

Article

Japan's Employment System and Formation of the "Abuse of the Right to Dismiss" Theory

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In Japanese labor studies, it is common to think of long-term employment practice as a major characteristic of Japan's employment system and to position the "abuse of the right to dismiss" theory (*Kaiko-ken ranyō hōri*)¹ as part of the legal framework supporting it. This perception is not necessarily mistaken, but viewing it too simplistically is not appropriate for the following reasons.

First, regarding constraints on dismissal as the most prominent feature of Japan's employment system, is not a very appropriate or effective means of comparing laws of Japan with those of developed Western countries other than the United States. In terms of comparative law, only the United States is an outlier in that it continues to uphold companies' freedom to dismiss employees at will. In other Western countries, legislation requiring just cause for dismissal has been developing, albeit with varying with degrees.

Second, from this standpoint, we can say that what distinguishes Japan is that restrictions on dismissal have been developed exclusively in courts through an accumulation of judicial precedents, without going through legislation, whereas they have developed through legislation in Western countries.

In other words, viewing the abuse of the right to dismiss theory and Japan's employment system as virtually synonymous is incorrect in that it treats American freedom to dismiss employees, which is the exception rather than the rule, as a universal international standard. Furthermore, it is

considered to run the risk of giving a false impression that the transformation of Japan's employment system might inevitably cause the loosening of dismissal regulations.



This article seeks to clarify the relationship between Japan's employment system and the abuse of the right to dismiss theory through historical analysis of the process by which the theory was formed.

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The former Labor Union Act, enacted in 1945, prohibited dismissal that constituted unfair labor practices, with the passage that "[t]he employer shall not commit...to discharge or otherwise treat a worker in a disadvantageous manner a worker by reason of such worker's being is a member of a labor union," but only imposed penalties as a legal effect and did not stipulate dismissal itself as invalid. Even if a case was confirmed as a violation under the criminal provisions, there was no immediate civil effect. Therefore, it was necessary to file a separate civil lawsuit in order for the employee to be reinstated.

In a groundbreaking example of such a case, the court issued a verdict on the *Tsuruoka Toho* case on November 24, 1948, invalidating a dismissal as an unfair labor practice with a civil effect, the first judicial precedent regarding dismissals. In 1949, the Labor Union Act was fully revised. In addition to disadvantageous treatment such as dismissals,

the Act incorporated new regulations into its framework of unfair labor practices; that is, refusal to engage in collective bargaining, and domination and interference with labor union activities. The penalty system was abolished, and instead the form of orders for relief issued by the Labor Relations Commissions² was adopted. This stipulated the Commissions' authority to issue relief orders, including reinstatement of workers to their previous positions. Combined with the judicial precedent on the invalidity of dismissal from the era of the previous penalty system, the idea that dismissal constituting an unfair labor practice was invalid became widespread.

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Meanwhile, in the 1950s, with regard to dismissals of individual workers that did not fall into the category of unfair labor practices, the abuse of the right to dismiss theory was formulated and established at the lower court level. As for its theoretical framework, in the early 1950s there were conflicting theories—the theory of employer's freedom to dismiss workers, the abuse of the right to dismiss theory, and the theory of justifiable dismissal—but in the late 1950s the abuse of the right to dismiss theory became overwhelmingly dominant.

With the basic principles of civil litigation, the burden of proof is imposed on employer under the theory of justifiable dismissal, whereas the burden of proof is on workers under the abuse of the right to dismiss theory, and this point ought to differentiate the two theories. However, the *Nippon Reizo* case verdict of May 22, 1950 shifted this burden of proof of validity for the dismissal to the company while adopting the abuse of the right to dismiss theory. And this became the standard practice in such court cases. In other words, the abuse of the right to dismiss theory, which became the mainstream, was not different from the theory of justifiable dismissal at all in its substance.

So why didn't the theory of justifiable dismissal become mainstream? Important precedents were the *Red Purge Dismissal* cases and the *USFJ (US*

Forces Stationed in Japan) Employees' Dismissal cases. In the former cases, a large number of labor union activists were dismissed based on allegations that they were Japan Communist Party members or sympathizers. And it was the abuse of the right to dismiss theory, rather than the theory of justifiable dismissal from which it barely differed in any substantial way, that was intentionally used in order to reach the conclusion that the dismissals were valid. The major ruling in the latter cases stated that “even if the military has not explicitly specified the justification of dismissal, claiming it as ‘reasons of national security,’ the demands for ‘confidentiality’ in a military cannot be denied,” and the abuse of the right to dismiss theory was formulated under special conditions, to reach the conclusion that the dismissals were not abusive even if no specific justification was given.

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As the abuse of the right to dismiss theory developed in the 1950s, Japan's employment system was not overtly stated as its reasoning. On the contrary, considering the enactment of the Protection against Dismissal Act in West Germany in 1951, there seems to have been a broad-based movement in developed countries around this time toward attempting to regulate dismissal without just cause, regardless of the form of employment system. In Japan, the same result was reached by an accumulation of judicial decisions. In other words, the abuse of the right to dismiss theory was not deeply rooted in Japan's employment system, at least during its initial, formative period.

A group of court cases citing Japan's long-term employment practices as reasons for invalidity of dismissal appeared only later, in the 1960s. However, in the August 9, 1967 verdict in the *Singer Sewing Machine Co.* case, involving dismissal of an American employed by a Japanese branch office of the American company, the abuse of the right to dismiss theory was recognized as an aspect of Japan's distinctive lifetime employment system, but the dismissal was recognized as valid on the grounds that the invalidity of abusive dismissal

does not apply to Americans. This legal prescription may seem logical when compared to the status of American employees of American companies where freedom of dismissal is the norm. It is, however, not necessarily appropriate when compared to the systems of European countries that place some restrictions on dismissal although their employment systems differ from Japan's. In this sense, such cases involving American companies doing business in Japan played a role in developing the overly simplistic discourse that justified the abuse of the right to dismiss theory in terms of Japan's distinctive employment system.

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In the 1970s, the oil crises struck developed countries, and corporate restructuring resulted in dismissal of employees en masse. In response to this, many rulings on economic dismissal were issued at the lower court level in Japan, forming the basis for the so-called theory of economic dismissal (*Seiri kaiko hōri*). In these rulings, Japan's employment system was often referred to as a rationale, and here for the first time a judicially created theory based on the employment system was established. The *Toyo Sanso* case at Tokyo High Court ruling on October 29, 1979 stated,

In Japanese labor relations, lifetime employment is assumed to be a basic principle, and workers usually make their long-term life plans on the premise of a permanent and stable employer-employee relationship. Dismissal not only deprives workers of their means of making a living, or forces them to change jobs against their will to employers with more unfavorable working conditions, but also often severely disrupts their overall life plans. Therefore...employer's freedom to dismiss employees for reasons of business necessity should be subject to certain restrictions, as is dismissal for other reasons.³

This established the economic dismissal theory on the basis of Japan's employment system.

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The abuse of the right to dismiss theory,

established at the lower court level in the 1950s, was confirmed by a Supreme Court ruling in the 1970s and became a judicial precedent. Ironically, the theory of economic dismissal itself, which embodies Japan's employment system, has to this day never been confirmed by a Supreme Court decision, and in a strict sense cannot be called a judicial precedent.

Since 2000, with relaxation of dismissal regulations rising near the top of Japan's labor law policy agenda, the theory of economic dismissal has been one of the areas of focus, in particular what is called its second requirement (or element)—the obligation to take various measures to avoid economic dismissals. The government's Council for Regulatory Reform asserted the importance of “shifting the main thrust of employment policy, from ensuring employment within specific companies to ensuring employment across society as a whole,” and suggested “proposing re-employment assistance and skill development support as other options, in place of the obligation to make efforts to avoid dismissal.”

It is important to note that at this point, neither the theory of economic dismissal nor the abuse of the right to dismiss theory is officially prescribed by legislation, and under the provisions of the Civil Code, the principle of freedom to dismiss employees is upheld. These proposals for relaxation of economic dismissal argued that legislation should be used to transform and mitigate judicially created theories, which are not actually legal provisions.

However, the Labor Standards Act Article 18-2, which was enacted in 2003 after discussions of the tripartite Labor Policy Council composed of labor, management and public interest members, faithfully stipulated not the economic dismissal theory but only the abuse of the right to dismiss theory, for which there is a Supreme Court judicial precedent. This article of the Act defines “[i]f a dismissal lacks objectively reasonable grounds and is not considered to be appropriate in general societal terms, it is treated as an abuse of rights and is invalid.” This article was subsequently transferred to Article 16 of the Labor Contracts Act in 2007, but its content remains completely unchanged. In other words, the

current dismissal laws in effect in Japan merely stipulate minimal dismissal regulations in the same manner as Western countries other than the United States, and the theory of economic dismissal grounded in Japan's employment system is still backed by nothing more than lower court precedents.

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Meanwhile, there is a debate over whether a system for financial resolution of dismissal cases should be introduced, besides an issue with different dimensions from revising the abuse of the right to dismiss theory and the theory of economic dismissals in themselves. Various proposals were made when drafting the 2003 and 2007 legislation described above, but none of them came to fruition. In recent years, discussions have been held in the Study Group on a Fair and Transparent Labor Dispute Resolution System, established by the Ministry of Health, Labour and Welfare. The study group's report issued in May 2017 worked out the policy direction of stipulating, in practical legal terms, workers' right to request monetary payments.

However, the issue seems to be quite a thorny one. Japanese law does not prohibit any financial resolution of dismissals. In fact, a large number of dismissal cases have been resolved financially through Labor Bureau's conciliation and in labor tribunals, and a considerable number have also been settled through monetary compensation of dismissal-related lawsuits. The author has comprehensively clarified these matters by reviewing JILPT surveys (Hamaguchi 2016). However, unjust dismissals do not result in payment for damages—unlike *Auflösung des Arbeitsverhältnisses* (cancelling of

labor contract) known in Germany—when a worker seeks invalidation of dismissal and confirmation of their employee status.

In the future, there will be further Labor Policy Council discussions on dismissal legislation. It is to be hoped that these will be grounded in an awareness of the historical background outlined in this article.

1. This theory “is for screening and restricting employers' exercise of the right to dismiss employee (manifestation of the intention to dismiss employee)” (Ikezo 2018).
2. The Labor Relations Commissions, established in March 1946 following the enactment of the Labor Union Act, are tripartite bodies instituted in each prefecture. They are entrusted with adjustment of labor disputes under the Labor Relations Adjustment Act through conciliation, mediation and arbitration.
3. Administrative Reform Committee, *Kisei kaikaku ni tsuite* [Committee's view on administrative reform], last modified December 12, 2000, <https://www.kantei.go.jp/jp/gyokaku-suishin/12nen/1215kenkai/kakuron12.html> [in Japanese].

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