CURRENT CONTROVERSIES ON THE CONTROL OF RELIGIOUS ORGANIZATIONS IN JAPAN

YASUHIRO OKUDAIRA*

During the early days of 1995, it looked as if Japan was under some curse. On January 7, the Kobe area was struck by an earthquake of great magnitude, killing more than 5,500 people and injuring thousands more as well as causing property damage on an enormous scale. And on March 20, highly poisonous sarin gas was released in various places throughout the Tokyo subway system, depriving 12 people of their lives and causing injuries to hundreds more. Ten days after the subway incident, on March 30, Koji Kunimatsu, Inspector General of the National Police Bureau, was the victim of an unknown, would-be assassin. All of these unusual events took place in rapid succession within a very short time.

In light of the widely held belief that the Tokyo metropolis, despite its dense population and high level of industrial activity, was one of the safest cities in the world, the sarin incident in the Tokyo subway system greatly shocked people throughout the world. It became all too clear that any populous place in the world could be a target of attack by fierce and indiscriminate terrorists.

A few days after the subway incident, the police had a clue about who committed the crime. They were almost certain that some members of a religious organization called *Aum Shinrikyo* ("Supreme Truth Sect"), under the direction of its guru, Shoko Asahara, had placed containers of sarin in certain subway cars with the intention of murdering people and inciting serious social disorder. Various facets of *Aum Shinrikyo* were exposed in great detail in daily newspaper and TV reports.

Before the Tokyo sarin incident, it was rumored that *Aum Shinrikyo* was responsible for committing a variety of crimes, including abductions, illegal confinements, firearms violations, kidnaping for ransom, and swindling people, as well as plotting and committing murder. The police came to suspect that another, still unexplained sarin outbreak that had occurred in the town of Matsumoto in the early summer of 1994, had been caused by cult members.[1] More than 200 cult followers were arrested over

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* Professor of Law at International Christian University, Tokyo, Japan.

1. *Gas Attack Probe Enters Final Phase*, Japan Times Weekly Int'l Ed., May 8, 1995, *available in* LEXIS, News Library, Curnws File.

the span of a few weeks. Criminal investigations by both the police and public prosecutors took place throughout the country on a large scale and were followed by a number of criminal proceedings in various district courts.

While the criminal investigations and proceedings were going on, politicians came to the stage and began to argue that in order to end such terrorist activities by members of the cult organization, the government should dissolve *Aum Shinrikyo* in addition to imposing criminal sanctions on individual members guilty of wrongdoing. To the extent that the story of *Aum Shinrikyo* concerns only criminal justice, no serious constitutional issues are involved.[2] Most problems, if any, are matters of criminal law. If, however, as some politicians argue, the governmental dissolution of *Aum Shinrikyo* should be accomplished by whatever means necessary, including the application of the Subversive Activities Control Law[3] or, as other politicians suggest, the amendment of the Religious Corporation Law of 1951[4] to strengthen governmental control of religious organizations, constitutional controversies about Article 20 of the Constitution of Japan, which guarantees religious freedom,[5] would become unavoidable. This paper explores some of the constitutional issues involving religious organizations that have arisen in the aftermath of the Tokyo sarin gas attack.

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2. There is a notorious practice of police investigations which has invited a constitutional argument and this practice seemed prevalent throughout the whole process of police investigations of Aum's activities. The practice is known as *bekken taihō* or *bekken sōsa*, in which the police invoke an arrest warrant or a search warrant on the grounds of the nominal cause of a minor and easily proved crime in order to get a clue for a real target of another more serious crime. The practice, if relied upon in unlimited ways, comes into conflict with articles 34 and 35 of the Constitution which provide strict systems for arrest and search warrants. The Supreme Court is rather reluctant to set a clear-cut limitation on such practices probably due to the consideration of practical necessity. Ishikawa v. Japan, 31 KEISHU 821 (Sup.Ct., Aug. 9, 1977).

3. Hakai katsudō bōshihō [Subversive Activities Control Law], Law No. 240 of 1952.

4. Shūkyō hōjinhō [Religious Corporation Law], Law No. 126 of 1951.

5. Kempō [Constitution of Japan], art. 20, para. 1 ("Freedom of religion is guaranteed to all. No religious organization shall receive any privileges from the State, nor exercise any political authority").

I. RECENT HISTORY OF GOVERNMENTAL REGULATION OF RELIGIOUS CORPORATIONS

In prewar Japan, people lived in a very peculiar world in terms of religion.[6] This peculiarity can be seen in the very text of the clause in the prewar Meiji Constitution of 1889. Article 28 of the Constitution provided: "Japanese subjects shall, within limits not prejudicial to peace and order, and not antagonistic to their duties as subjects, enjoy freedom of religious belief."

The language of Article 28 sounds as if "freedom" is guaranteed. But this guarantee depends entirely on such highly ambiguous concepts as "peace and order" and "duties as subjects." Furthermore, being different from other "freedoms," such as freedom of dwelling and movement or freedom of speech, the "freedom of religious belief" of Article 28 was subject not only to limitations imposed by Diet enactments but to limitations imposed by ordinances of the emperor and other forms of administrative orders as well. Therefore, what constituted "peace and order" or "duties as subjects" could be determined by mere administrative orders. Indeed, before 1939, almost all matters concerning religion were regulated by various kinds of administrative orders. Thus, there was no consistent regulation of religious organizations.

In 1939, the Diet passed the first systematic law regulating religious organizations, the Religious Body Law.[7] This law, however, was passed not out of concern for religious freedom but rather as a means of controlling religious organizations as part of the then prevalent National Mobilization Movement.[8] The law defined schools, sects, or associations of Shintoism (excluding, however, Jinja Shinto, or State Shinto[9]), Buddhism, Christianity, and other religions as "religious bodies" and for the first time conferred the status of "juridical person" on each religious body that qualified under the law. In order to receive the status of "juridical person," a group of citizens had to apply for a license from the Ministry of Education (*Monbushō*). For the purpose of handling the application, the

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6. *See generally* HELEN HARDACRE, SHINTO AND THE STATE, 1868-1989 (1989).

7. Shūkyō dantaihō [Religious Body Law], Law No. 77 of 1939 (repealed 1945).

8. The National Mobilization Movement culminated in the enactment of the Kokka Sōdōinhō [National Mobilization Law], Law No. 55 of 1938. The law was enacted in order to concentrate the war effort in the hands of the government and resulted in encouraging nationalistic and militaristic sentiments among the people and crushing any peace-loving sentiments. *See generally*, HAVENS, VALLEY OF DARKNESS: THE JAPANESE PEOPLE AND WORLD WAR TWO (1978).

9. *See* HARDACRE, *supra* note 6, at 3-19 (as to the concepts of Shinto and State Shinto).

Ministry was supposed to scrutinize in great detail such matters as the character, structure, personnel, and property of the applicant religious group. The government could regulate various aspects of the body in the name of the preservation of "peace and order" or observation of "duties as subjects."

Diverse groups, both large and small, were forced to reconstruct themselves so that they could be recognized as a "religious body" within the meaning of the new law. The most serious victims in this respect were perhaps Christians, since Catholics and Protestants had to reunite as a single religious group.[10] Notably, however, there was no provision concerning State Shinto in the Religious Body Law of 1939. State Shinto was outside the reach of that law. According to the established, official doctrine of prewar Japan, State Shinto was not a "religion" in the ordinary sense of the word. State Shinto was considered a national institution which performed state rites. Participation in rites and rituals conducted by State Shinto was required of every person, irrespective of his or her religion, on the basis of this theory that State Shinto was not a religion. State Shinto was given strong support by the state, and it held control over the nation as a sort of super religion. Thus, throughout the history of prewar Japan, there was no room for speaking about a separation between the state and religion.[11]

In the late 1930's and early 1940's, a number of preachers, priests, and citizens of various religions, including Buddhism, local Shintoism (some of which the government called "pseudo-religions"), and Christianity were arrested and detained by the government, and some were convicted and sent to prison—in the name of the "preservation of peace" or on the basis of the violation of "duties as subjects."[12] For the purpose of such governmental suppression there existed a very convenient legal tool—the Peace Preservation Law of 1925.[13] This law enabled the government to suppress any persons who had connected themselves with any organization aiming to overthrow the "national polity."[14]

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10. *See generally* DAVID M. O'BRIEN & Y. OHKOSHI, TO DREAM OF DREAMS 45-46 (1996)

11. *See* Hiro Takagi, *Shūkyō Ho, in* NIHON KINDAI HO HATTATSU SHI ,vol. 7, 3-36 (N. Ukai et al eds. 1959)(for a brief history of the non-separation between the state and religion).

12. *See* RICHARD H. MITCHELL, THOUGHT CONTROL IN PREWAR JAPAN (1976); ELISE TIPTON, THE JAPANESE POLICE STATE: THE TOKKO IN INTERWAR JAPAN (1990).

13. Chian ijihō [Peace Preservation Law], Law No. 46 of 1925 (amended as Law No. 54 of 1941).

14. Lese majesty of the Criminal Code (art. 76, as before deleted in 1947, Keihō ichibukaiseihō [Law amending the Criminal Code] Law No. 124 of 1947) was another useful tool for suppression by the government. *See generally* LAWRENCE W. BEER, FREEDOM OF EXPRESSION IN

In sum, there was practically no freedom of religion in prewar Japan. After the war, one of the first things that the occupation powers demanded was that the Japanese government abolish State Shinto as a national institution and guarantee freedom of religion to the citizens. In October 1945, the Religious Body Law, together with the notorious Peace Preservation Law, was abolished. In its stead, at the direction of the occupation powers, the government enacted the Religious Corporation Ordinance.[15]

The new ordinance introduced, in place of the former licensing system, a registration system whereby status as a religious juridical person was conferred upon any group that registered at a registry office in accordance with the form required by the ordinance. The ordinance aimed at providing a rule that set minimally necessary requirements for institutionalizing the concept of a religious juridical person, paying high respect to the freedom of religion now held in the hands of the people.[16]

The new Constitution was promulgated in 1946 and came into force in 1947. Article 20 of the Constitution provided a firm foundation for religious freedom as well as for the separation between the state and religion.[17]

In 1951, the Diet replaced the Religious Corporation Ordinance with the present Religious Corporation Law. The substantive character of the latter was not different from the former in that it remained to provide simply a minimally necessary framework for the system and to avoid state interference as much as possible. There were some technical changes, however. For example, a new system was introduced for granting juridical person status whereby applicants had to present to the governor of the prefecture in which their headquarters were located documents required by the law and to ask for official certification from the governor (in the case of a larger corporation having under its umbrella smaller corporations which were located in a prefecture or prefectures different from that of the larger corporation, the certification proceedings were to be handled by the Ministry of Education rather than by any local government). The

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JAPAN 48, 53, 77, 80 (1984) (as to the concept of lese majesty).

15. Shūkyō hōjinrei [Religious Corporation Ordinance], Imperial Ordinance (chokurei) No. 719 of 1945 (repealed 1951).

16. As to the law reform under the Occupation period, see Kazunori Koga, *Senryoka ni Okeru Shūkyō Gyōsei no Henyo, in* 11 SHŪKYŌHŌ KENKYU (Shūkyōho Kenkyukai, Ryukoku University ed. 1992); William P. Woodward, *Religion-State Relations in Japan, in* CONTEMP. JAPAN, Vol. XXV, No. 1 at 81 (1957); WILLIAM P. WOODWARD, THE ALLIED OCCUPATION OF JAPAN 1945-1952 AND JAPANESE RELIGIONS (1972).

17. *See supra* note 6; *infra* pp. 138-41.

government had no discretion whatsoever regarding these matters; its only function was to refuse to grant certification when it found formal illegalities in the documentation.[18] It is interesting to note that although the law generally presupposed the religious juridical person to be a non-profit, public-service body, for the first time the law explicitly allowed the religious corporation to engage in profit-making activities insofar as the activities were not in conflict with the corporation's purpose and on the condition that profits so gained be used for the purposes of the corporation itself.[19]

II. THE DISSOLUTION OF *AUM SHINRIKYO* BY APPLICATION OF THE RELIGIOUS CORPORATION LAW

One consequence of the *Aum Shinrikyo* controversy was that it made it possible for the government to amend the Religious Corporation Law.[20] Another consequence of the incident was that the government was reminded of the existence of a provision in the law which could be usefully applied against this cult organization. Article 81(1)[21] of the law empowers a judicial court to issue a dissolution order against any religious

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18. *Aum Shinrikyo* was certified as a religious juridical person in August 1989. And as will be described later, it lost this legal status in December 1995. It may be worth mentioning that the Governor of Tokyo did not grant Aum's application automatically, and that the governor spent some time to take into account a number of citizens' complaints against Aum's certification. Aum applied for certification in the beginning of March 1989, which the governor refused to receive on account of some illegalities in the documentation. Aum devotees performed public demonstrations and other protest activities in front of the Tokyo Metropolitan Government buildings, accusing the Governor of a negative attitude toward Aum. Finally the Governor received the application, but postponed the issuance of certification until late August of the same year. In the meantime, in early June, Aum entered a suit against the Governor, arguing that the Governor's delay of granting certification to Aum was groundless and that the certification be issued as soon as possible. *See, e.g.*, Asahi Shimbun, Nov. 10, 1995.

19. As to the Religious Corporation Law, *see generally*, EIGYO INOUE, KAITEI SHŪKYŌ HŌJINHŌ NO KISOTEKI KENKYU (5th ed. 1995). *See also* BUNKACHO BUNKABU SOMUKA, SHŪKYŌHO NO KAISETSU TO UNYO (1974); SHIGERU WATANABE, CHIKUJO KAISETSU SHŪKYŌ HŌJINHŌ (1972).

20. *See infra* p. 134.

21. The clauses concerned read as follows:

> Article 81(1). When the court recognizes one of the following conditions fulfilled by a religious corporation, . . . the court may order to dissolve that corporation:
> 1. when there is clear evidence that a corporation has given serious harms to the public welfare by violating law.
> 2. when a corporation has behaved itself considerably inimical to the purpose of a religious organization as provide in Article 2 of this law, or when a corporation has done nothing with respect to the said purpose for more than one year.

Religious Corporation Law, *supra* note 4, art. 81. The case against Aum was grounded on the recognition that the conditions in Clause 1 and the first part of Clause 2 were met.

corporation under certain circumstances. According to the first clause of Article 81(1), the court may issue a dissolution order against a corporation which the court deems to have clearly violated the law in general and conspicuously injured the public welfare. The first part of the second clause of Article 81(1) gives the court the same power when the court finds that the corporation has exceedingly deviated from its religious purpose. The court may proceed by issuing a dissolution order either ex officio or upon application by competent authorities (in this kind of case, usually a prefectural governor), interested parties, or public prosecutors.

In the end of June 1995, the Governor of Tokyo together with the Chief of the Tokyo District Prosecutors Bureau applied to the Tokyo District Court requesting that the court issue a dissolution order against *Aum Shinrikyo* on the basis of Article 81(1), Clauses 1 and 2 (first part) of the law.

This is the first case in which dissolution has been invoked on the basis of these clauses of Article 81,[22] which contains other clauses whereby a court may issue a dissolution order against a religious corporation, e.g., when the court determines that despite the demolition of the settlement for religious worship, a corporation has done nothing for reconstructing that settlement for more that two years (Article 81(1) Clause 3) or that there has been a vacancy in the position of its representative officer or its substitute for more than one year (Article 81(1) Clause 4) and the like. There have actually been a few cases in which the courts have dissolved religious bodies on the basis of these clauses.[23] However, these clauses are considerably different from the clauses that were invoked in the case of *Aum Shinrikyo's* dissolution in that the former are related only to cases of inaction for a certain period, easily determined, whereas the latter are necessarily concerned with an evaluation of substantive wrongdoing. From a constitutional perspective, the latter are more important than the former because the latter may require some possibly delicate fact-finding and balancing of conflicting interests between substantive wrongdoing and freedom of religious association.

In the end of October 1995, four months after receiving the application for dissolution of *Aum Shinrikyo*, the Tokyo District Court approved the application and decreed that *Aum Shinrikyo* be disbanded.[24]

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22. M. Tanamura, *Shūkyō Hōjin Seido ni Okeru Gyōsei no Sekinin to Yakuwari*, HŌITSU NO HIROBA, Apr. 1996, at 11, 19.

23. *See* Inoue, *supra* note 19, at 420.

24. Takahashi v. Aum Shinrikyo, 1544 HANREI JIHŌ 43 (Tokyo District Court, Oct. 30 1995).

Aum Shinrikyo appealed to the Tokyo High Court, which rejected the appeal in the middle of October 1995, and the Tokyo District Court's ruling became final.[25] According to the general rules of procedural law in this area, the judgment of a court of appeal is final.[26]

Both of the inferior courts gave serious consideration to the question of whether it was possible to apply Article 81(1) to this cult organization. The district court did not consider the constitutionality of either the dissolution clause or of its specific application to *Aum Shinrikyo*. The high court recognized the possibility of involvement of constitutional issues, namely, freedom of religious belief of the individual members of that organization, but the court avoided consideration of this issue on the basis of a technicality concerning the standing of *Aum Shinrikyo*.

Aum Shinrikyo made a special appeal to the Supreme Court, but the Court dismissed the appeal in the end of January 1996.[27] The Court, however, did take up the question of whether Article 81(1) could constitutionally be applied to *Aum Shinrikyo*, and did not allow itself the indulgence of the standing issue raised by the high court. The Court upheld the constitutionality of the application of Article 81(1) by striking a balance between the conflicting interests as follows. On the one hand, the Court realized that, due to the issuance of the dissolution decree, *Aum Shinrikyo* property, such as settlements and places which had been used by members for religious purposes, would be subject to liquidation proceedings and that, as a result, the members would have to face difficulties inflicted upon them. On the other hand, the Court held that it was undeniable that the appellants' illegal activities were appallingly contrary to the public welfare and clearly deviated from the purpose of a religious corporation, and therefore the dissolution decree issued against *Aum Shinrikyo* was compelling and fully justified. The Court concluded that the decree against *Aum Shinrikyo* was constitutional. It should be noted that in reaching this conclusion, the Court indicated that the dissolution proceedings were conducted entirely by a judicial court and, thus, it could be assumed that the proceedings had been procedurally fair. The Court avoided the question of whether the dissolution clause in the law

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25. Aum Shinrikyo v. Takahashi, 1548 HANREI JIHŌ 26 (Tokyo High Court, Dec. 19, 1995).

26. Minsohō [Civil Procedure Law], art. 419, para. 2, Law No. 127 of 1954 (as amended). A party may further appeal to the Supreme Court on the basis that the judgment of the inferior court was in conflict with constitutional law. And, in fact, as discussed in the text below, Aum did appeal the case to the Supreme Court. However, an appeal of this special kind to the highest court has, as interpreted generally, no influence on the effect of the dissolution decree.

27. Aum Shinrikyo v. Takahashi, 1555 HANREI JIHŌ 3 (Sup. Ct., Jan. 30, 1996).

was constitutional. It appears that the Court assumed that the law was constitutional.[28]

In addition, *Aum Shinrikyo* had to confront an additional legal challenge from ordinary citizens. There were a great number of people who claimed that they were the victims of various crimes allegedly committed by this cult organization, and many of them brought their own actions for damages against *Aum Shinrikyo*. At some point they all came to the same realization that the total sum of the damages which they had claimed against *Aum Shinrikyo* would be more than the assets of this organization. Therefore, they decided to act as a group and to file a bankruptcy petition against *Aum Shinrikyo*. This victims' group asked the Tokyo District Court to provisionally freeze *Aum Shinrikyo's* assets as the initial step in the bankruptcy procedures. Quite independent from this citizens' action, the state also presented almost the same petition to the Tokyo District Court as being in the position of being responsible for the recovery of crime-victims.

In the middle of December 1995 when the dissolution proceedings were still pending in the Tokyo High Court, the district court affirmed the petitions filed by both the victims' group and the state, and provisionally froze all of *Aum Shinrikyo's* assets. In the end of March 1996, the Tokyo District Court officially declared *Aum Shinrikyo* bankrupt,[29] against which *Aum Shinrikyo* — through its liquidator — did not appeal to a high court. *Aum Shinrikyo* no longer exists as a religious corporation. Although it still survives as a mere *de facto* group of devotees, its influence, power and significance have rapidly dissipitated because it has been deprived of a large amount of its financial resources.

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28. In the consideration of the constitutionality of the dissolution order or of the law itself, there involves an interesting issue of standing. That is, whether the applicant, *Aum Shinrikyo*, can attack the dissolution order or the law itself as unconstitutional on the grounds that the order or the law deprives, or otherwise fatally damages, its members' free exercise of religion. The Tokyo High Court in this case took this issue of standing rather seriously, arguing, in effect, that the corporation was an independent organ from its members, that it could not, as a rule, argue on behalf of its members' legal position, and that there were no special circumstances which justified the corporation to act as representative of its members' constitutional position. Interestingly enough, however, the Supreme Court did not say anything about the problem of standing. Instead, the Court considered the substantive issue about the constitutionality of the dissolution order in terms of Aum members' freedom of religion. It is almost certain that the Supreme Court examined the issue more leniently as to the devotees' constitutional freedom than did the High Court. In any event, the issue presented induces us to conduct a comprehensive study comparing U.S. jurisprudence in the area.

29. Sakamoto v. Aum Shinrikyo, 1558 HANREI JIHŌ 3 (Tokyo District Court, Mar. 28, 1996).

III. THE AMENDMENT OF THE RELIGIOUS CORPORATION LAW

As early as April 1995, the government made public that in order to avoid a repeat of a disaster like the Tokyo subway sarin incident, it was considering whether to amend the Religious Corporation Law.

In the amendment process, the Ministry of Education, the governmental entity empowered to administer and amend the law, usually submits the proposed amendment to the Advisory Council on Religious Corporations (*Shūkyō Hōjin Shingikai*),[30] an entity within the Ministry of Education. However, instead of the usual process, Prime Minister Murayama initiated the amending of the Religious Corporation Law when he commented in a Diet committee meeting that the government should reexamine the law.[31] Three weeks after the prime minister's comment, the Ministry of Education convened a meeting of the Advisory Council and requested it to reexamine the law. It was reported at that time that the Advisory Council was not being rushed to hastily present its opinions about the pros and cons of amending the law.[32] Most people believed that since the law serves as a fundamental basis for religious bodies and is closely related to the constitutional guarantee of religious freedom, it would require three years or more to reach conclusions about amending the law.[33]

Generally, representatives from religious groups have been antagonistic to any attempt to amend the law. These representatives believe that current law affords great respect to religious freedom and protection to religious groups, including granting various privileges and immunities. Thus, religious groups tend to be satisfied with the legal status quo concerning them.

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30. The Advisory Council consists of ten to fifteen members who are appointed by the Minister of Education on the basis of suggestions by the Chief of the Cultural Bureau. As to the qualification of members, the law only provides that the appointment shall be made among ministers of religion and other persons who have enough knowledge of or experience with religion. The term of the appointment is for two years, but reappointment is allowed. Religious Corporation Law, *supra* note 4, art. 72. *See* Okura, *infra* note 33, at 98 (as to the performance of the current Advisory Council).

31. *Police Raid Three More Facilities of Aum religious Sect*, Deutsche Presse-agentur, April 4, 1995, *available in* LEXIS, News Library, Curnws File.

32. *Lawmakers Leery of Clamping Down on Religious Groups; Cult Fears Raise Call for Reform, but Establishment Balks*, THE NIKKEI WEEKLY, July 31, 1995, *available in* LEXIS, News Library, Curnws File.

33. *See, e.g.*, Fumihito Okura, *Shūkyō Hōjin Shingikai ni Igi Ari*, Ushio, Dec. 1995, at 102; SANKEI SHINBUN, Apr. 6, 1995, at 2; SANKEI SHINBUN, May 9, 1995, Evening, at 9;, May 23 1995, at 9; SANKEI SHINBUN, June 12 1995, Evening, at 7. *See also* MAINICHI SHI SANKEI SHINBUN NBUN, April 23, 1995, at 4; MAINICHI SHINBUN, June 20, 1995, at 27.

Largely due to the antagonistic attitudes of religious organizations concerning amendments to the Religious Corporation Law, there has been no success in attempts to amend the law. In 1958, the Advisory Council on Religious Corporations sent to the Ministry of Education a report in which it recommended corrections to what it believed were defects in the system concerning the certification of religious organizations. All religious groups, except the Shintō Honchō,[34] opposed the position of the committee and were successful in stopping the proposed amendments.[35] Since 1958 there have been new topics that conflict with the substance of the law. Such topics which became the subject of public discussions include the misuse of tax privileges enjoyed by so-called religious groups and political campaigns. Other questionable political activities such as using illegal means to sell goods or collect money, kidnaping for ransom, false imprisonment, and negligently caring for children were also publicized.[36] It appeared to be appropriate to deal with most of these problems through new legislation aimed at these specific wrongdoings, which were of a secular nature, rather than by amending the Religious Corporation Law. However, if the government attempts to tackle these problems, it is inevitable that the problems are placed in a larger perspective of world affairs in the area of religion and must reexamine the concept of religious freedom in light of this new perspective. The public exposure of the dangerous conduct allegedly engaged in by *Aum Shinrikyo* gave the government an excellent opportunity to propose consideration of how to respond to religious groups — something which, since 1958, seems to have been regarded as a very difficult topic to broach.

However, it was widely understood that the primary reason for the Advisory Council on Religious Corporations being convened was for it to examine the situation created by *Aum Shinrikyo*. In addition, the committee was expected to present its recommendations on amending the Religious

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34. *Shintō Honchō*, forming itself as the headquarters of various Jinja Shintō (or State Shinto) establishments, was created in 1946 in accordance with the then new law, the Religious Corporation Ordinance.

35. *Government Panel Starts Debate on Religion Organizations*, JAPAN POL'Y & POL., May 1, 1995, *available in* LEXIS, News Library, Curnws File.

36. *See generally* Ronso: Shūkyō Hōjinhō, (Dai-ni Tokyo Bengoshikai ed. 1995); *see also* Masaki Kito, Nijuiseiki no Shūkyō Hōjinhō (1995). A vexing problem is in the special treatment of various taxes for religious corporations. However, this problem is not created by the Religious Corporation Law. The tax privileges which have been enjoyed by religious organizations which have been provoking public criticism are provided by tax laws. As to the tax problem, see generally, e.g., Fumitoshi Tamakuni, *Shūkyō Hōjin Kaisei no Arikata*, 1081 JURISTO, at 16 (1995); see also Hiroyuki Kitano, *Shūkyō Hōjinhō no Kaisei Mondai no Ronten*, 494 HŌGAKU SEMINA 46 (1996).

Corporation Law. Because amending the Religious Corporation Law has been a difficult endeavor in the past, most observers expected the formulation of recommendations to take several years. However, on September 29, 1995, only months after its first session, the Advisory Council delivered its final report, in which it pointed to three items that needed to be amended.[37] None of the three points were clearly or directly related to *Aum Shinrikyo's* alleged activities, and accordingly the points were not necessarily useful with respect to trying to control other religious bodies which might engage in similar illegal activities. In other words, the Advisory Council, in making the recommendation that it did, side-stepped the *Aum Shinrikyo* story and proceeded to a more general, sensitive, and neutral amendment to the Religious Corporation Law, thereby stepping into an area which had been regarded as somewhat sacrosanct,[38] at least among some groups of citizens.

A. *The Running Dispute over the Amendment of the Religious Corporation Law*

The Advisory Council on Religious Corporations sent to the Minister of Education a report of inquiry into the law in which the committee suggested three points in the law that needed amending. Although the report resulted in some criticisms of various kinds[39] (e.g., among members of the committee), on the basis of the report the government created a bill, which was passed by the Diet in December 1995 without additional changes.[40]

The amendment concerned: (1) modification of the Public Safety Review Commission's jurisdiction; (2) a new system of keeping records of each corporation; and (3) the right of access to a corporation's documents by its members. The relationship between the amendment and the *Aum Shinrikyo* incident is, if any, extremely limited. The amendment was

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37. *See* JURISTO No. 1081at 24 (1995).

38. *See, e.g.*, Y. Shimomura, *Shūkyō Hōjin Minaoshi o Habamumono*, BUNGEI SHUNJU, July 1995, at 178 (Shimomura is a former Minister of Education).

39. Seven of the 15 members of the Advisory Council endorsed a protest letter to the Minister of Education on the same day the government presented a bill to the Diet to amend the Religious Corporation Law, based on the Advisory Council's report. The protest letter stated that the entire process of making the report had been mishandled by the representative from the Ministry of Education and that the they did not intend to suggest amendment of the law on the basis of their report.

40. Shūkyō hōjinhō no ichibu o kaiseisuru hōritsu [Amendment to the Religious Corporation Law], Law No. 134 of 1995.

regarded as long overdue, but was achieved only by availing itself of the good opportunity presented by the *Aum Shinrikyo* incident.[41]

Despite being neutral in its content, the amended law indicates bitter political implications. In July 1995, while the Advisory Council on Religious Corporations was just beginning to consider the matter assigned to it, the regular election of members of the House of Councillors was held. This election was the first since the collapse of the "1955 political frame work"[42] and politically very important. The achievements of the newly created party, the New Frontier Party, in the election were remarkable. This party gained 12,500,000 votes in the districts of proportional representation, whereas the former administration party, the Liberal Democratic Party ("LDP"), received 11,090,000 votes in the same districts.[43] The advance of the New Frontier Party at this election was obviously due to the support of members of the largest religious corporation, the *Soka Gakkai*. In 1964, this corporation had created its own political party, the Clean Government Party (*Komeitō*). However, in 1994, during the restructuring of the "1955 Regime," the Clean Government Party disbanded itself and joined the creation of the New Frontier Party together with the former Democratic Socialist Party and some ex-members of the LDP. There is no doubt that the New Frontier Party is a coalition between various political groups and it is uncertain how long this party will last. As long as it survives, the power of the members of the former Clean Government Party will also survive within the new party as well. Therefore, the *Soka Gakkai* continues to be influential in the political sphere.

The Liberal Democratic Party considers the New Frontier Party as its only rival worthy of its attention and anxiety. Therefore, the LDP endeavors to decrease their rival's political strength. After the election of July 1995, the LDP seriously considered amending the Religious

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41. For the amended law and several comments and articles, see, e.g., JURISTO (Dec. 15, 1995); HŌRITSU NO HIROBA (Apr., 1996).

42. In 1955, conservative politicians established a unified political party, the Liberal Democratic Party. Progressive liberals also formed a new political party, the Socialist Party. The "establishment" of Japanese society seemed to hope that both parties would compete with each other so that a two party system like that of Great Britain could develop in the future. However, the Liberal Democratic Party soon began to occupy a dominant position over the Socialist Party and as a result, it is said, Japan was under the regime of "1.5 party v. 1 party" instead of a two party system. In any event, the "1955 Political framework" or the "55 Regime" connotes the political realities created under the dominant Liberal Democratic Party and the weaker Socialist Party.

43. In that election the LDP held 46 seats in total, the New Frontier Party 40, the Socialist Party 16, the Communist Party 8 and the New Party Sakigake 3.

Corporation Law in order to somehow restrict the political activities of religious organizations.

This line of political action was similar to the manner in which the government was reluctant to introduce restrictions on the political activities of religious groups by way of amendment to the Religious Corporation Law.[44] The government just wanted to carry out the amendment of the three points discussed above. Thus, the LDP decided to separate its own attempt from the government bill for the amendment of the Religious Corporation Law. The LDP, with the consent of the Socialist Party and the new Sakigake Party, passed the government bill — with the tacit understanding that it would produce at the next session of the Diet a bill aimed at restricting the political activities of religious groups. The last few days of the Special Committee of the House of Councillors, which was deliberating the government bill, were thoroughly taken up by the LDP for the purpose of demonstrating its political inclination toward control of religious organizations.[45]

B. A New Phase of "Politics and Religion"

In late 1995, the LDP began to think of the possibility of enacting an entire new law which would regulate political activities of religious groups, rather than amending the Religious Corporation Law. The first problem the LDP faced was having to overcome the constitutional difficulties concerning the political freedom of religious groups.

The problem starts with Article 20(1) of the Constitution, which provides: "Freedom of religion is guaranteed to all. No religious organization shall receive any privileges from the State, nor exercise any political authority." There have been numerous disagreements about the interpretation of the second sentence. The LDP insists that the sentence

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44. *See* discussion *infra* p. 139.

45. For instance, LDP members of a special committee on religious corporations of the House of Councillors insisted that the highest leader of *Soka Gakkai*, Daisaku Ikeda, be summoned before the committee as a witness for questioning about his organization's involvement in politics. To some members of the New Frontier Party, Ikeda's position was considered so prestigious that his forced service as a witness in the Diet was unthinkable. After several political skirmishes, both sides reached a compromise thatthe present President of *Soka Gakkai*, Einosuke Akiya, rather than Ikeda, would come to be questioned about "religion and politics." On December 4, 1996, Akiya appeared before the special committee, received questions, and responded to them. However, the debates were rather dull, and full of formality. See, *e.g.*, ASAHI SHINBUN, Dec.4, 1995, Evening, at 1; MAINICHI SHINBUN, Dec. 5 1995, Evening at 1.

should be interpreted literally, and that it means "No religious organization shall engage in any political activity."

The argument about the interpretation of this clause has its own history. First, when the Constitution was under consideration in the Imperial Diet in 1946, the government indicated its position that this clause was part of the constitutional principle of the separation between state and religion, and that it did not connote anything about the restraint of religious organizations' political freedom.[46] Since then, on every occasion when the same question concerning the interpretation of Article 20(1) was raised in the Diet, the government, through its bureaucratic mouthpiece, the Cabinet Bureau of Legislation, has publicly repeated its original position.[47]

Although there are a minority of scholars who maintain that this clause prohibits any religious organization from establishing a political party or engaging in other kinds of positive activities which may have an impact on politics,[48] the government's interpretation is now well established. According to the prevailing interpretation, the term "political authority," which concerns the authority which religious organizations may exercise, designates legislative power, taxation power, judicial power and the appointment power as commonly exercised by the Church in medieval Europe. Since in modern times, such medieval church practices have become inconceivable, the constitutional provision is regarded as mainly a precautionary measure.

Article 20(1) first appeared in the so-called "MacArthur Draft" which used substantially the same words (Article 19: "Freedom of religion is guaranteed to all. No religious organization shall receive special privileges from the state, nor exercise political authority"). In order to understand the draftsman's intent of this provision, the following part of the minutes of the Meeting of the Steering Committee with the Committee on Civil Rights is necessary (Original Draft)(Friday, February 8, 1946);[49]

> As originally written Article XIII not only guaranteed freedom of religion but expressly forbid [sic] all ecclesiastics from political activity of any kind. The Steering Committee questioned both the wisdom and the practicality of the latter provision. Colonel Kades objected that the denial of political

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46. *See* CHIKUJŌ NIHONKOKU KEMPŌ SHINGIROKU 2, at 421 (Shin Shimizu ed. 1962).

47. *See* KAZUO YAMANOUCHI AND ICHIRO ASANO, KOKKAI NO KEMPŌ RONGI, 1204-1208 (1984).

48. *See, e.g.*, JOJI TAGAMI, NIHONKOKU KEMPŌ GENRON 123 (1980).

49. NIHONKOKU KEMPŌ SEITEI NO KATEI, 200 (Kenzo Takayanagi ed. 1972).

> activity to ecclesiastics involve the denial to them of freedom of speech and press as well. A special prohibition of this kind has no place in a Constitution, which should be a Bill of Rights, rather than a Bill of Restrictions. Colonel Roest states that this article was designed to prevent the abuse of spiritual authority to political ends. Japan has been a priest-ridden country for generations and political tyranny has been reinforced by the threat of spiritual punishment. It must be made clear to the Japanese that no political authority is attached to any ecclesiastical organization.

The established interpretation of the article is consistent with the position taken by the draftsmen of the original document.

Now that the prevailing interpretation is well established, the LDP will have to be persistent in surmounting it. Otherwise, they have no constitutional grounds on which to regulate the political freedom of religious organizations. Some members of the political world have been repeatedly trying to persuade the government to alter its interpretation of this article.

With respect to the government's position of constitutional or other legal interpretation, it is necessary to discuss the operation of the cabinet Bureau of Legislation. This is an organ attached to the cabinet that serves as a consultant on legislative matters and its bureaucrats are highly trained in legislative technicalities. As the Constitution adopts the Westminster style of government, the cabinet may propose bills of legislation. One of the most important tasks of the bureau is to examine the constitutionality of the government's bill before presenting it to the Diet and to maintain consistency in the government's interpretation of the constitutional intepretation.[50]

The bureau is not completely independent from political pressures. The bureau had received the image of being too subservient to the political demands of the party in power[51] (usually the LDP). However, on the

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50. *See* Yasuhiro Okudaira, *Forty Years of the Constitution and Its Various Influences: Japanese, American, and European, in* JAPANESE CONSTITUTIONAL LAW 29-30 (Percy R. Lueny, Jr. & Kazuyuki Takahashi eds. 1993) (for a brief description of the role of the Cabinet Bureau).

51. The following is one example which indicates the bureau's involvement in politics led by the LDP. In 1984-85, Prime Minister Yasuhiro Nakasone was quite enthusiastic about legalizing "official visits" to Yasukuni Shrine and established a private advisory committee to issue a report as to the constitutionality of the "official visits." With a few dissenting opinions, the general tone of the report was in favor of "official visits" on the condition that rites accompanied with the visits be performed not in the traditional manner of State Shinto. It is widely believed that the idea of

whole, the bureau has been regarded as a respected professional team acting with consistency and according to principles.

Since late 1995, some members of the LDP have become increasingly enthusiastic about the idea of having a law regulating the political freedom of religious organizations and have tried very hard to persuade the cabinet bureau to alter its constitutional position as to Article 20(1). These members argue that a change of constitutional interpretation is justified because of the present state of political involvement of certain religious organizations. However, it will be difficult to overturn such a consistently upheld interpretation as the present one.

IV. THE PROPOSED APPLICATION OF THE SUBVERSIVE ACTIVITIES CONTROL LAW TO *Aum Shinrikyo*

The same day that the Tokyo District Court brought the cult organization to the verge of bankruptcy, another fateful blow struck *Aum Shinrikyo*—this time the attack came from the Public Safety Investigation Bureau (*Kōan Chosa-chō*, set up as extra-ministerial board in the Department of Justice) ("PSI Bureau") when it announced the beginning of its investigation[52] of *Aum Shinrikyo* under the Subversive Activities Control Law of 1952[53] ("SAC Law"). The entrance of the PSI Bureau onto the scene was a sign of political maneuvering backstage.

As soon as *Aum Shinrikyo* was reported nationally as allegedly responsible for the two sarin incidents and other various crimes, politicians demanded that this cult organization be completely disbanded.[54] But while some politicians sought to apply and/or amend the Religious Corporation Law, others called for *Aum Shinrikyo's* dissolution by the application of the

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introducing the alternative manner of performing rites in order to overcome constitutional difficulties was born in the process of communicating with some officials of the Cabinet Bureau of Legislation.

Nakasone payed an "official visit" to Yasukuni Shrine on August 15, 1985 (the memorial day of defeating the Pacific War), soon after forming the private advisory committee. Strong protests from various Asian countries including China and both Korean republics resulting in the cancellation of future plans of "official visits" to Yasukuni. The Asian countries bitterly criticized Nakasone's actions on the basis that Yasukuni had recently enshrined the souls of A-class war criminals including Hideki Tojo and that Yasukuni continued to be a symbolic legacy of Japanese Imperialism. Interestingly, since Nakasone's visit, there have been no "official visits" by any administration. *See* O'Brien *supra* note 10, at 169-171 (as to the Nakasone policy of Yasukuni). *See* generally, 848 JURISTO (1985) (providing a collection of materials concerning this matter).

52. *Tokyo Moves to Disband Aum Cult*, THE NIKKEI WEEKLY, Dec. 18, 1995, *available in* LEXIS, News Library, Curnws File.

53. Hakai katsudō boshihō [Subversive Activities Control Law], Law No. 240 of 1952.

54. *See, e.g., 223 Local Assemblies Seek Aum Disbandment*, Japan Econ. Newswire, June 30, 1995, *available in* LEXIS, News Library, Curnws File.

SAC Law. The New Frontier Party in particular urged that the SAC Law be used against *Aum Shinrikyo* and opposed the application of the Religious Corporation Law. This new party wanted so strongly to keep the Religious Corporation Law intact that they did not want to do anything to make the law conspicuous. [55]

Why on earth was the New Frontier Party so keen about leaving the Religious Corporation Law untouched? As discussed earlier, this political party was created in December 1994 by a coalition of various political groups, the major one of which was the former Clean Government Party (*Komeito*), which had been closely connected to the largest religious organization in Japan, the *Soka Gakkai*.[56] It would be fair to say that the New Frontier Party is heavily dependent on the support of this most powerful religious organization. The *Soka Gakkai* has been accused by various groups of being too deeply involved in power politics. On more than one occasion, it has been suggested that the Religious Corporation Law should be amended so that the political activities or political involvement of religious organizations such as those of the *Soka Gakkai* could be limited.[57] An attempt at such highly political legislative reform had never been attempted before the occurrence of the Aum incident. Against this backdrop, it is quite understandable why the *Soka Gakkai* was very cautious about anything which might lead to bringing the Religious Corporation Law to the political arena. That is the reason why the New Frontier Party as well as the *Soka Gakkai* preferred the application of the SAC Law to that of the Religious Corporation Law for the purpose of disbanding *Aum Shinrikyo*.

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55. The New Frontier Party's position favorable to the application of the SAC Law to Aum (instead of the Religious Corporation Law's revision) became evident especially after the election of the House of Councillors in July 1995. *See, e.g.*, TŌKYŌ SHINBUN, Aug. 30, 1995, at 2. *See* TŌKYŌ SHINBUN, Sept. 9, 1995, at 2; SANKEI SHINBUN, Sep. 6, 1995, at 2; NIKKEI SHINBUN, Sep. 13, 1995, at 2.

56. *See, e.g.*, John Kie-Chiang Oh, *The Fusion of Politics and Religion in Japan: The Soka Gakkai-Komeitō*, 14 J. CHURCH & ST. 59 (1972); DANIEL A. METRAUX, THE SOKA GAKKAI REVOLUTION (1994).

57. It is a widely supported observation that the attempt of the Religious Corporation Law's amendment which had started to control *Aum Shinrikyo* now (after the surprising rise of the New Frontier Party in the July 1995's elections of the House of Councillors) shifted its target and that the party in power (LDP) wanted it to control political activities of the Soka Gakkai and other religious organizations. *See, e.g.*, NIKKEI SHINBUN, Sep. 1, 1995, at 2; NIKKEI SHINBUN, Sep. 5 1995, at 2; NIKKEI SHINBUN, Sep. 6, 1995, at 2. *See also* YOMIURI SHINBUN, Sep. 6, 1995, at 3; ASAHI SHINBUN, Sep. 5, 1995, at 2; ASAHI SHINBUN Sep. 14, 1995, at 2; ASAHI SHINBUN Dec. 27, 1995, at 4; TŌKYŌ SHINBUN, Sep. 6, 1995, at 2; MAINICHI SHINBUN, Sep. 6, 1995, at 2; MAINICHI SHINBUN, Sep. 10, 1995, at 3.

In addition to the New Frontier Party, there were still plenty of other politicians in the ruling LDP who were very enthusiastic about the application of the SAC Law for that purpose. The SAC Law had never been applied for the purpose of regulating the activities of any organization since its promulgation in 1952. Right-wing politicians had long sought the opportunity to apply the law, but it did not come until *Aum Shinrikyo's* alleged crimes came to light in 1995. This provided them with the long-cherished chance to apply the law.[58]

Immediately following the revelation of *Aum Shinrikyo's* role in the Tokyo sarin gas incident, the people who hated the group the most tended to think that every tool should be utilized by the government to extirpate the root of this organization. Therefore, it was no surprise that more than 80 percent of the whole population were reportedly in favor of the SAC Law's application to the cult organization.[59] Most people, of course, did not have sufficient information as to what the law was, what kind of problems were involved in its application to such an organization as *Aum Shinrikyo*, and so on. They just wanted the extinction of *Aum Shinrikyo* by whatever means.

A. A Historical Sketch of the Subversive Activities Control Law

Although the SAC Law was promulgated immediately after Japan became independent from the occupation powers, most of its drafting work was done under the regime of the occupation powers. The predecessor of the law was an Imperial Ordinance entitled the Organization and Other Activity Regulation Ordinance,[60] which was made in 1949 under the special authority of General Headquarters. This ordinance aimed to regulate any organization which had attempted to resist or oppose the authority of the occupation powers, or to assist or justify any policies of overthrowing the governmental scheme by violence. It is undeniable that during the whole occupation period the ordinance served as a very efficient apparatus for the execution of occupation policies. For example, it served as a legal basis for conducting political purges of militarists, ultra-nationalists, and the like. It was also utilized by the government to deprive

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58. *See, e.g.*, YASUHIRO OKUDAIRA, KORE GA HABŌHŌ 25 (1996).

59. *See, e.g., Tokyo TV Says Sect Leader Confessed*, WASH. TIMES, Oct. 5, 1995, at A13, *available in* LEXIS, News Library, Curnws File.

60. Dantaitō kiseirei [Organization and Other Activity Regulation Ordinance], Imperial Ordinance (chokurei) No. 64 of 1949 (repealed 1952).

communist members of their Diet seats and to stop the Communist Party from printing of periodicals.[61]

But as the end of the occupation neared and Japan prepared to regain its sovereignty, the government felt the need to replace the Organization and Other Activity Regulation Ordinance with a new law enacted by the Diet. Thus, the Department of Justice began to draft the new law starting in the spring of 1951. After a year-long draft-making process, the government laid a bill before the Diet in April 1952.

The government named the bill the Subversive Activities Control Law. This should remind the older generation of Americans of the U.S. Subversive Activities Control Act of 1950.[62] It should invite no serious objections if the writer characterizes this Act as principally directed against communist and communist-infiltrated organizations and their movements, and as such, as a very unhappy product of McCarthyism or of the cold war mentality.[63]

In the spring of 1952, throughout the country there prevailed public demonstrations and public meetings against the bill.[64] Perhaps there had never been such widespread, organized anti-government movements in the entire history of Japan. The people were worried about the revival of the prewar "police state," seeing in the SAC bill a sign of resurrection of the notorious Peace Preservation Law of 1925.

The bill finally passed the Diet in late July of the year, but only after it had been subject to various changes. (It should be pointed out, though, that changes were in terms of phraseology rather than substance.)[65]

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61. *See, e.g.*, TOSHIMASA SUGINUMA, ET AL., SENGO CHIAN RIPPO NO HATTEN TO TOKUSHITSU, CHIAN RIPPO 29 (1958); Yutaka Miyauchi, *Keisatsu Kiko*, 61 HŌGAKU RONSO, No. 5, at 23 (1955).

62. Act of Sept. 23, 1950, ch. 1024, title I, 64 Stat. 987 (current version at 50 U.S.C. §781 et. seq. (1994)).

63. The similarity of the name in the two laws was not by accident. It has been said that the Japanese law was made under the strong influence of the U.S. law. *See, e.g.*, Yutaka Miyauchi,, *Sengo Chian Rippo no Saihen to Kihonteki Seikaku, in* SENGO CHIAN RIPPO NO KIHONTEI SEIKAKU 25, 47 (1960). However, this is not a place for the writer to try to develop a comparative study of these two laws. Suffice it to say that for the Japanese law the target was also communist movements and their organizations and that as such the law was also an unlucky accessory to cold war policies. To that extent, a similarity can be drawn between the laws.

64. *See, e.g.*, SENGO SHIRYŌ MASU MEDIA, 191-195 (Rokuro Hidaka, ed. 1970). *See also*, SHIRYŌ SENGO 20 NEN SHI: RŌDŌ, 190-196 (Kazuo Okouchi ed. 1966).

65. *See generally* ITARU SEKI, HAKAI KATSUDŌ BŌSHIHŌ KAISETSU (1952) (as to the legislative process).

B. *Analysis of the Subversive Activities Control Law*

The structure of the SAC Law[66] is somewhat complicated. However, we can broadly grasp it by dividing it into two parts: the first part deals with the control of organizations rather than individuals; the second part deals with the criminal handling of individual wrongdoers.

The key concept predominant in both parts is that of "subversive activities by violence,"[67] which is defined in Article 4 of the law. The Article 4 definition is very extensive, providing a long and very complicated list of illegal activities. However, as a matter of convenience, the definition can be divided into two categories. The first category concerns such crimes as rebellion, insurrection, etc.—broadly speaking, something like the U.S. concept of "treason" or overthrow of the government by violence. The second category includes, again broadly speaking, regular crimes defined by the Criminal Code, but committed with special motivations—that is to say, with political intentions. Since the concern in this paper is with the government's attempt to dissolve Aum Shinrinkyo by applying the SAC Law, only the first part of the law dealing with the control of organizations will be discussed here.

The law provides for two ways of regulating organizations. Article 5 empowers the Public Safety Review Commission ("PSR Commission," or simply "agency") to prohibit any organization of a certain type from engaging in activities such as organizing public demonstrations, public meetings, etc., or printing, distributing organs, etc. Article 7 grants the same agency the power to issue an order of dissolution against any organization of a certain type.

Article 5 (provision of the control on organization activities) and Article 7 (provision of dissolution) provide, respectively, the condition prerequisite to the agency's action by almost the same words—except that before issuing a dissolution order under Article 7, the agency shall first consider whether the action prescribed by Article 5 (a less restrictive alternative than dissolution) is insufficient to suppress illegal activities of the organization concerned. The agency may issue either a restraining order or a dissolution order against an organization which the agency deems as having engaged in some "subversive activities by violence " and which will clearly be repeated in the future.

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66. Hakai katsudō bōshihō [Subversive Activities Control], Law No. 240 of 1952.
67. *Id.*

In terms of these whole businesses, the law lays down two administrative steps: first, the PSI Bureau takes the preliminary step of giving information and evidence against the organization; and then, it applies to the PSR Commission for an official action. Finally, the PSR Commission takes the stage and decides formally whether it is a case in which the agency will take any action against the organization.

As indicated above, nine months after the *Aum Shinrikyo* incident, in the middle of December 1995, the PSI Bureau decided to carry out the initial step of giving information and evidence against *Aum Shinrikyo* — what we call the "explanation procedure" on the basis of Article 12. Up to the present, the PSI Bureau has been able to perform only two sessions of the explanation procedure, and nobody knows when the PSI Bureau will finish the whole process, nor what kind of conclusions it will draw.

C. The Constitutionality of the Subversive Activities Control Law

Before the *Aum Shinrikyo* incident, the government had never invoked the organization control clauses of the SAC Law. And as a result, except for public discussions at the time of the legislative process in the early 1950s, there had been no serious constitutional arguments about this part of the law. The law had nearly sunk into oblivion.

But now that the government has decided to apply the dissolution clause to *Aum Shinrikyo*, it is unavoidable for the government to confront the issues of the constitutional validity of the law at every stage of the whole process, including even judicial review by the Supreme Court. Those constitutional issues raised by the SAC Law's dissolution system, rather than the organization control scheme in general, will be discussed below.

Constitutional arguments can be divided into two parts: the substantive aspects of the law and the procedural aspects of the law.

1. Substantive Aspects

The dissolution system of the SAC Law is quite different from that of the Religious Corporation Law. The latter involves merely a deprivation of a legal status (or the privilege) as a religious juridical person, whereas the former constitutes not only the denial of the organization's very existence, but also the direct denial of individual membership. In terms of the effect on people's freedoms (freedom of religious association, freedom of religious performances, freedom of religious communication, etc.), the former system could be more serious than the latter. Therefore, in

considering the question of constitutionality, the former should be subject to stricter scrutiny than the latter.[68]

Article 7 prescribes several conditions for the operation of the dissolution scheme. First, to issue a dissolution order, the agency has to prove that the organization has already conducted "subversive activities by violence." Second, the agency must present enough evidence to support the belief that there is a clear danger that the organization concerned will continue to conduct or will repeat subversive activities as actions of the organization in the future.

The key concept of the SAC Law, "subversive activities by violence," appears here as axial for inflicting, as it were, capital punishment upon an organization. But does the law define this concept precisely and narrowly enough to be constitutional? As noted above, Article 4 of the law gives the definition. The list of what constitutes "subversive activities by violence" is very extensive and very complex. It seems rather difficult not to have doubts about its legal validity.

There are, as already mentioned, two types of "subversive activities by violence." The first is of the "rebellion, insurrection or treason" type (Article 4, Section 1, Clause 1) and the second is of the type of "regular crimes with political motivations"type (Article 4, Section 1, Clause 2). Since the government has not yet tried to deal with the cult organization by using the first category (despite strong pressure by conservative politicians and lawyers),[69] it will not be discussed here. At least at the moment, the PSI Bureau has accused Aum of committing, and plotting to commit, murder with political motivations in the Matsumoto sarin incident of June 1994.

As for political motivations, the law defines this as an "intention to carry out, to support, or to oppose any political principle or policy." Is this phraseology precise and narrow enough to be constitutional? Perhaps it is fine, if you contemplate application of the law to communist or another type of organization with some identifiable political ideology. But if you try applying the law to an obscure, but principally religious, organization like *Aum Shinrikyo*, does this phrase still work as an appropriate standard?

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68. *See infra* p. 148 (as to the strong effect which Article 8 of the law bestows with the dissolution order in an evaluation of the constitutionality).

69. *See, e.g.*, Kazuo Kawakami, *Sōsa, Kōtan no Mondaiten wa Nanika*, HŌGAKU SEMINA, Feb. 1996, at 16. Kawakami, former Public Prosecutor of the Supreme Public Prosecutors' Office, was of the opinion that the government should have indicted Asahara, the guru of Aum, for a rebellion in addition to homicide and other charges.

The law requires that any "subversive activities" shall be recognized as conducted by the organization itself ("as the organization's actions") rather than by its individual members. Again, it might be satisfactory if application of the law to any political association is more or less philosophically consistent. But what about in the case of a cult organization such as *Aum Shinrikyo*? Would it be possible to identify an "organization's actions" as distinct from actions done by individual members in the case of a cult organization?

With regard to the requirement that there be a clear danger, the then-Deputy Chief of the PSI Bureau, who had served as a principal draftsman in the legislative process of the law in 1951-52, wrote a book in which he stated that this requirement was satisfied by showing a possibility of danger.[70] Surely "a possibility of danger" is not enough to meet the law's requirement. At that time in Japan, during the U.S. occupation, the "clear and present danger" test[71] of U.S. jurisprudence was unknown among legislative bureaucrats, perhaps even unfamiliar among legal scholars. Moreover, the writer believes that although the law does not require explicitly that the danger be immediate or imminent, this element should be introduced by interpretation lest the law be declared invalid. In order to correctly say that "there is a clear danger," not only should the danger be precisely existent, but it also should be visible in the very short, foreseeable future, that is to say, in the immediate future. Otherwise, we cannot say that there is a clear danger.

We will have the opportunity again to touch on the issue of the constitutionality of Article 7 from other angles. However, the writer would like to now turn his attention to Article 8, which is deeply connected to the dissolution scheme. Article 8 provides that once the dissolution decree comes into effect, no officer or member of the organization concerned may do anything for the sake of the organization. This article purports, of course, to pursue the dismantling effect as drastically as possible. But, does the wording, "[d]o nothing for the sake of the organization" sound so strong and so indefinite as to be constitutional? It is interesting that a similar phrase had once been in the notorious anticommunist law, the Peace Preservation Law as amended in 1928, from which the prewar "police state" made habitual use of the law.[72]

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70. *See* Seki, *supra* note 65 at 93.

71. Schenck v. United States, 249 U.S. 47 (1919); Brandenburg v. Ohio, 396 U.S. 444 (1969).

72. *See, e.g.*, YASUHIRO OKUDAIRA, CHIAN IJIHŌ SHŌSHI, 102-05 *passim* (1977).

In attempting to apply the law to *Aum Shinrikyo*, the PSI Bureau came to realize that Article 8 had some constitutional difficulties due to its broadness and vagueness. Right after the PSI Bureau took the initial step (the explanation procedure), it made public "Guidelines" for the interpretation of Article 8 immediately before the opening of the explanation procedure. The Guidelines are peculiar in that they did not establish a general standard for legal interpretation, but purported to show the PSI Bureau's policy specifically for application of the law to *Aum Shinrikyo*. The PSI Bureau seemed to try to limit the broadness and vaugeness of Article 8 so that they could avoid its constitutional difficulties. It is, however, quite dubious whether the PSI Bureau was successful in ensuring the law's constitutionality by establishing the Guidelines. Instead, it is arguable that the Guidelines are designed to restrain rather than to protect religious freedom of ex-members of the cult organization.[73] In any event, the Guidelines do not have any legal force and their existence does not prevent judicial review of the constitutionality of the law.

2. Procedural Aspects

Let us proceed to consider constitutional difficulties from a procedural point of view. The operation of the dissolution system starts with an initial request from the PSI Bureau's chief (Article 11). First, the chief shall make a notice of the PSI Bureau's request to open the dissolution procedure and set up hearing opportunities for the organization concerned. There then follows the explanation procedure, in which the representatives of the organization face the PSI Bureau's officials. These initial steps are publicly announced in the government's Official Gazette (Article 12).

It should be noted at the outset that although the explanation procedure handled by the PSI Bureau undoubtedly constitutes an essential part of the whole dissolution system, the law characterizes this procedure just as a preliminary, preparatory step for the final decision to be made by the PSR Commission. Strangely enough, however, the provisions concerning this rather introductory "explanation procedure" are more detailed than those of the final decision-making process!

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73. Helen Hardacre, *Dissolving Aum: Legal Challenges, Future Implications* 13 (1996) (unpublished paper) (on file with author) (giving a critical analysis of the Bureau's Guidelines).

At any sessions of the explanation process, the organization may send no more than five people as their representatives and no more than five people as observers. Furthermore, the law allows people from news-gathering services to attend the sessions — perhaps as representatives of the media (Articles 14-15). As some people may be aware, with this the law seemed to introduce a semi-open type of hearing in the administrative process. In the early 1950's when the concept of due process was rarely known in Japan, the introduction of this type of administrative hearings was quite unique. We can trace this to a U.S. influence. Since then, however, we have developed some meaningful sense of due process.[74] And given our present legal common sense, semi-open types of hearings of that extent are not satisfactory at all. But still, it would be rather difficult to say that the insufficiency inherent in these provisions makes the law unconstitutional, because the constitutional requirement of an open court (Article 82) is not literally applicable here.[75]

Broadly speaking, the procedural rights of the accused organization are well secured, but not entirely free from fault. There is an uncertainty, because of the lack of explicit guarantee, as to whether the accused party has the right to present witnesses on its behalf. As a matter of fact, this problem came up at the first session when *Aum Shinrikyo's* representatives requested to let Asahara Shoko, the guru of the accused organization, take the witness stand. Despite *Aum Shinrikyo's* urgent request, he has not yet appeared as a witness.[76] There exists a certain conflict among the Public Prosecutors' Tokyo District Bureau, the Tokyo Metropolitan Police, and the PSI Bureau surrounding the issue of how to deal with the guru, who is presently being detained in prison and has never appeared before the court for his own trial. Whatever positions may be taken by these three agencies, *Aum Shinrikyo's* request was taken as reasonable and undeniable, but meeting the request will be postponed until some time in the near future. It is certain that if the PSI Bureau should proceed and finish the explanation process without giving the opportunity to the guru or other people to serve as witnesses, the whole process will be regarded as contrary to due process of law and hence invalid.

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74. *See* Okudaira, *supra* note 72, at 13-16 (in respect to the gradual adoption of the concept of due process).

75. Kenpō [Constitution of Japan], art. 82, para.1 ("Trials shall be conducted and judgment declared publicly.").

76 This was true at the time when this article was written. However, he was at last allowed to appear as a witness before the PSI Bureau on May 15, 1996 and May 28, 1996. *See* ASAHI SHINBUN, May 15, 1996, Evening, at 1; ASAHI SHINBUN, May 29, 1996, at 1.

Another procedural defect can possibly be found in Article16. This article provides that the PSI Bureau does not have to investigate any evidence which has been presented by the accused party (Article14 secures the accused party's right to present evidence), if the PSI Bureau deems it unworthy. Undoubtedly this provision gives the PSI Bureau discretion that is too broad. Thus, the law tries to limit such discretion by adding the proviso that the delegated officials shall take caution not to unjustly restrain the accused party's right to fair treatment. The real point is, perhaps, in the actual operation of the proviso.

After the explanation procedure has completely finished, the PSI Bureau must determine whether it will continue or discontinue the dissolution procedure. If it chooses to continue, the PSI Bureau shall send all of the evidence that was presented before the explanation procedure as well as all minutes of the proceedings (Article 20). From this phase on, the PSR Commission acts as the sole player.

In view of the legal structure in which this commission is the agency to decide the matter concerned and the PSI Bureau is merely an organ to collect (by handling the explanation procedure) proper and necessary information for consideration by the commission, it seems rather mysterious that the procedural clauses for the former are weaker than those for the latter. There is no provision for the right to hearings or any other kind of procedural rights on the part of the accused party. It seems that the law allows the PSR Commission to reach its decision mainly on the basis of the oral testimony, the documents, and other written material that have been produced by the PSI Bureau. In other words, the law appears to presuppose that the case is decided in secret sessions by the one-sided handling of the commission. This is the reason, the writer submits, why the law here, being different from the case of the explanation procedure, is utterly silent about the accused party's representation and about the attendance of observers or representatives of news-gathering services.

It is true, that the law (Article 22) provides that in the decision-making process "the PSR Commission may make any investigations which it deems necessary." For example, the PSR Commission may summon any interested parties, references, and the like. But it appears that it is left to the discretion of the PSR Commission to determine what kind of investigation is necessary and when it should be performed. The law says nothing about the reservation of rights of the interested accused party.

The writer submits if the PSR Commission carries out its "review" process in its own way without compensating for the silence of the law, the

decision thus reached will inevitably invite critical arguments about due-process protection.

For better or worse, the SAC Law is unusual in the Japanese legal system in that action such as the disbandment of an organization is carried out through administrative procedures. This kind of action in other fields is, as a rule, taken by the judicial courts.[77] For instance, as we already know, *Aum Shinrikyo's* dissolution as a juridical person under the Religious Corporation Law was carried out by the court. In upholding the constitutionality of this disorganization scheme, as will be recalled, the Supreme Court offered different reasons, one of which concerned the fairness of the procedure. In this respect the Court placed emphasis on the fact that the system was handled by a judicial court. It is highly interesting to observe how this kind of reasoning will be applied to the case of *Aum Shinrikyo's* dissolution under the SAC Law.

3. Problems That Remain

So far we have briefly discussed the constitutionality of the SAC Law with respect to the dissolution scheme it sets up. The next question is whether this part of the law could be properly applied to the case of *Aum Shinrikyo*. The most serious problem in doing so is the issue of how the government will be able to overcome the requirement for the dissolution order provided by Article 7 of the law. The government has to prove, for example, that there is a clear and present danger that the cult organization will continue to conduct or will repeat in the future similar kinds of illegal activities as those involved in the two sarin incidents as well as other incidents. Is this organization still capable of conducting "subversive activities by violence," despite all of the subsequent events such as the bankruptcy declaration to preserve assets to be paid as the damages of the victim groups, the denial of the status as juridical person, and the imprisonment of a great number of persons, including the guru and other leaders of the cult group? But, however interesting they may be, these are all matters of application of the law beyond the scope of this article and left for the analyses of other writers.

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77. *See, e.g.*, Shōhō [Commercial Code] art. 58, (with respect to the dissolution of a commercial company); Dokusen Kinshihō [Anti-Monopoly Law] art. 95 para. 4 (in the case of disbandment of a trade association which is deemed to have violated the law).

V. A FEW WORDS FOR PERSPECTIVE

The LDP formed a special "Working Team" (headed by a former Minister of Education, K. Yosano) and assigned it to deliberate on issues of "Politics and Religion" and to produce a draft law which accommodates the conflicting interests in this very sensitive area. Already at the end of the year, it was reported that the team had made a first draft for the bill provisionally called "Fundamental Law on Religion" or "The Fundamental Law on the Separation Between Politics and Religion."

The contents of the draft as publicly reported[78] are remarkably extensive: a definition of "religion" and "religious organizations," several provisions concerning the separation between the state and religion, the relationship between education and religion, various provisions on the regulation of religious organizations' activities, and a special provision on the dissolution of religious organizations among others.

There is no doubt, however, that the main target of the draft law is the regulation of political involvement of religious organizations. The draft imposes, first of all, upon religious organizations the duty to concentrate on religious activities along the line of their own religious doctrines (it, of course, contains a proviso that it does not prevent them from engaging in public interest activities). Apparently, the most essential part of the draft is this:

> [N]o political party or member of the Diet may utilize any religious authority or religious doctrines in order to assert the legitimacy of its (his/her) political position, etc. . . . No religious organization may form a political party aimed at the realization of its doctrines. No religious organization . . . may contribute any amount of money to any political party, political organization, member of the Diet, or any local government assembly . . . .

Obviously, this part of the draft is in conflict with the constitutional guarantee of religious freedom, unless one repudiates the established interpretation of Article 20(1) and replaces it with a new interpretation that that clause prohibits religious organizations from having a commitment to politics. That is the reason why the LDP, notwithstanding that it is the most influential of the parties in power, was unable to get any legislative

78. See, *e.g.*, CHŪGAI NIPPO, Feb. 1, 1996, for the most recent and well-formed draft.

assistance from the Cabinet Bureau of Legislation. The bill, if finally completed, will be presented to the Diet under the names of individual members of the LDP and other affiliated parties, not by the sponsorship of the government itself.

At the outset, the LDP seemed to attempt to provoke public sentiments against the abuse of privileges and immunities of religious organizations and their involvement in politics so that by the spring of 1996 they could create to a certain degree conditions that would be advantageous for the enactment of their bill. But it turned out, on the other hand, that from the end of 1995, much more serious problems developed, and all of the energy of politicians was consumed to confront these problems.[79] These events have forced the LDP to delay drafting of the "Fundamental Law of Religion" and presenting it to the Diet. However, even without the interference of new political crises, such a drastic legislative attempt as this will not be successful under the present circumstances since the concept of constitutional guarantee of freedom of religion has been so firmly established among the people that the attempt will inevitably have to be confronted with people's resistance on a wide scale. It seems no single political party or even a coalition of a few parties has any political powers to carry forth such an energy-consuming undertaking.

The main target of constitutional challenge in the field of religion has been set on the establishment clause (Article 20, Clause 3) because of the legacy of various forms of state-Shintoism.[80] This tendency will likely continue, but the Tokyo sarin gas incident has shrouded another constitutional clause (Article 20, Clause 1) in controversy as well. It remains to be seen whether government interference in the affairs of religious organizations shall become an enduring area of constitutional controversy.

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79. The most troublesome topic is how to settle the failure of housing loan companies—a symbolic issue of the aftereffects of the late "bubble era" of economics. Additionally, the redefining of the Security Treaty between Japan and the United States as well as the settlement of the Okinawa problem are also very serious. Next comes the HIV problem, which originally concerned the Welfare Ministry, but has now developed into a public demand for open government generally.

80. Some examples of this legacy include the Yasukuni shrine issue and the issue around the Emperor's various rituals.