

# Individual Religious Freedom under the Constitution of Japan

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## ABSTRACT

The Constitution of Japan guarantees religious freedom in Article 20 and Article 89. This paper outlines how this guarantee has been interpreted and applied by Japan's courts in regard to individual religious liberty. An overview of the significance of freedom of religion is given as well as its application as a matter of constitutional law and the requisite definition. This is followed by a discussion of what attributes the liberty includes and how it has been limited or defined by the courts. The religious right of personhood, a developing area of the law, is also addressed, and prominent legal theories for its acceptance are presented.

## Introduction

Out of the bitter experience of the Constitution of the Empire of Japan [Meiji Constitution] and a profound remorse, specific provisions to guarantee religious freedom were laid down in the Constitution of Japan, which was promulgated in November 1946 and took effect in May 1947. This guarantee encompasses two areas, the freedom of religion as it applies to individuals and the principle of separation of the state [government] and religion. The guarantee for the former is declared and stipulated in first half of Article 20 Paragraph 1, which specifies unequivocally: "Freedom of religion is guaranteed to all."<sup>i</sup> Article 20 Paragraph 2 then continues: "No person shall be compelled to take part in any religious act, celebration, rite or practice."<sup>ii</sup> The latter half of Paragraph 1 and Paragraph 3 of Article 20 as well as Article 89 prohibit any connection between government and religion, striving for the principle of separating religion and government with which to consequently construct an adequate guarantee for the freedom of religion.<sup>iii</sup> In this paper, I will focus on the former guarantee as it has been interpreted and applied.

## I Significance of Religious Freedom

The establishment of freedom of religion in the United States and countries of Europe was a milestone on the road toward man's spiritual freedom. In medieval Europe, it was typical that only one particular religion was tolerated by the state. Belief in other religions was not condoned. Violators were often severely punished. Under this kind of persecution, believers in what were then referred to as "heretical" religions fought to practice their faith. Establishment of principles guaranteeing freedom of religion was an awareness of man's spiritual freedom. Thus, many modern constitutions came to guarantee religious freedom. However, the constitutional approaches to that guarantee are not uniform, but differ depending on each nation's history.<sup>iv</sup>

In Japan, freedom of religion was guaranteed by Article 28 of the Meiji Constitution. However, this guarantee was limited, permitting Japanese subjects to enjoy the freedom of religious belief merely "...within limits not prejudicial to peace and order, and not antagonistic to their duties as subjects..."<sup>v</sup> Also, compared to other basic rights, no legal reservations were stipulated for the freedom of religion. It was, therefore, nothing more than a substandard right that could be

circumscribed by edict. Moreover, although it was presumed that “State Shinto was not a religion,” it did occupy, for all practical purposes, such a status. Citizens were obligated to revere and worship at shrines. In sum, the scope of religious freedom was only that permitted within a range compatible to State Shinto.

With the opportunity presented by Japan's defeat in World War II, what drastically changed this situation was the Shinto Proclamation of December 15, 1945 promulgated by the Headquarters of the Allied Powers. That proclamation required the thorough separation of state and religion, ending the role of State Shinto as an ideology supporting the doctrine of divinity for the emperor system.<sup>viii</sup> The Constitution of Japan, which was enacted after the Shinto Proclamation, established the freedom of religious belief and the separation of religion and politics. As mentioned above, it declares the freedom of religious belief in Article 20 and the separation of church and state in the latter paragraphs of the same Article and in the finance clause of Article 89.<sup>ix</sup>

## II Constitutional Modes

The way in which freedom of religious belief is guaranteed in the constitution or basic law of countries varies, and may be broadly categorized into three types.

A) A system where the nation adopts a state religion, but permits broad religious tolerance of religions other than the state religion. This effectively results in guaranteeing religious freedom. Examples of this type of system include those adopted in the United Kingdom<sup>x</sup> and Spain<sup>xi</sup>.

B) A system where the church or other religious institution is a constitutionally recognized legal entity having almost equal status as the state.

The state and the church each deal independently with matters in their particular domains. Matters bordering both jurisdictions are handled based on concordats or political-religious treaties, which clearly separate the areas managed. Examples of this type of system include those of Germany<sup>xii</sup>, Italy<sup>xiii</sup>, et cetera.

C) A system where a thorough separation of religion and state is maintained, and a principle has been established that neither interferes with the other. Examples of this type of system include the constitutions of the United States<sup>xiv</sup>, France<sup>xv</sup> and Japan.

## III Concept of Religion

The “freedom of religion” stipulated in Article 20 Paragraph 1 means the freedom to believe in religion, but the Constitution of Japan does not define what religion is. Theological definitions of religion are wide and varied. However, such definitions are by their nature not always applicable to religion as a matter of constitutional law. The Nagoya High Court decision in the Tsu City Jichinsai [a ceremony to purify a building site] Case<sup>xvi</sup> provided a workable definition for this purpose: “Religion in the constitutional sense means a firm belief in the existence of a supernatural, superhuman essence (namely, an absolute being, the creator, a supreme being et cetera, particularly deities such as God, Allah, Buddha, souls, et cetera), and the feeling and act of reverent worship. Irrespective of whether it is a personal religion, a group religion, a coincidentally natural religion or a religion that a person is the first to advocate, it is proper to construe the concept [of religion] as comprising all of these.”<sup>xvii</sup> This definition broadly and comprehensively embraces religion. However, the object of man's faith is by nature infinite in its variety, so ultimately what man believes to be religion is religion. The

constitution attempts to guarantee the freedom of that belief. As such, an extensive and expansive definition, similar to the above is necessary for understanding religion in the constitutional sense.

#### IV Nature of the Freedom of Religion

Under the Constitution of Japan, the above mentioned articles pertaining to the freedom of religion consist of the following attributes:<sup>xviii</sup>

A) Freedom of religious belief. The meaning of the freedom of religious belief encompasses the definition given above, but also includes the freedom to believe in a particular religion, the freedom not to say anything regarding one's beliefs, and the freedom not to believe in religion.

B) Freedom of religious acts. The freedom of religious acts is the freedom to conduct religious rituals, such as worship services, prayer, festivals, rituals, events and other undertakings, and to participate in these. Additionally, it includes the freedom neither to conduct these acts nor to be forced to participate in them.

C) Freedom of religious assembly and association. The freedom of religious assembly and association means the freedom for people, who share the same belief, to assemble for the purpose of their religious activities, and to organize religious organizations such as churches or religious groups.

D) Freedom to propagate a religion. The freedom to propagate a religion is the freedom to publicize the religion one believes in and to recruit believers. It also includes the freedom to criticize other religions and to recommend converting to another religion.

#### V Limitations on Religious Freedom

As mentioned above, the freedom of religion is guaranteed, but when those religious acts take the form of external expression as opposed to an internal belief, they must yield to certain limitations in their relationship to civil law and order. On this point, the following are some of the cases that have been fought over the limits of the guarantee of freedom of religion.

A) Case of bodily injury resulting in death due to the recitation of Buddhist healing incantations<sup>xx</sup>

The defendant, a shaman, was asked by close relatives of a patient with mental disease to perform a recitation of Buddhist healing incantations<sup>xx</sup> using sticks of incense burnt on an altar to invoke divine aid for the patient.<sup>xxi</sup> The ritual also included burning incense being pressed against the victim's body, bodily beatings and other acts that led to the death of the victim. The shaman asserted that his actions were executed as part of a religious ceremony to purify and cure the person, and thus protected by the freedom of religion provision of the Constitution of Japan.

In regard to whether or not these actions were recognized as a religious activity protected by the Constitution, the Supreme Court said in its decision that even though the recitation of healing prayers to pray for the recovery of the victim was undertaken as a religious act, when such action leads to the death of the victim through the exercise of unlawful physical force causing injury or harm to another's life, body or health, it is an act that falls outside of the limits of the guarantee of freedom of religion in the Constitution of Japan Article 20 Paragraph 1. The Court held that when religious activities are expressed externally, they must be acceptable to common dictates of civil law and order.

The Supreme Court held that freedom of religion is subject to the “public welfare” clause in Articles 12<sup>xxii</sup> and 13<sup>xxiii</sup>, and thus is not absolute and unconditional. In this case, the shaman's actions overstepped these constitutional guarantees, and the court found that the Penal Code provision for injury resulting in death applied<sup>xxiv</sup>.

#### B) The Pastoral Activity Case<sup>xxv</sup>

In this case, a minister, knowing that two high school students were being pursued by the police on suspicion of unlawful entry in regard to a campus disturbance, allowed them accommodation at a church. He provided counseling and guidance to the two youths, urging them to reform their lives, in the pursuit of his pastoral activity, which was his service to the community out of consideration toward people's souls and which he regarded as being his religious duty toward God as a minister. The minister was charged under Article 103 of the Penal Code [Harboring a criminal].<sup>xxvi</sup> The issue was whether or not pastoral activity, i.e. the minister's acts, corresponds to such a crime or is a legitimate religious activity protected by the Constitution, and thus not a crime.

The Kobe Summary Court held: “Even in cases where the outward action of pastoral activity is subject to restrictions for the sake of the public welfare, there is a danger that such restrictions may result in effectively infringing upon the freedom of inner belief that is the essence of the act itself. Thus, such restrictions need to be given the utmost care in their consideration. Whether or not the specified pastoral activity was within a fair measure of the range appropriate for its purpose is to be decided by whether or not the action was undertaken out of consideration for an individual's soul, [a concept] which the believer had come to rely upon

fully. After first taking into account constitutional requirements, and whether or not the action conforms to the theoretical and customary conditions recognized as necessary in view of the nature of the act as well as whether or not the action itself was within a reasonable scope, the merit of the means or method should be judged specifically and comprehensively to this end through a comparative examination of various circumstances including the urgency of the act, the nature of alternative acts and the balancing of legal interests.”<sup>xxvii</sup>

In this case, even though the minister's actions, as a matter of form, violated the penal law, they were actions undertaken in consideration of the young boys' souls. The two high school students later repented their actions due to the minister's guidance and teachings. They also voluntarily presented themselves to the police. As any hindrance to the investigation was small, it was not possible to interpret the minister's religious activities as a clear deviation of the limitations on religious acts. The court held that “they were within a scope corresponding to their purpose...” and “on the whole, at no point did they contradict the principles of law and order, and as legitimate dutiable act, they do not constitute a crime.”<sup>xxviii</sup>

#### C) Cultural Tourism Tax Ordinance Case<sup>xxix</sup>

Nara Prefecture promulgated an ordinance instituting a cultural tourism tax to be imposed as an admission fee on people visiting or worshipping at Todai Temple and Horyu Temple. The purpose of this ordinance was to collect funds to be directed for expenditures related to maintaining tourist facilities in the prefecture. In response, Todai Temple argued that opening its temple to the public was an activity of religious propagation, and that worshipping by visitors to the temple was a religious act. Thus, the

imposition of a tax as an admission fee was an infringement of the freedom of religion of both the temple and the worshipers.

The court found that the overwhelming number of people who enter Todai Temple are tourists, and that there was no great disparity between the actual circumstances pertaining to temple visitors and ordinary cultural tourism. The court held that an admission fee is not payment for worship, but consideration for entering the grounds to enjoy a cultural asset, so it cannot be recognized that the objective of this ordinance specifically targets religion nor has the intention of restricting it. The ordinance was therefore held not to be unconstitutional.

#### D) The Christian Sunday Lawsuit<sup>xxx</sup>

In this case an elementary school child, who went to religious school on Sundays, was absent from her public elementary school class held on one Sunday so that parents and others could come and observe the school and classroom activities, i.e. a “parents day at school.” The school recorded the child as absent. The child and the child’s parents filed a lawsuit claiming that compulsory attendance at the Sunday observation class violated the child’s freedom of religion as guaranteed by the Constitution of Japan Article 20.

The Tokyo District Court found that the requirements of public education necessitate certain restrictions on the freedom of religion that are unavoidable. The court held: “Within the scope of a compensatory class day, which is a particular necessity of public education, even if such a day does infringe upon a religious organization’s gathering, the law should be construed to tolerate such an infringement as a necessary limitation based on reasonable grounds.”<sup>xxxi</sup> The court went on to explain that exempting a child who is participating in a religious activity from

attendance on public education class day is not appropriate nor does it maintain the religious neutrality of public education. The school’s act was held not to be a violation of the freedom of religion clause of the Constitution of Japan.

#### E) Case Ordering the Dissolution of the Religious Corporation Aum Shinrikyo<sup>xxxii</sup>

In this case, a petition was filed ordering the dissolution of Aum Shinrikyo as a religious corporation. The Supreme Court’s decision rested on five points. First, the system for ordering the compulsory dissolution of a religious corporation has an entirely secular purpose, which “is not intended to dispel spiritual or religious aspects of religious organizations or believers, and the purpose of the system is reasonable.”<sup>xxxiii</sup> Second, the complainant, Aum Shinrikyo, produced the poisonous gas sarin with the objective of carrying out mass murder. “It has been found clearly that [Aum Shinrikyo] violated the law and brought considerable harm to the public welfare, and it is obvious that it has substantially deviated from the purpose of a religious organization.”<sup>xxxiv</sup> Third, any infringement upon “the religious acts conducted by the religious organization of Aum Shinrikyo and its believers consequent upon this dissolution order” in the end will only be “effectively indirect”<sup>xxxv</sup> as the believers in the tenets of Aum Shinrikyo are free to continue their beliefs, albeit not as a religious corporation. Fourth, the court concluded: “Therefore, said dissolution order even taking into account the impact it will have on the spiritual and religious aspects of Aum Shinrikyo and its believers...is a necessary and unavoidable legal restriction.”<sup>xxxvi</sup> Fifth, the court additionally observed that “as [the dissolution order] was issued according to a court’s judicial judgment, the appropriateness of its procedures is also guaranteed.”<sup>xxxvii</sup> The court

held that the dissolution order did not violate Article 20 Paragraph 1 of the Constitution of Japan.

## VI Religious Right of Personhood<sup>xxxviii</sup>

While the decisions regarding freedom of religion by Japan's courts have, in general, been supported by the majority of legal scholars, the Supreme Court Grand Bench decision concerning the enshrinement of a dead Self-Defense officer to Gokoku Shrine<sup>xxxix</sup> has been severely criticized by many. While the holding in this case focused on the principle of separation of the state and religion, the court also denied the nature of a religious right of personhood, which was claimed by the officer's widow. Academic theories have sharply criticized this decision, and the prevailing view now is toward affirming the nature of a religious personal right.

The facts of the case as given in the Supreme Court verdict's "Comments" are as follows:

"This is the case in which the Appellee, a surviving wife of a dead member of the Self-Defense Forces (SDF) who was killed by a traffic accident while he was on duty, filed a civil law suit against the government seeking compensation for mental damages allegedly caused by the enshrinement of her dead spouse. The Appellee's contention was that she, a Christian, was psychologically injured by the joint enshrinement (*goshi*) of her dead spouse to Gokoku Shrine conducted upon an application allegedly filed jointly by a regional liaison office of the Self-Defense Forces, a governmental agency, and by a federation of branches of the SDF Veterans Association (*Taiyukai*), a corporate juridical entity, mainly composed of retired SDF members....The Appellee asserted, as the infringed right, a religious personal

right, a right of religious privacy and a legal interest guaranteed by the constitutional principle of separation of religion and the state. Though the trial court (the Yamaguchi District Court) and the appellate court (the Hiroshima High Court) affirmed part of the Appellee's claim, the Grand Bench of the Supreme Court reversed the judgments of the lower courts and dismissed the Appellee's claim in this decision."<sup>xi</sup>

The majority opinion for the Supreme Court held: "The guarantee of freedom of religion requires tolerance for the religious activities of others that are inconsistent with the religion that one believes in as long as such activity does not disturb his or her freedom of religion through compulsion or by giving rise to disadvantages."<sup>xii</sup> The court found that any sort of legal interest in being able to lead a life of belief in a tranquil religious environment, which the District Court's decision held to be a religious right of personhood, could not be recognized as a legal interest, thus denying the nature of any such right.

However, Justice Ito, in his dissenting opinion, said: "[T]he next issue here is whether 'the interest to live a religious life in a tranquil religious atmosphere,' as the original court said, can be a protected legal interest, which interest does not fall within the freedom of religion itself though it is related thereto. I am of the opinion that in modern society the interest of not being disturbed in one's mind by unwanted stimulus from others, i.e., the interest of mental peace, can be a legal interest under tort law. When this interest is recognized as existing in the religious domain, this may be called a 'religious personal right or religious privacy.' That is a matter of terminology."<sup>xiii</sup> Thus, this dissenting opinion, as other dissents have in the past, has provided the basis for the recognition of such a right as time

has gone by and circumstances have changed.

Three legal theories have emerged in arguing for the sanctioning of this legal interest. One is a theory advanced by Professor Koichi Yokota that affirms the right on the basis of Article 13.<sup>xliii</sup> His reasoning is that Article 13 guarantees the “right to...liberty, and the pursuit of happiness.”<sup>xliv</sup> Today, there is little debate that included in this guarantee is the right to privacy. There are, however, differing views about what that privacy encompasses, but at the very least, it is understood that one of its constituting elements is “the interest in not being disturbed by undesired stimulation from another person.”<sup>xlv</sup> So, Professor Yokota argues that as a component of that element of privacy, it is possible to recognize “religious privacy.” He believes that this also by its very nature includes “the legal interest that one should be able to lead a life of faith in a tranquil religious environment.”<sup>xlvi</sup>

The second theory affirming such a right is advanced by Yasuhiro Okudaira, professor emeritus of the University of Tokyo, and based on the first half of Article 20 Paragraph 1.<sup>xlvii</sup> Professor Okudaira observes that there are increasing infringements on individual self-sufficiency, independence and self-reliance by the modern state’s public authority in an indirect or “soft” manner. In light of this realization, the provisions guaranteeing each individual fundamental human right are premised on the right to privacy. Professor Okudaira believes that religious privacy and a religious personal right can be justified on the provision of freedom of religion.

The third theory affirming the right is argued by Professor Shinichi Takayanagi and based on the provision of separation of state and religion.<sup>xlviii</sup> Professor Takayanagi put forth the concept that the provision for separation of state and religion is something that forms one part of the freedom of religion, and should be

understood as a clause guaranteeing human rights. A religious personal right, which is “the legal interest that one should lead a life of faith in a tranquil religious environment,”<sup>xlix</sup> is thus guaranteed by the provision of separation of state and religion.

## VII Conclusion

The Japanese courts have adopted a double standard when reviewing infringements on rights enumerated in the Constitution. With economic rights, deference is given to the policy-making discretion of the legislature. However, spiritual freedoms are judged by a rigorous standard of constitutionality, or the doctrine of least restrictive alternative, in which the government or legislature bears a heavy burden of proof to show that there are no other less restrictive alternatives to achieve the targeted legislative purpose. The cases cited herein have illustrated this double standard. Cases C (Cultural Tourism Tax) and D (Christian Sunday Lawsuit) involved slight limitations on the freedom of religion, a small admission fee and an observation class on Sunday, respectively. Both of these cases show that the freedom of religion is not absolute and inviolable. Cases A (bodily injury resulting in death) and E (Aum Shinrikyo dissolution order) were both incidents where the guarantee of freedom of religion was deviated from to such an extent as to cause death. Yet, in none of these four cases was an individual’s right to his belief in religion actually prohibited or limited, only the external acts associated with such a belief and then only to a reasonable degree. Case B (pastoral activity) was exemplary in upholding the value of religion to society, stating that when an external act bears upon internal belief, such restraints are required to be given particular care in their consideration and upholding the minister’s acts as a legitimate religious activity. The area, however,

where the constitutional guarantee seems to have been insufficiently appreciated is, as mentioned above, the case of a former Self-Defense Forces officer being enshrined in Gokoku Shrine. Nevertheless, with the increasing emphasis on privacy in today's society and on the importance of protecting intellectual property rights [tort law provides for compensation on their infringement] which have accompanied the growth of the internet and information technology, circumstances have changed to emphasize personal privacy and the use of personal or protected information, such as one's name, so that such a legal interest in a religious right of personhood may be honored in the future if a corresponding case should come before the courts.

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## Legal Documents

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- Constitution of Japan, promulgated on November 3, 1946; put into effect on May 3, 1947.
- France's Fifth Republic Constitution, introduced on October 5, 1958.
- Kobe Summary Court Judgment, February 20, 1975, 768 Hanrei Jiho 3.
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- Supreme Court Grand Bench Judgment, June 1, 1988, Judgment on the enshrinement of a dead SDF officer to Gokoku Shrine, Case No. (O)-902 of 1982.
- Tokyo District Court Judgment, March 20, 1986. 37-3 Minshu 347
- United States Constitution, adopted by a convention of the States on September 17, 1787 and ratification was completed on June 21, 1788, subsequently ratified by remaining states.

## Notes

- <sup>i</sup> 第20条 1 項: 「信教の自由は、何人に対してもこれを保障する。」
- <sup>ii</sup> 第20条 2 項: 「何人も、宗教上の行為、祝典、儀式又は行事に



参加することを強制されない。」

<sup>iii</sup> Article 20: 1) “No religious organization shall receive any privileges from the State, nor exercise any political authority.” 「… いかなる宗教団体も、国から特権を受け、又は政治上の権力を行使してはならない。」

Article 20: 3) “The State and its organs shall refrain from religious education or any other religious activity.” 「国及びその機関は、宗教教育その他いかなる宗教的活動もしてはならない。」

Article 89: “No public money or other property shall be expended or appropriated for the use, benefit or maintenance of any religious institution or association, or for any charitable, educational or benevolent enterprises not under the control of public authority.” 「公金その他の公の財産は、宗教上の組織若しくは団体の使用、便益若しくは維持のため、又は公の支配に属しない慈善、教育若しくは博愛の事業に対し、これを支出し、又はその利用に供してはならない。」

<sup>iv</sup> See Shinichi Takayanagi, *Kihon Komentaru* [基本コメ] 84 as given in Tokioka, Hiroshi, *Zukai Kenpo*, p. 47.

<sup>v</sup> 「安寧秩序ヲ妨ケス及臣民タルノ義務ニ背カサル限ニ於テ」

<sup>vi</sup> See generally Constitution of the Empire of Japan, Chapter II. Rights and Duties of Subjects.

<sup>vii</sup> 「神社神道は宗教にあらず」

<sup>viii</sup> See article by Akazawa, Shiro, Ritsumeikan University Professor of Law: “Yasukuni Shrine Taking the Position of ‘State Vindication’--The Significance of the Enshrinement of Class A War Criminals”; *Tokyo Ekonomisuto*, July 25, 2005. pp. 30-31.

<sup>ix</sup> For comments on the religious climate of Japan, see Yokota, Koichi, *The Separation of Religion and State, Japanese Constitutional Law*, pp. 206-208.

<sup>x</sup> See “Religious Freedom: The UK Context” by Clinton Bennett of Westminster College, Oxford in a speech delivered at the International Coalition for Religious Freedom Conference on “Religious Freedom and the New Millennium” in Berlin, Germany, May 29-31, 1998: “Britain does not possess a written constitution so there is no constitutional clause guaranteeing religious freedom. However, Britain is signatory of international covenants, which guarantee religious freedom, and/or which outlaw religious discrimination and incitement to religious hatred. Most significant of these is probably the 1950 European Convention on Human Rights (article 9 guarantees freedom of religion; article 14 prohibits discrimination on grounds of religion).”

<sup>xi</sup> See U.S. Department of State *International Religious*

*Freedom Report* 2003-Spain (<http://www.state.gov/g/drl/rls/irf/2003/24434.htm>):

Section II. Status of Religious Freedom-Legal/Policy Framework: “The Constitution provides for freedom of religion, and the Government generally respects this right in practice. The Government at all levels strives to protect this right in full and does not tolerate its abuse, either by governmental or private actors. Discrimination on the basis of religious beliefs is illegal. The Constitution, which declares the country to be a secular state, and various laws provide that no religion should have the character of a state religion. However, the Government treats religions in different ways. Catholicism is the dominant religion, and enjoys the closest official relationship with the Government as well as financial support. The relationship is defined by four 1979 accords between the country and the Holy See, covering economic, religious education, military, and judicial matters. Jews, Muslims, and Protestants have official status through bilateral agreements, but enjoy fewer privileges. Other recognized religions, such as Jehovah’s Witnesses and the Mormon Church, are covered by constitutional protections but have no special agreements with the Government.”

<sup>xii</sup> See German Embassy to the United States, Washington, DC. Background Papers: *Church and State in Germany*: “Freedom of worship and conscience is safeguarded in German law as a fundamental right. Article 4 of the Basic Law, the Federal Republic’s constitution, stipulates that “Freedom of faith and conscience as well as freedom of creed, religious or ideological, are inviolable,” and, further, that “The undisturbed practice of religion shall be guaranteed.” The Federal Republic has no official faith or state church, and the state is constitutionally obliged to maintain a position of neutrality in religious matters. In contrast to the understanding of the separation of church and state embodied in the U.S. Constitution, however, German law does not preclude close cooperation between governmental and ecclesiastical bodies in areas such as health care and education. The terms of this cooperation are spelled out in a series of agreements and concordats.” (<http://www.germany-info.org/relaunch/info/archives/background/church.html>)

<sup>xiii</sup> See U.S. Department of State *International Religious Freedom Report* 2003-Italy (<http://www.state.gov/g/drl/rls/irf/2003/24415.htm>):

Section II. Status of Religious Freedom-Legal/Policy Framework: "The Constitution provides for freedom of religion, and the Government generally respects this right in practice. The Government at all levels strives to protect this right in full and does not tolerate its abuse, either by governmental or private actors. Prior to the Constitution's adoption in 1947, the country's relations with the Catholic Church were governed by a 1929 Concordat, which resolved longstanding disputes stemming from dissolution of the Papal States and established Catholicism as the country's state religion. A 1984 revision of the Concordat formalized the principle of a secular state but maintained the practice of state support for religion--support that also could be extended, if requested, to non-Catholic confessions. In such cases, state support is to be governed by legislation implementing the provisions of an accord ("intesa") between the Government and the religious confession. An intesa grants ministers of religions automatic access to state hospitals, prisons, and military barracks; allows for civil registry of religious marriages; facilitates special religious practices regarding funerals; and exempts students from school attendance on religious holidays. If a religious community so requests, an intesa may provide for state routing, through a voluntary check-off on taxpayer returns, of funds to that community, a privilege that some communities initially declined but later requested. The absence of an intesa does not affect a religious group's ability to worship freely; however, the privileges granted by an intesa are not always granted automatically, and a religious community without an intesa does not benefit financially from the voluntary check-off on taxpayer returns."

<sup>xiv</sup> United States Constitution Amendment I: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

<sup>xv</sup> Fifth Republic Constitution, introduced on October 5, 1958, Article 2 [State Form and Symbols] (1) "France is an indivisible, secular, democratic, and social Republic. It ensures the equality of all citizens before the law, without distinction as to origin, race, or religion. It respects all beliefs."

<sup>xiii</sup> Nagoya High Court Judgment, May 14, 1971. 630 *Hanrei Jiho* 8.

<sup>xvii</sup> *Bessatsu Jurisuto*, No. 37, July 1972: Sato, Isao, "The Unconstitutionality of a Shinto Jichinsai by a Local Public

Entity", pp. 32-35.

<sup>xviii</sup> See Tokioka, Hiroshi, *Zukai Kenpo*, p.46; and Sato, Isao, *Compendium on the Constitution of Japan*, pp.185-186.

<sup>xix</sup> Supreme Court Grand Bench Judgment, May 15, 1963, 17-4 Keishu 302, as given in *Bessatsu Jurisuto*, No. 37, July 1972: Aizawa, Hisashi, "The Guarantee of Religious Freedom and its Limitations," pp. 10-11. Referred to in Japanese as 「加持祈祷による傷害致死事件」

<sup>xx</sup> Referred to in Japanese as 加持祈祷 [Kajikito]

<sup>xxi</sup> Referred to in Japanese as 線香護摩 [Senko-goma]

<sup>xxii</sup> Article 12 "The freedoms and rights guaranteed to the people by this Constitution shall be maintained by the constant endeavor of the people, who shall refrain from any abuse of these freedoms and rights and shall always be responsible for utilizing them for the public welfare."

<sup>xxiii</sup> Article 13: "All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs."

<sup>xxiv</sup> Article 205 Paragraph 1: A person, who inflicts injury upon the person of another and thereby causes the latter's death, shall be punished with penal servitude for a limited period of not more than two years or a fine of not more than three hundred thousand yen or a minor fine.

<sup>xxv</sup> Kobe Summary Court Judgment, February 20, 1975, 768 *Hanrei Jiho* 3. Tokioka, Hiroshi, *Zukai Kenpo*, p.46-47, and Sato, Isao, *Compendium on the Constitution of Japan*, pp.187-188. See also <http://www.daga.org/press/urm/urm1/chap402.htm> Referred to in Japanese as 「教会活動事件」

<sup>xxvi</sup> Article 103 [Harboring a criminal]: A person, who harbors, or interferes with the search of another who has committed a crime punishable with a fine or graver penalty or has escaped during detention, shall be punished with penal servitude for not more than two years or a fine of not more than two hundred thousand yen.

<sup>xxvii</sup> See Note 23.

<sup>xxviii</sup> *ibid.*

<sup>xxix</sup> Nara District Court Judgment, July 17, 1968, 19-7 Keishu 1221. See Tokioka, Hiroshi, *Zukai Kenpo*, p.46-47, and Sato, Isao, *Compendium on the Constitution of Japan*, pp.188. Referred to in Japanese as 「文化観光税条例事件」

<sup>xxx</sup> Tokyo District Court Judgment, March 20, 1986. 37-3

Minshu 347, as given in <i>C Book Constitution: General Principles and Human Rights</i> , Tokyo Legal Mind, p.262. Referred to in Japanese as「日曜日授業参観事件」	Gokoku Shrine, Supreme Court Grand Bench Judgment, June 1, 1988, Case No. (O)-902 of 1982.
<sup>xxxii</sup> <i>ibid.</i>	<sup>xi</sup> <i>ibid.</i> , p.1
<sup>xxxiii</sup> Supreme Court Decree, January 30, 1996, as given in <i>C Book Constitution: General Principles and Human Rights</i> , Tokyo Legal Mind, p.262. Referred to in Japanese as「宗教法人オウム真理教解散命令事件」	<sup>xli</sup> <i>ibid.</i> , Section III-3.
<sup>xxxiv</sup> <i>ibid.</i>	<sup>xlii</sup> <i>ibid.</i> Dissenting opinion of Justice Masami Ito, Section I.
<sup>xxxv</sup> <i>ibid.</i>	<sup>xliii</sup> <i>C Book Constitution: General Principles and Human Rights</i> , Tokyo Legal Mind, p.264, referring to Hogaku Seminaru, edition 404, p.14.
<sup>xxxvi</sup> <i>ibid.</i>	<sup>xliiv</sup> <i>ibid.</i>
<sup>xxxvii</sup> <i>ibid.</i>	<sup>xlii</sup> <i>ibid.</i>
<sup>xxxviii</sup> Referred to in Japanese as宗教の人格権	<sup>xli</sup> <i>ibid.</i>
<sup>xxxix</sup> Judgment on the enshrinement of a dead SDF officer to	<sup>xli</sup> <i>ibid.</i>

## 日本国憲法と信教の自由

デビット・ウルボグ

### 要 旨

大日本国憲法（明治憲法）の苦い経験と深い良心の呵責から、日本国憲法には、宗教の自由を保障する特別な規定が取り入れられた。日本国憲法は、1946年に公布され、1947年に効力を発した。この保障には、二つの分野が含まれている。個人の宗教の自由と政教分離の原則である。個人の宗教の自由は、第20条1項の前半に「信教の自由は、何人に対してもこれを保障する」とうたわれている。ひき続き、第20条2項は、「何人も、宗教上の行為、祝典、儀式又は行事に参加することを強制されない」と明言している。第20条1項の後半と3項、そして第89条は、宗教と国家の分離原則にのっとり、政治と宗教のいかなる関係をも否定し、その結果、適切な宗教の自由の保障を打ち立てている。この稿では、今まで解釈され、活用されてきた個人の宗教の自由の保障に焦点をあて、論を進める。