

Freedom of Religion and the Rule of Law in Japan  
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Relationship in the Era of Globalization"

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During globalization, the rule of law and religious freedom are undergoing a major transformation. The big question is whether to force religious minorities to adapt to the culture and ideology of the majority, or whether to include them in society as they are.

Japan's Supreme Court has been trying to harmonize the rule of law with religious freedom. However, as various religions come into society, precedents that were previously considered right and taken for granted may be deemed worthy of reconsideration.

This paper deals with several cases regarding freedom of religion and judicial review by the courts. One is a case in which a student of a professional college of technology was expelled from school after refusing to attend a physical education lecture, called Kendo, Japanese traditional martial arts of Samurai, on the grounds of his religious beliefs. In Japan, public schools are closed on Sundays. However, on Sundays when the parents are off from work, the school holds a Sunday visitation day so that the parents can watch their children take classes. In another case, a parent is a pastor of a church and presides over services on Sundays, so the child had to be absent as well. The parents asked that the absence be rescinded. In Japan, it may be necessary to reconsider the precedents when including minorities in society.

## I. General Principles of Freedom of Religion

Freedom of religion is recognized as a very old right, but it is not a universal principle.<sup>1</sup> In the world, there are various styles of relationship between the state and religion.<sup>2</sup> First, a national religion system is adopted in which a single religion recognized by the majority of the population is given the status of national religion, and the government intervenes

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<sup>1</sup> NOBUYOSHI ASHIBE, *KENPŌ[CONSTITUTION]* (7<sup>th</sup> ed. Iwanami Shoten 2019), 159-160.

KOJI SATO, *NIHONKOKUKENPŌRON [CONSTITUTION]* (Seibundo 2011) [hereinafter KOJI SATO] 225.

*HIDENORI MOTO, ed., KENPŌKŌGI[LECTURE OF CONSTITUTION]* (hereinafter MOTO) 360.

<sup>2</sup> SATO, at 232. ASHIBE, at 165.

within the religion.<sup>3</sup> Second, a system of recognized religions is adopted, in which multiple religious groups are given special legal status. Religion is considered a public affair. <sup>4</sup>These two systems also guarantee religious education in public schools and establish the principle of religious tolerance.<sup>5</sup>

Thirdly, there is the style of separation of state and church by declaring in the constitution that political power and religious power are to be separated. Specifically, no special legal status is given to any religious organization, and religion is treated as a private matter.<sup>6</sup>

Article 20 of the current Constitution<sup>7</sup> stipulates freedom of religion and declares the principle of separation of church and state. The content of freedom of religion is threefold.<sup>8</sup> First, freedom of religion within the mind is absolutely guaranteed.<sup>9</sup> The freedom of individuals to have their own faith and not to be forced to confess it by the government is guaranteed. Second, freedom of religious activity is guaranteed. Thirdly, freedom of religious association is guaranteed.<sup>10</sup>

As far as the inner mind of an individual's faith is concerned, it is absolutely guaranteed, but when it is manifested outside the mind as religious behavior and acted upon, it is subject to the same restrictions by public welfare as any other freedom. In other words, if it infringes on the freedom of others, it may be subject to civil or criminal liability.<sup>11</sup>

Article 20 of the Constitution calls for the separation of state and religion, but the extent of this separation is left to interpretation. Usually, we may want to aim for a complete, strict separation of state and religion, but since this is difficult in reality<sup>12</sup>, a certain degree of involvement is constitutionally allowed. Therefore, a criteria to assess the violation of the principle of separation of church and state is needed.<sup>13</sup>

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<sup>3</sup> NOBUYOSHI ASHIBE, SHINKYO, *JINKEN, KENPŌGAKU [FREEDOM OF RELIGION, HUMAN RIGHTS, AND STUDY OF THE CONSTITUTION]* (Yuhikaku 1999)

<sup>4</sup> Id.

<sup>5</sup> Id.

<sup>6</sup> Id.

<sup>7</sup> Art. 20 of the Constitution of Japan.

<sup>8</sup> SATO, at 225. ASHIBE, at 160. MOTO, at 362.

<sup>9</sup> SATO, at 225-226. ASHIBE, at 161. MOTO, at 363.

<sup>10</sup> SATO, at 225-226. ASHIBE, at 161. MOTO, at 364.

<sup>11</sup> SATO, at 226. ASHIBE, at 160. MOTO, at 362.

<sup>12</sup> SATO, at 233-234. ASHIBE, at 165. MOTO, at 369-370.

<sup>13</sup> ASHIBE, at 165. (Ashibe points out cases in which the modern state, based on the idea of a welfare state, is obligated to provide social benefits to religious organizations as it does to other secular groups.)

MOTO, at 370. (MOTO points out that if a social benefit is denied on the basis of being a religious organization, it may be a violation of the religious freedom of the

The Japanese Supreme Court has reviewed the separation of church and state in reference to *Lemon v. Kurtzman* in 1971.<sup>14</sup>

In Japan, in the *Tsu Jichinsai* case<sup>15</sup>, the Supreme Court stated that in light of the social and cultural conditions of each country, the state has no choice but to have some relationship with religion in practice. The Supreme Court states that it should determine in what cases and to what extent the state's involvement with religion is constitutionally impermissible.

Evaluating the purpose and effect of governmental action that engages with religion, the Supreme Court<sup>16</sup> explains that such engagement should be judged in light of the following criteria. The criteria are that the purpose of the act in question has religious meaning and that the effect of the act is to aid, promote, or oppress, or to appreciate, religion. According to the Supreme Court<sup>17</sup>, in order for a specific act at issue in a case to be evaluated as a religious activity, it must be determined objectively in accordance with “socially accepted norms”, taking into consideration the religious evaluation of the act by the general public, the intention and purpose of the actor in question to engage in the act and the existence and degree of religious awareness, as well as the effect and impact of the act on the general public. The U.S. *Lemon* test, the original purpose and effect standard used by the Japanese Supreme Court, is generally judged on three criteria: whether the purpose is secular, whether the effect promotes or suppresses religion, and whether there is excessive involvement of the state and religion. Violation of any one of these three is unconstitutional, and coercion and endorsement tests have also been adopted in court decisions.

The Japanese Supreme Court, while adopting this *Lemon* test, is more lenient than the American standard because both purpose and effect must be violated for the law to be unconstitutional. Japanese Constitutional law scholars have criticized the Supreme Court for allowing relaxed separation.<sup>18</sup>

The principle of separation of church and state can be understood as requiring religious neutrality of the state.<sup>19</sup> This neutrality includes two things: non-involvement of the state in religion and equal assistance between religious and non-religious groups, or between

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organization in question.)

<sup>14</sup> *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

<sup>15</sup> Saikō Saibansho [Sup. Ct.] July 13, 1977, Shōwa 46 (gyo tsu) no. 69, 31(4)SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 533 (Japan).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> SATO, at 233. ASHIBE, at 167. MOTO, at 371.

<sup>19</sup> MOTO, at 371.

religions. Religious neutrality can be linked to either strict or gradual separation, depending on which emphasis is placed on it. <sup>20</sup> The next three rulings will be examined.

## II. Kobe Kendo Case

In this case<sup>21</sup>, A student who refused to take the compulsory physical education class of Kendo, based on the doctrine of Jehovah's Witnesses, was suspended from the original class and eventually expelled. The student claimed that the expulsion violated his freedom of religion and demanded that the expulsion be rescinded. The Supreme Court ruled that it was difficult to say that the practical skills of Kendo were even mandatory at a technical college, and that the achievement of educational objectives through physical education subjects could be achieved through alternative methods such as taking other physical education courses. The Supreme Court<sup>22</sup> evaluated that the student's reason for refusing to take practical Kendo was sincere and closely related to the core of his faith, and that the expulsion was extremely serious.

According to the Supreme Court, such a significant disadvantage is unacceptable even if the student voluntarily enrolls himself in a school that adopts Kendo practical training. The refusal to allow other appropriate alternative measures to avoid inequity to other students does not have the effect of aiding, promoting or facilitating any particular religion or non-religion for that purpose, nor does it have the effect of oppressing or inflicting appreciation on other religions or non-religions. The Supreme Court explained that the religious neutrality of public education is not violated when a school conducts an investigation to determine if there is a reasonable connection between a student's refusal to take Kendo and the student's explained religious beliefs. The Supreme Court concluded that the expulsion was a punishment that was grossly unreasonable from a social perspective and an abuse of discretion.

Religious neutrality, as required by the principle of separation of church and state, requires that there be no discrimination between religious and non-religious groups.<sup>23</sup> We can evaluate the Supreme Court's decision based on the fact that the burden on students

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<sup>20</sup> Moto, at 371.

<sup>21</sup> Saikō Saibansho [Sup. Ct.] March 8, 1996, Heisei 7 (gyo tsu) no. 74, 50(3)SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 469 (Japan).

<sup>22</sup> Id.

<sup>23</sup> SATO, at 229. ASHIBE, at 163. MOTO, at 378.

(SATO criticizes the Supreme Court for easily relying on the dichotomy between inner beliefs and external acts, and for not giving sufficient consideration to faith-sensitive alternatives. MOTO appreciated the Supreme Court's decision that a school's survey to determine the rational connection between a student's religious beliefs and his or her refusal to practice kendo does not violate religious neutrality.)

who are followers of Jehovah's Witnesses was too heavy, and serious disadvantages of retention and expulsion were imposed on them. However, the Supreme Court has traditionally examined the principle of separation of church and state loosely, but has judged this case very strictly, which can be criticized as inconsistent with the precedents.<sup>24</sup>

### III. Kyoto old capital case

### IV. Sunday visitation case

In this case<sup>25</sup>, the Tokyo District Court<sup>26</sup> ruled that the record of schoolchildren's absence from Sunday school did not violate their freedom of religion.

The purpose for schools to hold Sunday visits is because parents are generally off work on weekends and the purpose of the visit is for parents to see how their children are doing at school. In this case, the child, whose parents are pastors, attended church school and was absent from the Sunday visit. The parents sought rescission of the record of the absence in the instructional record and compensation for damages.

Tokyo District Court ruled<sup>27</sup> that the entry in the teaching record was a mere factual act of informing the homeroom teacher of attendance and did not impose any legal disadvantage on the child. It also ruled that cancelling absences due to parents' attendance at church school was not desirable in maintaining the religious neutrality of public education. According to the Tokyo District Court, because of the special necessity of public education, to the extent that the class day is rescheduled, it is an inevitable restriction based on a rational basis, even if it conflicts with the assembly of a religious group. Freedom of religion is absolutely guaranteed as long as it is within the heart, but when it becomes an external act, it is subject to certain restrictions based on reasonable grounds.

At the time the Tokyo District Court decided the Sunday visitation case, it might have been easy for the court to endorse the majority view that on Sundays, parents have no work to do and are off.<sup>28</sup> The decision easily allowed for restrictions on reasonable

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<sup>24</sup> Moto, at 368, 373, 378.

<sup>25</sup> Tokyo Chihō Saibansho [Tokyo Dist. Ct.] March 20, 1985, Shōwa 57 (gyo u) no. 151(Japan).

<sup>26</sup> Id.

<sup>27</sup> Id.

<sup>28</sup> SATO, at 229. ASHIBE, at 162. MOTO, at 377-378.

(Sato assessed that the Tokyo District Court adopted a dichotomy to distinguish between internal and external acts. According to Sato, the Tokyo District Court ruled that an individual's thoughts are absolutely guaranteed if they remain in the inner mind, but if they become external acts, they are subject to certain restrictions based on

grounds, but the majority's tolerance of minority religions is becoming more and more strongly demanded.

According to the Ministry of Education, Culture, Sports, Science and Technology (MEXT), from 2007 to 2008, the number of children of foreign nationality in elementary, junior high and high schools who need Japanese language education has increased from 25,000 to 40,755. And the number of Japanese children in elementary, junior high and high schools who also need Japanese language education has increased from 4383 to 10371.<sup>29</sup>

Of the children in need of Japanese language education, 79.5% are foreign nationals and 74.4% are Japanese nationals who are receiving special guidance such as Japanese language instruction.<sup>30</sup> The mother tongues of the foreign national children who need Japanese language instruction are Portuguese, Chinese, Filipino, Spanish, and Vietnamese, in that order, out of the total 40,755.<sup>31</sup>

The Sunday visitation case and the Kendo refusal case show that religious neutrality requires the majority to deliberate on the religious freedom of the minority, and this data shows that this deliberation needs to be done even more carefully than it was at the time of these cases.<sup>32</sup>

In addition, under the purpose and effect standard set forth in the *Tsu Jichinsai* case<sup>33</sup>, the court will determine whether the act in question constitutes a religious activity in the eyes of the general public.<sup>34</sup> Then, when evaluating the act in question from the perspective of the general public, the court examines the intention of the actor, the purpose, the existence and degree of religious awareness, and the effect on the general public.<sup>35</sup> Therefore, the conclusion of constitutionality or unconstitutionality is drawn on the vague

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a rational basis allowed by law.) (MOTO explains the Tokyo District Court's decision in terms of religious neutrality. A school's act of rescheduling a class day to Sunday is acceptable on reasonable grounds, even if it clashes with a meeting of a particular religious group. It would undermine religious neutrality for a school to cancel the records of students who missed Sunday.)

<sup>29</sup> Ministry of Education, Culture, Sports, Science and Technology, Results of the Survey on the Acceptance of Students in Need of Japanese Language Instruction (Fiscal Year 2008). [https://www.mext.go.jp/content/20200110\\_mxt-kyousei01-1421569\\_00001\\_02.pdf](https://www.mext.go.jp/content/20200110_mxt-kyousei01-1421569_00001_02.pdf)

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> MOTO, at 377.

<sup>33</sup> Saikō Saibansho [Sup. Ct.] July 13, 1977, Shōwa 46 (gyo tsu) no. 69, 31(4)SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 533 (Japan).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

grounds of "ordinary people" and social conventions.<sup>36</sup> The courts will be required to read into the "general public" a consideration for the religious freedom of minority groups.

The principle of separation of church and state and the freedom of religion sometimes raise the issue of whether a legal obligation imposed in general can be exempted in consideration of the burden it imposes on a minority of a particular faith.<sup>37</sup>

If the government exempts only a minority of people of a particular faith from a general legal obligation, it can also be assessed as violating religious neutrality because the exemption of the obligation may be evaluated as the effect of favoring a particular religion.<sup>38</sup> When the principle of separation of church and state conflicts with freedom of religion, the question of whether it is permissible to exempt burdens on a particular religion has been debated in Japanese constitutional law. If we interpret Article 20<sup>39</sup> of the Constitution as loosely separating the state from religion, it could mean that the government, on the basis of religious neutrality, is constitutionally allowed to exempt only a minority from general obligations, taking into account the religious freedom of the minority.<sup>40</sup>

These Japanese court decisions might have been influenced by *Employment Division, Department of Human Resources of Oregon v. Smith* in 1990<sup>41</sup> showed that religious neutrality does not give religious organizations an exception to their general legal obligations, and it will be important to see how the Japanese Supreme Court changes this decision.

The Supreme Court also indicated the possibility of not adopting the purpose and effect standard in 2010. First, on January 20, 2010, the Court<sup>42</sup> ruled that the town's act of leasing land for the Sorachifuto shrine without charge was unconstitutional. In this case, the Supreme Court did not mention the purpose and effect standard. However, six months later, on July 22, it ruled that the act of the mayor attending the celebration of the Shira-

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<sup>36</sup> SATO, at 233. MOTO, at 373-374. (MOTO believes that the *Tsu Jichinsai* case gave rise to the tendency of the Supreme Court to interpret the separation of church and state loosely.)

<sup>37</sup> MOTO, at 379.

<sup>38</sup> *Id.*

<sup>39</sup> *Nihon-Koku Kenpō* [CONSTITUTION], art. 20, translated in (The Constitution of Japan) [JAPANESE LAW TRANSLATION], <http://www.japaneselawtranslation.go.jp/law/detail/?id=174&vm=04&re=01&new=1> (Japan).

<sup>40</sup> SATO, at 233-234. ASHIBE, at 166. MOTO, at 370.

<sup>41</sup> *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).

<sup>42</sup> Saikō Saibansho [Sup. Ct.] Jan.20, 2010, Heisei 22 (gyo tsu) no. 260, 64(1)SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1 (Japan).

yama-hime Shrine and giving a congratulatory speech was constitutional using the purpose-effect standard.<sup>43</sup>

The Supreme Court also seems to recognize that the purpose-effect standard is a manipulable standard that leads to constitutional and unconstitutional decisions.<sup>44</sup> In the Sorachifuto Shrine case, the Supreme Court may have paid attention to the fact that no one realized for a long time that the site of the shrine was part of the land owned by the community association. In the Shirayama-hime Shrine case, the Supreme Court may have ruled that the mayor's address at the celebration was constitutional, emphasizing the secular motive of attracting people through tourism.<sup>45</sup>

## V. Nationality Act case

...This is a case in which the court recognized the significant changes in socioeconomic facts as one of the factors to be examined when reviewing the constitutionality of a law. Although this case examined the Nationality Act and equality and did not touch on religious neutrality, it is possible that the Supreme Court would also consider social changes as one of the factors to be reviewed when examining religious neutrality.

## Conclusion

It is a great challenge to culture, society, and law to accept religious minorities into society as what they are.<sup>46</sup> We must be wary of unintentionally enforcing the common sense of the majority on the minority.

Strict separation of church and state may, in some cases, lead to the imposition of certain burdens on the religious freedom of minorities in public education, in the name of religious neutrality.<sup>47</sup> If the principle of separation of church and state is considered as a

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<sup>43</sup> Saikō Saibansho [Sup. Ct.] July 22, 2010, Heisei 20 (gyo tsu) no. 202, 234 SAIKŌ SAIBANSHO SAIBANSHU[SHŪMIN]337(Japan).

<sup>44</sup> SATO, at 239. ASHIBE, at 169-170. MOTO, at 372-373.

(SATO notes that the Supreme Court has stated that the violation of the separation of church and state should be judged "comprehensively in light of socially accepted norms," taking into account the nature of the religious facility, the circumstances and manner of its free provision, and the public's evaluation of it.)

(MOTO assesses that the Supreme Court has not regarded the purpose-effect standard as the exclusive standard and has not abandoned it, although it has limited its scope of application in light of the particularities of the case.)

<sup>45</sup> ASHIBE, at 170. MOTO, at 373.

<sup>46</sup> MOTO, at 379.

<sup>47</sup> Id. at 371.



relaxed one<sup>48</sup>, it would not violate the principle of separation of church and state even if the obligation is exempted when the burden is too heavy in consideration of the religious freedom of minorities.

Constitutional law scholars in Japan have criticized the Supreme Court for its moderate separation of church and state.<sup>49</sup> There have been a concern that the criticism of the Supreme Court by scholars may lead to the integration of the religious freedom of minority groups into that of the majority, without taking into consideration the religious freedom of minority groups.

Constitutional scholars need to argue that the "general public" or "socially accepted norms" used by the Supreme Court is assumed to be a general public in which the majority contemplates the religious freedom of the minority, and that the content of social conventions is that society should aim to take into account the religious freedom of the minority.

One of the grounds on which constitutional scholars have criticized the Supreme Court's moderate separation of church and state was because they were seriously concerned about the ambiguity of the content of these general public and social conventions, and the fact that the conclusions could be changed in any way.<sup>50</sup>

The Nationality Act was amended after the war, and in 2008 the Supreme Court ruled that the Nationality Act, Article 3(1)<sup>51</sup>, as amended in 1984, was unconstitutional on the grounds that it did not fit the realities of society.

After the Kobe Kendo case on 1996 and the Sunday visitation case in 1985, the culture and values of society have changed greatly. The socio-economic facts that support the law have changed.

After these cases, the number of school children who cannot speak or read Japanese is increasing, and schools must take these students into consideration. Rather than integrating minorities into the majority, it is necessary to respect and include the minority way of life. The Supreme Court should be commended for stating that the religious neutrality of public education is not violated when a school investigates to determine if there is a reasonable connection between a student's refusal to take Kendo and the student's explained religious beliefs.

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<sup>48</sup> SATO, at 233-234. ASHIBE, at 166. MOTO, at 371.

<sup>49</sup> SATO, at 233-234. ASHIBE, at 166. MOTO, at 371.

<sup>50</sup> SATO, at 233-234. ASHIBE, at 166. MOTO, at 371.

<sup>51</sup> Kokuseki hō[Nationality Act], Art.3(1)(Japan).