The Role of the Judiciary and the Political Branches to Further the Work of Religious Freedom: Japan's experience

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The Constitution of Japan of 1946 (current Constitution) guarantees freedom of religion and declares separation of church and state (Articles 20 and 89). Japanese jurists have struggled to establish religious freedom through the courts which have the power of judicial review and they have succeeded to some extent.

It seems to me, however, the role of Government to "further the work of religious freedom" has been overlooked in Japan. But I think we can not deny that the political branches (Diet and Cabinet, and local public entities) also have played a certain role to further religious freedom, when they accommodate religion in legislation or administration.

In this presentstion I will introduce the present situation in Japan regarding the role of the Judiciary and the political branches to further the work of religious freedom.

1. Constitutional Framework

(1) Historical background

At first, for those who are not familiar with Japanese Law, I should explain the constitutional framework guaranteeing religious freedom in Japan.

In Japan the modern nation-state system was introduced for the first time by the Constitution of the Empire of Japan (so-called "Meiji Constitution"), which was promulgated in 1889. This Constitution guaranteed freedom of religion, stating "Japanese subjects shall ……enjoy freedom of religious belief" (Article 28). But this guarantee was limited by the important proviso that the subjects enjoyed the freedom "within limits not prejudicial to peace and order, and not antagonistic to their duties as subjects".

After the so-called “State Shinto” virtually gained the position of state religion, the words “their duties as subject” were understood as containing the duty to worship Shinto shrines and during the World War II citizens were compelled to worship Shinto shrines.

In 1945 Japan surrendered to the Allied Powers and the old regime had to be renovated. During the occupation, the Allied Powers vigorously promoted the policy to reinforce religious freedom as one of the most important policies. The General Headquarters (GHQ) of the Supreme Commander for the Allied Powers issued two directives (“Civil Liberties Directive” and “Shinto Directive”), strictly ordering the abolition of all laws and ordinances which imposed restrictions on freedom of religion and the abolition of all state supports to and controls over Shinto shrines.

You might know that the original draft of the current Japanese Constitution was written by GHQ (“MacArthur’s Draft”). So, you could easily imagine that the religion clauses of the Constitution of Japan reflect the policy of GHQ just described, and up to today Japanese jurists are influenced by the theories on the U.S. Constitution, when they interpret the clauses.

(2) Constitution of Japan

(a) Freedom of Religion

Article 20, Sec. 1 of the Constitution of Japan provides that “Freedom of Religion is guaranteed to all” and this provision is generally understood as guaranteeing freedom of religious conscience, freedom to conduct one’s religious worship and freedom of religious association.

It is noteworthy that, besides freedom to willingly participate in religious activities, freedom not to be compelled to participate (negative religious freedom) is emphasized in Japan. In fact, Article 20, Sec. 2 explicitly guarantees that “No person shall be compelled to take part in any religious act, celebration, rite or practice”. You might think this provision does not make sense because Section 1 of the same article guarantees comprehensively freedom of religion. But, as I pointed out earlier, under the Meiji Constitution citizens were compelled to participate in national ceremonies in the form of Shinto religion. This is why this provision was specially stipulated.

(b) Separation of Church and State

Regretting State Shinto was virtually established as state religion and freedom of religion was denied under the Meiji Constitution, the Japanese Constitution adopts the principle of separation of church and state.

We have no comprehensive "non-Establishment Clause" which is seen in the U.S. Constitution. But our Constitution provides "No religious organization shall receive any privileges from the State, nor exercise any political authority" (Art. 20, Sec. 1), "The State and its organs shall refrain from religious education or any other religious activity" (Art. 20, Sec. 3) and "No public money or other property shall be expended or appropriated for the use, benefit or maintenance of any religious institution or association" (Art. 89). Therefore it is widely accepted that the Japanese Constitution adopts the separation system.

2. Furtherance of religious freedom by the Judiciary

As I stated earlier, Japanese jurists have centered their efforts on the furtherance of religious freedom through the courts, though some jurists criticize the Japanese Supreme Court is too conservative to invalidate legislations or administrative acts. But it seems to me that the criticism is somewhat one-sided and the Japanese courts also have played a certain role to guarantee religious freedom in Japan.

Though there are not so many cases in which the infringement of religious freedom was alleged, I can present the *Kobe City College of Technology* case (Supreme Court Decision of 8 March 1996) as one example in which the Supreme Court played the active role.

A college student, Jehovah's witness, refused to take kendo (Japanese fencing) class, because practicing any martial art is prohibited by his religious belief. As a result of his refusal, the student could not earn the credit of the required subject of physical education and was eventually expelled from the college. So, he brought the action for withdrawal of the expulsion, insisting that forcing him to take kendo class against his religious belief and expelling him for the reason of his refusal infringed his freedom of religion.

The Supreme Court found that because "his refusal to participate in kendo class is grounded on the core of his sincere religious belief" and because "he was driven into the situation of expulsion as a result of his religiously motivated refusal regardless of his good records on other subjects", the expulsion had the

nature that led him to act against his own religious belief, i.e. to participate in kendo class, if he wished to avoid the serious disadvantage". According to the Court, "the college could offer alternative classes in the proper way and form which do not appear partial to him" and "such alternative classes would not impair the educational order in the college nor seriously disturb the operation of the college". So the Court held the conclusion that the decision of the college to expel him was unconstitutional.

Among the numerous separation cases, I can point out the *Ehime Tamagushi-ryo* case (Supreme Court Decision (full bench) of 2 April 1997) as the example in which the Supreme Court played the active role. This case is related to spending of public money to religious corporations. From 1981 to 1986 the governor of Ehime prefecture offered 166 thousand yen to Yasukuni Shrine and other organizations in the name of the charge for sprig of a sacred tree (Tamagushi-ryo) etc. and the inhabitants brought the action, alleging the governor's act violated separation of church and state.

The Supreme Court found that "because the votive offerings are placed in front of Shinto gods in the ceremonies of Shinto religion, it is clear that shrines think the offerings have religious significance" and "it is hard to think that an ordinary person would evaluate the dedication of the offerings as one of the social courtesies". The Court continued that "there is no evidence that the prefecture spent its money to the ceremonies of the same kind which other religious organizations celebrate. So, we can not deny that the prefecture became intentionally entangled with the particular religious organizations. If a local public entity becomes entangled with the particular religious organizations in the special manner as seen in this case, such an entanglement will give an ordinary person the impression that the prefecture specially supports them because of their superiority to others, and the ordinary person will become interested in them". The Court concluded that because Ehime prefecture's spending to Yasukuni Shrine etc. had the purpose of religious significance and the effect to support, promote or further the particular religion, it is in violation of separation of church and state.

3. Furtherance of religious freedom by the political branches

There is a good reason why the role to guarantee religious freedom has been expected almost exclusively to the Judiciary by Japanese jurists. As you could

easily imagine, it seems natural to think that the political branches can not be expected to play this kind of role, because they consist of members selected by majority decision and will be dominated by the religious majority. Moreover, because it is support of Shinto shrines by conservative politicians that has been attacked in the separation cases in postwar Japan (for example, ritual visits to Yasukuni Shrine by the Prime Minister), it might be also natural for Japanese jurists to think they can not trust them.

But the political branches have not always been the threat to religious freedom in Japan. Rather, if we closely look at the current Japanese Law, we can find many examples which show the accommodation of religion by them.

As such an example I can point out the existence of Religious Corporations Act (Religious Juridical Persons Law). The Act was enacted in order to give religious organizations legal abilities to own the buildings of worships and other properties and so on. It is said that at the time of the Allied Occupation GHQ studied abolishing the pre-war Act which had specially regulated religious corporations and treating them as one of public benefit corporations generally regulated by the Civil Code. GHQ thought that if the special statute which regulates only religious corporations is enacted, it shows that the Government is too interested in religions.

But it was the prevalent opinion of the leaders of religious organizations that the Civil Code contained too many restrictions. Certainly the public benefit corporations incorporated by the Japanese Civil Code at that time had the characteristic of corporation about which the state authorized public benefit or social utility. The Civil Code adopted the authorization system with wide administrative discretion as to incorporation of public benefit corporations (ex-Art. 34) and vested the administrative organs with the powers to supervise and control their activities (ex-Art. 67). If religious organizations had to be subject to such an authorization system, their incorporation would have to depend on the preference of the administrative organs. If supervision and control by the administrative organs reached religious corporations, the result contrary to separation of church and state would be certain to occur. Therefore, in Japan, the special ordinance which regulated only religious corporations (Religious Corporations Ordinance) was first issued in order to avoid these consequences and the current Religious Corporations Act inherited this idea.

The current Religious Corporations Act provides that those who wish to found a religious corporation must submit the documents prescribed by the Act

and acquire the certification by the Minister of Education or the governor of the prefecture (Art. 12, Sec. 1). This administrative act of certification is understood as act of confirmation indicating the administrative organ's judgment that the submitted documents meet the requirements by the Act and as act without administrative discretion. Today the discretionary powers of the administrative organs over religious corporations are thus denied.

It seems clear that Religious Corporations Act was enacted not because the Diet was too interested in religious affairs, but because the Diet thought that it is necessary to deter the Government from intervening into religious organizations. So, the Act can be seen as one example which shows the effort of the political branches to further religious freedom.

I can point out the zoning law as another example. The City Planning Act prescribes that use districts shall be designated in the city plans (Art. 8), and the Building Standards Act specifies the types of buildings which can be constructed in each use district (Art. 48 and Appendix II). For example, only houses, apartment houses and clinics etc. are permitted to build in low story residential districts.

But the Act provides that "shrine, temple, church and similar house of worship" can be built in any use district. As a consequence, the zoning law will never be applied to exclude religious institutions in Japan. This also shows the effort of the Diet to further religious freedom.

It has not been clearly answered how we should understand these efforts by the political branches. Did the Diet only legislate what are required by the constitutional provisions of freedom of religion or separation of church and state ? Or did the Diet exercise its discretionary power to further religious freedom beyond what are constitutionally required ? If we should answer in the latter way, the question whether these efforts are not in violation of the constitutional provisions of separation of church and state remains. This question has not been answered by Japanese courts nor jurists.

But what I can say from the Japan's experience described above is that even if we have the good reason to focus on the role of the Judiciary when we are going to further religious freedom, we should pay attention to the political branches, too. The political branches can further religious freedom. Of course we must keep our eyes on them so that they never infringe religious freedom, but at the same time we can work on them to take necessary measures to further religious freedom.