

THE JAPANESE PRIME MINISTER’S VISITS  
TO THE YASUKUNI SHRINE ANALYZED  
UNDER ARTICLES 20 AND 89 OF THE  
JAPANESE CONSTITUTION

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INTRODUCTION

For those familiar with Japan, the simple mention of the Yasukuni Shrine raises the specter of controversy. The Shrine is an edifice of the Meiji Era that sprung from humble and innocent beginnings into the site of international controversy. The shrine was originally created in 1869, to commemorate government soldiers killed in the Boshin war, considered a civil war of independence between the Shogunate and Emperor Meiji, and it was renamed as the Yasukuni Shrine in 1879.<sup>1</sup> It has grown into a symbol of Japanese nationalism, militarism, and historical revisionism, which is controversial to the pacifist culture in Japan and to China, Korea and Taiwan.<sup>2</sup>

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1. ISAO EBIHARA, SHINTO WAR GODS OF YASUKUNI SHRINE: THE GATES OF HADES AND JAPAN’S EMPEROR CULT 55-59 (2011).

2. *Id.*

Many enshrined there today were involved in Japanese military expansionism and some committed war crimes.<sup>3</sup> This includes fourteen Class-A war criminals who were secretly enshrined there without public knowledge.<sup>4</sup> There are, of course, many enshrined there who did not commit war crimes, but the cultural meaning of the shrine is itself controversial to the victims, and the co-nationals and descendants of the victims, of atrocities carried out by the Japanese military before and during World War II.<sup>5</sup> Thus, to many Koreans, Chinese, Taiwanese and others, as well as many Japanese, the shrine—and especially official visits to the shrine by the Prime Minister of Japan—is an offense to humanity and a celebration of war criminals.<sup>6</sup>

Japan is a constitutional democracy, however, and whether or not visits to the Yasukuni Shrine by the Prime Minister of Japan are offensive and ill advised, the question remains whether those visits are constitutional. Most courts that have considered the question have held the visits are constitutional, but at least one court, the Osaka High Court, has held the visits are unconstitutional.<sup>7</sup> This essay argues that the Osaka High Court correctly interpreted the Japanese Constitution and that public—as opposed to truly private—visits to the Yasukuni Shrine by Japanese government officials is unconstitutional when Articles 20 and 89 of the Japanese Constitution, and relevant Japanese Supreme Court decisions, are considered. This essay also argues that virtually all visits by the Prime Minister to the Yasukuni Shrine are public visits for constitutional purposes, regardless of how they are characterized. Readers from outside Japan,

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3. *Id.*

4. *Id.*

5. *See generally* YASUKUNI, THE WAR DEAD AND THE STRUGGLE FOR JAPAN'S PAST (John Breen ed. 2010) (collection of essays, most of which address the connection between the Yasukuni Shrine and Japanese history and revisionism, as well as the tensions it creates for Japan with nations that were colonized and subject to war crimes during Japanese occupation).

6. *See generally id.*

7. JOHN BREEN & MARK TEEUWEN, A NEW HISTORY OF SHINTO 215-16 (2009).

however, should be mindful of the fact that the value of legal precedent is different in Japan than in the United States.<sup>8</sup>

The focus of this essay is specifically on visits by the Prime Minister of Japan to the Yasukuni Shrine to pay homage to the Kami (spirits) enshrined there, but the analysis may be applicable to visits by other government officials. The analysis would also apply to visits by the Prime Minister and other government officials to other religious sites if those visits also have the religious elements that visits to the Yasukuni Shrine have. This article does not address the involuntary enshrinement of the spirits of people, even when the government tacitly aided the shrine in gaining the information necessary to determine whom to enshrine. This issue, while exceptionally important, is well beyond the limited scope of this essay.

Part I of this essay will briefly set forth the history and cultural meaning of the Yasukuni Shrine and visits by the Prime Minister to the Shrine. Part II will discuss the current state of the law relating to Articles 20 and 89 of the Japanese Constitution, which address freedom of religion. Part III will look specifically at the legal implications of visits by the Prime Minister to the Yasukuni Shrine in light of the information discussed in Parts I and II, as well as court cases in Japan that have directly addressed the issue.

## I. A BRIEF OVERVIEW OF THE YASUKUNI SHRINE AND RELATED CONTROVERSIES

As mentioned above the Yasukuni Shrine was founded in 1869 to commemorate government soldiers killed in the Boshin war, a civil war of independence between the Shogunate and Emperor Meiji.<sup>9</sup> The shrine was publically supported by the government, and was a major edifice of State Shinto, described below, until the end of World War II. Since then, it has been a private entity that does not receive financial support from the

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8. See *infra* notes 71-73 and accompanying text.

9. EBIHARA, *supra* note 1, at 55-59.

government.<sup>10</sup> It has been heavily supported by right-wing nationalist groups, and has become a symbol for those groups.<sup>11</sup> The Yasukuni Shrine includes a war museum that glorifies Japanese military action and occupation through exhibits that tend to portray a revisionist history that overlooks the human rights violations committed by the Japanese military during the Meiji, Taisho and Showa eras,<sup>12</sup> and depicts that military action as protecting Asia from western imperialism.<sup>13</sup>

The Yasukuni Shrine and its glorification of the Emperor and militarism—which is not supported by the current Emperor—has its roots in State Shinto. 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 Amaterasu, the Goddess of the sun and universe in Shintoism.<sup>14</sup> During the Meiji era State Shinto both came to prominence and was established as the state religion.<sup>15</sup> It is important not confuse State Shinto with the longstanding tradition of Shintoism and modern Shinto. State Shinto was centered on the Emperor and his ancestors.<sup>16</sup>

State Shinto facilitated militancy and a sense of Japanese superiority.<sup>17</sup> This mentality supported significant military campaigns, territorial occupation, and subjugation of other nations,<sup>18</sup> culminating in Japanese involvement in World War II.<sup>19</sup> After the war, the U.S. occupation government abolished State Shinto,<sup>20</sup> and in 1946 the modern Japanese Constitution

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10. *Id.*

11. YASUKUNI, *supra* note 5, at 25-26.

12. *Id.*

13. *Id.* at 77.

14. NOBUSHIGE HOZUMI, ANCESTOR-WORSHIP AND JAPANESE LAW 34-47 (1912).

15. *Id.*

16. *Id.*

17. HELEN HARDACRE, SHINTO AND THE STATE, 1868-1988 4 (1991).

18. *Id.*

19. *Id.*

20. *Id.* at 133.

was promulgated.<sup>21</sup> A significant focus of the new Japanese Constitution was drastic limitation on the power of the Emperor and the prohibition of government support for religion, in order to prevent a return to State Shinto.<sup>22</sup>

The Yasukuni Shrine is viewed by many Japanese as a remnant of that period. It is also viewed that way by those nations affected by Japanese military action and occupation, especially China, Korea and Taiwan. This has been especially true since it was revealed that fourteen Class-A war criminals are enshrined there.<sup>23</sup> Since that time neither Emperor Hirohito nor current Emperor Akahito have visited the shrine because Class A war criminals are enshrined there.<sup>24</sup>

Enshrining the spirits of the dead in Shinto Shrines as Kami, which can be understood as eternal spirits—although these Western terms do not exactly capture the idea—is not unique to the Yasukuni Shrine and is generally not controversial. In fact, many of those enshrined at the Yasukuni Shrine as Kami, especially those enshrined prior to the Japanese occupation of China, Taiwan, and Korea, would not be considered controversial.<sup>25</sup> It is the enshrinement of war criminals, as well as the enshrinement of individuals who did not want to be enshrined there,<sup>26</sup> including those who were forcefully conscripted into the Japanese military, that has raised controversy.<sup>27</sup>

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21. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], (JAPAN).

22. *Id.* arts. 20 & 89.

23. BREEN & TEEUWEN, *supra* note 7, at 1-5; EBIHARA, *supra* note 1, at 87-89.

24. *Hirohito Quit Yasukuni Shrine Visits Over Concerns About War Criminals*, N.Y. TIMES, (APR. 26, 2007), [http://www.nytimes.com/2007/04/26/world/asia/26iht-japan.1.5447598.html?\\_r=0](http://www.nytimes.com/2007/04/26/world/asia/26iht-japan.1.5447598.html?_r=0).

25. *Id.*

26. Barry A. Fisher, Symposium, *Yasukuni Shrine: Typhoon's Eye of Japan's Spiritual/ Political Storm Rejecting Wartime Victim Redress*, DUKE U. (Nov. 8, 2007) <http://people.duke.edu/~myhan/kaf0704.pdf> (some of these individuals were from Taiwan, Korea and China, and their families have sought unsuccessfully to have them unenshrined).

27. *Id.*

The above-mentioned facts, and the connection between the Yasukuni Shrine and extreme nationalist groups, have made it a controversial place both within Japan and outside of Japan. Thus, visits by the Prime Minister of Japan to the shrine have been divisive. This essay does not address the political controversy as such, but rather asks the question whether official visits by the Prime Minister to pay homage and make offerings at what is clearly a religious venue is unconstitutional under Articles 20 and 89 of the Japanese Constitution.<sup>28</sup>

I do not, however, question the right of the Yasukuni Shrine to exist as a private religious entity, the right of anyone—including the Prime Minister—to visit the shrine as a private individual (without government support or public attention), or the right of nationalist groups to push their political agenda without government support. These rights are clearly protected by the Japanese Constitution. In fact, the same constitutional ideals that this essay suggests make official visits by the Prime Minister to the Yasukuni Shrine unconstitutional, support the right of the Shrine to exist and carry out its business as a private religious entity.

## II. SEPARATION OF GOVERNMENT AND RELIGION UNDER THE JAPANESE CONSTITUTION

This section focuses on cases decided by the Japanese Supreme Court that are of particular relevance to official visits by the Prime Minister to the Yasukuni Shrine. No case decided by the Japanese Supreme Court has directly addressed this issue; although a few lower court cases mentioned in Part IV directly address the issue. Thus, the cases addressed in this section set forth relevant legal concepts developed by the Japanese Supreme Court under Articles 20 and 89 of the Constitution of Japan, which govern what we in the United States refer to as the Establishment of Religion, and can be referred to in Japanese as

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28. *Id.*

Seiji to Shuukyō no Bunri, or the Separation of government and religion.

Article 20 of the Constitution of Japan 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, rite or practice. 3. The State and its organs shall refrain from religious education or any other religious activity.<sup>29</sup>

Article 89 of the Constitution of Japan 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>30</sup>

The language of these articles seems to create a strong barrier against government support for religion. Yet, as I have suggested elsewhere that barrier was rarely strong in decisions by the Japanese Supreme Court prior to 1997.<sup>31</sup> In 1997, the Japanese Supreme Court held that a strong barrier between government and religion is consistent with the language and intent of Articles 20 and 89. The Court explained that Articles 20 and 89 were clearly aimed at ending government support for State Shinto or any other religion.<sup>32</sup> Prior to 1997, the Court did not view government interaction with Shinto as strictly subject to these strictures, but these earlier cases were more focused on

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29. Nihonkoku Kenpō [Kenpō] [Constitution], art. 20 (Japan).

30. *Id.* art. 89.

31. Frank S. Ravitch, Symposium, *The Shinto Shrine Cases, Religion, Culture, or Both: The Japanese Supreme Court and One Hundred Years of Establishment of Religion Cases*, 2013 *BYU L. Rev.* 505, 509-12 (2014).

32. The Ehime Tamagushi Case, Saikō Saibansho [Sup. Ct.] Apr. 2, 1997, 1992 (Gyo-Tsu) no. 156. 51 *SAIKŌ SAIBANSHO MINJI HANREISHŪ* [Minshū] 1673 (Japan).

traditional or day to day Shinto, rather than the remnants of State Shinto.

In 1997, the Japanese Supreme Court decided the *Ehime Tamagushi* case which involved the use of public funds by government officials from Ehime Prefecture.<sup>33</sup> The funds were used for offerings given by government officials to the Yasukuni Shrine and the Gokoku Shrine at ceremonies held by those shrines.<sup>34</sup> The offerings were not expensive and consisted of twigs from the sakiki tree wrapped with folded white papers.<sup>35</sup> This sort of offering is called “Tamagushi.”<sup>36</sup> The offerings were paid for with government funds and given by representatives of the government at the behest Haruki Shiraishi, the then governor of Ehime Prefecture.<sup>37</sup>

The *Ehime Tamagushi* Court applied Article 20(3) and Article 89 of the Constitution of Japan, and in doing so used a legal test similar to the one adopted by the U.S. Supreme Court in *Lemon v. Kurtzman*,<sup>38</sup> augmented by endorsement of religion analysis also similar to that used by the United States Supreme Court.<sup>39</sup> The test is as follows, “taking the purposes and effects of the given conduct into consideration, it [the principle of separation of government and religion as applied by the court] should be interpreted as prohibiting” state conduct that is “beyond the appropriate limits in light of the social and cultural circumstances of our country.”<sup>40</sup>

Further elaborating on this test the Court wrote:

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33. *Id.*

34. *Id.*

35. *Id.*

36. HOZUMI, *supra* note 14, at 59.

37. The Ehime Tamagushi Case, SaikōSaibansho [Sup. Ct.] Apr. 2, 1997, 1992 (Gyo-Tsu) no. 156. 51 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1673 (Japan).

38. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

39. *See generally* *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844 (2005).

40. The Ehime Tamagushi Case, SaikōSaibansho [Sup. Ct.] Apr. 2, 1997, 1992 (Gyo-Tsu) no. 156. 51 Saikō Saibansho Minji Hanreishū [Minshū] 1673 (Japan).

According to [the] significance of the principle of separation of state and religion, 'religious activity' in Article 20(3) should not be interpreted as prohibiting all religious activities that the state or state authority might be involved in. Rather, only the activities exceeding such reasonable limits, the purpose of which have some religious meaning and the effect of which is to support, promote, or, adversely, oppose or interfere with religion, should be prohibited. And in determining whether a given religious act constitutes a prohibited 'religious activity' or not, not only the external aspects of the conduct but also the place of the conduct, the average person's religious understanding toward the conduct, the existence or extent of actor's religious intention, purpose, or awareness in holding the ceremony, and the effect or influence on the average person should be considered as factors. And at that time, objective judgment based on socially accepted ideas is necessary.<sup>41</sup>

As will be seen in Part IV, these factors taken as a whole do not favor the constitutionality of visits by the Prime Minister of Japan to the Yasukuni Shrine.

Significantly, the Court explicitly stated that one of the major reasons underlying Articles 20 and 89 was the abolishment of State Shinto.<sup>42</sup> The Court condemned Meiji era 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>43</sup> The Court held this approach helps protect the freedom of religion.<sup>44</sup>

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>45</sup> The purpose and effects test, considering whether the government action under review favors religion in the eyes of the public, allows the courts and government officials to determine whether

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41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

a given action or actions exceeds the permissible boundaries under Article 20(3) and Article 89.<sup>46</sup> Applying this analysis, the Court held that paying for and giving the Tamagushi offerings at the Yasukuni and Gokoku Shrines violated both the purpose and effect elements of the test and endorsed religion in the eyes of the public.<sup>47</sup>

Government officials offering tamagushi (and kumoturyo, another kind of offering), in the name of the local government, directly supports the religious activity of the shrine.<sup>48</sup> The Court noted that other sorts of gifts, so long as they are given to the family of the war dead rather than the shrine, could be given because such gifts are not given to support religious activity.<sup>49</sup> The Court also noted that government officials may give saisen from their own pockets.<sup>50</sup> Saisen is an anonymous gift given when people visit temples or shrines.<sup>51</sup> Shiraishi was ordered to repay the government for all the expenditures made in support of the offerings.<sup>52</sup>

The *Ehime Tamagushi* case was a significant event in constitutional analysis of Articles 20 and 89 of the Constitution of Japan.<sup>53</sup> Earlier cases applied similar legal tests, but without the historical and jurisprudential context applied by the *Ehime Tamagushi* Court.<sup>54</sup> Most notable among these earlier cases is the *Tsu City Groundbreaking Ceremony* case.<sup>55</sup>

The facts of that case are significantly different from those in the Ehime Tamagushi case. In *Tsu City*, Shinto rites were performed at a city-sponsored groundbreaking for a municipal

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46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. Ravitch, *supra* note 31, at 513-19.

54. *Id.*

55. 31 SAIKOU SAIBANSHO MINJI HANREISHUU [MINSHUU] No. 69 (Grand Bench) (1977).

gym.<sup>56</sup> The ceremony and offerings were paid for by the city.<sup>57</sup> The Japanese Supreme Court applied the purpose and effects test later used by the Ehime Tamagushi Court, and held 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>58</sup> A violation of Art. 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>59</sup>

The groundbreaking rites were obviously connected to religion,<sup>60</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>61</sup> The effects of the ceremony did not subsidize or promote Shinto, suppress or interfere with other religions, according to the Court.<sup>62</sup> The Court basically held that the groundbreaking ceremony was just a local cultural custom that did little to promote religion.<sup>63</sup>

I have argued elsewhere that the analysis in this case is inconsistent with the legal test it sets forth and the language of Article 20(3) and Article 89.<sup>64</sup> For present purposes, however, *Tsu City* helps us understand why a visit by the Prime Minister to the Yasukuni Shrine, unlike local groundbreaking ceremonies, is

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56. *Tsu City Ground-Breaking Ceremony Case*, Nagoya Daihōtei [Sup. Ct.] Aug. 13, 1977, 1971 (Gyo-Tsu) no. 69, 31 Saikou Saibansho Minji Hanreishuu [Minshū] 533 (Japan).

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. Ravitch, *supra* note 31, at 509-13.

not just a cultural norm that does little to promote Shinto, but rather constitutes a nationally and internationally recognized engagement by the Prime Minister with one Shinto sect. In fact, the focus on the traditional nature and general acceptance of local Shinto groundbreaking ceremonies in *Tsu City* can be easily contrasted with the controversial nature of offerings by government officials at the Yasukuni Shrine---which has a connection to State Shinto---in *Ehime Tamagushi*.<sup>65</sup>

### III. WHAT DOES ALL THIS MEAN FOR OFFICIAL VISITS BY THE PRIME MINISTER OF JAPAN TO THE YASUKUNI SHRINE?

A number of lower courts have directly addressed visits by the Prime Minister to the Yasukuni Shrine, and most have held that it is constitutional, but they have done so in a number of cases by distorting the facts and suggesting that the visits were private, even where major national attention was called to the visits and where the Prime Minister used official vehicles, etc . . . during the visit. One court, the Osaka High Court, however, held these visits to be unconstitutional and recognized that a publically acknowledged visit by the leader of the nation to the Yasukuni Shrine is imbued with religious meaning in the minds of the public and may have a religious effect (and as a practical matter a religious purpose).

The argument most often made to support the constitutionality of these visits is that they are made in the government official's private capacity. This suggests that the visits are not state action and therefore cannot be a violation of the Constitution. When people visit the shrine there is a guest book that is signed. This has been an important focus in visits by government officials. Do they sign the book as a private citizen,

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65. Compare *Tsu City* (finding local Shinto groundbreaking ceremony a generally accepted, normal part of Japanese culture) with *Ekime Tamagushi* (finding offerings by government officials at the Yasukuni Shrine to be unconstitutional and noting connection between Yasukuni and State Shinto as well as the lack of general acceptability or normalcy in Japanese society for such offerings by government officials).

under their government title, both, or do they simply not sign the book at all?

Yet, under Articles 20(3) and 89, it does not matter whether the Prime Minister states the visit is in his private or public capacity. The visits are unconstitutional regardless. The *Ehime Tamagushi* and *Tsu City* cases both look at the “totality of the circumstances” when evaluating the constitutionality of government action.<sup>66</sup> When a Prime Minister visits the Yasukuni Shrine, even in an allegedly private capacity, many factors must be considered in determining if there is state action and whether that state action is unconstitutional. First, and foremost is the fact that these visits are generally public and attract the attention of the media. In fact, this is often the intent of the Prime Minister or official visiting the Shrine.

Moreover, there is no question that the Yasukuni Shrine is a religious entity, and in fact, a religious entity with a direct theological and historical relationship to State Shinto. Prime Ministers generally make offerings at the shrine and have visited the shrine during festivals held at the shrine. Many people in Japan and throughout Asia pay attention to whether a given Prime Minister visits the Shrine. These visits are in no real sense private, especially considering the factors set forth in the *Ehime Tamagushi* case.

If one wanted to be cynical, one could argue that these visits serve no religious intent, but rather are a form of political pandering. Yet, many government officials who visit the Shrine reject this argument. Moreover, favoring one religion in order to pander to constituents is no more constitutional than favoring a specific religion for purely religious purposes. Let’s consider the factors set forth by the Japanese Supreme Court for analyzing cases under Articles 20(3) and 89:

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66. The Ehime Tamagushi Case, Saikō Saibansho [Sup. Ct.] Apr. 2, 1997, 1992 (Gyo-Tsu) no. 156, 51 Saikō Saibansho Minji Hanreishū [Minshū] 1673 (Japan); Tsu City Ground-Breaking Ceremony Case, Nagoya Daihōtei [Sup. Ct.] Aug. 13, 1977, 1971 (Gyo-Tsu) no. 69, 31 Saikou Saibansho Minji Hanreishuu [Minshū] 533 (Japan).

1. “The external aspects of the conduct”—As noted above the conduct involves the leader of the nation visiting a religious shrine to make offerings under intense media scrutiny.

2. “The place of the conduct”—The Yasukuni Shrine, which is clearly a religious site and which has a direct connection to State Shinto, and Articles 20(3) and 89 were designed to limit State Shinto.

3. “The average person’s religious understanding toward the conduct”—The average person knows that the Shrine is a religious venue where the souls of Japanese war casualties are enshrined. The average person would also be aware that war criminals are enshrined there given the massive media attention paid to this issue and the international condemnation such visits engender.

4. “The existence or extent of actor’s religious intention, purpose, or awareness”—There are really only two possibilities here. The Prime Minister genuinely intends to visit the shrine for religious purposes or the Prime Minister is using the visit to pander to particular political interests (in which case he is using a religious means to achieve a secular end).

5. “The effect or influence on the average person”—The average person can perceive these visits as supporting the Shrine, the souls of the dead there, and also Japanese nationalism. The last of these perceptions is not constitutionally problematic because it is not based in religion, but the first two are.

6. “Objective judgment based on socially accepted ideas”—The controversy surrounding these visits within Japan (for this element the controversy outside Japan is not relevant) demonstrates that these visits are not socially accepted in the way a Shinto rite at a local groundbreaking ceremony would be. There is no broad public consensus or sense within Japan that these visits are socially acceptable. To use the language of the United States Supreme Court, these visits create political insiders and outsiders along religious lines (or in this case based on religious acts) and a reasonable member of the public

would view the visits as endorsing the Yasukuni Shrine and its religious, as well as religio-political, agenda.<sup>67</sup>

Thus, given all these factors, a strong argument can be made that these visits, considering their purpose and effects in light of the principle of the separation of government and religion, are state conduct “beyond the appropriate limits in light of the social and cultural circumstances of” Japan.<sup>68</sup> Whether the Prime Minister formally characterizes the visits as public or private is irrelevant so long as the visit is publically recognized.

An important question that must be addressed is the Prime Minister’s right to free exercise of religion under Article 20(1).<sup>69</sup> An argument can be made that prohibiting government officials from visiting a Shrine they may want to visit for personal religious reasons, and maybe because they have relatives enshrined there, would be a significant infringement on the official’s freedom of religion. This is a good argument, but the concern can be answered with little trouble.

The most obvious argument to be made here is that government officials must follow the Constitution even when it conflicts with rights they may have if they did not hold public office. But here even this argument is unnecessary. There would be no problem with a Prime Minister visiting the Shrine in a truly private capacity, meaning no public announcement of the visit, no leaks to the media, no use of government vehicles or government seals or paraphernalia, any offerings being paid for and made privately, and no endorsement of, support for, or announcement by, any government official or staff member.

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67. See generally *Santa Fe Ind. School Dist. v. Doe*, 530 U.S. 290 (2000); see also *McCreary*, 545 U.S. 844 (2005).

68. The Ehime Tamagushi Case, Saikō Saibansho [Sup. Ct.] Apr. 2, 1997, 1992 (Gyo-Tsu) no. 156, 51 Saikō Saibansho Minji Hanreishū [Minshū] 1673 (Japan).

69. For a discussion of Free Exercise of religion under the Japanese Constitution, see Frank S. Ravitch, Symposium, *The Unbearable Lightness of Free Exercise Under Smith: Exemptions, Dasein, and the More Nuanced Approach of the Japanese Supreme Court*, 44 TEX. TECH L. REV. 259, 274-79 (2011).

Given, however, the need for security it would seem acceptable and consonant with Articles 20 and 89 for the Prime Minister to have the necessary security staff there. If the media somehow found out about the visit through no fault of the government (leaks would be the fault of government), there would be no violation. If the Shrine or a group that is connected, even indirectly to the shrine, were to announce the visit, it may lead to a situation where it would be impossible for the Prime Minister to make such visits while in office without violating Articles 20(3) and 89 in light of the factors set forth in the *Ehime Tamagushi* case.

The distinction drawn between public and private visits in some of the lower court cases, a distinction also made by Prime Ministers who have visited and their staffs, is inconsistent with the factors and legal tests the Japanese Supreme Court has developed under Article 20(3) and 89. The fact that the Yasukuni Shrine is a holdover from the Meiji era and State Shinto should make analysis of visits there even more strict. In fact, the *Ehime Tamagushi* Court addressed the historical reasons for Articles 20 and 89 going back to the problems created by State Shinto during the Meiji, Taisho and early Showa eras.<sup>70</sup> However, even under a basic analysis of the factors used in separation of government and religion cases in the Japanese Supreme Court, the visits are unconstitutional.

For non-Japanese reading this essay, it is important to note that the *Ehime Tamagushi* and *Tsu City* decisions do not have the same binding force as decisions made by the United States Supreme Court on constitutional questions.<sup>71</sup> In Japan, the concept of precedent is different than in the United States.<sup>72</sup> Yet,

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70. The Ehime Tamagushi Case, Saikō Saibansho [Sup. Ct.] Apr. 2, 1997, 1992 (Gyo-Tsu) no. 156, 51 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1673 (Japan).

71. Shigenori Matsui, *Constitutional Precedents in Japan: A Comment on the Role of Precedent*, 88 WASH. U. L. REV. 1669, 1671-77 (2011).

72. *Id.*

both the *Tsu City* and *Ehime Tamagushi* cases were followed by subsequent Courts (and lower courts).<sup>73</sup>

## CONCLUSION

Public visits by the Prime Minister of Japan, and by implication other high ranking government officials, are unconstitutional under Articles 20(3) and 89 of the Japanese Constitution. These visits violate every factor set forth by the Japanese Supreme Court for analyzing cases under Articles 20(3) and 89. Whether these visits are ostensibly in a private or public capacity should be irrelevant to the analysis given these factors. The real question should be whether the visits are publically recognized, and to this question, no formalistic distinction between public and private visits makes sense. Truly private visits, without significant public attention, are protected by Article 20(1), but visits by the Prime Minister rarely if ever fall into that category because of the public attention they—often intentionally—garner. So long as these visits are announced and covered by the media they are unconstitutional.

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73. Ravitch, *supra* note 31, at 515-18.

