
Industrial Action and Liability in Japan: A Legal Overview

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This article gives an overview of Japanese law on strikes and other industrial actions, focusing on the issue of their legality and liability for illegal action. While the number of industrial actions has decreased markedly in recent years, Japanese workers have a constitutional right to act collectively, which includes the right to strike. The Labor Union Act clarifies the right by providing for immunity for participating workers from criminal punishment, civil liability, and termination, as well as any other unfavorable treatment. However, the action in question must be deemed “proper” in order to enjoy these protections. Devoid of statutory guidelines, the courts usually look into the objective and the manner of the action, as well as the parties to the act and procedural questions involved, in deciding whether the action was proper or not. When a strike goes beyond the border of properness, the strikers and their union may be ordered to pay damages to the employer. It should also be noted that public sector employees are prohibited from engaging in strikes or other collective actions, although their number at the national level has decreased drastically since the 1980s as a result of privatization.

I. Introduction

Let me start with a candid observation. The issue of industrial action is not attracting much attention in Japan, primarily because we see very little industrial action today. Except for sporadic strikes by airline employees, there is almost no report of strikes or other industrial actions. Even during the period of annual wage negotiations called *shunto* (spring labor offensive), only a handful of strikes occur, typically at some local bus companies that do not affect many people. In fact, strikes have become so rare in recent years that, according to half-joking news reports, union officials are not sure if they will remember how to call a strike when it becomes necessary. Still, under the constitutional guarantee of workers’ right to act collectively, it is firmly established that Japanese workers and their unions are immune from criminal or civil liability, insofar as their collective actions are “proper.” And it is obvious that a strike to oppose the employer’s plan to, say, close a plant and dismiss the employees will be deemed proper, which I understand is not the case in Korea.

In the following pages, I will describe the legal aspects of Japanese industrial actions after reviewing briefly the historical trend of collective labor disputes. Given the scarcity of recent materials, most of the court decisions and academic arguments mentioned herein will be from the last century.¹

* This article was originally a paper prepared for the KSSL International Conference on Industrial Action and Liability, which was held in Seoul on September 26, 2014. The author would like to thank the Korean Society of Labor Law for its permission to publish the paper here with minor modifications and updates.

II. Trends of Collective Labor Disputes in Japan

Collective labor disputes have decreased markedly in the past decades in Japan, as shown in Tables 1 and 2. In 2013, there were only 507 cases of such disputes²—the lowest figure since the current method of survey was adopted in 1957. The number of labor disputes accompanying strikes or other industrial action was 71, remaining below 100 for five consecutive years. There were 31 cases of labor disputes accompanying strikes for a half-day or longer, in which 1,683 workers participated in the aggregate. By contrast, those numbers were 208 and 37,528, respectively, in 1995. These numbers look large in the eyes of today, but there were far more strikes in the preceding years.

The Japanese labor movement, which gained legal foundations after the end of World War II, had volatile formative years in the late 1940s and the early 1950s. It was streamlined under *Sohyo*, or the General Council of Trade Unions of Japan, and a couple of other competing organizations by the middle of the 1950s, when the rapid growth of the national economy began and the practice of annual *shunto* negotiations started. Under this post-war framework of labor relations, the number of industrial actions increased throughout the 1960s. The peak was reached in 1974, when the cost of living skyrocketed after the first oil crisis. There were 10,462 cases of collective labor disputes in that year, among which 9,581 accompanied industrial action. Strikes lasting a half-day or longer occurred in 5,197 cases, in addition to 6,378 cases of shorter strike. The next year, 1975, was also notable in that the unions of the then Japanese National Railways (JNR) staged an unprecedented nation-wide strike in late November, halting its entire operation for a week. The strike, generally referred to as the “strike for a right to strike” because it was aimed at legal reform to legalize strikes in the public sector, was a bitter failure. This certainly cast a shadow of doubt about the effectiveness of a strike in the minds of labor and management, as well as the general public. However, the number of labor disputes and strikes remained rather high until the middle of the 1980s, although shorter strikes became more prevalent than longer ones in the later years.

The decrease of collective labor disputes in the late 1980s may be explained by a number of factors including the continued decline of unionization rate, but probably the

¹ For an overview of the Japanese labor law including that of collective actions, see Kazuo Sugeno, *Japanese Employment and Labor Law* (Translated by Leo Kanowitz), Carolina Academic Press, 2002, pp. 616–666; Tadashi Hanami & Fumito Komiya, *Labour Law in Japan*, Wolters Kluwer, 2011, pp. 182–196. Those who can read Japanese language will find the following two textbooks helpful. Kazuo Sugeno, *Rodo-ho (10th ed.)*, Kobundo, 2012; Satoshi Nishitani, *Rodokumiai-ho (3d ed.)*, Yuhikaku, 2012. Prof. Sugeno’s book is widely regarded as the most authoritative in this field, and its earlier version was translated into English as cited above. Prof. Nishitani is also a highly respected scholar and shows a more understanding view of the workers’ position.

² Ministry of Health, Labor and Welfare, *Survey on Labor Disputes Statistics (Rodo-sogi tokei-chosa)*. Labor disputes are defined in this survey as collective labor disputes either accompanying acts of dispute (strikes, lockouts, etc.) or in which help of the third party such as the Prefectural Labor Relations Commission was sought.

Table 1. Number of Collective Labor Disputes 1960–2013 (Selected Years)

Year	Union Density (%)	Total (Collective) Labor Disputes	Labor Disputes with Industrial Actions	Strikes	
				Half-day or longer	Shorter than half-day
1960	32.2	2,222	1,707	1,053	—
1965	34.8	3,051	2,359	1,527	871
1970	35.4	4,551	3,783	2,256	2,356
1975	34.4	8,435	7,574	3,385	5,475
1980	30.8	4,376	3,737	1,128	3,038
1985	28.9	4,826	4,230	625	3,834
1990	25.2	2,071	1,698	283	1,533
1995	23.8	1,200	685	208	549
2000	21.5	958	305	117	216
2005	18.7	708	129	50	99
2010	18.5	682	85	38	56
2013	17.7	507	71	31	49

Source: Ministry of Health, Labor and Welfare, *Survey on Labor Disputes Statistics*.

Table 2. Number of Strikes 1960–2013 (Selected Years)

Year	Total (Collective) Labor Disputes	Strikes				
		Half-day or longer			Shorter than half-day	
		Number	Participants	Days Lost	Number	Participants
1960	2,222	1,053	917,454	--	--	--
1965	3,051	1,527	1,670,285	5,474,681	871	854,437
1970	4,551	2,256	1,719,551	3,769,956	2,356	1,294,428
1975	8,435	3,385	2,731,209	7,974,133	5,475	2,449,088
1980	4,376	1,128	562,752	998,165	3,038	1,355,749
1985	4,826	625	123,257	256,919	3,834	1,266,571
1990	2,071	283	84,289	140,386	1,533	638,221
1995	1,200	208	37,528	72,813	549	192,549
2000	958	117	15,312	35,050	216	70,561
2005	708	50	4,119	5,629	99	23,746
2010	682	38	2,480	23,244	56	19,016
2013	507	31	1,683	7,035	49	11,359

Source: Ministry of Health, Labor and Welfare, *Survey on Labor Disputes Statistics*.

most important being the privatization of the three public corporations in 1985 (telegraph & telephone, tobacco & salt) and 1987 (national railways). The employees of the new, privatized companies were legally eligible to strike, but the majority of them chose to belong to the less militant unions. And the larger picture of Japanese industrial relations itself was transformed substantially under the leadership of moderate private-sector unions, culminating in the formation of a giant umbrella organization called *Rengo*, or the Japanese Trade

Table 3. Collective Labor Disputes by Principal Demands 1960–2013 (Selected Years)

Year	Total (Collective) Labor Disputes	Wage Increase	Semi-annual Bonuses	Change of Working Hours	Objection to Dismissals	Objection to Shutdown, Contraction of Business, etc.
1960	2,222	805	638	16	93	15
1970	4,551	2,131	1,260	16	137	28
1980	4,376	3,236	722	48	112	26
1990	2,071	954	1,123	39	40	16
2000	958	310	224	7	147	32
2010	682	91	89	11	174	24
2013	507	71	60	8	108	7

Source: Ministry of Health, Labor and Welfare, *Survey on Labor Disputes Statistics*.

Union Confederation, in 1989.

Then came the bursting of the bubble economy in the early 1990s and the long slump that followed. Most unions continued to engage in wage negotiations each spring, but it became less frequent for them to resort to industrial action. It is also noteworthy that as for the subject of labor dispute, “wage increase” dropped drastically in number and became even fewer than “objection to dismissal” (Table 3). In any event, collective labor disputes and strikes have become very scarce in these years as described above. This marks a contrast to the increase in individual labor disputes in the same period, which prompted the enactment of new statutes—the Act on Promoting the Resolution of Individual Labor Disputes of 2001 and the Labor Tribunal Act of 2004—to deal with them more effectively.

III. Constitutional and Statutory Framework of Industrial Actions

1. Historic Development

Japanese labor unions started to be formed in the late 19th century, but they had to live in a hostile legal environment. Especially notorious was the Public Order and Police Law of 1900, which criminally punished even peaceful inducement of a work stoppage in a genuine labor dispute. Workers also could be terminated or otherwise retaliated against by the employer when they joined a labor union or participated in its activities. The conditions somewhat improved in 1925, when the most intrusive provision of the Public Order and Police Law was abolished as the society became more accommodative of labor movements. However, there were other laws and regulations the police could utilize, often with an unduly expansive reading of the relevant legal text, to suppress workers’ collective actions. Attempts were made repeatedly in the 1920s to adopt a law on labor unions to legalize their establishment and activities with appropriate restraint, but they ran aground each time, only to disappear completely in the 1930s under the wartime mobilization regime.

It was after the end of World War II, and during the American-led Allied Occupation

of Japan (1945–52), that a drastic change was brought about. The (old) Labor Union Act³ was enacted in December 1945, providing criminal and civil protection for legitimate union activities, including strikes, for the first time in history. Then the Labor Relations Adjustment Act of 1946 (hereinafter LRAA) established the procedures for adjustment of collective labor disputes. The Constitution of Japan, which contains a guarantee of workers' right to act collectively, was adopted in the same year and took effect in May 1947. The current Labor Union Act (hereinafter LUA) was newly enacted in 1949. It retained, and slightly strengthened, the protection for union activities under the 1945 Act. Since then, there has been no change to this constitutional and statutory framework for more than 60 years.

2. Relevant Provisions

(1) Constitution

The Constitution of Japan guarantees workers' collective rights as follows.

Article 28. The right of workers to organize and to bargain and act collectively is guaranteed.

This is popularly known as the guarantee of the three basic rights of workers – to organize, to bargain collectively, and to act collectively. It is undisputed that the right to “act collectively” includes the right to strike.

In the process of making the Constitution, the draft prepared by the Japanese side did not contain any of these rights. It is well known today that a branch of the occupational forces wrote the present Article 28 in secret and then handed it, together with other progressive provisions, to the Japanese government.

Most scholars agree that Article 28 has “direct” effects. In contrast to paragraph 2 of Article 27, which says that standards for wages, hours, rest and other working conditions shall be fixed by law, Article 28 does not have to rely on additional legislation. Of course, in reality, the Labor Union Act does exist to materialize and better implement the workers' rights under Article 28. However, even without such an act, unions and workers could invoke the constitutional provision directly to enjoy the criminal and civil protection for their proper activities.

(2) Labor Union Act

The LUA provides three kinds of protection to workers when they engage in industrial action.⁴ They are, respectively, (a) immunity from criminal liability, (b) immunity from

³ It was common to cite this act in English as the Trade Union Law of 1945. However, the Japanese government decided in 2006 to use Americanized expressions in the translation of Japanese laws. I will follow this rule for the post-WWII statutes, including the Labor Relations Adjustment Act of 1946 and the Labor Union Act of 1949.

⁴ I will concentrate on industrial action of the workers' side, but there has been a debate whether

civil liability, and (c) protection from unfavorable treatments.

Firstly, immunity from criminal liability means the action in question is not punishable. The participants are therefore free from criminal prosecution and conviction. Article 1, paragraph 2 of the LUA provides for this protection as follows.

*Article 1, paragraph 2. Article 35 of the Penal Code (Act No. 45 of 1907) shall apply to collective bargaining and other acts of labor unions which are proper and have been performed for the attainment of the purposes of the preceding paragraph. Provided, however, that in no case shall exercises of violence be construed as proper acts of labor union.*⁵

This is not a very intelligible provision, but Article 35 of the Penal Code declares that an act performed in accordance with laws and regulations or in the pursuit of lawful business is not punishable. According to a common explanation, a doctor who performs an operation on a patient is not subject to criminal liability, even though his/her act looks like a bodily injury, because it is a legitimate business and involves no illegal element. Likewise, strikes and other acts of dispute by workers do not constitute a crime if they are proper and have been performed for the attainment of the purposes the LUA.⁶

Secondly, Article 8 of the LUA relieves the civil liability of unions and its members for proper acts of dispute as follows.

Article 8. An employer may not make a claim for damages against a labor union or a union member for damages received through a strike or other acts of dispute which are proper acts.

Thus, the employer cannot recover damages suffered from a proper strike, either on

the employer has a “right” to engage in industrial action in the form of a lockout. Although the LUA and the Constitution are both silent on this point, the Supreme Court has affirmed the existence of such a right in a very limited situation where the employer has been brought to a dire situation by the union’s fierce acts of dispute. Marushima Suimon case, Supreme Court, Judgment of April 25, 1975, *Minshu* 29–4–481.

⁵ There were some changes to the semi-official translation of the LUA in 2006, when the government changed the English names of this and other statutes (See note 3). The word “proper” was replaced by “justifiable” in this article, and in Article 8 and 7 (1) as well. However, I stick to the former word because it seems to convey more appropriately the positive nuance of the original Japanese word (*seito-na*).

⁶ Paragraph 1 of the same article provides that the purposes of the LUA are “to elevate the status of workers by promoting their being on equal standing with their employer in their bargaining with the employer; to defend the exercise by workers of voluntary organization and association in labor unions so that they may carry out collective action, including the designation of representatives of their own choosing to negotiate working conditions; and to promote the practice of collective bargaining, and procedures therefore, for the purpose of concluding collective agreements regulating relations between employers and workers.”

breach of contract or tortious grounds. On the other hand, the strikers are not paid wages for the wasted time, staging a game of endurance between the labor and the management.

Thirdly, workers are protected from termination and other unfavorable treatment by the employer, as is shown in Article 7, item 1 of the LUA.

Article 7. The employer shall not commit the acts listed in any of the following items:

(1) to discharge or otherwise treat in a disadvantageous manner a worker by reason of such worker's being a member of a labor union, having tried to join or organize a labor union, or having performed proper acts of a labor union...

Such a treatment constitutes an “unfair labor practice” of the employer, along with refusal to bargain (item 2), domination and interference with the formation and administration of a union (item 3), and retaliation against workers’ filing of a charge with, or otherwise cooperating with, the Labor Relations Commission (item 4).

The critical phrase of “having performed proper acts of a labor union” was added in 1946 to the old Labor Union Act and was carried over to the LUA of 1949. A significant difference between the two Acts is that the Labor Relations Commission can issue a remedial order to the employer under the current Act.⁷ In case of a discharge, the Prefectural Labor Relations Commission typically orders that the worker be reinstated with back pay to the former position. The employer may appeal the order to the Central Labor Relations Commission and/or to the competent district court, which may end up eventually with a decision of the Supreme Court.

This system was modeled after a U.S. statute—the National Labor Relations Act of 1935—but there are considerable differences as well. One such difference is that in Japan the Labor Relations Commission is not the exclusive venue for redress. In addition to, or instead of, the proceedings at the Commission, the worker may sue the employer directly before the district court, claiming that the discharge is illegal and therefore null and void. In this case, the court does not review the order of the Labor Relations Commission but decide *de novo* like any other civil case. If the court finds that the discharge in fact violated Article 7 (1), it usually declares that the employment contract between the employer and the worker is still alive, and makes the employer pay the wages due after the illegal termination.

3. Prohibition of Strikes in the Public Sector

In spite of the guarantee of the right to act collectively found in Article 28 of the Constitution, workers in the public sector are prohibited from resorting to acts of dispute. I will

⁷ Under the old Act the employer was subject to criminal punishment for the violation. The Labor Relations Commission had the authority to investigate and send the case to the prosecutor’s office but could not issue an order to the employer.

not go into details here,⁸ but a short overview would be appropriate because this has been a subject of heated controversy.

At the national level, the National Public Service Act prohibits strikes, slowdowns, and other acts of dispute by national public servants across the board (Article 98, paragraph 2) and there is even a provision to punish the instigator of such acts. While most of the employees of the national government are governed by the National Public Service Act with respect to their labor relations, some of them who belong to “specified independent administrative agencies” are placed under a different statute—the Act on Labor Relations of Specified Independent Administrative Agency⁹—which is somehow closer to the LUA of the private sector as regards unions and collective bargaining. However, this Act also flatly prohibits strikes, slowdowns, and other acts of dispute (Article 17, paragraph 1), although it does not criminally punish the instigator.

There is an analogous pattern at the local level. There are two different statutes, that is, the Local Public Service Act and the Local Public Enterprise Labor Relations Act, the latter being much smaller in the number of covered employees and more resembling the LUA in contents. They both prohibit strikes and other acts of dispute, however, and the slight difference is the lack of criminal punishment for the instigator under the latter Act.

At one time, the Supreme Court took a remarkably progressive position to construe the scope of such prohibition quite narrowly in deference to Article 28 of the Constitution.¹⁰ This judicial trend was only short-lived, however. The Court held repeatedly in the following years, reversing itself, that the broad prohibition should be given a literal meaning and it is constitutional as such.¹¹ Thus, despite repeated criticism from academics, it is firmly established in Japanese law that a strike is automatically regarded as illegal and improper in the public sector and the workers are therefore outside of the above-mentioned three kinds of protection.

In the meantime, the public sector, especially at the national level, shrank in size considerably as a result of privatization. The three public corporations were privatized in the 1980s as described earlier in II, and so was the postal service, which used to be by far the largest national enterprise, in 2007.¹² The workers of the newly privatized companies have

⁸ For a more thorough picture of Japanese public sector labor relations law, see Ryuichi Yamakawa, “Japan’s Collective Labor Relations Law in the Public Sector: Constitutional Conflict between Union Rights and Democracy,” 34 *Comparative Labor Law & Policy Journal* 349 (2013).

⁹ From April 2015, the specified independent administrative agencies will be reorganized into “administrative execution” agencies. The name of the Act is to be changed accordingly, though its substantive provisions will remain the same.

¹⁰ Zentei-Tokyo-chuyu case, Supreme Court, Judgment of October 26, 1966, *Keishu* 20–8–901; Zen-shiho Sendai case, Supreme Court, Judgment of April 2, 1969, *Keishu* 23–5–685.

¹¹ Zen-norin case, Supreme Court, Judgment of April 25, 1973, *Keishu* 27–4–547; Zentei-Nagoya-chuyu case, Supreme Court, Judgment of May 4, 1977, *Keishu* 31–3–182.

¹² The workers of the public corporations and the national enterprises were covered by the equivalent of the Act on Labor Relations of Specified Independent Administrative Agency before privatization. As of 1984, there were about 740,000 workers at the three public corporations and 310,000 postal

a full-fledged right to resort to strikes and other acts of dispute under the LUA, even though they rarely exercise this right in reality.

IV. Scope of Proper Industrial Actions

1. General

Industrial actions must be “proper” in order to be protected by the LUA, and the Constitution is understood to be predicated on the same requirement. However, there is no definition of properness in the LUA except the proviso of Article 1, paragraph 2, which says that exercises of violence cannot be proper acts of labor union. The courts usually look into the objective and the manner of the action in question and, relying on *shakai-tsunen* or generally accepted norms of the society, decide whether it was proper or not. Sometimes they also consider the parties to the act or procedural questions involved.

The standard of properness can vary according to different purposes of the LUA, though this happens only in relatively few instances. For example, a collective action may be regarded as not proper with regard to immunity from civil liability even when it is still within the range of properness for the purpose of immunity from criminal liability.

2. Objective of the Action

There is no question that labor unions may call a strike regarding proper issues of bargaining with the employer, such as wages, hours, and other conditions of employment. They include treatments of particular employees. When an employee who belongs to the union is discharged or disciplined, the demand that the measure be rescinded would be a proper objective of a strike. Matters between the employer and the union, such as the renting of office space to the union on the premises, are also included. The employer has a legal duty to bargain in good faith, and it is permissible for the union to call a strike, with respect to these matters. It does not make a difference if the union’s demand is seemingly excessive or unrealistic. It is up to the union to demand what and how, and the law cannot dictate it to act wisely. Sometimes unions call a “protest strike” when, for example, a serious accident has happened at the plant. This is proper, too, because the union is in effect demanding a safer workplace.

A question arises when a union makes demands about the matters of non-members, but the courts put a generous construction on them. In a case under the old Labor Union Act, workers went on strike urging that the plant manager be ousted from the position. Although this seems like an intrusion into the prerogative of management, the Supreme Court agreed with the lower court that the real issue was the wages of union members, and therefore the strike was proper in its objective, because the manager had refused the union’s wage de-

workers. For comparison, the number of regular national public servants in 2013 is about 341,000, excluding Self-Defense Forces personnel, judiciary staff, and other special officials.

mands in an arrogant manner at a prior bargaining session.¹³ In another case in which a strike was called demanding the employer rescind the discharge of two managerial, non-union employees, the Supreme Court, as well as the lower court, upheld the properness of its objective, saying that the demand included the establishment of a better and fairer personnel system.¹⁴ It was surely a matter of concern for all the workers, and the Court did not think it a problem that this demand was articulated only after the strike had begun. Accordingly, if a union calls a strike urging that the employer withdraw a plan to shut down the plant or to introduce new machinery, it is probable that implicit demands affecting the union members, such as opposition to their dismissal, will be found by the court, which in turn will keep the strike within the scope of properness.

There was, and still is, some controversy whether a political strike is proper. Some academics adopt the affirmative view, contending that political matters inevitably affect the conditions of workers one way or another, but the Supreme Court has consistently refused such a position.¹⁵ In a relatively recent case, it sustained disciplinary suspension of union officials who directed a strike in protest against the government's decision to let a troubled nuclear-powered ship dock at Sasebo Port, holding that Article 28 of the Constitution does not embrace an act of dispute for political purposes that is not directly related to the demands vis-à-vis the employer for the betterment of the workers' economic standing.¹⁶

Likewise, a "sympathy" strike to support another union of an unrelated employer is not regarded as proper because it is beyond the control of the immediate employer. Such a strike is rare in Japan and we can only find a rather old decision of a district court concerning this issue.¹⁷

3. Manner of the Action

A strike, or concerted stoppage of work, is the most typical act of dispute. Unless marred by collateral illegality such as occupation of the plant or violence at the picket line, a strike is, by any means, proper. The union may call either a total strike by all of the workers, or a limited strike carried out by some of them; either a long strike lasting days or weeks, or a short strike for a couple of hours: either a single strike, or repeated strikes.

However, it is generally accepted that a strike should not endanger human lives or cause irreparable damage to the facilities. The LRAA declares this principle in Article 36, providing that "an act which hampers or causes the stoppage of normal maintenance or op-

¹³ Ohama Coal Mine case, Supreme Court, Judgment of April 23, 1949, *Keishu* 3-5-592. The employer was convicted for discharging union officials who led the strike.

¹⁴ Kochi Shimbun case, Supreme Court, Judgment of April 26, 1960, *Minshu* 14-6-1004. Disciplinary discharge of union officials was held to be null and void.

¹⁵ For example, see the Zen-norin case, *supra* note 11.

¹⁶ Mitsubishi Heavy Industries case, Supreme Court, Judgment of September 25, 1992, *Rodo-hanrei* 618-14.

¹⁷ Kishima Coal Mine case, Tokyo District Court, Judgment of October 21, 1975, *Rominshu* 26-5-870.

eration of safety equipment at factories or other workplaces shall not be resorted to even as an act of dispute.” In addition, a statute was adopted in 1953 regarding electric power facilities and coal mines.¹⁸ It forbids acts of dispute that would prevent supply of electricity to the general public or disrupt essential security measures of the mine, and although there is no special sanction against violators, which is also the case with Article 36 of the LRAA, such acts will not be regarded as proper under the LUA.

On the other hand, even doctors and nurses employed at a hospital have a right to act collectively. The Supreme Court recognized that their strikes are not automatically improper because the patients cannot receive necessary care and treatment, although it intimated at the same time that the strikers should cooperate with the employer in cases of emergency.¹⁹

A “slowdown,” which entails working at a reduced pace than usual, is regarded as a proper means of collective action in Japan. It could be more harmful to the employer than an ordinary strike in that the workers remain on the job to perform imperfectly. However, it is settled that a slowdown is permissible so long as the workers are simply withholding a part of their work. By contrast, it is not proper for them to engage in positively injurious acts, such as intentional production of defective goods.

It is also not a proper act of dispute if the strikers occupy the facility and block access of the employer’s side. Immediately after World War II some unions not only occupied the facility but also ran the business on their own, but the Supreme Court denounced this so-called *seisan-kanri* or “production management” tactic as entailing an excessive infringement on the employer’s property rights.²⁰ Similarly, when the workers of a bus company took away and kept the vehicles during the strike so that they may not be driven by replacements, the Supreme Court decided that their action was excessive and unjustifiable and upheld their criminal conviction.²¹

Another source of impropriety is the workers’ conduct at the picket line. Some academics take the position that the use of physical power is inevitable and permissible to a certain degree, depending on the circumstances. However, the Supreme Court held repeatedly that any violence, threat or trespass should not be allowed even at the picket line because the substance of a strike is no more than workers’ non-performance of their job duties.²² In a relatively recent case where the drivers of a taxi company, at the time of strike,

¹⁸ The Act to Regulate Strikes in Electricity Enterprises and Coal Mines, popularly known as “Strike Regulation Act.” This statute was adopted, overriding fierce opposition from the labor side, to curb the tactics the unions of these industries deployed in autumn 1952.

¹⁹ Niigata Mental Hospital case, Supreme Court, Judgment of August 4, 1964, *Minshu* 18–7–1263. The employer discharged the union officials who led the strike, but the Labor Relations Commission issued a remedial order and the Supreme Court sustained it.

²⁰ Yamada Kogyo case, Supreme Court, Judgment of November 15, 1950, *Keishu* 4–11–2257. The union officials were found guilty of theft.

²¹ Sanyo Denki-kido case, Supreme Court, Decision of November 15, 1978, *Keishu* 32–8–1855.

²² Asahi Simbun case, Supreme Court, Judgment of October 22, 1952, *Minshu* 6–9–857; Haboro Coal Mine case, Supreme Court, Judgment of May 28, 1958, *Keishu* 12–8–1694. In the former case, discharge of union members who physically obstructed the operation of business by non-union work-

sat down in front of the garage to prevent the vehicles from being operated by replacements, the Court, reiterating the same rationale, held that the drivers' action was not proper and therefore fell outside of the protection of Article 8 of the LUA.²³

4. Other Factors Affecting Properness

There are some other factors that may affect the properness of industrial actions by labor unions.

Firstly, an act of dispute must be executed by appropriate persons under the control of a labor union. If a fraction of workers start a strike without authorization from the union, it is an improper "wild-cat" strike. Yet, it should be noted that even when there is no labor union, workers may form a temporary "*sogidan*," or dispute group, to deal with the employer over working conditions. Protected by Article 28 of the Constitution, they can resort, as a group, to strikes or other acts of dispute if necessary.

Secondly, most labor unions are required by their constitution to conduct a vote among the members before calling a strike. In fact, Article 5, paragraph 2 of the LUA mandates a union to have such a clause in the constitution if it wishes to utilize the procedures of the Labor Relations Commission. However, it is generally accepted that a failure to comply with this requirement will not render the strike improper vis-à-vis the employer, because it is only for the purpose of intra-union democracy.

Thirdly, an advance notice of a strike is sometimes required by the collective bargaining agreement between the parties. In such a case, the union should comply with the prior notification requirement, or the strike will not be considered to be proper. Even when there is no such agreement, the union's action may be condemned as improper in view of the facts of the case. For example, a district court held that an unannounced slowdown by union workers was grossly unfair and improper.²⁴ An appellate court came to a similar conclusion in a case where the union started a strike twelve hours earlier than its prior notice, giving the employer only five minutes to react to the change.²⁵

Fourthly, when a collective bargaining agreement is concluded for a fixed period of time, both parties are bound by it for the period and the union should not call a strike demanding mid-term changes to the agreement. Some argue that such a strike would be totally intolerable and improper because the so-called "peace obligation" under the collective bargaining agreement is critically important. Others disagree, regarding it as a relatively minor infraction of a private agreement. The Supreme Court had an opportunity to address this

ers was upheld. The latter is a criminal case in which union members were found guilty of forcible obstruction of business for a similar conduct.

²³ Mikuni Haiya case, Supreme Court, Judgment of October 2, 1992, *Rodo-hanrei* 619–8. Union members were found to be liable for the employer's claim of damages.

²⁴ Texas Instruments Japan case, Urawa District Court, Judgment of December 6, 1974, *Rominshu* 25–6–552.

²⁵ East Japan Railway case, Tokyo High Court, Judgment of September 11, 2001, *Rodo-hanrei* 817–57.

issue, but did not provide a clear answer.²⁶

Finally, as for “public welfare undertakings” which provide essential services to the general public, such as transportation, telecommunication, electricity or gas supply, or medical services, Article 37, paragraph 1 of the LRAA requires that ten days’ notice be given to the Labor Relations Commission and the Minister of Health, Labor and Welfare or the prefectural governor before an act of dispute is commenced. Violators are subject to criminal punishment based on the request from the competent Labor Relations Commission, although there has been no case of prosecution or conviction in reality.²⁷ The Supreme Court is yet to decide if a strike becomes improper when the union fails to comply with this requirement, but most scholars are doubtful, saying that this provision is only for the convenience of the society and should not therefore affect the properness of the act.²⁸

V. Liabilities for Improper Actions

1. Criminal Liability

When an act of dispute is not proper, neither Article 1, paragraph 2 of the LUA nor Article 28 of the Constitution provides criminal immunity to the actors. Still, the question remains what exactly constitutes a punishable crime.

It is generally accepted, at least in the private sector, that a strike is not a crime by itself. The Constitution and the LUA recognizes this as an indispensable and legitimate weapon for workers with which to deal effectively with the employer. Admittedly, strikers are intentionally inflicting economical damages on the employer aiming to make it yield to their demands. It would not be totally impossible to argue that strike is a forcible obstruction of business or an illegal extortion when it is not justified as a proper act of dispute. However, as far as I know, there is nobody who takes this position. The same is true with slowdowns and completely peaceful picketing. Criminal convictions have been upheld only in cases where the strikers engaged in other offending conducts, such as assault, bodily injury, trespass, or the damaging of property.

In this regard, it would be helpful to touch on the situation of postal workers before the privatization of the postal service. As described earlier in III. 3, they were covered by the predecessor of the Act on Labor Relations of Specified Independent Administrative

²⁶ Konan Bus case, Supreme Court, Judgment of December 24, 1968, *Minshu* 22–13–3194. Disciplinary discharge of the head of the union was found to be null and void, without sufficient reasoning as to the issue of peace obligation.

²⁷ The Labor Relations Commissions come across such a case only once in several years, and even when a violation is found the case is usually closed with the issuance of a letter of warning.

²⁸ In addition, Article 38 the LRAA provides for prohibition of acts of dispute for 50 days when the Prime Minister has invoked the special “Emergency Adjustment” procedure for fear that the operation of the national economy or the daily lives of the people would be imperiled gravely by the labor dispute. Strikes in violation of this provision will probably be regarded as improper, but this procedure was used only once in the coal strike of 1952 and has been dormant ever since.

Agency, which prohibited strikes and other acts of dispute. In addition, as a unique feature of the postal service, the Postal Act made it a crime for anyone engaging in postal work to abandon or delay the handling of mail. When a postal union called a strike and its leaders were prosecuted for aiding and abetting this crime, the Supreme Court upheld their conviction, holding that the strike was illegal and therefore could not be proper.²⁹ However, it added that rank-and-file workers who participated in the strike as directed by their leaders should not be punished. Although this 1977 decision has been criticized by the labor side as reactionary, the Court did place some restraint on the criminal punishment of strikers.³⁰

As for the government employees who are under the National Public Service Act or the Local Public Service Act, strikes are still illegal and, as explained above in III. 3, instigators are subject to criminal punishment. However, there is no provision to punish those who simply participated in the walkout. On the other hand, the instigators cannot escape criminal liability. The Supreme Court once limited this to cases of aggravated instigation in especially harmful strikes, leaving the union officials who planned and directed an ordinary strike in a normal manner unpunishable.³¹ However, the Court subsequently changed its attitude and has since upheld the conviction of union officials in a number of cases.³²

2. Civil Liability

When workers go on strike or slowdown, they are abandoning, either totally or partially, their duties under the employment contract. This is a violation of the contract, and they must assume civil liability for the damage inflicted on the employer by their respective violation if the strike or the slowdown is not a proper act of dispute. And the union officials who directed the act to the rank-and-file members are concurrently responsible for the total damage of the employer as an abettor of such inexcusable violations, pursuant to a tort provision of Article 719, paragraph 2 of the Civil Code.

On the other hand, when workers engage in violent picketing, occupation of the workplace, or destruction of facilities, the source of liability is such excessive acts accompanying the strike. The perpetrators are liable for tort damages resulting from the act under Article 709 of the Civil Code, and the union officials who directed the act are concurrently responsible as an abettor under Article 719, paragraph 2 of the Civil Code if they are not perpetrators themselves.

²⁹ Zentei-Nagoya-chuyu case, *supra* note 11.

³⁰ The same provision remains in the Postal Act after the privatization, but a postal strike can be a proper act of dispute under the LUA today. Even when it cannot be regarded as proper because, for example, its objective is a political one, I doubt that ordinary participants of the strike will be punished for violating the provision.

³¹ Zen-shiho Sendai case, *supra* note 10; Tokyo-to-kyoso case, Supreme Court, Judgment of April 2, 1969, *Keishu* 23-5-305.

³² Zen-norin case, *supra* note 11; Iwate-ken-kyoso case, Supreme Court, Judgment of May 21, 1976, *Keishu* 30-5-1178; Nikkyoso case, Supreme Court, Judgment of December 18, 1989, *Keishu* 43-13-882; etc.

In addition, in either case, the labor union itself assumes vicarious liability under the relevant provisions of the Civil Code and a related law, depending on the judicial status of the union and the nature of the act. Some academics argue that only the union, and not the individual union members nor officials, should be responsible for the damage, emphasizing that an act of dispute is a unified, collective action. Others disagree, saying that the liability of those individuals should not disappear simply because the union is also liable. Still, they try to relieve the plight of workers and union officials somehow by adding that the employer cannot claim against them until it has claimed unsuccessfully against the union, so long as the act in question had been authorized the union. However, the courts have held, although we can find only a handful of lower court decisions, that the individual members and officials are jointly and severally liable, together with their union, for the entire amount of damages.³³ The employer is therefore free to claim against the individual members or officials first, if it so desires.

It is difficult to tell how the damages are calculated, because there have been so few cases. Moreover, I am not sure how correct each of these decisions was, nor if the employer could have recovered other losses by including them in the calculation. However, just to give readers some perspective on this question, four examples will be shown below.

- (1) In a case where a seven-day strike at a chemical factory was held to be improper because the union did not observe its obligation under the collective bargaining agreement to bargain peacefully before resorting to an act of dispute, the union was held liable for the employer's monetary loss from (a) reduced production due to the strike, (b) wasted constant costs during the strike, (c) partially-processed products ruined because of the strike, (d) additional expenses incurred to restart the facilities after the strike, and (e) special personnel costs to prepare for the strike.³⁴
- (2) In a case of a five-day strike at a food-manufacturing factory, the union's tactic to blockade the facility and deny the employer's access was held to be improper. Because the employer could not handle the perishable materials stored in the refrigerator, some were totally ruined and the others had to be used for lower-priced products. The union and its officials were ordered to pay for (a) the value of the ruined materials, and (b) the reduced profits from the production of the lower-priced products.³⁵
- (3) In a case of a taxi company, members of the drivers' union sat down in front of the

³³ Misuzu Tofu case, Nagano District Court, Judgment of March 28, 1967, *Rominshu* 18-2-237; Shosen case, Tokyo District Court, Judgment of May 6, 1992, *Rodo-hanrei* 625-44; Shirai Transport case, Tokyo District Court, Judgment of December 26, 2006, *Rodo-hanrei* 934-5; etc.

³⁴ Denki-kagaku Industry case, Niigata District Court, Judgment of September 30, 1949, *Rohanshu* 5-26. The total amount of the damages was 2 million yen, which was as far as the employer demanded. The employer could have been awarded more than 7 million yen, according to the court. One could question if the union's failure in this case was reasonably related to all of these losses.

³⁵ Misuzu Tofu case, *supra* note 33. The total amount of the damages was about 1.1 million yen.

garage and made it impossible for the employer to operate the six cars kept inside during the two-day strike. This tactic was held to be improper, and the union members were ordered to pay for the employer's loss, that is, (a) average operating profit minus average operating cost (fuel, oil, depreciation of vehicles, and personnel) for the two days, and (b) attorney's fees.³⁶

- (4) In a case of an unusually long strike at a company operating two bookstores, a minority of workers were on strike for almost two years. The company sued the union as well as the individual workers for the damages for the first three months, during which the strikers and the supporters scared away the customers, sometimes with physical force, and the sales dropped almost to zero. Because such an act was improper, the company was awarded damages for the lost profit, that is, (a) average sales for the three months multiplied by the average rate of profit, minus (b) the amount of saved wages of the strikers during the period.³⁷

As for the civil liability of the union and the workers in relation to the third party, such as a customer of the employer, they are exempted from liability, just as they are not liable towards the employer, so long as their act of dispute is proper.³⁸ The wording of Article 8 of the LUA does not specify this, but it is generally accepted that a different conclusion would be contrary to the purpose of the LUA and the Constitution. When an act of dispute is not proper, this immunity does not apply. However, the workers and the union have no contractual relationship with the customers of the employer. Accordingly, so far as contractual liabilities are concerned, the employer should assume the liability, if any, towards the customers for the loss incurred by an improper strike, for example, and then demand the union and/or the workers to compensate. On the other hand, if the third party suffers directly from the act of the workers such as violence at the picket line, the workers, and possibly their union, are naturally responsible for the tort damages.

3. Discharge and Disciplinary Measures

Willful abandonment of duties by the worker who engages in a strike or slowdown can constitute a cause for a discharge or other disciplinary action as well, if it is not legitimized as a proper act of dispute. So can the worker's violence, trespass, and other offending actions accompanying a strike. In fact, most employers prefer taking disciplinary measures to suing the union and/or the workers for damages, which is costly and unrewarding. The employer must abide by the provisions of its work rules regarding discharges and disciplinary actions, but otherwise Article 7, item 1 of the LUA does not prohibit the em-

³⁶ Mikuni Haiya case, Takamatsu District Court, Judgment of May 6, 1986, *Rodo-hanrei* 537-67. The total amount of the damages was about 230,000 yen. This case eventually went to the Supreme Court. See *supra* note 23.

³⁷ Shosen case, *supra* note 33. The total amount of the damages was about 97.7 million yen.

³⁸ OS Movie Theater case, Osaka District Court, Decision of June 24, 1948, *Rosaishu* 1-80.

ployer from discharging or disciplining a worker who engaged in an improper act of dispute.

Here again, some academics take a position that individual workers should not be held responsible because the union is the one to blame. There is also a different type of argument against disciplinary actions, which says that provisions of work rules are for the sake of discipline and order of the enterprise and therefore only meant for ordinary times, that is, not applicable to the worker's action at the time of a labor dispute. However, the courts have found no difficulty holding that the individual workers may be discharged or disciplined for their own infractions during a strike.

It is common that the union officials are disciplined more severely than rank-and-file members, including cases where only the officials are disciplined at all. Some criticize such a practice, asserting that union officials could not be treated unfavorably because of their positions within the union. However, there is a countervailing argument that the union officials are not being punished for their positions but for the actual roles they played—such as deciding the strategy and tactics, or directing the members at the site—in an improper act of dispute. Most courts take the latter view, upholding heavier disciplinary actions against union officials so long as the measures are suitable for their respective actual conduct.

Of course, even without the protection of Article 7, item 1 of the LUA, discharge and disciplinary actions are subject to generally applicable rules. Thus, a disciplinary discharge may be held to be null and void when it is disproportionately severe for the conduct in question. And the employer should comply with requirement of due process before disciplining the workers. Furthermore, if the employer is actually motivated by its underlying hostility towards the union and uses the improper act of dispute as a pretext, the disciplinary action may well be a violation of Article 7, item 1 of the LUA.

VI. Answers to Japan-Specific Questions

1. Was There the Abolishment of the Offense of the Obstruction of Businesses in 1946? If So, What Was the Background behind It?

No, the offence was not abolished. Let me review the historic developments. As mentioned above in III. 1, the Public Order and Police Law of 1900 was the most notorious piece of legislation in pre-war Japan aimed at curbing the workers' collective activities. It was amended in 1925 and a provision punishing even peaceful inducement of an ordinary strike was abolished. However, the other provisions regulating meetings and street demonstrations remained for the police to apply rather conveniently. At the same time, a new statute called the Law concerning Punishment of Physical Violence and Others was enacted, which prohibited violence, threat, destruction, forcible demand of meeting, etc. In addition, the Public Security Preservation Law of 1925 prohibited socialism, communism, or other anti-governmental activities, suppressing many politically active workers and unions. And there was the offense of forcible obstruction of business in Article 234 of the Penal Code. It

was a general provision of the basic criminal statute, but was utilized, along with even more laws and ordinances, to restrict labor movements.

After World War II, the ultimate goal of the Allied Powers was to democratize Japanese society, and it was thought crucial for this purpose to liberalize and promote labor unions. In October 1945, less than two months after the end of the war, a memorandum was issued by the occupational forces, which suspended all the laws and regulations restricting political, civil, and religious liberty of Japanese people. Then, the Public Security Preservation Law and the Public Order and Police Law were both abolished by the end of November, and the Labor Union Act was adopted in December 1945.

By contrast, the offense of forcible obstruction of business was not abolished. It remains in Article 234 of the Penal Code. So does the Law concerning Punishment of Physical Violence and Others. These regulations were regarded as legitimate and necessary tool to maintain the order of the society, although they had been abused in the past. When a strike is accompanied by violence or other forcible factor and therefore improper, these criminal provisions are applicable. However, the attitude of the police should be modest in view of the constitutional guarantee of the workers' collective rights.

2. Is There Any Difference between Liability of a Trade Union and That of Individuals in Relation to Burden of Proof?

Probably no. As described above in V. 2, the courts do not seem to care about the difference between the liability of individuals and that of a union. Once a strike is found to be improper, they are jointly and severally responsible for the entire loss of the employer. The same applies in the case of violence at the picket line, so long as it is an incidental result of the union's act of dispute. However, if the violence is totally personal in nature and has nothing to do with the union, the union may be relieved of liability. In this sense, union's vicarious liability has more factors to be proved or disproved, but I do not think this is an issue of "burden of proof."

3. Please Let Us Know the Case of the Privatization of JR with Regard to the Scope of Legitimate Industrial Action and Civil Liability.

As explained above in III. 3, the workers of the former Japanese National Railways (JNR) were covered by the predecessor of the Act on Labor Relations of Specified Independent Administrative Agency, which prohibited strikes and other acts of dispute. They frequently resorted to such acts in reality, however, and the participants and the union officials were disciplined or discharged as a result. There was an argument for relativity, saying that some of their strikes can be proper despite their illegality in a formalistic sense, but the Supreme Court eventually rejected this argument.³⁹

After privatization, six regional railway companies and a nation-wide freight compa-

³⁹ See Zentei-Nagoya-chuyu case, *supra* note 11.

ny were established. So far as labor relations are concerned, they are all ordinary private employers. The unions are as free to call a strike as any other union in the private sector. Because railways are included among “public welfare undertakings” under the LRAA, the union must give ten days’ notice before starting an act of dispute, as explained above in IV. 4. However, this is not a heavy burden and probably will not affect the properness of the action in any event. Thus, the difference is huge with regard to the scope of legitimate industrial action between before and after privatization.

As a matter of fact, even before privatization, the employer did not regard it as a particularly good idea to sue the union or the workers for damages for illegal strikes. However, in response to the audacious “strike for a right to strike” of 1975, the JNR, under considerable pressure from conservative politicians, filed an action for damages against the two unions which initiated the strike. It demanded an astronomical amount of 20.2 billion yen, reflecting the huge blow it afflicted on the JNR as well as the entire nation. As this case proceeded very slowly before the district court, privatization became a predominant issue at the JNR in the 1980s. The Nihon National Railway Motive Power Union (*doro*), the smaller of the two defendant unions, decided to cooperate with the employer for the privatization plan, and the JNR withdrew the claim against it in 1986, acknowledging their changed attitude. The other, the National Railway Workers’ Union (*kokuro*) maintained their opposition to the privatization plan. It was by far the largest union at the JNR, but lost most of its members, for one reason or another, during the process of privatization. The litigation dragged on well after the privatization, but the successor of the JNR’s assets and the union settled the case in December 1994. The union agreed in this settlement to return a building near Tokyo Station that it had rented from the employer for a long time. Thus, although the action for civil damages did not produce a final decision of the court, it did play a role in the tangled labor relations at the JNR and its successors.

4. Is It Legal to Occupy Some Part of Premise during a Strike?

No, according to today’s prevalent theory. It may be regarded as legal for the workers to stay on the premises during a strike for various purposes, on the condition that they will not hinder the access and activities of the employer’s side, but “occupy” seems to imply otherwise. In a relatively recent case, in which the workers occupied a concrete mixer for six hours, denying the employer’s access to the vehicle, and because it could not be moved a nearby facility remained idle for the entire period, a high court decided that it was not a proper act of dispute.⁴⁰ Some academics are more willing than others to allow the workers’ incidental presence on the employer’s premise during a strike. However, it is not disputed that they cannot occupy the facility and exclude the employer’s access completely.

⁴⁰ Okaso case, Tokyo High Court, Judgment of November 8, 2001, *Rodo-hanrei* 815–14.

VII. Conclusion

I do not think we should complain that there are too few strikes in Japan. A strike is a form of economic warfare that inevitably disrupts the lives of many people. However, if the society becomes too accustomed to a scarcity of strikes, people may forget that it is a legitimate weapon for workers. People may become upset and react irrationally when they come across a strike. And perhaps judges may do so, too. When a union started a strike at a hospital in Mie Prefecture in August 2012, the employer's side asked the district court for an injunction to suspend the strike. It was granted summarily without hearing from the union. The issue at the prior bargaining sessions was a disagreement on working conditions and related matters. Because a hospital is a public welfare undertaking, the union had given a proper notice to the prefectural governor and others. It also took care not to endanger the lives and safety of the patients during the strike, although it refused the employer's specific request to secure certain persons.

The union later sued the chairman of the medical corporation that ran the hospital for damages, claiming that his petition for the injunction was a tortious infringement on the workers' right to strike. The same district court, presided by a different judge, accepted this rationale and ordered the employer to pay 3.3 million yen in total to the union as damages.⁴¹ There remains a question if the employer was solely responsible for the misguided injunction. However, it will certainly take our efforts to keep the workers' collective rights viable in the real world.

⁴¹ Suzuka Sakura Hospital case, Tsu District Court, Judgment of February 28, 2014, *Rodo-horitsu-jumpo* 1820–67. According to news reports, the Nagoya High Court affirmed the judgment on November 27, 2014.