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# MAJOR JUDICIAL DECISIONS

Jan. — Dec., 1997

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## 1. Constitutional and Administrative Law

### a. Constitutional Law

A case in which the Ehime Prefecture Governor's expenditure for Shinto Shrines was held to be unconstitutional.

Ruling by the Grand Bench of the Supreme Court on April 2, 1997. Case No. (*tsu*) 156 of 1997. 51 *Minshū* 1763; 1601 *Hanrei Jihō* 47. [Reference: Constitution of Japan, Articles 20 (3) and 89. Local Autonomy Law Article 242.2 (1) iv]

#### *[Facts]*

*Jōkoku* respondent, Ehime Prefecture Governor Shiraishi, often contributed public money, in the name of various religious offerings, for some ceremonies held by Yasukuni Shrine and other ceremonies held by Gokoku Shrine. Some citizens filed a citizen suit, claiming that those expenditures were illegal in light of the freedom of religion and the principle of separation of religion and the State (the Constitution of Japan, Articles 20 (3) and 89), and that he should pay back the public money to the Prefecture. The Matsuyama Dis-

strict Court held those expenditures to be unconstitutional, but the Takamatsu High Court reversed this decision. The plaintiffs appealed to the Supreme Court. The Court's 13-to-2 decision reversed the Takamatsu High Court's decision. A summary of the court's opinion follows.

*[Opinion of the Court]*

Reversed.

The principle of separation of religion and the State is generally considered to mean the neutrality or indifference of the State to religion, which is to mean that government should not involve itself with religion. The relationship of a State to religion varies, however, according to the historical and social background of each State. In Japan, the Meiji Constitution (1889) had a clause concerning freedom of religion, under which religion was allowed "unless the subject might threaten the public order and safety and violate the duties of a subject". Additionally, under that regime, Shinto stood as almost a state-established national religion. It was sometimes imposed on people and some religious groups were suppressed harshly. Therefore, we must recognize that the protection of the freedom of religion under the Meiji Constitution was highly inadequate. In view of the various evils that followed from the entanglement of the Meiji state with Shinto, the Constitution of Japan (1947) states the principle which unconditionally protects the freedom of religion and contains a clause stipulating the separation of religion and state to preserve that right. Taking into account those features, it appears to be proper to interpret the Constitution as having adopted the basic concept of complete separation of religion and the State, in which the religious neutrality and indifference of the state is ensured. The separation clause is essentially that of the so-called "Seidoteki-hosho", which is interpreted to protect the core of the system that separates religion and state. Therefore the clause is not intended to preserve the freedom of religion as such immediately, but achieves it indirectly by maintaining the system. A State cannot entirely avoid some involvement with religion when regulating social life or achieving objectives such as the encouragement and support of education, welfare and culture. So, practically speaking, we are not sure that we can realize complete separation in the existing framework.

Conversely, unreasonable consequences may be caused in various aspects of social life as a result of the enforcement of complete separation. In terms of these points, we admit that separation essentially entails a degree of limitation. Therefore it is the following question that matters: On what occasion and to what extent is the entanglement of State with religion impermissible with respect to the basic purpose of the system, which is to preserve the freedom of religion, assuming a range of practical involvement in light of the social/cultural functions of the State? We conclude that the principle of separation only applies as far as government exceeds the reasonable boundary in terms of purpose and effect of the act of government and in light of social/cultural conditions.

Therefore we affirm that “religious acts” of government defined by Article 20 (3) of the Constitution only means governmental acts beyond the reasonable limit. It is necessary that the purpose of the action be religious and its effects be liable to support, encourage, promote, oppress or interfere with any religion. To investigate whether a governmental action is one of the “religious acts”, we must concentrate on various things: where the acts occurred; how the citizens perceived the religious aspect of the action; what was the intention and purpose of the actor; whether or how far the actor was aware of the religious implications of his/her action; what effects or influence the action had on the ordinary person, etc. And we must look at these things objectively in accordance with common sense.

Taking into account various things found, we can see clearly that the local government had some entanglement with essentially religious ceremonies held by particular religious groups. Generally, such expenditures cannot be described as mere social or secular courtesies whose religious implications have already been extinguished. We cannot imagine that such donations are accepted commonly as a kind of social etiquette or courtesy. Accordingly, we must assume a donor should be aware, more or less, that his/her action has religious implications. We must say that is true in this case as well. We cannot find the prefecture also donating funds to similar ceremonies of other religious groups, well, so we cannot deny it had purposeful commitments to particular religious groups. We must hold that those involvements

gave citizens the impression that the prefecture gave partial support to these particular religious institutions (shrines), and they had high status as compared with other religious groups.

Considering those points, the purpose of the donations had a religious implication and the effects did support, encourage and promote a particular religion. The entanglement of the prefecture with Yasukuni Shrine and Gokoku Shrine transcended the reasonable boundary in light of social/cultural conditions, therefore the donations were among the "religious acts" prohibited by Article 20 (3) of the Constitution and the expenditures were illegal under Article 89.

*[Comment]*

In this decision the Supreme Court held local governmental actions unconstitutional, and we must say it was the first time in a case concerning the freedom of conscience. Therefore, it may be a problem whether this case will mark a turn in the attitude of the Supreme Court, taking into account the negative fact that the Court had often played a part in legitimating governmental action in important cases concerning individual rights. In this regard, we can point out that, since the death of the Showa Emperor, the Japanese people seem to have finally emancipated themselves from the residue of sentimental monarchism that had influenced their minds. It appears to us that the change is the foundation of this decision. In this respect, the Ehime case can be appreciated because it represents the predominance of the essence of democracy and liberty in our society after 50 years of experience. Nevertheless, we must concede that, even in this case, the Court did not intend to undertake a positive role through judicial review. The courts should sometimes challenge the traditional and pervasive values in a society if there is anything seriously impeding democracy and liberty. The logic of the majority opinion in this case showed an ambiguous attitude in this regard, in applying the "purpose-effect test" formulated in the *Tsu Jichinsai* case in 1971, while arriving at a conclusion opposite to that leading case.

In 1971, a city, Tsu, held a Shinto religious ceremony, called "*Jichinsai*", to purify a place and worship the spirit existing there before the construction of a city gymnasium, and dedicated public money

to the ceremony. This action was challenged in a claim that there had been a violation of the principle of separation between the State and religion under the Constitution of Japan, Articles 20 (3) and 89. The Supreme Court put forward a “purpose-effect test” and held the local governmental practice constitutionally legitimate under this test. This test is often said to imitate the “*Lemon* test”, which was formulated in the famous precedent of the U.S. Supreme Court, *Lemon v. Kurtzman* (403 U.S. 602 (1971)), however while the original played a part in separating government from religion, the imitation was more likely to rationalize the entanglement of the two. First, under the *Lemon* test, a governmental practice must (1) have a secular purpose; (2) have a primary effect which neither advances nor inhibits religion; and, (3) not foster excessive entanglement with religion. On the other hand, under the Japanese test, it was the first two prongs of the test (purpose and effect) which were used to evaluate the third factor, which was not counted as an independent factor at all. Secondly, in the Japanese test, the religious aspect of the governmental practice is likely to be concealed because the test weighs subjective elements such as “the intention and purpose of the actor” or “awareness of religious implications”. Both “purpose” and “effect” were evaluated in accordance with “common sense” in the end, taking into account “various things”, which indicates bias towards subjective elements. Finally, it is not even clear whether both of two factors must be satisfied. The interpretation in the dissenting opinion of Justice Kabe stated that they need not be. It has frequently been questioned whether this test, which has such flaws, is adequate enough to work as a proper measure. We find the concurring opinions of Justices Takahashi and Ozaki convincing, because they refused to apply this test due to its ambiguity. Indeed two dissenting opinions in this case found the governmental practices constitutionally legitimate by following the same test as the majority opinion adopted. We cannot but wonder why the majority opinion should retain this test without qualification to arrive at this epoch-making conclusion.

Now, we must take notice of the fact that, when the separation principle was alleged to have been violated, it was the entanglement between the government and Shinto that was primarily challenged. Viewed historically, we must recall that it was not until the linkage

between the government and a particular religion was cut off that liberal democracy was to be realized at all. These historical facts are the background of this principle. Therefore, we must be aware of the historical conditions peculiar to us: under the Meiji Constitution, the absolute authority of the Emperor of Japan was supported by excessive entanglement with Shintoism as the almost state-established religion. Under the new Constitution, by cutting this linkage, the Japanese people have acquired a democratic society in a real sense for the first time. Both dissenting opinions asserted that, as religious corporations, Yasukuni Shrine and Gokoku Shrine have become secularized as places for mourning the soldiers who died in the wars. But in view of historical facts, such a statement should have been made with the utmost caution. Though we don't think the majority opinion shared such a view with the dissenting opinions, we cannot overlook the curious fact that the majority opinion and the two dissenting opinions, which are incompatible with each other, rest on the same test, so it makes it more difficult to make any sense of the majority opinion. Why did it sustain the test which might allow an excessive range of entanglement? Shouldn't it have had more concern about those historical experiences peculiar to us?

We cannot, therefore, agree entirely with the opinion of the Court, though we are certain this decision has discouraged one of the anti-constitutional tides that has survived our liberal democracy. It doesn't necessarily follow that "the purpose-effect test" is completely unusable. It is not an unconvincing view that the test could be corrected so as to delineate the appropriate boundary between the State and religion. But, for that purpose, the approach of the test must be transformed so that the relationship of entanglement and separation are reversed. We mean that separation should be primary and entanglement should be allowed only so far as particular requirements are satisfied.

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