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Self-regulation in Private Law in Japan and Germany

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Self-regulations and Constitutional Law in Japan as Seen from the Perspective of Legal Pluralism

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I. Introduction

For years, I have been interested in legal pluralism and have been investigating the ways in which non-state laws coexist with state laws from that perspective.[1] My interest in legal pluralism is based on the question of whether traditional state law can properly cover newly emerged spheres of human activity, which tend to extend beyond national borders in accordance with the development of globalization, and on the presumed possibility that self-regulation in these spheres can complement state laws or can function as non-state "laws" instead of state laws. I usually focus on these self-regulations in the global context, looking, for example, at international NGOs' rules on self-organization; at the laws regarding the Internet, such as those sustained by ICANN; at the lex sportive, as found in rules institutionalized by the IOC or the world soccer associations; at the lex mercatoria, which is often connected with international arbitration; at the various kinds of standardization or certification systems related to global environmental law and governance; and so on. While these are comparatively recent examples of non-state rules or regulations, there are also more traditional transnational laws such as Islamic law and Jewish law.

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1 Y. Asano, From the Theory of Private Law to Legal Pluralism: On the Reconstruction of Private Law in the Age of Globalization, Japanese Yearbook of international Law 57 (2015) 163–178; TLI Think! Paper 18/2016. Available at SSRN: *https://ssrn.com/abstract=2767862.*

However, the idea of legal pluralism focusing on various functional areas such as Internet communication, market transactions, religious activity and so on, which are possibly regulated more effectively and more properly by self-regulation or through private governance than by the state,[2] can be applied to domestic cases relating to these functional areas.[3] Also, most of the historical origins of legal pluralism are rooted in the study of plurality of law in domestic contexts, such as the coexistence of the colonial law and the native law in a colonized country.

Thus, in this article, as a Japanese researcher who has studied legal pluralism, I would like to consider a domestic case of self-regulation in Japan, *Japan v. Nakaya,*[4] from that point of view and would like to look at the lessons learned from it.

There are four reasons why I take up this case. First, this case referred to a religious issue, which is one of the traditional topics of legal pluralism. Second, it is a famous Supreme Court case concerning the relationship between Japanese constitutional law and self-regulation, and also a case that raised strongly divided opinion among the courts as well as in the academic sphere.[5] Third, as evident from the second reason, this case looks very different according to the perspective one takes. Fourth, the case seems to reflect characteristics of Japanese culture, especially to the eyes of foreign people, and it thus makes sense to choose it as a topic for communication on legal as well as cultural matter between Japan and Germany.

In following sections, I introduce the gist of this slightly complicated case (section 2), analyse the Supreme Court's judgment (section 3), explicate three different views on the case (section 4), and add some considerations from the perspective of legal pluralism (section 5), before providing a brief conclusion.

II. The Gist of the Case

In 1973, Yasuko Nakaya, widow of Takafumi, a deceased member of the Ground Self-Defense Force (hereinafter SDF) who had died of injuries in a traffic accident while on active duty, sued to have his Shinto enshrinement,

2 P. Zumbansen, Transnational Legal Pluralism, Transnational Legal Theory 1 (2014) 147, 151.

3 On the connection between the functionalism emphasized in legal pluralism and the domestic welfare state government, see *ibid.,* 144, 173.

4 *Japan v. Nakaya* (*Ji'ei-kan gōshi hanketsu,* The Serviceman Enshrinement Case) Supreme Court, 1 June 1988, Minshū 42, 277.

5 In contrast to the negative decision by the Supreme Court toward Mrs. Nakaya, many media outlets and legal scholars saw her as a victim or a heroine. See Y. Obuki, *Kenpō no kiso riron to kaishaku* [Foundational Theory and Interpretation of Constitutional Law] (Tōkyō 2007) 546.

which had taken place at the request of the Yamaguchi chapter of the Self-Defense Forces Friendship Association (hereinafter, SDF Friends or the Friends, a private association composed of SDF ex-servicemen and their families) rescinded.

In 1972, the Friends had petitioned the Yamaguchi Shinto Gokoku Shrine, a shrine for war dead, for the "joint enshrinement" *(gōshi)* of the spirit of Mrs. Nakaya's deceased spouse, along with the souls of twenty-six other deceased servicemen. The SDF Regional Liaison Office, a state agency, cooperated with and supported the Friends in making this petition. The petition was carried out according to the self-regulation of the Friends – that is, the "rules of practice for worship of servicemen deceased on duty at Yamaguchi Shinto Gokoku Shrine"[6] – and the organization and the purpose of establishment of the Friends were prescribed by the articles of association and other detailed rules.[7]

Mrs. Nakaya, a Christian since 1958, opposed the enshrinement, arguing that the Friends, as an auxiliary of the SDF, a state agency, was bound by the constitutional norm of separation of religion and the state. She demanded the retraction of the original petition for joint enshrinement, and asked for one million Yen from the Friends and the Government of Japan as compensation for violating her personal religious rights under the constitution.

The district court rejected Nakaya's demand that the petition for enshrinement be rescinded, but awarded her damages to be paid by the Friends and the state. The Friends and the government brought an appeal to the High Court against the adverse portion of the district court's judgment (*kōso*), as did Mrs. Nakaya in a supplementary appeal. The Hiroshima High Court affirmed the first instance judgment for the most part. The government then brought an appeal to the Supreme Court *(jōkoku)*.

III. The Judgment of the Supreme Court

The Supreme Court vacated the first instance judgment and dismissed the case. Its reasoning can be constructed as follows:

First, the Supreme Court denied the fact of substantial involvement of SDF as a state agency in the course of the petition made by the Friends of the Yamaguchi Gokoku Shrine. It said the joint enshrinement was basically achieved through the efforts of the Friends only, which was acting on the request of the families of deceased SDF members and negotiating with the shrine under its own name. The SDF Regional Liaison Office only gave the Friends the reports of examples of other Gokoku shrines that had already enshrined servicemen

6 Supreme Court, 1 June 1988, Minshū 42, 358.
7 Supreme Court, 1 June 1988, Minshū 42, 378.

who had died on duty in addition to the previous war dead, as well as contacting Mrs. Nakaya and other family members. Thus, it was said that this case was not necessarily one between the state and an individual, but rather between a private association and an individual, as well as between Mrs. Nakaya and Yamaguchi Gokoku Shrine (also a private legal person), which actually enshrined Takafumi based on the petition made by the Friends.[8]

Provided that the SDF's involvement was limited, the next issue to be considered by the court was whether this involvement violated Article 20, paragraph 3 of the Japanese Constitution (*Nihon-koku Kenpō* of 1946), which prescribes the separation of religion and the state.[9] The court suggested its case law showed that religious activity under said article should not be construed to include any acts related to religion, as this would lead to impractical and unreasonable conclusions concerning deep and widespread connections between religion and social custom. Thus, the article should be interpreted to prohibit only those acts whose purpose has religious meaning and whose effect is to promote, aid or support specified religions, or to suppress or interfere with other religions.[10] The actual actions of the SDF Regional Liaison Office staff had an indirect relationship with religion. Their purpose and intention were assumed to be to raise the social status and morale of SDF members, not to encourage their religious attitudes to take a specific direction. These actions would not be considered by the general public as having the effect of the state drawing attention to a particular religion or suppressing or interfering with another religion.

Provided there was no violation of the Constitution by the SDF, the court finally investigated whether Mrs. Nakaya's legal interest of freedom of religion had been infringed by the Friends. Despite the original judgment that the joint enshrinement infringed upon Mrs. Nakaya's legal interest in a

8 Yamaguchi Gokoku Shrine had denied Nakaya's request to rescind the enshrinement before the litigation. For the shrine, it was not acceptable for an enshrinement to be nullified because it would mean blasphemy against the once-enshrined entity.

9 Article 20 reads:

"1. Freedom of religion is guaranteed to all. No religious organization shall receive any privileges from the State, nor exercise any political authority.

2. No person shall be compelled to take part in any religious acts, celebration, rite or practice.

3. The State and its organs shall refrain from religious education or any other religious activity."

10 This is called the "purpose-effect test", established first by the *Tsu jichin-sai hanketsu* (Tsu Ground God Ceremony Case), Supreme Court, 13 July 1977, Minshū 31, 533. For an analysis of cases applying this "purpose -effect test" and recent pertinent developments, see F. RAVITCH, The Shinto Cases: Religion, Culture, or Both – The Japanese Supreme Court and Establishiment of Religion Jurisprudence, Brigham Young University Law Review (2013) 505.

peaceful religious atmosphere and her religious rights as a person, the Supreme Court suggested that an argument for constitutional rights, when applied to cases between private parties and not those between the state and an individual, has to take into account both parties' equal freedom – in this case, both Mrs. Nakaya's religious rights and the Friends and other family members' religious rights. Based on the religious plurality characteristic of Japanese society, a claim to one's religious rights should entail tolerance for other people's religious activity, even when this activity does not accord with one's religious beliefs, unless the individual in question is compelled to take part in a religious ceremony held by others or their own religious activity is suppressed by those others.

In this case, Mrs. Nakaya was not compelled to participate in the ceremony held at Yamaguchi Gokoku Shrine. The Friends simply sent a mail which read: "Offerings for the Sacred Eternal Prayer in memory of Shinto Deity Takafumi Nakaya are solemnly accepted. Hereafter, a memorial service will continue to be held on 12 January forever." The offerings were actually paid for by the Friends, using money donated by other Friends members. Mrs. Nakaya kept Takafumi's remains in a charnel at her church and prayed for him annually at a memorial ceremony held by the church, without any disturbance from others. Based on these facts and reasoning, the court concluded that her legal interest in religious freedom had not been infringed.

This was the majority opinion of the court. There were four supplementary opinions and three different opinions with the same conclusion and one dissenting opinion.

IV. Three Different Stories About this Case

Shrines in Japan were established for the worship of the mainstream gods and goddesses, such as Amaterasu, who is said to be an ancestor of the Japanese royal family, as well as many local gods and goddesses who were originally the opponents of the mainstream ones. Historically, many Japanese people have become accustomed to the idea of the enshrinement and deification of losers of political battles or persons who have lost their lives to tragedy, in order to console their souls and avoid later misfortune.[11]

Because the tradition is based on polytheism and other related elements of Japanese culture, it is not surprising that this idea of enshrinement seems strange or nonsensical to many people whose religions originated from monotheism or who belong to non-Japanese cultures. As for Takafumi, however, he

11 Japan's long-standing tradition of enshrinement of such people who might become vengeful spirits is explained, for example, in M. Saiichi, *Chūshin-gura to ha nani ka* [What is *Chūshin-gura*] (Tōkyō 1984).

was said to have no specific religious belief, Christianity included, and it is not irrational to assume from the fact that he belonged to the SDF that he did not strongly deny or hate Shintoism and its related idea of protecting the nation.[12]

Even given this common understanding, as I mentioned earlier, the case looks very different depending on which viewpoint one takes. Let me explicate three ways of viewing and understanding this case.

1. Opponents of the Judgment

From the viewpoint of the opponents, this case demonstrates one of the typical problems in traditional Japanese state ideology. The Supreme Court's finding that the SDF's cooperation with and support of the Friends was trivial is contrary to the facts. In line with the intention of the Defense Ministry, the SDF had long been campaigning for the enshrinement of servicemen who had died on duty at certain Gokoku shrines across Japan in order to raise the morale of servicemen, who are said to guard the state.[13] In the course of this campaign, they also promoted the idea of death for the state as death with honour.[14] This idea is a remnant of Japanese authoritarianism and militarism passed on from the generations who lived before the war. In this case, the SDF actually checked and reported on existing examples in various Gokoku shrines of the enshrinement of servicemen who had died while on duty and wrote a draft of the "rules of practice for worship of servicemen who have died on duty at Yamaguchi Gokoku Shrine" as well as the prospectus for donations for worship on behalf of the Friends. Almost all the individuals who contacted Mrs. Nakaya in person were SDF staff members working for the Friends' office, which was located in the same building of the SDF Regional Liaison Office. Thus, this case provides a typical example of authoritarian ideology being supported by a part of the state and a part of Japanese society and successfully suppressing the freedom of an individual.

This view may be supported by the sceptical feeling that a part of the Japanese population holds towards Shintoism based on negative historical experiences prior to the end of WW II.[15]

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12 On this point, see the claim made by the State as the defendant in Supreme Court, 1 June 1988, Minshū 42, 371–372, and the adverse claim made by Mrs. Nakaya (*ibid.,* 349)

13 Supreme Court, 1 June 1988, Minshū 42, 301.

14 See N. ASHIBE, *Ji'ei-kan gōshi to seikyō bunri gensoku,* [Joint Enshrinement of a Serviceman and Principle of Separation between State and Religion], Hōgaku Kyōshitsu 95 (1988) 12–13.

15 *Masaji Chiba* points out that while it is possible to see *jichin-sai* as a non-religious custom, based on the legal theory of the separation between state and religion (*supra* note 10), it is not proper as a political choice considering the history of Japan, which used Shintoism to support the national ideology during the wars. See M. CHIBA, *Asia-hō no tagenteki kōzō* [The Plural Structure of Asian Law] (Tōkyō 1998) 302–303.

2. From the Viewpoint of the Private Relationship

The second way of viewing the case is from the perspective of the private relationship involved within the conflict. From this viewpoint, despite any commitment the SDF was said to have made, the SDF itself had no strong intention to enshrine Mrs. Nakaya's deceased spouse against her will. The story only started with the fact that some families of deceased SDF members expressed their personal desire to have the deceased jointly enshrined at the Gokoku Shrine. Upon hearing this, the Friends and the SDF cooperated to realize the families' desire. In fact, after recognizing that Mrs. Nakaya did not wish to have Takafumi enshrined because of her religious faith, SDF staff tried to cancel the application for his enshrinement. However, knowing this, Takafumi's father asked that it not be cancelled. Later, the father sent the Friends a letter signed by the family members, including Takafumi's sister and brother, himself and even Mrs. Nakaya's father. It stated that they were all very happy and wished for Takafumi to be enshrined. The SDF and the Friends were embarrassed and asked Mrs. Nakaya to consult with the father.[16] Entangled in conflict within the family in such a way, Mrs. Nakaya felt that the SDF's attitude was irresponsible and insincere. She thought that her will should take priority. The SDF felt caught in a dilemma. This impasse seemed to provide the background for the court to talk about the necessity of tolerance between private parties.

3. From the Viewpoint of the Church Group's Involvement

The third view focuses on the Christian association to which Mrs. Nakaya belonged. In 1958, she was baptized at the Yamaguchi Shin'ai Church of the United Christian Church, which was led by the priest Kenji Hayashi. He had organized study sessions opposing a series of legislative measures aimed at establishing government funding for the Yasukuni Shrine, which was established to enshrine the souls of loyalists who had died in the Meiji Restoration and went on to include imperial subjects who had died in WW II. He suggested that one of the members of the study group collect signatures for a petition to protest the state funding for Yasukuni.[17]

When the SDF and the Friends began to contact her about her deceased husband's enshrinement, she consulted with Priest Hayashi about the correct way to worship. Previously, Mrs. Nakaya had attended the Buddhist funeral ceremony for Takafumi held by the SDF and the Buddhist memorial service held by his father. She also bought a Buddhist altar for her home so that she could worship him.[18] But she hesitated to have him enshrined at the Gokoku

16 Supreme Court, 1 June 1988, Minshū 42, 391.

17 N. FIELD, In the Realm of a Dying Emperor (New York 1991) 124–125.

Shrine. Hayashi strongly supported her denial of the enshrinement and accompanied her to meet SDF staff members to protest against it.[19] The Friends claimed that while they were only trying to console the souls of deceased SDF members, Priest Hayashi politicized the case, promoting Mrs. Nakaya's discomfort to make her situation part of his campaign against Yasukuni Shrine, which didn't have any direct relation to the local Gokoku Shrine.

V. The Case from the Legal Pluralism Perspective

From the viewpoint of legal pluralism, this case can basically be explained as one in which the court admitted room for the autonomy of a private association's – the Friends' – self-regulation. It is also the case that the Supreme Court demonstrated the limits of the direct application of a constitutional right to solve conflicts within a family or between private associations. The theories used to justify the constitutional limit and the application of an association's self-regulation were "the indirect or restricted effect of constitutional law when applied to a case between private parties" in general and the idea of tolerance between different religious beliefs specific to the case.

From a legal-pluralist viewpoint, which does not expect state laws to take priority in all cases and tries to accept different values existing in a society, this reasoning can mostly be appreciated. However, there do seem to be some problems.

First, it must be pointed out that nobody can really deny the fact of a strong relationship between the Friends and the SDF, whatever the constitutional consequences of that relationship. Even if one denies the relationship between them as the Supreme Court did with its formalistic way of understanding the fact, one can never deny social or ideological continuity between them.[20] Legal pluralism often supports powerful self-regulations substantially backed by the state or state laws, contrary to its idea of promoting plural values or interests within a society expressed by norms other than state laws. This sort of danger of legal pluralism explains why many scholars see this case as an example of the indifference and insensitivity to an individual's religious freedom in the Japanese state court.

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18 Supreme Court, 1 June 1988, Minshū 42, 377–378.

19 Supreme Court, 1 June 1988, Minshū 42, 354.

20 On the formalistic interpretation the Supreme Court used and its relationship with the Japanese style of *"Institutsgarantie"* theory relating to the "separation between state and religion", see K. Sato, *Nihon-koku kenpō-ron* [A Theory of Japanese Constitutional Law] (Tōkyō 2011) 236–237. On the opposition to the Court's use of the *"Institutsgarantie"* theory to avoid the direct judicial review of violations of an individual's rights in this case, see T. Inoue, *Hō to iu kuwadate* [Law as Project] (Tōkyō 2003) 174–176.

Second, in terms of the conflict within the family, the other family members seemed to show no respect for Mrs. Nakaya's wish to avoid the enshrinement. Takafumi's father and other family members went over her head to the SDF to deny her wish without contacting her. There also seemed to be no respect for her wish on the part of SDF staff, who were reported to have said at the beginning of the petition procedure that she must be glad about the enshrinement of her spouse as a Japanese national. Additionally, after the litigation, Mrs. Nakaya was reported to have received numerous harassing telephone calls and threatening letters, saying things such as "You are possessed by a devil" or "Go to a Christian country!"[21] The Supreme Court's preaching of tolerance toward Mrs. Nakaya was not so effective given such intolerance in Japanese society towards a person belonging to a minority group, as she did.[22] We should be careful of the oft-cited collectivism in Japanese society when considering the actual results of legal pluralism. It may sometimes lead to the result that only the stronger party can enjoy its norms, while the interests of the weaker party are sacrificed.

As mentioned above, I expect positive possibilities to emerge from legal pluralism, according to which people may enjoy and coordinate their activities in line with their own reasonable order, irrespective of whether this is state law or non-state law. In pursuing this, we need to avoid the danger of hidden collusion between certain types of self-regulation and state law, which may lead to the hidden imposition of state ideology by the state under the guise of private, voluntary action. We also need to be sensitive to the danger of collectivism when considering whether to support legal pluralism.[23]

Thus, what conditions are necessary for the self-regulation in this case to function in a more proper way? In other words, what conditions would have had to be fulfilled for this self-regulation to function as a "law" providing reasonable guidance regarding the activities of the people involved in this case. Here, we can utilize lessons from legal pluralism.

Three issues can be pointed out. First, one of the biggest problems in this case was that the relationship between the state and the private association, the Friends, was too close. As a result, the state entangled itself in the serious conflict within the family through the activity of the Friends. With a more autonomous position as a private, mutual aid association which did not advocate for Shintoism in the name of the state, the Friends' self-regu-

21 FIELD, *supra* note 17, 133–136.

22 See N. SASAGAWA, *Shūkyō-jō no jinkaku-ken no rekishi-teki igi* [Historical Meaning of Personal Right on Religion], Hōritsu Jihō Vol. 60 No. 10 (1988) 60–61.

23 On the complicated relationship between liberalism and legal pluralism, and the cases where liberalism based on individualism is incompatible with legal pluralism, see R. MICHAELS, On Liberalism and Legal Pluralism, in: Maduro/Tuori/Sankari (eds.), Transnational Law: Rethinking European Law and Legal Thinking (Cambridge 2014) 125–130.

lation for offering condolences to deceased people could have been more reasonable and justifiable.[24]

Second, even if the relationship between the SDF and the Friends had been slight enough to be ignored, the Friends' self-regulation was deficient in that it only anticipated agreement from and within the families of the deceased, thereby neglecting the possibility of disagreement from individual family members. It required more comprehensive rules for cases where there were disagreements – for example, a rule giving priority to the surviving spouse's wishes or a rule preventing the unauthorized use of a person's name as a donor.

However, such imperfections of self-regulation cannot be perfectly avoided in many cases. Thus, for a self-regulation to function as a law, as reasonable guidance for people's conduct, some device or institution to find and amend deficiencies on demand is necessary. This is the third point. Here, the importance of the procedural setting has to be emphasized.[25] Information disclosure systems, such as the disclosure system for directors' remuneration used in the Japanese corporate governance code, can work in some cases. But one of the most advocated methods is the institutionalization of some dispute resolution system. With the term "dispute resolution", I don't mean the court-like system only. The process can be a more informal or more primitive one intended to hear the voices of the parties involved. In this enshrinement case, there were no rules regarding a process for hearing grievances.

VI. Conclusion

In conclusion, for a self-regulation to become a "law" directing people's conduct outside the state law, it needs (1) enough autonomy from the state organization, (2) enough comprehensiveness of the rules to be applied to possible cases, and (3) some institutionalized process for hearing claims (grievances). To the extent that these requirements are fulfilled, a self-regulation can be a "law" to be applied beyond parties to contracts or people who obey the rules of any association on a fully voluntary basis. This seems to be a suggestion we can obtain from the perspective of legal pluralism in our domestic case.

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24 Berman suggests that when a non-state legal practice is internal, the practice should be given more leeway than when the state is part of the relevant affiliation, thereby taking account of the community affiliation analysis, which reflects a pluralist vision of conflict law. P. Berman, The Evolution of Global Pluralism, in: Cotterrell/Del Mar (eds.), Authority in Transnational Legal Theory (Cheltenham, UK/Northampton, MA, USA 2016) 162–163.

25 In the area of legal-normative regimes outside of the nation state, the shift from legitimacy based on state constitutional order to legitimacy based on process and procedure has to be emphasized. See P. Paiement, Paradox and Legitimacy in Transnational Legal Pluralism, Transnational Legal Theory 4 (2013) 198, 203, 213.