

## FREEDOM OF RELIGION AND THE SEPARATION OF STATE AND RELIGION: A JAPANESE CASE STUDY\*

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### *Summary*

The separation of state and religion is sometimes understood only as a means of guaranteeing freedom of religion, but it can be also justified on other grounds, one of which is a liberal idea of public neutrality. It follows that there may be a conflict between religious freedom and the separation of state and religion where the former demands some accommodation by the state. The solution to such conflicts depends on how we understand the rationale behind the separation of state and religion and how we evaluate religion in public life and politics. The author examines these issues in terms of recent decisions by the Supreme Court of Japan and Japanese constitutional jurisprudence on religion clauses. He considers the requirement of public neutrality to be a major justification for the separation of state and religion, and insists that it also demands neutrality between religion and nonreligion as well as between different religions. He also points out that many legal institutions which are taken for granted today are not neutral in reality, and requests that the public be more sensitive to the alternative lifestyles of minorities.

### *I. Introduction*

On 2 April 1997, the Grand Bench of the Supreme Court of Japan made a landmark ruling that is expected to have historical significance in the nation's constitutional jurisprudence and an impact on local and central governments' relationships with religions. Indeed, this judgment has not been overruled since then. This case is called the Ehime "Tamagushi-ryo" (offerings for shrines) Case, where the constitutionality of the late former Ehime Prefecture Governor's official payment of "tamagushi-ryo" to Yasukuni Shrine and other Shinto shrines was disputed. Although defense counsel for the former Governor argued that the payment was only a social courtesy for the purpose of paying tribute to the war dead, the Supreme Court ruled that the payment of public funds to those shrines violated Articles 20(3) and 89 of the Constitution.

Article 20(3) of the Constitution prohibits the state and its organs from engaging in any religious activity, and Article 89 provides, "No public money or other property shall be expended or appropriated for the use, benefit or maintenance of any religious institution and

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association, or for any charitable, educational or benevolent enterprises not under the control of public authority.”

Ten of the top court’s fifteen judges joined in the majority opinion, and three other justices also found the governor’s action unconstitutional on slightly different, albeit similar, grounds. Only two justices dissented. It must be pointed out, however, that the general doctrine of the separation of state and religion in this decision was almost the same as that of the Tsu “Jichinsai” Case twenty years previously (Judgment of the Supreme Court, 13 July 1977), where Tsu City’s act in conducting a jichinsai (Shinto ceremony to purify a construction site) was found to be constitutional. Appealing to the same doctrine, the Supreme Court found Tsu City’s act and some other arguably religious governmental activities constitutional, but the Ehime Governor’s act unconstitutional. One may find some differences between these governmental acts: perhaps the Ehime Governor was more involved in religious activity than Tsu City had been. However, the Supreme Court’s jurisprudence of the separation of state and religion is hardly crystal-clear.

In this paper, I consider the problem of the status of religion in a modern liberal constitution, especially that of the possible conflicts of freedom of religion and the separation of state and religion, examining the jurisprudence of the Japanese Supreme Court. This tension has already been found and much discussed in American constitutional law in the form of the tension between the two Religion Clauses of the First Amendment: the Non-Establishment Clause and the Free Exercise Clause (see, e.g., Sadurski (ed), 1992; Kramnick and Moore, 1997). There are much fewer works on this topic in Japan. (Indeed, many constitution scholars seem blithely unaware of the tension, assuming that the separation of state and religion is simply an institutional guarantee of religious freedom.) I hope my examination of Japan’s official jurisprudence will be of some value to constitutional scholarship in other nations, including the United States, that both honor religious freedom and separate religion from the state.

## II. *Freedom of Religion*

Among various constitutional liberties, freedom of religion has played a central role in the modern history of human rights. Some scholars even argue that all human rights historically derive from religious freedom. The idea that the individual is a morally autonomous and responsible agent developed in early modern Europe and America in the movement for freedom from religious persecution. In addition to such moral considerations, it was feared that the entanglement of religion with politics might bring sectarian conflicts to civil war and corrupt religion itself. Thus, there came to be greater tolerance of various sects and religions in modern constitutional states. For example, the First Amendment to the US Constitution commences, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”.

Japan’s current Constitution of 1947 is no exception. Article 20(1) guarantees freedom of religion. But religious belief itself is an important factor of thought and conscience in general, the freedom of which is guaranteed in Article 19, and religious acts and worship are either assembly or symbolic expression, the freedom of which is guaranteed in Article 21. So why then does the Constitution single out freedom of religion in Article 20? One possible

explanation is that religious freedom is historically and/or intrinsically so important that it should be guaranteed separately, but that is not convincing in modern Japan, where people are not known for their religiosity. A more plausible explanation is that freedom of religion (Art. 20) is provided separately from both freedom of thought and conscience (Art. 19) and that of assembly, association and expression (Art. 21) on account of the Constitution's commitment to the separation of state and religion. Article 20 can be understood as merely implementing that separation apart from the recognition of religious freedom, which is mentioned only at the beginning of the article. The entire article reads as follows.

Article 20. 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.

One may gain the impression that Article 20 evaluates freedom *from* religion higher than that *of* religion. It seems that the Constitution does not give privileges to religious freedom in preference to freedom of secular thought and conscience. However, some rulings in Japan allow public accommodation of particular religions on the ground of religious freedom. By far the most important case is that of a Jehovah's Witness high school student (Judgment of the Supreme Court, 8 March 1996), where the plaintiff argued his freedom of religion was violated when he was ejected from a municipal high school for refusing to take compulsory lessons in "kendo" (Japanese-style fencing fought with wooden weapons). The Supreme Court held that the student had the right to refuse to participate in kendo training on the ground of his sincere religious beliefs and found the high school's treatment of him unconstitutional. The Court maintained that the high school should have adopted some alternative means to accomplish its educational purposes in gymnastics classes.

I cannot marshal here other cases concerning public accommodation of religious freedom. It is clear, however, that Japanese courts deny a strict religion-blind attitude to government by allowing some scope for the accommodation of religion. Perhaps the courts believe that religious beliefs are so important to believers' lives that the state must pay the maximum respect to them. I do not disagree with such judgments. However, I do nonetheless feel uneasy about one issue. The courts are not at all clear about what status religious freedom has in constitutional law as compared with freedom of nonreligious thought and conscience. Thus, if the government should also respect atheists' freedom of conscience, then public schools must take some means to accommodate such secular pacifist or humanitarian consciences that find some physical exercise (e.g. wrestling) too barbarous or violent for them to participate in. If only religious believers are given some privileges because of their religion, it would contravene the principle of equality under the law (Article 14(1)). Or rather, if the state is sincerely committed to the non-establishment principle, is it permissible or even obligatory in some cases for the government to give preferential treatment to secular beliefs over religious ones? In order to answer this question, we must examine the meaning and rationale of the constitutional separation of state and religion.

### III. *Separation of State and Religion*

The majority opinion in the Ehime Tamagushiryo Case mentioned above held that “the separation of state and religion principle is generally understood to mean nonreligiousness or religious neutrality which forbids the state (including local governments) from interfering with religion”, but the complete separation of state and religion is in practice virtually impossible and socially undesirable, so that the separation principle, properly interpreted, prohibits as unconstitutional only such entanglements with religion of the state that “are intended to have religious significance and result in the promotion or oppression of religion”.

It is often pointed out that the “aims and effects” test advocated here is derived from the Lemon Case of the United States (*Lemon v. Kurtzman*, 403 U.S. 602 (1971)), but that that test is more amorphous and more likely than its American counterpart to find contested governmental acts constitutional.

In my opinion, this criticism is quite justified, though it may be argued in defense of the “aims and effects” test that it is unwise to search for a clear-cut standard in this case and that we must take into consideration many different factors in the case. In any event, I think it is more important to consider whether the governmental act, if religious in some way, can be justifiable in terms of the separation of state and religion than whether its aims have religious significance and/or whether its effects promote or oppress religion. For example, the payment of public funds to religion-oriented private schools certainly has favorable effects on some religions, but it does not necessarily follow that it is unconstitutional. We must consider the meaning of and rationale for the separation of state and religion before we decide on the constitutionality of the act.

The majority opinion in the Ehime Tamagushiryo Case held that “the separation of state and religion is generally understood to mean nonreligiousness or religious neutrality”, as if these three concepts mean the same thing. This terminology is problematical and confusing.

Obviously, religious neutrality at least means the state’s neutrality between different religions, whether it be religions venerated worldwide or so-called cults. Hence, the establishment of a particular religion is out of the question. But does religious neutrality also include neutrality between religion in general and nonreligion?

There are three possible answers to this question. The first is the giving of priority to nonreligion: Religion must restrict itself as purely private matters like hobbies. The state should tolerate religions in citizens’ private lives, but is strictly required to banish all religious moments from public spheres. Typical proponents of this position regard religion as essentially irrational and inimical to public discourse, where they believe rational dialogue among equal autonomous citizens should reign. No government actions should be based on religious grounds. Even if the thorough application of the separation of state and religion places a burden on the adherents of a particular religion, it is no reason to compromise the separation principle. The words of the Constitution of Japan (Articles 20 and 89) appear to suggest the priority of nonreligion. However, dominant interpretations in Japan, whether by courts or scholars, are not literal in this case. Hardly anybody finds the public financial support of private schools controlled by religious associations or tax reductions for religious corporations unconstitutional. But I suspect Japan’s public educational practice strongly tends toward the priority of nonreligion since teaching about religion tends to be avoided while the truth and

rationality of modern science is taken for granted. (I shall return to this topic later.)

The second answer is the neutrality between religion and nonreligion. On this view, the state should neither take an active part in religious activity, especially that of a particular religion on the one hand nor treat religious activities unfavorably in comparison with secular ones on the other. This interpretation is derived not so much from the Constitution's apparently separatist religion clauses (Art. 20) as from "the equality under the law" clause (Art. 14). In addition, the influential liberal (or libertarian) idea that the state must be neutral among various conceptions of the good seems consistent with this position. Thus, the payment of public money to private religion-oriented schools is constitutional insofar as the other (nonreligious) private schools also receive public financial support on an equal footing.

The third answer is the priority of religion. According to this view, it is somewhat desirable that the state support religion in general and encourage religious sentiment because religion, as well as arts and science, plays an indispensable part in both private and public human life. The Constitution prohibits the public promotion and oppression of *particular* religions only. This view may accord with the religious consciousness found in many Japanese today, who usually do not believe in any particular sectarian religion, but are pious toward their ancestors and respect the supernatural.

Which of these three positions does Japan's Supreme Court take? Certainly it does not accept the priority of nonreligion, for it holds that the separation principle does not necessarily forbid every kind of state involvement with religion. Moreover, as mentioned above, there are some rulings that exempt some religious believers from general obligations on the basis of freedom of religion. It is not certain whether the court subscribes to the priority of religion over nonreligion or neutrality between them, but it is inclined toward the former position, for the majority in the Ehime Tamagushiryo Case found the Governor's act unconstitutional because it gave a special public status to Shintoism, not simply because it was an offering to a religious association. This ruling seems to suggest that it would be acceptable for the government to support every religious association equally. Indeed, the Court mentioned the possibility of consoling the souls of the war dead in a manner that has nothing to do with a particular religion: It may be constitutional that the state perform a generically religious ceremony to console the dead, but a belief in souls in the afterlife is a characteristically religious belief in itself. An atheist does not hold such a belief. (Even some Buddhists and Protestants deny the existence of an afterlife.) Therefore, the court seems implicitly to take the position of the priority of religion. After all, nonreligiousness and the separation of state and religion principle as understood by the Supreme Court are nothing but neutrality between various religions.

Which of the three positions is most consistent with liberal constitutionalism? It depends where we find the rationale for the separation of state and religion.

Some people regard the separation chiefly as a means of guaranteeing freedom of religion. According to them, the separation is institutionalized since the establishment of one religion leads to the oppression of other religions.

But there are other arguments for the separation principle available. One candidate is the requirement that the religion remain pure. The separation is intended to prevent religions, especially dominant ones, from corruption through entanglement with political power. The establishment of religion is harmful not only to other religions, but also to the established religion itself. This doctrine is not common in Japan, though it has been quite influential in the

United States since the time of Thomas Jefferson.

The third reason is the neutrality of the state in the private sphere: the liberal idea that the government should respect each and every individual's choice in their private matters and remain neutral among different opinions concerning personal values and lifestyle. According to Jefferson, "[t]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical" (Virginia Statute of Religious Freedom, 1779). Some libertarians even advocate not only the separation of state and religion, but also the separation of arts and state and the separation of education and state (e.g., Boaz, 1997, pp.106-112).

Fourthly, many Japanese constitutional scholars regard the separation of state and religion mainly as a bulwark against the public support of Shintoism, which, as the de facto established religion in the seemingly secular Constitution of 1890, they find seriously responsible for the militarism and authoritarianism of Japan prior to 1945. This pragmatic consideration cannot be simply rejected as crying wolf, for there are still some Japanese who wish to make Yasukuni Shrine a national institution.

Fifthly and finally, the rationalist understanding of the democratic political process mentioned above as the basis for the priority of nonreligion is also a ground for the separation of state and religion. According to this view, religious belief is essentially beyond rational dialogue and hence impermissible in the public decision-making process.

These five possible reasons for the separation of state and religion are, unlike the three positions concerning the relative status of religion and nonreligion mentioned above, compatible with each other, though the second and the fifth may be incompatible. Nevertheless, different conclusions follow from different ways of weighing them. Thus if we make much of the first reason (religious freedom) and do not take the third reason (the neutrality of the state) very seriously, we would be inclined to conclude in favor of the priority of religion and allow public accommodation of some religions or religion in general. But if we are ever to respect individual liberty, the third reason cannot be ignored. And if we think the state should be as neutral as possible among different views of personal good, then we are led to the neutrality of religion and nonreligion.

Some scholars in this field emphasize only the first ground and find no tensions between the separation of state and religion and religious freedom, but we must examine the different aspects of the separation of state and religion.

#### IV. *The Limits of Neutrality*

I have just argued that the idea of state neutrality should play an important part in considering the problems of religious freedom and the separation of state and religion. But how is the state's neutrality put into practice, and how achievable is it? I suspect those who argue for liberalism in theory seldom insist on strict neutrality in every case.

It must be admitted, at first, that the neutrality among different conceptions of the just, as distinguished from the good, cannot be maintained even in liberal theories. It is permissible, or even inevitable, that the state enforces certain views about political justice and rejects others. Certainly some understanding of political legitimacy must be presupposed in any political association. Even if those whose beliefs concerning public matters are lost in the political arena

suffer some material or psychological damage, they have no right to complain.

But no contemporary state appears to have completely secured even the neutrality among different personal views of the good. Thus, most liberal states enforce monogamy as the only lawful type of marriage. The enforcement of monogamy clearly discriminates against minorities in this field such as those who practice polygamy or polyandry. This partiality is taken for granted only because the overwhelming majority, including liberal theorists, are too familiar with monogamy alone to be fully aware of alternative forms of marriage. I also doubt that the science curriculum in public education is neutral among different worldviews, for modern science rests on the belief in universal human rationality and interpersonal dialogue, not the belief in particular traditions or supernatural revelations. Although the science curriculum may be justifiable on the ground of its technological advantages, this justification is to be distinguished from the superiority of scientific outlook over religious or nonscientific values.

Another problem is that of legal holidays. Sunday is a legal holiday in nearly all the industrialized world. This custom has Christian origins and is certainly favorable to Christian churchgoers and unfavorable to believers of some other religions such as Jews and Muslims, whose Sabbaths are on Saturday and Friday respectively. In my opinion, however, it is permissible that the state follows this custom because the institution of legal holidays has a good secular reason of freeing people from work, and because following the most common pattern of legal holiday (i.e. Sunday) is economically and socially efficient. This custom is indeed partial in terms of its effect, but its justification is neutral.

Some people may object to my concern for public neutrality as follows. Why must we make so much of neutrality? Every nation has its own distinctive history, culture, ethnicity and traditions. It is only through respecting these concrete particularities that national identity and pride can be realized. Cosmopolitan neutrality would impoverish human life, which is inevitably spent in particular communities.

But this objection does not take individual choice and autonomy seriously, compelling identification with some given community. I do not mean to underestimate the importance of communitarian values; I merely insist that those values should not be forced upon us by public authority.

## V. *Conclusion*

My examination of religious freedom and the separation of state and religion finally leads to the problem of the state's neutrality among different values, both religious and secular. No matter how desirable or even possible the state's neutrality is, we must reflect that many familiar institutions we take for granted are not in fact neutral, and we should be sensitive to alternative conceptions of the good and respect each person's freedom to pursue his or her own goals. Freedom of religion is not the privilege of religious people, but one (important) aspect of personal freedom in general.



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