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Hiroaki Kobayashi

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## Religion in the Public Sphere: Challenges and Opportunities in Japan

*Hiroaki Kobayashi*\*

### I. BACKGROUND

The difficulties involved in church-state relations are certainly nothing new in a global context. However, as recent high profile issues in France and the United States demonstrate, there has been a renewed popular interest in the debate. A year-old French statute banning the wearing of Muslim headscarves and other religious paraphernalia in public schools has received massive worldwide attention.<sup>1</sup> Almost concurrently, courts in the United States, including the Supreme Court, have considered both directly and indirectly whether the words “under God” in the pledge of allegiance violate the Establishment Clause of the U.S. Constitution.<sup>2</sup> These high profile cases, however, are just the tip of the iceberg.<sup>3</sup> They represent only a small portion of the many less-publicized or less-controversial cases dealing with church-state

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\* Professor of Jurisprudence Nihon University, Visiting Professor of Jurisprudence, Johannes Gutenberg University, Mainz, Germany.

1. Law No. 2004-228 of Mar. 15, 2004, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Mar. 17, 2004, p. 5190, available at <http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=MENX0400001L> (last visited Mar. 15, 2005). For a detailed comparative analysis of recent issues affecting religious freedom in France and the United States, see T. Jeremy Gunn, *Religious Freedom and Laïcité: A Comparison of the United States and France*, 2004 BYU L. REV. 419.

2. See *Newdow v. U.S. Cong.*, 292 F.3d 597 (9th Cir. 2002) (holding, inter alia, that the words “under God” in the pledge of allegiance are unconstitutional). This initial decision was subsequently revised to eliminate the holding that the words “under God” are unconstitutional. See *Newdow v. U.S. Cong.*, 328 F.3d 466 (2002). Instead, the court simply ruled that a California statute requiring teachers to lead students in daily recitation of the pledge was unconstitutional. *Id.* In a four to four decision, the U.S. Supreme Court avoided the material issue by holding that the plaintiff, Michael Newdow, did not have standing to bring the action. See *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301 (2004); see also Gunn, *supra* note 1, at 423, 479–502.

3. In another example, the recent and tragic case of Terri Schiavo shows how political questions very often have religious dimensions. See, e.g., Dana Milbank, *GOP, Democrats Look for Symbolism in Schiavo Case*, WASH. POST, Apr. 1, 2005, at A12.

separation and religious freedom in many countries worldwide. All of these cases, however, necessarily involve a determination about the appropriate level of government involvement in the lives of citizens and their religious practices. The issues raised by these cases have significance in every free nation because they impact the right of individuals to live and worship as they choose.

As in many countries, Japanese lawmakers and courts have confronted and continue to address the issue of separation of church and state in specific contexts relevant to the global discussion. In one notable Japanese case, the Supreme Court of Japan examined whether local governments could sponsor a traditional Shinto ceremony as a part of the groundbreaking ceremony of a government building.<sup>4</sup> More recently, visits by important public figures, including the Prime Minister, to the controversial Yasukuni shrine, which honors those who died while serving in the Japanese military or Self Defense Forces, have sparked both domestic and international controversy over the separation of church and state in Japan.<sup>5</sup>

Legal analysis of such issues is often complicated by the close connection between Japanese history and culture and Japan's centuries-old religious traditions.<sup>6</sup> Judges and lawmakers often find themselves treading a tenuous line between governmental respect of cultural traditions and improper or unconstitutional interference with, or advancement of, religious practices. Significant differences of opinion remain about where the line should be drawn—differences that are not likely to subside in the foreseeable future.

Although the discussion of the proper place for religion in the public sphere has great significance for religious freedom in every country, it is well known that the status of religion in the public sphere differs from nation to nation. The central focus of this paper is to analyze and identify precisely how “religion in the public

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4. See *Kakunaga v. Sekiguchi*, 31-4 MINSHŪ 533 (Sup. Ct., July 13, 1977), reprinted in LAWRENCE W. BEER & HIROSHI ITOH, *THE CONSTITUTIONAL CASE LAW OF JAPAN, 1970 THROUGH 1990*, at 478-91 (1996).

5. See, e.g., Norimitu Onishi, *Ad Man-Turned-Priest Tackles His Hardest Sales Job*, N.Y. TIMES, Feb. 12, 2005, at A3 (reporting appointment of a new high priest at Yasukuni Shrine and discussing political pressure by China on Prime Minister Koizumi to stop his visits to the shrine).

6. See, e.g., *Japan v. Nakaya*, 42-5 MINSHŪ 277 (Sup. Ct., June 1, 1988), reprinted in BEER & ITOH, *supra* note 4, at 492; *Kakunaga*, 31-4 MINSHŪ 533, reprinted in BEER & ITOH, *supra* note 4, at 478.

sphere” operates in modern Japan. To help the reader attain a workable understanding of the contemporary relationship between church and state in Japan, this paper introduces some foundational concerns in the Japanese church-state dynamic. Specifically, Part II surveys the history and character of church-state relations in Japan. Parts III, IV, and V discuss freedom of religion in Japan in the various contexts of the Japanese Constitution and its ramifications for religion in public fora, in judicial decisions, and in the treatment of religious education in public schools. Part VI summarizes the place of religion in the public sphere in modern Japan, and Part VII concludes that the state can and should retain a neutral disposition with regard to religion, which would allow it to avoid being either nonreligious or antireligious. This Article will ultimately conclude that government neutrality vis-à-vis religion should not be construed to require the surgical removal of the positive influences of religious history and traditional religious values that properly inform a country’s constitutional structure.

## II. THE HISTORY AND CHARACTER OF CHURCH-STATE RELATIONS IN JAPAN

### *A. The Interrelation of Religion, Culture, and Religious Relativism*

The church-state debate in Japan is complicated because Japanese culture and religion are not easily separated. The religious life of the Japanese people can be seen in the interplay between Shinto and Buddhism. Most Japanese worship at Shinto shrines at the beginning of the year and participate in Buddhist memorial services for their ancestors during the summer. They will generally celebrate their birth by Shinto ritual, hold their wedding ceremony according to Shinto or Christian tradition,<sup>7</sup> and be buried in a Buddhist ceremony.<sup>8</sup>

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7. Thirty-five percent of marriages in the Tokyo (Kanto) area, and twenty-four percent of marriages in the Kyoto-Osaka (Kansai) area are performed by Christian ceremony.

8. See Tokihisa Sumimoto, *Religious Freedom Problems in Japan: Background and Current Prospects*, 5 INT’L J. PEACE STUD., Autumn/Winter (2000), [http://www.gmu.edu/academic/ijps/vol5\\_2/sumimoto.htm](http://www.gmu.edu/academic/ijps/vol5_2/sumimoto.htm) (last visited Mar. 21, 2005); Scott M. Lenhart, Note, *Hammering Down Nails*, 29 GA. J. INT’L & COMP. L. 491, 512–13 (2001). Many Japanese also participate in Shinto memorial services. See Nakaya, 42-5 MINSHŪ 277, reprinted in BEER & ITOH, *supra* note 4, at 492–516 (1996) (describing litigation brought by the wife of a

Both historically and currently, it is uncommon for a Japanese person to believe in only one religion or one god and devote his or her whole life to that one religion or god. The Japanese “religious population” is often calculated at more than 220 million, despite the fact that the entire population of Japan is only 130 million.<sup>9</sup> This implies what is generally known to be true: the typical Japanese belongs to more than one religious organization.<sup>10</sup> Today’s modern Japanese typically belongs to a Buddhist sect because of family tradition<sup>11</sup> and is affiliated with the local Shinto shrine because he is a member of the community.<sup>12</sup>

One of the reasons that Christianity and other “new religions” (such as Aum Shinrikyo, Tenrikyo, Omotokyo, and Soka Gakkai)<sup>13</sup> have been alienated from Japanese society lies in the fact that for many Japanese, the exclusivity requirements of these religions are at odds with their traditional pluralistic religiosity.<sup>14</sup>

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Japanese Self-Defense Force member who opposed his post-mortem enshrinement because of her Christian faith).

9. See Kenichi Asano, *Japan’s Imperial-Era Society: From the Anti-AUM Movement to the Elimination of all Heterodoxies*, [http://www.cesnur.org/testi/aum\\_018.htm](http://www.cesnur.org/testi/aum_018.htm) (last visited Mar. 21, 2005).

10. See *id.*

11. See, e.g., Sumimoto, *supra* note 8.

During the Tokugawa period (1600-1868), Japanese Buddhism was formally incorporated into the feudal administrative institution . . . [and] required every household to be affiliated with a particular Buddhist temple. . . . Although the law establishing this system was rescinded in 1871, to this day many families still feel a special obligation to the temple with which their ancestors were registered . . .

*Id.*

12. See 2 RELIGIONS OF THE WORLD: A COMPREHENSIVE ENCYCLOPEDIA OF BELIEFS AND PRACTICES 718 (J. Gordon Melton & Martin Baumann eds., 2002) [hereinafter 2 RELIGIONS].

13. “New religion” refers loosely to those religions that have arisen in Japan during the last century.

14. Obviously, there are other reasons as well. For example, the Tokugawa Shogunate began to fear the increased power of foreign missionaries. For a fictional account of persecutions imposed on Japanese Christians in the 1600s, see SHUSAKU ENDO, CHINMOKU [SILENCE] (1966). Presently in Japan, it is estimated that ten to twenty percent of the total population are now associated with “new religions,” whereas Japanese Christians constitute less than one percent of the population. For a general discussion of the historical interaction between Shinto and Buddhism, see *Kakunaga v. Sekiguchi*, 31-4 MINSHŪ 533 (Sup. Ct., July 13, 1977) (Fujibayashi, C.J., dissenting), *reprinted in* BEER & ITOH, *supra* note 4, at 488.

*B. The Emperor in Shinto and Buddhism*

In addition to the pluralistic religiosity of Japanese history and culture, the emperor, as the traditional personification of government, has historically had a prominent connection to religious sites, ceremonies, and customs. For example, the Emperor is traditionally seen as the chief priest of Shinto, and the prominent Ise Shrine—often considered the most important Shinto shrine—is closely related to the imperial family.<sup>15</sup>

Similarly, Buddhism has long often been affiliated with the Imperial family. When Buddhism was introduced into Japan from the Korean peninsula in AD 538, it received considerable political support from Prince Shotoku (574-622).<sup>16</sup> Two hundred years later, the Todaiji Temple was built in Nara, then the resident city of the emperor. The building of this important temple in the city of the emperor implied that Buddhism was integrated with his political authority.<sup>17</sup> Since then, Buddhism has been advanced as the religion that advocates the security and protection of the state,<sup>18</sup> and consequently, it has flourished under state and imperial auspices.<sup>19</sup>

*C. Freedom of Religion in the Meiji Period and the Unique Position of Shinto*

While Buddhism burgeoned for much of Japan's history, from the Meiji Restoration period (1866-1869) until the end of World War II, "State Shinto" was the national religion under Japan's constitutional monarchy.<sup>20</sup> During this period, the government

15. See JOSEPH M. KITAGAWA, *RELIGION IN JAPANESE HISTORY* 168 (1990). Moreover, the priests of the prominent Shinto shrines keep actual ties of wedlock with the Imperial Household. See generally *id.* at 30–38.

16. See 4 RELIGIONS OF THE WORLD: A COMPREHENSIVE ENCYCLOPEDIA OF BELIEFS AND PRACTICES 1165 (J. Gordon Melton & Martin Baumann eds., 2002) [hereinafter 4 RELIGIONS]. Prince Shotoku even built the Horyuji Temple, which boasts some of the world's oldest wooden structures and is still an important Buddhist site. See generally Horyuji: A Brief History, [http://www.horyuji.or.jp/horyuji\\_e.htm](http://www.horyuji.or.jp/horyuji_e.htm) (last visited Mar. 18, 2005).

17. See KITAGAWA, *supra* note 15, at 35.

18. See 2 RELIGIONS, *supra* note 12, at 718.

19. See *supra* note 11. Like the priests of prominent Shinto shrines, the priests of the head temples of the main Buddhist denominations continue to keep ties of wedlock with the Imperial Household. See generally KITAGAWA, *supra* note 15, at 30–38.

20. See *Kakunaga v. Sekiguchi*, 31 MINSHŪ 4, 533 (Sup. Ct. July 13, 1977) (Yoshida, J., dissenting), reprinted in BEER & ITOH, *supra* note 4, at 483–85; 2 RELIGIONS, *supra* note 12, at 718.

ordered the separation of Shinto from Buddhism,<sup>21</sup> enacted the Religious Organization Law—which largely brought the religious activities of the Japanese people under state control—and generally regulated non-Shinto religious activity.<sup>22</sup> The State suppressed and persecuted Christianity and other “new religions” because of their perceived incompatibility with the traditional imperial system.<sup>23</sup> The State further coerced people to submit to State Shinto as the national religion and rejected religions that advocated worldwide universalism.<sup>24</sup> Finally, the State guaranteed religious freedom only “within limits not antagonistic to Japanese citizens’ duties as subjects of the emperor”—a caveat based on the assumption that the religious authority of the emperor would be absolute.

Although the “duties as subjects” referred to secular duties such as military service, tax payment, and obedience to established law, it did not refer to worship at a Shinto shrine.<sup>25</sup> By fusing religious principles with secular civic duties through the previously mentioned limitations on non-Shinto religions and the worship of the emperor as a *kami*,<sup>26</sup> the State made Shinto both a religious and secular phenomenon. In many ways, however, the State treated Shinto as a “non-religion.”<sup>27</sup> For example, while all non-Shinto religions were under the jurisdiction of the Education Ministry, Shinto was under the jurisdiction of the Interior Ministry.<sup>28</sup> Furthermore, the State prohibited Shintoists from recruiting new members or practicing Shinto funeral rites and limited the subsidy for shrines to ten percent of legitimate expenses. Thus, although it is commonly believed that the national government protected Shinto, the reality for Shinto believers was very different. The fact is, the established

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21. This separation is commonly called the Haibutsu-Kishaku.

22. See KITAGAWA, *supra* note 15, at 278–79.

23. During World War II, state control over religions intensified, and the state restricted the activities of Christian churches that were regarded as conflicting with the national polity (*kokutai*). This is because Christianity and many new religions were largely seen as threats to those who wanted to maintain the status quo.

24. See KITAGAWA, *supra* note 15, at 200–03.

25. AKIRA MOMOCHI, *KENPO TO SEIKYOBUNRI* [THE CONSTITUTION AND SEPARATION OF CHURCH AND STATE] 31 (1991); Takeshi Hirano, *Meijikenpokano Seikyokankei* [State-Church-Relations under the Meiji-Constitution], 52 KOHOKENKYU 64 (1990).

26. The kami are the Shinto deities. The word “kami” is generally translated “god” or “gods.” However, the kami bear little resemblance to the gods of monotheistic religions.

27. MOMOCHI, *supra* note 25, at 30.

28. See KITAGAWA, *supra* note 15, at 212.

State Shinto was more concerned with civic duty than religious ritual,<sup>29</sup> and even legitimate Shinto religious rituals were regulated by the State.

It is thus inaccurate to say that State Shinto has ever been the established religion of Japan in the same way that Christianity was the established religion of much of Europe or that Islam is the established religion of some Middle East countries. As the regulation of State Shinto leading up to and during World War II demonstrates, religion in Japan has been subjected to State power, yet religion has not exercised power over the State.

Despite a history of government regulation of religion, the current problem of church-state relations in Japan involves divining how best to liberate the religious practice of individuals and their organizations from excessive or unnecessary intervention by the national government. More specifically, the challenge is how to make the State respect religious freedom given the past church-state dynamic.

### III. FREEDOM OF RELIGION IN THE JAPANESE CONSTITUTION

Two conflicting forces have shaped the government's treatment of religion during the postwar period. First, the new constitution imposed by the Allied Occupation Forces not only disestablished State Shinto (perhaps as an act of repentance for the religious policy of the Meiji era), but its language seemingly excluded religion from the public arena entirely and set the groundwork for a rigid separation of church and state.<sup>30</sup> Second, the Religious Corporation Law (1951) offered religions protection and generous treatment under the tax system.

The Religious Corporation Law, which was implemented as part of the postwar revised constitution, sought the protection of religion generally and was a form of governmental repentance for the unjustified suppression of religious organizations in prewar times. The basic assumption of the law is that registered religious organizations contribute to the public good; therefore, economic activities and public utilities are permitted to support religious

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29. For an in depth discussion of State Shinto during the Meiji era, see KITAGAWA, *supra* note 15, at 177–261; *see also* 4 RELIGIONS, *supra* note 16, at 1167–68.

30. *See generally* KENPŌ [Constitution] art. 89 (Japan).

activity. To this end, the law established 180,000 independent religious “corporations.”

The Religious Corporation Law leveled the playing field for all religions, which means that Buddhism and Shinto now have a legal status equal to that of minority religions, including Christianity. In this respect, the legal enfranchisement and protection of religious minorities was established. Moreover, under the Religious Corporation Law, the range of permitted activities for religious organizations is very broad, with few formal rules regulating religion.

This Part will explain the relevant legal provisions regarding religion under the Japanese Constitution and will demonstrate that these constitutional provisions have been misapplied, thereby shifting the focus from the general protection of religious freedom to efforts to enforce a rigid separation of religion and state. This Part suggests ways to properly identify and interpret the separation doctrine as a means of achieving religious freedom and encourages a broader sense of religious neutrality that is more generous and tolerant to the free exercise of religious tenets.

*A. “Freedom of Religion” Articles in the Japanese Constitution*

To fully examine the constitutional basis for religious freedom in Japan, it is necessary to briefly note the American jurisprudential influence on Japanese law following World War II. After World War II, the occupation forces, consisting mainly of U.S. personnel, drafted a new Japanese Constitution that superseded the Meiji Constitution and is still in effect today. The Japanese Government submitted it to the Diet, which adopted it subject to a degree of oversight, revision, and censorship by the occupation forces.<sup>31</sup>

Accordingly, the articles relating to the freedom of religion are based in large part on a western, and more specifically an American, way of thinking about religious jurisprudence and culture.<sup>32</sup> Naturally, both the academic community and the courts followed the judicial precedents established in the United States on the subject of church-state relations.<sup>33</sup> With this historical understanding, it is now

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31. See HIROAKI KOBAYASHI, *DER PAZIFISMUS IN JAPAN* [THE PACIFISM IN JAPAN] 18 (1998).

32. This development may be demonstrative of the spiritual and legal control that can be exercised by occupation forces over an occupied nation in a state of lethargy after its defeat.

33. See, e.g., NOBUHIKO TAKIZAWA, *KOKKA TO SHUKYO NO BUNRI* [SEPARATION OF STATE AND RELIGION] (1985); Yasuhiro Okudaira, *Kenpososho no Kido to Riron* [Track and

possible to examine the constitutional and judicial aspects of religious freedom in Japan.

The constitutional provisions dealing with religion are Articles 20 and 89:

Article 20:

- (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, rite or practice.
- (3) The state and its organization shall refrain from religious education or any other religious activity.<sup>34</sup>

Article 89:

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>35</sup>

Pursuant to these provisions, the State is obliged to take a neutral and nonunifying attitude toward all religions and denominations. Moreover, regardless of whether it is perceived as an “established” or a “new religion,” the permitted range of religious activities under the current constitution is considerably broad, and there are few rules regulating religion.<sup>36</sup> Consequently, the need for a special body of law to protect religious minorities is rarely, if ever, seriously discussed within academic circles.<sup>37</sup>

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*Theory of Lawsuits Concerning the Constitution*], Hogaku Seminar, 1983; Hideo Tsuchiya, *Amerika Gashukoku ni okeru Seikyobunri* [*Separation of Church and State in the United States: Analysis of Characteristics of the Federal Supreme Court*], 98 KOKKAGAKUZASHI. Nos. 11 & 12 (1985).

34. KENPŌ [Constitution] art. 20 (Japan).

35. *Id.* art. 89.

36. *See* Religious Corporation Law (1951).

37. One of the few contexts in which religious minorities are ever discussed in Japanese academia involves a problem called “deprogramming,” which involves an attack by members of a religious minority (the Church of Christ in Japan associated with leftist lawyers) against members of a different religious minority (Unification Church members). *See* U.S. DEP’T OF STATE, ANNUAL REPORT ON INTERNATIONAL RELIGIOUS FREEDOM, JAPAN (1999)

Nevertheless, the constitutional command that the state maintain a neutral and nonunifying attitude towards all religions was not designed to mandate the state's indifference toward, withdrawal from, or antagonism against religion. Consequently, I believe that the rigid separation of church and state, as currently interpreted, results in a complete removal of religion from national life and fosters a suppression of religious freedom.<sup>38</sup> Nonetheless, the theory of a rigid separation of church and state has been the mainstream principle underlying church-state relations in postwar Japan.<sup>39</sup>

*B. Freedom of Religion and the Separation of Church and State*

In seeking a separation of church and state, it is important to remember that enforcing such a separation should be only a means to the end of protecting religious freedom.<sup>40</sup>

The concept of freedom of religion originated in the Reformation of the early sixteenth century. Together with freedom of conscience, it is one of the oldest and most fundamental of human rights.<sup>41</sup> Freedom of religion applies to both individuals and organizations. For individuals, freedom of religion refers, internally, to the freedom to have the religious faith of one's own choice or to have none at all. Externally, it refers to the freedom to conduct deeds, rituals, or proselytizing activities based on that religious faith. For an organization, freedom of religion refers to the freedom to carry out its religious activities (including political activities) in a

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(describing deprogramming as kidnapping and false confinement of an adult). However, this is an issue involving the interaction of religious minorities in Japan, rather than the *constitutional* protections of religious minorities.

38. For example, since the end of World War II there have been numerous calls to prohibit the Emperor or Prime Minister from visiting the Yasukuni Shrine, all based on a strict interpretation of the separation of church and state. This not only infringes upon the individual religious freedom of these officers but also ignores the fact that many Japanese support visiting this shrine as a matter of expressing the nation's continued appreciation for the war dead. *See infra* notes 97 to 101 and accompanying text.

39. The effects of this principle can be seen in two fields; one is in the judicial decisions concerning the separation of church and state, and the other is the state policies governing religious education.

40. *See* Akira Momochi (1991), *op. cit.* p. 68 [hereinafter Momochi (1991)].

41. *See* HIROAKI KOBAYASHI, *RYOSHIN NO JIYU TO KOKKA* [THE FREEDOM OF CONSCIENCE AND THE STATE] 1-42 (Seiko-Priplan 1995); *see also* Kevin J. Worthen, *Introduction*, 2004 BYU L. REV. 1093, 1094 n.6.

broad sense.<sup>42</sup> Ensuring some separation between the state and established religion is necessary as a means to achieving true religious freedom.<sup>43</sup> In Japan, however, the separation of church and state has often been seen not as a means of securing religious freedom but as an end in itself.<sup>44</sup>

To ensure that freedom of religion is, in fact, the constitutional goal, it is necessary to:

1. Set aside the issue of separation of church and state for the time being;<sup>45</sup>

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42. The assertion in the text that religious organizations should be free to carry out political activities is not in conflict with the constitutional command that “[n]o religious organization shall . . . exercise any political authority.” KENPŌ [Constitution] art. 20(3) (Japan). The constitutional command is concerned with preventing religious groups from exercising *actual* political authority (as a political party for example), rather than with promulgating their position on political issues or even in lobbying. It would be odd for the Japanese Constitution to prohibit any political activity by religious groups when the American Constitution—which is the primary foundation, if not the sole basis, of the Japanese Constitution—allows, and sometimes under the Free Speech Clause guarantees, religious organizations the ability to participate in lobbying and other political activities. See *Rosenberger v. Rector*, 515 U.S. 819, 839 (1995) (“More than once have we rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design.”).

43. See Momochi (1991), *supra* note 40, at 68.

44. This may be because the Japanese Constitution was given as a “gift” by the U.S. occupation forces, who somewhat clumsily meshed American concepts of Free Exercise and Establishment into one article. See KENPŌ [Constitution] art. 20(1) (Japan).

45. See Hiroaki Kobayashi, *Nishidoitsu ni okeru Seikyobunri* [Separation of Church and State in West Germany], in 22 KENPOKENKYU [The Journal of Constitutional Law] 19 (1990). This assertion is not so radical in other countries. For example, there are only two German language monographs with a title that includes the phrase “Trennung von Staat und Kirche” (Separation of Church and State). They are: Z. GIACOMETTI, *QUELLEN ZU GESCHICHTE DER TRENNUNG VON STAAT UND KIRCHE*, TUEBINGEN [SOURCES OF THE HISTORY OF THE SEPARATION OF CHURCH AND STATE, TUEBINGEN] (1926); and E. FISCHER, *TRENNUNG VON STAAT UND KIRCHE: RELIGIONSFREIHEIT IN DER BUNDESREPUBLIK* [SEPARATION OF CHURCH AND STATE: RELIGIOUS FREEDOM IN THE GERMAN REPUBLIC] (1964). It is true that there are constitutional scholars who distinguish “the separation of church and state in a broad sense” and “the separation of church and state in a narrow sense.” The former is interpreted as the “prohibition of mutual intervention between politics and religion,” and is placed as a fundamental principle of a modern state (and is sometimes even regarded as absolute and universal in present era). It stands up alright as a theory. However, I believe that it is potentially dangerous to treat “mutual intervention between politics and religion” as a constitutionally mandated “separation of church and state” issue, whether in a “broad sense” or a “narrow sense,” because such treatment confuses the relationship between the purpose (religious freedom) and the method (separation of church and state). Originally, even under the Japanese Constitution, “the separation of church and

2. Recognize “neutrality of the state toward religions, religious sects and philosophies of life” (*Weltanschauungen*);
3. Clarify the differences and commonalties between the tasks of the state and those of religious organizations;
4. Respect the mutual independence of the state and religious organizations; and then
5. Examine, where necessary, the possibility of separating or supplementing one another.

In the current social environment in Japan, with its various forms of religious faith and philosophies of life, it is virtually impossible for the state to take any attitude other than neutrality towards religion, expressed in the principled attitude of generosity.<sup>46</sup> The constitutional mandate for the state to take a neutral attitude toward religions and philosophies of life is, at its root, nothing but a mandate to take a generous or tolerant attitude toward them.<sup>47</sup> Saying that government should be tolerant towards religions is simply a recognition that denying benefits or otherwise being ungenerous or intolerant to religions or religious believers would infringe on the latter’s right to freely exercise their religion. It is wrong to assume that the requirement of neutrality gives a secular state a mandate to take an intolerant attitude toward religious believers.

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state” is not a directly defined “source of the law;” rather it is a scholarly concept for easy comprehension. AKIRA MOMOCHI, SEIKYOBUNRI TOWA NANIKA - SOTEN NO KAIMEI [WHAT IS SEPARATION OF CHURCH AND STATE? CLARIFICATION OF ISSUES] 8 (1997); Hiroaki Kobayashi, *Glaubensfreiheit und Aufstellen von Kreuzen im Gerichtssaal im Lichte der Entscheidung des Bundesverfassungsgerichts* [*Religious Freedom and the Display of Crosses in Courtrooms in Light of the Decision of the Federal Constitutional Court*], 34 SEYKEIKENKYU 529 (1998) (Japanese); Hiroaki Kobayashi, *Glaubensfreiheit und Schulgebet im Lichte der Entscheidung des Bundesverfassungsgerichts* [*Religious Freedom and School Prayer in Light of the Decision of the Federal Constitutional Court*], 34 SEYKEIKENKYU 229 (1998) (Japanese).

46. See R. Herzog Komm. zu art. 4 GG. in Maunz/Durig/Herzog/Scholz. Grundgesetz. 3. Aufl.1989. Rdnr. 19f.

47. See Zippelius. Kom. zu art. 4 CG. in Bonner Komm. (2. Bearb.) Rdnr. 2ff. 5.

IV. CRITERIA FOR THE SEPARATION OF CHURCH AND STATE IN  
JUDICIAL DECISIONS

*A. The Separation of Church and State as a Judicial Ideal*

In Japan there is a consensus that the separation of church and state is a foundation to guarantee the freedom of religion.<sup>48</sup> There are, however, differences of opinion as to whether the separation of church and state is the means of ensuring freedom of religion, or whether the two concepts are inseparably united, concomitant terms.

The view that the separation of church and state is the essential prerequisite for religious freedom does not, however, enjoy universal approval. Nevertheless, both in theory and in Japanese judicial decisions, there are those who support it.<sup>49</sup> In fact, many judicial decisions endorse a view of strict separation premised on the belief that such separation is required to protect religious freedom. For example, in perhaps the most important Supreme Court decision on the issue, *Kakunaga v. Sekiguchi*, announced in 1977, the dissent idealized the separation of church and state. It noted that “a correct interpretation of the principle of separation of religion and State embodied in [the Japanese Constitution] would require absolute separation, that is, that religion and the State should be mutually independent with no connecting ties.”<sup>50</sup> Twenty years later, in a case brought against the governor and administrators of Ehime Prefecture, *Anzai v. Shiraishi*, the majority of the Court echoed that sentiment in concluding that “the [c]onstitution 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>51</sup> In

48. See Momochi (1991), *supra* note 40, at 9.

49. *Id.* at 76.

50. 31-4 MINSHŪ 533 (Sup. Ct., July 13, 1977) (Yoshida, J., dissenting), *reprinted in* BEER & ITOH, *supra* note 4, at 484.

51. 51-4 MINSHŪ 1673 (Sup. Ct., Apr. 2, 1997) (an English translation is available at <http://courtdomino.courts.go.jp/promjudg.nsf/ffc82a0a5fb61e504925648f00352937/647ec01fcfd520f74925680e001e611f?OpenDocument> (last visited May 18, 2004)). In the next paragraph, though, the court states a more nuanced approach to the separation of state and religion:

[T]he state unavoidably connects with religion when the state regulates social life or implements various policies to promote or subsidize education, social welfare, or culture. Thus, an actual system of government that attempts a total separation would inevitably lead to unreasonable situations in society. Thus, it follows that there are inevitable and natural limits to the separation of state and religion.

both cases, the Court or the dissent made this assertion without providing any grounds to support it. Their boldness in making such an assertion without any significant support is astonishing. It is an assertion that goes beyond the stance adopted in the United States, the mother country of the occupation forces that imposed upon Japan the constitution and its religious freedom provisions.<sup>52</sup>

*B. Criteria for the Separation of Church and State  
in Judicial Decisions*

*1. Separation of church and state in United States Supreme Court decisions*

In recent U.S. Supreme Court decisions, the majority of the Court has identified several principles that courts must consider when addressing whether a law violates the Establishment Clause of the U.S. Constitution. For example, the government cannot endorse any religion in a general or specific manner that a reasonable observer would interpret as preferential or favoring a particular religion.<sup>53</sup> Furthermore, the government cannot engage in any activity that has a primarily religious purpose, even if it is facially neutral,<sup>54</sup> and the government cannot directly or indirectly provide aid to religion.<sup>55</sup> Because these principles are relatively broad and have resulted in some confusion and inconsistency throughout the relevant case law, the U.S. Supreme Court has gradually developed more specific rules, but even these have generated controversy and have been criticized for being overly vague.<sup>56</sup>

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*Id.*

52. For a careful analysis of the *Kakunaga* decision in an American law review, see David M. Beatty, *The Forms and Limits of Constitutional Interpretation*, 49 AM. J. COMP. L. 79, 112–16 (2001).

53. See *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (holding that a nativity scene prominently displayed in a court house constituted an impermissible government endorsement of religion).

54. See, e.g., *Aguilar v. Felton*, 473 U.S. 402 (1985).

55. See *Mitchell v. Helms*, 530 U.S. 793 (2000) (holding that aid given to Catholic schools under a federal program subject to express conditions that the aid be used for secular purposes and that monitoring occur to ensure compliance did not violate the Establishment clause). The implication of *Mitchell* is that had the federal funds gone to religious education, the aid would have violated the Establishment Clause. *Id.*

56. The Court has at times attempted to follow its own three part “Lemon test,” requiring that to be constitutional: (1) a government action must have a secular legislative

Despite this confusion, it is clear that if the law in question violates one of the three broad principles outlined above, it is regarded as a law to establish a state religion and is consequently unconstitutional.<sup>57</sup> Nevertheless, the reality in America is that various religious practices are embedded in the life of the people in America as a whole;<sup>58</sup> thus, even today, church and state in America are far from being separated completely.

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purpose; (2) the action's principal purpose or primary effect must be one that does not advance or inhibit religion; and (3) the action must not engender an excessive government entanglement with religion. *See Lemon v. Kurtzman*, 403 U.S. 602 (1971). However, the Court has concluded that the test is too abstract and vague to be effective in fact specific situations and has had to generate ad hoc rules according to the cases that have come before it. Consequently, the *Lemon* test has become a rule generation device more than a specific test to be precisely applied in any given situation. *See* EUGENE VOLOKH, *THE FIRST AMENDMENT: PROBLEMS, CASES AND POLICY ARGUMENTS* 724–25 (2001).

57. *See, e.g.*, *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1992).

58. For example, the oath of office administered to every U.S. President is constitutionally prescribed, in accordance with Article II, Section I of the U.S. Constitution: "I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States." While the required text has no reference to religion, the first U.S. president, George Washington, recited the oath adding extemporaneously the words "so help me God." Since then, it has become tradition to likewise add the reference to God. *See Wolfe Blitzer Reports: Bush Inauguration Ceremony About to Begin* (CNN television broadcast, Jan. 20, 2005) (transcript available at 2005 WLNR 809324); *see also* Delia M. Rios, *President's Faith Viewed as Zealotry: Most Presidents Have Spoken of Religion*, *TIMES-PICAYUNE* (New Orleans, LA), Nov. 23, 2004, available at <http://www.nola.com/news/t-p/washington/index.ssf?base/news-0/110119845762010.xml>.

The annual observance of Thanksgiving is also a cherished American tradition that was memorialized by the first U.S. president, George Washington. In 1789, he issued the first Presidential Thanksgiving proclamation declaring a day of "thanksgiving and prayer." Also, in his first inaugural address, President Washington declared, "No people can be bound to acknowledge and adore the Invisible Hand which conducts the affairs of men more than those of the United States." Subsequently, Congress passed a joint resolution requesting the President establish "a day of public Thanksgiving and Prayer, to be observed by acknowledging with grateful hearts the many and signal Favors of Almighty God." As referenced by President George H.W. Bush, in President Washington's first such proclamation, he wrote, "It is the Duty of all Nations to acknowledge the Providence of Almighty God, to obey his Will, to be grateful for his Benefits, and humbly to implore His Protection and Favor." *See* Proclamation No. 6073, 54 Fed. Reg. 48,225 (Nov. 17, 1989). The current U.S. president proclaimed the days around September 11 as "National Days of Prayer and Remembrance." *See* Proclamation No. 7811, 69 Fed. Reg. 55,715 (Sept. 10, 2004). Congress has similarly asked the President to declare a National Day of Prayer on the "first Thursday in May as a National Day of Prayer on which the people of the United States may turn to God in prayer and meditation at churches, in groups, and as individuals." *See* 36 U.S.C. § 1 (2000).

In fact, many of the officially recognized U.S. holidays reference or recognize religiously oriented holidays such as Christmas, Thanksgiving, Memorial Day, etc. *See* 5 U.S.C. § 6103

2. *The separation of religion and states in Japanese judicial decisions—  
from Kakunaga to Anzai*

The first lawsuit in Japan in which an all-out polemic was conducted over the issue of the constitutional separation of church and state, *Kakunaga*, concerned a Shinto ceremony purifying a building site in Tsu City. The appellate court judge applied the theory of rigid separation, holding the involvement of the local government in a Shinto ceremony unconstitutional.<sup>59</sup>

The Supreme Court, however, adopted a more permissive theory of limited separation based on a “purpose-effects test,” which looks at whether the government purpose behind the challenged conduct was to advance religion or whether it had that effect.<sup>60</sup> The majority concluded that even if there were religious implications to the ceremony, because the purpose of the groundbreaking at the building site was “chiefly secular[,] [i]t will not have the effect of promoting or encouraging Shinto or of oppressing or interfering with other religions.”<sup>61</sup> Therefore, the Court held, it was permissible for the city to make a courtesy donation to the Shinto priest.<sup>62</sup> The Supreme Court has since reaffirmed this stance in a case concerning a joint memorial service for the members of the Self Defense Forces who died on duty.<sup>63</sup> With these decisions, it appeared that the theory of limited separation had become an established precedent under Japanese law.

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(2000). Also, many of the patriotic and national hymns and anthems of the United States include references to deity; consider “God Bless America” and “The Star Spangled Banner.” Since 1923, U.S. presidents also light a “National Christmas Tree” outside the White House every year near Christmas (December 25) to celebrate the “holiday spirit.” See THE WHITE HOUSE, PAGEANT OF PEACE: THE NATIONAL TREE, at <http://www.whitehouse.gov/president/holiday/tree/> (last visited Mar. 21, 2005). While portrayed as an inclusive cultural event, this act clearly has religious undertones relating to the Christian commemoration of Christmas.

59. Decision by the High Court at Nagoya, 22 Collection of Precedents No. 5, 680 (High Ct., May 14, 1971).

60. *Anzai v. Shiraishi*, 51-4 MINSHŪ 1673 (Sup. Ct., Apr. 2, 1997).

61. *Kakunaga v. Sekiguchi*, 31-4 MINSHŪ 533 (Sup. Ct., July 13, 1977), reprinted in BEER & ITOH, *supra* note 4 at 483.

62. *Id.*

63. See *Japan v. Nakaya*, 42 MINSHŪ 5, at 277 (1988), reprinted in BEER & ITOH, *supra* note 4, at 492–516 (describing litigation brought by the wife of a Japanese Self-Defense Force member who opposed his post-mortem enshrinement/deification because of her Christian faith).

After *Kakunaga*, the lower courts tended to adopt the theory of limited separation until the 1980s. Around this time, lower Japanese courts rendered an increasing number of judgments reflecting adherence to the theory of rigid separation. For example, local and appellate cases dealing with issues such as joint memorial services for the members of the Self Defense Forces who died on duty,<sup>64</sup> a ceremony celebrating the completion of a monument to the loyal dead,<sup>65</sup> a ceremony to comfort the spirits of the dead,<sup>66</sup> and the donation of public money for a Shinto ceremony<sup>67</sup> all demonstrated the prevailing philosophies of the lower courts: in each case, based on theory of rigid separation, the courts found the practices unconstitutional.

The Supreme Court reviewed this last case, *Anzai v. Shiraishi*, and ostensibly applied the more flexible “purpose-effects test” to a situation involving donations to Shinto shrines by government officials of the Ehime Prefecture.<sup>68</sup> However, the Court applied this test rigidly and found the donations unconstitutional.<sup>69</sup>

As one of the most recent major decisions on the issue of church-state separation, the *Anzai* decision merits further explication. From 1981 to 1986, the Governor of Ehime Prefecture instructed subordinates to make contributions from public money to both the Yasukuni Shrine in Tokyo and the Gokoku Shrine in Ehime.<sup>70</sup> Each donation was rather small—¥5,000 (approximately \$50) to the Yasukuni Shrine and ¥10,000 to the Gokoku Shrine—and was to be used for ceremonies held to comfort the spirits of Japanese soldiers who have died in war and their family members.<sup>71</sup>

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64. See Decision by the High Court at Hiroshima, 1046 HANREI JIHŌ 3 (Dist. Ct., June 1, 1982); Decision by the District Court at Yamaguchi, 921 HANREI JIHŌ 44 (Dist. Ct. 1979).

65. See Decision by the District Court at Osaka, 33 Collection of Precedents No. 3, 564 (Dist. Ct., Mar. 24, 1982).

66. See Decision by the District Court at Osaka, 34 Collection of Precedents No.3, 358 (Dist. Ct., Mar. 1, 1983).

67. See Decision by the District Court at Matsuyama, 40 Collection of Precedents No. 3, 188 (Dist. Ct., Mar. 17, 1989).

68. *Anzai v. Shiraishi*, 51-4 MINSHŪ 1673 (Sup. Ct., Apr. 2, 1997).

69. See Akira Momochi (1997). op. cit., p. 211; Akira Momochi, *Ehime Tamagushiryō Soshō Saikosai Hanketsu o megutte* [On the Decision by the Supreme Court on the Lawsuit over Tamagushiryō at Ehime], in 63-4 NIHON HOGAKU 47.

70. *Anzai*, 51-4 MINSHŪ 1673.

71. *Id.* The contributions to both the Yasukuni and Gokoku shrines were made nine times, for an aggregate total of ¥45,000 (approximately \$450) to Yasukuni and ¥90,000 (approximately \$900) to Gokoku. See *id.*

At trial, the defense insisted that the offering of public money for a Shinto ceremony is not unconstitutional because the offering was made as an “administrative assistance” to the family members of the soldiers who died in war.<sup>72</sup> As such, it was merely a social courtesy for the secular purpose of comforting the war dead and their family members.<sup>73</sup> This argument was rejected by the court of first instance but prevailed at the High Court at Takamatsu.<sup>74</sup>

The Supreme Court reversed.<sup>75</sup> It concluded that history, specifically the close alignment of the State and Shinto following the Meiji Restoration in 1868, had led to a great deal of harm and injustice, despite the ostensible guarantee of freedom of religion that existed at the time.<sup>76</sup> Accordingly, the Court held that the new constitution was enacted to prevent government suppression of religion.<sup>77</sup> The Court recognized that it was virtually impossible to completely separate religion from the state, especially where the state regulates the social—and thus sometimes the religious—lives of its citizens.<sup>78</sup> The Court reasoned that “the principle of separation of state and religion, which is the basis of the constitutional provision and becomes the guiding principle for interpretation, demands the religious neutrality of the state but does not prohibit all connection with religion.”<sup>79</sup> Therefore, the Court held, whether a particular government activity is constitutionally impermissible must be evaluated on the basis of the “purposes and effects of the given conduct[] . . . in light of the social and cultural circumstances of our country.”<sup>80</sup> If, given appropriate social and cultural consideration, the challenged action has a religiously significant “‘purpose’ and has

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72. *Id.*

73. *Id.* (“It is also said that the governor made the expenditure as a part of administration in order to support bereaved families and did not have any other intention, purpose, or deeply religious belief, and that the amount of offerings was really small and within the scope of social courtesy.”).

74. *Id.*

75. *Id.*

76. *Id.*; see also Michael Young, *Japan and Religious Freedom: An American Perspective* (1998), <http://www.religiousfreedom.com/Conference/japan/Young.htm>.

77. See *Anzai*, 51-4 MINSHŪ 1673.

78. *Id.* (“[T]he principle of separation of state and religion, which is the basis of the constitutional provision and becomes the guiding principle for interpretation, demands the religious neutrality of the state but does not prohibit all connection with religion.”).

79. *Id.*

80. *Id.*

the ‘effect’ of assisting, promoting, oppressing, or intervening in religions,” it is constitutionally impermissible.<sup>81</sup>

Applying this test to the donations by the Governor of Ehime, the Court concluded that the ceremonies held by both the Yasukuni and Gokoku Shrines were religious in nature<sup>82</sup> and that even if the governor did not have a religious purpose in offering the donations, known as *tamagushiryo*, the shrines used the donations to advance religious purposes.<sup>83</sup> Therefore, “the average person [would be] impressed that the prefecture especially supports this specific religious group and that this religious group is special and different from other religious groups.”<sup>84</sup> Concluding that “it is possible to mourn for the war dead and to console [their] bereaved families without such a special relationship with a specific religion,” the Japanese Supreme Court specifically rejected the social courtesy argument the defendants raised in the trial court.<sup>85</sup> In summary, because the “purpose” of offering *tamagushiryo* could not avoid being classified as having religious significance, and because the “effect” of the *tamagushiryo* would be assistance and promotion by the state of a particular religion, albeit indirectly, the Court held that offering *tamagushiryo* was constitutionally impermissible.<sup>86</sup>

### 3. Response to this line of cases

After *Kakunaga*, the constitution “should not be taken to prohibit all contact with religion, but rather [only] that which exceeds reasonable limits and which has as its purpose some religious meaning, or the effect of which is to promote, subsidize, or, conversely, to interfere with or oppose religion.”<sup>87</sup> Based on this principle, some Japanese academics and judges have concluded that separation should be relative or limited. In the *Anzai* case, for example, despite the extension of the “purpose-effects test” to

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81. *Id.*

82. As such, the Court concluded that these memorial services were distinguishable from the groundbreaking ceremony at issue in *Kakunaga*. *Id.*; see also *Kakunaga v. Sekiguchi*, 31-4 MINSHŪ 533 (Sup. Ct., July 13, 1977), reprinted in BEER & ITOH, *supra* note 4, at 483. *But see id.* (Yoshida, J., dissenting), reprinted in BEER & ITOH, *supra* note 4, at 483–85.

83. See *Anzai v. Shiraishi*, 51-4 MINSHŪ 1673 (Sup. Ct., Apr. 2, 1997).

84. *Id.*

85. *Id.*

86. *Id.*

87. *Kakunaga*, 31-4 MINSHŪ at 533, reprinted in BEER & ITOH, *supra* note 4, at 481.

expressly prohibit indirect promotions of religion, the majority of the Supreme Court at least ostensibly showed a renewed commitment to this view of limited separation.<sup>88</sup>

On the other hand, advocates of rigid separation, presupposing the secular nature of the state, assert that church and state should be completely separated.<sup>89</sup> And yet, paradoxically, while these advocates insist on rigid separation in matters such as using public money to support a Shinto ceremony to purify a building site or to celebrate the completion of a monument to the loyal dead, they generally would permit a wide range of exceptions among other religious-based activities of central and local governments and would allow government subsidization of even religious schools.

I disagree with the Court's conclusions in the *Anzai* case for the following reasons:

1. A national or local governmental activity should be permissible when it is for a secular purpose, even if it has incidental religious significance. In this case, the provision of *tamagushiryō* should be within the range of secular purposes because it was conducted as a social courtesy. As such, it should not be considered religious activity by the local government even if the Shinto organization is acting in a religious manner.<sup>90</sup>

2. Heads of local governments attend countless ceremonies conducted according to Shinto, Buddhist, Christian, and other denominational traditions for festivals, marriages, funerals, and other such events. On those occasions, the fact that there is religious significance for those who conduct ceremonies (such as priests, ministers, and pastors) does not mean such significance exists for the government representatives participating. To them, participation and financial donations are usually merely social courtesies, and most observers, including most "average" Japanese observers, would agree. In the *Anzai* case, the defendant did not even attend the festival in question but simply had the donation delivered to the ceremony.<sup>91</sup> Consequently, the action by the governor of Ehime had

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88. See *Anzai*, 51-4 MINSHŪ 1673.

89. Consider, for example, the dissenting Justices in *Kakunaga*. 31-4 MINSHŪ at 533, reprinted in BEER & ITOH, *supra* note 4, at 481.

90. This assertion may seem odd to my Western readers, who may be unfamiliar with the range of required social courtesies in Japan involving monetary gifts. However, many Japanese social conventions involve small monetary gifts, or *o-rei*.

91. See *Anzai v. Shiraishi*, 51-4 MINSHŪ 1673 (Sup. Ct., Apr. 2, 1997).

no religious meaning and should not have been adjudged constitutionally violative.

3. In *Kakunaga*, the Supreme Court found that the Tsu City government was constitutionally justified in holding a ceremony purifying a building site, offering donations to ceremonies, and donating public money to Shinto ceremonies.<sup>92</sup> Yet, it found similar activities by the Ehime Prefecture government to be unconstitutional.<sup>93</sup> Unquestionably, there is a striking lack of balance and consistency in these decisions.<sup>94</sup>

4. The *Anzai* decision states that the Ehime Prefecture government donated public money to the Yasukuni Shrine only and not to any other religious organization.<sup>95</sup> However, the prefecture had offered public money for the war dead ceremony held in the spring and autumn at Chidorigafuchi (Japan's tomb of the unknown soldier), for construction of the war memorial in Okinawa, and for other similar events.<sup>96</sup> If the Supreme Court asserts that the government is not permitted to donate public money to the Yasukuni Shrine, a religious organization, then this would essentially lead the government to practice religious discrimination.

This assertion may strike some readers as odd without an understanding of the relationship between Yasukuni and Chidorigafuchi. The Yasukuni Shrine was established in 1879 by the Emperor Meiji to honor those who had died in war for the good of Japan.<sup>97</sup> It therefore enshrines the souls of people who have fought for Japan in various conflicts.<sup>98</sup> To the many Japanese who believe in Shinto,<sup>99</sup> the souls enshrined at Yasukuni continue to protect the

92. See *Kakunaga*, 31-4 MINSHŪ 533, reprinted in BEER & ITOH, *supra* note 4, at 479-83.

93. See *Anzai*, 51-4 MINSHŪ 1673.

94. As pointed out in Justice Yoshida's dissenting opinion in *Kakunaga*, "[i]t is clear . . . that this groundbreaking ceremony was a religious ceremony performed by a Shinto priest according to distinctly Shinto rituals. It is true that such ceremonies . . . have become secularized over time, but this groundbreaking was profoundly religious in atmosphere." *Kakunaga*, 31-4 MINSHŪ 533 (Yoshida, J., dissenting), reprinted in BEER & ITOH, *supra* note 4, at 486.

95. See *Anzai*, 51-4 MINSHŪ 1673.

96. See *id.*

97. Yasukuni Jinja, *About Yasukuni Jinja Q&A*, <http://www.yasukuni.or.jp/english/qanda.html> (last visited Mar. 18, 2005).

98. *Id.*

99. See *supra* notes 9-12 and accompanying text (discussing the number of Shinto followers in Japan).

country. The ceremonies at Yasukuni are also conducted to show the continued appreciation of the Japanese people for the sacrifices the war dead have made for Japan. Yasukuni therefore encompasses both religious and civic purposes.

Chidorigafuchi is Japan's tomb of the unknown soldier and is located in a serene park near the Imperial Palace.<sup>100</sup> Like Yasukuni, the Chidorigafuchi cemetery was established to show the Japanese people's appreciation for the sacrifices made by the war dead. Even though there is no shrine at Chidorigafuchi, it is nevertheless a spiritual place for many Japanese.<sup>101</sup> The two sites thus serve similar purposes and evoke similar sentiments.

I submit that allowing donations to the Chidorigafuchi cemetery but not to Yasukuni Shrine, simply because the former is secular and the latter religious, evinces hostility towards religion not justified after *Kakunaga*.<sup>102</sup> Moreover, the *tamagushiryo* at issue in *Anzai* was a social courtesy that should have been adjudged constitutional on that basis alone. The Supreme Court's contrary decision is unjustified after *Kakunaga* and inappropriate under the view that the

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100. See JAPANESE MINISTRY OF THE ENVIRONMENT, NATIONAL GARDENS AND NATIONAL CEMETERY, available at <http://www.env.go.jp/en/rep/fcpn/parts/12.pdf> (last visited May 21, 2005).

101. Similarly, Arlington National Cemetery in the United States is a spiritual place—it even has a nondenominational chapel available for funeral services. See ARLINGTON NATIONAL CEMETERY, CHAPEL SERVICES—SEA SERVICES, [http://www.arlingtoncemetery.org/ceremonies/clergy\\_information/Navy/chapel\\_services.htm](http://www.arlingtoncemetery.org/ceremonies/clergy_information/Navy/chapel_services.htm) (last visited Mar. 18, 2005) (describing the protocol for visiting clergy). This chapel, while funded by the government, is nondenominational and provided as an accommodation for the families of soldiers being interred at Arlington. I would argue that accommodating the religious desires of families buried at Arlington is similar to the service performed at the Yasukuni Shrine because many Japanese desire to have their family members who died in the service of their country enshrined at Yasukuni. See *Japan v. Nakaya*, 42-5 MINSHŪ 277 (Sup. Ct., June 1, 1988) (Nagashima, J., concurring), reprinted in BEER & ITOH, *supra* note 4, at 503 (noting that the enshrined serviceman's father and siblings sent letters requesting his enshrinement). Significantly, while the Chidorigafuchi cemetery is operated by the Ministry on the Environment, Yasukuni Shrine is a private religious organization. If it is appropriate for the U.S. government to operate a chapel for use by the families of soldiers being interred at Arlington, it should also be appropriate for Japanese government officials to make donations to Yasukuni, which similarly uses the funds for the benefit of the families of the war dead.

102. While Article 89 of the Japanese Constitution provides that “[n]o public money . . . shall be expended or appropriated for the use, benefit, or maintenance of any religious institution or association,” in *Kakunaga*, the Japanese Supreme Court held that such expenditures are justified under the “purpose-effects test” if they have a secular purpose. *Kakunaga v. Sekiguchi*, 31-4 MINSHŪ 533 (Sup. Ct., July 13, 1977), reprinted in BEER & ITOH, *supra* note 4, at 483.

purpose of separation of church and state is to promote individual religious liberty; in effect, the *Anzai* decision signals a paradigm shift towards viewing separation of church and state as an end in itself rather than the means to promoting religious liberty.

To promote the view of separationism as a means for promoting religious liberty, the constitution should not forbid ostensibly religious conduct in the following situations:

1. When a venerable religious tradition is simply recognized as a fact of social life;
2. When the application of rigid separation is likely to lead to the suppression of a religion and denial of religious freedom; and
3. When the easing of the separation between church and state does not assist a particular religion or oppress other religions.

Under this view, the state would be permitted to utilize public money for religious events and practices as exemplified in *Kakunaga*.<sup>103</sup> Similarly, it would be regarded as constitutionally acceptable to support prison chaplains, maintain a stone image of a “Jizo” (a guardian deity of children) on public property, purify a building site through a Shinto ceremony carried out by the local government, and other such religiously based activities. This position is appropriate because it is impossible to separate church and state to the absolutist degree proffered by the advocates of rigid separation.

#### V. GOVERNMENT POLICIES CONCERNING RELIGIOUS EDUCATION

As discussed, following *Anzai*, the mainstream philosophy of church-state relations in postwar Japan has shifted away from limited separationism and is currently largely one of rigid separation of church and state. As an example of the effects of rigid separation, consider the state of religious education in public schools.

At first glance, Article 20(3) of the Japanese Constitution gives the impression that it prohibits any kind of religious education in public schools.<sup>104</sup> On August 15, 1946, the Diet passed a

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103. See Momochi (1991), *supra* note 40, at 90.

104. KENPŌ [Constitution] art. 20(3) (Japan) (“The state and its organization shall refrain from religious education . . .”).

“Resolution on the Education of Religious Sentiments,” which states with regard to Article 20, “We must stipulate in this section that a doctrine which is biased toward a particular religion or denomination must not be taught.”<sup>105</sup> A provision in Article 9 of the Fundamental Law of Education stated this point of law more concretely:

Now tolerance for religion and the place of religion in society must be respected in education. Therefore, certain religious education is not possible in public schools, but this does not apply to more general religious training. And in private schools, according to Article 24 of the School Law, it is possible to teach religion in place of ethics and the teacher’s license is issued specifically to allow for such a teaching. Therefore, institutionally the Japanese education laws value education on religion.<sup>106</sup>

In short, while the law provides that public schools must not advance a particular religion, it does not require the exclusion of religious education itself from public education. Rather, it specifically requires that “the attitude of religious tolerance and the position of religion in social life” must be respected.<sup>107</sup>

In spite of these provisions and the legitimate state interest in universal religious education in public schools, the reality is that religious education is substantially excluded from public schools even though education of religious sentiments is not legally prohibited. In the background of this silent policy is the “Shinto Directive,” which was issued by the occupation force on December 15, 1945, and which technically abolished governmental support for State Shinto. More broadly, the directive, by the insistence of the occupation force, resulted in the ultimate exclusion of all religious education from public schools.<sup>108</sup> This situation continued even after the end of the occupation.

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105. Resolution on the Education of Religious Sentiments.

106. Fundamental Law of Education, Art. 9, *available at* [http://portal.unesco.org/education/en/ev.php-URL\\_ID=12444&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/education/en/ev.php-URL_ID=12444&URL_DO=DO_TOPIC&URL_SECTION=201.html) (quoted with analysis in Seishiro Sugihara, *Separation of State and Religion and Japanese Education*, Address at the International Coalition for Religious Freedom Conference on “Religious Freedom and the New Millennium” (May 23–25 1998), <http://www.religiousfreedom.com/Conference/japan/Sugihara.htm>).

107. *Id.*

108. See KITAGAWA, *supra* note 15, at 271. Furthermore, the organization that played a leading part against religious education in public schools was the Japan Teachers Union (Nikkyoso), which believed in Marxism-Leninism and was largely antireligious. The

## VI. RELIGION IN THE PUBLIC SPHERE IN MODERN JAPAN

The modern debate on the proper role of religion in the Japanese public sphere, in the context of history, is a relatively recent development. In fact, the term “religion” was only added to the Japanese lexicon about 135 years ago when it was translated as “Shukyo” from the German term “Religionsbewegung” (religious action).<sup>109</sup> Prior to this, the term “Shukyo” did not exist. The new word was composed of two characters, “shu” and “kyo.” Shu means “memorial services for ancestors” or “main thought.” Kyo means “to teach” or “education.” Therefore, shukyo means the “teaching of ancestor” or “teaching of religious founder.”<sup>110</sup>

Consequently, whether Shintoism is a religion in the traditional Western sense is a point of some debate. Shinto has no religious founder and no moral teachings. Its historical significance is found in the fact that the Emperor was its chief minister.<sup>111</sup> Shintoism originated in the ancient rice-farming culture and can be described as a religion seeking harmony with nature, adapting man to the change of seasons, and conveying a human way of life in its primitive simplicity.<sup>112</sup> Thus, Shintoism is more of a cultural phenomenon and is at most a natural religion that existed before the Japanese state was established.<sup>113</sup> It is deeply rooted in Japanese society in the form of social courtesies. For example, the social custom in Japan of removing one’s shoes before entering a home has its roots in Shinto teachings on purity; through time, this historic understanding has been subsumed into general social custom. Furthermore, because Shintoism was a natural religion that had no written doctrines, it could easily accept and coexist with Buddhism as a sectarian religion, thus tending to show that Shintoism itself is not a religion in the same sense that Buddhism is a religion.

This raises the question whether “Shinto” is properly considered a religion at all. The interpretation of the new Japanese Constitution

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bureaucrats in the Ministry of Education, Culture, and Science tended to cater to the Japan Teachers Union.

109. Takenori Aoayama, *Shinkyon no Jiyu no Haikei* [The Background on the Freedom of Religion in Japan] 1 (June 22, 2004) (unpublished manuscript, on file with author).

110. *Id.*

111. See KITAGAWA, *supra* note 15; *supra* text accompanying note 15.

112. See KITAGAWA, *supra* note 15, at 1163–66.

113. See 4 RELIGIONS, *supra* note 16, at 1163.

has certainly made Shinto into a religion; however, because it has no founder and proscribes no *moral* conduct, it is very different from other religions like Buddhism or Christianity and is inconsistent with the meaning of religion as embodied in the Japanese term *shukyo*.<sup>114</sup>

The question of whether Shintoism is a “proper” religion is compounded by the fact that the Japanese Constitution, which is facially secular, makes the Emperor the symbol of the nation. As mentioned above, the Emperor is also the chief minister of Ise Shrine.<sup>115</sup> Therefore, one might ask whether the Emperor’s ritual acts at Ise can be both Shinto and political, or whether the act of the Emperor in his political capacity should be legally differentiated from his ritual act. Presuming Shinto to be a religion separate from the state, we must differentiate the Emperor’s political actions from his ritual ones. Therefore, it follows that his ritual act is simply his private religious act or a manifestation of his personal beliefs. However, this differentiation is unsupported by history and is a casual and somewhat naïve hypothesis only.

Insofar as the Japanese Constitution embraces the Emperor as a symbol—which it continues to do—the Emperor has performed rituals both as the chief minister of the Shinto religion and as the symbol of the state. This dual role should be regarded as being embraced in the constitution. Putting aside questions of the Emperor’s multiple roles, it should be clear that any constitutional system that embraces an emperor as both a political and religious figure cannot perfectly separate religion and state. Thus, the most proper definition of “Shinto,” taking into account the historical and present realities of the Emperor’s important role in Shinto, is that it is more a traditional social convention than a religion.

This definition would have enormous practical implications for the Yasukuni Shrine problem. As discussed above, the war dead from the Meiji Restoration forward are all memorialized in the Yasukuni Shrine.<sup>116</sup> The Japanese State had promised that the war dead would be enshrined therein and prayed for by the Emperor and prime minister. They did so until the 1970s, when the so-called “A-Class” war criminals were enshrined in the Yasukuni Shrine. Subsequently, Japanese left-oriented newspapers and the Chinese and Korean

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114. *See supra* notes 111–12 and accompanying text.

115. *See supra* text accompanying note 15.

116. *See supra* text accompanying notes 99–100.

governments began to criticize these official visits by public figures. Succumbing to this pressure, the Emperor stopped visiting the shrine. That the Prime Minister continues to do so provokes criticism every year.<sup>117</sup> However, the State is obliged to maintain its promise to the war dead. Even separating the religious elements, which probably underlay the promise originally, commemorating the sacrifices made by soldiers in defense of country and expressing the nation's continued appreciation for their efforts is a valid secular purpose.<sup>118</sup>

Defining Shinto as a traditional social convention provides the ultimate solution to this problem because then the visit to Yasukuni Shrine is an act of social courtesy rather than an act of religious significance.

## VII. CONCLUSION

In a pluralistic society in which various religions coexist, it is essential for the maintenance of peace that the state exercise religious neutrality. That does not mean the state should be antireligious or even nonreligious. For the sake of social stability, a state should recognize the importance of religion in the lives of its citizens, value the contributions of religious groups, and respond to religions favorably.

Freedom of religion is guaranteed most effectively in a society where the state and religious organizations remain separate, recognize mutual independence, and cooperate in the areas where they have common interests. Among democratic states governed by the rule of law, each country must maintain religious freedom in the context of its unique historical background. Hence, no country possesses the ideal method of protecting religious freedom that can be applied universally in other countries.

Still, an enduring constitution protects freedom of religion. The separation of church and state is an important tool in ensuring that this protection is vibrant and meaningful. Constitutions, however,

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117. See, e.g., Norimitsu Onishi, *The Japan-China Stew: Sweet and Sour*, N.Y. TIMES, Jan. 16, 2005, at A4.

118. By way of comparison, the annual visit by the President of the United States to Arlington National Cemetery on Memorial Day should not be prohibited because there may be religious implications to the visit. Rather, the annual visit is an appropriate method of showing appreciation for the sacrifices made by the soldiers. See, e.g., Richard W. Stevenson, *At Arlington, Bush Salutes the Dead of Wars Past and Present*, N.Y. TIMES, June 1, 2004, at A3.

also necessarily reflect the cultural and social mores of the people that enact them, often shaped and influenced by history and religion. For example, Western Europe and North America have largely built their constitutional systems on the basis of Christian culture. This not only reflects the historical religious preferences of their founders but also acknowledges that many of the countries' citizens today believe in certain principles that are founded on religious precepts. That it is appropriate—perhaps even essential—for a constitutional structure to reflect the public policy of a state when that policy is informed by religious precepts indicates that separation of church and state need not require hostility towards religion.

Moreover, even Western Europe and North America, which generally are regarded as successful in ensuring religious freedom, have their unique problems.<sup>119</sup> Yet despite these problems, these areas of the world still strive to maintain religious freedom and protect religious minorities. That they are able to do so in their Christian-influenced legal systems suggests that it is both possible and permissible for Japan to build its constitutional system on the basis of Shinto and Buddhist culture, in spite of any historical burdens associated with those religions, and still be able to maintain religious freedom and protect religious minorities.

We must remember that the goal is protecting religious freedom, and the separation of church and state is merely one means to accomplishing that goal.

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119. *See, e.g.*, Gunn, *supra* note 1 (detailing church-state issues currently confronting both the United States and France).