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Freedom of Religion, Religious Political Participation, and Separation of Religion and State: Legal Considerations from Japan

*Keiko Yamagishi**

This article examines the misuse of religion for political ends and the necessity for legal mechanisms that can prevent such misuse. In particular, I consider Japan's experience with State Shinto, which serves as a useful illustration of the dangers incident to religious states. This is not to say that all theocratic or semi-rheocratic states would necessarily share Japan's experience.¹ Rather, I seek to illustrate some possibilities for Japan's future by considering Japan's past, and to make some recommendations for Japan's future to prevent the past from being repeated.

State Shinto is a branch of the Shinto religion, a faith unique to the Japanese people. For about fifty years leading up to and including World War II, State Shinto was the *de facto* state religion of Japan, and it played a large role in the formation of militarism in Japan. The Japanese would do well to learn from this part of their history and act to ensure freedom of religion by further codifying separation of religion and state.

Part I of this article discusses the relevant provisions of Japan's Constitution as it relates to freedom of religion. It also provides a brief historical context by explaining how State Shinto influenced and was influenced by the Japanese political system prior to and

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1. James F. Driscoll, *Theocracy*, in 14 THE CATHOLIC ENCYCLOPEDIA (1912), available at <http://www.newadvent.org/cathen/14568a.htm>.

leading up to World War II. Part II explains how the religion clauses in Japan's post-World War II Constitution were a reaction to State Shinto and then details how Japan's Supreme Court has interpreted these constitutional provisions. Part III argues for the adoption of a new code to more effectively ensure freedom of religion and separation of religion and state in Japan. Given the current interpretation of the relevant constitutional provisions, this new code significantly advances both freedom of religion and separation of religion and state.

I. FREEDOM OF RELIGION AND RELIGIOUS POLITICAL PARTICIPATION IN JAPAN

A. *The Legal Structure of Freedom of Religion in Japan*

The Constitution of Japan has several clauses intended to guarantee freedom of religion and separation of religion and state. The Constitution specifies that "freedom of religion is guaranteed to all."² In addition to the freedom to believe and practice the religion that one desires, freedom of religion is also understood to include a right of political participation.³ Those who share similar beliefs are able to form religious associations; they may participate in proselytizing activities to spread their religion; and they may work toward the realization of such a society as is desirable according to their religion.⁴ As political participation is often necessary for this third aspect of religious freedom to have effect, it is an understood part of that freedom, though not explicitly stated in the Constitution.

2. KENPŌ [Constitution], art. 20, para. 1 (Japan).

3. For further discussion on the structure of the religion clauses in the Constitution of Japan, see SHIGENORI MATSUI, Nihonkoku Kenpō [JAPANESE CONSTITUTIONAL LAW] 428-43 (Yūhikaku 2007) (Japan); MAKOTO ŌISHI, KENPŌ TO SHŪKYŌSEIDO [THE CONSTITUTION AND THE RELIGION SYSTEM] 235-50 (Yūhikaku 1996) (Japan). See also Yōichi Koizumi, *Seikyōbunri to Shinkyō no Jiyū* [Separation of Religion and State and Freedom of Religion], 1334 JURISUTO 72 (2007) (Japan).

4. While the current Constitution of Japan only states that "[f]reedom of religion is guaranteed," as Nobuyoshi Ashibe explains, ever since the period of the 1889 Meiji Constitution, legal theory had dictated that freedom of religion actually encompasses three freedoms: (1) the freedom of belief; (2) the freedom of religious action; and (3) the freedom of religious association. This third aspect of religious freedom could then be interpreted as necessarily allowing the religious activities such as proselytizing and advancing societal aims. NOBUYOSHI ASHIBE, SHUKYŌ, JINKEN, KENPŌGAKU [RELIGION, HUMAN RIGHTS, THE STUDY OF THE CONSTITUTION] 5-6 (Yūhikaku 1999) (Japan).

If religious adherents refrain from interfering with public welfare, they do not violate the Constitution when they seek to realize their religious goals by participating in politics.⁵ Consequently, Japanese religious associations can become political powers. In Japan's democratic system, when a large enough number of people share the belief of a particular religious association and vote as a block in elections, they can—and do—add their religious hue to the colors of political power.

Japan's political landscape is generously colored with religious politics. An obvious example is the ruling coalition of the current government. The Liberal Democratic Party's coalition partner, New Kōmeitō, is backed by a Buddhist sect called Sōka Gakkai. The Sōka Gakkai first entered politics in the 1950s; their goals then and now being to challenge government corruption by bringing more ethical individuals into the political arena, to represent the voice of ordinary people, and to protect the freedom of religion.⁶ The Sōka Gakkai started fielding candidates to run in local elections in 1955 and in national elections a year later.⁷ Over time, and through their political partnerships, the Sōka Gakkai has gained some power. Now, through the Sōka Gakkai-backed New Kōmeitō, the party influences Japan's political process through introducing Buddhist values and goals.⁸

While Japan's older and more traditional religions, like Shinto, continue to have significant political influence, several of Japan's newer religions have also been active in postwar Japanese politics. Of

5. But to the extent that religious groups interfere with the public welfare, their political participation does violate Japan's laws. In recent years, pursuant to the Act on Religious Juridical Persons, article 81, paragraph 1; the Supreme Court dissolved the religious group named Aum Shinrikyo for activities that interfered extremely with the public welfare. Among other crimes, the group launched the nerve gas attack on the Tokyo subway system. See *Aum Shinrikyo v. Public Prosecutor & Tokyo*, 1555 HANREI JIHŌ 3 (Sup. Ct., Jan. 30, 1996) (Japan).

6. For information about Sōka Gakkai, see the history page of the organization's English version Web site at <http://www.sgi.org/about/history/history.html>. Sōka Gakkai now operates in many countries around the world. *Id.*

7. Edward W. Desmond & Irene M. Kunii, *The Power of Soka Gakkai: Growing Revelations About the Complicated and Sinister Nexus of Politics and Religion*, TIME, Nov. 20, 1995, at 21.

8. For more information about the Sōka Gakkai-backed New Kōmeitō, see <http://www.komei.or.jp> and <http://www.sokanet.jp>. For a discussion of their influence on Japan's political process, see Daniel A. Métraux, *Religion, Politics, and Constitutional Reform in Japan: How the Sōka Gakkai and Kōmeitō Have Thwarted Conservative Attempts to Revise the 1947 Constitution*, 29 SE. REV. ASIAN STUD. 157 (2007).

these, however, the Sōka Gakkai is the only one to have established a major political party.

As the histories of many countries around the world indicate, state government and religion are often easily connected. This commingling often serves both state goals and religious ends. To accomplish these goals, there are some cases where religion and the state merge completely. Alternatively, there are cases where a particular religion may control the state, or, as was of concern in the case of State Shinto, the state may completely control religion and use it as a tool of government.

B. Japanese History with "State" Religion: An Examination of State Shintoism

Whether or not state religion is a good thing is debatable. The history of Japan from the Meiji Era until the end of World War II illustrates the dangers of too close a relationship between religion and state.⁹ Specifically, this period of Japanese history shows what can happen when a specific religion is affiliated with the state and the state misuses that religion for political ends. In Japan's case, when the government subverted State Shinto the resulting parade of horrors violated real freedom of religion and also resulted in extensive human rights violations, including the oppression of the freedoms of thought, conscience, expression, and learning.¹⁰

Before discussing State Shinto in depth, some background discussion on Shinto is helpful. First, Shinto is a native Japanese religion.¹¹ In a nation with many cultural imports, Shinto's native

9. See Takeshi Hirano, *Meiji Kenpōka no Seikyō Kankei* [State and Religion in the Meiji Constitution], 52 KŌHŌ KENKYŪ [PUBLIC LAW REVIEW] 56 (1990) (Japan). The Public Law Review is edited by the Japan Public Law Association. The following relevant articles are published in 52 KŌHŌ KENKYŪ [PUBLIC LAW REVIEW] 1-55 (1990) (Japan): Norikatsu Sasagawa, *Kenpō to Shūkyō: Genri teki na Sho Mondai ni tsuite* [Constitutional Law and Religion—Studies on Fundamental Problems] and Masaaki Ikeda, *Kenpō to Shūkyō no Rekishi Shinri: Hō Bunka e no Izanai* [A Historical Psychological Study of the Relation Between Constitutional Law and Religion: An Exhortation to the Theory of Legal Culture].

10. According to the definition of the Shinto Directive ("Abolition of Governmental Sponsorship, Support, Perpetuation, Control, and Dissemination of State Shinto") issued by the General Headquarters of the Supreme Commander for the Allied Powers on December 15, 1945, State Shinto is a branch of Shinto which by official acts of the Japanese government has been differentiated from the religion of Sect Shinto and has been classified as a non-religious national cult.

11. The religious landscape of Japan is varied. Along with Shinto, Buddhism is a major religion in Japan. Although Shinto is considered a native religion of Japan, it has been argued

quality makes it distinctive. Shinto followers do not believe in a single deity or sacred text, but in a kind of polytheism. Shinto followers practice a form of ancestor worship and believe that there are kami, or gods, in almost every aspect of life.¹² Shinto literally translated means “the way of the kami.”¹³ Followers of Shinto believe there are millions of kami connected to nature.¹⁴ Since the earliest times in Japan’s history, Shinto adherents believed the emperor was a descendant of the kami and so viewed religion and government as inseparably connected.¹⁵

Although State Shinto emerged from and follows traditions of Shinto’s ancestor and kami worship, Shinto and State Shinto are not identical. The Japanese imperial government created and implemented the religion, or system, of State Shinto in a time period that corresponds roughly with the resumption of the imperial government until Japan’s defeat in World War II, from the mid-nineteenth century to the mid-twentieth century.¹⁶ The governmental sponsorship of and control over Shinto during this time period is called “State Shinto.”¹⁷ Through State Shinto, the imperial government propagated extreme nationalism and aroused

that various aspects of Shintoism were borrowed from Confucianism or Buddhism. As an example of the interconnectedness of religions in Japan, it is commonly said that there is a total religious population in Japan of 220 million, despite the fact that there are only 130 million people in Japan. For a comprehensive analysis of Japan’s religious history, see JOSEPH KITAGAWA, *RELIGION IN JAPANESE HISTORY* (Columbia Univ. Press 1990) (1966). For more regarding religion in Japan today, see ROBERT ELLWOOD, *INTRODUCING JAPANESE RELIGION* (2008).

12. Takahiko Tomoeda, *The Essence of Shinto*, 3 PAC. AFF. 343, 346 (1930).

13. “Shin” comes from the Chinese character that refers to the gods, or kami (in this case the character is pronounced “shin” instead of “kami,” but is otherwise identical). “To” is the Chinese character that refers to a “path” or “way.”

14. Shigenori Matsui, *Japan: The Supreme Court and the Separation of Church and State*, 2 INT’L J. CONST. L. 534, 535 (2004).

15. The first emperor was also a priest and was said to have descended from the gods who created Japan. Under Shinto beliefs, the gods who created the island of Japan were called Izanagi and Izanami. Their granddaughter was Amaterasu who was the grandmother of the first emperor, Jimmu Tennou. Therefore, the emperors since then have successively come through this lineage and were considered to be of divine origin. See Eric Weeks, *A Widow’s Might: Nakaya v. Japan and Japan’s Current State of Religious Freedom*, 1995 BYU L. REV. 2, 691–93 (1995); see also Tomoeda, *supra* note 12, at 347.

16. Wilbur Fridell, *A Fresh Look at State Shinto*, 44 J. AM. ACAD. RELIGION 547, 547 (1976); see also Joseph Kitagawa, *Some Remarks on Shinto*, 27 HIST. OF RELIGIONS 227, 240 (1988).

17. For a comprehensive analysis of the elements of State Shinto, see Fridell, *supra* note 16, at 547.

loyalty to the emperor and dedication to the wars Japan participated in during this period.¹⁸ This intense “religious” loyalty on the part of the Japanese people allowed the government to violate human rights while the general population remained indifferent or even became complicit.¹⁹

Understanding the origins of State Shinto requires framing this “State” form of the religion in the history that gave it birth. State Shinto began when the emperor known as Meiji became the ruler of Japan in 1867. By the mid-1800s, Japan’s centuries of shogun and samurai rule, known as the Tokugawa Shogunate, had faltered in the face of Western power in East Asia. The Shogunate had been entrusted with the government of Japan, but when foreigners attempted to force Japan to open its ports for trading, popular dissatisfaction with the Shogunate spread through Japan.²⁰ As the Tokugawa Shogunate sustained a loss of authority, the last Tokugawa shogun transferred his power back to the emperor and the imperial court.²¹

This transfer occurred at a difficult time for Japan and presented the emperor with a religious problem—or opportunity. The Tokugawa Shogunate had sanctioned Buddhism as a state religion.²² Although Buddhism had been present in Japan for many hundreds of years, it did not have the potentially nationalistic doctrines of Shinto. Upon its return to authority, the imperial government issued

18. Japan was very militaristic from 1867 until the end of World War II. During that time, Japan fought with China in the first Sino-Japanese War from 1894–1895, with Russia in the Russo-Japanese War from 1904–1905, and with the Central Powers in World War I. Japan then fought with China in the second Sino-Japanese War beginning in 1937, which merged into Japan’s warring with much of the world in World War II, ending in 1945. See, e.g., JOHN BENSON & TAKAO MATSUMURA, *JAPAN, 1868–1945: FROM ISOLATION TO OCCUPATION* (2001).

19. For an example of major religious persecution implemented by the imperial government of this time, see Fridell, *supra* note 16.

20. See Kitagawa, *supra* note 16, at 240; see also KITAGAWA, *supra* note 11, at 177–83.

21. SHIGEYOSHI MURAKAMI, *JAPANESE RELIGION IN THE MODERN CENTURY* 20 (H. Byron Earhart trans., Univ. Tokyo Press 1980) (1968). In the early- and mid-nineteenth century Japan was under intense pressure from Western nations to open its ports to trading. Feeling this intense pressure, Japan felt it needed something to unite its people and the nation so it would not be helpless under foreign military and economic powers. One way Japan lost face was through the unequal treaties into which it entered with foreign countries such as the United States. Under the unequal treaties, Japan was forced to make numerous concessions that were not reciprocated by the Western powers. *Id.*

22. KITAGAWA, *supra* note 11, at 183; Kitagawa, *supra* note 16, at 238; Tomoeda, *supra* note 12, at 345.

an order in 1868 that directed the separation of Buddhism from Shinto.²³ This separation raised the status of Shinto and made it independent from further Buddhist influence.²⁴ The imperial government then instituted policies that promoted Shinto as the state religion.²⁵ The government aimed to unite Japan in heart and mind under the emperor and to restore Japan to its pristine past.²⁶ In order to accomplish this objective, the imperial government suppressed most other forms of religion.²⁷

The Meiji Constitution, adopted in 1889, affirmed the imperial government under which the emperor was the center of government and religion.²⁸ Under the 1889 Constitution, the emperor held the sovereign power of Japan, and he—along with a small number of advisers—governed Japan.²⁹ In addition, the imperial house was designated as the highest Shinto shrine, as well as the center of government.³⁰ Along with his governmental duties, the emperor was also the highest Shinto priest and a living kami, or god.³¹ Thus, the emperor was sacred, inviolable, and a symbol of the unity of the people,³² and the practice of Shinto was an obligation of the people toward the emperor.³³ Because the emperor was of divine origin and a descendent of the gods, the people worshiped him as a Shinto god, and it was their religious duty to support him and show loyalty to him. In this context, religious duty encompassed and consumed political and patriotic duty.

23. Kitagawa, *supra* note 16, at 238.

24. HELEN HARDACRE, *SHINTO AND THE STATE, 1868–1988*, at 27 (John F. Wilson ed., 1989).

25. This effort was called the “Great Promulgation Campaign.” For a detailed reading, see *id.* at 42–59.

26. See Richard Gardner, *Nationalistic Shinto: A Child's Guide to Yasukuni Shrine*, in *RELIGIONS OF JAPAN IN PRACTICE* 336–37 (George Tanabe, Jr. ed., 1999).

27. Although the imperial government had a nominal policy of freedom of religion, the policy had no substance. For example, the imperial government destroyed Buddhist temples and persecuted Buddhist followers during the State Shinto period. For an in-depth analysis of persecution of Buddhism and other religions, see MURAKAMI, *supra* note 21, at 4–40.

28. See MEIJI KENPŌ [Meiji Constitution], ch. 1 (Japan). An English translation is available at <http://history.hanover.edu/texts/1889con.html>.

29. *Id.*

30. See Tomoeda, *supra* note 12, at 347–48 (describing how and why Shinto and the State, which is both the emperor and the government, are and should be interconnected). Tomoeda was a proponent of State Shinto during that era.

31. Matsui, *supra* note 14, at 536.

32. *Id.* at 535–36.

33. *Id.* at 536.

Under the State Shinto system, the government propagated its message through the Shinto shrines. With the emperor as the head of the government and Shinto, the government of Japan then took control of the Shinto shrines for nationalistic purposes and began to emphasize through the shrines the Shinto element of emperor worship.³⁴ The imperial government took control of all the major Shinto shrines, including the Ise shrine, which houses the god Amaterasu, the divine ancestor of the emperor.³⁵ The Japanese government systematized and ordered these major shrines into a cohesive and controlled system for disseminating the government's messages. The imperial government created a Shinto Ministry division that had a major duty of implementing a nationwide training system. The Ministry taught reverence for the kami, the importance of the Law of Heaven and the Way of Humanity, loyalty to the throne, and obedience to the authorities.³⁶ The government also instituted a new imperial calendar of rites that instituted a schedule of festivals—many adapted from other religions, such as Buddhism.³⁷

With Japan's success in the first Sino-Japanese war (1894–1895) and in the Russo-Japanese war (1904–1905), the populace began to accept the new rites and to believe that their emperor was truly a god.³⁸ Building on these successes, the imperial government set about next to control all forms of Shinto worship by taking over all of Japan's Shinto shrines. Although in 1906 there were 190,265 shrines, which were mostly regional shrines without clergy; the government, “[n]ot entrusting the management of shrines to the local common people,” decreased the number of shrines to 110,000 (a forty-two percent reduction) and appointed leaders as parish representatives.³⁹

The imperial government directed the policies and activities of the shrines and sponsored the shrines by giving them financial assistance.⁴⁰ In addition, the Shinto shrine priests who performed

34. Kitagawa, *supra* note 16, at 240; see also Tomoeda, *supra* note 12, at 348 (explaining the bureaucratic governmental organization of the Shinto temples).

35. MOTOORI NORINAGA, THE TWO SHRINES AT ISE: AN ESSAY OF SPLIT BAMBOO 14 (Mark Teeuwen ed. & trans., Harrassowitz Verlag 1995) (1798).

36. KITAGAWA, *supra* note 11, at 201.

37. See HARDACRE, *supra* note 24, at 33.

38. *Id.*

39. MURAKAMI, *supra* note 21, at 66.

40. KITAGAWA, *supra* note 11, at 213.

rites and ceremonies of worship were secular government officials.⁴¹ Because the emperor was the chief Shinto priest and the sovereign power of the emperor emanated from Shintoism, the government asked all Japanese to join in the Shinto rites and ceremonies and refrain from openly expressing disbelief in Shinto or the divinity of the emperor.⁴² In this way, the imperial government turned Japan's society into a large family with the emperor at the center, as "the supreme national father-figure."⁴³ State Shinto thus became an effective mechanism through which the government and the emperor propagated emperor worship and eventually extreme nationalism.⁴⁴

Essentially, the imperial government devised State Shinto's doctrine and preached it to the people through the shrines and festivals. In relevant part, State Shinto teaches three main nationalistic tenets: (1) the emperor of Japan is superior to the heads of other states because of his ancestry, descent, or special origin because he descended from a god; (2) the people of Japan are also superior to the people of other lands because of ancestry, descent, or special origin and because the Japanese people as a whole are descended from a god; and (3) the islands of Japan are superior to other lands because of divine or special origin because they are inhabited by the emperor and his people.⁴⁵ This nationalistic doctrine emboldened the entire nation.

Through their control of the religious institutions of Shinto, Japan's national leaders were able to arouse the loyalties of the people by appealing to the sacred order of Shinto.⁴⁶ This produced extreme loyalty for both the nation and the imperial government, and the leaders aroused the people to carry out the policies of the imperial government. The State Shinto system was a major mechanism through which the government of Japan compelled its people to participate in the Japanese war machine leading up to and during World War II.⁴⁷

41. Tomoeda, *supra* note 12, at 348.

42. ALAN NII, SEPARATION OF RELIGION AND STATE IN JAPAN 15 (1983).

43. Fridell, *supra* note 16, at 550.

44. Matsui, *supra* note 14, at 536.

45. See, e.g., NII, *supra* note 42, at 3, 6-7.

46. Fridell, *supra* note 16, at 550.

47. See Matsui, *supra* note 14, at 536.

II. SEPARATION OF RELIGION AND STATE IN JAPAN: LEARNING FROM THE PAST

As has been noted, Japan's Meiji Constitution of 1889 proclaimed freedom of religion, but that freedom never materialized. While words on the printed page cannot substitute for a populace and rulers willing to implement them, structural systems are, perhaps, a prerequisite for religious freedom. Japan's current Constitution proclaims freedom of religion, accompanied with separation of religion and state.

A. The Ideal of Total Separation of Religion and State

The 1889 Meiji Constitution did not have a clause on separation of religion and state. Instead, it had a very bold clause proclaiming freedom of religion. Article 28 prescribed that "Japanese subjects shall, within limits not prejudicial to peace and order, and not antagonistic to their duties as subjects, enjoy freedom of religious belief."⁴⁸ As the government explained to the people, and as some Shinto priests assert today, "compulsory" State Shinto was acceptable under the 1889 Constitution because State Shinto was a non-religious national cult.⁴⁹

Japan's defeat in World War II ushered in a new era in Japanese history, society, and politics. The Supreme Commander for the Allied Powers, General Douglas MacArthur, issued the "Shinto Directive" on December 15, 1945, shortly after Japan's surrender.⁵⁰

The directive banned all "propagation and dissemination of militaristic and ultranationalistic ideology" in anything connected with Shinto. It abolished all public educational institutions engaged in the study of Shinto or in training the priesthood. . . . The educational system was purged of all "dissemination of Shinto doctrine in any forms and by any means."⁵¹

State Shinto, once separated from the state and from militaristic and ultra-nationalistic ideologies, continued as a religion called Shrine Shinto.

48. MEIJI KENPO [Meiji Constitution], ch. 2, art. 28 (Japan). An English translation is available online at <http://history.hanover.edu/texts/1889con.html>.

49. See HARDACRE, *supra* note 24, at 34-36.

50. *Id.* at 136.

51. *Id.*

Japan's postwar Constitution was created by its occupiers and implemented in 1947. This Constitution proclaims that sovereign power resides with the people.⁵² The Constitution further explains that the Emperor is the symbol of the state and of the unity of the people, deriving his position from the will of the people with whom resides sovereign power.⁵³

Reflecting on the experience of State Shinto, the 1947 Constitution, still effective in Japan today, also details separation of religion and state. It states that "[n]o religious organization shall receive any privileges from the State, nor exercise any political authority";⁵⁴ "[t]he State and its organs shall refrain from religious education or any other religious activity";⁵⁵ and "[n]o 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."⁵⁶ As these articles show, the Constitution of Japan tightly restricts and controls the relations between religion and the state. The Supreme Court of Japan understands the Constitution contains the ideal of total separation of religion and state.⁵⁷ The separation of religion and state in the Constitution of Japan has two meanings. One is the guarantee that restricts state intervention in religion. Another is the guarantee that restricts religious intervention in politics that harms the public welfare.

In the everyday life of the Japanese today, the latent existence of institutionalized religion is hardly felt.⁵⁸ Common people's religious interest is not necessarily high, especially when placed in the context of work and family priorities. Existence of confrontation or strife between religions is not visible to ordinary Japanese. As such, the Japanese people do not have much incentive to consider religion as a

52. KENPŌ [Constitution], preface (Japan).

53. *Id.* at art. 1.

54. *Id.* at art. 20, para. 1.

55. *Id.* at art. 20, para. 3.

56. *Id.* at art. 89.

57. See *Kakunaga v. Sekiguchi*, 31 MINSHŪ 533 (Sup. Ct., July 13, 1977) (Japan); see also *Anzai v. Shiraishi*, 51 MINSHŪ 1673 (Sup. Ct., Apr. 2, 1997) (Japan). These and other Japanese court cases in this article are available online at <http://www.courts.go.jp/english>.

58. See YŌKO KUDO, SHŪKYŌ VS. KOKKA [RELIGION VS. STATE] 10 (Kōdansha 2007) (Japan) (arguing that the Japanese have become a mostly secular people who do not consider religion an important part of life).

serious political problem or even as a latent political problem. In such an atmosphere, however, it is also true that those political leaders who are empowered to prevent the connection of state and religion do not have a strong incentive to do so—no accountability to voters exists on this issue. In fact, those Japanese who do care about religion, such as those voting for the Sōka Gakkai-backed New Kōmeitō, can provide a disproportionately large incentive for leaders to cater to religious interests. It is, therefore, correctly pointed out that the state and religion are connected comparatively easily in Japan.⁵⁹

B. Undue Leniency of the Supreme Court Concerning the Principle of Separation

Watching over this potential connection of religion and state is Japan's Supreme Court. As the highest court in Japan, the Supreme Court ultimately determines the relationship between the state and religion. The Japanese Supreme Court oversees the conduct of the various religions in Japan because the establishment of a tribunal like a church court is prohibited in the Constitution.⁶⁰

One of the leading cases for interpreting the constitutional provisions governing the interaction between religion and state in Japan is *Kakunaga v. Sekiguchi*.⁶¹ Prior to building the Tsu City Gymnasium, the Mayor of Tsu, Kakunaga Kiyoshi, arranged to have a groundbreaking ceremony on January 14, 1965, with the local Shinto priest officiating. The ceremony performed by the Shinto priests was traditional; they petitioned the gods for their approval, praying for the construction to go smoothly, without incident or mishap. The city paid the priests ¥4,000 with city funds for their services and paid another ¥3,663 in offerings; at the time, the dollar equivalent would have been \$21.29.⁶²

59. See Yasuhisa Koshiyama, *Explanatory Remarks on the Supreme Court Decisions*, 33 HOSŌ JIHŌ (LAW. ASS'N J.) 553, 566 (1981) (Japan).

60. KENPŌ [Constitution], art. 76, para. 2 (Japan) ("No extraordinary tribunal shall be established").

61. *Kakunaga v. Sekiguchi* (The Tsu City Groundbreaking Ceremony Case), 31 MINSHŪ 533 (Sup. Ct., July 13, 1977) (Japan); see also THE CONSTITUTIONAL CASE LAW OF JAPAN, 1970 THROUGH 1990, at 478-83 (Lawrence W. Beer & Hiroshi Itoh eds., 1996).

62. Calculated in 1965 dollars at the fixed rate of ¥360: \$1.00. See Werner Antweiler, Professor, University of British Columbia, PACIFIC Exchange Rate Service (2006), <http://fx.sauder.ubc.ca/etc/USDpages.pdf>.

On its face, when a mayor pays religious priest to perform a ceremony at an official state function, there appears to be a violation of Japan's constitutional provisions which state that "[n]o religious organization shall receive any privileges from the State";⁶³ "[t]he State and its organs shall refrain from . . . any . . . religious activity";⁶⁴ "[n]o public money or other property shall be expended or appropriated for the use, benefit or maintenance of any religious institution or association";⁶⁵ and "[n]o person shall be compelled to take part in any religious acts, celebration, rite or practice."⁶⁶ A suit was brought against the Mayor for violating these constitutional provisions.

Upon review, the Supreme Court dismissed the constitutional challenge using two lines of reasoning. First, the Court defined the Shinto ceremony as non-religious and therefore not a violation of the religion and state clause. By defining the ceremony as non-religious, the Court moved a step toward increasing and broadening the scope of permissible ways in which religion and state may mix. Here, it was permissible for a state actor to use public funds money for what was essentially a religious function—a prayer. Though the Court defined the prayer ceremony as non-religious, for Shinro adherents the form of the Shinto ceremony was essentially religious—a professional Shinto priest in religious robes and following specific Shinto rituals prepared a particular petition for the ceremony and used particular ceremonial equipment. Moreover, the priest who performed the service did so, one can assume, out of religious conviction and belief. Thus the argument that the ceremony was non-religious seems facially wrong, and it appears that the Supreme Court played a game of semantics in calling the ceremony non-religious.

Although the Court admitted the ceremony had religious overtones, it created a purpose and effect test to determine if the activity was prohibited "religious activity" for purposes of constitutional analysis. The Court wrote:

Even if the ceremony is performed in the style of an existing religion, as long as it remains within the bounds of well-established

63. KENPO [Constitution], art. 20, para. 1 (Japan).

64. *Id.* at art. 20, para. 3.

65. *Id.* at art. 89.

66. *Id.* at art. 20, para. 2.

and widely-practiced usage, most people would perceive it as a secularized ritual without religious meaning, a social formality that has become customary at the start of construction work.⁶⁷

Scholars have called this line of reasoning the “purpose and effect test.”⁶⁸ The Court summarized its argument in these terms: “‘Religious activity’ under article 20, paragraph 3 of the Constitution does not mean all conduct of the State and its organs that is related to religion, but conduct whose purpose has a religious significance and whose effect is to subsidize, promote, or, conversely, suppress or interfere with religion.”⁶⁹

The second approach may only be dicta, but it is suggestive of a test that allows for far more state sponsorship of religion than the purpose and effect test developed in the first prong of analysis. The Court argued that religion is far more than a mere belief in something, but it also includes actions that extend into areas of society such as “education, social welfare, culture, and folk customs.”⁷⁰ As these areas of life are areas the government will often have an interest in regulating or supporting, the Court reasoned that “complete separation between religion and State is virtually impossible in an actual system of government.”⁷¹ For example, for the state to deny subsidies to religious schools or to deny funds to maintain religious cultural treasures, while offering that support to secular equivalents, “would amount to imposing a disadvantage on these entities because of their religious affiliation; in other words, it would amount to discrimination on religious grounds.”⁷²

The decision in *Kakunaga v. Sekiguchi* has not only diluted the definition by excluding from the category of prohibited state actions what are clearly religious ceremonies, but it has also allowed state support of religious institutions that were specifically targeted by the postwar Constitution. The Shinto Directive of 1945 sought to purge the preaching of Shinto from all schools,⁷³ and it was a fear of too close a relationship between the government and Shinto that inspired article 20, paragraph 3’s prohibition that “[t]he State and its

67. *Kakunaga v. Sekiguchi*, 31 MINSHO 533 (Sup. Ct., July 13, 1977) (Japan).

68. *Matsui*, *supra* note 14, at 539.

69. *Kakunaga v. Sekiguchi*, 31 MINSHO 533 (Sup. Ct., July 13, 1977) (Japan).

70. *Id.*

71. *Id.*

72. *Id.*

73. See HARDACRE, *supra* note 24, at 26.

organs shall refrain from . . . any . . . religious activity.⁷⁴ And yet the religious institutions most likely to get state support are Shinto institutions because of the ease with which Shinto ceremonies can be considered cultural events as opposed to religious events. This decision appeared to set a precedent that majorly eroded constitutional provisions.

Twenty years later, however, another Supreme Court decision, *Anzai v. Shiraishi*,⁷⁵ broke with the precedent set in *Kakunaga v. Sekiguchi*. Shiraishi was the governor of the Ehime Prefecture from 1981 to 1986, during which time Nakagawa, the chief of the Ehime Prefecture Tokyo Office, contributed ¥45,000 from public funds as *tamagushiryō*⁷⁶ to the Yasukuni Shrine—a major Shinto shrine under State Shinto⁷⁷—over the course of nine visits (¥5,000 per visit), and ¥31,000 from public funds as *kentoryō*⁷⁸ over the course of four visits (¥7,000 or ¥8,000 per visit). Also, four other Ehime Prefecture officials donated ¥90,000 from public funds as *kumotsuryō*⁷⁹ over the course of nine visits (¥10,000 per visit) to the Gokoku Shrine to support widows of war dead. While this activity would have been permissible if the government officials had used their own money,⁸⁰ the conflict arose because government money was spent.

The Court applied the precedent of *Kakunaga v. Sekiguchi* to resolve *Anzai v. Shiraishi*. Under the purpose and effect test, whether an act of the government that has religious overtones violates Article 20, Paragraph 3 (the prohibition on participating in religious activity) or Article 89 (the prohibition on supporting a religion through donation of public money or property) is dependent on the purpose and effect of the activity as understood by most citizens. The Court stated:

[O]nly the activities exceeding such reasonable limits, the purpose of which have some religious meaning and the effect of which is to

74. KENPŌ [Constitution], art. 20, para. 3 (Japan).

75. *Anzai v. Shiraishi* (The Ehime Tamagushi Case), 51 MINSHŌ 1673 (Sup. Ct., Apr. 2, 1997) (Japan); see also Matsui, *supra* note 14, at 539.

76. Tamagushiryō refers to money to purchase the sprig of a sacred tree for use in Shinto ceremonies.

77. For more information, see the Yasukuni Shrine homepage, <http://www.yasukuni.or.jp/english/> (last visited July 25, 2008).

78. Kentoryō refers to money to purchase a votive lantern for use in Shinto ceremonies.

79. Kumotsuryō means offering money.

80. All are free to practice their religion, government officials included.

support, promote, or, adversely, oppose or interfere with religion, should be prohibited. And in determining whether a given religious act constitutes a prohibited “religious activity” or not, not only the external aspects of the conduct but also the place of the conduct, the average person’s religious understanding toward the conduct, the existence or extent of the actor’s religious intention, purpose, or awareness in holding the ceremony, and the effect or influence on the average person should be considered as factors.⁸¹

The Ehime Prefecture argued that the various payments to the Yasukuni and Gokoku Shrines were courtesy payments, somewhat similar to the secular ritual that Kakunaga had initiated by paying a Shinto priest to perform the Shinto ceremony at the construction site. However, in applying the purpose and effect test, the Court found the payments constituted an unconstitutional expenditure of public monies. The public spending for *tamagushi*, lanterns, and offerings inevitably contained religious implications, and thereafter the Court found that the expenditure had a religious purpose.

Furthermore, the payments showed the effect of state support for a particular religion.⁸² The Court arrived at this outcome without changing the purpose and effect test because of the particular shrines visited. The Yasukuni Shrine, in particular, held a special place in State Shinto—it was the location where many of the war dead were enshrined,⁸³ including many Class A war criminals such as Japan’s World War II government leader, Prime Minister General Hideki Tojo.⁸⁴ The Gokoku Shrine was a local “branch” of the Yasukuni and so carried the same implications. The Court reasoned that while the average Japanese person may not see a visit to a local shrine as anything more than custom and a donation as nothing more than courtesy, an official visit and donation at the Yasukuni Shrine will always carry the color of religious activity.⁸⁵ What is more, visiting

81. *Anzai v. Shiraishi*, 51 MINSHO 1673 (Sup. Ct., Apr. 2, 1997) (Japan).

82. *Id.*

83. About Yasukuni Shrine, <http://www.yasukuni.or.jp/english/about/index.html> (last visited July 25, 2008).

84. *Where War Criminals Are Venerated*, CNN.COM, Jan. 14, 2003, <http://edition.cnn.com/2001/WORLD/asiapcf/east/08/13/japan.shrine/>. The shrine remains very politically sensitive in part because the Shinto priests operating the shrine have not accepted the status of Prime Minister General Hideki Tojo and thirteen others interned there as Class A war criminals. A pamphlet available for visitors to the shrine reads, “Some 1,068 people, who were wrongly accused as war criminals by the Allied court, were enshrined here.” *Id.*

85. *Anzai v. Shiraishi*, 51 MINSHO 1673 (Sup. Ct., Apr. 2, 1997) (Japan).

the Yasukuni Shrine is inseparably connected with the religion that motivated the current constitutional provisions forbidding too much mixing between state and religion, namely State Shinto. In the Court's view, the Shrines were too closely connected with State Shinto for these government officials' donations to be permissible state action.

Thus, while the Court applied the purpose and effect test in each case, the outcomes were polar opposites. The greatest distinction in the facts is the association with State Shinto shrines in *Anzai v. Shiraishi* that was not present in the earlier case. Similar in each case, however, is the reasoning that defines the purpose and effect of the action in light of popular understanding, or at least the Court's perception of popular understanding.

C. Criticism of the Purpose and Effect Test

Japan's Supreme Court thus asserts that it is almost impossible, in practice, to realize a total separation of religion and state, while at the same time recognizing the ideal of total separation.⁸⁶ And the Supreme Court is accumulating the judgments that show the boundaries of permissible state involvement in religion. The Supreme Court asserts that the limit of religious action in the public sphere should be viewed from the standpoint of its purpose and effect to determine if the involvement is prohibited.

The Supreme Court's series of decisions that contain the purpose and effect test can be strongly criticized, however, for allowing too much mixing of religion and state. The purpose and effect test, as the Court has applied it, depends on the view of most people, which means that the courts look to the ideas that are socially accepted at a particular time. The Supreme Court's rationale for adopting this test is that since the problem of state involvement in religion is experienced primarily by a country's citizens, when determining whether a certain mixture of state and religion has violated Japan's Constitution, naturally the courts should take into consideration the views of the general population.⁸⁷

Nonetheless, public opinion is unstable footing for a test of constitutional interpretation. Popular sentiment should not be a

86. See *Kakunaga v. Sekiguchi*, 31 MINSHŪ 533 (Sup. Ct., July 13, 1977) (Japan); see also *Anzai v. Shiraishi*, 51 MINSHŪ 1673 (Sup. Ct., April 2, 1997) (Japan).

87. See *Kakunaga v. Sekiguchi*, 31 MINSHŪ 533 (Sup. Ct., July 13, 1977) (Japan).

factor in the analysis of a question of constitutionality. A violation of the Constitution must never be justified by acceptance of many people; otherwise, the written Constitution becomes a document subject to current popular will. This destroys protection for minority segments of the population, whether they are religious or political. Protecting minority segments of the population from a violation of Japan's constitutional guarantee of separation of religion and state must be a mission of the Court. The judiciary's role should not depend on majority rule but on the rule of law.

If the Supreme Court's purpose and effect test is pushed to its logical extreme allowing for broad state action over religion, then a religious government may be justified and constitutional, if accepted by the majority of Japan's citizens. In Japan, it is already accepted that a religious party—for example, the Sōka Gakkai-backed New Kōmeitō—can act as a coalition partner of the ruling party in the Japanese cabinet, even though the Constitution clearly prohibits religious organizations from exercising any political authority.⁸⁸ If acceptance by a majority continues to be a factor in determining the boundaries of permissible intersection of religion and state in Japan, the boundaries of permissible intersection will continue to increase and will continue to erode the constitutional guarantee of freedom of religion and separation of religion and state.

III. A REMEDY: NEW CODE

Under the current legal regime in Japan, optimism that State Shinto, or another religion,⁸⁹ could not again mix with politics is unwarranted. Even if the Supreme Court does not continue to erode the constitutional protections, the underlying reasoning of the purpose and effect test does not prevent a specific religion from disguising itself as an ideology of national integration. Japan could return to the way along which it once walked without changes in the

88. KENPO [Constitution], art. 20, para. 1 (Japan).

89. The possibility that State Shinto would again mix with State politics may be less likely than the prospects for another religion to do so because the Supreme Court is more sensitive to State Shinto. See the discussion of *Anzai v. Shiraishi*, *supra* Part II.B. But State Shinto's continued strength as a religion still makes it a primary candidate for intertwining with State affairs.

law.⁹⁰ Japan's tradition and history is such that state and religion are connected comparatively easily. Earnest watch is required.

A. Proposal for a New Code

Because religion ably functions to unify masses of people and imbue them with collective feelings, political power cannot help having interest in this ability. Once, State Shinto was a support of the Japanese integration and nationality; it unified the Japanese in a way that perhaps has not been possible since. Its ends, however, were disastrous. Japan must continue to prevent present and future religious affiliation that state actors could utilize to cause serious wrong. As has been demonstrated, the judicial body whose function would be to play this role has not developed precedent that will protect the Japanese via the Constitution.

Japan's Diet should enact a code embodying specific implementation of the religious freedom and separation of religion and state guarantees of the Constitution of Japan.⁹¹ This new code would formulate regulations concerning that which the state and its organs shall not do and that which is a violation of the religion and state provision. One of the most important provisions required by this suggested code is a section that proscribes the misuse of religion for political ends. In such a section, the code will specifically prescribe in detail what constitutes a violation of the separation of religion and state guarantee of the Constitution. This section will ensure that separation of religion and state will not be eroded. It will preserve the constitutional guarantees that prohibit the use of religion by the state and the use of political authority by religious organizations. Without a code to protect our constitutional guarantees, the Supreme Court's precedents represent ineffective protection, and further erosion remains likely.

In most cases, the principle of separation of religion and state helps freedom of religion because it prevents the state from promoting one religion to the threat of other religions. However, under the Japanese Constitution's allowance of religious political participation, which is included in the guarantee of freedom of

90. Note that in prewar Japan, the State and Shintoism were inseparably entangled. See *supra* Part I. Many current cases show a relation between political power and Shintoism still continues today.

91. KENPŌ [Constitution], art. 41 (Japan) ("The Diet shall be the highest organ of the state power, and shall be the sole law-making organ of the State").

religion, there is an embedded limitation for the principle of separation of religion and state. There is a serious constitutional inconsistency about religion and politics in Japan.⁹² The Constitution contains the ideal of total separation, but the Supreme Court, guardian of the Constitution, is unwilling to apply the principle of separation vigorously with a clear test. The Constitution stipulates no religious organization shall exercise any political authority,⁹³ while Japan accepts, at least to a degree, the political power of a religious party.

Enacting a code could adjust such inconsistency by clearly defining each provision. The new code would need to clarify a demarcation between these two competing rights: a violation of the religion and state provision becomes clear only to the extent that religious adherents' right to practice their religion becomes clear. By delineating a clear distinction, the new code would stabilize freedom of religion, including political participation.

The new code would also contribute to judicial control over the relationship between religions and the state. In order to prevent illegal acts that misuse religion for political ends, the role of the judicial power is important—the judiciary is the first line of defense within the government. However, in Japan it is currently very difficult to make a judicial challenge concerning the constitutionality of separation of religion and state.

As a significant example, no suit has yet been brought concerning the visits of Japan's Prime Minister to the Yasukuni Shrine.⁹⁴ As has been mentioned in the discussion of *Anzai v. Shiraishi*, in prewar days, the Yasukuni Shrine was a major Shinto shrine under State Shinto. It was managed by the army, and it served as the centerpiece for Japanese militarism. It was regarded as a sacred institution for enshrining the souls of soldiers who had died for the emperor, thus providing a strong religious justification for war before and during World War II. While this would seem a ripe opportunity for political opponents to embarrass the Prime Minister, to date no suit has been brought concerning the constitutionality of

92. See Matsui, *supra* note 14, at 544; Métraux, *supra* note 8, at 169.

93. KENPO [Constitution], art. 20, para. 1 (Japan).

94. Prime Minister Junichiro Koizumi has made six visits to the shrine since 2001. See *Japan's Controversial Shrine*, BBC NEWS, Aug. 15, 2006, <http://news.bbc.co.uk/2/hi/asia-pacific/1330223.stm>. The visits are certainly political, because they have generated uproar in China and Korea.

the visit, or a suit concerning the constitutionality of the Prime Minister's use of public funds to accomplish his visits. The answer is structural: the Diet must authorize lawsuits concerning the Prime Minister's visits,⁹⁵ but the Diet is controlled by the Prime Minister's party. Japanese citizens are anxious for these lawsuits, particularly for a suit by the taxpayers against the Central Government.⁹⁶ For the realization of these suits, a new code should authorize citizens to bring constitutional suits against the Central Government. As a model, the law titled "Local Government Act" authorizes local taxpayers to file a suit against unlawful expenditures of public money.⁹⁷ The residents use this taxpayers' suit to attack the constitutionality of their local government's public spending. Such a suit by the taxpayers should be expanded to the Central Government.

Another aim of the new code would be to ensure separation of judicial power from the Diet and the executive. The judicial power is also a power of the state. Japan's past proves that it is possible for united powers of the state to misuse religion for political ends. Japan may protect against this by further entrenching the separation of powers.⁹⁸ By enacting a code that offers specific interpretations for the judiciary, the legislature will enable the Court to better define the Constitution.⁹⁹ The new code would delineate the guarantees of

95. Gyōseijikensosyōhō [Administrative Case Litigation Act], Minsōhō [Code of Civil Procedure], arts. 5, 42 (Japan). Japan has administrative litigation rules that are different than the civil procedure rules. The judicial control over administrative cases is authorized under the Administrative Case Litigation Act (ACLA). Article 5 of the ACLA prescribes the lawsuit named "popular action." This popular action can be filed by authorization of the Diet. *Id.* at art. 42. For further details on popular action prescribed in the ACLA, see Keiko Yamagishi, *Kyakkan Soshō no Hōri* [Legal Theory on Objective Administrative Litigation] (2004) (Japan) (studying how objective litigation differs from subjective litigation, or ordinary litigation, and explaining that popular action is characterized by objectivity).

96. For an analysis of the chorus of Japanese people who are anxious for such a taxpayers' suit, see Office of the Prime Minister, Administrative Litigation Investigative Commission, <http://www.kantei.go.jp/jp/singi/sihou/kentoukai/05gyouseisoyou.html>.

97. Chihōjichihō [Local Government Act], KENPŌ [CONSTITUTION], art. 242-2 (Japan).

98. Japan's judiciary has not always been very independent of the ruling political party. Particularly during the late 1960s, judges opposed to the ruling conservatives found their careers disadvantageous. See J. MARK RAMSEYER & ERIC B. RASMUSEN, *MEASURING JUDICIAL INDEPENDENCE: THE POLITICAL ECONOMY OF JUDGING IN JAPAN* (2003).

99. There is a danger that the Court could abdicate its role to the Legislature to formulate the delineation under all circumstances. But alternatively, and preferably, the Court could perceive the law as a challenge and assert itself in a way that would provide for a more separate identity of the Court.

freedom of religion and separation of religion and state, and thus they will be preserved and strengthened. The code will help to prevent the erosion of these constitutional guarantees and will encourage judicial initiative in more clearly defining these constitutional provisions. Enacting a code will also enable Japanese citizens to fully understand what constitutes a violation of these constitutional provisions and what does not.

IV. CONCLUSION

The experience of State Shinto can serve as material for considering the misuse of state action in religious affairs. State Shinto embodied a connection between the state and religion. It could happen again. We, the Japanese people, should discuss how Shintoism changed into the ideology of State Shinto, for the political ends of the imperial government. Further questions for debate include whether State Shinto is a religion or ideology, whether the Japanese people did not or could not reject State Shinto, and whether the current Supreme Court test of purpose and effect can be subverted for political ends by a majority. These are important questions that needed to be addressed, and the answers will guide Japan's future actions as a people and nation. The nation should consider implementing a new code to protect Japan's constitutional guarantees of freedom of religion and separation of religion and state.

The ways in which religion may be misused for political ends has universal application. In order to prevent the misuse of religion's capability to change an adherent's mind or exert influence over an adherent, one may learn from Japan's unhappy history, which can be useful to the student who is willing to learn. One can extract principles and guidelines from Japan's history, and if Japan's history can contribute not only to the happiness of the Japanese people but also to global peace, many souls who fell victim to State Shinto would be truly honored.¹⁰⁰

100. For additional, in-depth exploration of topics in this article, see generally NOBUYOSHI ASHIBE, *SHŌKYŌ, JINKEN, KENPŌGAKU* [RELIGION, HUMAN RIGHTS, STUDY OF THE CONSTITUTION] (Yūhikaku 1999) (Japan); MAKOTO ŌISHI, *KENPŌ TO SHŌKYŌSEIDO* [THE CONSTITUTION AND THE RELIGION SYSTEM] (Yūhikaku 1996) (Japan); KEIJI HOSHIKAWA, *TAIWASURU SHŌKYŌ: SENSŌ KARA HEIWA HE* [RELIGION WHICH HAS A DIALOG: FROM WAR TO PEACE] (Taishō University Press 2006) (Japan); DALE M. HELLEGERS, *WE, THE JAPANESE PEOPLE: WORLD WAR II AND THE ORIGINS OF THE*

