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Religious Accommodation in Japan

*Eiichiro Takahata**

I. INTRODUCTION

Religious accommodation refers to “government laws or policies that have the purpose and effect of removing a burden on, or facilitating the exercise of, a person’s or an institution’s religion.”¹ Religious practices are, by their very nature, actions. Thus, they are governed completely different from other types of expression (such as normal speech). When a religious practice contradicts with laws or regulations, believers have to choose secular duties (or interests) or their religious obligations. To require such a choice burdens the conscience of believers. Religious accommodation heightens the value of the free exercise of religion by eliminating the burden the believer would have on her conscience. It does this by granting a legal exception for a practice that would otherwise be prohibited because of the centrality of the practice to the believer’s religion.² Religious practices that are thought to be socially harmful, such as bigamy, are generally not allowed, despite the religious character of the practice.

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1. Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 686 (1992); see also *id.* at 717–18 (“This kind of ‘favoritism toward religion,’ however, is inherent in the very text of the First Amendment. . . . If the Establishment Clause prohibits the advancement of religion, and if extending special constitutional protection to free exercise advances religion, then the Religion Clauses are contradictory.”).

2. See THOMAS C. BERG, *THE STATE AND RELIGION IN A NUTSHELL* 145 (2d ed. 2004); Tanina Rostain, Note, *Permissible Accommodation of Religion: Reconsidering the New York Get Statute*, 96 YALE L.J. 1147, 1158 (1987); see also *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). Religious accommodation is an expression that the government respects a person’s choices concerning her way of life. See José de Sousa e Brito, *Political Minorities and the Right to Tolerance: The Development of a Right to Conscientious Objection in Constitutional Law*, 1999 BYU L. REV. 607, 628–29; Jonathan E. Nuechterlein, Note, *The Free Exercise Boundaries of Permissible Accommodation Under the Establishment Clause*, 99 YALE L.J. 1127, 1136 (1990).

The 1981 United Nations Declaration on Religious Tolerance and Non-Discrimination (“1981 UN Declaration”) seems to have had little legal effect on the protection of religious liberty in Japan. As noted below, current Japanese constitutional law guarantees religious freedom, requires the government to treat all religions equally, and requires the government to be neutral between religion and non-religion if possible.³ Japan, therefore, has not had to significantly change its practices in reaction to the 1981 UN Declaration.⁴ This Article will provide an overview of religious accommodation in Japan. Part II of this Article briefly describes the history of religious regulation in Japan, focusing on government control over religious persons and practices. Part III considers modern religious accommodation in Japan, as illustrated by court cases and government practices. Part IV looks briefly at the future of religious accommodation and how Japanese courts can handle the increasing diversity of religious beliefs within modern Japanese society.

II. THE HISTORY OF RELIGIOUS REGULATIONS

The Japanese government has regulated religion since at least AD 701. *Taiho Ritsu-ryo*, one of the oldest legal codes in Japan, contains provisions regulating clerics (especially Buddhist priests).⁵ The content of the laws originated in China, the leading legal system at that time.⁶

Shinto and Buddhism were the main religions in Japan at the time. Shinto is a Japanese indigenous religion that revolves around

3. See *infra* notes 68–72 and accompanying text.

4. However, some subtle discrimination exists against religious groups that have committed serious crimes. Take, for example, the religious group Aum Shinri Kyo, which orchestrated a terrorist attack in the middle of Tokyo in 1995. Nicholas D. Kristof, *Terror in Tokyo*, N.Y. TIMES, Mar. 21, 1995, at A1. Also, several religious organizations in Japan have committed fraud on their believers, which has caused considerable problems with the view of religion in the eyes of many Japanese. See, e.g., *New Religious Cult Under Fire for Fraud*, MAINICHI DAILY NEWS, Nov. 30, 1999, at 1 (“Ho No Hana[, a religious organization, was] sued by people demanding the return of exorbitant fees they paid to take part in religious rites that were supposed to relieve them from earthly troubles.”); *Foot-Reader Fined for Fraud*, BBC NEWS WEBSITE, Dec. 25, 2000, <http://news.bbc.co.uk/1/hi/world/asia-pacific/1087178.stm> (“A foot-reading Japanese cult has been ordered to pay 157 million yen (\$1.39 million) to 31 of its followers who sued for fraud.”).

5. CARL STEENSTRUP, A HISTORY OF LAW IN JAPAN UNTIL 1868, at 35 (1991).

6. *Id.* at 30–36.

the worship of the *kami*, or divine element, within objects (such as a tree, a stone, a mirror, or a sword) or within persons (such as one's ancestors or another historical person).⁷ While the practice of Shinto does not necessarily entail the worship of the Emperor of Japan, or *Tenno*,⁸ Shinto has had historical connections with *Tenno*'s authority to rule.⁹ Thus, Shinto was seen as the state religion at the time, and was administered by a separate section of the government.¹⁰

Buddhism was treated differently in the law. In China, Buddhist priests had brought social disorder and led anti-governmental movements, and the Japanese government had learned from China's experience.¹¹ *Taiho Ritsu-ryo*, as well as its successor *Yoro-ryo* (enacted in AD 718), contained restrictions on Buddhist priests.¹² It provided that all those who wanted to become Buddhist priests had to receive permission from the government.¹³ A priest who wanted to return to secular life was also required to report to the government through a master of a temple.¹⁴ Furthermore, priests were not allowed to have private property¹⁵ and were required to obey religious commandments strictly. A major infraction of these rules, such as drinking, eating the five pungent spices (*gojin*),¹⁶ delighting in music, or gambling, would result in the offender being jailed for thirty to one hundred days.¹⁷ Priests who engaged in

7. See, e.g., STUART D.B. PICKEN, *ESSENTIALS OF SHINTO* xxii (1994). To learn more about Shinto, see *Encyclopedia of Shinto*, <http://eos.kokugakuin.ac.jp/modules/xwords/> (last visited June 23, 2007).

8. However, some Shinto shrines, such as *Izumo Taisha* in *Shimane* Prefecture, were established by *Tenno* at that time to comfort the spirit of his enemy.

9. *Tenno* had become the sovereign because he could tell the will of the *kami* to the people. See W. G. BEASLEY, *THE MEIJI RESTORATION* 301 (1972); ISHII RYOSUKE, *TENNO* 40–43, 72 (1982).

10. See PICKEN, *supra* note 7, at 15–16; SHU'UKYOU-SHI [RELIGIOUS HISTORY] 38 (Kawasaki Tsuneyuki & Kasahara Kazuo eds., 3d ed. 1974).

11. See INOUE MITSUSADA, *NIHON KODAI NO KOKKA TO BUKKYOU* [STATE AND BUDDHISM IN ANCIENT JAPAN] 46 (1971). Overseeing Buddhist temples and priests appears to have started in the 7th century. See *id.* at 33.

12. The precise name of the code is *Souni-ryo*. For a version in modern Japanese, see <http://www.sol.dti.ne.jp/~hiromi/kansei/yoro07.txt> (last visited June 23, 2007).

13. *SOUNI-RYO*, art. 22.

14. *Id.* art. 3.

15. *Id.* art. 18.

16. *Id.* art. 7. These "spices" include garlic, leek, scallion, onion, and rocambole. Since it was believed that eating those vegetables made people lustful or angry, they were prohibited. See also *DAIJIRIN* 892 (Muramatsu Akira ed., 2d ed. 1995).

17. *SOUNI-RYO*, art. 9.

fortune telling, enchantments, or curing diseases lost their privileges as a priest and became laypersons.¹⁸ Priests who foretold catastrophe through astrology and caused disorder, committed murder, engaged in sexual intercourse, or committed theft would be punished and lose their priestly privileges.¹⁹ Preaching to people outside approved temples was prohibited.²⁰ This meant there was no free exercise of religion, even for those priests who belonged to approved temples, and the government severely suppressed religious activities that did not have the government's permission.²¹ All temples and priests were controlled by the government, which maintained them financially.²² Although some ceremonies directly administered by *Tenno* were Shinto rituals, almost all the state ceremonies were Buddhist rituals. Thus, Buddhism at that time was regarded as the state religion.²³

As time passed, this Chinese-like political system gradually broke down and prescriptions on religious priests lost their force. The end of government control over temples and priests spurred the proliferation of unlicensed priests and temples.²⁴ Many powerful temples hired unlicensed priests or priests of low ranks to serve as soldiers in an effort to force the government to increase their power or to battle against rival temples.²⁵

The religious laws of the *Yoro-ryo* were not officially invalid.²⁶ However, when the warrior class, the *Samurai*, began to rule Japan in 1192, the new government, the *Bakufu* or shogunate, did not apply those laws.²⁷ Many priests who seceded from approved temples began to teach people their own interpretation of Buddhism.²⁸ The

18. *Id.* art. 2.

19. *Id.* art. 1.

20. *Id.* art. 5; see also Monbusho Shu'ukyou-kyoku [Ministry of Education, Religion Division], *Nihon Shu'ukyou Seido-Shi Taikoh* [A General History on State-Religion Relations in Japan] 3-4, in 7 SHU'UKYOU SEIDO CHOUSHA SHIRYO [REFERENCE MATERIALS ON STATE-RELIGION RELATIONS] (Hara Syobo 1977).

21. See TOYODA TAKESHI, SHU'UKYO SEIDO-SHI NO KENKYU [A STUDY ON A HISTORY OF GOVERNMENT CONTROL OVER RELIGIONS IN JAPAN] 229 (rev. ed. 1973).

22. See Monbusho Shu'ukyou-kyoku, *supra* note 20, at 5-6.

23. See *id.* at 7.

24. See *id.* at 7-8; see also TOYODA, *supra* note 21, at 11.

25. See Monbusho Shu'ukyou-kyoku, *supra* note 20, at 8.

26. See STEENSTRUP, *supra* note 5, at 35 ("[I]n Japan, at least on paper, the *Yoro* Code was in force—for the intervening feudal laws were technically only *exceptions* from the imperial code—until the Meiji Restoration [sic].").

27. See *id.* at 83-84.

28. See SHU'UKYOU-SHI, *supra* note 10, at 139.

Bakufu could not control this new movement and sometimes gave certain sects great protection (especially to a denomination of *Zen*).²⁹ Since new Buddhist denominations were gaining the respect of both the common people and the government, old temples tried to expel or destroy new sects, resulting in religious strife.³⁰

In the sixteenth century, some Buddhist denominations built up their religious and political influence to battle against regional lords, sometimes defeating the lord and establishing the temple as the regional government.³¹ Because both these new denominations and the old temples threatened strong *samurai* leaders who tried to build a centralized military state over all of the country, the *samurai* severely suppressed those religions.³² When *Tokugawa Ieyasu* established a centralized military state (*Tokugawa Bakufu*) over Japan, his government, in an effort to control powerful temples, created laws regulating and controlling religion (*Shoshu Ji'in Hatto*) in 1665.³³ The laws deprived the temples of much of their political autonomy, removed their military powers, and created a system where the main temples of a sect had control over smaller temples, making it easier for the government to control temples.³⁴ The government prohibited denominations from building new temples and limited the building of new religious buildings.³⁵ The government had imposed restrictions on Buddhist priests' behaviors, such as not dressing ostentatiously, living by their religious norms, and maintaining an ascetic lifestyle.³⁶ The government did not approve new religious denominations, neither in Buddhism nor in Shinto.³⁷ The Christian religion was completely prohibited³⁸ because

29. See TOYODA, *supra* note 21, at 13. The government was not powerful enough to subdue traditional old temples that were beyond the government's reach. *Id.* at 12-13.

30. See SHU'UKYOU-SHI, *supra* note 10, at 245.

31. See *id.* at 174.

32. The strongest, the famous *Oda Nobunaga*, for example, massacred some 3000 priests who belonged to a powerful temple, *Enryakuji*, in 1571. See *id.* at 253-54.

33. See *id.* at 282.

34. See *Monbusho Shu'ukyou-kyoku*, *supra* note 20, at 12.

35. See *id.* at 12-13.

36. See *Shoshu Honji yori Sashi-dashi sourou hatto-gaki* [*Prescriptions on Priests Issued by Various Temples*], in 4 SHU'UKYOU SEIDO CHOUZA SHIRYO [REFERENCE MATERIALS ON STATE-RELIGION RELATIONS] (Hara Syobo 1977); see also *Monbusho Shu'ukyou-kyoku*, *supra* note 20, at 14.

37. See *Monbusho Shu'ukyou-kyoku*, *supra* note 20, at 14.

38. See STEENSTRUP, *supra* note 5, at 115. Christianity was introduced to Japan in 1549 by Dominus Franciscus de Xavier, a Jesuit. PICKEN, *supra* note 7, at 28.

Christian countries that had traded with Japan (mainly Spain and Portugal) seemed to become an invasive power through missionary work.³⁹ The government also feared that Christians would unite and rebel against the government.⁴⁰ Christians were required to deny their faith, and those who refused were executed or expelled.⁴¹ A huge Christian rebellion in 1637 (*Shimabara no Ran*), in which almost 30,000 believers had entrenched themselves in a castle for a year, resulted in retaliation of severe oppression against Christians.⁴² Christians were put through a religious test where the government officials forced them to put their foot on a picture of Jesus or Mary to ensure they were not loyal to Christianity.⁴³ All people had to belong to a temple of an approved Buddhist denomination (excepting Shinto priests);⁴⁴ thus, the government did not recognize Christianity in any form. A temple kept an annual record of its parishioners' names, ages, and family relationships, and administered a travel note or a certificate.⁴⁵ The government used temples in this way to control the people. In this era, priests who committed a crime were punished more harshly than a layperson because of their responsibility to lead people in a moral life.⁴⁶ The government applied almost the same regulation to Shinto priests (*Shosha Negi*

39. See Monbusho Shu'ukyou-kyoku, *supra* note 20, at 14–15.

40. The prohibition against Christianity began in 1587 by *Ieyasu's* predecessor, *Toyotomi Hideyoshi*. He felt threatened by the unity of Christian believers because of his experience battling against a Buddhist denomination that had established their temple as the regional government. The *Tokugawa* government continued the prohibition against Christianity. See SHU'UKYOU-SHI, *supra* note 10, at 276–77, 321.

41. See *id.* at 323.

42. See FUKAYA KATSUMI, 9 *TAIKEI NIHON NO REKISHI: SI-NOU-KOU-SHOU NO YO* [A HISTORY OF JAPAN: THE ERA OF CASTE SYSTEM] 80–89 (1988). Netherlands, the only European country trading with Japan at that time, sent troops and a battleship to quell the Christian rebellion. An American commodore, Matthew C. Perry, who coerced the opening of Japan to the other countries, condemned the actions of the Netherlands in his book, *Narrative of the Expedition of an American Squadron to the China Seas and Japan*. See *id.* at 72; see also CONRAD TOTMAN, *JAPAN BEFORE PERRY* 137, 146–47 (1981).

43. See UMEDA YOSHIHIKO, 3 *NIHON SHU'UKYOU SEIDO SHI* [A HISTORY OF GOVERNMENT CONTROL OVER RELIGIONS IN JAPAN] 44 (rev. ed. 1972).

44. See TOYODA, *supra* note 21, at 114–20; Monbusho Shu'ukyou-kyoku, *supra* note 20, at 14–15. There was a Buddhist sect, *Nichiren Shu'u Fuju Fuse Ha*, that was not approved by the government and was suppressed because it had asserted strict independence from the government and hated its control. See also STEENSTRUP, *supra* note 5, at 115.

45. See STEENSTRUP, *supra* note 5, at 115; TOYODA, *supra* note 21, at 120–22.

46. See Monbusho Shu'ukyou-kyoku, *supra* note 20, at 16–17.

Kan'nushi Hatto).⁴⁷ The *Tokugawa* Government installed an administrator, *Ji-Sha Bugyo*, to supervise religious matters.⁴⁸

In 1868, the shogunate gave way to the *Meiji* Restoration, returning the sovereign power to *Tenno*.⁴⁹ The new government, controlled in fact by former low-ranked *samurai*, discarded the old religious regulations and established a new system. Because of its close relationship with the shogunate, the new government rejected Buddhism as a tool of controlling the people.⁵⁰ During the shogunate, Buddhism and Shinto had been mixed in some ways, but the new government ordered them to be strictly separated.⁵¹ These attitudes brought about an assault on Buddhism, and some of the temples and statues were destroyed.⁵² Furthermore, the government deprived temples of their manors.⁵³ With the decline of Buddhism, Shinto became the state religion. The government tried to make the people believe in Shinto and *Tenno* because it wanted to revert to the ancient imperial system.⁵⁴ All state ceremonies were done in Shinto style, and a Shinto shrine kept records of its parishioners' name, age, and family relationships, as the Buddhist temple had done in the *Tokugawa* era.⁵⁵ However, the government's Shinto establishment movement had lost its vigor. Bringing back the ancient government system also ran afoul of its other aims: to make Japan a modern legal state and to amend unfair trade treaties with Western countries.⁵⁶ Shinto itself did have inherent flaws: no solid dogma, no firm organization, and fewer and more poorly-trained missionaries.⁵⁷

47. See SHU'UKYOU-SHI, *supra* note 10, at 300-02.

48. See Monbusho Shu'ukyou-kyoku, *supra* note 20, at 15-16.

49. See BEASLEY, *supra* note 9, at 2; PICKEN, *supra* note 7, at 35.

50. See SHU'UKYOU-SHI, *supra* note 10, at 342.

51. See BUNKACHO BUNKA-BU SHU'UMU-KA [AGENCY FOR CULTURAL AFFAIRS, CULTURAL AFFAIRS DEP'T, RELIGIOUS AFFAIRS DIV.], MEIJI IKO SHU'UKYOU SEIDO HYAKUNEN-SHI [RELIGIOUS HISTORY OF 100 YEARS SINCE MEIJI RESTORATION] 9-14 (1983).

52. See *id.* at 14-17; TOYODA, *supra* note 21, at 170-71.

53. See BUNKACHO BUNKA-BU SHU'UMU-KA, *supra* note 51, at 31-41; TOYODA, *supra* note 21, at 172-90.

54. See SHU'UKYOU-SHI, *supra* note 10, at 359; see also BEASLEY, *supra* note 9, at 321; PICKEN, *supra* note 7, at 36.

55. See BUNKACHO BUNKA-BU SHU'UMU-KA, *supra* note 51, at 22-29; TOYODA, *supra* note 21, at 193-96.

56. See BEASLEY, *supra* note 9, at 366-69; BUNKACHO BUNKA-BU SHU'UMU-KA, *supra* note 51, at 4-5.

57. See SHU'UKYOU-SHI, *supra* note 10, at 362.

Those factors made the government rethink the idea of a state religion. By 1872, the government had approved several Buddhist denominations.⁵⁸ It withdrew the prohibition on Christianity in 1873. While not an officially approved religion, Christianity was not oppressed by the state.⁵⁹ The government also allowed women to enter the precincts of a temple or a shrine, where they were once strictly prohibited.⁶⁰

Religious freedom was first recognized by the Japanese government in 1875. This concept was codified in the *Meiji* Constitution of 1889 as Article 28: "Japanese subjects shall, within limits not prejudicial to peace and order, and not antagonistic to their duties as subjects, enjoy freedom of religious belief."⁶¹ The article provided that religious belief was given absolute protection, while religious exercises were allowed unless they conflicted with laws or with public order, so long as believers obeyed the duties of subjects.⁶² The duties of subjects were to be obedient to the state and *Tenno* (including the royal family), to honor imperial monuments (such as imperial mausolea, shrines, etc.), to be conscripted, to accept national education, and to pay taxes.⁶³ Those religions that contradicted those duties or the public order were prohibited. In the sense of religious accommodation, it appears that religious exemptions were not allowed. Shinto was subject to special status because of its closeness to *Tenno*.⁶⁴ It was seen as the *de facto* state religion.⁶⁵

58. See BUNKACHO BUNKA-BU SHU'UMU-KA, *supra* note 51, at 3.

59. See *id.* at 52. Christianity was approved by the state in 1899. See *id.* at 92.

60. See *id.* at 75.

61. MEIJI KENPO, art. 28.

62. See ITO HIROBUMI, KENPO GIGE [COMMENTARY ON CONSTITUTION] 52-53 (1889). Ito was a founder of the Constitution, so his commentary has been seen to express its original intent.

63. See MINOBE TATSUKICHI, KENPO SEIGI [ANNOTATION ON CONSTITUTIONAL LAW] 399-400 (1927). Minobe was a prominent constitutional scholar of the era. Minobe himself stated that to be obedient to *Tenno* and to honor his related monuments was not meant to exclude other religions or to coerce religious belief in *Tenno*. See MINOBE TATSUKICHI, 2 NIHON GYOUSEI HOU [JAPANESE ADMINISTRATIVE LAW] 562-63 (1940).

64. Even though it is a religion, the government had treated Shinto as though it were not a religion to give it special status. Shinto priests were treated as state officials and shrines as public institutions. In schools, students were strongly encouraged to visit a shrine, even if it was against the students' beliefs. The government asserted that since Shinto was not a religion, these actions did not contradict the Constitution. See BUNKACHO BUNKA-BU SHU'UMU-KA, *supra* note 51, at 132-35.

65. MINOBE, KENPO SEIGI, *supra* note 63, at 402.

Cases on the free exercise of religion in that era were few. One case, occurring in Kagoshima prefecture, involved a man who opened a place of worship without obtaining permission from the local government. He was arrested and sentenced to prison for ten days. The requirement to obtain permission was provided for in a local ordinance. The defendant asserted that opening a place of worship was within the free exercise of religion guaranteed by the Constitution and was “not prejudicial to peace and order, and not antagonistic to their duties as subjects,”—thus, there was no reason to regulate the activity. The Great Court of Judicature (*Daishin'in*) reasoned that the ordinance itself was purported to secure “peace and order” so that the act of opening a place of worship in violation of the ordinance should not be given constitutional protection.⁶⁶

After Japan’s defeat in the Second World War, the *Meiji* Constitution was modified to adopt the notion of the sovereignty of the people.⁶⁷ The religion provision, now contained in Article 20 of the new constitution, was amended to read:

Freedom of religion is guaranteed to all. No religious organization shall receive any privileges from the State, nor exercise any political authority. No person shall be compelled to take part in any religious act, celebration, rite or practice. The State and its organs shall refrain from religious education or any other religious activity.⁶⁸

Moreover, Article 89 prohibits government from conferring financial aid to religious organizations.⁶⁹ The Constitution provides almost absolute protection on religion, though it has a provision that all the rights protected in the Constitution shall “not interfere with the public welfare.”⁷⁰ The public welfare is understood to prohibit encroachments on life, liberty, or property of other individuals, and

66. *Akiyoshi v. Japan*, 10 *DAIHAN KEISHU* 445, 450 (Oct. 12, 1931).

67. See *KENPO*, art. 1 (“[T]he people with whom resides sovereign power.”); *id.*, pmbl (“Government is a sacred trust of the people, the authority for which is derived from the people, the powers of which are exercised by the representatives of the people, and the benefits of which are enjoyed by the people.”). For a general overview of the Japanese Constitution, see Eiichiro Takahata, *Japan*, in 2 *ENCYCLOPEDIA OF WORLD CONSTITUTIONS* 456 (Gerhard Robbers ed. 2007).

68. *KENPO*, art. 20.

69. *Id.* art. 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.”).

70. *Id.* art. 13.

to allow for the maintenance of public order.⁷¹ It is understood that the freedom of belief, free exercise, and the right to organize or join a religious group are guaranteed in the Japanese Constitution.⁷² The Constitution also guarantees the separation between the state and religion. Under the Constitution, there should be no state religion at all.

III. RELIGIOUS ACCOMMODATION IN JAPAN

No provision in Japan today clearly requires the government to exempt religious practices from generally applicable laws. Whether or not to confer accommodation or exemption on a religious practice is up to the court or the government. This Part first examines court decisions on religious accommodation then explores current government policies accommodating religion, especially in prisons and in schools.

A. Cases

The issue of religious accommodation has not been seen as an important judicial matter because the Japanese people generally are not religiously observant and easily accept government policies that do not accommodate religion.⁷³ Furthermore, Japanese people sometimes compromise their religious beliefs to comply with the public order.⁷⁴ For these reasons, religious accommodation is rarely an issue in the courts. However, several cases have addressed the issue. Before examining the accommodation cases, this Part first considers a case that dealt with a more general limitation on religious exercise.

71. TAKAHASHI KAZUYUKI, RIKKEN-SHUGI TO NIHONKOKU-KENPO [CONSTITUTIONALISM AND THE CONSTITUTION OF JAPAN] 107–08 (2005).

72. ASHIBE NOBUYOSHI, KENPO [THE CONSTITUTION] 147–48 (4th ed. 2007).

73. See Yokota Koichi, *The Separation of Religion and State, in* JAPANESE CONSTITUTIONAL LAW 205, 206 (Percy R. Luney, Jr. & Kazuyuki Takahashi eds., 1993) (“The religious consciousness of Japanese people is different from that of . . . Americans Most Japanese do not have a single faith, such as Christianity [T]he attitude [of Japanese people] toward religion is best demonstrated by the fact that most Japanese take a newly born baby to [a] Shinto shrine, visit a Shinto shrine to celebrate the New Year, have a Christian or Shinto wedding, and are buried in a Buddhist funeral.” (citation omitted)).

74. See, e.g., *id.* at 208.

*1. The limits of religious exercise: Nishida v. Japan*⁷⁵

A defendant who was a priestess of a Buddhist sect was arrested for bodily injury resulting in death. She asserted that her alleged criminal conduct was religious in nature; she claimed her actions were incident to the spiritual healing of a woman with a mental disorder. The defendant carried out incantations and prayers at the request of the victim's family. Since moderate incantation had no effect on the victim, the defendant took stronger measures—putting her in a sealed room, burning incense that caused scalds on her body, tying her down, and beating her body to drive out the evil spirit. After the assault, the victim was left alone and died.⁷⁶

The Supreme Court of Japan upheld the lower court's conviction of the defendant, stating:

It goes without saying that freedom of religion is extremely important as one of the fundamental human rights However . . . the people must not abuse the fundamental human rights, and shall always be responsible for utilizing them for the public welfare [A]ccordingly, the guarantee of freedom of religion is not absolute and unlimited [T]he acts of the accused in this instance consisted of the religious acts of offering prayers and incense in petition for the recovery of the victim from a mental disorder; but the manner, methods, and motives in practicing this faith cure, attended by a degree of violence that ended in the victim's loss of life . . . cannot possibly be recognized as acts of medical treatment for persons with mental disorders generally accepted in medical practice. Even if we grant that the acts of the accused in this case were, as argued, a kind of religious acts, they correspond to unlawful exercise of physical force endangering the life and limb of another person Accordingly, the above acts of accused undeniably ended in the death of the victim and were seriously inimical to society; they deviated from the boundaries of the freedom of religion guaranteed in . . . the Constitution, and the punishment of these acts . . . in no way violates the . . . provisions of the Constitution.⁷⁷

75. *Nishida v. Japan*, 17 KEISHU 302 (Sup. Ct., May. 15, 1963).

76. *Id.* at 334.

77. *Id.* at 304-05, translated in THE CONSTITUTIONAL CASE LAW OF JAPAN: SELECTED SUPREME COURT DECISIONS 1961-70, at 223, 225 (Lawrence W. Beer & Hiroshi Itoh eds., 1978).

This case clearly pronounces the existence of a limitation on the free exercise of religion, and if a religious practice goes beyond the limitation, it is subject to regulation. The other point worth noting is that the Supreme Court did not question whether the accused's acts were religiously proper or not. The Court simply evaluated the alleged acts based on how they were punishable and said nothing about the religion itself.⁷⁸

This attitude of the Court has influenced lower courts' manner of handling religious accommodation. This can be seen in the following cases that have considered the issue. Even though almost sixty years have passed since the current constitution came into force, the cases on religious accommodation are few. Each of the cases are introduced followed by a discussion of the present state of the law.

2. *Religious preaching: Taneya v. Japan*⁷⁹

The defendant, a minister, was accused of sheltering minor criminals who, with others, had committed several crimes, including intrusion into schools, assembling with weapons, and larceny, in order to protest against authority. While sheltering the minors, the defendant tried to preach to them, admonishing them to reflect and meditate and not to join any violent protest group again. The defendant did not reveal that he was harboring the minors when questioned by police. Ten days later, when the defendant observed that the minors were becoming calm and reflecting on their actions, he called their school, and they turned themselves in to the police. The minor criminals were sentenced not to be put under probation from a family court.⁸⁰

The Kobe Summary Court held the defendant minister not guilty. In so doing, the court found no illegality in the defendant's act, even though sheltering criminals was a crime. A goal of religious preaching, the court stated, was to assist the immature to enable them to go through the real world. For a minister, preaching was his professional duty as well as a religious obligation. The defendant sheltered the minors to direct them not to escape from the police, an

78. See Koizumi Yoichi, *Shinkyo no Jiyu to Kaji Kito Chiryō* [*Religious Freedom, and Cure in Incantations and Prayers*], in 1 KENPO HANREI HYAKUSEN [100 CASES OF CONSTITUTIONAL DECISIONS] 86-87 (4th ed. 2000).

79. 768 HANREI JIHO 3 (Kobe Summary Ct., Feb. 20, 1975).

80. *Id.* at 3-5.

action which fell within his professional duty. Just like a doctor's act in an operation, when a minister's preaching is part of his professional duty, it should not be evaluated as illegal. Although it would be facially illegal, the object of the preaching was consistent with the laws aiming to protect public safety. Since the Constitution protects religious freedom, the government must accommodate religious practices whose aim is consistent with the law. In this case, the defendant's religious act, which made the minor criminals finally go to the police, did not seriously hinder the criminal investigation. Therefore, the defendant's act did not deserve punishment.⁸¹

3. *School visitation on Sundays: Sawa v. Edogawa Ward*⁸²

An elementary school held its school visitation on Sunday because it was a convenient time for parents, especially fathers. The purpose of the visit was for the parents to come to the school, see how a class was actually operated, and discuss the education of their children with the children's teachers. The school visitation was held once every school term. The petitioners were school children, who were devout Christians, and their parents, who were ministers of a Christian church. Since the children attended Sunday school at their church, their parents asked the school not to hold the visit on Sunday. The school did not answer their request, but carried out the visitation and recorded the petitioners' absence. The petitioners filed suit against the municipal government and the principal of the school, seeking retraction of the record of the absence.⁸³

The Tokyo district court dismissed the case. It held that the record of the absence did not directly influence the petitioners' rights or duties in a legal sense. No evidence showed the absence gave them any disadvantage in applying to schools or finding a job, and it was impossible to believe that the record would influence their entrance to higher schools. Thus, the court held that the petitioners lacked standing to bring the suit.⁸⁴

In both of these cases, the courts have balanced the state interest that would be impaired by exempting a religious practice from a generally applicable law with the value of the accommodation to the

81. *Id.* at 5-7.

82. 37 GYOUSAI REISHU 347 (Tokyo D. Ct., Mar. 20, 1986).

83. *Id.* at 347-52.

84. *Id.* at 369-70.

religious practitioner. In the religious preaching case, the court allowed the accommodation because the criminal investigation was not significantly impaired by the defendant's act, emphasizing the fact that the minor criminals turned themselves in to the police. On the other hand, the court in the Sunday school visitation case did not permit the children's request, stressing that public education must be neutral toward religion and that the petitioners were not actually disadvantaged—the only damage they had suffered was merely the record of the absence.

The Japanese courts sometimes permit claims from religious believers or groups seeking exemptions,⁸⁵ and have decided the accommodation cases by weighing the significance of religious freedom to the believer against the state's interest in enforcing generally applicable laws. This attitude of the courts was clearly settled in the Kendo practice case.

4. *Kendo practice case: Matsumoto v. Kobayashi*⁸⁶

The appellee was a student of Kobe City College of Technology, a public college. He was a devout Jehovah's Witness. Kobe City College required its students to take physical training, and in 1990, the college had adopted kendo⁸⁷ as a mandatory training program for the first-year students. Before the physical training class started, the plaintiff, who believed that it was against the tenets of his religion to practice kendo, asked his teachers if he could submit papers instead of engaging in the kendo training. The teachers denied his request and said that his lack of participation would be counted as an absence from the class if he refused to practice. The defendant, the principal of the college, finally made a decision not to accommodate the request.

The plaintiff participated in the preparatory exercises and lectures but only watched as his classmates practiced kendo. After each of the classes, he voluntarily submitted papers for the class, but the teachers refused to accept them. Since the college regarded the plaintiff's

85. Cf. *Employment Div. v. Smith*, 494 U.S. 872 (1990) (limiting constitutional requirement of accommodation). *But see* *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006) (requiring federal government accommodation under the federal Religious Freedom Restoration Act, passed in reaction to *Smith*).

86. 50 MINSHU 469 (Sup. Ct., Mar. 8, 1996).

87. Kendo is a Japanese style of fencing, or swordsmanship.

refusal to practice kendo as an absence from class, he failed and had to repeat his first year. The following year, neither the plaintiff nor the college had changed their minds, and he failed again. The code of the college provided that the principal may order the dismissal of a student who failed a course twice. Based on this provision, the defendant dismissed the student from the college.⁸⁸ The plaintiff brought suit, seeking a repeal of the order. The district court denied his claim,⁸⁹ but the high court recognized it.⁹⁰

The Supreme Court upheld the decision of the high court. It found that a college principal has reasonable discretion to dismiss a student, but held that the decision to dismiss will be found invalid if the decision is not completely based on facts, or if the decision is regarded as overtly inappropriate in light of the common sense of society (*shakai tsu'unen*). In such cases, the decision would be an abuse of discretion. The court recognized that the decision to dismiss a student from a college—depriving the student of his or her status—is a crucial decision. Accordingly, more careful consideration is required when a principal chooses to dismiss a student, and a student may only be expelled when there are educationally compelling reasons for doing so. Thus, the decision at issue was invalid because it was clearly inappropriate in light of the common sense of society and went beyond the limits of discretion.⁹¹

In a college, practicing kendo is not said to be an absolute requirement. It is possible to substitute the practice of other sports to accomplish the aim of physical training. It is obvious that the appellee's disadvantage was extreme, because he was dismissed as a result of his refusal to practice kendo based on his religious belief, even though he had good grades in other courses. Moreover, the decision in this case surely was of a character which obliged the appellee to practice kendo, against his religious tenet in order to avoid his extreme disadvantage. The decision itself did not mandate him to act against his religion and did not directly restrict his free exercise of religion. Since the decision had such features, the appellant had to accommodate the appellee when the appellant made

88. *Matsumoto*, 50 MINSHU at 473-75.

89. *Kobayahi v. Matsumoto*, 813 HANREI TAIMUZU 134 (Kobe D. Ct., Feb. 22, 1993).

90. *Kobayahi v. Matsumoto*, 45 GYOUSAI REISHU 2069 (Osaka High Ct., Dec. 22, 1994).

91. *Matsumoto*, 50 MINSHU at 476-77.

the decision as an exercise of discretion. Given the character of the decision, the appellant should have considered the proprieties, manners, and conditions of substitute measures for kendo practicing before finally making the decision. The Court did not find that the appellant took such measures into account here.⁹²

The appellant alleged that to take the substitute measures would violate Article 20, paragraph 3 of the Constitution (the anti-establishment clause). However, to give a grade in a physical training course to a student who can not participate in kendo practice because of religious reasons should not be regarded as an activity whose purpose has religious meaning and whose effect supports, promotes, and fosters a certain religion, or one that oppresses and interferes with other religious believers or non-believers. Allowing the student to take a substituting measure in any manner and condition cannot evidently be said to violate Article 20, paragraph 3. In public schools, it is not permitted to investigate or look into students' beliefs or to treat religions unequally. However, it does not violate the requirement of religious neutrality in public education to investigate whether a student's refusal of practicing kendo is a pretext of indolence or whether it has a reasonable relation to a serious religious tenet.⁹³

The Supreme Court correctly understood that a religious student was forced either to obey his own religious convictions and thus be dismissed from the college, or to participate in kendo practice and violate his beliefs. Although the Supreme Court of Japan did not hold that forcing a religious person to make this choice violates the Constitution, as Justice Souter of the United States Supreme Court and Judge McConnell of the 10th Circuit Court of Appeals have suggested, this is a circumstance in which religious accommodation is needed.⁹⁴ The Supreme Court of Japan compared the interest of

92. *Id.* at 477-79.

93. *Id.* at 479-80.

94. *See Lee v. Weisman*, 505 U.S. 577, 628 (1992) (Souter, J., concurring) (stating that government could release religious believers from situations in which they needed to take "sides between God and government"); Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 26 (stating that accommodation is needed especially when individual believers face a choice between "religious duties and obligations and the demands of society," and that a religious accommodation attempts to ease those believers of the conflict between a religious belief and the social obligations "without sacrificing significant civic or social interests"); *see also* *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) ("[T]o condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her

the college in requiring its students to practice kendo with the student's interest in not participating in the class as an exercise of his constitutional right. The Supreme Court emphasized that since kendo practice was not indispensable for the purpose of physical training in a college, denying the appellee's religious right subjected him to an unreasonable disadvantage.⁹⁵ In so declaring, the Supreme Court held that the principal of the college would have to accommodate the student in this situation.

Furthermore, the Supreme Court said that such an accommodation did not violate the Constitution under the "purpose-and-effect" test.⁹⁶ By ruling that the student did not have to practice kendo to attend college, the Court exempted the student from the rule other students had to follow. The Supreme Court proposed that the principal allow a substituting measure in order for the student to fulfill the physical training requirement.⁹⁷ This seems to imply that the Supreme Court asked, or at least recommended, that the government impose a substitute requirement in a case of accommodation so as not to benefit religion over non-religion.⁹⁸

B. Government Practice

The Japanese government also provides for religious accommodation in its administrative policies. Prisons and schools are the main areas in which it has made such accommodations.

religious faith effectively penalizes the free exercise of her constitutional liberties.").

95. Many commentators have emphasized this point. See, e.g., Tomatsu Hodenori, *Shiho Shinsa no Kijun 5: Shuju no Kenri no Hashou* [Criteria of Judicial Review: Protections to Various Rights], 191 HOUGAKU KYOUSHITSU 26, 27 (1996); Yajima Motomi, *Kouritsu Gakkou ni okeru Seikyo Bunri Gensoku to Shinkyō no Jiyū'u* [Separation of Church and State and the Free Exercise of Religion in Public Schools], 1113 JURISUTO 15, 16 (1997).

96. The "purpose-and-effect" test is a judicial test announced in *Kakunaga v. Sekiguchi* (Tsu City Case), 31 MINSHU 533 (Sup. Ct., July 13, 1977), to evaluate whether or not government actions violate the anti-establishment clause. This test is quite similar to the *Lemon* test, which was adopted by the U.S. Supreme Court. See *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

97. *Matsumoto*, 50 MINSHU at 479.

98. No Japanese commentator mentions the relationship between religious accommodation and the alternative burden. See, e.g., Munesue Yasuyuki, *Kendo Jitsugi no Kyōsei to Shinkyō no Jiyū'u* [Coercing Kendo Practice and Religious Freedom], 192 HOUGAKU KYOUSHITSU 94 (1996).

1. Prison

Some statutory provisions allow religious accommodations for inmates. A law governing prisons provides that worship or other religious practices that an inmate exercises by himself shall not be banned or restricted, unless doing so would adversely affect the order, safety, security, and operations in penal institutions.⁹⁹ The statute also provides that the chief administrator of a penal institution shall endeavor to make opportunities for inmates to participate in religious ceremonies, held by volunteer clergy, or to accept religious counsel from those clergy. The Chief Administrator may prohibit inmates from participating in the ceremonies or from accepting counsel if it would cause any difficulty in the order, safety, security, or operations of the institutions.¹⁰⁰

With respect to religious preaching, the government has allowed inmates to do so in a Shinto, Buddhist, and Christian way.¹⁰¹ More than 2000 clergy engage in such preaching throughout Japan.¹⁰² Recently, as the number of Islamic inmates grows, the government has asked Islamic priests to give religious counseling to them.¹⁰³ This religious counseling is not officially religious preaching, but it is treated in the same manner.¹⁰⁴

Penal inmates are permitted to hold religious books, texts, or goods as long as those do not undermine the order, safety, security, or operations in the institutions.¹⁰⁵ Islamic inmates are given different meals whenever pork is served in the prison.¹⁰⁶ Special arrangements are also made during Ramadan, an Islamic period of fasting and prayer. At this period, the institutions have allowed them to have their evening meal at lights out, and have also tried to accommodate their breakfast time.¹⁰⁷

99. Keiji Shisetsu oyobi Jukei-sha no Shogu tou ni kansuru Houritsu [Act Concerning Penal Institutions and Treatment of Inmates], Law No. 50 of 2005, art. 44.

100. *Id.* art. 45.

101. See PAMPHLET FOR PRISON PREACHING ASSOCIATION 2 (2005), available at <http://www.disclo-koeki.org/02b/00385/a.pdf>.

102. Interview with Mr. Ishihara, Prison Service Division Official, Corrections Bureau, Ministry of Justice, in Tokyo (Aug. 28, 2006).

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. Letter from Mr. Ishihara, Prison Service Division Official, Corrections Bureau,

As to grooming regulations, a prison rule provides that it shall not coerce an inmate to cut his or her hair or shave if the inmate does not want to do so and not doing so is reasonable given his or her religion, custom, time for release, or other considerations.¹⁰⁸ Currently, no legal suits or grievances are pending with respect to religious treatment in prisons.¹⁰⁹

2. Schools

Japanese public elementary and secondary schools usually offer school lunch to the children. While no formal research has been conducted on religious accommodation for food served for school lunch, a few anecdotal examples of accommodation of those who have religious dietary restrictions are known. Edogawa Ward, a municipal government in Tokyo, gives special treatment to children who do not eat pork.¹¹⁰ As they would with a child with food allergies, schools ask the parents whether their children need special accommodation for meals at the beginning of the school year in April.¹¹¹ They usually do not offer different meals, but simply remove the foods that the children will not eat.¹¹²

As mentioned above, very few examples of positive accommodation in practice are known. However, many laws treat religious institutions as equal to secular institutions. The government confers tax exemptions not only to religious corporations but also to schools, hospitals, and charitable corporations as public-interest corporations.¹¹³ It gives educational financial aid to all private schools, including those that are operated by religious organizations.¹¹⁴ Many temples and shrines have received financial

Ministry of Justice, Tokyo, to author (Sep. 5, 2006) (on file with author).

108. Keiji Shisetsu oyobi Jukei-sya no Syogu tou ni kansuru Houritsu Shiko Kisoku [Rule Enforcing Act Concerning Penal Institutions and Treatment of Inmates], Ministry of Justice Rule No. 57 of May 23, 2006, art. 22, no. 4.

109. See Interview with Mr. Ishihara, *supra* note 102.

110. Telephone Interview with an official of the Edogawa Board of Education (Aug. 29, 2006).

111. *Id.*

112. *Id.*

113. Houjin Zei Hou [Corporation Tax Law], Law No. 34 of 1965, art. 4, no.1. If a public-interest corporation makes a profit, the tax is imposed on the profit. *Id.*

114. Shiritsu Gakko Shinko Josei Hou [Financial Aid to Private Schools Act], Law No. 61 of 1975, art. 4.

support from the state to keep and maintain religiously related statues and buildings that are considered national treasures.¹¹⁵

IV. THE FUTURE OF RELIGIOUS ACCOMMODATION

I have suggested elsewhere that religious accommodations can be classified into four types.¹¹⁶ First, the government can offer religious services directly, such as providing a chaplain or a place for worship in a prison, a military base, a public hospital, or a nursing home. Second, the government may confer the same benefits on religious groups that it gives to secular organizations, such as property tax exemptions. Third, the government can exempt religious believers from a generally applicable requirement, if the believers claim that part of their religious practice would involve not obeying the requirement. Finally, government can also exempt certain religious believers from a government requirement, such as allowing conscientious objectors an exemption from military service. The governments and courts in Japan recognize all types of accommodation except for the third.

The Supreme Court has suggested that when the government provides a religious accommodation, it has discretion to impose an alternative burden on believers for the price of the accommodation.¹¹⁷ The imposition of an alternative burden reduces disproportion not only between religion and non-religion, but also among religions. Imposing the alternative burden would make other religious believers understand that Jehovah's Witnesses (as in *Matsumoto*) are not the only individuals who can receive an accommodative exemption. Since the burden can solve unfairness, it is useful in a religiously complex society.

Since government cannot charge fees for the free exercise of religion,¹¹⁸ it is impossible to impose the burden unless the

115. Bunka-zai Hogo Hou [Cultural Properties Protection Law], Law No. 214 of 1950, art. 2; *see also* Kakunaga v. Sekiguchi (Tsu City Case) 31 MINSHU 533, 540 (Sup. Ct., Jul. 13, 1977) (stating that giving financial aid to religious schools or groups for educational reason or maintenance of national treasures is justified by non-discrimination against religion).

116. Eiichiro Takahata, *Permissible Accommodation of Religion and the Alternative Burden*, 15 COMP. L. 199, 236-37 (1998).

117. For instance, a person who does not want to participate in kendo could be required to perform some other exercise program. *See supra* Section III.A.4.

118. *Cf.* Murdock v. Pennsylvania, 319 U.S. 105, 111 (1943) ("Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way.").

government requires its people to do something. There, especially in the third category, those who seek the accommodation engage in their religious practice, which has a priceless meaning in itself. Unlike the freedom of speech, they do not have any alternative means to express their beliefs other than the practice. The alternative burden fits only in the cases where the believers do not want to do what the government requires. The decision on whether the burden is proportional to the accommodation belongs to the judiciary. Courts may assure that the burden is substantially the same as the burden from which the believers want to be exempted.

V. CONCLUSION

Although many episodes of religious suppression exist in Japanese history, one can argue that the history of religious regulation shows that the government's purpose was to keep social order and protect government authority. Since the government emphasized generally applicable laws to keep order, it seemed impossible to make exemptions for religious exercise that conflicted with those laws. Full protection of religious liberty arrived in Japan when the current constitution came into effect.

As Japanese society increasingly values religious freedom, demands to exempt religious practice from generally applicable laws have become more frequent. But for the reasons noted above¹¹⁹ and because the Japanese people tend to hesitate to bring lawsuits, few cases address religious accommodation. The government can further accommodate religious believers by exempting them from a generally applicable requirement with alternative burdens, and it will likely become an important way for the Japanese government and judiciary to protect religious belief for its citizens.

119. See *supra* text accompanying note 73.

