

Religion and the Secular State in Japan¹

I. SOCIAL CONTEXT

The contemporary society of Japan appears to be comprised of *both* secular and religious influences. The reality is that the Japanese society reflects an ambivalent feeling towards religion shared by the majority of the Japanese people and is the key to understanding the social, political and legal context in the theme of “Religion and the Secular State.”

In this section of the report, both the current breakdown of religious affiliations in Japan and a brief historical explanation of the major religious traditions in Japan are given. According to the latest reliable statistics available concerning the religious affiliation of the Japanese, 51.2 percent are Shintoists (Shinto is traditional polytheistic religion of Japan), 43.3 percent are Buddhists, 1.0 percent are Christians, and 4.4 percent are other religions. The total number of Shintoists and Buddhists combined make up approximately two hundred million, which is almost twice as many as the total population of the country. How could that be explained?

First, as the statistics are based on a questionnaire answered by religious communities, each community may have declared a number slightly more than actual membership. Another explanation could be the possibility that each community counted the number of people who had simply participated in some religious events of the community or worshipped in some way or other, even though there is no such clear-cut sign of one’s religious affiliation in Shinto and Buddhism as baptism is in Christianity. Many Japanese tend to participate in religious events of different religions, such as the New Year’s celebrations at Shinto shrines or Buddhist temples, Saint Valentine’s Day and Christmas Eve, romantic wedding ceremonies at Christian churches, and funeral ceremonies done in a Shintoist or Buddhist style.

According to a variety of public-opinion polls, however, approximately 30 percent or less of the Japanese believe in a religion. This gap between their willingness to participate in various religious events and their self-understanding regarding religious affiliation is due to the dual meaning of the word “religion.” If the word “religion” implies something related to the ultimate solution of human problems, most Japanese would answer that they are not committed to a particular religion. However, most Japanese become involved in religion in some way or other by taking part in a variety of religious events, because it cannot be denied that a religious dimension still exists in those mores. Actually, few Japanese consider themselves to be atheistic or strictly non-religious. In this “secular” society, there are as many as 182,310 religious corporations, thus showing the religious ambivalence of the Japanese.

The following major religious traditions in Japan are worth mentioning: Shintoism, Buddhism, Confucianism, and Christianity.

Shintoism is the indigenous polytheistic religion of Japan. In particular, Shrine Shinto (Jinja Shinto) enjoyed a special status until the end of the Second World War as a “state religion” of pre-war Japan. After the Meiji Restoration, an event in 1867 which put an end to Tokugawa shogunate, it was called State Shinto (Kokka Shinto), which incorporated traditional local Shinto rites, nationalized certain rituals and holidays, and built on them to promote worship of the emperor and Yasukuni Shrine’s cult of war dead. State Shinto (or

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Shrine Shinto) was officially regarded as non-religion by the government and it spiritually supported ultra-nationalism and militarism of pre-war Japan.

Buddhism found its way into Japan in the sixth century and proliferated in each era in some way or other with governmental support. The traditional authority enjoyed by Buddhism in Japan was lost in the sixteenth century when some feudal rulers burned down the Buddhist temples. But a mixture or synthesis of Shinto and Buddhism based on the identification of Buddhist figures as Shinto deities has been a prominent feature of Japanese religiosity throughout time in spite of Meiji government's Edict for Separation of Shinto and Buddhism just after the Restoration.

Confucianism, a political moral philosophy founded by Confucius in ancient China, is not regarded as an authentic religion. It did, however become highly influential, particularly in Tokugawa period, when it provided the shogunate with ideological support. It has since been highly influential among commoners since the Meiji era.

Christianity was introduced to Japan by a Jesuit Francisco Xavier in 1549. After harsh persecution during Tokugawa era and the Western major powers' arrival at the end of the shogunate, Japan was finally exposed to the West and religious dissemination came to be tolerated. Today, most major Christian churches or sects are found in the country. The total number of Christian followers, however, has never surpassed 1 percent of total population of Japan. The Roman Catholic Church has the largest number, but it still has about 450,000 people, less than 0.5 percent of the total population. Japan even has members who are Jehovah's Witnesses. Although superficially celebrated, Christian ceremonies and rituals include Christmas, Saint Valentine's Day, and Halloween. There are very few Muslims, Judaists, Hindus and Sikhs in Japan.

II. THEORETICAL AND SCHOLARLY CONTEXT

The present Constitution, promulgated on 3 November 1946 took effect on 3 May 1947 and replaced the first Constitution (Meiji Constitution), which was enacted in 1889. Critical reflection of the state Shinto system, accompanied by oppression of other religions under the Meiji Constitution, led to the guarantee of human rights embodied in an extensive list of fundamental rights and freedoms of the present Constitution. The list includes a provision regarding religion (Article 20), which is bolstered by Article 89 concerning prohibition of financial support for religion. The two articles provide for religious freedom and the principle of church-state separation in detail.

There are competing views among politicians, academics and activists as to how religion and the state should relate to each other, similar to the significant controversies regarding the Religion Clauses of the First Amendment to the U.S. Constitution. Two major views exist in Japan.

The conservative view, held by right-wing organizations, conservative politicians in the Liberal Democratic Party (now out of power), the Self Defense Force leadership, the Associations of War-Bereaved Families, and the Association of Shinto Shrines, have argued against strict separation, insisting on state support for Yasukuni Shrine and official visits to the shrine by public figures. The other more liberal view held by Christians, communists, socialists, and a majority of constitutional scholars argue that a strict separation of the state from religion is mandated by the two articles and that this is essential as a barrier against the revival of pre-war militarism.

The latter view can be said to be shared more widely, but academics differ on how a line of separation should be drawn in each of the concrete problem areas.

III. CONSTITUTIONAL CONTEXT

One of the important aims of the Meiji Restoration was to separate Shinto from Buddhism. The two religions had been mixed for a long time in Japanese history. The Edict for Separation of Shinto and Buddhism in 1868 by the new Meiji government officially put an end to this co-mingling. This separation of Shinto from Buddhism made it possible for the government to treat the former in a special way, both politically and

constitutionally: Shrine Shinto, or State Shinto, was to be treated as a state religion by way of the tricky logic of considering Shinto shrines and State Shinto to be “non-religious.” Accordingly, Shinto priests were considered state officials, and Shinto shrines came to be supported financially by the government.

The Meiji Constitution Article 28 guaranteed religious freedom as “the subjects shall have freedom of religion to the extent that it does not interfere with the public welfare and their liability as a subject is not breached,” but the wording invited an interpretation that the freedom could be restricted by a mere order. Also, the freedom of religion was only guaranteed to the extent that it could coexist with the special status of Shrine Shinto or State Shinto as a state religion. Therefore, other religions were treated coldly or even oppressed (e.g., Christianity and Ohmoto). In sum, the full realization of religious freedom was fundamentally obstructed under this regime. With the rise of ultranationalism, the “state religion” status and dogma of Shrine Shinto became a spiritual support for the nationalism and militarism of prewar Japan.

After the Second World War, in December 1945, the Shinto Directive (the Directive on the Abolition of Governmental Sponsorship, Support, Perpetuation, Control and Dissemination of State Shinto) issued by SCAP (Supreme Commander for the Allied Powers in Japan) clearly repudiated special character and constitutional status enjoyed by State Shinto. Together with the renunciation of divinity made by the late Shouwa Emperor Hirohito on New Year’s Day in 1946, it brought about a total demise of the pre-war regime and demanded a new regime guaranteeing religious freedom and state separation from religion. This historical development was a backdrop of the detailed provisions concerning religion in the present Constitution. The present Constitution has two provisions concerning religion as mentioned before, namely Articles 20 and 89:

Article 20:

Sec.1 Freedom of religion is guaranteed to all. No religious organization shall receive any privileges from the State, nor exercise any political authority.

Sec.2 No person shall be compelled to take part in any religious act, celebration, rite or practice.

Sec.3 The State and its organs shall refrain from religious education or any other religious activity.

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.

Thus, religious freedom is explicitly protected and separation of religion and state is distinctly mentioned. This scheme is modeled after the American constitutional principle found in the First Amendment, namely, strict separation of the state and religion.

The principle of state separation from religion provided for by Articles 20 and 89 is a principle of state neutrality toward religion. This understanding, commonly shared by constitutional academics, was professed by the Supreme Court of Japan as well in *Tsu City Ground-Purification Ceremony Case* in 1977. What actually matters is how both “non-involvement” and “impartiality,” two competing elements of “(religious) neutrality” could and should be respected as it would determine the outcome of each concrete case determining which of the two elements is given more serious consideration.

Whatever the position on this question may be, it is certain that there can be no preferred or privileged religion, or group of religions, under the current Constitution. There are also specific provisions concerning the principle of equality when dealing with the individual’s religion, namely, Article 14 Section 1, which provides that “all of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin,” and Article 44, which provides that “the qualifications of members of both Houses and their electors shall be fixed by law. However, there shall be no discrimination because of race, creed, sex, social status, family origin, education, property or income.”

IV. LEGAL CONTEXT

The Religious Corporation Law is a piece of legislation that deals with religion. The Religious Corporation Law, enacted in 1951 and significantly revised in 1995, aims to confer juristic personality on a religious organization in order to facilitate its ownership and maintenance of properties such as a place of worship, and its operation and business for achieving its goal (Article 1 Section 1). Section 2 of the Article provides that religious freedom guaranteed by the Constitution should be respected in all the administrative settings and that any provision in the Religious Corporation Law should not be interpreted in such a way that the constitutionally guaranteed religious freedom of an individual, group or organization may be restricted.

The revision in 1995 was controversial in that the administrative control of religious corporations by the Ministry of Education (and prefectural governors) was tightened through the requirement of an annual submission of administrative/financial documents and through the requirement to report (on a religious corporation's business) and answer (to the public authority's inquiry when requesting a dissolution order by a court seems necessary) (Article 81). This scheme of dissolving a delinquent religious corporation, provided for by Article 81 of Religious Corporation Law, was upheld under Article 20, Section 1 of the Constitution guaranteeing freedom of religion by the Supreme Court in the Oumu Shinrikyou Dissolution Case in 1996.

There are also specific provisions on religion in several laws. Section 1 of Article 897 of the Civil Code concerning Succession provides that "notwithstanding the provisions of the preceding Article, the ownership of genealogical records, of utensils of religious rites, and of tombs and burial grounds passes to the person who, according to custom, is to preside over the rites for the ancestors. If, however, the *de cuius* has designated a person to preside over the rites for the ancestors, such person shall succeed to that ownership." Corporate Tax Law, Local Tax Law and Income Tax Law provides for tax exemption of religious corporations. The Fundamental Law of Education enacted in 2006 provides that benevolence towards religion, religious cultivation and social importance of religion is to be respected in education and that no religious activities including denominational religious education shall be permitted at public schools (Article 15). It also prohibits discrimination based on creed in education (Article 4 Section 1).

Similar provisions concerning the principle of equality when dealing with the individual's religion or creed are found in National Public Service Act Article 27 ("In the application of this Act, all citizens shall be accorded equal treatment and shall not be discriminated against by reason of race, religious faith, sex, social status, family origin, or political opinions or affiliation except as provided for in item 5 of Article 38."), Labor Standards Act Article 3 ("An employer shall not engage in discriminatory treatment with respect to wages, working hours or other working conditions by reason of the nationality, creed or social status of any worker."), and Labor Union Act Article 5 Section 2 Item 4 ("No one shall be disqualified from union membership in any case on the basis of race, religion, gender, family origin or status."). The Criminal Law makes it a crime to disrespect a place of worship and to disturb a religious ritual (Article 188).

As to specific case law on religion, there is a substantial body of case law concerning constitutional guarantees of religious freedom and state separation from religion because the system of constitutional review in the United States has been introduced (Article 81 of the present Constitution). In principle, constitutionally guaranteed freedoms and rights cannot be restricted by legislation.

The specific body in the State structure that deals with religious affairs and religious communities is the Ministry of Education, Culture, Sports, Science and Technology (the Ministry of Education until 2001), and especially its extra-ministerial bureau, the Agency for Cultural Affairs. These two bodies are responsible for religious administration. The Ministry includes the Religious Corporations Council, an independent expert advisory council, whose establishment is provided for by Article 71 of the Religious Corporation Law. The function and power of the Council is confined to enforcement of relevant provisions such as dealing with petitions for redress of a grievance. Religious Corporation

Law (Article 71 Section 4) prohibits the Council from intervening in internal religious affairs of a religious corporation. This requirement naturally follows from the constitutional principle of state separation from religion, since the Council is a part of the State government.

V. THE STATE AND RELIGIOUS AUTONOMY

The public authorities may not restrict the autonomy of religious communities, because Article 20 Section 1 of the Constitution guarantees freedom of religion, which includes freedom of religious association. (Freedom of association in general is specifically guaranteed by Article 21 Section 1 as well). The autonomy of religious communities follows from freedom of religious association.

Thus, the public authorities are prohibited from intervening in internal affairs of religious communities (e.g., in structuring, administering and financing the religious community, in determining religious doctrine, in selection of religious personnel, in disciplining members of the community). The Religious Corporation Law Article 85 specifically provides that any provision of the law shall not be interpreted to empower the public authorities (including courts) to intervene in the internal affairs of religious communities, such as determination of religious doctrine, discipline or custom and selection of religious personnel. Article 84 of the law also requires the public authorities to avoid violating religious freedom of such corporations when they enact or amend a law affecting such corporations' finance (e.g., tax law), or when they lawfully inspect such corporations.

There is a substantial body of case law concerning secular judicial intervention in internal disputes of religious communities. It has been established judicially that a suit to obtain a declaratory judgment regarding a purely religious status within a religious community is to be dismissed without prejudice, and that an ostensibly legal dispute, the resolution of which is virtually dependent on a determination of underlying religious doctrinal matter, is not a legal controversy and dismissed without prejudice.

As for the secular law protecting or restricting the autonomy of religious communities to govern themselves and act freely in the secular sphere, see Part IV, above.

VI. RELIGION AND THE AUTONOMY OF THE STATE

Article 20, Section 1, in its latter part, provides that no religious organization may receive any privileges from the state, nor exercise any political authority. A good example of the proscribed privilege is the special status and preferential treatment enjoyed by State Shinto (or Shrine Shinto) until the end of the World War II. Under the present Constitution, however, no particular religion can be supported by the government nor be given any power to control other religious communities, as any preferential treatment of a particular religion of those kinds is considered a form of the proscribed privilege.

“Political authority” has been commonly understood to mean “sovereign power” currently monopolized by the state or local public entities (i.e., legislative power, taxing power, judicial power, power to appoint and to dismiss public officials). Political activity itself is not considered “political authority.”

In this context, the Soka Gakkai, a religious group of the followers of certain Buddhist sect, is worth mentioning. The Soka Gakkai became an influential religious group after the war, getting many members and engaging in political activity with the intention of converting the Japanese to their particular Buddhist faith. The Soka Gakkai organized a political party named Komei-to (Clean Government Party) in 1964. The party had smoothly developed in the political arena so much so that it transformed itself from the opposition to the government together with the Jimin-to (Liberal Democratic Party) in the 2000s.

The Soka Gakkai has been a genuine “new religion” since 1991, when it was excommunicated by the authority of the Buddhist sect. The Soka Gakkai International, an international arm of the Soka Gakkai, has been internationally developing as well.

VII. LEGAL REGULATION OF RELIGION AS A SOCIAL PHENOMENON

As to the state law regulating religion specifically, see Part IV above. The religious almanac, edited by the Agency for Cultural Affairs, contains information about religious affiliation of individuals. This is, however, a result of voluntary replies submitted by religious communities. Religious freedom guaranteed by Article 20, Section 1 prohibits the state from forcing people to confess their religious affiliation.

Regarding the exemption from generally applicable laws or requirements based on religious conscientious objection, there are some lower court decisions worth noticing: the Bokkai Katsudou Case, concerning a clash between criminal law and the religious activity of a priest, Tokyo School Attendance Case, and Kobe Technical College Case, both concerning a generally applicable burden on religious activity of believers.

The new issue of whether religious exemption from public duty to serve as a lay adjudicator (named “Saiban-in”) should be given is also noteworthy. This system of guaranteeing lay people’s participation as lay adjudicators in certain serious criminal cases came into operation in May 2009. Catholic Bishop’s Conference of Japan announced its official opinion the following month that the clergy should decline to serve as Saiban-in while the laity should be free to decide whether or not they would assume the responsibility as Saiban-in. As Japan still maintains capital punishment, some sects of Buddhism which are critical of death penalty are also concerned about the possibility of their followers serving as Saiban-in in a case where a sentence of capital punishment would be likely.

VIII. STATE FINANCIAL SUPPORT FOR RELIGION

State separation from religion is provided in detail in the present Constitution in Article 20, Section 1 (“No religious organization shall receive any privilege from the State.”) and Article 89 proscribing public financial support of religious institutions or associations. The latter proscription is a part of the prohibition of granting a “privilege” provided in the former. In all the cases regarding the separation principle, the “purpose-effect test,” a Japanese version of the *Lemon* test in the U.S., has been applied. The following is a list of important concrete issues in this field:

- Public payment to a religious organization (e.g., Ehime Shrine Donation Case).

- Public benefit to accommodate an individual's religious activity (e.g., Mino War Memorial Case, and Sorachibuto Shrine Case).

- Indirect public aid to religion through tax exemption.

- Public subsidies for maintenance of religious structures which have historical or cultural value.

- Public aid to private religious schools.

The Sorachibuto Shrine Case is important in that the purpose-effect test was not articulately applied there.

IX. CIVIL LEGAL EFFECTS OF RELIGIOUS ACTS

So long as there is no violation of secular law, religious acts are respected as they are. With regard to secular judicial intervention in internal religious dispute, see Part V.

X. RELIGIOUS EDUCATION OF THE YOUTH

Religious communities are free to create private schools with curricula and diplomas recognized by secular law. Actually, some of the most competitive prestigious schools in Japan are both private and religious. Due to the essential requirement of the separation principle articulated in the Constitution Article 20, Section 3 (“The State and its organs shall refrain from religious education or any other religious activity.”) and by the Fundamental Law of Education Article 15, Section 2 (forbidding religious education for a particular religion), the public school’s curricula cannot include any denominational religious instruction on a specific subject. They can, however, include non-

denominational education about religions or beliefs as provided for by Article 15, Section 1 of the Law.

Private schools are free to give religious instruction even in a denominational way, as they are not the state or its organs.

XI. RELIGIOUS SYMBOLS IN PUBLIC PLACES

Heated controversies concerning religious symbols in public places (e.g., the headscarf issue in France) have not yet occurred in Japan. In the context of education, however, a pupil or student of a school which officially prescribes a school uniform and a teacher wearing distinctly religious symbols may cause legal controversies. Most constitutional academics seem to agree that accommodating their religious need to wear religious symbols at school would not be held unconstitutional under the presumably established purpose-effect test concerning the separation principle articulated by Article 20 of the Constitution.

XII. FREEDOM OF EXPRESSION AND OFFENSES AGAINST RELIGION

There is no particular protection of religion in the public arena against offensive expressions such as the criminalization of a blasphemous libel. There is, however, a related provision in the Criminal Law Article 188 concerning the crime of disrespecting a place of worship or of disturbing a religious activity (see Part IV).