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# The Shinto Cases: Religion, Culture, or Both—The Japanese Supreme Court and Establishment of Religion Jurisprudence

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# The Shinto Cases: Religion, Culture, or Both—The Japanese Supreme Court and Establishment of Religion Jurisprudence

*Frank S. Ravitch\**

## I. INTRODUCTION

Japanese “Establishment Clause” law, cases under Article 20 and Article 89 of the Japanese Constitution,<sup>1</sup> is heavily based on situations involving Shinto shrines or Shinto rituals. For a number of historical, theological, and cultural reasons, discussed in greater detail in Part II, this should not be surprising.<sup>2</sup> The history and evolution of this area of jurisprudence from the Meiji era to the most recent cases creates a fascinating legal and cultural journey.

There is a tendency to consider the “Shinto cases” as a single line of cases that are at the core of Japanese Establishment of Religion jurisprudence. This Article suggests that it is certainly correct to view these cases as a core of Japanese Establishment of Religion jurisprudence, but they are not a “line” of case law. Rather, they represent two loosely connected lines of cases and one era that involved state establishment. Thus, the cases fall into a history of three relatively distinct legal eras. First, the pre-war establishment of State Shinto. Second, the post-war Shinto as Culture cases. Third, what I will call the post *Ehime Tamagushi* era,<sup>3</sup> or what some might call the modern era of Shinto cases. The most recent of these cases was decided in early 2012.<sup>4</sup>

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\* Professor of Law, Walter H. Stowers Chair in Law and Religion and Director of the Kyoto, Japan Summer Program, Michigan State University College of Law. I would like to thank Cole Durham, Brett Scharffs, and the BYU Law and Religion Center for sponsoring this wonderful symposium and for inviting me to speak on this fascinating topic. I also thank Tasuku Matsuo for his excellent presentation and for sharing some of his great experience and wisdom with me. Thanks also to Colin Jones and Bunji Sawanoburri, with whom I spoke periodically about this Article and whose suggestions helped immensely.

1. NIHONKOKU KENPO [KENPO] [CONSTITUTION], art. 20 & art. 89 (Japan).

2. See *infra* Part II.

3. This refers to the *Ehime Tamagushi* case, Saiko Saibansho [Sup. Ct.] Apr. 2, 1997, 51 SAIKO SAIBANSHO MINJI HANREISHU [MINSHU] 1673 (Japan), and cases decided after that decision.

4. 66 SAIKOU SAIBANSHO MINJI HANREISHUU [MINSHU] no. 2 [1st Petty Bench] 2012,

Part II of this Article addresses the cultural and legal norms that governed Establishment of religion jurisprudence from the Meiji era through the turn of the Twenty First Century, and from the Meiji Constitution through Articles 20 and 89 of the current Japanese Constitution. This part sets forth why there are three distinct eras in the law. Part III looks more closely at the cases in the second and third eras, those under the post-war (current) Japanese Constitution. Part IV makes some observations on the current approach and will be followed by a short conclusion. This Article suggests that the current approach is a vast improvement over the pre-1997 approach, but the current approach also has its limitations.

## II. THE MEIJI CONSTITUTION

The Meiji Constitution was promulgated by Emperor Meiji in 1889 (on the Roman Calendar) and was in effect until the end of World War II.<sup>5</sup> The postwar Constitution was promulgated in November 1946 and came into effect in 1947.<sup>6</sup> Under the Meiji Constitution there was no separation of church and state in any modern sense.<sup>7</sup> Article 3 of the Meiji Constitution read: “The Emperor is sacred and inviolable.”<sup>8</sup>

There was, however, a modicum of free exercise of religion under the Meiji Constitution.<sup>9</sup> Article 28 read: “Japanese subjects shall, within limits not prejudicial to peace and order, and not antagonistic to their duties as subjects, enjoy freedom of religious belief.”<sup>10</sup> In reality, this clause also included two qualifications that significantly limited the free exercise of religion: 1) free exercise of religion is available “within limits not prejudicial to peace and order,” and 2) free exercise of religion is available so long as it is “not antagonistic to [citizens’] duties as subjects.”<sup>11</sup> Ultimately, what has come to be

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[Hereinafter *Sunagawa City II*] (This case sought the declaration of the illegality of municipal property management of property containing a Shinto Shrine.).

5. DAI NIHON TEIKOKU KENPO [MEIJI KENPO] [CONSTITUTION] (Japan). An English translation is available online at <http://history.hanover.edu/texts/1889con.html>.

6. NIHONKOKU KENPO [KENPO] [CONSTITUTION], art. 20 & art. 89 (Japan).

7. DAI NIHON TEIKOKU KENPO [MEIJI KENPO] [CONSTITUTION], ch. 1, art. 3 (Japan).

8. *Id.*

9. *Id.* at ch. 2, art. 28.

10. *Id.*

11. Keiko Yamagishi, *Freedom of Religion, Religious Political Participation, and Separation of Religion and State: Legal Considerations from Japan*, 2008 BYU L. REV. 919, 928.

known as “State Shinto” was established as the state religion.<sup>12</sup> State Shinto involved worship, or public recognition of and fealty to, the Emperor and the imperial ancestors who were said to have come from an unbroken line descended from the Goddess Amaterasu, the Goddess of the sun and universe in Shintoism.<sup>13</sup>

It is important not to confuse State Shinto with the longstanding tradition of Shintoism and modern Shinto. State Shinto was centered on the Emperor and his ancestors, and included public rituals at the imperial house and shrines to the emperor’s ancestors in every home.<sup>14</sup> The imperial household gave items to every household in Japan every year from the imperial shrine at Ise.<sup>15</sup> It was considered to be the duty of every loyal Japanese subject to worship the imperial ancestors at home.<sup>16</sup> Needless to say, this could not coexist with the serious free exercise of other religions. In fact, Buddhism, which had sometimes been favored by the state in earlier periods of Japanese history,<sup>17</sup> became disfavored and State Shinto gained dominance.<sup>18</sup> State Shinto shrines were run by the government.<sup>19</sup>

Traditional and modern Shinto, however, are quite different. First, traditional Shinto and Buddhism coexisted well for at least one thousand years.<sup>20</sup> Second, traditional Shinto is heavily focused on household ancestors and to some extent broader spirits and animism.<sup>21</sup> It is not that the imperial ancestors are irrelevant, but rather that they are not the primary focus in many Shinto traditions.<sup>22</sup>

Eventually, State Shinto helped foster a militant mentality and a greater sense of Japanese superiority.<sup>23</sup> This led to significant military action and territorial occupation during the Meiji, Taisho,

12. *Id.* at 925–28.

13. NOBUSHIGE HOZUMI, ANCESTOR-WORSHIP AND JAPANESE LAW (1912).

14. *Id.* at 30–31, 36–47.

15. *Id.* at 30.

16. *Id.* at 36.

17. KENJI MATSUO, A HISTORY OF JAPANESE BUDDHISM (2007).

18. HOZUME, *supra* note 13, at 91.

19. *See generally id.*

20. MATSUO, *supra* note 17.

21. C. SCOTT LITTLETON, UNDERSTANDING SHINTO: ORIGINS, BELIEFS, PRACTICES, FESTIVALS, SPIRITS, SACRED PLACES (2011).

22. *Id.*

23. HELEN HARDACRE, SHINTO AND THE STATE, 1868–1988 (1991).

and Showa eras.<sup>24</sup> Ultimately, it led to Japan's involvement in World War II.<sup>25</sup> After the war in 1945, the United States' occupation government officially abolished State Shinto,<sup>26</sup> and in 1946 the modern Japanese Constitution was promulgated.<sup>27</sup> Not surprisingly, two major aspects of the new Constitution were: (1) the imposition of significant limitations on imperial power and (2) the prohibition of government establishment of, or support for, religion, under Articles 20 and 89.<sup>28</sup> The concepts imposed in this Constitution, however, were modeled on the U.S. experience, and as Japan took its place as one of the world's leading constitutional democracies, Japanese courts were faced with interpreting these constitutional provisions in the context not of State Shinto, but of more traditional forms of Shinto with origins going back Millennia before Emperor Meiji came to power in the Nineteenth Century.<sup>29</sup>

In a line of cases discussed in Part III,<sup>30</sup> the Japanese Supreme Court held that Shinto has a strong cultural component, and therefore a certain level of public recognition. Even a subsidy of Shinto was allowed without violating Articles 20 and 89 of the Constitution.<sup>31</sup> The government actions upheld in these cases were a far cry from State Shinto, but these decisions seemed inconsistent with the language of Articles 20 and 89.<sup>32</sup> Also, as discussed in Part III,<sup>33</sup> the reasoning from these earlier cases was strongly rejected by the Japanese Supreme Court in a landmark 1997 case.<sup>34</sup> Since that time, the Court has been grappling with its new approach. In two cases decided in 2010 and in a follow up opinion to one of those cases decided in 2012, the Court seems to have developed a more forceful concept of Seiji to Shuukyoku no Bunri, or separation of church and state.

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24. *Id.*

25. *Id.*

26. *Id.*

27. NIHONKOKU KENPO [KENPO] [CONSTITUTION] (Japan).

28. *Id.* at art. 20 & art. 89.

29. LITTLETON, *supra* note 21.

30. *See infra* Part III.

31. Kakunaga v. Sekiguchi (*Tsu City Ground-Breaking Ceremony Case*), Saiko Saibansho [Sup. Ct.] July 13, 1977, 31 SAIKO SAIBANSHO MINJI HANREISHU [MINSHU] 533, no. 69 (Japan).

32. NIHONKOKU KENPO [KENPO] [CONSTITUTION], art. 20 & art. 89 (Japan).

33. *See infra* Part III.

34. *The Ehime Tamagushi Case*, Saiko Saibansho [Sup. Ct.] Apr. 2, 1997, 51 SAIKO SAIBANSHO MINJI HANREISHU [MINSHU] 1673 (Japan).

### III. CASES UNDER THE CURRENT CONSTITUTION

This section discusses cases involving the establishment of religion—the term for these issues under the United States Constitution—under the postwar Japanese Constitution, specifically Articles 20 and 89. Article 20 reads:

1) Freedom of Religion is Guaranteed to all. No religious organization shall receive any privileges from the state, nor exercise any political authority. 2) No person shall be compelled to take part in any religious acts, celebration, right or practice. 3) The State and its organs shall refrain from religious education or any other religious activity.<sup>35</sup>

Article 89 reads: “No public money or other property shall be expended or appropriated for the use, benefit or maintenance of any religious institution or association, or for any charitable, educational or benevolent enterprises not under the control of public authority.”<sup>36</sup>

On their faces, these articles seem to provide a strong barrier against government support for religion, especially financial and educational support. In fact, as the Japanese Supreme Court held in 1997, such a conclusion is consistent with the language and intent of these Articles, which were imposed on Japan but subsequently accepted by the Japanese courts and government. Articles 20 and 89 are clearly aimed at ending state support for State Shinto or any other religion.<sup>37</sup> Yet until 1997, the Court did not view government interaction with traditional Shinto as strictly subject to these limitations.<sup>38</sup> Subsection A discusses these cases. Subsection B focuses on the Japanese Supreme Court’s move away from these earlier decisions and toward prohibiting government support for any religion, including traditional Shintoism.

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35. NIHONKOKU KENPO [KENPO] [CONSTITUTION], art. 20 (Japan).

36. *Id.* at art. 89.

37. *The Ehime Tamagushi Case*, Saiko Saibansho [Sup. Ct.] Apr. 2, 1997, 51 SAIKO SAIBANSHO MINJI HANREISHU [MINSHU] 1673 (Japan).

38. *See infra* Part III.A.

*A. Shinto as Culture (and Religion)*

The *Tsu City Groundbreaking Ceremony* case,<sup>39</sup> is the most famous of what I will call “the Shinto as culture” cases, and it has been followed in other cases.<sup>40</sup> It is interesting because the Court adopted a test very similar to the test adopted by the U.S. Supreme Court in *Lemon v. Kurtzman*,<sup>41</sup> but then held that Shinto can be interpreted as a cultural practice, and therefore government recognition of Shinto was not problematic under Article 20, paragraph 3 of the Japanese Constitution.<sup>42</sup> The case also implicated Article 89 of the Constitution.<sup>43</sup>

In this case, Shinto rites were performed by a Shinto Priest at a city-sponsored groundbreaking for a municipal gym.<sup>44</sup> The city paid for the ceremony and offerings.<sup>45</sup> A local citizen brought a case under the Japanese Constitution alleging that the ceremony was an unconstitutional establishment of religion.<sup>46</sup>

The trial court held that the ceremony was a folk custom and thus not religion for constitutional purposes.<sup>47</sup> The appellate court reversed, holding that government support for the ceremony violated the principle of separation of church and state.<sup>48</sup> The Japanese Supreme Court reversed.<sup>49</sup> It held the State must be religiously neutral,<sup>50</sup> but not all state connection with religion is prohibited.<sup>51</sup>

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39. *Kakunaga v. Sekiguchi (Tsu City Ground-Breaking Ceremony Case)*, Saiko Saibansho [Sup. Ct.] July 13, 1977, 31 SAIKO SAIBANSHO MINJI HANREISHU [MINSHU] 533, no. 69 (Japan).

40. See *infra* notes 58.

41. 403 U.S. 602, 612–13 (1971) (requiring courts to find government action unconstitutional if it lacks a secular purpose, has a primary effect that advances or inhibits religion, or fosters excessive government entanglement with religion).

42. *Kakunaga v. Sekiguchi (Tsu City Ground-Breaking Ceremony Case)*, Saiko Saibansho [Sup. Ct.] July 13, 1977, 31 SAIKO SAIBANSHO MINJI HANREISHU [MINSHU] 533, no. 69 (Japan).

43. See *id.* (The Court held that Article 89 was not violated because the money paid to the Shinto priests to conduct the ceremony was a “fee for services,” and for that reason did not violate Article 89). The Court’s reasoning in *Tsu City* would not likely be followed under the post-1997 cases. See *infra* Part III.B.

44. *Kakunaga v. Sekiguchi (Tsu City Ground-Breaking Ceremony Case)*, Saiko Saibansho [Sup. Ct.] July 13, 1977, 31 SAIKO SAIBANSHO MINJI HANREISHU [MINSHU] 533, no. 69 (Japan).

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

State connection with religion that, when considering Japanese social and cultural conditions and the purpose and effect of the state action, exceeds a reasonable standard consonant with the objective of religious freedom, is unconstitutional.<sup>52</sup> A violation of Article 20, paragraph 3 occurs when government conduct has a purpose with religious significance or the effect of the government conduct is to subsidize, promote, suppress, or interfere with religion.<sup>53</sup>

Here, the rites were obviously connected to religion,<sup>54</sup> but they were not unconstitutional when considering the totality of the circumstances because the ceremony had the secular purpose of “marking the start of construction by a rite performed in accordance with general social custom to pray for a stable foundation for the building and accident-free construction work.”<sup>55</sup> The effects of the ceremony did not subsidize or promote Shinto or suppress or interfere with other religions, according to the Court.<sup>56</sup> Therefore, government support for—and involvement in—the ceremony was not a religious activity for the purposes of Article 20.<sup>57</sup>

Several subsequent cases followed the *Tsu City* case’s reasoning and application of that reasoning. For example, the Court applied *Tsu City* in a case involving a stone monument on a public school playground.<sup>58</sup> The local government subsidized the movement of the monument, a high profile government official participated in ceremonies held at the monument, and the association in charge of the monument was not charged for the use of public property.<sup>59</sup> The memorial stone commemorated the war dead.<sup>60</sup> The city transferred and rebuilt a war monument on the school playground, which is government property.<sup>61</sup> It allowed a local association of The Japan War-Bereaved Association to maintain the site and use the land free

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52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. Saikou Saibansho [Sup. Ct.] Oct. 21, 1999, Hei 7 (gyo-tsu) no. 148, 1696 HANREI HIJOU [HANJI] 96 (Japan) (This case involved a claim for confirmation of invalidity of the decision to cease using part of the playground and a claim for suspension of payment for the area and memorial service).

59. *Id.*

60. *Id.*

61. *Id.*



of charge.<sup>62</sup> A Petty Bench of the Japanese Supreme Court upheld the transfer, rebuilding, and free use by the association.<sup>63</sup> Moreover, the Court held that participation of the head of the local board of education in Shinto or Buddhist rituals held at the site by the association did not violate Article 20 or Article 89.<sup>64</sup>

The Court applied reasoning very similar to that in the *Tsu City* case.<sup>65</sup> But the fact that the monument was a war memorial and that the association was generally focused on the families of war dead are important factual distinctions. Also, there is no evidence that the city paid for the ceremonies in this case. Still, a high ranking local official participated in the ceremonies and the monument sat on public land free of charge.<sup>66</sup> The Court held that the primary focus of the monument and the association was the war dead, which was not religious.<sup>67</sup> Moreover, applying the test from the *Tsu City* case, the Court held that a monument to the war dead is not related to any specific religion and the city had a secular purpose for the land's use where the monument was located.<sup>68</sup>

The Court further held, in a tone reflective of the *Tsu City* case, that the head of the school board participated in the memorial services "with the exclusive intention of conforming to common courtesy for the bereaved families of the war dead."<sup>69</sup> Thus, the *Lemon* style analysis was applied, but a government official's participation in religious ceremonies on government property was upheld as being consistent with "common courtesy," that is, as being culturally appropriate.<sup>70</sup> As explained in the next section, while the current Japanese Supreme Court might agree with the first part of this analysis if it could be shown that neither the monument or association was religious in nature, the Court would be quite unlikely to find the government official's public participation in the religious ceremonies on public property constitutional.<sup>71</sup>

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62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. See *infra* Part III.B.

*B. Shinto as Religion (and Culture)*

In 1997, the Japanese Supreme Court issued an opinion that continued to follow and augmented the legal framework set forth in the *Tsu City* case, but which drastically departed from that case's understanding of, and application of, that framework.<sup>72</sup> The *Ehime Tamagushi* case involved the use of public funds by government officials from Ehime Prefecture.<sup>73</sup> The funds were used for offerings given by government officials to the Yasakuni Shrine and the Gokoku Shrine at ceremonies held by those shrines.<sup>74</sup>

The offerings cost relatively small sums of money and consisted of twigs from a specific type of tree, the sakiki tree, wrapped with folded white papers.<sup>75</sup> This sort of offering to a Shinto Shrine is called Tamagushi.<sup>76</sup> The offerings were paid for with government funds and given by representatives of the government at the behest of Haruki Shiraishi, the then governor of Ehime Prefecture.<sup>77</sup>

The Court in *Ehime Tamagushi* applied the legal test from the *Tsu City* case,<sup>78</sup> but it also added an endorsement of religion analysis similar to that used by the U.S. Supreme Court.<sup>79</sup> Significantly, the Court explicitly condemned Meiji era Free Exercise practices and held that, "the Constitution should be interpreted as striving for a secular and religiously neutral state by regarding the total separation of state and religion as its ideal."<sup>80</sup> The Court held that this approach helps protect the freedom of religion.<sup>81</sup> This is a stark contrast from the analysis in the *Tsu City* case, because the Court suggested total separation of religion and government if the ideal and did not give much weight<sup>82</sup> to the cultural and political history of officials visiting these shrines.

72. *The Ehime Tamagushi Case*, Saiko Saibansho [Sup. Ct.] Apr. 2, 1997, 51 SAIKO SAIBANSHO MINJI HANREISHU [MINSHU] 1673 (Japan).

73. *Id.*

74. *Id.*

75. *Id.*

76. HOZUMI, *supra* note 13, at 59.

77. *The Ehime Tamagushi Case*, Saiko Saibansho [Sup. Ct.] Apr. 2, 1997, 51 SAIKO SAIBANSHO MINJI HANREISHU [MINSHU] 1673 (Japan).

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Compare Kakunaga v. Sekiguchi (Tsu City Ground-Breaking Ceremony Case)*, Saiko

The Court recognized, however, that total separation between church and state is impossible, because anytime government regulates social norms it can affect religion indirectly.<sup>83</sup> The test to determine whether religious neutrality is violated is the purpose and effects test used in the *Tsu City* case,<sup>84</sup> but with an endorsement gloss: i.e., considering whether the government action under review favors religion in the eyes of the public.<sup>85</sup> The Court applied this analysis to cases under both Article 20 and Article 89, and found that paying for and giving the offerings violated both the purpose and effect elements of the test and endorsed religion.<sup>86</sup>

Applying that test, the Court held that the offering of tamagushi (and kumoturyo, another kind of offering made to the Shrines), in the name of the local government, directly supports the religious activity of the shrine.<sup>87</sup> The Court noted that other sorts of gifts, such as koden, which is a gift to the family of the war dead, could be given on behalf of the government because it is not given to the shrine or in support of religious activity.<sup>88</sup> The Court also noted that government officials may give saisen from their own pockets.<sup>89</sup> Saisen is an anonymous gift given when people visit temples or shrines.<sup>90</sup>

The Court ordered Shiraishi to repay the government for all the expenditures made in support of the offerings because he had ordered the other defendants to make the offerings by invoking his power under relevant municipal laws.<sup>91</sup> The enforcement of the holding through a judgment is quite significant. For a variety of reasons, well beyond the scope of this Article, the Japanese Supreme Court has sometimes found Constitutional violations but been relatively lax in enforcement. Thus, an order requiring Shiraishi to

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Saibansho [Sup. Ct.] July 13, 1977, 31 SAIKO SAIBANSHO MINJI HANREISHU [MINSHU] 533, no. 69 (Japan), with *The Ehime Tamagushi Case*, Saiko Saibansho [Sup. Ct.] Apr. 2, 1997, 51 SAIKO SAIBANSHO MINJI HANREISHU [MINSHU] 1673 (Japan).

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

repay all the costs to the government out of his own pocket is a rather significant action by the Court.

Recently, in two Grand Bench opinions and a Petty Bench opinion that addressed enforcement of one of the Grand Bench opinions, the Court followed and further elaborated on the analysis from the *Ehime Tamagushi* case.<sup>92</sup> The results differed in the two Grand Bench cases, but the factual distinctions are significant.<sup>93</sup> The factual distinctions were especially important because the same local government in Hokkaido was involved in both cases.<sup>94</sup>

In *Sunagawa City I*, the city had allowed a joint neighborhood association the use of city owned property, located in and near a City-owned meeting hall, for a Shinto Shrine without requesting any compensation from the association.<sup>95</sup> The shrine consisted of a torii (gate to a Shinto Shrine), a jishingu (stone monument to the deity that is seen as protecting the local area), a hokora (small Shinto Shrine), and a sign noting that Shinto Shrine is located in the building.<sup>96</sup> A religious association called the Ujiko managed the property and performed festivals and rituals, but paid no compensation to the city for the use of the property.<sup>97</sup>

The Court using the endorsement analysis from *Ehime Tamagushi*—how this situation would be viewed from the public's perspective—held that the city's actions violated Article 20 and Article 89.<sup>98</sup> The fact that the Shrine was originally taken on by the city at the request of a local citizen who had donated the land (for tax reasons) did not change this analysis.<sup>99</sup> The Court acknowledged the religious nature of a Shinto Shrine and the problems relating to

92. 64 SAIKO SAIBANSHO MINJI HANREISHU [MINSHU] no. 1 [Grand Bench 2010], [hereinafter *Sunagawa City I*]; 64 SAIKO SAIBANSHO MINJI HANREISHU [MINSHU] no. 1 (gyo-tsu no. 334) [Grand Bench 2010] (hereinafter *Sunagawa City Failure to Administer Property Case*); *Sunagawa City II*, 66 SAIKO SAIBANSHO MINJI HANREISHU [MINSHU] no. 2 [1st Petty Bench 2012].

93. Compare *Sunagawa City I*, 64 SAIKO SAIBANSHO MINJI HANREISHU [MINSHU] no. 1 [Grand Bench 2010], and *Sunagawa City Failure to Administer Property Case*, 64 SAIKO SAIBANSHO MINJI HANREISHU [MINSHU] no. 1 (gyo-tsu No. 334) [Grand Bench 2010].

94. Compare *Sunagawa City I*, 64 SAIKO SAIBANSHO MINJI HANREISHU [MINSHU] no. 1, and *Sunagawa City Failure to Administer Property Case*, 64 SAIKO SAIBANSHO MINJI HANREISHU [MINSHU] no. 1 (gyo-tsu No. 334).

95. *Sunagawa City I*, 64 SAIKO SAIBANSHO MINJI HANREISHU [MINSHU] no. 1 [Grand Bench 2010].

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

government favoritism toward the Shrine.<sup>100</sup> The use of a government meeting building to house a religious Shrine, especially without any compensation, would be viewed from the public's perspective as favoring religion—in this case, Shintoism.<sup>101</sup>

The Court noted, however, that it would be inappropriate to require the Mayor to remove the Shrine immediately because it would make it very hard for the Ujiko group to carry out its religious activities, which would harm the religious freedom of members of the group.<sup>102</sup> Thus, the Court remanded the case to see whether any “rational and realistic alternative means” other than total removal of the shrine were possible.<sup>103</sup> The Court noted several possible alternatives, including a grant, transfer for compensation, or lease at fair market value.<sup>104</sup> It is unclear if a grant by itself would have been constitutional under these facts; but in a related case, decided in 2010 and discussed next, a grant was allowed under somewhat different facts.<sup>105</sup> The *Sunagawa City I* court seemed to favor a remedy that involved compensation or a lease at fair market value; but since it also mentioned a grant, it is not clear what would be required.<sup>106</sup> The Court ultimately approved, in *Sunagawa City II*—discussed below, a lease at fair market value and some other measures.<sup>107</sup>

In another decision involving a different Shrine in Sunagawa City concerning facts somewhat distinguishable from *Sunagawa City I*, the Court upheld a transfer by the local government to a neighborhood association of a Shinto Shrine and the small parcel of land on which it sat.<sup>108</sup> To avoid confusion, I will refer to this case as the *Sunagawa Failure to Administer Property Case*.<sup>109</sup> The transfer of the land and shrine was challenged under Article 20, paragraph 3 and under

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100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Sunagawa City Failure to Administer Property Case*, 64 SAIKO SAIBANSHO MINJI HANREISHU [MINSHU] no. 1 (gyo-tsu No. 334) [Grand Bench 2010].

106. *Sunagawa City I*, 64 SAIKO SAIBANSHO MINJI HANREISHU [MINSHU] no. 1 [Grand Bench 2010].

107. *Id.*

108. *Sunagawa City Failure to Administer Property Case*, 64 SAIKO SAIBANSHO MINJI HANREISHU [MINSHU] no. 1 (gyo-tsu No. 334) [Grand Bench 2010].

109. *Id.*

Article 89.<sup>110</sup> Interestingly, the Court noted that given the religious nature of a Shinto Shrine, the city might have been viewed—from the public’s point of view—to be favoring religion.<sup>111</sup>

The case has some interesting similarities to the recent U.S. Supreme Court decision in *Salazar v. Buono*,<sup>112</sup> which involved a large cross in the middle of the desert that was originally on government land but was transferred to a private organization after it was found unconstitutional by a lower court.<sup>113</sup> The transfer was challenged, and the case made its way to the U.S. Supreme Court.<sup>114</sup> Significantly, though, in *Salazar*, land and cash were given to the government by the private entity.<sup>115</sup> That land and cash were designed to equal the value of the land, given by the government, on which the cross sat.<sup>116</sup>

In the *Sunagawa Failure to Administer Property* case, however, which was decided before *Salazar*, compensation was not paid to the city.<sup>117</sup> The Court noted, however, that the land had originally belonged to the predecessor of the same neighborhood association and the purpose for which it was given to the city (teacher’s apartments) was no longer being served because those apartments were no longer there.<sup>118</sup> There was no such history in the *Salazar* case, and in fact, Congress’s actions in that case were far more suspicious from an Establishment Clause perspective than were the actions of Sunagawa City in this case.

The Sunagawa City land transfer was viewed by the Court as a return of land given by the association to the city for a specific purpose that was no longer being served.<sup>119</sup> The land transfer was a constitutional way to avoid problems under Article 20 and Article 89 that would have existed had the city continued to allow the shrine

110. *Id.*

111. *Id.*

112. 559 U.S. 700 (2010).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Sunagawa City Failure to Administer Property Case*, 64 SAIKO SAIBANSHO MINJI HANREISHU [MINSHU] no. 1 (gyo-tsu No. 334) [Grand Bench 2010].

118. *Id.*

119. *Id.*

on its land free of charge.<sup>120</sup> Thus, the facts of the case differ in an important way from the facts in *Sunagawa City I*.<sup>121</sup>

A Petty Bench of the Japanese Supreme Court decided a follow up case to the *Sunagawa City I* case in 2012.<sup>122</sup> I will refer to the 2012 case as *Sunagawa City II*. As explained above, the case involved a Shinto Shrine on local government property in Sunagawa City in Hokkaido. The land was originally private, but was donated to the city by the landowner for tax reasons.<sup>123</sup> The Supreme Court found violations of Article 20, paragraph 1 and Article 89, in *Sunagawa City I*<sup>124</sup> but remanded the case to see whether any “rational and realistic alternative means” other than total removal of the shrine were possible.<sup>125</sup> This case was decided based on the City’s actions after remand.<sup>126</sup>

After the decision in *Sunagawa City I*, the city and the Shinto group agreed to have the shrine materials removed from the public building and relocated near the Tori at the group’s expense, which would make the shrine much smaller in area and allow the group to rent that land from the city at a reasonable cost.<sup>127</sup> The Court upheld this arrangement.<sup>128</sup> Three factors seemed relevant to the holding. First, the shrine was there before the land was public, and a private entity would now be paying fair rent for its space and would no longer be occupying a public building. Second, the purpose and effect of the arrangement did not unconstitutionally favor religion.<sup>129</sup> Third, there was no “endorsement” of religion under these circumstances because a member of the public would not believe this arrangement promoted Shintoism.<sup>130</sup> Thus, the Court followed up on its earlier judgment with serious analysis of whether the post-remand arrangement was itself constitutional.

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120. *Id.*

121. *Id.*

122. *Sunagawa City II*, 66 SAIKO SAIBANSHO MINJI HANREISHU [MINSHU] no. 2 [1st Petty Bench 2012].

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

## IV. BENEFITS OF THE CURRENT APPROACH

The current approach to Article 20, paragraphs 1 and 3, and Article 89, is a vast improvement over the pre-1997 approach for several reasons. First, the *Ehime Tamagushi* Court addressed the historical reasons for its decision going back to the problems created by State Shinto during the Meiji, Taisho, and early Showa eras.<sup>131</sup> Second, the Court addressed the principles that underlay its legal analysis in much clearer terms than did the *Tsu City* Court.<sup>132</sup> Third, the approach in *Ehime Tamagushi* and its progeny is far more consistent with the actual language of Articles 20 and 89 than were the decisions in *Tsu City* and its progeny.<sup>133</sup> Finally, the post-1997 approach not only states the Constitutional principles and legal tests it is applying, but also takes the enforcement of judgments seriously.

Technically,<sup>134</sup> the idea of binding precedent is not required in Japanese law. But both the *Tsu City* and *Ehime Tamagushi* cases were followed by subsequent Courts (and lower courts). Perhaps most significantly, the *Ehime Tamagushi* Court's rejection of the *Tsu City* Court's reasoning has been followed by subsequent Courts.<sup>135</sup>

Still, none of the decisions subsequent to *Ehime Tamagushi* have been as explicit in their reasoning as that landmark case was. In fact, it can be argued that the *Sunagarwa City I* Court's order on remand, that the city should use any "rational and realistic alternative means" other than total removal of the shrine if possible, was a way to avoid enforcement of its judgement.<sup>136</sup> However, the subsequent action by the City after that case and discussion of that action by the Court in *Sunagarwa City II*, suggest that the Court continues to take the reasoning in *Ehime Tamagushi* seriously.

## VI. CONCLUSION

Rather than viewing the Japanese Supreme Court's Shinto cases as a single line of cases, this Article suggests that the cases fall into

131. *The Ehime Tamagushi Case*, 51 SAIKO SAIBANSHO MINJI HANREISHU [MINSHU] 1673.

132. *Id.*

133. *Id.*; NIHONKOKU KENPO [KENPO] [CONSTITUTION], art. 20 & art. 89 (Japan).

134. Shigenori Matsui, *Constitutional Precedents in Japan: A Comment on the Role of Precedent*, 88 WASH. U. L. REV. 1669 (2011).

135. *See supra* Part III.B.

136. *Sunagarwa City I*, 64 SAIKO SAIBANSHO MINJI HANREISHU [MINSHU] no. 1 [Grand Bench 2010].



two lines. Both of these lines of cases use related legal tests, but the application of the legal tests, as well as the guiding principles and historical analysis underlying that application, suggest two distinct periods in Japanese Supreme Court postwar establishment of religion cases. Those cases decided before 1997, and those cases decided after the landmark 1997 decision in *Ehime Tamagushi*.<sup>137</sup> Therefore, this Article suggests that the cases from 1997 until the present are far more consistent with the language and history of Articles 20 and 89 of the Japanese Constitution.

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137. *The Ehime Tamagushi Case*, 51 SAIKO SAIBANSHO MINJI HANREISHU [MINSHU] 1673.