

Kazuki Usami

Kobe University and Tokyo Bar Association, Japan

kazuki112342189@gmail.com

J-GLOBAL ID: 202201008225478092

Transition of the decisions concerning laicism in Japanese Supreme Court

<http://dx.doi.org/10.12775/SIT.2025.008>

1. Introduction

Laicism is the second most frequently ruled unconstitutional area of Japanese Supreme Court precedent after equality, and in February 2021, a new unconstitutional ruling was issued on laicism. This article reviews Japanese Supreme Court precedents in response to this trend in Japan.

First, I briefly describe Shintoism and Confucianism. Theoretically, laicism in Japan is relevant to all religions; however, the most common problem in our country's precedents has been in relation to Shintoism, and more recently, in relation to Confucianism. Before I explain the precedents, I would like you all to know a little about Shintoism and Confucianism. Next, I introduce laicism in the Japanese Constitution. I introduce the text of the Japanese Constitution there. Further, I introduce four precedents on laicism; there are many precedents concerning it in Japan, but these four are very famous and important. Therefore, I also present the opinions of the justices. Finally, I share my own views on the current situation of laicism in Japan through these precedents.

2. About Shintoism and Confucianism

2.1. About Shintoism

Shinto is a religion unique to Japan. The following is a quote from the Shinto Agency's explanation of Shinto.¹ It is a belief that was born out of the daily life of the Japanese people. Long time ago, our ancestors lived their lives in relationship with nature through rice cultivation, agriculture, and fishing. While the forces of nature provide mankind with blessings, they also wield a formidable power. People sensed the workings of the gods in such natural phenomena. They also realized the preciousness of life that continues uninterruptedly in nature, and regarded the life force that gives birth to all things as the work of the gods.

They then worshipped natural objects such as clean mountains, rocks, trees, and waterfalls as sacred places for the deities to dwell. Eventually, buildings were erected at these places of worship, and shrines were born. The belief in gods that arose in various parts of the Japanese archipelago took shape with the unification of the country by the Yamato Imperial Court. When Buddhism arrived in Japan in the 6th century, this unique Japanese belief came to be known as Shinto. TORII is the symbol of Shinto.

The most common ruling on laicism was in relation to Shinto. Why was this often an issue in relation to Shinto? As mentioned earlier, it worships various deities as gods. In Japan, the emperor was worshipped as an Arahito deity in such a context. In other words, the emperor was treated as a god by Shinto. Before World War II, the emperor was treated as a god and Shintoism, which was closely related to the emperor, was treated specially. The Constitution of Japan, enacted after World War II, provided for laicism and sought to avoid any special treatment of Shinto.²

¹ See https://www.jinjahoncho.or.jp/shinto/shinto_izanai.

² See Y. Koizumi, *Religious Freedom and Separation of Church and State*, in: T. Mouri, Y. Koizumi, H. Asano, T. Matsumoto, *Constitution II (fn.3)*, 2022, pp. 162–163.

2.2. About Confucianism³

Confucianism is a tradition of Chinese origin, said to have been known in Japan since the 5th century. It has religious aspects, but it is mainly philosophical, ethical, and political teaching. In Japan, it assumed particular importance between the 6th and 9th century and from the Edo period (1600–1868) through the early Shōwa period (1926–1989).

Confucianism owes its basic orientation largely to Kong Qiu (K'ung Ch'iu), a teacher and philosopher of the Zhou (Chou) dynasty (1027 BC–256 BC).

3. Laicism in Japan

The Constitution of Japan stipulates laicism in Articles 20 and 89.

Article 20(1) says that freedom of religion is guaranteed to all. No religious organization shall receive any privileges from the State, nor exercise any political authority.

According to Article 20(3), the State and its organs shall refrain from religious education or any other religious activity.

Article 89 states that 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.

Article 20(1) guarantees freedom of religion, Article 20(3) prohibits religious activities by the state, and Article 89 prohibits financial and other support for religion. The issue in all of the cases I present hereafter is whether these articles have been violated.

³ See <https://japanknowledge.com/introduction/keyword.html?i=507>.

4. Judgment

I now describe four rulings in which the issue was whether or not a violation of laicism was committed. I present two rulings that are identical in nature so that they can be compared.

4.1. The Tsu City Shinto Groundbreaking Ceremony Case (13 July 1977)

In 1952, the city of Tsu, Mie Prefecture, wanted to build a municipal gymnasium. To do so, they held a Shinto ceremony called groundbreaking ceremony, or ground-breaking ceremony. Ground-breaking ceremony is a Shinto ceremony to pray for the safety of the land. The question arose as to whether Tsu City's holding of such a ceremony constituted religious activity.

The Supreme Court ruled that the ceremony did not constitute religious activity, which does not violate laicism. This judgment is the leading case judgment on laicism in Japan. There are many important points in this judgment.

First, the nature of laicism. Regarding laicism, this ruling explains that it is guaranteed as an institution. It is a famous statement that laicism is not a right of the people but an institution.

Next, it is stated that the principle of laicism in our country does not require complete separation from religion. In France, the state and religion are not supposed to be involved in any way, while in Japan, the state and religion are allowed to be involved to a certain degree. However, if any involvement is permissible, then laicism and state are meaningless. Therefore, it is necessary to determine the limits of such an involvement. The Supreme Court has held that the limit is determined by whether or not it exceeds a reasonable standard. And since exceeding what is reasonable is a very vague standard, it is necessary to be specific.

The precedent is embodied in the following statement.

It should be interpreted as prohibiting conduct that brings about state's connection with religion only if that connection exceeds a reasonable standard determined by the consideration

of the conduct's purpose and effects in the totality of the circumstances.

Because of this focus on purpose and effect, this standard is called the purpose-effect standard. This is a very important and well-known standard that continues to be used by court decisions since then.

The purpose-effect standard requires a layperson's perspective in its application. The public's point of view is used to judge the various circumstances and to determine whether the purpose and effect of the action are "good" or "bad". As a result, the act of spending public money by Mie Prefecture this time was not considered to be a violation of the Constitution because it did not exceed the limit of what is considered to be reasonable.

4.2. Ehime Tamagushi Lawsuit (2 April 1997)

Next, I would like to introduce a case in which the expenditure of public funds was found to be unconstitutional based on the purpose-effect standard mentioned earlier.

This case was also related to Shinto, and the issue was the relationship between Shinto and the state's expenditure of public funds. In Japan, there is a shrine called Yasukuni Shrine. It is a shrine dedicated to the war casualties, and it is among the symbols of militarism. Yasukuni Shrine holds an annual ceremony called "Reidaesai", and Ireitaisai, the grandest ceremony. In 1997, the governor of Ehime Prefecture disbursed money called "Tamagushi-ryo" from public funds to Yasukuni Shrine for holding the annual ceremony. The case concerned whether this expenditure of public money to Yasukuni Shrine violated the principle of laicism. The Supreme Court concluded that the expenditure of public funds violated the principle of laicism.

First, the Supreme Court showed that laicism in our country is not a complete separation and that there is no violation of the principle of laicism only when it does not exceed a reasonable standard. It then cited the purpose-effect standard. The Supreme Court held that the purpose-effect standard is applied, and, as

a result, laicism exceeds a reasonable standard and is a violation of the principle of laicism. The reason why this case differs in conclusion from the previous precedent is that the nature of the ceremonies held is very different.

In particular, the regular ceremony is the grandest of all Shinto-sponsored ceremonies. In contrast, the ground-breaking ceremony, mentioned earlier, is a ceremony held on a daily basis for the erection of buildings. The court's decision states the following about the regular ceremony: "The court concluded that the nature of these ceremonies is different". This difference in the nature of the ceremonies may have been the difference that led to the conclusion of the case.

4.3. Case to seek a declaration of the illegality of the omission of administration of property (20 January 2010)

The following are two precedents that did not use the purpose-effect standard. The first is the Supreme Court decision in the Sorachibuto Shrine case. This case is another case involving Shinto. However, unlike the previous two cases, this case concerns the "granting of benefits to religion", in which the state leases land to Shintoism free of charge.

In Sunagawa City, Hokkaido, there was a piece of land with a shrine and a torii gate that was marked as a shrine. The shrine was managed and operated by local residents, and regular events were held there. Sunagawa City continued to lease this land for a long time without charging rent. The question arose whether Sunagawa City's act of leasing the land free of charge constituted a benefit sharing and did not violate the principle of laicism. The Supreme Court ruled that it was a violation of the principle of laicism.

First, the Supreme Court indicated that laicism in our country is not a complete separation and that there is no violation of the principle of laicism only when it does not exceed a reasonable standard. So far, this is the same as the two previous decisions.

What is different is what follows. This decision stated that “laicism is not a violation of the principle of laicism only when the laicism does not exceed a reasonable standard”, without referring to the purpose-effect standard. As a result, the court ruled that Sunagawa City’s actions constituted the provision of benefits to a religious organization, given that the Ujiko group, which is composed of residents living near the shrine, is a separate entity from the neighborhood association and that the Ujiko group is a religious organization whose purpose is to hold religious events, etc. Prior to this decision, the court had ruled that the provision of benefits to a religious organization had the same effect as the provision of benefits to the residents of a town.

Prior to this decision, there had not been a single decision that did not use the purpose-effect standard. Furthermore, this ruling did not change the precedent. In fact, some of the rulings since this ruling have referred to the purpose-effect standard. This has led to a great deal of discussion about whether to use the purpose-effect standard.

4.4. Case seeking the revocation of the exemption from fixed asset tax, etc. (24 February 2021)

As the fourth decision, I present a decision that did not refer to the purpose-effect standard, similar to the Sorachibuto Shrine case. This one is not about Shinto, but about Confucianism.

In Naha City, Okinawa Prefecture, there existed Confucian facilities for the worship of Confucius, including the Jisei Mausoleum. These are collectively called the Confucius Temple. When the Confucius Temple was to be relocated, the organization that managed it approached Naha City. In response, Naha City decided to lease the site of the park on city-owned land free of charge. Three years later, when the relocated facilities were completed, the city exempted all park fees. The question arose as to whether this disposition constituted the granting of benefits to a religious organization. The Supreme Court ruled that it was a violation of the principle of laicism.

As before, the Supreme Court indicated the nature of our country's laicism and that it is not a violation of laicism only if it does not exceed reasonable standards. And, as in the Sorachibuto Shrine case, it did not mention the purpose-effect standard when determining whether or not the exemption is, in light of the above-mentioned conditions, beyond the limit that is deemed to be reasonable in relation to the fundamental purpose of the system of securing guarantee of freedom of religion, and in violation of the provisions on separation of state and religion, it is reasonable to consider that determination should be made comprehensively in light of socially accepted ideas, while taking into consideration various factors, including the nature of the facility in question, the circumstances where the exemption has been granted, the manner of offering the national and public lands for no charge as a result of the exemption, and the public's evaluation of such a practice.

As a result, taking into consideration the circumstances that led to the exemption and the nature of the facility, the court ruled that the exemption in this case constituted a religious activity, i.e., a violation of laicism.

However, there is one major problem with this decision. First of all, is Confucianism a religion? As I explained earlier, Confucianism is an ideology that originated in China. In modern times, Confucianism is widely considered to be a morality and ideology, not a religion. Although the Supreme Court has held that it is a religion, this point can be questioned, and it may be necessary to reexamine the meaning of the word "religion", as defined in Article 20.

In addition, Okinawa is a unique region of Japan, and was originally a different country from Japan, the Kingdom of Ryukyu. As an independent nation close to China, Okinawa may have different ways of thinking than modern Japan.

5. Examination

5.1. Range of the purpose-effect standard

As I mentioned earlier, the Sorachibuto Shrine case has led to some discussion about whether the purpose-effect standard should be used. I would like to share a few observations on this.

5.2. Justice Tokiyasu Fujita's view⁴

Justice Tokiyasu Fujita, the judge in the Sorachibuto Shrine case, stated in his supplemental opinion: "The target of constitutional challenge in this case is the fact that a local public entity simply offers public land for the use as the site of the facility which is, as pointed out by the majority opinion, purely intended for Shintoism and has no particular meaning other than religious meaning. As I see it, in this court's precedents, the phase in which the purpose-effect test was made to function was when the court determined which should be given more importance between 'religious nature' and 'secular nature' in cases where both natures resided in the act, etc. in question, and they were nearly indistinguishable in superiority (for instance, the judgment on the Tsu Jichinsai Case, the judgment on the Minoh Chukonhi Case [the case on a monument of the loyal souls in Minoh City], etc., at least based on the view of the majority opinions, exactly fall under such case). They were not cases where an act that clearly had a religious nature alone was disputed and the purpose of such an act was further questioned (for example, if a person or entity makes a visit or donation to a temple or Shinto shrine in a public position, but explains that such act is not a 'religious activity' as set forth in the Constitution because the said act is derived exclusively from the purpose of praying for the security of the country or safety of the people and is not intended to give preferential treatment for

⁴ Justice Tokiyasu Fujita's supplemental opinion in the Sorachibuto Shrine case.

a particular religion, such an attitude cannot be permitted at all even in accordance with the aforementioned purpose-effect test. The judgment on the Ehime Tamagushiryo Case can be understood as showing this reasoning.)"

The purpose-effect standard has been used in cases where both religiosity and secularity are found, and it is difficult to determine the superiority or inferiority of the two. When one is clearly superior to the other, it is not necessary to use the purpose-effect standard, but only to weigh the various circumstances in the aggregate.

Indeed, the two cases in which the purpose-effect standard was used were related to events derived from religion, while the two cases in which the purpose-effect standard was not used were related to religious facilities themselves. The latter can clearly be considered the predominance of religiosity.

5.3. Justice Masahiko Seino's view⁵

Justice Seino, an investigator for the Supreme Court, stated that "the purpose-effect standard can function for one-time and temporary acts, but the purpose-effect standard cannot be used for acts or omissions over a long period of time because the temporal human standard moves with the flow of time and cannot be determined even if the purpose-effect standard is used to examine acts or omissions based on purpose and effect, as it has been in the past".

"In contrast, the act of providing the use in this case is a continuous act that has a history of more than half a century, and while the act has the aspect of an act of omission in that it is the fulfillment of a contract between the parties, it also has the aspect of an act of omission in that it is simply leaving the current situation unattended. In addition, the act of providing the use of the property has a history of more than half a century, and while the

⁵ See M. Seino, *Hankai*, in: *Housoukai, Supreme Court Commentary on Judicial Precedents*, Civil Edition, 2010, pp. 1-83.

act has the aspect of an act of commission, it also has the aspect of an act of omission, i.e., simply leaving the current situation as it is. Furthermore, during the course of such activities, there have been major changes in circumstances, such as the demolition of the old shrine pavilions and torii gates, and the acquisition of the two lands from the improvement district. With regard to such acts of free provision, even if we examine the purpose of the acts from the conventional viewpoint, we must face the problem of which actor's purpose at what point in time should be examined, and even if we examine the effect, at what point in time and based on whom should the effect be examined? On the other hand, to ignore the history and the manner of use of the act of providing use in this case and to simply examine the purpose of Y and its effect on the residents at the time of the conclusion of the oral argument would be to ignore all of the history and the manner of use of the act of providing use, would be to ignore all of the history and the manner of use of the act of providing use and to simply examine the purpose and the effect of the act on the residents at the time of the conclusion of the oral argument".

In other words, it states that the purpose-effect standard can be used only for one-time acts and not for long-term acts. Both are persuasive, but comparing the four decisions, I think that Justice Fujita's view is rather better.

5.4. My own view

The ways in which religion and the state can interact can be very diverse. The classification of whether an act is a long-term act of omission or a one-time act of commission is difficult to begin with. For example, as in the third and fourth cases, the land lease itself is a one-time administrative action, and furthermore, it is an act of omission, but the effect of that action, the land lease, is a long-term effect. Justice Seino adds that the two acts should be determined whether they are long-term acts of omission or one-time acts of commission, taking into consideration factors other than the nature of such acts.

In my opinion, Justice Seino's opinion seems to suggest that the nature of the act should be considered the axis, supplemented by other circumstances. Given that the relationship between religion and the state can be diverse, I can agree with Justice Fujita's opinion in that it has the potential to flexibly take into account the nature of the act in the first place. However, in the end, no matter which view is taken, the factors to be considered remain the same, and it is quite possible that the substantive elements of the decision will remain the same.

6. Conclusion

Finally, I would like to summarize the current situation regarding the principle of laicism in Japan by looking at court cases regarding the principle of laicism in Japan.

First, I would like to discuss our Japanese laicism. As we saw earlier, we can consider that Japan's laicism is based on the same objective legal principle as Germany's. In Japan, the principle of laicism is not considered a right. On the one hand, there is the view that the principle of "laissez-faire" is a human rights provision to ensure the freedom of religion of the individual. In Japan, however, this remains a minority view. The Supreme Court's precedent – the decision of the appeals court in the Tsu ground-breaking ceremony lawsuit introduced earlier – does not claim so either. The Supreme Court has stated that it does not directly guarantee freedom of religion itself, but seeks to indirectly ensure freedom of religion by guaranteeing the separation of state and religion as a system. The current Supreme Court believes that laicism is not a human right. And laicism, which is guaranteed as an institution, does not confer a subjective right on each citizen.

Next, I would like to offer my opinion on the current situation with regard to precedents. As you can see from the four precedents we have just looked at, there used to be a lot of disputes about the expenditure of public money. As we have already seen, it was often the case that money was given for ceremonies. In contrast,

recently, there have been many cases involving the granting of benefits from the state to religions. In both of the cases discussed in this issue, the state lent land to a religion for free. Recently, such benefit sharing is becoming more and more common.

Finally, I would like to offer my opinion. In Japan, there has been preferential treatment of Shinto in the past. Shinto is also very much a part of people's lives. There are many shrines in my neighborhood, and many students go to shrines before exams to pray for success. In summer, ceremonies are held in various cities, many of which have their origins in Shintoism. This is my neighborhood's Shrine. Under such circumstances, we believe that the government has so far conducted its activities without giving much serious thought to its relationship with Shinto. In many cases, it is only after a trial that one is made to strongly consider the fact that the event is a Shinto event. We believe that in the future the state will have to be more conscious of whether or not it is preferential to religion.

SUMMARY

Transition of the decisions concerning laicism in Japanese Supreme Court

In February 2021, Japan's Supreme Court issued a decision finding a violation of laicism. This is the case known as the Confucius Temple case, which was discussed. Laicism is an area where, along with equality, the Japanese Supreme Court has often ruled unconstitutional. In light of this, there is a need to rethink how the Supreme Court's attitude to the principle of separation of church and state should be considered. This article briefly explains laicism in Japan and then examines four well-known Supreme Court decisions.

Keywords: Japan; laicism; religion

STRESZCZENIE

Przegląd decyzji dotyczących laicyzmu w orzecznictwie japońskiego Sądu Najwyższego

W lutym 2021 r. japoński Sąd Najwyższy wydał decyzję stwierdzającą naruszenie laicyzmu. Jest to sprawa znana jako sprawa Świątyni Konfucjusza, która została omówiona. Laicyzm jest obszarem, w którym japoński Sąd Najwyższy, obok równości, często orzekał o niekonstytucyjności. W świetle tego istnieje potrzeba ponownego przemyślenia, w jaki sposób należy rozważyć stosunek Sądu Najwyższego do zasady rozdziału kościoła od państwa. W niniejszym artykule pokrótkę wyjaśniono laicyzm w Japonii, a następnie przeanalizowano cztery dobrze znane decyzje Sądu Najwyższego.

Slowa kluczowe: Japonia; laicyzm; religia.

BIBLIOGRAPHY

Koizumi Y., *Religious Freedom and Separation of Church and State*, in:
T. Mouri, Y. Koizumi, H. Asano, T. Matsumoto, *Constitution II*, 2022,
pp. 162–163.

Seino M., *Hankai*, in: *Housoukai, Supreme Court Commentary on Judicial Precedents*, Civil Edition, 2010, pp. 1–83.