limits

(a) The main test on strikes is their "propriety". It is examined with regard to the parties, their purposes, procedures and their means (II.3).

(b) The strike ban (II.8) and the obligation of 10 days prior notice (II.3(c)) are aiming at protecting the common good. Moreover, from the same perspective, LRAL prohibits dispute acts during a period of fifty days after the Prime Minister's decision authorizing an emergency labor adjustment in public-welfare undertaking. This is explained later (II.12(a)ii).

(c) The aims of a strike are taken in to account when determining its propriety. A strike must be

[5] The *Yamada Kogyosho* case, Supr. Ct., Grand Bench, Nov.15,1950, 4 Crim.Cases, 2257.
[6] National Civil Service Law Art.98 Par.2, Local Civil Service Law Art.37.
[7] National Enterprises and Special Public Agencies Labor Relations Law Art.17.
[8] Local Public Enterprises Labor Relations Law Art.11.
[9] National Enterprises and Special Public Agencies Labor Relations Law Art.17.
[10] *The Zen Norin Keishokuho* case, Supr. Ct., Grand Bench, Apr.25,1973,27 Crim. Cases 547.

aimed at promoting collective bargaining (II.6-2). Dispute acts which only aim at harming employers or third persons are deemed to be unlawful.

(d) With regard to the propriety of the means, there is the principle of fair-play resulting from the faithfulness principle in union-management relations. Since employer-union relations are premised to continue after a collective bargaining agreement is reached, a fair fight is required in the parties' exercise of economic pressures. In this point, a dispute act which makes it impossible to resume operations will be improper.

II.10 Lawful strikes

(a) Although strikes can give rise to liability for nonperformance of contract obligations, an employer is not permitted to seek the contractual liability against the proper strike (TUL Art.8). As for the pay claims of workers, he can deduct wages during the strike based on the principle of "no work, no pay." However, the "no work, no pay"-principle is a mere guideline for an interpretation of contractual rights and duties. If there is an agreement provision that, for instance, no wage deduction is to be made for certain days of non-performance, wage should be paid according to the contractual agreement.

(b) The question is how the wage claims of non-participants in the strike should be treated with regard to the work that cannot be performed because of the strike. Judicial decisions have held that, if the employer has to interrupt the business due to the strike and the work of the non-strikers no longer exists, they are not entitled to wages. According to those decisions, strikes are phenomena beyond the employer's control as a result of the dispute-right guarantee and hence the workers should bare the risk of the inability to work. The Supreme Court has advanced the same interpretation[11].

However, non-strikers are entitled to a special allocation under the LSL in case that the strikes have been conducted by the union which they do *not* belong to. According to Art.26 of the LSL, if an interruption of business is attributable to the employer, he is required to pay an allowance equal to at least 60 percent of the worker's average wage to each worker concerned during the period of business interruption. A "business interruption attributable to the employer" is broader interpreted than "any cause for which the obligee [i.e., employer] is responsible" (Civil Code Art.536 Par.2) which gives rise to the obligor's (i.e., worker's) right to wages. A judicial decision took the same position in case of a strike conducted by the union which the non-strikers concerned do *not* belong to; it held that such a strike could not be said to be cause for which the employer was responsible for purposes of the Civil Code, but did hold that it fell under LSL's "attributable to the employer"

[11] The *Northwest Koku* case, Supr. Ct.,2nd Petty Bench, July 17, 1987, 41 Civ.Cases 1283 [in case of a strike conducted by the union which the non-strikers belong to].

language[12]. On the other hand, the Supreme Court has held that the inability to work by a shutdown resulting from the strike of one's own union at a separate workplace cannot be said to be attributable to the employer for the purpose of a business-interruption allowance[13].

II.11 Illegal strikes and liability

(a) The illegality/unlawfulness of a strike must be declared by the courts. Japan has no specialized Labor Court and thus, the right court to address is the general one.

(b)i. Although the work stoppage by a participant in improper strikes constitutes a violation of the individual labor contract, the employer doesn't automatically get the right to dismiss him summarily. The validity of a summary dismissal is examined in each case with regard to dismissal regulations provided for in the LSL:

An employer must give at least 30 days advance notice (LSL Art.20 Para.1) to a dismissal. A summary dismissal is allowed (as an exception) in the event that the continued operation of the enterprise has been made impossible by a natural disaster or other unavoidable cause, or in the event that the worker is dismissed for reasons for which the worker is responsible (LSL Art.20 Para.1 Proviso). The notion "reasons for which the worker is responsible" in Art.20 Para.1 Proviso of the LSL is understood as an egregious misconduct or a serious breach of faith. The participation in illegal strikes does not *a priori* constitute an egregious misconduct or a serious breach of faith. In determining this, the form of the strike, the damage caused by the strike and the like should be considered.

ii. Since dismissals are strictly limited in Japan, disciplinary measures, rather than discharges, are a more customary method for punishing workers for their misconduct. Most employers have institutionalized disciplinary acts like disciplinary discharges, counseled dismissals, suspensions, wage decreases, warning, reprimands and the like. Thus, participants in illegal strikes can be subject to any disciplinary measures of the employer. However, disciplinary punishment must be proportionate to the gravity of the misconduct and due process is also required.

iii. The logical result of the traditional contract law is that participants in improper strikes can be subject to civil liability for damages. However, a widely held view rejects the notion of individual liability for improper dispute acts. According to this view, a union's strike is an act of an organization which is realized only through the collective acts of individuals and the individual acts should be regarded as being entirely compelled by the organization's purposes formed by majority decision. Emphasizing on the collectivity of strikes, they argue, the individual strikers should not bear any legal responsibility. However, some legal scholars doubt the legally binding effect of the decision to engage in illegal strikes and argue that the characteristic of a strike to be carried out as collective

[12] The *Myojo Denki* case, Maebashi Dist. Ct.,Nov.14,1963, 14 Lab.Civ.Cases 1419.
[13] The *Northwest Koku* case, note 11.

action means only the "individual execution" of a strike. As a result, they insist that individual strikers should also bear the liability for damages.

(c)i. When dispute acts infringe the employer's property rights (e.g., exclusive workplace occupation) or the freedom to conduct operations (e.g., picketing accompanied by physical force), the employer can demand an injunction. Historically, employers often claimed temporary orders to exclude illegal dispute acts and most of them won. Whether employers can seek judicial restraining orders in case of dispute acts violating the peace obligation is a matter of debate.

ii. Improper dispute acts constitute the torts of intentionally infringing upon the employer's right to demand to accomplish the work and to operate a business, and in some cases employer's property rights as well. Workers who have engaged in improper strikes will be liable for those torts and these tort liabilities of strikers belong to the union which ordered that improper strike (TUL Art.12-6, Civil Code Art.709, 715-1 and 719). As already mentioned, the problem remains as to whether the individual striker should bear liability for damages, but it is at least broadly affirmed that the union itself is liable for damages because of his tort responsibility.

iii. The union is not sanctioned with fines except in case of emergency adjustment. LRAL prohibits dispute acts during fifty days after the Prime Minister's decision authorizing an emergency labor adjustment in public-welfare undertakings (II.12(a)ii). The violation of this prohibition subjects the transgressor organization and its representatives to a fine not exceeding 200,000 yen (LRAL Art.40).

v. Improper strikes will constitute violations of the criminal law (e.g., extortion, forcible obstruction of business, violation of a domicile and obstructing the performance of a public duty) and the strikers can be subject to criminal punishment. Their leaders can be also prosecuted as an actual offender, instigators or accomplices under penal laws.

II.12 Dispute adjustment

(a)i. In Japan there is a procedure called "labor dispute adjustment", whereby outside parties endeavor to settle the dispute by adjusting both parties' claim. Dispute adjustment procedures are divided between those that are established by unions and employers themselves in collective agreements or otherwise agreed to, and those prescribed by state law. In the second type, the Labor Relations Adjustment Law (LRAL) provides for adjustment procedures for labor disputes. The Labor Commission, a tripartite body instituted in each prefecture, is entrusted with adjustment of labor disputes under the Law through conciliation, mediation and arbitration.

ii. The basic principle of LRAL is voluntary settlement. Arbitration in which the Commission's final award is binding cannot be imposed by the state. However, in public welfare undertakings, i.e., those in transportation, post or telecommunications, water, electricity or gas supply, medical treatment or public health (LRAL Art.8), mediation is carried out by resolution of the Labor Commission or by request made by the Health, Labor and Welfare Minister or a prefectural

governor (LRAL Art.18 No.4 and 5).

Public-welfare undertakings can also be subject to “emergency adjustments”. Where the Prime Minister believes, because the case (1) is related to a public-welfare undertaking, (2) is of large scope or (3) is related to work of a special nature, that suspensions of operations by a dispute act would gravely imperil the normal operation of the national economy or the daily lives of people, he may decide on emergency adjustment, but only when such a threat actually exists (LRAL Art. 35-2). When he has decided on emergency adjustment, he must immediately publicize that decision with the reasons therefor, and notify the Central Labor Commission and the parties concerned. When the Central Labor Commission has received notice of the Prime Minister’s decision, it must exert its utmost efforts to settle the dispute. Towards this end, it may employ conciliation, arbitration, mediation, fact-finding and publication of the facts of the case, or recommend the taking of measures deemed necessary for the settlement of the case. It may employ arbitration, however only when both parties agree to it (LRAL Art. 35-3). The Central Labor Commission must deal with cases involving a decision for emergency adjustment before all other cases.

iii. Although conciliation can be initiated at the Commission chairman’s own motion, mediation or arbitration is carried out when both parties request it or when a request is made by both parties or one party on the basis of a collective agreement.

(b)i. Conciliators are appointed by the chairman of the Labor Commission from among the names on a list that was previously prepared by the Commission.

Mediation is conducted by a tri-partite mediation committee consisting of one or more members representing, respectively, the employers, the workers and the public interest. They are designated by the Commission chairman from among the corresponding groups on the Commission or from among the Commission’s Special Candidates for Adjustment.

Arbitration is conducted by an arbitration committee consisting of three members. They are designated by the chairman with the agreement of the parties concerned from among the Commission’s public members and/or the Special Candidate for Adjustment representing public interest. In the event that the selection in accordance with the agreement of the parties concerned has not occurred, the chairman appoints the members from among the same persons, after requesting the opinions of the parties concerned.

ii. Conciliators hear the facts presented by both parties and strive to conciliate the dispute. In the course of these proceedings, however, they sometimes propose specific settlement plans, although at other times they do not. When a conciliator determines that there is no prospect of effecting a settlement, he is required to withdraw and report the salient facts of the case to the Labor Commission.

The mediation committee fixes a date, requests the presence of the parties concerned and requests them to present their views. It has the power to draft a settlement proposal, present it to the

parties concerned, recommend that they accept and if necessary, give it to newspapers and radio stations. When the parties concerned give their reply to the settlement proposal, the mediation committee's duties terminate, and it transmits a written progress report to the chairman.

The arbitration committee hears the facts of the case from the parties and it holds meetings to discuss the contents of its award. Worker and employer commission members appointed by the parties and Special Members for Adjustment may attend the meetings and state their opinions, with the consent of the arbitration committee. The arbitration award is made in writing, which states the date when the award goes into effect. Arbitration proceedings can be terminated by withdrawal of the request for arbitration.

iii. In Japan, there is no compulsory arbitration and thus, the strike is not suspended because of the "order to submit the dispute to arbitration". However, when the Prime Minister has decided on emergency adjustment in public-welfare undertakings, the parties may not resort to any dispute act for fifty days (LRAL Art.38). Violation of this regulation subjects to a fine (Art.40).

iv. Only in arbitration, the Commission issues an award which is final and binding. The award has the same effect as a collective agreement (Art.34).

(c) Because arbitration is an adjustment procedure the results of which are naturally binding on both parties, there are actually few cases. Less than one percent of the Labor Commission's overall number of adjustment cases is submitted to arbitration. 1-2 percent is to mediation and the vast majority of adjustment cases go to conciliation procedure.

III. Strikes in practice

(a) In Japan, there is only limited statistic on strikes in practice and it is not clear to what extent restrictions on strikes are respected.

(b) It has been the actual practice that employers take disciplinary action against participants in improper strikes, but in most cases only against the leaders of the union. This is because union leaders in Japan are normally employees in the enterprise and disciplinary action is a more effective retaliation than claim for damages against the individuals.

(c) Since Art.28 of the Constitution gives the right to strike basically to trade unions (II.4), the parties to strike are in most cases trade unions.

(d) There is only the statistic on the reasons of "labor disputes" which means both "dispute acts including strikes" and "conflicts that didn't lead to dispute acts but were intervened by the Labor Commission". In a 2010 survey[14], the most frequent causes of "labor disputes" (50.1%) were wage issues (multiple answers). "Wage issues" mean wage system, modification of wage system, wage of individual union member, retirement allowance and the like.

[14] The 2010 statistic by the Ministry of Health, Labor and Welfare
http://www.mhlw.go.jp/toukei/list/dl/14-22a-07.pdf

(e) In Japan, preemptive lockouts conducted by an employer are not allowed at all. In this meaning, an industrial conflict typically starts with a strike.

(f) The main type of dispute acts in Japan is work stoppages of short duration to demonstrate workers' demands. This is because the vast majority of trade unions in Japan are organized at the level of the enterprise and don't have a big financial base to support strikes of long duration. There is no special regulation for such short-time acts of disputes and their propriety is examined according to the criteria pointed above. As already mentioned, political strikes are improper in their purposes (II.6-2).

(g) Nowadays general strikes are not frequent. However, in order to compensate for the weakness of Japanese enterprise unions in bargaining power, every spring, industrial federations of enterprise unions and national confederations set the goal for wage increases and coordinate the time schedule of enterprise-level negotiations and strikes across enterprises and industries. According to the schedule, strong enterprise unions in a prosperous industry, chosen as pattern setters, start negotiations first and set the market price for that year. Other unions then follow suit. Thus, most strikes in Japan occur at the time of this "spring wage offensive" (normally from March to April).

IV. Support

(a) According to the relatively large scale survey[15], about 80% of the trade unions surveyed have in 2008 a system to save money for a strike fund, but only about 55% of them were really saving money. The percentage was almost the same in 2003 and 2005. The average amount of the saving for each union member deserved 8.7% of his monthly union dues in 2008. It was 12% in 2003 and 10.6% in 2005. In this survey, the whole amount of a strike fund was nearly 2.5 times as much as union-dues income and could have compensated wage lost for 16.2 days for each member. The result was 18.7 days in 2003 and 20 days in 2005.

It might be characteristic in Japan that a strike fund normally consists of both reserves by the trade union and by its members. The part of reserves by each member is managed individually under his name. The survey shows that the part of savings by each member is bigger than the one by the trade union.

Apart from that, occasionally trade unions collect extra money obligatorily or voluntarily from their members in order to support participants in strikes.

(b) Employees participating in a strike have no right to get payments to insured job-seekers (unemployment benefits). However, according to the administrative interpretation, strikers are treated as entitled to welfare benefits if they cannot maintain their life because of the long-time

[15] Research Institute for Advancement of Living Standards, "The research on union dues in 2008" http://rengo-soken.or.jp/report_db/file/1246331795_a.pdf

wage loss while on strike[16].

Non-strikers are not entitled to wage claim based on the labor contract if their work became impossible to perform because of the strike (II.10(b)). In addition to it, in case of the strike of one's own union, non-strikers are not entitled to the special allocation under the LSL (II.10 (b)). However, if the administration interpretation mentioned above is assured, they will also have the possibility to get welfare benefits in case of extreme poverty.

V. Economic relevance

(a) In Japan, industrial relations are stable and strikes are very few. In a 2010 survey[17], there were 94 strikes. Only 38 strikes of them lasted longer than the half of the contractual daily working hours. The number of strikes tends to decrease after the statistical peak in 1974 when Japan's economy was faced with a severe recession caused by the first oil crisis; 11575 in 1974, 1816 in 1990, and 333 in 2000. 94 in 2010 was the smallest number ever.

(b) As for the average duration of strikes, there is merely a statistic on "labor disputes". It surveys not only strikes but also other types of dispute acts (e.g., slow-down, lockout) and also conflicts which didn't lead to dispute acts but were intervened by the Labor Commission for the settlement. According to the 2010 survey[18], there were 682 labor disputes, and 582 of them were settled by the parties to the dispute or by the Labor Commission. 148 of 582 were solved within 30 days, 139 were within 31-60 days, 110 were within 61-90 days, and 185 lasted for more than 90 days.

(c) In the same 2010 survey, the number of working days lost due to strikes was 23244. It has been decreasing in recent years; 32560 days in 2000 and 231424 days in 1992. This research calculated working days lost only due to strikes which were continued longer than the half of the contractual daily working hours.

VI. Legal protection of conflicting interests

(a) During a strike by a union, an employer is free to mobilize supervisors or workers who are not members of the union to continue its operations. This "freedom to conduct operations" of employers has been proclaimed in many judicial decisions involving the propriety of union picketing and the Supreme Court has also taken this position[19]

i. A strike is a "negative" means of dispute acts in terms of "withholding" of work and thus broadly recognized to be proper in its means. In Japan, slow-downs, partial strikes or intermittent work stoppages can be proper acts of dispute. The reconciliation with the freedom to conduct operations

[16] Apr. 26, 1968, Shaho (Social department in the Ministry of Welfare [now, the Ministry of Health, Labor and Welfare]), No.111.

[17] The 2010 statistic by the Ministry of Health, Labor and Welfare, note 14.

[18] *Id.*

[19] The *Sanyo Denki Kido* case, Supr. Ct., 2nd Petty Bench, Nov. 15, 1978, 32 Crim. Cases 1855.

is rather on issue in case of workplace occupation, boycott or picketing (II.7).

ii. As a part of the freedom to conduct operations, an employer can hire substitute workers (strike replacements). However, it is a general understanding in Japan that strikers have the right to return to their jobs at the end of the strike and employers may hire strike replacements only on a temporary basis not to exceed the duration of the strike. The employer's refusal to re-employ the striking workers after the strike is regarded as discriminatory treatment based on the participation in a proper dispute act, and thus, constitutes an unfair labor practice (II.3 (b)).

Occasionally, unions and employers conclude agreements which prohibit the hiring of substitute workers during a strike and limit the persons who can be used to continue the employer's operation. Where such "scab-prohibition agreements" exist, the employer is contractually restricted and will be liable for any contract-violation.

iii. In Japan, worker dispatching (temporary employment) is basically permitted under the regulations of the Worker Dispatching Law (WDL). However, the WDL applies "the principle of non-intervention in labor disputes" [20] provided with in the Employment Security Law to the worker dispatching (WDL Art.24). As a result, temporary employment agencies cannot put temporary staff at the disposal of a user enterprise, to replace workers of the latter who are on strike.

iv. Although Art.28 of the Constitution does not mention lockouts or employers' acts of dispute, the Supreme Court has since the "1975 ruling"[21] repeatedly confirmed the employer's right to lockout. According to the Court, workers' constitutional right to participate in dispute acts is aimed at promoting and securing equality between labor and management and is thus ultimately based on the fairness principle. Therefore, the Court said, when the workers' dispute acts give rise to a severe imbalance in the power relationship between labor and management and the employer is subject to extraordinary pressure, dispute acts by the employer may be justified in the light of the fairness principle. In this meaning, only "defensive lockouts" are proper and the subject to a lockout would be limited to the union, or the group of workers, whose acts are obstructing the business, and their members.

By the way, defensive lockouts are conducted on the base of the continuity of the labor relationship in Japan. A collective lay-off of the workers who are not on strike constitutes an unfair labor practice and is invalid.

(b) The dispute right must be reconciled with the employer's right to occupy its facilities and other property rights. The employer's property rights are guaranteed in Art.29 of the Constitution. In this point, the exclusive workplace occupation and union's production management are improper (II.7).

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[20] The Employment Security Law aiming at developing and improving workers' vocational abilities states the principle of non-intervention in labor disputes. According to this principle, both public employment-security agencies and private job-referral enterprises are prohibited from sending job applicants to enterprises that are beset by a strike or lockout (Art.20, 34 and 42-2).

[21] The *Marushima Suimon* case, Supr. Ct., 3rd Petty Bench, Apr.25, 1975, 29 Civ. Cases 481.

(c) Whether a worker has in general the right to demand work or not is discussed by academics. According to the dominant view, the work is not a right but only an obligation in labor contract and thus, the right to be provided with work is principally denied. Therefore, non-strikers cannot demand that their right to work be protected, either. In the context of strikes, only their pay claims are on issue (II.10(b)).

VII. Neutrality of the state

Although the neutrality of the state with regard to strikes is not written down in a general way, it is true that the Japanese legal system of strikes is based on this principle. Collective labor relationships are basically the matter of collective autonomy. For this reason, trade unions are legally qualified and collective negotiation and dispute acts are constitutionally guaranteed. As a result of this constitutional framework, the state shall not intervene in dispute acts including strikes. The principle of non-interference by the state is partially shown in some legal provisions. For example, the LRAL states that the parties concerned should endeavor to resolve dispute acts by themselves and the state should (only) help the voluntary settlement by the parties (Art.2, 3 and 4; II.12(a)). In addition, the Employment Security Law lays down the principle of non-intervention in labor disputes and prohibits public employment-security agencies from sending job applicants to enterprises that are beset by a strike or lockout (Art.20, 34 and 42-2; VI(a)iii, note 20).

However, it is also true that the state exceptionally intervenes in strikes if they can have a severe influence on public interest. From the view of common good, certain restrictions and prohibition are made in relation to strikes (II.8, II.9(b), II.12(a)ii).

VIII. Parity of parties

There is no general test on the parity of parties to a dispute act in Japan. The balance of power between the parties is focused on only when the justification of lockouts is in question; if the strike gives rise to a severe imbalance in power relationship, the lockout may be justified in the light of the fairness principle (VI(a)iv.).