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ON THE LEGAL NATURE OF THE
RIGHT TO ANNUAL VACATION WITH PAY

By KEN-ICHI TADENUMA

Professor of Labor Law

I

1. It cannot be said that the vacation system for laborers did not exist at all in our
country before the war. In fact, there were found so called “granted holidays in recognition
of employees’ services” in civil circles, and “granted furlough” in governmental offices. But
as shown in the terms themselves, they were not more than those granted by employers as
favors, though in some cases they were given to employees almost periodically. They were
not of the nature that the employee had the right to vacation. In our country, the system of
annual vacation with pay based on the fundamental concept of the employee’s right was born
for the first time in the establishment of Labor Standards Act after the Second World War.

At the creation of this system, an international level was taken into consideration. To
the continued employees over one year, the lowest 6 day annual vacation should be given,
and to the employees served more than that period, an annual vacation increasing in days in
compliance with the number of years in continued services should also be granted. The term
“with pay” in the case of an annual vacation with pay means that regular wages should be
paid for the vacation period. These above two points are common to the annual vacation
with pay system of Labor Standards Act (Art. 39) and to the ILO Convention No. 52 (“Con-
vention on the annual vacation with pay”, 1936). The present Labor Standards Act stipulates
that an annual vacation with pay for the lowest 6 days shall be given to the employees on
the condition that they served more than 80 per cent of the attending days in the previous
year, and since then, for every one year, the vacation will additionally be increased one day
more each on the same condition, setting the maximum of 20 day annual vacation. Further,
under the Act, for every day in the vacation period, average wages or daily amount of
standard remuneration (provided for in the Health Insurance Act), instead of the regular
wages, may be paid on a certain condition.

2. However, this system has not been utilized and operated just according to the primary
principles. The annual vacation with pay has mostly been utilized as an expedient of count-
ing absent days as present ones. Under the circumstances where the attending days distinctly
or delicately affect on bonus or allowance, even in the case of salaried men whose salaries
are not deducted on their absent days, such utilizing ways are also adopted. Especially in
the case of laborers whose wages are deducted on their absent days, these expedients have
been used very often. On this account, the vacation has been taken by piecemeal. In the
establishment of the annual vacation system in addition to the weekly holiday system, it
should be understood that the former system demands to guarantee to employees the con-
secutive releasing from duty for some days. To take vacation piecemeal, counting absent
days as present days, is in fact no more than a variety of holiday. Therefore, the ILO Convention No. 52 stipulates that the minimum 6 day vacation must be given consecutively, and divided or separate granting is only admitted for the vacation days over 6 days. In the legislative examples, similar cases are also seen. In the case of our country, at the time of establishment of the Labor Standards Act, laborers themselves demanded the divided vacation. As the result, not only the consecutive granting, but also the divided granting of an annual vacation with pay has been admitted, which has clearly been stated in the law (but a divided granting less than a day is not allowed). This demand on the part of labor means that even if they got leisure time only, they could do nothing without money, that is to say, unless there are some inexpensive facilities which laborers can use for their recreation in any vacation days, they cannot do anything.

But there were some special legislative and factual circumstances under which employees could not take a vacation continuously. They were that not a few enterprises had not secured necessary number of employees presupposing the performance of the newly enacted annual vacation system. The new system demands the granting of annual vacation from the minimum 6 days to the maximum 20 days, if the employees worked over 80 per cent of attending days in the previous year. The condition of attending days over 80 per cent means that the employees who served ordinarily are mostly entitled to get a vacation. If the employers grant only as they liked to a few employees, who have served industriously not taking any vacation for long years, the granted holidays in recognition of their services, no hindrance will occur in the normal operation of business. But in order not to cause a stop or hindrance to the normal operation of business by giving each of many employees who is serving ordinarily a vacation every year, some program for the annual vacation must be established in advance. And if the normal operation of business is always to be secured, even if many employees take vacation alternately, necessary number of employees will have to be secured taking the matter into consideration. After all, the annual vacation system demands that the necessary number of employees should always be employed, considering the granting of vacation to many employees as an eternal condition of the operation of business. But the securing of such necessary personnel has not been taken into due consideration by management. Thus, when an employee is to take a vacation consecutively, he troubles himself about that an awkward effect will be inflicted on the work of their fellow employees, causing as a result some difficulty of taking vacation. Of course, even if such necessary personnel has been secured, so long as the above-mentioned condition of taking divided vacation exists on the side of labor, piecemeal vacations will not disappear. But the greatest reason why annual vacation has not been taken undividedly according to the original principle is that the necessary personnel has not been secured.

The present law provides that the vacation shall be given in the quarter when employees demand it without giving hindrance to the normal operation of enterprise, and that in case a hindrance arises by giving it in the demanded quarter, the vacation may be given in the other quarter (Art. 39, Par. 3). Now the meaning of the "quarter" mentioned here contains some questions as shown later. Up to now, under the circumstances where neither the program of the annual vacation with pay is stipulated, nor the securing of the necessary personnel is possible, a demand for a vacation of one day or two is frequently made, designating an actual date of its commencement. In such a case, unless the employee's request be made far in advance, it will very often meet with the employer's plea of other quarter than the
requested, on the ground that the granting of the vacation in the requested period will no doubt prevent the normal operation of the enterprise. But even in case such a request of annual vacation is made far beforehand, and the person who is going to do work instead of the person requesting a vacation is arranged, enabling the latter to take a vacation for recreation by the employer, it is almost impossible for him to tell his fellow employee who is to work instead of him that he is going out for recreation, because in present Japan the practice of taking annual vacation for recreation by turns has not yet established among employees in each enterprise. Then, vacation can not practically be taken except only in case when the fellow employee does not complain of the undesirable effects inflicted on him, for example when a marriage ceremony of the requesting person himself or his near relative is to be held. And now, as regards the marriage and funeral of an employee or his near relative, there are many enterprises where the system of holidays with pay for congratulations and condolences for a certain period is established. In such enterprises, therefore, annual vacation is utilized substitutionally, in the case of person who has to go to some remote places where one cannot go and come back within the period prescribed, in the event of congratulations or condolences.

Thus, a year will very often pass away before all the days of annual vacation with pay can be taken by the employee entitled to it. As the result, a problem of a “carried forward” vacation occurs. Furthermore, as almost all employees have left some vacation days, the means called the “tactic of asking for vacation in concert” as a kind of the “law abiding tactics” in the wider sense, have been resorted to by employees under the occurrence of a labor dispute.

In the presence of such annual vacation with pay system, some problems have been raised on the interpretation of the Labor Standards Act, Art. 39. The center of the problems is; what contents, which are in conformity with the original principle of this system and which are more advanced than the fact mentioned above as well, should be and could be given to the present Act, Art. 39? The present Act, Art. 39 and its annexed rules never touch on the annual establishment of the plan of annual vacation with pay, and as stated above, they even admitted unlimited divided granting of annual vacation. Yet, isn’t it possible to interpret and compose the contents according to the original principle of the vacation system distinguished from the holiday system? At least, the utmost effort in these directions must be made. Even though such interpretation and composition are possible, if they are too far from the backward actual facts, the power to bring the facts near to law cannot practically be expected. On the contrary, the interpretation which is completely based on and approves wholly the backward actuality will hinder the real implanting of the annual vacation with pay system in our country. In the following I will consider these problems, answering and counter-criticizing the criticisms on my opinion which may be called “right of designation of the quarter” theory (expressing in German, Vierteljahresrechtstheorie), opposed to the “right of claim” theory (Anspruchrechtstheorie) and the “right of forming” theory (Gestaltungsrechtstheorie), and at the same time touching the attitude of the court.
The Labor Standards Act, Art. 39 stipulates in its Par. 1, 2 (and 5) on what conditions "the employer shall grant" his employees an annual vacation with pay, and in Par. 3, that "the employer shall grant vacation with pay provided for in the preceding two paragraphs in the quarter for which the worker makes requisition, provided that, when it prevents the normal operation of the enterprise to give the vacation in the required quarter, the vacation may be given in another quarter".

1. The problem first taken up was the legal nature of "requisition" in Par. 3. At first, the right of an annual vacation with pay was said to be the right of claim (Auspruchsrecht) by which the release from the duty of work could be got after the consent of the employer. In regard to this, Mr. Keiya asserted that the employer was obliged to consent to it, unless there existed the reason prescribed in the proviso of Par. 3. Later, Prof. Goto advocated against Mr. Keiya that this vacation right was no more than the right of forming (Gestaltungsrecht), like the right of the leaseholder to require the land-lessor to purchase the building on the leased land in the Leased Land Act and the right of the tenant to require the house-lessor to purchase the furnishings attached by him to the rented house in the House Lease Act. It has been without controversy recognized that these rights of the lease-holder and the land-lessor are both the rights of forming. Afterward, a standpoint taking a side with the latter theory and also a court judgement appeared, but there were some supporters of the former theory in these oppositions.¹

I insisted on the "right of designation of the quarter (Vierteljahresernennungsrecht)" theory against the "right of claim" theory and the "right of forming" theory,² the main point of which was as follows.

(1) The employer's duty to grant vacation to his employee actually arises every year under the conditions mentioned in Art. 39, Par. 1, 2 (and 5). In the case of neglecting the duty, the employer cannot be exempted from the application of the penal regulations (Art. 119, Item 1). Notwithstanding whether the requisition of the employee is regarded as the exercise of the right of claim or it is regarded as the exercise of the right of forming, it is improper to consider that the employer does not receive the application of the penal regulations when they failed to give the vacation on the ground that no requisition was made for it. The word "requisition" is not connected with the fulfillment or non-fulfillment of the duty to give a vacation, but with the word "quarter" only. This point may be clearly understood if it is compared with the provisions of Art. 7, 65 and 67 which have the terms denoting that without employee's requisition the employer has no duty of giving. Art. 7 provides, "the employer shall not refuse when the worker requires necessary time to exercise franchise and other civil right..." Art. 65 and 67 prescribe, "the employer shall not set in


work a woman... *when she requests...*”.

(2) Attention should especially be paid to the word “quarter”. It is not the synonym of “season”, but means that it has almost the same length of period as a season, namely about three months’ period. Accordingly, even when the employee makes “requisition” mentioned in Par. 3, the beginning and ending times of an annual vacation is not yet finally decided. When the employee makes “requisition”, it defines only the period of about three months in which 6 to 20 days holidays prescribed in Art. 39 could be allotted with some (or nearly high) degree of flexibility. And when the designation or appointment of such a “quarter” was made, the employer can, if the employee does not define the beginning and ending times of the annual vacation, and if he does not specifically reserve the right to make later the designation thereto, define the beginning and ending times of the annual vacation of the employees at any dates within the quarter designated by him.

However, in appointing a “quarter”, Art. 39 does not prohibit the employees from appointing specifically the beginning and ending times simultaneously with or later than the designation of the quarter. Again it does not prohibit them from appointing from the first a certain vacation “period”, defining a specific beginning and ending times, without regard to the word “quarter”. Nor does it prohibit from appointing the vacation quarter so that the vacation can be separately given among more than two quarters. But if employees, as at present, separately and suddenly require as annual vacation, *e.g.* a period of a few days from the following day, appointing specifically the dates of beginning and ending, such a requisition receives from employers the plea that it would disturb a normal operation of the enterprise.

Accordingly it is not proper for the Act to consider such a “requisition” as fundamental.

(3) The forms in which the dates of the beginning and ending are actually determined through the employee’s “requisition” are, in connection with the “quarter” mentioned in (2) above, of various kinds under the present Act, and are not limited to one kind only. To the contrary, the “right of claim” theory and the “right of forming” theory assert that the dates of the beginning and ending of a vacation are determined directly by, and in accordance with, the employee’s “requisition” (and the employer’s consent, according to the “right of claim” theory). But we cannot sustain such an explanation.

We do not contend that such a requisition is not at all approved under the present law, but we consider that the fundamental way of the “requisition” is a “requisition” for a vacation “quarter” where only the period of about three months is appointed by the employee’s “requisition”. We could only say that the “requisition” specifying the dates of beginning and ending asserted by the “right of claim” theory and the “right of forming” theory can be accepted, in a negative way, in view of the fact that the intent of Par. 3 lies in giving vacation to employees at the time or times most likely to satisfy their wishes, because the Par. 1 admits the division of vacation to employees. When an employee makes his “requisition” for annual vacation, specifying a certain “quarter” — according to the wording of Par. 3 — and neither appointing any dates of beginning and ending, nor reserving the appointment of these dates to a later day, the employer can appoint the period or periods of vacation in the required quarter, assuming that the employee is indifferent to the dates of beginning and ending, and must notify this appointment to the employee, so that he may not attend to work unawares during the period or periods of vacation thus determined. Again, it is also admitted under the present law that the period or periods of each employee's
vacation is specifically determined through the method of employer's simultaneous inquiry about the designation of the vacation period, which is expressed, though imperfectly, in the Art. 25 of the old Enforcement Regulations, or through the method of combining it with the system under which the inquiry into the qualification of employees for annual vacation is made annually at the fixed date. The system of determining the dates of beginning and ending through such method somewhat resembles the system of appointing and granting of an annual vacation in accordance with the plan for an annual vacation with pay, which can be seen in the legislations of foreign countries, and seems to be more desirable. Further, the appointing and granting of annual vacation with pay based on the established plan for it, through the above-mentioned simultaneous inquiry about the designation and the adjustment of the vacation periods based on it, or through a collective agreement between the employer and employees are not stipulated in the present provisions of Art. 39, but to resort such methods is undoubtedly far from conflicting with Art. 39. Finally, though it is impossible for the employer to unilaterally determine the period of annual vacation, it is permissible to determine the period of vacation in such a way as to suggest on the part of the employer that the vacation should be taken on certain days and to consent to it on the part of the employee. Therefore, when we consider the fact that there are various methods of specifically determining the dates of beginning and ending through the employee's "requisition", we cannot but conclude that the dispute about whether the "requisition", under Par. 3 should be interpreted as an exercising of the right of forming (Gestaltungsrecht) or it should be understood as an offer which, though requires employer's acceptance, the employer should accept under a certain condition, is influenced by the conventional thinking in the civil law which is suggested by the word "requisition", and does not catch the true meaning of the annual vacation system. Accordingly, it is more proper that the word "requisition" here should be substituted by the word "designation" or "appointment". As regards the case which both the "right of forming" theory and the "right of claim" theory assume as the method of "requisition", i.e., the case in which employees make "requisition" separately and suddenly a vacation for some days, appointing specifically the dates of beginning and ending, there would practically be little difference between the two theories.

2. My theory mentioned above has recently been criticised by Prof. Ariizumi and Prof. Yasuya. They basically supported but partially criticised my criticism of the "right of claim" theory and the "right of forming" theory. My answer to or criticism of their criticism is as follows:

(1) Prof. Ariizumi says, "there is some doubt in assuming that the word "quarter" has so wide a meaning (as interpreted by Tadenuma). First, the word 'quarter' does not exactly correspond with the word 'season'. If it did, Art. 39 would use the word 'season'. It would be proper to understand that the word means a 'period' which does not exclude seasons. Secondly, our Labor Standards Act stipulates no restrictions on dividing annual vacation with pay.... Under such a system, it is meaningless to discuss the problem of the season." Further, Prof. Yasuya says, "Even if we interpret the word 'quarter' as meaning season, it lacks the consistency of theory that, if an employee desires, he may appoint specifically the dates of beginning and ending and, as the dividing-and-giving of annual vacation is admitted, it can not necessarily be interpreted as season." But, in Commentary on

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Labor Standards Act edited by Prof. Azuma, I never used the word "quarter" in the same meaning as "season". I wrote, "the word 'quarter' means almost the same period of time as 'season', i.e., a period extending over about three months" (Op. cit., p. 482).

(2) Secondly, I cannot agree with the view that, under the present act, where unlimited dividing and granting is admitted, "it is meaningless to discuss the question of the season", or it is needless to interpret the word "quarter" as "season". Indeed, it is "almost meaningless" to think that, under the present law, the only admitted method is, as regards the requisition for a "quarter" (in my opinion, designation or appointment of a "quarter"), to appoint a season or a period of about three months, and that the other methods can not be admitted. But I do not think so. On the contrary, I think that, though there are various forms in the "requisition" mentioned in Par. 3, the fundamental method is that of appointing as annual vacation period a season or a period of about three months, and emphasize its importance. And I do not think it "almost meaningless" to discuss this point. The reasons for this are as follows:

(a) The present law has provisions concerning giving annual vacation "consecutive" as well as "dividedly" or "separately". Both of these two methods are legal, but the uninterrupted vacation is undoubtedly better suited to the spirit of the annual vacation system, and therefore should be considered as fundamental. And it is because the consecutive vacation must be considered as fundamental that the word "quarter", and not the word "time" or "period", is used. It is, indeed, admitted by the present law to require and to give annual vacation piecemeal by specifically appointing actual beginning and ending times, but such requisition and giving are not of primary importance, and I think such are only unprohibited, as unlimited dividing-and-giving is not prohibited. Is it sure that my such view "lacks the consistency of theory"?

(b) As mentioned above, there are at present circumstances which prevent employees from taking an uninterrupted vacation. And if annual vacation is not used otherwise than to perform wedding or especially funeral service or to increase "congratulations and condolences holidays", it is practically impossible to make "requisition" for annual vacation fairly long before, much less to appoint in advance a quarter, i.e., a period of about three months. Even if this is real, it admits of no doubt that this is inconsistent with the spirit of annual vacation system. And yet it may not be practically impossible to change the present actual state and to bring about the state consistent to the intent of the present Act. If this must be considered pessimistically as impossible, the appointment of "a quarter" or "quarters" (i.e. a period of about three months or more than two such periods) may be "almost meaningless". But isn't this pessimism an interpretation of the law which adheres too closely to the existing state? Of course, we can not expect to bring about really at once an ideal annual vacation system because such an appointment could be made. But I think that, in order to put our present vacation system on the right track, it is necessary to make both employers and employees thoroughly understand the propriety of appointing a vacation quarter mentioned above, by emphasizing that employers are requested to secure sufficient number of employees so that normally working employees, recognizing that they are all able to take annual vacation every year, may enjoy it without interrupting the normal operation of enterprise or without feeling afraid of giving trouble to fellow employees. If employee's requisition for annual vacation is made suddenly (with notice of two or three days at the longest), specifying the dates of the beginning and ending, it would be lawfully rejected by the employer's "plea of
changing the designated quarter” at any time, whenever the employer’s business shows activity, as is usually the case. Though the present law admit to give vacation piecemeal, it could not be said that the law considers such a practice as proper. Further, as holidays for the purpose of attending wedding ceremony and especially funeral ceremony, as stated above, can not be previously appointed, it is desirable that these holidays should be taken as “congratulations and condolences” holidays. Thus, annual vacation should, suitably for the purpose of this system, be used as recreation holidays, the period of which can be previously determined. Such a use of annual vacation would make the “requisition” for “quarters” possible and proper.

3. Prof. Ariizumi asserts that the right of the annual vacation is a claim in specie which arises when the prerequisites under Par. 1 and 2 of Art. 39 are fulfilled and which exempt employees from labor for a definite number of days in the following year. I am very doubtful of the propriety of applying a “claim in specie (Gattungsschuld)”, which is one of the claims concerning the delivery of chose, to the annual vacation, which means the temporary suspension of the duty to give services of employment. Further, Prof. Arizumi understands that Par. 3 of Art. 39 is an exception to the provisions of the civil code (Art. 401, Par. 2) concerning the individualization (Individualisierung) of the claim in specie, and, based on the theory of civil law that the object of “claim in specie limited (begrenzte Gattungsschuld)” decreases gradually, and when there remain no room for optional appointment, the object of claim becomes specifically confined to the remaining, asserts that, if no requisition is made by employees and the number of remaining days of the year becomes equal to the number of holidays the employee can take, the employer must give holidays during the remaining period. Accordingly, he arrives at the conclusion that if the employer does not give annual vacation on the ground that there is no requisition from employees and the year passes away, the employers can not escape the punishment under the provision of Art. 39.

Prof. Yasuya, too, arrives at the same conclusion, though for different reasons. According to him, there are three methods of realizing a vacation: (i) appointment of its period by employees, (ii) determination by the agreement between employer and employees, and (iii) appointment by employer. And as employer’s “duty of giving an annual vacation should be interpreted positively”, if there is no requisition from employees, the employer has the duty to unilaterally appoint and give the vacation. Further, he asserts that the employer has “the duty to inquire about the period of vacation to be chosen by employees, and to take other necessary measures”, so that a normal operation of his enterprise may be insured.

As mentioned above, I also reject the view that, when no requisition is made by an employee, the employer should not be punished even though he does not give annual vacation to the employee. But I think that, when the duty arises for the employer to give annual vacation in accordance with Par. 1 and 2, Art. 39, and nevertheless no “requisition” is made by the employee for some time thereafter, the employer must advise the employee to make this “requisition”. In other words, I am of the same opinion with Prof. Ariizumi and Prof. Yasuya in thinking that Art. 39 does not prescribe that the employer need not give annual vacation if the “requisition” is made by the employee, while I think that, when the duty of the employer to give annual vacation arises and exists in accordance with Par. 1 and 2, Art.

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39, the employer should advise the employee to make requisition before the number of the remaining days of the year decreases to (or below) the number of annual vacation to which the employee is entitled, if there is no requisition from the employee. We cannot conceive of a case where the employee dares not to appoint the period of vacation with pay, without any peculiar ground, in spite of the employer's advice thereof. Accordingly, from my point of view, there will practically be few cases where the number of remaining days of the year decreases below the number of holidays to which employees are entitled. But if we do not recognize the duty of such advice on the part of the employer, there will sometimes arise such instances as stated above. And it seems that Prof. Ariizumi contends that in such cases employers must be unconditionally punished, but from my point of view, if such instances should arise very exceptionally, punishment should be given to employers only when they failed to perform their duty of advising employees.

Prof. Yasuya asserts that it is necessary for employers to inquire about the period of annual vacation which employees wish to "require" or to take some other positive measures. In this point, I am of the same opinion with him. But, when he contends that if employees did not express their will, ...employers must unilaterally decide the period of vacation and give it to employees, I must express some doubt about his contention. If employers must be punished even when they took "some positive measures such as asking to 'require' the vacation" and employees failed to require it, there would be no necessity to put employers under the duty to take such positive measures. Further, it would be too hard upon employers to punish them under the provisions of Art. 39, on the ground that employers failed to determine and give the remaining period as annual vacation, even when the employer's failure was caused by the employee's failure to express their will in spite of measures taken on the part of employers. If, in this instance, employers make a plea on the ground of its harmful influence upon their enterprises and if it should be recognized, it would be of little use to recognize the employers the right and duty to determine unilaterally a vacation period and give holidays to employees. (The plea in Par. 3 is a plea that other quarter should be appointed as a vacation quarter, but as regards the instance in question here, it is a plea that annual holidays shall not be given within the year.)

Incidentally, we may have argued a question whether employers can unilaterally appoint a vacation quarter or not, in case of employee's failure to make appointment in spite of employer's advice as the performance of the duty to inquire about the vacation period asserted by Prof. Yasuya, or of the duty to advise asserted by me based on the provisions of Art. 408 of the civil code concerning the transfer of the right of choice in the alternative claim (Wahlschuld). I think such transfer should not be admitted. It is impossible to apply to the right of taking annual vacation the provisions concerning the alternative claim. There is no specific rule to the effect that if no choice of quarter was made notwithstanding the fact that employers encouraged it the right of choice passes into employers. The law provides for only the giving of vacation to employees in the quarter chosen by them.

4. I suppose two arguments would be presented against my view admitting employer's duty to advise. The first is the same argument as the one presented when Art. 25 of the

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8 There may be some instances where employees avoid appointing a quarter even though they are encouraged to do so, because the employer discriminates against such employees in respect of bonus etc., in spite of their encouragement. Such an action of the employers who in this way practically prevent employees from taking holidays should be interpreted as a violation of Art. 39.
old Enforcement Regulations prescribing the duty of employers to inquire about the appointed quarter was abolished, *i.e.* the argument that to impose such a duty is nothing but to create illegally a new duty not provided for in Art. 39 of the Act. But I think that so long as in Par. 1 and 2 of Art. 39 the conditions on which the duty to give annual vacation arises and then in Par. 3 how to give annual vacation *i.e.* to give it in the "quarter" the employee makes "requisition" are provided, it is expected as a matter of course that the employer should, as a connecting-link between the two, encourage employees to make "requisition" for a "quarter" when they fail to do so for some time after the duty of giving annual vacation arose. Of course, it is unreasonable to recognize at once the arising of a criminal responsibility under the provisions of Art. 39, because of intentional non-performance of this duty. This duty is to be understood as not backed by independent penal regulations concerning non-performance of it. Even when there is this intentional non-performance, the application of penal regulations concerning the violation of Art. 39 is out of question, if employees are ready to appoint a quarter and a vacation is given accordingly. The relation between the duty to advice or encourage and the penal regulations becomes a question only when the prescribed number of annual holidays has not actually taken.

The second argument asserts that to recognize the duty to encourage may be an idealism not based on the actual state of things in Japan, where an unlimited piecemeal giving of annual vacation is recognized by law, and where employees are actually making use of annual vacation piecemeal, in order to attend an unexpected wedding or funeral service. It is certain that, as long as an annual vacation is sued in occasionally attending unexpected services, employees would be unable to appoint previously a quarter, although they were advised by employers to do so. The same may be said of the case where employees utilize annual vacation as an expedient of counting their absent days as present ones. But this practice is not in accord with the purport of the system of annual vacation. One should not interpret the law, adhering to the present actual state of things, but should try to bring actual state of things as near the purport of the law as possible. If we admit that employers should be punished when employees fail to appoint a quarter in spite of employers' advice to do so, we may be liable to the blame that we are too idealistic. But for the reason mentioned above, we reject the view which admits such a result.

In this connection, Prof. Ariizumi asserts that, when employees failed to "demand" and the year passed without giving an annual vacation during the year, employers must be punished under Art. 39, but that, even if employee's "right of holidays" (the right of being exempted from the duty to work on working days) lapses as a result of the inability to perform owing to the passing away of the year, it is another question whether employee's claim to "the wages which should be paid in spite of no services of employment" would lapse at the same time. Further, he asserts that, as employees "have the obligation to co-operate for the realization of annual vacation with pay in such a way as to "demand" according to Par. 3, the employees who have failed to co-operate to take vacation lose the claim to wages." *But* if we should recognize that employees have a duty to co-operate, we would not be able to answer the argument that, when employees failed to perform such a duty and therefore annual vacation has not been realized, employers can not become liable to the criminal responsibility arising from the violation of Art. 39. From my point of view, when employees failed to "demand", and therefore the year passed without employer's giving

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annual vacation, the matter could be considered in two cases: where employers performed the duty of encouragement, and where employers failed to do so. In the former case, the employer is not punished by law on the ground of non-performance of the duty which he owes to the state, and his duty in relation to his employee to give annual vacation, which is one of the employer's duties to protect his employees which are based on the labor contract as well, lapses on account of the impossibility of performance through a cause not imputable to the party liable. On the other hand, in the latter case the employer receives punishment, and employees obtain a claim for damages including an amount corresponding to the annual vacation allowance (Par. 4, Art. 39), on account of employer's failure to perform their duty to give annual vacation provided for in the labor contract through a cause imputable to him.\textsuperscript{10}

A noteworthy judgment\textsuperscript{11} has recently been given by a court on the meaning of the "quarter" mentioned in Par. 3, Art. 39.

1. According to this judgement, "it would rather be proper to think that the right of annual vacation does not take forming effect directly when employees make requisition for it (though it is different from an ordinary right of claim in that employers are bound to give annual vacation with pay in the quarter demanded, except for the case mentioned in the proviso of Par. 3, Art. 39), and yet it is also a kind of the right to claim". The following four points are presented as the reasons for it: (1) When we consider that we find in Art. 39 an expression that the vacation "must be given" or "need not be given", the Act seems to consider that the right of vacation with pay arises on the condition of getting employer's consent. (2) According to the right-of-forming theory, there is little room for the crime against Art. 39 to arise in connection with Art. 39, except that it arises only in connection with Par. 4. It is at least faithful to the spirit of the present Act to consider, in accordance with the "right of claim" theory, that the crime arises even when employers unjustly failed to give consent mentioned under Par. 3 to the requisition of employees. (3) It is more compatible with the "right of claim" theory because employers are liable to the duty to pay wages for the period of vacation. It is because employers' management and control over labor power is clearly reserved in the form of consent to, or alternation of, the demand from employees that employers are liable to pay wages for the period of vacation. (4) So long as the proviso of Par. 3 is applied, there is practically no difference between the two theories.

However, can the words "must give" in Par. 1 and 3, Art. 39, and the words "need not give" in the proviso of Par. 2 be understood to mean that the law considers that the

\textsuperscript{10} This asserts that the duty to give annual vacation lapses with the passing away of the year, that is, the so-called carrying-over of annual vacation is not recognized. Prof. Ariizumi, too, denies the carrying-over of annual holidays. But there are some instances where practically the same result as the carrying-over arises. (See my article, pp. 502-503, \textit{op. cit.} Also see Ariizumi's \textit{Labor Standards Act}, p. 359.)

\textsuperscript{11} Judgement of Fukuoka Local Court, Dec. 21, 1962. (Case concerning the Struggle of Fukuoka Teachers' Union against the Efficiency Rating System). \textit{Journal of Judicial Precedents}, No. 334, p. 2, ff. This is a case against the staff officials of the Fukuoka Teachers' Union who were accused of the crime laid down in Par. 4, Art. 61, of the Local Civil Servant Act, which punishes those who stir up an act of labor dispute of local civil servants. The argument about the nature of the right of the annual vacation was made as a preliminary to the discussion whether the tactics of asking for vacation in concert is an act of dispute mentioned in the Local Civil Servant Act.
right of vacation arises at the time when the employer gives consent? Probably, the judgment considered that, if it stands in the law that "Employees... can take vacation", it may be interpreted as the right of forming, but the law uses the expression that "employers must give". But concerning annual vacation, the Labor Standards Act prescribes in the same way as concerning many other matters in the Act, only from the standpoint of employer's duty to give. Further, in my opinion which considers the "requisition" in Par. 3 as the "appointment" of a "quarter", the question whether the "requisition" is one that requires the consent (though compelled) of the employer or an exercise of the right of forming, becomes a question so long as an appointment of the vacation period is made by specifying the dates of beginning and ending, which is an exception to the system. And as regards the effect at the time when such an appointment was made, my opinion is eventually the same as the right of forming theory. For, so long as there is no reason mentioned in the proviso of Par. 3, the above appointment by an employee specifies labor days which, as holidays, exempt the employee from the duty of labor without the consent of the employer.\(^{12}\)

Also, as regards the point (2) mentioned above, it may be correct to say that the crime against Art. 39 can hardly, if not never, arise in connection with Par. 3, when we adopt the "right of forming" theory, standing by the present right of forming and right of claim theories, both of which assert that to appoint the vacation period by actually specifying the beginning and ending times means to "make requisition for a quarter" mentioned in Clause 3. (Even from the standpoint of the "right of forming" theory, we can understand that the case, in which employees did not take holidays because employers made the plea in spite of the lack of the conditions for the alteration of the appointed quarter mentioned in the proviso of Par. 3, can be regarded as a crime against Par. 3, Art. 39. But under the "right of forming" theory, which asserts that employees can take vacation without employer's consent when they demand it, employers are not liable to punishment under Art. 39, in so far as employees actually took vacation.) But it is possible to think that in case when the employer unjustly failed to give consent under Par. 3 to the requisition of employees, and even in case when he prevented employees from taking vacation during the appointed period by exercising unlawfully the plea mentioned in Par. 3, the employer is liable to punishment under Art. 39, and there is no theoretical necessity for us to interpret the matter in the former way. Further, according to my view which considers it proper to appoint a vacation "quarter" for a period of about three months, and which considers that the specification of the begin-

\(^{12}\) According to Prof. Nomura, the employees, though they may be opposed by employer's "right of changing the designated quarter", have the right of the annual vacation with pay, which they can exercise unilaterally without the consent of employers. But, "no legal effect arises from a mere unilateral expression of will. And only the holidays actually taken can be considered as a vacation with pay". Consequently, it is unreasonable to consider it as the right of forming. (Prof. Nomura, \textit{Lecture on Labor Law}, p. 118.) It is certain that "only the holidays actually taken can be considered as a vacation with pay", but when there is a "requisition" from employees by specifying the dates of beginning and ending, and so long as there is no request from the employer to change the dates, working days on which employees are exempted from labor are specified by this "requisition", and the effect of a vacation, \textit{i.e.}, the suspension of the duty of labor, does not arise after the vacation was actually taken. In this case, when employees worked on the days on which they are, as during vacation, exempted from the duty of labor, we should think that the employees would acquire, not the right of claim of the restitution of unjust enrichment, but a wage claim. Nevertheless, we should not think that the effect of the vacation, \textit{i.e.} the suspension of the duty of labor, would arise only after employees actually stopped working on these days.
ning and ending times of vacation are not made solely by employees' "requisition" (besides employer's consent, required by the "right of claim" theory), the limits within which the violation against Art. 39 arises in connection with Par. 3 becomes wider than according to these two theories.

As regards point (3), I cannot agree with it. In my opinion, annual vacation is nothing but a temporary termination of employee's duty to offer services, on the assumption that the employer has the right to ask employees to offer labor services on working days. Consequently, it would not be unreasonable to assert that the vacation can exist only when it is assumed that the employer has the right of "management and control over labor power", in other words, that as regards the holidays over which the employer has no right of management and control, a vacation is out of the question. But the annual vacation allowance is paid for the period of temporary suspension of employee's duty to offer labor, i.e., for the period of temporary suspension of employer's "management and control over labor power", and so, it is different from the remuneration of labor which forms the main part of wages. The judgment is based on the theory that the annual vacation allowance is wages and wages are to be paid in case there exists employer's right of management and control over labor power and, therefore, as regards the arising of the annual vacation with pay, employer's management and control over labor is reserved in the form of employer's consent or alteration of the quarter appointed by the employee. But this theory is erroneous from the first.

Lastly, as regards point (4), the assertion of the judgment is right. For, from the "right of claim" and the "right of forming" theories, in which employee's "demand" specifying actual beginning and ending times is called into question, there would be little difference in the result. But so far as this point is concerned, the "right of forming" theory is better. In short, I disagree with almost all of the points (1), (2), (3) and (4) of the judgment.

2. About why the word "quarter" is used in Par. 3, Art. 39, the judgment says, "This broad word "quarter" is used here only because of the fact that the 20 day vacation with pay may have to be taken either uninterruptedly at a time or intermittently over more than two seasons and, therefore, employee's demand for a vacation... can be accepted over more than two seasons. The law does not requests that a vacation should always be taken within the period of a season". Even if this assertion be right, it does not constitute a criticism against my theory, which does not regard "quarter" as "season". But I cannot agree with the assertion of the judgment which does not understand the deep meaning of the word "quarter" used in Par. 3, Art. 39. Again, the above assertion was made by way of dictum against the assertion of the advocate who argued that the proviso of Par. 3 ("Interuption of a normal operation of enterprise") should, in relation to "quarter", be understood only in the period of time extending over a quarter of a year. If a "quarter" of a year is not the same as a season, but only a period of about three months, the assertion of the judgment substitutes a "season" for a "quarter". Further, if there is various forms in the "requisition" of employees and the manner of specifying the beginning and ending times in connection with the requisition, there are various forms in the determination whether there is "interruption

13 Wages do not always actually arise on the condition that employees offer services. But the main source of wages is the offer of services. (See my article, "Claim for Wages of Strikers" in Quarterly Journal of Labor Law, No. 52.) But Prof. Ariizumi rejects my opinion on the ground that the annual vacation allowance is wages, not an allowance... (Prof. Ariizumi, Labor Standards Act, p. 358, Note 1.)

14 For details, see, Azuma, ed., Commentary on Labor Standards Act, p. 493 (written by Tadenuma).
of a normal operation of enterprise”. But here I refrain from touching on this problem.\(^\text{15}\)

IV

Both the right of forming theory and the “right of claim” theory assert that it is the purport of the “requisition for a quarter” mentioned in Par. 3, Art. 39, of the Labor Standards Act that employees appeal, as often seen at present, to the method of taking annual vacation one day suddenly without any advance notice, specifying the beginning and ending times. Or at least, they do not clearly express or adopt the view that the “appointment” of “a quarter” (a vacation period of about three months), emphasized by the “right of designation of the quarter” theory, is the purport of the “requisition for a quarter” mentioned in Par. 3. Again, as regards the “right of designation of the quarter” theory, a criticism, besides the constructional criticism counter-criticized here by me, was offered to the effect that the manner of determining annual vacation, emphatically asserted by the theory to be proper, is much removed from the realities in this country. But recently, not a few unions are aiming at taking annual vacation completely. It is a question how earnestly this aim is pursued, but at least a step has been taken toward that aim. And as long as this aim is pursued, it will sooner or later be proved that, as regards the meaning of “requisition for a quarter”, it is not a “demand for a period” seen at present, but a “demand for a quarter” emphatically asserted to be proper by the “right of designation of the quarter” theory that answers the purpose of the annual vacation system, and that this latter demand is true to the spirit of the law and, at the same time is not in the least based on an idealistic theory that is removed from the realities.

\(^{15}\) For details, see, Azuma, ed., Ibid., pp. 486-488.