

Article

The Constitutional Debates on the Yasukuni Shrine and the Separation of Religion and State in Japan

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I. INTRODUCTION

The Yasukuni Jinja (Shrine) is one of the Shinto Shrines, which is located in Tokyo Japan. In the center of the hustle and bustle of Tokyo downtown, the Yasukuni is a rare oasis of green in a jungle of concrete. At this shrine, more than 2 million people who died in modern Japanese wars, including several Class A war criminals,¹ are enshrined. Many Japanese view it as a place to mourn their ancestors who sacrificed for their country. However, to many other Asian countries, which were invaded by Japan during and before the Second World War, the Yasukuni Shrine is regarded as a symbol of imperialism and militarism. Political visits or official support of the shrine always causes strong protests from Japan's neighboring countries, particular China and Korea. On the other hand, because of the constitutional restraints on the relation between religion and the state in Japan, official contacts with this religious site would be regarded as violating the Constitution.

Despite this, official support and political visits to the Yasukuni have never stopped in Japan. Many lawsuits were raised. The Yasukuni has become an important constitutional issue. This paper focuses on the constitutional debates and is intended to study the issue of the Yasukuni Shrine and the principle of separation of religion and state in Japan.

II. THE MEIJI CONSTITUTION AND THE YASUKUNI SHRINE

Under the Meiji Constitution, people's freedom of religion obtained the constitutional guarantee, but there was no constitutional mandate of the separation of religion and state. The Meiji government made Shinto an official religion. The Yasukuni Shrine, one of the Shinto shrines, was regarded as a special shrine for honoring those who died in wars.

A. *The Promulgation of the Meiji Constitution*

Before the middle 19th century, the Tokugawa Shogunate, a feudal structure, had given Japan more than two centuries of political and governmental stability. At the same time, however, great scientific, social, economic, and political developments in Europe and North America

1. They are Itagaku Seisiro (the Minister of Army), Kimura Heitaro (the Vice Minister of Army), Doihara Kenji (the Commandant of the Military Academ), Muto Akira (the Lieutenant General), Matsui Iwane (the Commander of the Expeditionary Forces sent to China), Hirota Koki (the Prime Minister), Tozjo Hideki (the Prime Minister), Umedsu Yoshijiro (the chief commander of the Japanese army), Koizo Kuniaki (the Prime Minister), Hiranuma Kiichiro (the Prime Minister), Shiratori Toshio (the Advisor to the Foreign Minister), Togo Shigenori (the Minister of Foreign Minister), Nagano Osami (the Fleet Admiral and General Staff in the Imperial Japanese Navy), Matsuoka Yosuke (the Minister of Foreign Minister).

resulted in the emergence of modern state-nations in these areas.

In 1853, Commodore Matthew Calbraith Perry of the United States appeared in Japanese waters² and demanded that Japan ends its policy of seclusion.³ The ease with which American ships intimidated the government exposed the weakness of the Tokugawa regime and emboldened regional clans, largely from western Japan, who decided to depose the Tokugawa regime. After a series of civil wars, Tokugawa Yoshinobu, the last Shogun, returned power to the emperor in 1867. From then on, major reforms, called the Meiji Restoration, were carried out in Japan.

The purpose of the Meiji Restoration was to build a modern state, which was summarized in the phrase “*Fukoku Kyohei*” (Prosperous Country and Strong Army). During the decades of the Meiji Restoration, Japan adopted many western structures and systems in political, economic and legal sides to replace the feudal society.

Japan’s first constitution, the Meiji Constitution, was revealed to the country and the world in 1889. Learning from the western systems, the Meiji Constitution adopted a governmental system with the Diet,⁴ the Cabinet, and the Judiciary⁵ under the emperor sovereign.⁶ This constitutional monarch was not based on the consent of the people by virtue of some kind of social contract, but based on “a line of emperors unbroken for ages eternal” (Article 1 of the Meiji Constitution).⁷

The guarantees of human rights, such as the right of property, the freedom of speech, and so on, were stipulated in Chapter 2. Under the title of “Rights and Duties of Subjects,” however, people’s human rights were regarded as gifts from the emperor. Moreover, human rights were

2. Before this “Black Ship Incident,” other foreign ships had appeared in Japanese waters. For example, Russian ships exploring the coast of Hokkaido demanded that the government enter into negotiation in the 1790s; British ships arrived in Nagasaki Bay and demanded that the Japanese discuss the opening of its ports. See GOMI HUMIHIKO, OMI TAKANO, TAKANO TOSHIHIKO & TORIUMI YASUSHI EDS., *SHOSETSU: THE STUDY OF JAPAN’S HISTORY* 228-291 (Yamakawa, Tokyo, 1998).

3. Under the policy of seclusion in the Tokugawa period, only trade with China, Holland, Korea and Ryukyu were permitted in some special cities.

4. The Diet was divided into two houses. The upper house was called the House of Peers, which was made up mainly of the hereditary nobility. The lower house was called the House of Representatives, members of this house were chosen only by adult males.

5. The Judiciary was part of the Ministry of Justice, which controlled court budgets and the selection, promotion, transfer, and dismissal of judges. Moreover, the judiciary was limited to hear private lawsuits. Administrative cases were assigned to separate courts that were, in fact, quasi-judicial administrative agencies staffed by retired government officials. See Percy R. Jr. Luney, *The Judiciary: Its Organization and Status in the Parliamentary System*, 53 *LAW AND CONTEMPORARY PROBLEMS* 137-138 (1990).

6. Article 4 of the Meiji Constitution: The Emperor is the head of the Empire, combining in Himself the rights of sovereignty, and exercises them, according to the provisions of the present Constitution.

7. IAN NEARY, *THE STATE AND POLITICS IN JAPAN* 17 (Blackwell, Malden, MA, 2002).

guaranteed only within the limits of law.⁸ Under the national policy of “prosperous country and strong army,” the demands of democracy were neglected by the Meiji government.⁹ Human rights were easily violated by the government. The Meiji Constitution could not be regarded as a democratic constitution.

B. *Religions and the State under the Meiji Constitution*

In Japan, most people believe in a “conglomerate religion,” particular Shinto and Buddhist. Some people believe in Christianity and other religions. Unlike the Tokugawa Shogunate which prohibited Christianity, freedom to all religions was guaranteed as a subject’s right in the Meiji Constitution.¹⁰

As the largest and an indigenous religion,¹¹ Shinto has a close connection to the Imperial House and a special status in Japan.¹² The Meiji Constitution was especially intended to create a governing system that unified the people and held them together under the Emperor. Because the Meiji leaders believed that Shinto is a useful tool for these purposes, it was made the official religion of Japan and its combination with Buddhism was outlawed. The Emperor was not only the head of state but also the highest priest of Shinto. Thus, it is not surprising that many ceremonies involving the Emperor were according to Shintoism.

As time went on, Shinto was increasingly used in the advertising of nationalists’ popular sentiments. In 1890, the “Imperial Rescript on Education” was passed, and students were required to ritually recite its

8. TONAMI KOZI, *THE CONSTITUTION 22* (Gyosei, Tokyo, new edition, 1998).

9. Before the Second World War, the movement of democratization reached its apex in the period from 1918 to 1932, which is known as the “Taisho Democracy.” (Emperor Taisho succeeded his father, Meiji, in 1912). During this period, cabinets were dominated by the political parties that controlled the Diet (FRANCES ROSSEN & MICHAEL F. THIES, *Politics in Japan, in COMPARATIVE POLITICS TODAY: A WORLD VIEW* 321 (Gabriel A. Almond, Powell G. Bingham, Jr., Strom Kaare & Russell J. Dalton ed., Pearson Longman, New York, 8th ed., 2004)). In 1925, the suffrage was expanded to include all adult males. Since the Second Sino-Japanese war in the 1930s, however, the military took over the government and suppressed all opposition. Democracy itself was viewed with skepticism.

10. Article 28 of the Meiji Constitution: “Japanese subjects shall, within limits not prejudicial to peace and order, and not antagonistic to their duties as subjects, enjoy freedom of religious belief.”

11. Shintoism originated in prehistoric times, as a religion with respect for nature and in particular certain sacred sites. Shinto as an indigenous religion has no holy book, no founder, and no canon. Two historic books in ancient Japan, the *Kojiki* (the Records of Ancient Matters) and the *Nihonshogi* (the Chronicles of Japan), however, contain a record of Japanese mythology.

12. According to the Shinto legend, Japan was founded by the Kami Izanagi-no Mikoto and Izanami-no-Mikoto, who formed the land and created many Kami (gods). They made the goddess of the sun, Amaterasu-Omikami, the first ruler of Japan, and she nourished and nurtured its people. One of her descendants, Jimmu, became the first emperor. The emperors, thus, relied on the religious authority of Shinto to justify their political power, and thus they came to play a significant role in promoting Shinto.

oath to “offer yourselves courageously to the State” as well as protect the Imperial family. Shinto was not merely a religion, and it became a symbol of patriotism and nationalism. For example, respecting the Ise Shrine, the tombs of the emperors, or Shinto shrines dedicated to souls of ancestors of the emperor was regarded as the people’s duty.¹³

Particularly in wartime, the Japanese government controlled other religions more strictly.¹⁴ State Shinto was elevated to the position of the only religion, which provided a spiritual basis for Japanese ultra-nationalism. Under the revised Public Security Preservation Law of 1941, the state could and did destroy any religious group for preaching beliefs that simply varied from emperor worship.¹⁵

C. *The Special State of the Yasukuni Shrine*

In Japan, there are hundreds of thousands of shrines, but there is no other shrine, which has caused so many debates as the Yasukuni has. The Yasukuni Shrine was originally constructed in June 1869 by order of the Emperor Meiji to commemorate the victims of the Boshin War.¹⁶ It was at that time one of several dozen such shrines built throughout Japan. Originally named “*Tokyo Shokonsha*,” the shrine was renamed Yasukuni Jinja (Shrine) in 1879. From then on, its status was raised. The Yasukuni Shrine was under the control of the Ministries of Army and Navy, which was different from other shrines under the control of the Ministry of Home Affairs. The Yasukuni was regarded as a special shrine for honoring those who died in wars. It was created to be a symbol of nationalism and militarism.¹⁷

According to the Yasukuni rules, those enshrined at the shrine are limited to those who died while serving Japan. They are not only Japanese soldiers, some civilians who were employed by the military, for example

13. In a case that the students at Sophia University refused to worship at the Yasukuni, the Minister of Education argued that it is not a religious but an educational activity for students’ worship at shrines. See NONAKA TOSHIHIKO, NAKAMURA MUTSUO, TAKAHASHI KAZUYUKI & TAKAMI KATSUTOSHI, *JAPAN CONSTITUTIONAL LAW* 1 293 (Yuhikaku, Tokyo, 3d ed., 2001).

14. The Religious Organization Law, which required all religions to register in order to be recognized, was passed in 1941. However, only those religions that supported the teaching of the emperor’s divinity were recognized.

15. Sumitomo Tokihisa, *Religious Freedom Problem in Japan: Background and Current Prospects*, 5 *THE INTERNATIONAL JOURNAL OF PEACE STUDY* 2 (2000), available at <http://www.gmu.edu/academic/ijps/vol-5/sumitomo.htm>.

16. It was a civil war, fought from 1868 to 1869 between forces of the ruling Tokugawa Shogunate and those seeking to return political power to the imperial court.

17. For example, a paper published in the wartime advocated: “Death in war is undoubtedly a tragic thing. But, for ordinary Japanese, more than going to war and being sent to war, death in war is giving one’s life to the nation, so it is not just any death. It is the peak of shining honor. It is a boy’s ultimate dream.” See YOKOYAMA NATSUKI, *THE SHINING YASUKUNI TALES* 226 (Taihei Shobo, Tokyo, 1994).

nurses, may also be enshrined at this shrine. Nowadays, there are about 2.5 million “*Eirei*” (spirits of heroes), including some 28,000 Taiwanese, who are enshrined at the shrine.¹⁸

The list of numbers enshrined at the Yasukuni from each war is as follows:¹⁹

Wars	Number	Wars	Number
Boshin War and Meiji Restoration	7,751	World War I	4,850
Southwest War ²⁰	6,971	Jinan Incident ²¹	185
First Sino-Japanese War	13,619	Manchuria Incident	17,176
Second Sino-Japanese War	191,250	World War II	2,133,915
Boxer Rebellion ²²	1,256	Taiwan Expedition	1,130
Russo-Japanese War	88,429	Total	2,466,532

III. THE SEPARATION OF RELIGION AND STATE IN THE POSTWAR CONSTITUTION

After the Second World War, the freedom of religion has been guaranteed as a basic and inviolable human right in the postwar Constitution. Unlike the Meiji Constitution, the separation of religion and state is stipulated in the postwar Constitution.

A. *The Birth of the Postwar Constitution*

When the Emperor of Japan announced that Japan accepted the Potsdam Declaration calling for “unconditional surrender” on August 15, 1945 in a radio broadcast, the Second World War ended in Japan’s failure. For most Japanese people, it was the first time that they heard the

18. This fact has caused not only the diplomatic disputes between Taiwan and Japan but also public concerns in Taiwan. In Taiwan, public opinions about Yasukuni Shrine are divided. Some Taiwanese went to Tokyo to protest against Japan’s official visit and the enshrinement of their relatives who died while serving in the Imperial Japanese Army during the Second World War. Some people even sued for this issue in Japan. However, many other Taiwanese people and politicians have visited and worshiped at the Yasukuni.

19. See Yasukuni Homepage: <http://www.yasukuni.or.jp>.

20. It was a revolt of the Satsuma clan samurai against the Imperial Japanese Army in 1877.

21. It was an armed conflict between the Japanese Army allied with Northern Chinese warlords against the Kuomintang’s southern army in Jinan, the capital of Shandong in 1928 during the Kuomintang’s Northern Expedition.

22. It was a Chinese rebellion from 1899 to 1901 against foreign influence in areas such as trade, politics, religion and technology that occurred in China during the final years of the Qing Dynasty. By August 1901, over 230 foreigners, tens of thousands of Chinese Christians, an unknown number of rebels, their sympathizers and others had been killed in the ensuing chaos. The uprising crumbled on August 14, 1900 when 20,000 foreign troops entered Beijing, the Chinese capital.

emperor's actual voice.²³

After the Second World War, Japan was occupied by an allied army, in reality, dominated by the U.S. force. Under the Occupation, a variety of reforms, for example the demobilization of the Japanese army and navy, the dismantling of *Zaibatsu* (financial combination), land reforms, had been carried out in order to dismantle the prewar Japanese political system. The objects of these reforms were demilitarization and democratization.

The culmination of these reforms was the promulgation in 1947 of a new Japanese constitution. The Meiji system of transcendent Imperial sovereignty was abolished and the principle of popular sovereignty was established, with the Emperor becoming merely a symbol of national unity.²⁴ By contrast with the "rights of subjects" in the Meiji Constitution, which were guaranteed only insofar as it was consistent with one's duties as a subject and were easily restricted by legislation, this new Constitution guaranteed a broad variety of individual rights to the citizenry as basic and inviolable. Moreover, the Constitution is now the supreme law of the land — amendable only by the will of the people — and the Supreme Court is the court of last resort in a newly independent judiciary, with the power to decide the constitutionality of all laws and government actions.²⁵ Therefore, some people view it as imposed by the United States,²⁶ but the postwar Constitution is regarded as an actual democratic constitution.

B. *Constitutional Mandates of Freedom of Religion and the Separation of Religion and State*

In the postwar Constitution, the freedom of religion is regarded as a fundamental human right and guaranteed in Article 19.²⁷ The contents of freedom of religion include three parts, freedom of belief, freedom of religious activities, and freedom of religious association.²⁸ Freedom of

23. Before the end of the Second World War, the Emperor was treated as the *Akitsumikami* (a living god). He always kept his subjects at a distance. With the promotion of the GHQ (the General Headquarters), however, Emperor Showa issued to the press a rescript that came to be known as his "Declaration of Humanity" after the War.

24. According to Article 1 of the postwar Constitution, "The Emperor shall be the symbol of the State and the unity of the people, deriving his position from the will of the people with whom resides sovereign power."

25. According to Article 81, "The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act."

26. See Aihara Ryoichi, *The Effect of the Current Constitution*, 16 THE STUDY OF PUBLIC LAW 25 (1957).

27. (1) Freedom of religion is guaranteed to all. No religious organization shall receive any privileges from the State, nor exercise any political authority. (2) No person shall be compelled to take part in any religious acts, celebration, rite or practice. (3) The State and its organs shall refrain from religious education or any other religious activity.

28. ASHIBE NOBUYUKI, THE CONSTITUTION 3, HUMAN RIGHTS IN DETAIL 122, 127

belief means that individuals have rights to believe in religion or not, and to change their faith. Freedom of religious activities means that everyone has rights to engage in religious ceremonies or not. Freedom of religious association means that everyone has rights to form a religious group and participate in the religious groups or not.²⁹

Although the Constitution provides for freedom of religion and the government generally respects this right in practice, there are a few restrictions on this freedom. These restrictions have also caused many disputes.³⁰ One of the most important issues is the “Aum Shinrikyo Incident”. Because of its 1995 sarin gas attack on the Tokyo subway system, the Aum Shinrikyo group lost its status and remained under government surveillance. In response to the “Aum Shinrikyo Incident,” moreover, a 1996 amendment to the Religious Corporation Law gives the authorities increased oversight of religious groups and requires greater disclosure of financial assets by religious corporations. This amendment, however, caused some debates and was viewed to violate the Constitution by some scholars.³¹

The Supreme Court,³² however, affirmed the lower courts’ determination granting the petition of the Governor of Tokyo to dissolve the religious organization Aum Shinrikyo.³³ The Diet enacted two additional laws in 1999 aimed at regulating the activities of Aum Shinrikyo.

On the other hand, it is necessary to separate religion and the state for actualizing freedom of religion.³⁴ In the United States, for example, the

(Yuhikaku, Tokyo, Supplement Edition, 2000); TONAMI, *supra* note 8, at 221; URABE NORIHO, THE CONSTITUTIONAL CLASSROOM 132-135 (Nihon Hyoronsha, Tokyo, 2d ed., 2006).

29. Although the Japanese Constitution prohibits any religious organization from exercising political authority, there is no limitation for religious organizations to engage in political activities. In 1993, for example, a coalition was formed which ended 38 years of continuous rule by the Liberal Democratic Party. This event brought the Komeito which was founded and heavily supported by a powerful religious group, Soka Gakkai. However, this event has raised many debates in Japan. See Robert Kisala, *Soka Gakkai, Komeito, and the Separation of Religion and State in Japan*, 18 *NANZAN BULLETIN* 7-17 (1994).

30. See 17 *Keishu* 4, at 302 (Supreme Court, Grand Bench, May 15, 1963); 768 *Hanji* at 3 (Kobe Summary Court, Feb. 20, 1975).

31. KOBAYASHI SETSU, RELIGIONS HAVE THE RIGHTS TO ENGAGE IN POLITICAL ACTIVITIES 102-163 (Shio Publishing Co., Tokyo, 1996).

32. 50 *Minshu* 1, at 199 (Supreme Court, First Petty Bench, Jan. 30, 1996). According to the Court, “even if a religious organization is dissolved as a result of a dissolution order, believers are not prevented from continuing a religious organization without juridical personality or from creating such an organization anew, nor are they prevented from conducting religious acts or from procuring new installations or equipment for the exercise of such acts; the Dissolution Order does not accompany any legal effect which prohibits or limits religious acts by the believers.”

33. Pursuant to Article 81 of the Religious Organization Law, a religious organization may be dissolved as a legal entity where a religious organization is found to have (1) acted illegally or clearly interfered with the public welfare or (2) acted in a manner, which clearly deviates from the purpose of religious entities.

34. Although the separation of religion and state is similar to the concept of freedom of

First Amendment of the Constitution contains two parts of the freedom of religion guarantee, i.e., the Free Exercise Clause, which protects people's right to practice their religion, and the Anti-Establishment Clause, which bans the establishment of an official state-sanctioned religion and erects a wall of separation between church and state. These ideas were introduced by America and stipulated not only in Article 19 but also in Article 89³⁵ of the Japanese Constitution.

Like in the United States, therefore, religions and the state are completely separated in Japan. Particular according to the Constitution, no religious organization shall receive any privileges from the State, nor exercise any political authority (Paragraph 1, Article 20); the state and its organs shall refrain from religious education or any other religious activity (Paragraph 3, Article 20); no public money or other property shall be expended or appropriated for the use, benefit or maintenance of any religious institution or association (Article 89). These can be regarded as the essential parts of the separation of religion and state. However, the separation of religion and state is regarded to be only an institutional and indirect guarantee in Japan. This Institutional Guarantee Theory holds that the legislative branch should not violate the essential part but could change the border part of the principle of separation of religion and state. According to this theory, therefore, the government would be lenient with the separation of religion and state.³⁶ In the Tsu Ground Jinsai case, the Supreme Court held a leniency test to decide the relation between Shinto and the State.

C. *The Purpose-Effect Test*

The Ground Jinsai is a Shinto religious ceremony. When Tsu City constructed a new city gymnasium in 1971, the City spent public money to hire a Shinto priest to perform this Shinto ceremony. It was, therefore, sued for violation of Articles 20 and 89 of the Japanese Constitution.

In the district court's decision,³⁷ although the Ground Jinsai was regarded as a Shinto religious ceremony, there was no religious purpose and it was merely a secular activity. Therefore, there was no constitutional bar to the City's paying for the ceremony. On appeal, however, the high

religion, the two concepts are not the same. For example, the citizens in the United Kingdom with a state church have complete freedom of religion. And citizens in the Soviet Union without a state church could not enjoy the freedom to practice their religion.

35. 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.

36. NONAKA, *supra* note 13, at 299-300.

37. 18 Gyosyu 3, at 246 (Tsu District Court, Mar. 16, 1967).

court³⁸ found that the Ground Jinsai was not a secular activity and the payment by the city was in violation of the Constitution's prohibition against state support of religion.

In the Supreme Court's decision,³⁹ the "Purpose-Effect test" was adopted to determine the relationship between religion and state. For purpose, the Court looked to whether the activity has religious purposes. For effect, the Court looked to whether the effect of an activity was to either favor or inhibit religion as such. From these perspectives, even though the Ground Jinsai was conducted in accordance with religious practice, it would be regarded as a secularized ritual without religious meanings.

The Japanese Court's Purpose-Effect test was derived from the "Lemon test" which was adopted by the United States Supreme Court in the Lemon case,⁴⁰ but the Court did not adopt all of the prongs of the three pronged Lemon test, neither did the Court apply the Lemon test the way it would have been applied by the United States Supreme Court. This Japanized test, therefore, was criticized as a lenient test. Some scholars held that Japanese courts should at least construe the standard as strictly as the American standard.⁴¹

This Purpose-Effect test was often quoted by Japanese courts in some aftermath cases. For example in a case involving the enshrinement of a Self-Defense Force Member at Gokoku Shrine without consulting his wife,⁴² the Supreme Court used this test to uphold its constitutionality. In the Minoo City Memorial Service case,⁴³ the Court also used this test to declare constitutional the City Memorial Service. Recently, in the cases concerning the Suki Saiden Nuki no Gi⁴⁴ and Daijosai⁴⁵ which are the Shinto ceremonies, the Court adopted this test and upheld their constitutionality, too.

According to the Supreme Court's decisions, the Japanese Constitution guarantees unconditional religious freedom and, in order to secure this guarantee, provides for several provisions concerning the

38. 22 Gyosyu 5, at 680 (Nagoya High Court, May 14, 1971).

39. 31 Minshu 4, at 533 (Supreme Court, Grand Bench, Jul. 13, 1977). According to the Supreme Court, "religious activities should not be taken to mean all activities of the State and its organs which bring them into contact with religion, but only those which bring about contact exceeding the aforesaid reasonable limits and which have a religiously significant purpose, or the effect of which is to promote, subsidize, or, conversely, interfere with or oppose religion."

40. The three criteria of the Lemon test are: (1) they must serve a secular legislative purpose; (2) they must have a principal or primary effect...., that neither advances nor inhibits religion; (3) they must not foster an excessive government entanglement with religion (Lemon v. Kurtzman, 403 U.S. 602 (1971)).

41. ASHIBE, *supra* note 28, at 181-182.

42. 42 Minshu 5, at 277 (Supreme Court, Grand Bench, Jun. 1, 1988).

43. 47 Minshu 3, at 16877 (Supreme Court, Grand Bench, Feb. 16, 1993).

44. 1799 Hanji, at 101 (Supreme Court, Third Petty Court, Jul. 9, 2002).

45. 59 Minshu 6, at 1204 (Supreme Court, First Petty Bench, Jul. 11, 2002).

separation of religion and state, but the principle of separation of religion and state does not prohibit the state from having any relationship with religions. The principle should rather be construed to include only those activities whose relationship goes beyond proper limits; those activities which purpose has religious significance and which effect results in supporting, promoting, oppressing, interfering, or otherwise hindering religions.

In some other cases, however, Japanese courts construed the Purpose-Effect test more strictly and thus made unconstitutional decisions. For example in the district court's decision in the Mino City Memorial Service case,⁴⁶ the court adopted this test but held unconstitutional the City Memorial Service. In the Ehime Prefecture case, moreover, the Supreme Court used this test to hold that public money paid by officials of the prefecture to the Gokoku Shrine and the Yasukuni Shrine are unconstitutional. This decision has become a landmark in determining the relation between the Yasukuni Shrine and the state in Japan.

IV. THE YASUKUNI LAWSUITS

The Yasukuni issue has not only caused many diplomatic rows between Japan and its neighbors, it also has become a domestic debate in Japan. Particular official contacts with the Yasukuni Shrine are often regarded as violating the principle of separation of religion and state which is stipulated in the Japanese Constitution. Many lawsuits thus have been raised.

A. *Official Contacts with the Yasukuni Shrine*

After the Second World War, as noted above, the separation of religion and state has been stipulated in the current Constitution. State Shinto was abolished and the Yasukuni Shrine has become a religious site. Including offering public money, official visits, official contacts with the Yasukuni and other Shinto shrines may be inhibited. As the largest and the native religion, however, Shinto still plays a central role in everyday Japanese life. It has proven difficult to maintain a total separation between Shinto and state. For example, there are many Shinto shrines that have historical value. According to Shinto belief, moreover, the principal worship is conducted at shrines, and Kami (gods) are enshrined in shrines. To worship at the Shinto shrines has become an important part of daily

46. 1036 Hanji, at 20 (Osaka District Court, Mar. 24, 1982).

life for many Japanese.⁴⁷ Therefore, even the central or local government has used public money to support the maintenance of those shrines. Official contacts with the Shinto shrines are sometimes regarded as secular but not religious activities.⁴⁸

On the other hand, following the abolition of state Shinto, the Yasukuni Shrine has become a religious site which is independent from the Japanese government and is not different from other religious institutions. Those war dead are still enshrined at the Yasukuni. The bills for making the Yasukuni a governmental institution had been introduced to the Diet many times, but all these bills failed to be passed. However, even if the Yasukuni becomes a government institution for mourning the dead, its religious nature should not exist.

The controversy about the Yasukuni has been reignited since 1975, when Prime Minister Miki Takeo visited the shrine on August 15, the day that Japan commemorates as the end of the Second World War.⁴⁹ In 1978, it was decided that several Class A war criminals were to be enshrined at the Yasukuni.⁵⁰ This fact has caused more serious diplomatic rows between Japan and its neighbors.

Based on the Purpose-Effect test, moreover, the Council on the issue of Yasukuni Shrine worship by cabinet ministers, a private advisory council of the Chief Cabinet Secretary, upheld constitutional official visits to the Yasukuni. Unlike his predecessors who visited privately or quietly in order to bypass this constitutional principle, Prime Minister Nakasone Yasuhiro made an official visit on the symbolic date of August 15.⁵¹

47. In modern Japan, people are not consciously Shinto, but many Shinto customs are still practiced, including visiting a shrine on special days, taking part in local shrine festivals, praying to the Shinto gods for success in examinations. Many Japanese weddings are Shinto.

48. The relationship between Shinto and the state is hard to completely separate, and could also be found in the close connection between Shinto and the Imperial house. Particularly since the death of Emperor Showa in 1989, the Japanese government was forced to confront this problem. Although the government decided to hold an official state funeral service soon after the private funeral service for the Imperial house at the same place with the same guests in order to uphold the separation of religion and state, this decision was criticized for the failure to separate the services sufficiently. The government faced the same issue with respect to the enthronement ceremony. The government was also criticized for holding an enthronement ceremony with religious implication. See YOKOTA KOICHI, *THE CONSTITUTIONAL AND THE EMPEROR SYSTEM* 185-193 (Iwanami Shoten, Tokyo, 1990).

49. See *Asahi Shimbun*, Aug. 16, 1985.

50. Some Japanese even view the Tokyo Trial as the "Victor's Justice". They think that those Class A war criminals should not be punished. See TAKAHASHI TETSUYA, *THE YASUKUNI ISSUE*, 67 (Chikuma Shobo, Tokyo, 2005).

51. Nakasone argued that: "In the United States, they have the Arlington Cemetery. If you go to the Soviet Union and other foreign countries they have Tombs of the Unknown Warriors. They have places where people can express their thanks to those who have fallen in battle. Otherwise, who is going to give their lives for the country?" (LDP Seminar in Karuizawa on Jul. 27, 1985). However, Prime Minister Nakasone, took China's protests seriously. He not only made efforts to quell China's anger but also changed his policy toward this shrine later. See Daiki Shibuichi, *The Yasukuni Shrine Dispute and the Political Identity in Japan*, 45(2) *ASIAN SURVEY* 206-207 (2005).

Nakasone's visit caused many debates both in Japan and abroad. For Japan's neighboring countries, it was regarded as an attempt to legitimize Japan's past militarism. For many Japanese people, it was regarded as an action violating the constitutional mandate of separation of religion and state.

Although political visits to the Yasukuni Shrine have caused so many debates, many Japanese politicians, particularly the conservatives, continue to visit the Yasukuni to express their gratitude and respect to the war dead, and because they know it can help them obtain the votes of the bereaved, which amounts to hundreds of thousands. The *Izokukai* (the Bereaved Association) has been politically active in demanding the official worship of the Prime Minister and the Emperor. During the Liberal Democratic Party leadership contest in 2001, for example, Koizumi Junichiro used the promise to worship at the Shrine, especially on the symbolic date of August 15, to obtain their support.

In order to realize his promise, Prime Minister Koizumi visited the Shrine repeatedly after he took office. It has not only caused strong protests from its Asian neighbors, but many lawsuits against his visit to the Yasukuni had also been raised.

B. *The Ehime Prefecture Case*

Under the principle of separation of religion and state, all religious institutions should be completely separate from the state. As noted above, however, the relationship between Shinto and the Japanese government and people are very close. Although the Yasukuni Shrine enshrines those dead in modern Japanese wars, many Japanese perceive it as a heartwarming symbol of sacrifice and patriotism. Official contacts with this shrine were often held. The relationship between the Yasukuni and the state has become an arguable issue. In a landmark case, the Ehime Prefecture case, the Supreme Court made an important decision to resolve the problem.

In this Ehime Prefecture case, residents of the Prefecture sued to recover public money paid by officials of the Prefecture to the Gokoku Shrine and the Yasukuni Shrine. Both shrines held spring and autumn ceremonies for the enshrined war dead, and the ceremonies were regarded as religious. The residents insisted that the donation to the Shinto shrine violated the Constitution. The residents' claims were held by the district court.⁵² The high court, however, held that the ceremonies at these shrines were secular and thus overturned the district court's decision.⁵³

52. 1305 Hanji, at 26 (Matsuyama District Court, Mar. 17, 1989).

53. 1419 Hanji, at 38 (Takamatsu High Court, May 12, 1992).

The Supreme Court concurred that Paragraph 3, Article 20 and Article 89 did not prevent all relationships between religion and state considered appropriate in the context of sociological and cultural norms, but rather prohibited governmental actions which have both a religious purpose and the effect of aiding or promoting or, conversely, interfering or oppressing religious activity. As a result, these activities were viewed to support a special religion by the common man; the relationship between the local government and shrines exceeded what the Court found to be reasonable social and cultural Japanese norms.⁵⁴

In the Ehime Prefecture case, the Supreme Court adopted the Purpose-Test strictly and declared the illegality of the expenditure. After the Court's decision, Japan's government refrained from offering public money to the Yasukuni. However, the Court did not explicitly or implicitly overturn the Tsu City Ground Jinsai case but distinguished it from the case at hand. Commentators remained puzzled over whether these two cases were consistent with each other and how the Court would decide future cases.⁵⁵

C. *Lawsuits on Political Visits to the Yasukuni*

Public officials' or politicians' visits to the Yasukuni have caused so many debates because of their special position, but the political visits have never stopped in Japan. Since Prime Minister Nakasone's visits, many lawsuits against political visits have been raised.

Prior to the lawsuits against prime ministers' visits to the Yasukuni, on the other hand, the Iwate Prefecture Assembly had passed a resolution which requests for official visits to the Yasukuni by prime ministers. Residents, thus, sued against this resolution. In the district court's decision,⁵⁶ as private citizens, even prime ministers have freedom of thought, conscience and religion, their visits to the Yasukuni are not regarded as unconstitutional. The high court, however, upheld that official

54. 51 Minshu 4, at 1673 (Supreme Court, Grand Bench, Apr. 2, 1997). According to the Supreme Court: "(1) Because the purpose of the offerings had religious significance and the effect of the offerings led to support or promotion of a specific religion, and the relationship between the local government and Yasukuni Shrine or other shrines caused by these offerings exceeded the reasonable limit under the social and cultural conditions of Japan; (2) It is clear that Yasukuni Shrine and Gokoku Shrine are religious organizations as stipulated by Article 89 of the Constitution, and, as mentioned above, it is assumed that these offerings of tamagushiryo to Yasukuni Shrine and Gokoku Shrine resulted in a special relationship between the local government and these shrines that exceeded reasonable limits under the social and cultural conditions of Japan."

55. Matsui Shigenori, *The Significance of the Grand Bench Decision in the Ehime Prefecture Case*, 203 THE LAW CLASSROOM 18 (2003); Nosaka Yasui, *The Significance and Problems in the Grand Bench Decision in the Ehime Prefecture Case*, 1114 JURISTO 29 (1997).

56. 38 Gyousaisyu 2 and 3, at 166 (Morioka District Court, Mar. 5, 1987).

visits to the Yasukuni violate the constitutional mandate of separation of religion and state.⁵⁷

The lawsuits against Nakasone's visit to the Yasukuni were raised for damage. The plaintiffs insisted that the visit violates freedom of religion, rights of religious personality and religious privacy. In the Osaka and Fukuoka district courts' decisions,⁵⁸ for example, it was not regarded as violating any concrete right. The plaintiffs' claim for damage was rejected. The district courts did not make any constitutional judgment on this case.

In the high courts' decisions, the appeals were also dismissed. However, the Fukuoka High Court suggested that official visits would violate the Constitution in the obiter dictum.⁵⁹ The Osaka High Court held that there was much doubt about the constitutionality of official visits in this event.⁶⁰

After the Nakasone visits, few prime ministers visited the Yasukuni. Prime Minister Miyazawa Kiichi's visit in 1992 was kept secret until the newspaper revealed it in 1996;⁶¹ Prime Minister Hashimoto Ryutaro only paid a short visit in 1996. Prime Minister Koizumi, however, visited the Shrine repeatedly, including on August 15, after he took office.⁶² Lawsuits against his visits were raised in Tokyo, Osaka, Chiba, Takamatsu, Fukuoka, and Naha.

The plaintiffs sued the state for damages, but their claims were rejected in all the court's decisions. Except on the decisions of the Fukuoka District Court and the Osaka High Court, there was no constitutional judgment on these judicial decisions. The Fukuoka District Court construed the Purpose-Effect test strictly and declared unconstitutional this Prime Minister's visit.⁶³ The Osaka High Court also adopted the Purpose-Effect test and held that it was an official visit and thus unconstitutional.⁶⁴

On this Yasukuni issue, Japanese courts are divided. With a tradition of judicial restraint which means courts should defer to the decisions of

57. 42 Gyousaisyu 1, at 1 (Sendai High Court, Jan. 10, 1991).

58. 1336 Hanji, at 45 (Osaka District Court, Nov. 9, 1989); 1336 Hanji 81 (Fukuoka District Court, Dec. 14, 1989).

59. 1426 Hanji, at 85 (Fukuoka High Court, Feb. 28, 1992).

60. 1434 Hanji, at 38 (Osaka High Court, Jul. 30, 1992). This case was raised.

61. Yomiuri Shimbun, Jul. 29, 1996 (evening edition).

62. Koizumi said: "I worshipped with many thoughts in minds: the thought that the Japan of today is built upon the precious sacrifice of the people who lived in a time of war and unwillingly had to give up their lives, with gratitude for peace, and the hopes that from now on Japan will prosper in peace." See Asahi shinbun, Jan. 1, 2004.

63. Available at <http://homepage3.nifty.com/p-and-r/yasukunihaketu.htm> (Fukuoka District Court, Apr. 7, 2004).

64. Available at <http://www.hiraoka.rose.ne.jp/C/k050930osa.htm> (Osaka High Court, Sep. 30, 2005). Including 116 Taiwanese, there were 188 plaintiffs in this case.

the executive and legislative branches and not impose their own views of what is desirable government policy on the public, however, Japan's courts often did not decide a constitutional issue until it is absolutely necessary.⁶⁵ Most courts, thus, refrain from making any constitutional decisions on this issue.

In fact, Japanese courts often avoided making constitutional judgments but decided conflicts firstly. For example in the Eniwa case which was concerned in the constitutionality of the Self-Defense Force⁶⁶ and the Textbook Review case,⁶⁷ courts adopted this mode to avoid making any constitutional decisions.⁶⁸

However, the Yasukuni is a religious site without doubt. Any official contact may be held to violate the principle of separation of religion and state. Based on this important constitutional mandate, official support and political visits should be restricted, and it is the court's obligation to decide the constitutionality on this issue.

V. CONCLUSION

History shows that religion and state make a dangerous mix. The mistakes were clearly shown during the wartime in Japan. Based on bitter experience, the postwar Constitution strictly separates religion and state. However, the participation of the state and local governments in certain religious activities, which are categorized as social rituals or secular ceremonies, is hard to avoid and may be allowed. Official contacts with religions, thus, must be limited in certain cases which are regarded as secular but not religious activities by most people.⁶⁹

65. The mode of avoiding constitutional decisions was derived from the U.S. Court's decision, *Ashwander v. Tennessee Valley Authority* (297 U.S. 288 (1936)). It is also called the Ashwander rule: (1) The Court will not determine the constitutionality of legislation in non-adversarial proceedings. (2) The Court will not anticipate a question of constitutional law. (3) The Court will not formulate a rule of constitutional law, which is broader than needed. (4) The Court will not rule on constitutionality where there is another ground for deciding the case. (5) The Court will not determine a statute's constitutionality unless a party has been injured by it. (6) The Court will not invalidate a statute at the request of parties who have taken advantage of its benefits. (7) The Court will always consider whether any reasonable interpretation of a statute allows it to avoid the constitutional issues.

66. 9 *Gekeisyu* 3, at 359 (Sapporo District Court, Mar. 29, 1967).

67. 26 *Gyosyu* 12, at 1446 (Tokyo High Court, Dec. 20, 1975).

68. Whether courts could avoid making constitutional decisions had cause some debates in Japan. Some scholars agreed with this mode, but some other held that should make constitutional decisions if the constitutional issues were raised. See Miyazawa Toshiyosi, *About the Eniwa case*, 370 *JURISUTO* 26 (1967); Arikura Ryokichi, *The Eniwa case*, 135 *LAW SEMINAR* 14 (1967).

69. The ruling party, LDP, intends to amend the Constitution and permit state and local governments to engage in the religious ceremonies, which are considered to be social rituals and secular activities (Article 20 Paragraph 3, the draft of the Constitution). This amendment is based on the Tsu Ground Jinsai but overturned the Ehime Prefecture case. It has also caused some controversies in Japan.

The Yasukuni Shrine, with its Shinto character, is broadly regarded as a religious site. Only few Japanese consider its activities are secular rather than religious. Until today, however, official support and political visits to this shrine have never stopped. Many debates have been caused and many lawsuits have been raised. Some courts have upheld the unconstitutional nature of these activities. Particularly in the Supreme Court decision in the Ehime case, which is considered a landmark case, the Court demanded the government or politicians should refrain from religious activities. In the background of the constitutional debate, thus, if the government offers money to the Yasukuni, it would violate Article 89; if government officials visit the Yasukuni, it would violate Article 20.⁷⁰

70. Because of their special position, those top leaders should refrain from visiting the Yasukuni even in private while in office.

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