

Case Jurisprudence on the Justifiability of Industrial Actions

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Abstract

The Constitution of the Republic of Korea guarantees three labor rights □ the right to organize, the right to bargain collectively and the right to take a collective action □ as fundamental rights, and these basic labor rights are materialized in the Trade Union and Labor Relations Adjustment Act(TULRAA). Considering that the TULRAA includes excessive restrictions on industrial actions and many provisions on criminal punishment, however, it is doubtful whether the TULRAA is designed to substantially protect basic labor rights or it is only to regulate industrial actions.

Moreover, although taking an industrial action is the legitimate exercise of fundamental rights laid down in the Constitution, the court of the Republic of Korea requires that laborers abide by strict criteria for the justifiability of an industrial action in the respect of its entity, purpose, procedure, and methods and means. If the concerned industrial action fails to fulfill the foregoing criteria, its justifiability comes to be forfeited and thereupon those who led or joined the action are to assume civil, criminal, and/or disciplinary responsibility. Since the Republic of Korea carries out a labor policy that is oriented only toward criminal punishment, it is the reality that a person who plans to be a union leader is prepared to be subject to imprisonment.

Recently there have been many court rulings on the justifiability of industrial actions, and, at the same time, there have been heated debates on the validity of those rulings. One of the issues was whether the industrial actions are justifiable which were taken with the object of resisting massive lay-offs that had been done in the process of structural adjustment after the financial crisis at the end of 1997. Another issue was whether it is proper to inflict criminal punishment for failing to observe procedural requirements on industrial actions. Particularly, even in the cases of the negative type of strikes such as just rejecting to offering labor, many of union leaders were punished under the Criminal Code despite

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that the concerned action had no additional unlawful factors. This incurred severe criticism and censure from the international community as well as from the domestic society.

This paper examined recent case laws from the court of the Republic of Korea regarding the justifiability of industrial actions. This paper also looked into the definitions of a labor dispute and an industrial action stipulated in the TULRAA and gave concrete consideration to the issue of justifiability in the respect of the following four aspects.

- *Entity*
 - *Purpose: Political strikes, Solidarity strikes, Management-related strikes, Wage demands for the period of industrial action, Disputes of rights, Mandatory bargaining issues, Issues for the Labor-Management Council to decide, Issues subject to collective agreements valid during industrial actions, Demands that require ratification by the general meeting of the trade union prior to making the collective agreements*
 - *Procedure: Precedence of actual negotiations, Adjustment precedent to industrial actions, Simple majority affirmative vote by the union members under a direct, secret and unsigned ballot, Prohibition or suspension of industrial actions upon decision to submit to arbitration or emergency adjustment*
 - *Methods and means: Strikes, Occupying workplace, Picketing, Sabotage, Protection of security and safety protective facilities, Prohibition of third party support activities*
- Finally, the present writer sincerely hopes that the court of the Republic of Korea will make a complete change in its attitude toward industrial actions, which is conservative and even hostile.*

I. Introduction

Article 33, Paragraph 1 of the Constitution of the Republic of Korea states: “Workers shall have the right to independent association, collective bargaining and collective action to enhance employment conditions,” thereby guaranteeing the workers’ right of collective action (of which right to industrial action consists the core) in writing as a basic constitutional right. Such constitutional protection of the right of collective action is interpreted to have not only the passive effect against preventing infringement from government agencies, but the progressive effect between private persons as well.

The principal general statute that materializes the three basic rights of workers under the Constitution is the Trade Union and Labor Relations Adjustment Act (hereinafter the ‘TULRAA’). In the past the relevant statutes were divided into the Trade Union Act, which stipulates the establishment and management of trade unions, collective bargaining, collective agreements, and unfair labor practices, and the Labor Dispute Adjustment Act, which provides for adjustment of labor disputes and restrictions on labor disputes. However, on March 13, 1997 when the labor law was comprehensively revised, the two were merged into one statute. Article 1 of the TULRAA states the purpose of the statute as follows: “The purpose of this Act is to maintain and improve employment conditions of workers and enhance their economic and social status by guaranteeing the rights of association, collective bargaining, and collective action as prescribed by the Constitution, and to contribute to the maintenance of industrial peace and the development of national economy by preventing and resolving labor disputes through the fair adjustment of labor relations.”

The industrial actions of workers cause obstacles to business activities of the employers, and thereby give rise to economic loss; however, obviously they are not subject to criminal or civil penalization because they are an exercise of a basic constitutional right. Article 3 of the TULRAA (Restriction on Damage Claims) states that an “employer cannot claim damages from a trade union or workers when it has seen loss from collective bargaining or industrial actions.” Article 4 of the TULRAA (justifiable actions) states that “Article 20 of the Criminal Code (which provides that acts permitted under statute, actions due to work or actions that are not violative of social convention shall not be penalized) applies to justifiable actions of trade unions such as collective bargaining, industrial actions and other actions that were taken to

achieve the purposes stated in Article 1 of the TULRAA.”

In order for such criminal and civil exemptions to apply in worker’s industrial actions, the justifiability of the industrial action must first be recognized, and if the justifiability of the industrial action is not recognized, the criminal and civil exemptions do not take effect. In particular, in Korea when the justifiability of industrial actions is not recognized, the senior officials of the trade unions who organize the labor strikes in the form of concerted refusal to work, are criminally held liable for having interfered with the employer’s operations. Thus, judgment on the justifiability of industrial actions bears significance.

Since the late 1980’s, as the democratic labor movement in Korea matured and industrial actions became frequent, a large number of judicial decisions regarding the justifiability of industrial actions emerged and accumulated. Even today, the case law is going through constant changes. Since late 1997, workers’ demands saw many changes due to the effects that the financial crisis caused on the working environment, and new issues on justifiability regarding the objectives of industrial actions began to arise. Also, the TULRAA contained various restrictions on industrial action procedures, elevating the importance of the issue of justifiability of industrial actions with respect to industrial action procedures.

This paper seeks to examine the meaning of industrial action and the elements of its justifiability by focusing on the regulations in the TULRAA and the most recent court decisions.

II. Definition of Labor Disputes and Industrial Actions

A. Legislative Method: Statutory Definition

The TULRAA provides for the definitions of labor disputes and industrial actions, to which the statute applies. Provision of definitions of labor disputes and industrial actions in statute is not common and Korea and Japan are unique in this respect.

B. Definition of Labor Dispute

Article 2, Paragraph 5 of the TULRAA defines labor disputes as “controversy or difference arising from disagreement between the trade union and the employer or

employers association concerning the determination of employment conditions such as wages, hours worked, welfare, dismissal and other like treatments,” where the “disagreements refer to situations in which the parties to labor relations are no longer likely to reach an agreement by means of voluntary bargaining even if they continue to make such an attempt.”

According to the above definition, the subjectives of labor disputes are limited to “issues regarding the determination of employment conditions such as wages, working hours, welfare, dismissal and other like treatments.” Disputes regarding whether issues other than employment conditions defined narrowly may be the subject of labor disputes and that whether performance of employment condition issues already determined (dispute of rights), which are not issues of determining employment conditions (dispute of interests) may be the subject of labor dispute, are generally interpreted to be negative.

The above provision in the TULRAA is criticized as interpreting the range of labor disputes in an excessively narrow manner and unjustifiably shrinking the right of collective action. In this perspective, there emerge persuasive arguments for revising the definition of labor disputes as “controversy or difference that arises from disagreements between the trade union and the employer or employers association regarding the maintenance and improvement of labor conditions and the enhancement of the workers’ economic and social position.”

C. Definition of Industrial Action

Article 2, Paragraph 6 of the TULRAA defines industrial action as “actions or counter-actions which obstruct the normal operation of business, such as strikes, sabotage, lock-outs, through which the parties to labor relations intend to accomplish their claims.”

According to the above definition, industrial actions seem to include lock-outs by employers, but the TULRAA embodies the constitutional protection of workers’ collective actions. Hence, it is questionable whether industrial actions by employers should be permitted. The emerging view is that only trade unions are recognized as the subject of industrial actions in the TULRAA and that it is enough to permit lock-outs by the employer as actual counter-actions against industrial actions because lock-outs by employers are merely counter-actions against industrial actions by workers, and as

such cannot be regarded as a basic constitutional right.

There is also a question as to whether the claims of parties to labor relations regarding the purpose of industrial actions should be understood to mean the “claims regarding the determination of employment conditions such as wages, hours worked, welfare, dismissal and other like treatment”. One view is that the ‘claims’ in the definition of industrial actions should be interpreted independently of ‘claims’ in the definition of labor dispute.

III. Judging Justifiability of Industrial Actions

A. Significance

Determination of the justifiability of an industrial action is very important because justifiable industrial actions are exempt from civil and criminal liability and are protected by the unfair labor practice remedies system.

The old Labor Dispute Adjustment Act did not state a standard for determining the justifiability of industrial actions, but the current TULRAA stipulates the principle of industrial actions and their standards. Specifically, it provides that “any industrial action shall not be inconsistent with the acts and subordinate statutes or other social order with respect to its purpose, method and procedure.”¹⁾ Furthermore, it provides that “no member of a trade union shall take part in any industrial action that is not led by the trade union.”²⁾

The Supreme Court decisions consistently perceive the justifiability of industrial actions from four viewpoints: Entity, purpose, procedure and method. In other words, in order for industrial actions to be criminally justifiable actions, first of all, the entity must be the entity which can do collective bargaining, second, the purpose must be to enable voluntary negotiations between the workers and the employers to enhance employment conditions. Third, the action must commence after the employer has refused collective bargaining regarding specific demands for improvement of the workers’ employment conditions, provided that unless there are special circumstances, the worker must proceed through procedural requirement in the statutes such as

1) Article 37, Paragraph 1 of the TULRAA

2) Article 37, Paragraph 2

obtaining the affirmative decision of the trade union members and the adjustment procedures of the Labor Relations Commission. Fourth, the method is subject to various conditions, such as that it must not conflict with the property rights of the employer, and must not involve the exercise of violence.

B. Entity to Engage in Industrial Actions

Article 37, Paragraph 2 of the TULRAA prohibits industrial action of a trade union member that is not led by a trade union, and Article 89, Subparagraph 1 provides for criminal punishment in case of violation of Article 37, Paragraph 2.

Supreme Court precedent deemed the trade union, which has the power to engage in collective bargaining and collective agreements, to be the only legitimate entity to engage in industrial actions. In other cases, the Supreme Court has decided that the industrial actions are unjustifiable and not exempt from civil and criminal liability.³⁾

A trade union in Korea must meet the substantive requirements of independence, democracy, and organization, and furthermore must meet formal requirements such as reporting on the establishment of the trade union to the relevant administrative agency and receiving a certificate.⁴⁾ When a trade union has met the substantive requirements but not the formal requirements, it should be deemed to have the authority to engage in industrial actions, by operation of the constitutionally protected right to collective action.

Worker's groups that have been united for the purpose of maintaining and improving employment conditions or improving socioeconomic positions, should be recognized as entities to engage in industrial actions if it was formed to exercise collective force to resolve a labor dispute, since the subject of worker's rights is the individual worker.

Article 5 of the Addendum to the TULRAA provides that if a trade union is established in one business or workforce, one cannot establish until December 31, 2006, a new trade union that has the same organizational jurisdiction as the existing trade union. Based on this provision, a question arises as to whether the newly formed trade union can lead an industrial action when it does not meet the formal requirements

3) Supreme Court Decision No. 95Do1016 dated October 12, 1995, Supreme Court Decision No. 91Do324 dated May 24, 1991, etc.

4) TULRAA Article 10, Article 12

of reporting its establishment and receiving a certificate. The prevailing view is that such trade unions cannot be deemed to be the subject of collective bargaining power under the TULRAA and thus industrial actions initiated by these unions are not easily justifiable.

In cases where a trade union is organized and a branch office of the trade union or its certain members engage in an industrial action (unofficial strike) irrespective of or contrary to the policies of the trade union, some are of the opinion that they should be deemed exceptionally justifiable in consideration of the demands of the union members, controlling relations, number of participants in the industrial action, and the level of organizational independence. Others take the view that such actions can never be justifiable. The Supreme Court denies justifiability in such cases.

C. Purpose of Industrial Actions

1. Two Different Basic Views

The purpose of protecting the right of collective action is to maintain and improve employment conditions and to enhance the socioeconomic position of workers. Thus, the breadth of industrial actions whose objectives are recognized as justifiable will differ depending on how we view the enhancement of employment conditions and the socioeconomic position of workers.

According to one view, employment conditions and enhancement of socioeconomic position can be defined narrowly, such that the employer has the authority to manage and only a few narrowly defined employment conditions may be improved through collective bargaining. Others take the broad view regarding employment conditions and enhancement of socioeconomic position, disallowing direct authority to manage by employers and not uniformly denying justifiability of industrial actions even though they may be for a purpose that cannot be arranged through collective bargaining.

The typical and customary form of industrial action allows for the authority to manage by employers and objectives concerning direct economic benefits such as maintaining and improving employment conditions; however, because of the modern trend that national legislative acts and policies highly and increasingly influence employment conditions, directly and indirectly, and the employment conditions of one company also significantly and increasingly influence those of others. Thus, the

exercise of collective action cannot be made independent of national legislative actions or policies or even the employment conditions of other companies. In light of this, it would be problematic to limit the purpose of industrial actions to the narrow meaning of working conditions.

However, the Supreme Court has recognized industrial action in only a very narrow set of circumstances: an industrial action must be for the purpose of further voluntary negotiations between employer and employees to enhance the employment conditions, in other words the demands to be achieved by the industrial action must also be a valid agenda for collective bargaining.⁵⁾ Furthermore, the Supreme Court has declared that the purpose of industrial action can be many and that even if one of these is not justifiable, the justifiability of the action as a whole may be judged by whether the primary or true purpose is justifiable. If the industrial action would not have occurred had it not been for the unjustifiable demands, then the industrial action in its entirety will not be deemed justifiable.⁶⁾

2. Political Strikes

Political strikes are industrial actions that are aimed at the national or a regional government and other governmental agencies, or that are for the purpose of demonstrating or fulfilling a particular political view of the workers. Political strikes are unique in that the employer doesn't have authority to manage as to these demands, and therefore there is no possible resolution by collective agreement.

There are two different types of political strikes. In a purely political strike the workers make purely political demands such as in regime-withdrawal-demand-strike. An economic political strike is related to the broader meaning of employment conditions, where the workers demand revision of labor laws or changes in labor policies.

With regard to the justifiability of political strikes, there are three schools: complete denial, full acceptance, differentiation between purely political strikes and economic political strikes. The prevailing view in the labor law academia is that at least the

5) Supreme Court Decision No. 94Da4042 dated September 30, 1994

6) Supreme Court Decision No. 91Nu5204 dated January 21, 1992, Supreme Court Decision No. 91Da34523 dated May 12, 1992

economic political strikes that are closely related to employment conditions such as the revision of labor laws or the implementation of labor policies are justifiable. Although recognizing economic political strikes as justifiable requires a sacrifice on the employer's part and therefore could be considered unjustifiable, we should regard it as a reflexive effect of a constitutionally protected right which the employer should accept and understand.

The Supreme Court, however, strictly limits the purpose of industrial actions to those to enable voluntary negotiations between workers and employers. Under this interpretation, economic political strikes in which the employer does not have any authority to manage may not be deemed justifiable.

3. Solidarity (Sympathy) Strikes

Solidarity strikes are used in order to support industrial actions in another company or industry. They are similar to political strikes in that the employer has no authority to manage as to the demands made in such strikes.

Like political strikes, there are two opposing views with respect to solidarity strikes, either recognizing or denying its justifiability. In Korea, chaebol or group managements are widespread, and the headquarters of the chaebols or business groups make the overall decisions on the employment conditions of their subsidiaries and these decisions are instructed to the relevant companies. In such cases the employment conditions of one of the subsidiaries can make a huge difference on other subsidiaries. Also, solidarity strikes should be permitted when a strike at one business site influences another company due to special circumstances.

Nevertheless, the Supreme Court is not likely to recognize solidarity strikes as justifiable.

4. Management-Related Strikes

When a trade union engages in an industrial action in order to attain its management-related demands, the question arises whether the action is justifiable from the perspective of its purpose. The majority view in the labor law academia is that although the managerial power and the right of personnel management lies solely with the employer, they may become objects of collective bargaining and a justifiable

objective of an industrial action where it is related to the employment conditions of the individual. However, determining whether a certain issue is directly or closely related to employment conditions is not easy.

Since the financial crisis in late 1997, the government and the business sector were under severe pressure to undergo restructuring. In its process, many workers were laid off, and the trade unions and workers put up a fierce struggle against the lay-offs. Eventually, a lot of the officers of the trade unions who engaged in the struggle against lay-offs were arrested or criminally prosecuted, leading to subsequent Supreme Court decisions on this issue. The Supreme Court has ruled as follows: “Lay-offs due to urgent managerial needs are managerial measures by the employer; and if the demands against lay-offs made by the trade union are that an employer should not lay off anyone, this would be fundamentally limiting the employer’s managerial powers. Thus, by principle they cannot be the objects of collective bargaining, and industrial actions that seek to achieve ends that are not within the range of legitimate collective bargaining may not be recognized as justifiable purpose.”⁷⁾ Essentially this decision may be interpreted to mean that industrial actions are not justifiable when the demands are in opposition to the lay-offs themselves, but that they are justifiable if the purpose was to attain demands regarding a plan to carry out the duty to make an effort to reduce lay-offs, provision of rational selection criteria for lay-offs and a measure for employment stability. However, it is not an easy task to specifically determine whether or not the purpose of an industrial action is to oppose lay-offs itself. Lay-offs refer to discharge of employees where the employee is not attributable, and they critically influence the economic and social position of the worker. Therefore, trade unions should be allowed to make certain demands related to lay-offs and engage in industrial actions to attain the ends.

5. Wage Demands for the Period of Industrial Action

Article 44, Paragraph 1 of the TULRAA states that “An employer has no obligation to pay wages to a worker for the period of industrial action during which the worker has not provided labor because of their participation in the industrial action.” Paragraph 2

7) Supreme Court Decision No. 99Do4893 dated April 24, 2001; Supreme Court Decision No. 99Do4779 dated November 27, 2001, etc.

provides that “trade unions shall not engage in an industrial action for the purpose of demanding and obtaining the payment of wages due for a period of industrial action.” Further, Article 90 states that a violation of Article 44 Paragraph 2 is punishable by up to 2 years of imprisonment or a fine of up to 20 million won.

In Korea a trade union is usually formed within a certain company and financially unstable. Thus, because there are no funds provided for strikes, and the social security system is too incomplete to be of any assistance, the employees’ means of subsistence itself would be cut off if they did not receive any wages from the employer during the period of the strikes. In the past, therefore, the employers have paid the employees certain sums of money under various other pretexts.

The above provision was inserted in order to put a stop to this practice. However, although this practice may not be desirable, the question of whether to pay certain wages during the period of the industrial action should be autonomously decided between the employer and workers. Holding an industrial action whose purpose is to attain fulfillment of demands for wages due during the period of an industrial action to be criminally punishable may eventually be criticized as excessive criminal punishment.

6. Dispute of Rights

A controversy arises whether workers may engage in industrial actions in order to win a matter which relates to a dispute of rights. Dispute of rights is not related to the determination of future employment conditions: they refer to the implementation of the rights of the workers obtained through prior collective agreements or employment contracts, or the right of an individual or as a group to seek legal remedies when they are unfairly treated. With respect to the question of a dispute of rights the Supreme Court has held that “the arguments between parties to labor relations regarding employment conditions” include claims related to both individual employment relations and group employment relations, and the assertion of rights under collective agreements or employment agreements (industrial action concerning the right) as well as claims made in order to achieve a new agreement regarding the rights and claims (industrial action concerning interest).⁸⁾ The Supreme Court decision rendered on May

8) Supreme Court Decision No. 90Do357 dated May 15, 1990; Supreme Court Decision No. 90Do602 dated September 28, 1990, Supreme Court Decision No. 90Do2528 dated March 27, 1991, etc.

14, 1991⁹⁾ held that “If the employer refuses to meet the demands to reach a collective agreement or is negligent regarding them without a justifiable reason, workers may not be said to have violated the Trade Union Act just because they engaged in labor dispute without first having sought remedies under Article 40 of the Act.”

However, the current TULRAA defines labor disputes as “controversy of claims concerning the determination of employment conditions,” rendering only disputes of interest related to decisions on employment conditions to be the legitimate objective of labor disputes but seemingly excluding disputes of rights from the range of objectives. General practice follows this interpretation. However, even in general civil relations, voluntary resolution of disputes between the parties is not excluded as a possible method even if legal remedies exist as the final means of dispute resolution. This principle should hold even truer in employer- employee relations where autonomy is regarded as important; settling the issues that may be resolved through a voluntary negotiation should be a legitimate objective of collective bargaining and labor dispute even if they concern determination of rights.

7. Mandatory Bargaining Issues

There is no law in Korea classifying collective bargaining issues as mandatory bargaining issues, discretionary bargaining issues or illegal bargaining issues. The Supreme Court, however, in deciding whether an issue is a proper object for labor dispute mediation, has ruled that issues that create an obligation through collective agreements (full-time trade union staff, provision of facilities for the trade union, trade union activities during work hours, treating trade union activities as business trips, etc.) shall be subject to discretionary bargaining only, and that these disputes are not valid labor disputes for mediation.¹⁰⁾

However, it would be unfair to arbitrarily classify the possible objects of collective bargaining, as above and exclude trade union activities from objects of mediation and arbitration. There is even an opinion by the lower court which differs from a higher Court’s holding,¹¹⁾ but the Supreme Court has not yet ruled on this case.

9) Decision No. 90Nu4006

10) Supreme Court Decision No. 94Nu9177 dated February 23, 1996, etc.

11) Seoul High Court Decision No. 2000Nu13251 dated May 11, 2001.

8. Issues for the Labor-Management Council to Decide, Provided in the Collective Agreement

In a case where a trade union demanded collective bargaining on issues that have been assigned as an issue to be decided by the labor-management council under collective agreement, and had engaged in industrial action to achieve these ends, the Supreme Court ruled that the action was not justifiable.¹²⁾

However, even if the issue is one for the labor-management council, that does not mean that the trade union is deprived of the right to request collective bargaining; hence, the right to industrial action should be interpreted broadly so that if the labor-management council fails in reaching an agreement, the trade union may engage in industrial action. In light of the countless disputes that arise at a worksite with regard to implementing labor-management agreements, industrial actions should be recognized as legitimate in order to actually resolve disputes.

9. Issues Subject to Collective Agreements Valid During Industrial Actions

If the demands made in an industrial action are matters regulated under collective agreements that were valid at the time of the industrial action, it is regarded as an industrial action that (passively) breaches the peace. The Supreme Court denies the justifiability of these actions.¹³⁾

However, this issue should not be uniformly decided on its form, but rather should be decided by specifically analyzing whether there is an objective need to change the contents of the collective agreement, even though it is still valid.

10. Demands that Require Ratification by the General Meeting of the Trade Union prior to Making the Collective Agreements

In order to ensure impartial representation by the representative and to prevent unfair and arbitrary collective agreements by the representative, often when the

12) Supreme Court Decision No. 94Da4042 dated September 30, 1994.

13) Supreme Court Decision No. 90Nu6620 dated January 15, 1991; Decision No. 92No7733 dated September 1, 1992; Decision No. 91Da4317 dated September 22, 1992; Supreme Court Decision No. 94Da4042 dated September 30, 1994, etc.

representatives of the parties to the labor relations have reached an agreement on a collective agreement proposal through collective bargaining, the affirmative majority ratification by the general meeting of the trade union is required before finalizing the collective agreement. With respect to this, the Supreme Court has opined that “even if, as a result of compromise and conciliation between the two parties to the labor relations, they have reached an agreement on wages or other employment conditions, there is a risk that a general meeting of the members of the trade union may refuse to accept the proposed collective agreement thereby rendering the results of collective bargaining useless. Therefore, an employer is justified in demanding an explanation of the representative’s complete right to collective bargaining and refusing to engage in collective bargaining on such a pretext; and industrial action carried out against such measures are not justifiable industrial actions in terms of the purpose of the action.”¹⁴⁾

The above Supreme Court decision is based on a previous Supreme Court decision¹⁵⁾ which ruled that the right to collective bargaining by the representative of the trade union was absolute and that any sort of limitations were invalid. However, we should not deny the effectiveness of the ratification vote by the general meeting of the trade union regarding the collective agreement proposal for the following reasons: to ensure democracy within the trade union; the collective agreement will ultimately regulate the individual members of the trade union directly; and the uniqueness of labor relations in that the employer can be seen as a direct party to the employee’s circumstances rather than simply an opposing party. It is reasonable to compel the trade union representatives to follow the vote of the general meeting of the members before or after the signing of the collective agreement: first, because issues related to collective agreements are a matter for the vote by the general meeting according to the three objectives of the constitutional provision protecting workers’ rights and the TULRAA, that is, independence, democracy, and the special character of trade unions; second, the statute provides for the right and obligation of equal participation of the members in all issues of the trade union; and a smooth relationship between the parties to labor relations promotes the development of the national economy. Therefore, the position that the above Grand Bench decision takes should be overturned.

14) Supreme Court Decision No. 97Do588 dated January 20, 1998; Supreme Court Decision No. 98Do3299 dated May 12, 2000, etc.

15) Supreme Court Decision No. 91Nu12257-Grand Bench Decision

D. Procedure of Industrial Actions

1. Precedence of Actual Negotiations

Industrial actions are supplementary in nature and should be used as the last resort. The definition of labor dispute in the TULRAA provides that it is an instance where the parties are in ‘disagreement’ and “no longer likely to reach an agreement by means of voluntary negotiation even if they continue such an attempt.” The phrase “no longer likely to reach an agreement” should be interpreted as meaning that the labor and management should try their utmost to engage in voluntary negotiations. The parties should be deemed no longer likely to reach an agreement when bargaining does not take place despite the efforts of one party, due to the non-cooperation of the other party. Whether an actual bargaining has occurred should not be measured mechanically by the number of times negotiations taken place. Should one party block any possibility of compromise, continuous negotiations would only be a waste of time and effort.

2. Adjustment Precedent to Industrial Actions

Article 45 of the TULRAA states that an industrial action shall not be taken without exhausting the adjustment procedures (the period of mediation stipulated in Article 54, Paragraph 1 of the TULRAA is 10 days for general businesses and 15 days for public services), and Article 91, Subparagraph 1 provides for criminal prosecution of violations (up to 1 year of imprisonment or a fine of up to 10 million won). Article 24, Paragraph 2 of the TULRAA Enforcement Decree further provides that when the Labor Relations Commission has received an application for adjustment and deems the substance of the application not appropriate for mediation or arbitration, it shall inform the parties of the grounds for the inappropriateness and other means of resolution. On this basis, the Labor Relations Commission has frequently denied initiating adjustment procedures and returned the adjustment application or issued an administrative guidance requiring them to continue with further actual negotiations, stating that an item in the application had not been filled or that the parties were not in disagreement. Thus, the obligation of adjustment precedent to industrial action has been used to limit the strike right.

The old Labor Dispute Adjustment Act provides for the report of labor disputes and

a cooling off period. The Supreme Court has held that industrial actions that violate these provisions should not be all regarded as lacking in justifiability, but should determine the justifiability depending on whether an objective circumstance has made it impossible to follow procedures. The Supreme Court also held that justifiability of an industrial action may not be recognized when such procedural violations have generated unfair results such as unforeseen confusion or loss to the stability of people's lives or employers' business operations.¹⁶⁾

On the other hand, with respect to the system of obligatory adjustment under the current TULRAA, in a case where the trade union has engaged in industrial action after the mediation period has passed in spite of the fact that the Labor Relations Commission has refused to further process the mediation procedures and has issued an administrative guidance mandating further actual negotiations, the Supreme Court has ruled that "if the trade union has applied to the Labor Relations Commission for mediation, the trade union may engage in industrial action after the mediation period has passed even though mediation procedures have not ended or mediation has not terminated. It is not necessary for the Labor Relations Commission to make a mediation determination before an industrial action to make the action justifiable."¹⁷⁾ This decision is recognition of the justifiability of an industrial action which takes place after an administrative guidance recommending voluntary negotiations, thereby putting a stop to the abuse of administrative guidance by the Labor Relations Commission.

With respect to the justifiability of industrial actions that have not been preceded at all by mediation procedures, they are not always unjustifiable just because the industrial actions have not followed the procedures in the statutory provision, since the purpose of the mediation precedence provision is to provide an opportunity for mediating a dispute and through it prevent the occurrence of industrial actions. It is not to prohibit industrial actions themselves. Instead, we should examine the specific circumstances and determine whether the violation will bring unexpected confusion or loss to socioeconomic order or the business operations of the employer, or other unfair results, and determine criminal culpability according to the determination of justifiability.¹⁸⁾

16) Supreme Court Decision No. 92Nu1094 dated September 22, 1992, etc.

17) Supreme Court Decision No. 2000Do2871 dated June 26, 2001.

18) Supreme Court Decision No. 99Do4812 dated October 13, 2000; Decision No 99Do4779 dated November 27, 2001, etc.

However, it is not easy to determine whether the action has brought about an unfair result. For example, in the case of the Munmak Branch of the Mando Machinery Trade Union, the district court ruled that the action did not generate unfair results and thus recognized its procedural justifiability,¹⁹⁾ but the Supreme Court ²⁰⁾ reasoned that at that time the company was producing the largest amount of important automobile parts in the country and that seven branches of the trade union had gone on strike simultaneously under the directive of the headquarters of the trade union (the defendants in this case were officers belonging to one of the 7 branches, the Munmak branch) and that the trade union went on strike six times from January 15, 1998, to April 28, 1998, without first notifying the company. The Supreme Court stated that in consideration of the factors such as the size of the company and the nature of the business, developments of the strike, the length of the strike, the number of times the strikes occurred and their predictability, the industrial action was judged to have given rise to unexpected confusion and loss to the socioeconomic stability and the business operations of the company. Thus, contrary to the decision in the lower court, the Supreme Court ruled that each of the industrial actions above were not procedurally justifiable.

A trade union that is not a legal entity may not go through the precedent mediation procedures, but their industrial actions should not all be dismissed immediately as unjustifiable. They should be examined in the entirety of the process and considered and judged with respect to their purpose and methods and whether these give rise to unexpected confusion or loss.

Meanwhile, new circumstances that arise during the industrial action do not give rise to separate procedural obligations.²¹⁾

3. Simple Majority Affirmative Vote by the Union Members under a Direct, Secret or Unsigned Ballot

Industrial action of a trade union, under Article 41, Paragraph 1 of the TULRAA, must be based upon a majority vote of the union members by a direct, secret, and

19) Chunchon District Court Decision No. 98No1147 dated October 7, 1999.

20) Decision No. 99Do4779 dated November 27, 2001.

21) Supreme Court Decision No. 92Do859 dated November 10, 1992.

unsigned ballot. Article 91, Subparagraph 1 provides that any violation of the above provision shall be criminally punishable (up to 1 year of imprisonment or a fine of up to 10 million won).

Such procedural limitation on industrial actions encourages members of the trade union to engage in such action through democratic decision making, thereby preventing those actions headed by only a few of the members. Especially, the limitation is especially interpreted as a policy incentive to strongly encourage the democratic operation and independent decision-making of trade unions, in light of the short history of trade unions in Korea. The necessity of this policy, however, is being questioned. The reason is that when the executive body of the trade union submits the issue of engaging in an industrial action to a vote, it is usually approved by an overwhelming majority, and hence it is realistically very difficult to curb the abuse of industrial action.

The Supreme Court, in the year 2000, rendered two conflicting decisions with respect to the justifiability of industrial actions and brought about a great controversy.²²⁾ The Supreme Court has since then clarified its position through a unanimous decision²³⁾; to quote from the relevant portion of the decision, “In engaging in industrial action, Article 41, Paragraph 1 of the TULRAA provides that the union members must go through the process of direct, secret or unsigned ballot to achieve an independent and democratic operation of a trade union and to further encourage union members to be cautious in deciding to start an industrial action, lest some disadvantage fall on the workers ex post with respect to the justifiability of the industrial action. Therefore, industrial actions that violate the above procedure shall not be justifiable unless objective circumstances that make it impossible to follow the procedures are recognized. If we interpret the provision differently to mean that industrial actions may not lose their justifiability even when the members did not vote according to Article 41, Paragraph 1 of the TULRAA prior to initiating an industrial action and that there is merely a flaw in the internal decision making process of the trade unions and that the trade union members have actually been involved in democratic decision making, then voting by proxy, public vote or ex post vote, assuming de facto affirmative vote, and

22) Supreme Court Decision No. 99Do4838 dated March 10, 2000; Supreme Court Decision No. 99Do4836 dated May 26, 2000.

23) Decision No. 99Do4837 dated October 25, 2001.

other similar methods would also be tolerated. Such a view directly contradicts the spirit of the related provision and the Supreme Court case law. The Supreme Court Decision No. 99Do4836 dated May 26, 2000 is thereby overturned with respect to the part of the opinion which states that an industrial action doesn't lose its justifiability just because it was not preceded by the above voting procedures as long as democratic decision-making by the union members have been actually ensured even if the industrial action took place without the simple majority affirmative vote by a direct, secret or unsigned ballot in violation of Article 41 Paragraph 1 of the TULRAA.”

The minority view on the majority opinion of the above Grand Bench decision regards the rationale on justifiability of industrial actions as generally reasonable with respect to civil actions or administrative proceedings suing for damages or penal liability; however, the opinion states that with respect to criminal liability of the workers for interfering with business operations, the court does not have to strictly follow the above rationale. Some opponents of the above view say that, depending on the specific issues at the time, a simple strike action by members who merely participated in it may not be in violation of the law despite the fact that there was no vote.

4. Prohibition or Suspension of Industrial Actions upon Decision to Submit to Arbitration and Emergency Adjustment

Article 63 of the TULRAA provides that a trade union shall not engage in industrial action for 15 days from the date when the labor disputes have been referred to for arbitration. In the event of a violation the participants are subject to criminal prosecution.²⁴⁾ Article 77 of the TULRAA states that when an emergency adjustment decision has been publicly announced, the parties shall immediately cease the industrial action and shall not resume industrial action until 30 days have passed from the date of the public announcement. In the event of a violation, the party will be subject to criminal prosecution.²⁵⁾

In the case of essential public interest companies, the Labor Relations Commission may force arbitration. Depending on how the mandatory arbitration system is operated, the workers may be effectively deprived of their right to industrial action. This aspect

24) Article 91, Subparagraph 1: up to one year of imprisonment or a fine of up to 10 million won.

25) Article 90 of the TULRAA: up to 2 years of imprisonment or a fine of up to 20 million won.

has brought a strong argument that this is unconstitutional. The Seoul Administrative Court has agreed to file a petition for a ruling on the constitutionality of such mandatory prior arbitration and has forwarded the case to the Constitutional Court.²⁶⁾

Due to the particular nature of the arbitration system and the emergency adjustment system, industrial actions that arise during the prohibited or suspended period are practically interpreted and treated to be unjustifiable.

E. Methods and Means

1. Strikes

A strike is a form of industrial action in which the workers collectively refuse to work under the supervision of the trade union or other workers' group. A strike, where the members of the trade union do not show up for work, is the principal form of strikes. But, in Korea sit-ins, where the workers take over the workplace, have been widely practiced in order to prevent the employers from dissolving the strike and withdrawing from the trade union.

2. Occupying Workplace

Occupying workplace has been widely practiced incidental to strikes because in Korea the trade unions are organized by firm and that employers are extreme in their attempts to dissolve strikes, and that each workplace unit takes on an important meaning as the base for trade union activities.

With respect to the justifiability of occupying workplace, there are various theories, including complete denial theory, complete acceptance theory, recognition of partial and coexistent possession theory (which is the denial of complete exclusive possession theory), recognition of preventing substitute workers theory. The Supreme Court recognizes the justifiability only when the occupying workplace is partial and coexistent and doesn't interfere with operations and prevent the employer's possession of the workplace.

However, it is forbidden to possess the following facilities under Article 42,

26) Seoul Administrative Court Decision No. 2001ku23542 dated November 16, 2001.

Paragraph 1 of the TULRAA and Article 21 of its Enforcement Decree: taking possession of facilities related to production or other major work; other like facilities such as electric, electronic computing, communications facilities; carriages on the railway or tracks; ships under construction, repair or anchored at harbor; aircraft, navigation safety facilities; or facilities for landing or taking off of aircraft or for transport of passengers and cargo; materials posing the risk of explosion such as gunpowder and explosives, or other facilities designated by the Minister of Labor in consultation with the head of the related central administrative agency to be likely to suspend or abolish production and other major activities or to cause material damage and harm to the public interest.

3. Picketing

Picketing is a supplementary means of industrial action that seeks participation and cooperation by the public and seeks to deter hiring substitutes or destruction of strikes by employers. There are various types of picketing. One is literally holding up pickets and using peaceful persuasion and appealing to a sense of justice. Another form is to use force to remove possible destroyers of the strike such as non-participants of the strike, substitute workers, or a company-rescue- team.

There are opposing views on the justifiability of picketing. One is that only peaceful means of persuasion should be permitted. Another view holds that use of force to an extent should be permitted. The other view is that use of force should be permitted for the purpose of deterring employers from hiring substitute workers.

The Supreme Court Decision No. 91Da43800 dated July 14, 1991, held that “strikes during industrial actions may be accompanied by the so-called picketing as a supplementary means or by sit-ins and is in itself not a violation of the law. It is the principle that picketing should be justified only where the picketers peaceably try to persuade, either orally or by written means, individuals who choose to continue to work and not participate in the strikes. Forceful deterrence or physical coercion by violence, threat, or power may not be justifiable. Occupying worksite may be justifiable when it is partial and coexistent without completely eliminating the possession of employers and the operations of the business. If the actions go beyond this and the picketers occupy the operations facilities of the employer fully and exclusively for a long-term period, it will be regarded as an infringement on the

employer's right to manage the facilities and, therefore, unjustifiable.”

Article 38, Paragraph 1 of the TULRAA states that “an industrial action shall not be conducted in ways such that they interfere with entry to the premises, work and other normal operations of individuals who are not related with the industrial action or choose to work. Also, violence or threat may not be used to appeal or persuade others to participate in the industrial action.” Thus, the issue has been resolved by legislation. But, an excessively strict interpretation may render the right to strike useless. Therefore, justifiability of such actions should be decided carefully in light of the totality of the circumstances.

4. Sabotage

Sabotage is an industrial action that consists of following the orders of the employer but refusing to carry out part of the orders and providing incomplete labor, thus decreasing the level of work efficiency. While strikes are a complete refusal to work, sabotage is an industrial action that impedes the normal operations of business by providing incomplete labor. It enables the workers to alleviate the disadvantage coming from the reduction of wages that follow strikes and yet to still interfere with the business. Therefore it is often used to put up a show of strong unity before actually engaging in industrial actions such as strikes or to speed up progress in collective bargaining.

If one engages in sabotage without notifying the employer, the employer may not know of the industrial action and therefore will lose the opportunity to seek appropriate countermeasures, incurring unpredictable loss. Thus, notification may be an important consideration in judging the justifiability of sabotage.

Meanwhile, unlike the traditional form of sabotage, the type of sabotage where the members destroy, hide, or arbitrarily dispose of materials, machinery and products, is generally considered unjustifiable as an industrial action because it gives rise to excessive intervention into management and loss and damage to production facilities.

5. Protection of Security and Safety Protective Facilities

Article 38, Paragraph 2 of the TULRAA provides that “work to prevent operation equipment from being lost or damaged, or to prevent impairment or deterioration of

materials and products shall be conducted in normal manner even during the period of industrial action.”

Article 42, Paragraph 2 provides that “Industrial action may not be conducted to suspend, discontinue, or interfere with the normal maintenance and operations of the safety protection facilities of a workplace.” Administrative agencies can make a stop order of such industrial action with the approval of the Labor Relations Commission. The safety protective facilities in the above provision must be interpreted narrowly, as limited to facilities that protect the safety of life and body. It should not be interpreted to include facilities that are meant to protect physical facilities. Industrial actions that contradict the limitation of this provision lose their justifiability. However, unless the industrial action was planned and carried out in an organized manner with the overall safety protection facilities as the objective, the justifiability of the industrial action will be lost with respect to the part whose objective was the safety protection facilities, but the industrial action in its entirety should not lose its justifiability.

In May 2001, the governor of Chollanam-do issued a stop order of an industrial action, reasoning that the power part of Yecheon NCC Corporation belongs in the category of safety protection facilities. Suwon District Court, on October 27, 2001, issued a preliminary injunction prohibiting industrial action with respect to a trade union, reasoning that the electric, steam, industrial water and machinery provision facilities of Banwol and Gumi Heat Power Plants in Korea Industrial Complex Corp. belong in the category of safety protective facilities.²⁷⁾

6. Prohibition of 3rd Party Support Activities

Article 40 of the TULRAA provides: “(1) a trade union and an employer may be supported by the persons in the following subparagraphs with respect to collective bargaining and industrial action: 1. the industrial federation or the national confederation of which the trade union is a member; 2. an employers’ association of which the employer is a member, 3. a person the trade union or employer has notified the administrative authorities in order to obtain the person’s support, or 4. other such person who is justifiably entitled to provide support under other relevant laws and regulations. (2) Any person other than those listed in each subparagraph of paragraph 1

27) Suwon District Court Decision No. 2001Kahap2752 dated October 27, 2001.

shall not interfere in, manipulate, or instigate collective bargaining or industrial action.”

Article 13-2 of the old Industrial Dispute Adjustment Act states under the title of “prohibition of 3rd party intervention,” that “any person other than the parties who have direct employment relationships, the trade union, employer, or other justifiably entitled persons may not engage in actions such as manipulating, instigating or interfering with the industrial action with the purpose of influencing the action. Provided, actions of the national confederation or the industrial federation the trade union belongs to shall not be deemed as 3rd party intervention.” There has been much criticism with respect to the 3rd party intervention prohibition provision above, from both domestic and foreign sources. Thus, it was inevitable that the provision would be deleted.

However, the new provision under current law prohibits persons other than persons from whom the trade union or employer may receive support with respect to collective bargaining and industrial actions from intervening, manipulating and instigating the collective bargaining or industrial action. Thus, the actions prohibited by the new provision are in effect more or less the same as in the old law. Although the new provision is one step advanced in that it adds to the range of persons excluded from prohibition: the employer’s groups which the employer belongs to and persons whom the trade union or the employer notified to the administrative agency. These additions are still not enough to completely remedy the negative effects of the old law. The best solution is to completely abolish the provision.

IV. Conclusion

In Korea, if an industrial action is judged to be unjustifiable, the officers of the trade union will be arrested for interfering with business operations under criminal law and shall be punished criminally, even if the means and methods are not at all unlawful and the industrial action is in the form of a simple strike where the members collectively refuse to provide labor. In addition to the already restricted circumstances, the Supreme Court has applied an excessively strict interpretation in judging the justifiability of industrial actions, making it more difficult for trade unions to engage in justifiable industrial actions. Therefore, a person who is elected an officer of a trade union and seeks to actively take part in fighting for the rights of the members of the union should

assume the risk of arrest or even criminal punishment while he or she is in office.

The current trend of neoliberalism deepens unequal distribution of wealth and decreases the quality of life of the workers. Especially, many Korean firms have been forced to go through restructuring since Korea received financial assistance from the International Monetary Fund. In the process, the neoliberalist policy has been indiscriminately applied in Korea. As a result, many workers were laid off and lost their means of living, and more than half of the total number of workers became non-regular workers who were subjected to discrimination and employment instability. Even in such circumstances workers could not exercise their right to strike, their only weapon, because of the Supreme Court's strict opinion on justifiability. Conversely, they were subjected to criminal punishment.

Jurisprudence on industrial action is not static, but dynamic and ever progressing. In 2001, a number of Supreme Court opinions have been declared regarding the justifiability of industrial actions. The high number may seem to reflect the circumstances that arose after the financial crisis, but problems still exist both jurisprudentially and realistically. In the future, changes should be made so that the right of industrial actions of the workers becomes in fact recognizable as the exercise of the constitutionally protected basic rights, not merely in theory.