

RELIGIOUS FREEDOM

UNDER THE MEIJI CONSTITUTION

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Religious Freedom in the Making of the Meiji Constitution

The Meiji Constitution of 1889 guaranteed the freedom of religious belief in its Article 28. Notwithstanding, this article is analyzed negatively by eminent scholars interested in the subject. Standard commentaries on the constitutional law of Japan elucidate that the article's guarantee of religious freedom within the limit not prejudicial to peace and order and not antagonistic to the duties as subjects was fundamentally different from the New Constitution's unconditional guarantee in that the truly meaningful part of the article in the Meiji Constitution was the limitation of the freedom and not the guarantee of the freedom.¹

This interpretation of Article 28 is a sector of the viewpoint that the Meiji Constitution was an illiberal and absolutist document which the Meiji oligarchs installed in opposition to and for the suppression of the liberal and democratic demands of the Movement for the People's Right. American scholars and administrators during and immediately after the war interpreted the Meiji Constitution and saw the Japanese politi-

1. Seimiya, pp. 140-141.

cal structure of the modern times in much the same way.²

However, some scholars observe the Meiji Constitution from a broader perspective. George M. Beckmann, tracing the making of the Meiji Constitution, concluded that it was basically a compromise embodying a feudal-based authoritarian political philosophy and the demand of the Movement for People's Right for representative government.³ George Akita, on the other hand, rejects this thesis of compromise and emphasizes the enlightened and independent leadership of the Meiji oligarchs by pointing out the more advanced state of mind among the ins than among the outs, the comparatively mild measures of the government for the control of the anti-government movements, and the incomparable strength of the government over the Movement for the People's Right.⁴ In a more recent publication, Joseph Pittau affirms that the Meiji Constitution was not as illiberal and absolutist as some interpreters assume and that a new theory of the state, which was essentially based on an uneasy marriage of absolutist ideas with modern constitutional principles bound together by mythical traditions, emerged in the framing of the Meiji Constitution.⁵

In Japan, Inada Masatsugu completed a most comprehensive study of the history of the making of the Meiji Constitution⁶ and Ienaga Saburō presented a provocative viewpoint which observes the history of the constitution as the growth process of the consolidated civil rights and which regards the political mechanisms

2. Typically, Bisson, pp. 401-417; Scalapino, pp. 83-87.

3. Beckmann, *Making*, p. 95.

4. Akita, pp. 159-177.

5. Pittau, pp. 197-201.

6. Inada, I and II.

such as parliamentary system and division of powers as mere organizational means to secure the civil rights.⁷ Although the conclusions vary, these studies agree in rejecting the viewpoint that the Meiji Constitution was straightforwardly illiberal and absolutist.

These studies thus provide the basis for doubting the validity of the negative explanation of the guarantee of religious freedom by Article 28 of the Meiji Constitution. This chapter purports to re-examine the article with a positive valuation. Whether independent or interdependent, provided that a few oligarchs that made the Meiji Constitution, the Movement for People's Right, the progressives and ultra-conservatives in the government, and the Western political philosophers constituted the elements that contributed to the formation of the Japanese constitutional thought. These people produced draft constitutions as the clearest expression of their ideas, so that a portrait of their constitutional articles on religious freedom serves as the scale to assess the comparative position of the Meiji Constitution's guarantee of religious freedom. Therefore the discussion below will delve first into the religious freedom article in the available early draft constitutions prepared by the rights and lefts of the ins and outs and evaluate them against the Meiji Constitution, and, second into the Meiji Constitution's drafting process regarding the religious freedom stipulation.

In modern Japanese history, the first person who became aware of the necessity of a written and published fundamental principle of government was Kido Kōin. Kido wrote in his

7. Ienaga, *Nihon kindai*, pp. 3-10.

diary on January 31, 1872, that he had proposed in 1868 the adoption of the Charter Oath of Five Articles in order to define the direction of the nation while the society was unsettled in the turmoil of the Restoration, that the new government arrived at stability and needed a better defined fundamental law. He also wrote that he was determined to examine for that purpose the fundamental laws and structure of the governments of the advanced Western nations which he would visit with the Iwakura Mission. His diary indicates that he had his secretaries collect books and other materials on constitutional government in the United States, Great Britain, and other nations in Europe. It also indicates that he visited Rudolf von Gneist, who was professor emeritus of the University of Berlin and a reputed proponent of monarchical constitution, and was much impressed with this man.

On August 2, 1872, Kido met Aoki Shūzō, Shinagawa Yajirō, Katsura Tarō, and others in London and discussed with them the fundamental principles of the government for the future Japan. Possibly at this occasion Kido instructed Aoki, who then was chargé d'affaires at Berlin, to draw up a draft constitution for Japan.⁸

Aoki agreed with Kido's idea, started research for Kido, and consulted with Gneist. Aoki learned from Gneist, among other principles, that religious matters were important elements for the preservation of a nation's peace and order, that the selection and administration of the established religion should accord with the tradition of the nation, and that Germany

8. Kido, II, pp. 226, 351-352.

established Christianity because of its historical and ethical contributions. Aoki was warned by Gneist of the danger of introducing foreign religions and was advised that the would-be Japanese constitution should stipulate the prohibition of Catholicism and the establishment of Buddhism.⁹ Aoki incorporated this advice of Gneist in his making of a draft constitution.

Aoki completed the first known draft constitution, the *Governmental Principles of Great Japan* (Dainihon Seiki) in the spring of 1873 and submitted it to Kido.¹⁰ This draft prohibited Christianity and other alien religions and provided for the establishment of Buddhism as the state religion.¹¹ The first draft constitution in existence thus definitely rejected the principle of religious freedom.

In July, 1873, Kido returned from Europe and proposed the government establish a fundamental code of government, emphasizing that the civilized sovereigns and officials of the West governed the subjects in accordance with the fundamental law of the nation. He also told the high officials that he had a draft constitution for their consideration, which should have been the Aoki draft.¹²

Aoki continued his research and wrote another version, the *Governmental Code for the Imperial Great Japan* (Teigo Dainihon

9. No record of what Gneist told Aoki is available, but a record of Gneist's lecture to Fushiminomiya and Hijikata Hisamoto is available in Yoshino, ed., III, pp. 431-477. The similarity of the content of Aoki's draft article on religious matters with that of the above mentioned lecture (pp. 454, 457, 458, 464-465 and 474) implies that the content of the information to Aoki, Fushiminomiya, and Hijikata Hisamoto, and Itō later was identical.

10. Aoki's letter to Kido, dated June 2, 1873, cited by Inada, I, p. 199.

11. Inada, I, p. 214; Beckmann, *Making*, p. 101.

12. Beckmann, *Making*, pp. 27-28; Inada, I, pp. 196-199, 205.

Seiten), between November, 1873, and May, 1874. In compliance with Japan's abolition of the prohibition of Christianity as of February, 1873, this draft constitution stipulated that every citizen should enjoy the freedom to believe or practice any religion and that citizens should enjoy the same civic rights irrespective of one's religious affiliation.¹³ This stipulation was the first instance of acknowledging the freedom of believing in and practicing Christianity as well as other religions as a basic constitutional principle. Special importance is due to this provision because it indicates that at this early stage the document that reflected the constitutional thinking of a most powerful leader in the government, Kido Kōin, guaranteed religious freedom. Furthermore, it demonstrates the close relation between the abolition of the prohibition of Christianity by the Western impact and the explicit guarantee of religious freedom in the situational context.

Meanwhile the government appointed Itō Hirobumi and Terashima Munenori to be in charge of investigating governmental reform plans on November 20, 1873.¹⁴ Kido's summary of the draft prepared by Aoki and Ōkubo's constitutional opinion which argued for the monarchical government, provided for the governmental structure including the institution of deliberative assembly (*Giseiin*) but lacked any provision for the rights and duties of citizens,¹⁵ were filed with Itō and became the basis of the following discussion. Toward the end of 1873, the government was planning, as a next step, to open a council of local

13. Inada, I, p. 214

14. Beckmann, *Making*, p. 28; Inada, I, p. 204; Osatake, I, p. 317.

15. Beckmann, *Making*, pp. 11-119.

officers (*Chihōkankaigi*) during September of 1874. However, primarily due to the crisis caused by the Formosan issue which invited Kido's resignation from the government, the convocation of the council of local officers became impossible and the program of constitution making was shelved for the time being.¹⁶ The Aoki draft went into oblivion due to the political confusion in 1874.

Two years after Aoki drew up the draft constitutions for Kido, the *Genrōin*, the government department responsible for legislation, came to work on the codification of the fundamentals of the nation. Upon the Imperial sanction of September 7, 1876, the chairman of the *Genrōin*, Arisugawa Taruhito, appointed a committee of four members of the *Genrōin*, Yanagisawa Sakimitsu, Nakajima Nobuyuki, Fukuba Bisei, and Hosokawa Junjirō, and ordered it to draw up a draft constitution. The committee, referring to the translation by Inoue Kowashi of the Prussian and the Belgian constitutions and being assisted by the staff including Guido Verbeck who had translated the Danish and the Italian constitutions, Tanaka Kōzō who had translated the Spanish, the Swiss, the Portuguese, the Dutch, and the Austrian constitutions, and Du Bousquet who had translated the French constitutions after the Revolution, completed a draft, the first *Draft National Constitution* (*Kokken An*), during October, 1876, and presented it to the chairman of the *Genrōin*. This draft included an article for the guarantee of religious freedom upon condition that the practice of religion would not obstruct the government or the good customs of society. The commentary

16. Inada, I, pp. 204-210.

that came in a separate volume indicated that in preparing this article the drafters referred to the corresponding article(s) of the constitutions of Prussia, Austria, and Denmark.¹⁷ The *Genrōin* produced the second draft in July, 1878, and the third draft in July, 1880, both of which retained the same provision regarding the conditional guarantee of religious freedom.¹⁸ The *Genrōin* drafts' inclusion of the limited guarantee of religious freedom denotes that those intellectuals who were working in the government considered the limited guarantee of religious freedom as a need in Japan's future constitution because they recognized it as a common practice among the civilized nations.

The *Genrōin* draft constitutions did not satisfy the powerful oligarchs such as Iwakura Tomomi and Itō Hirobumi, who rose to the highest prominence after the deaths of Kido, Ōkubo, and Saigō between 1877 and 1878. Itō wrote to Iwakura that the *Genrōin* draft constitution was a crude conglomeration of information randomly collected from constitutional articles of European nations without paying enough attention to the Japanese body politic and social customs.¹⁹ Itō's opposition to the *Genrōin*'s draft was concerned with its immaturity and did not involve specific criticism of the clause concerning religious matters. Itō's opinion that the draft was immature was supported by Iwakura, and the final draft of the *Genrōin* presented to the throne was shelved by the government.²⁰ The

17. *Ibid.*, pp. 291-292, 295, 311, 318-319, 324; Miyakoshi, p. 19.

18. Inada, I, pp. 333-337.

19. *Ibid.*, pp. 335-336.

20. Beckmann, *Making*, p. 52, finds, "Final action regarding the draft was taken by the oligarchs in March, 1881, when it was officially rejected, and Ōki and Yamada were ordered to revise it," but according to Inada, I, p. 337, the *Genrōin* handed it to the Throne on December 28, 1880, with the understand-

Genrōin's committee for making a draft constitution was dissolved on March 23, 1881.²¹

While the *Genrōin*'s committee was deliberating on their draft constitution and the result was being found dissatisfactory, some of the oligarchs memorialized their constitutional opinion in 1879 and 1880, and had their protégés draw up draft constitutions personally. Several draft constitutions were completed in connection with the move of Iwakura Tomomi, Yamada Akiyoshi, Yamagata Aritomo, Inoue Kowashi, and Ōkuma Shigenobu.

Iwakura, ideologically the most conservative among the leaders in the government, held an opinion that the constitution should be based on Japan's traditional body politic. While he urged Inoue Kowashi to write a constitutional platform in refutation of the advocates of radical Westernization, his fundamental conviction found an eloquent expression in Motoda Eifu.

Motoda, a Confucian lecturer of Emperor Meiji, was not involved in the oligarchical politics, but had direct information from and influence upon the Emperor through his daily attendance on the Emperor. In 1879, when Motoda was asked by the Emperor to criticize the second *Genrōin* draft, he revised several articles, including Article 14 which he modified to read that Japanese subjects might believe in any religion they chose unless the religion should run counter to the state religion and the civil and governmental affairs. He added to that provision

ing among Iwakura, Itō, and other oligarchs that His Majesty would neglect it.
Inada, I, p. 337.

22. *Ibid.*, p. 437.

that the state religion was the ethical religion of the divine ancestors and Emperors, known as Confucianism or as devoted loyalty to the nation and the Emperor, that this ethical religion had waned in modern times, and that the constitution should establish this state religion and should stipulate the subjects' duty to observe it.

In 1880, Motoda wrote a draft constitution titled the *Essentials of the National Constitution* (Kokken Taikō) and presented it to the Emperor. Article 3 and Article 5 of this brief document consisting of only seven articles read as follows:

(Article 3) Benevolence, Righteousness, Rites, Humbleness, Loyalty, and Filial Piety shall be the basic principles of the State Religion. All the subjects, high and low, the governmental constitution, and all the laws shall accord with these principles.

(Article 5) The Emperor shall rule over the religion and morality of the nation.²³

Motoda thus provided for the enforcement of a Confucianistic state religion and the unity of religion and government under the theocratic monarch, but did not at all postulate the civic rights of the people. He opposed the separation of church and state and consequently excluded the principle of religious freedom. The ultimate importance of government for Motoda was for a peaceful, orderly, and morally unified nation, and therefore the idea of civil rights including that of religious freedom he flatly denied.

Motoda's ideology was refuted by Itō. In fact, Itō, in an address at a meeting of the Association of Political and Social Sciences (*Kokka Gakkai*), attested that in those days when the

23. *Ibid.*, p. 439.

constitution became the concern of the government leaders, a traditionalist scholar of national learning argued for the revival of Prince Shōtoku's ethico-religious rules of government and that with the advancement of research and after the introduction of the Western ideas the modern constitutional principles buttressed this outdated opinion.²⁴ Hence, Itō, the maker of the Meiji Constitution, consciously defied the traditionalist demand for the inclusion of ethico-religious prescripts in the fundamental law of the nation in favor of the modern Western political philosophy of the separation of church and state.

Yamada Akiyoshi, a Chōshū man and the first to be appointed Minister of Justice when the cabinet system was instituted in 1885, was another oligarch who early became interested in a constitution. When Aoki was drawing up draft constitutions for Kido in the early seventies, Yamada seconded Aoki and Kido and propagated the need of a constitution to other oligarchs. After being asked by the government to submit his constitutional opinion in 1879 and having complied with the order in 1880, in September, 1881, Yamada himself wrote a draft constitution titled *A Draft Constitution* (Kempō Sōan). Yamada's article guaranteed religious freedom on condition that the right of opening temples and churches depended on regulations of law and that religious freedom did not exempt citizens from the civil duties as subjects.²⁵ Yamada thus stipulated more specifically the basis of governmental control of religious institutions and more positively the limit of the freedom of religious practice for the individual citizens than Article 28 of

24. Itō, "Hompō kempō."

25. Osatake, *Nihon kensei shi*, pp. 198-209.

the Meiji Constitution. In view of the fact that this document remains in the libraries of Itō and Iwakura,²⁶ Itō must have known of this article. Then this is a sign that Itō chose to be more positive in the guarantee and to be less specific in the limitation in stipulating religious freedom into the Meiji Constitution than his colleague expected to implement it.

Yamagata also was one of those whom the government ordered to submit a constitutional opinion in 1879. His response of 1880 observed the need of opening a public assembly with the government holding the right to dissolve it and recommended the making of a constitution at this assembly.²⁷ Thereafter Yamagata requested Nishi Amane, a scholar who had studied as the Shogunate's student abroad in the Netherlands, to compose a draft constitution for him. Nishi wrote a draft on the Dutch model of which the title was *A Draft Constitution* (Kempō Sōan), and submitted it to Yamagata in the autumn of 1882.²⁸

Nishi's article relating to religion, however was unique and not an adoption of a Dutch constitution article. It read:

Citizens shall enjoy the freedom of religious belief, provided that building chapels, performing religious practices, organizing religious congregations, and propagating religious doctrines shall be prohibited for those who open or import a religion not extant as of the present unless they are granted the toleration of the government and conform to the regulations stipulated by law.

Note: Toleration means for the government to permit the religion's entry only and does not mean for the authority to support it.

Citizens shall be equally entitled to the enjoyment of private and public rights, and to the assignment of aristocratic ranks and official posts, regardless of their religious affiliation.

Note: The existence of the established Anglican Church in England and

26. Inada, I, p. 552.

27. *Ibid.*, P. 427.

28. *Ibid.*, p. 557; Hackett, "Nishi," pp. 214-215.

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the Jewish believers in European nations necessitated such a provision in the West. Although Japan has not experienced difficulties caused by the religious diversities, this article will prove useful in the future.

The worship at indigenous Shintō shrines is the symbolic expression of acknowledging civic obligations and human virtues, and shall not be understood as a matter of religious belief. Shintō worship shall be based upon the popular will and the donation at such occasions shall be decided by citizens in accordance with the local customs and individual resources.²⁹

Nishi's article for Yamagata here guaranteed for individual citizens the right to believe the religion of their choice. This article, however, presented the position of separating Shintō from religions and identifying it with the national customs and of keeping for the government the control of organizational religious practice, including the veto for the opening and entry of religious bodies. It thus forecast Yamagata's forthcoming attempts to establish the machinery of spiritual identification such as the Imperial Rescript on Education of 1890 and the abortive Religions Bill of 1899.

Itō's comment on this article is not available, but a comment by Inoue Kowashi, Itō's right-hand man in the making of the Meiji Constitution, is kept on record. Inoue, in a letter to Yamagata, stated that the article providing that the worship at indigenous Shintō shrines was the symbolic expression of acknowledgement of civic obligations and human virtues and should not be understood as a matter of religious belief which ought to be removed.³⁰ That is to say, a chief architect of the Meiji Constitution opposed the viewpoint which later became a pretext for the state support of Shintō at its embryonic stage.

The next item, *An Opinion Concerning the Constitution* (Kokken

29. *Nishi*, II, pp. 206-207.

30. *Ibid.*, p. 200.

Iken) published in the *Tokyo Daily News* (Tokyo Nichi Nichi Shimbun) from March 30 to April 16, 1881, was written under the supervision of Inoue Kowashi, then the chief of the legislative bureau in the government, and by the hand of Fukuchi Gen'ichirō, who had accompanied the Iwakura Mission as a secretary, was closely affiliated with Itō Hirobumi and Inoue Kaoru, and was then the editor of this newspaper for the dissemination of the government's viewpoint.³¹ It therefore bore the character of a semi-official propaganda. The section relating to religious freedom of this document provided that the Japanese citizens should freely believe in any religion they chose and that all the religions should enjoy equal protection from the government. It accompanied an explanation which stated that citizens should enjoy the freedom to believe any such religion, whether Shintō, Buddhist, or foreign, that did not teach people to violate the provisions of law or to hurt the good customs of society. It further stated that the government should not interfere with religious worship nor grant special privileges to a religion while denying equal opportunities to others. The would-be constitution should not establish a state church, it contended, even though some constitutions of European countries established state churches because the system was the vestige of the uncivilized times which remained as an expediency rather than a desirability.³² This draft guaranteed religious freedom with its explanation setting the limit within the boundary of law and good customs of society. The general tone emphasized the guarantee and not the limitation. It is especially important that the explanation

31. Yoshino, ed., III, pp. 6-7.

32. *Ibid.*, pp. 381-405; Cf. McLaren, p. 494.

clarified the separation of the government from religions and demanded that the government treat all religions equally. It attests that Fukuchi and Inoue Kowashi, and quite possibly Itō and Inoue Kaoru, held a view positively to guarantee religious freedom and to restrict the government from arbitrarily controlling religious matters.

Ōkuma Shigenobu, who was the most powerful oligarch after Ōkubo's death in 1878 until his purge in October, 1881, formed another core of the movement to introduce constitutional government. He expressed his basic constitutional viewpoint in a delayed memorial of 1881 in answer to the 1879 inquiry. The document, which was written by Yano Fumio, a brain trust of Ōkuma and a senior disciple of Fukuzawa Yukichi, stated that a constitution should clarify the polity of the nation and the civic rights of the citizens, and recommended an immediate establishment of a national assembly and a cabinet system on the English model.³³ Also he submitted with it a private draft constitution including a chapter on the guarantee of civil rights. If this draft constitution were practically identical with the *Private Draft Constitution* (Shigi Kempō) of April, 1881, written by Yano and his friends gathered around Fukuzawa, its article on religion provided that the Japanese citizens should enjoy the freedom of observing the religion of their selection unless by so doing they should infringe upon the peace of the nation.³⁴ This article positively guaranteed religious freedom, but it also stipulated the boundary of freedom in such broad terms as the "peace of the nation." Provided that it did not forsake any

33. Inada, I, pp. 458-461.

34. Yoshino, ed., III, p. 410.

limitation nor set the limit with specific law, the religious freedom article in this draft constitution was fundamentally identical with what would appear in the Meiji Constitution.

Whereas Itō staged the purge of Ōkuma on the pretext of fundamental difference of constitutional opinion, Itō's disagreement with Ōkuma was essentially the question of timing rather than with his political philosophy. Regardless of so many explanations of the cause of the 1881 crisis, Itō and Ōkuma were much closer to each other in their political philosophy than to the conservative Confucianists and Satsuma oligarchs.³⁵ It is not a mere coincidence but a proof of an identical philosophy that a positive guarantee of religious freedom with a broad term limitation to religious practice was stipulated in the Ōkuma related draft constitution.

These draft articles made for men in the government almost always included two fundamentally contradictory orientations, though with varying degrees, one was the contention that the government should guide and control the religious belief of the subjects for the benefit of the state. The other was the position

35. Yano Fumio recollects as follows: In those days, Ōkuma, Itō, and Inoue [Kaoru] were all progressives, and often paid friendly visits to one another to exchange their views and perspectives. Although the three discussed much, none of them had yet formulated any concrete plan [of a constitutional government]. They agreed on opening a parliament, but they were not at the stage of discussing the date of its opening. They also agreed on making a constitution, but they had no idea if they would follow the example of England or Germany. As I was confident by myself that I should be one of the best learned in the knowledge of the parliamentary system of England, I wrote reports on the subject and gave them to Ōkuma. . . . Ōkuma used my paper with an objective to influence Sanjō, Arisugawa, and Iwakura. . . . Ōkuma took it for granted that Itō and Inoue, with whom he kept constant and friendly contact, would agree with him. . . . Hiratsuka, pp. 216-217.

that recognized the authority of the people's will and guaranteed religious freedom as the basic right of citizens. The degree of emphasis varied from the ultra-rightist position Motoda and Iwakura promoted which was based completely on the former principle to the most lenient Yano and Ōkuma position which assumed the latter position as a matter of principle. Despite the difference in degree, all the articles except that of Motoda positively guaranteed religious freedom for people at large, while keeping the faculty of controlling that freedom for the government within certain limits. It has also been suggested that Itō's position in 1881 vis-à-vis religious freedom was in conformity with the most lenient Yano-Ōkuma position.

In the meantime, since Itagaki Taisuke's resignation from the Grand Council of State on October 27, 1875, the constitutional movement among the citizens unaffiliated with the government became intensified and reached its peak during the early 1880's. The leaders of the Movement for People's Right demanded the opening of a diet and the establishment of a constitution, and expressed their ideals by means of private draft constitutions.³⁶ The representative drafts of this kind known today include the *Draft National Constitution of Japan* (Nihonkoku Kokken An) of August, 1881, by Ueki Emori and the *Prospective Draft Japanese Constitution* (Nihon Kempō Mikomi An) of September, 1881, by Sakamoto Namio, both written for Risshisha of Tosa, the political association which was under the banner of Itagaki.

These two draft constitutions provided that the citizens should

36. Ienaga, *Nihon kindai*, pp. 43-81, presents an analysis of the draft constitutions in this era and evaluates the private drafts in the orthodoxy of the development of the constitutional democracy.

enjoy freedom of religious observance and did not provide any limitation. Ueki wrote religious freedom among the thirty-five items of civil rights while Sakamoto enumerated thirty items of civil rights. They defined civil rights as the entities to be in confrontation with the government authorities, and consequently included in the drafts the people's right to revolt against a despotic government.³⁷ They did not categorize religious freedom as an item of religious administration, but as an inherent asset of the people. The idea of complete religious freedom thus presented itself in the constitutional movement that fought against the government authorities.

Itagaki's Movement for the People's Right found response from many local politicians. Some leaders of those local movements toward parliamentarism wrote their opinions into draft constitutions. Comprising this category are: *A Prospective Constitution of Great Japan Outlined* (Dainihon-koku Kempō Tairyaku Mikomi) of February, 1880, by Oshio Misao and others for the Association of Mutual Brotherhood of Chikuzen (*Chikuzen Kyōai Kai*), a voluntary association for the promotion of the popular participation in the government composed by the citizens of northern Kyūshū area,³⁸ *A Constitution of Great Japan* (Dainihonkoku Kempō) of November, 1880, by Sawabe Seishu and others who were intellectual merchants and petty landowners of Kyoto,³⁹ and *A Draft Japanese Constitution With Reference to the Constitutions of Western Nations* (Kakkoku Taishō

37. Hayashi, "Ueki," pp. 88-109; Suzuki, *Jiyū*, pp. 264-285; Inada, I, pp. 392-393, 407-409.

38. Hayashi, pp. 65-76.

39. Harada, pp. 65-76.

Shikō Kokken An) of November, 1881, by Doi Kōka and others written for a local paper established as the organ of constitution-
alists of Shizuoka Prefecture.⁴⁰ These draft constitutions in-
cluded an article to guarantee religious freedom, but all of them
placed the freedom within certain boundaries. The Oshio
draft provided that religious practices that contradicted the
laws and customs of the state were liable to punishment in accor-
dance with law. The Sawabe draft postulated that the funerals
and festivals should be practiced under the supervision of the
state authorities, and the Doi draft provided that the religious
practice should conform to the provisions of law. In view of
these draft articles, the authors of which used the *Genrōin* draft
and the published draft constitutions of Fukuzawa groups as
the reference in their writing, the prospect of the constitutional
guarantee of religious freedom within some limitation had al-
ready become a national consensus by the early 1880's.

The constitutional movement included another distinct group
affiliated with Fukuzawa Yukichi. The draft constitutions by
this group included: *A Private Draft Constitution* (Shigi Kempō
Sōan) of May through June, 1881, by Fujita Mokichi and others
which appeared on the *Yūbin Hōchi Shinbun*, the daily newspaper
published by the disciples of Fukuzawa,⁴¹ and *A Proposal of the
National Constitution* (Kokken Shikō) of July, 1881, by Minoura
Katsuto and others for the Hyōgo Association of the Constitution
Study (*Hyōgo Kokkenhō Kōshū Kai*).⁴² These draft constitu-
tions are practically copies of the Yano draft discussed earlier,

40. Hayashi, "Tokai," pp. 58-70.

41. Suzuki, *Jiyū*, pp. 318-344.

42. Hayashi, "Saikin (1)," pp. 65-67.

and provided an article guaranteeing religious freedom within the limit that the observing of the religion should not infringe upon the peace of the nation.⁴³ This group did not see the issue as the confrontation of the people against the government, and yet regarded it as an issue related to the popular right.

To summarize, there was one extremely absolutist draft article which refuted any civil right concept and, consequently, disapproved of religious freedom. There also were extremes in the opposite direction which rejected any governmental control on religions and provided for unconditional guarantee of religious freedom. The majority of draft articles, however, guaranteed religious freedom with a positive attitude, while setting a limit on religious practice by law, customs, peace, and other public precautions. Therefore, it is possible to assume that in the early 1880's the median intellectuals approved of the constitutional establishment of the principle of religious freedom while demanding the obedience of the citizens to the order of the civil state.

Returning the narrative to the movement in the government, Ōkuma's spring, 1881, recommendation to open a diet immediately and to establish a constitution in accordance with the English model invited an emotional and unanimous opposition from the Sat-Chō oligarchs who believed in the gradual introduction of a constitutional system with the maximum power kept in the government. More specifically, Ōkuma's radical recommendation offered Itō who felt Ōkuma broke the oligarchical courtesy by making his opinion public without consulting and

43. Hayashi, "Tokai," p. 67; Suzuki, *Jiyū*, p. 342; Hayashi, "Saikin(1)," p. 74.

getting consent from him. It drove Itō to join the conservative Satsuma oligarchs such as Kuroda Kiyotaka, Matsukata Masayoshi, and Saigō Tsugumichi, all of whom agreed to Itō's drafting a moderate constitution according to the Prussian model in order to refute Ōkuma's position. During the summer of 1881, the Sat-Chō oligarchs plotted the removal of Ōkuma from the government and arrived at an agreement by the end of September. After their tactical maneuver, Ōkuma was purged on October 12, 1881.⁴⁴ These events established Itō's draftmanship of the constitution.

Thereafter, on December 6, 1881, Terashima Munenori, Chairman of the *Genrōin*, proposed to Iwakura to send Itō to Europe for the investigation of the constitutional systems in operation and to have him prepare the project relating to the establishment of the constitutional government. Iwakura, after consultation with Inoue Kaoru, Oki Takato, and the two other *Daijin*, Sanjō and Arisugawa, agreed with the proposal and recommended to the Emperor the dispatch of Itō to Europe. Thereupon the Emperor sanctioned Itō's going to Europe for the investigation of the modern Western governments on March 3, 1882. Itō accepted the Imperial sanction and left Japan for Europe with his staff on March 14, 1881.⁴⁵

44. Akita, pp. 32-57; Beckmann, *Making*, pp. 53-60; Inada I, pp. 511-518, 527-530.

45. Beckman, *Making*, pp. 69-70; Inada, I, pp. 565-566; *Itō Hirobumi den*, II, p. 252; Osatake, II, p. 655. Inada traces the consultation among the oligarchs and ascribes the decision of Itō's dispatch to the agreement among the oligarchs. Whereas Beckmann, succeeding the analysis of Osatake, finds the cause in the decision by Sanjō, Iwakura and Arisugawa to the question from the Emperor. Whichever the case may be, both support the thesis that Itō had established a wide credit for his suitability for drafting the constitution by the end of 1881.

During his stay in Europe which lasted for thirteen months, Itō concentrated his efforts on attending lectures of Rudolf von Gneist, with Albert Mosse serving as a tutor, and Lorenz von Stein. Itō spent an additional two months in England, but did not do much there beyond collecting materials relating to constitutions of different countries.⁴⁶

Gneist expounded to Itō his position that the native tradition should be esteemed, that the government should keep its impartiality by detachment from the influence of political parties, and that the state religion should be established. He told Itō that the establishment of a state religion was instrumental in building up the spiritual integrity of the subjects and therefore in strengthening the nation. Gneist advised Itō that the would-be Japanese constitution should establish Buddhism as the state religion because it was the traditional religion of Japan just as Christianity was so and established in Germany. He added that the government might tolerate other religions but should differentiate those private religions from the state religion.⁴⁷ Thus Gneist advocated a position that opposed the principle of separation of church and state and, in essence, promoted the governmental manipulation of religious affairs.

Itō agreed with the thesis that emphasized the tradition of the nations and that authorized the detachment of the government from party politics, and wrote admiringly to his colleagues in the Japanese government that Gneist efficiently explained the argument that would refute the promoters of the Anglo-French parliamentary democracy. Itō, however, did not necessarily

46. Inada, I, pp. 568, 597-598.

47. *Ibid.*, pp. 569-579; Pittau, pp. 142-144; Yoshino, ed, III, pp. 431-477, cf. note 9.

agree with all that Gneist propounded. Regarding religious matters, Itō believed that, even though Christianity provided the spiritual foundation in the Western nations, the theory of strengthening the spiritual basis of the nation by establishing a state religion would not work in Japan and that the Japanese constitution should not establish Buddhism as a state religion because Buddhism would not stand for that task. Itō wrote that if a counterpart of Christianity should be found in Japan, that would be the enhancement of the loyalty to the Emperor, but none of the existing religions this seems unfinished. Actually the whole thing beginning with "Itō wrote" seems to be a sritrice fragment. Ito found that Gneist was too conservative.⁴⁸ He did not go along with the program of the establishment of a state religion.

Stein, a Viennese sociologist, also endorsed the monarchical government, and yet held a more liberal perspective than Gneist. Stein observed that the course of history consisted of the triangular struggle of the individual, the society and the state, all of which were highly interdependent. In this triangular relationship, the moving force and the individual and his destiny; and, the human existence being imbedded in society with his innact pursuit of larger power, the persistant friction was the nature of society. The state, that was added as a new element in the struggle for human existence in society, was the personification of the general will, which in principle was beyond class antagonism and whose functions were to secure perfect freedom and, thereby, to further the development of all individuals. The state, thus, was the force for human improvement. The best

48. Pittau, p. 144; Watanabe, *Nihon Kensei*, pp. 361-365; Reischauer, E. O., p. 533.

system for this reform process was the guidance from above by the social monarchy, where religion was an important agent of the self-fulfillment of individuals. Religion, consequently, was given a significant value in Stein's frame of reference. Stein, therefore, spoke emphatically of the necessity for citizens to be guaranteed the enjoyment of religious freedom, and at the same time for the state to establish the legal foundations for the guidance and administration of religions. The latter was necessary for the assurance of the former, because religions, if left to be autonomous, would compete with one another and obstruct the real freedom of religions in as much as political parties would destroy the growth of welfare in their pursuit of factional interest.⁴⁹

Itō was deeply impressed with Stein. Itō expressed his admiration of this sociologist in his letter to Iwakura, stating that he now felt that he grasped the fundamentals of the monarchical constitutional theory which refuted the tenets of the parliamentary democracy of England and France and that he was convinced he was capable of rebutting the arguments of the Movement for People's Right with his new learning.⁵⁰ Itō even attempted to invite Stein to Japan as the adviser in drafting the constitution, although Stein declined from taking the offer on the grounds of his age and family situations.⁵¹ These instances attest that Itō fully confided in Stein.

Provided that such was the case, Itō at the end of his investigation in Europe was reconfirmed in his belief in the signifi-

49. Yoshino, ed., IV, pp. 300-318; Pittau, pp. 133-136.

50. Inada, I, pp. 583-584.

51. *Itō Hirobumi den*, I, pp. 317-333.

cance of religious matters for the state and yet he did not accept the proposition of establishing a state religion. He must have believed after Stein that a constitution should guarantee religious freedom and also provide for the state to set the limit in the activities of religions, not because the government should manipulate religious aspects of human life but because the state function should moderate the unlimited competition among religions which would eventually obstruct the religious self-fulfillment of some individuals. Itō's constitutional opinion then must have been positive not only toward the guarantee of religious freedom but also toward setting the limit of religious activities within the scope of the order of the state.

On his return to Japan on August 3, 1883, Itō started to lay the foundation for the introduction of the Western constitutional system. On March 17, 1884, Itō completed the establishment of the Bureau for the Investigation of Constitutional Systems (*Seido Torishirabe Kyoku*) in the Imperial Household Ministry, and he himself filled the chairmanship of the bureau. On March 22, Itō chose the staff including Inoue Kowashi and Itō Miyoji, adding Kaneko Kentarō on April 15, 1884. From the spring of 1884 to the autumn of 1886, Itō implemented the supportive systems for the introduction of the constitutional system. Namely on July 7, 1884, the new peerage system was introduced which elevated the promoters of the restoration to the five ranks of peers so that they would be obligated to the Emperor and support the Imperial government. The modernization of the central administrative authority was effected by replacing the Grand Council of State (*Dajōkan*) with the Cabinet (*Naikaku*), thus making the nation's highest authority

the assembly of the responsible heads of the administrative department. Itō assumed the premiership of the new machinery in which the higher centralization of authority was vested.⁵²

Itō came to focus his efforts on drafting a constitution from the autumn of 1886. He officially requested Inoue Kowashi to investigate and draw up a draft constitution during November, 1886. Inoue returned a letter to Itō which indicated his acceptance of it and his basic principles of emphasizing the royal prerogative and the national tradition.⁵³ In drawing up the draft constitution Inoue asked for the advice of Hermann Roesler. Roesler, a German political scientist with publications in sociological jurisprudence and political economy and a member of the faculty of Tokyo Imperial University since 1878, had served the Japanese government as a legal adviser.⁵⁴ He prepared a draft constitution for the use of Inoue and handed it to him during April, 1887.⁵⁵

Roesler's draft included an article that stated that freedom of religious belief was guaranteed within the limit that the worship was neither prejudicial to public peace and order nor antagonistic to the duties of the citizens as subjects.⁵⁶ In another work prepared for Inoue's use, *Commentaries on the Constitution of the Empire of Japan*, he explained his position regarding religious affairs in detail. He wrote:

52. *Ibid.*, II, pp. 381-389, 462-464, 484-489; Inada, I, pp. 691-692, 699-700; McLaren, PP. 87-88; Beckman, *Making*, p. 73.

53. Inada, II, pp. 2-4.

54. Siemes, "Herman Roesler," pp. 2-4, 11; Pittau, pp. 138-141.

55. Inada saw the German text at the Inoue Kowashi home before World War II, but he cannot find the original any longer. Japanese text in Inada, II, pp. 104-116.

56. Inada, II, 111-112.

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By this article of the Constitution, freedom of religious belief is granted to the Japanese subjects. This is a decisive step towards the principles of Western civilization and will prove equally beneficial to the government for the progress of its international relations and to the subjects for the development of their intellectual and moral capacities. Religious belief offers the fundamental rights and duties of man and greatly determines the system of law and of policy in a nation. Consequently the constitutional liberties of a people could not be complete and would lack their proper foundation without the constitutional freedom of religious belief. Experience shows that freedom was in all Western countries gradually introduced under the influence of modern constitutional government. In the preceding periods the religion of the subjects was a matter of governmental determination and inequality of rights was intimately connected with the diversity of religious belief. In Europe during the middle ages, the Catholic Christian belief only was acknowledged by the governments and any disbelief or heresy was treated as a great crime liable to capital punishment; only the Jews were tolerated to a certain extent under burdensome restrictions and without the enjoyment of the rights of Christian subjects. Yet they could be expelled at the pleasure of the governments, and were frequently persecuted and deprived of their property. At the end of the middle ages in consequence of radical religious commotions and after many contestations and wars, the principle was established that the princes had the right of determining the religion of their subjects: thus, after various fluctuations, in England, the Protestant faith, and in France, the Catholic faith were enforced upon the people; while in the different German principalities the Catholic or Protestant faith was enforced upon the subjects according to the Catholic or Protestant faith of their princes and magistrates. Disbelievers that would not submit to such enforcements were only allowed to emigrate into another country. But in the following centuries, through the progress of civilization this principle was gradually mitigated in practice, and the principle of religious tolerance sanctioned by treaties and legislation. Thus it appears that the present article of the Japanese Constitution is in full accordance with the principles prevailing in the Western countries.

The freedom of religious belief implies the following rights: 1) every one is free to adopt a certain religious faith, or change the same according to his own internal conviction, but in some countries a certain age, as conditional of the maturity of judgment is required therefore; 2) upon no one can a certain religious faith be enforced by the government; 3) no one can be persecuted or punished, or deprived of the full enjoyment of his civil and public rights on account of his religious faith; 4) no one can be obliged to confess a religious faith at all; 5) no religious faith can be forbidden in the country; except for reasons of peace and order.

Religious belief, as a matter of internal conviction concerning the relations between God and man, is in itself purely spiritual and confined to the human soul. But every faith requires an external exercise as every one has a natural impulse and desire to act according to his faith. Therefore, freedom of religious belief must include the freedom of its exercise; otherwise it would be dead and valueless liberty. However, there is a great variety of the exercise of faith, and a great difference of laws in that respect in the other countries. In Japan, as the Constitution has nothing directly provided, with regard to the exercise of religion, such exercise only can be deemed to be included in the freedom of belief as may be naturally implied, that is to say; 1) the exercise by private or domestic worship within one's family; 2) the right to freely express religious opinions, but not by public teaching; 3) the right to institute one's life and to act generally according to one's religious belief. But every one remains under the existing laws, and the police ordinances and regulations upholding the public peace and order; and under his duties as subjects, for instance with regard to public morals, safety, peaceable relations between the subjects, the performance of military service and so on. If the law of the country does not allow bigamic marriages, no particular religious belief could justify disobedience to such law. So in every respect the freedom of religious belief refers exclusively to the affairs of individual and domestic life, but has no influence on the free exercise of the sovereign rights of the State and for its public interests.

The freedom of religious belief does not include the right of public exercise of any faith, as mainly by public worship and public teaching or preaching. Such public exercise of religion is intimately connected with the formation of religious communities, the institution of religious authorities and ministers with powers of administration, jurisdiction and discipline in religious matters, of erecting churches and chapels, of levying contributions and the like. Religious communities may be either corporations, public or private, or mere associations without the privileges of corporate bodies. The formation of such communities requires generally the sanction of the State and their organization is subject to the approbation of the State authorities according to the existing laws and ordinances.

By the Japanese Constitution the public exercise of religion is not freely permitted, but remains entirely under the existing laws and ordinances; and further settlement of these grave matters belongs to the future policy of the government. Religion is not altogether a private affair, nor can all the different religious denominations enjoy the same equality of rights. A state religion may be established upon the basis of national faith, and privileges may be accorded to such religion or to others related therewith.⁵⁷

57. Siemes, *Herman Roesler*, pp. 78-80.

Here Roesler first traced the historical development of religious freedom in the West and positively evaluated the Japanese constitution's guaranteeing religious freedom on the scale of modern Western nations. Secondly, he specified the content of the guaranteed religious freedom for individual citizens, enumerating the right to choose a religion by one's own decision, the right of no specific religion being enforced by the government, equality in civil and public rights in spite of the difference in religious faith, the right to refuse to confess one's belief, and the right to entertain any religion. Thirdly, he affirmed that religious freedom should include the freedom of religious practice including expressing one's own faith, building up one's character on that discipline, and practicing one's religion privately. He added, however, that the freedom of practicing religion was limited within the boundary of existing laws and did not authorize such behavior as refusing military service on the basis of religious conviction. Fourthly, he clarified that the constitution inferred the state control of the public exercise of faith because the public exercise of religion accompanied the formation of either incorporated or associated religious communities which required the sanction of the State. Finally, he noted that the constitution permitted the establishment of a state religion and the unequal treatment of religions in accordance with the relation of the religion to the state religion and that the decision on this matter was entrusted to the policy of the future government.

Roesler was not a conservative. He clearly observed the development of religious freedom as an individual right in the history of Western nations and hailed the adoption of its fruit by the con-

stitution of new Japan. He claimed the State's right to limit the practice of religion in so far as it related to public life, because he, reflecting Stein's sociological jurisprudence, acknowledged the positive function of the state which would transcend the struggle among the individual and corporate religious interests. The limitation, therefore, was aimed at overcoming the weakness of free competition. Roesler was positive in advocating both the guarantee of religious freedom and the State control of the public exercise of religion.

In the meantime Inoue wrote the fundamental principles of eleven articles in February, 1887. The document defined the sovereignty of the Emperor, the territory of the Empire, the qualification of the citizens, and the basic structure of the government, but referred to neither civil rights nor religious freedom.⁵⁸ In March, 1887, Inoue wrote a first draft with an article by article annotation and presented it to Itō. This document consisted of four chapters, the Emperor, the Land and the People, the Cabinet and the Council of State, and the Council of Elders and the Council of Representatives, but did not refer to civil rights again.⁵⁹ Consequently during the spring of 1887, he prepared two drafts, completing one draft during April, 1887 (*Otsu An*) and another during May, 1887 (*Kō An*).⁶⁰ Inoue prescribed the civil rights identically in Article 7 of the *Kō An* and Article 11 of *Otsu An*. The article stated as follows:

Every Japanese citizen shall be protected in the enjoyment of the following rights:

58. Inada, II, pp. 43-44.

59. *Ibid.*, pp. 44-48.

60. *Ibid.*, pp. 65-66, 70-82.

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1. Equality before law irrespective of one's title and rank;
2. Freedom to operate business, unless in violation of law, or prejudicial to peace and order, or specially controlled by government license;
3. Freedom of moving, unless in receipt of relief fund, or under surveillance due to the violation of the criminal code, or in the military service;
4. Freedom from being arrested without a warrant, except the cases specially provided for by law;
5. Freedom from being prosecuted except in accordance with the due process of law;
6. Inviolability of the privacy of a home unless with the consent of the owner of the home and/or special provision in law;
7. Freedom from being punished unless positively provided for in the criminal law;
8. Inviolability of private property unless specially provided for otherwise by law for the public benefit;
9. Freedom of religious belief within limits not prejudicial to peace and order and not antagonistic to the duties as citizens;
10. Liberty of speech, writing, publication, public meetings and associations within the limit of law;
11. Secrecy of letters except the investigation of police and during the time of war or civil war.⁶¹

Inoue added at the end of the civil rights article of *Otsu An* a comment which stated that the civil rights articles included both general and detailed items and appeared ill-balanced, so that he presented an alternative in the form of enumerating those rights in individual articles by adopting the suggestion of Messrs. Roesler and Mosse. The alternative article stipulated religious freedom as follows:

Religious freedom shall be inviolate. Enjoyment of public and civil rights shall not differ due to the difference of religions. However, the duties of citizens shall not be exempted because of religious convictions.⁶²

Inoue's draft articles thus provided the conditional guarantee

61. *Ibid.*, 71-72.

62. *Ibid.*, p. 73.

of religious freedom as one of the civil rights.

The summary above, however, indicates that Inoue's approach to the guarantee of religious freedom was considerably different from any of the draft constitutions. In fact he originally planned not to include provisions on the guarantee of religious freedom nor of other civil rights. Even in the case of including civil right guarantees in the constitution, he thought a reference in the preamble would suffice. It was only after the objection from Roesler and Mosse that he decided to include the civil right guarantee in the body of the constitution.⁶³ In the preface of *Otsu An*, he stated that the constitutions of Western nations overemphasized the civil right guarantee by virtue of the influence from the declaration of human rights of the French Revolution which was unacceptable to this drafter's position and that therefore the provision of civil rights ought to be mentioned only briefly with modifications to suit the particularities of the Japanese nation.⁶⁴ Another provision of interest relating to Inoue's evaluation of men of religion is shown in the provision on electoral qualification. In Article 27 of *Kō An* and Article 30 of *Otsu An*, Inoue provided that priests were disqualified from being elected to either the Council of Elders (*Genrōin*) or the House of Representatives (*Daigiin*).⁶⁵ Inoue, a Confucian by origin, did not take religious or civil rights as serious factors in the nation's foundation.

Another noteworthy point of Inoue's drafts is the lack of provision on the divinity and inviolability of the Emperor. Not

63. *Ibid.*, p. 85.

64. *Ibid.*, p. 69.

65. Inada, II, p. 75.

only did he omit such a provision, but he specifically explained in the preface of *Otsu An* that such an article that should declare the divinity and inviolability of the Emperor was definitely unnecessary for the Japanese Constitution, although the Western constitutions often provided it. Although Inoue certainly emphasized the indigenous tradition, he was not the promoter of this controversial article. Inoue, the drafter of the Meiji Constitution, intentionally stayed away from stipulating a theocratic foundation in his draft constitutions.

Inoue submitted both *Kō An* and *Otsu An* to Itō on May 23, 1887. Itō began the examination of the would-be constitution with the draft constitutions prepared by Inoue and by Roesler as the basic materials; and his staff, Inoue, Itō Miyoji, and Kaneko Kentarō, from June, 1887, at his villa in the suburbs of Yokohama, Natsushima. Itō and his staff continued intermittently to examine and revise the drafts until the final draft was completed in March, 1888.

Ito used Inoue's *Kō An* as the basis of his investigation and checked its provisions against Roesler's draft. Itō marked in his own handwriting on Inoue's provision on religious freedom that it should be referred to Article 56 of Roesler's draft.⁶⁶ When Itō, incorporating his own ideas as well as Roesler's and his staff's, framed a revised draft (*Natsushima An*) during August of 1887, he had the provision guaranteeing religious freedom composed in an independent article, adopting the provision by Roesler. Article 60 of *Natsushima An* read:

Japanese subjects shall, within limits not prejudicial to peace and order,

66. *Ibid.*, p. 134.

and not antagonistic to their duties as subjects, enjoy freedom of religious belief.⁶⁷

After Itō's establishing the guarantee of religious freedom in those words, the staff did not argue the issue, and the article was carried and realized as such in the Meiji Constitution.

Itō's *Commentaries on the Constitution of the Empire of Japan* (*Kempō Gikai*), which was originally drafted by Inoue, used as a reference at the ratification congress, revised by a committee composed of the faculty of the Tokyo Imperial University, in-attended incorporated Itō's personal opinions, and finally released as Itō's personal publication presents a detailed account of Itō's if not the drafters', view of religion and religious freedom. Itō stated in the document:

In Western Europe, during the middle ages, when religion exercised an ascendant influence, it was mixed up with politics, internal as well as external, and was very often the cause of bloodshed; while in the countries of the East, strict laws and severe penalties were provided in order to suppress religion. But the doctrine of freedom of religious belief, which dates back four centuries, first received practical recognition at the time of the French Revolution and of the independence of the United States of America, when public declaration was made on the subject. Since then, the doctrine has gradually won approval everywhere, until at present every country, although maintaining in some cases a state religion, and in others favoring a particular creed in the organization of its society or in the system of its public education, nevertheless grants to its people by law entire freedom of religious belief. The cruel treatment of those of a heterodox faith or the exclusion of them from the enjoyment of certain portions of public and civil rights, are already historical facts of the past, and now-a-days it is very seldom, if ever, that such absurdities are brought to our notice. (In the German states, political rights were denied to the Jews up to the year 1848.) In short, freedom of religious belief is to be regarded as one of the most beautiful fruits of modern civilization. For several centuries, freedom of conscience and the progress of truth, both of them of the most vital importance to man, have struggled through dark and thorny paths, until they

67. *Ibid.*, p. 202.

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have at last come out into the radiance of open day. Freedom of conscience concerns the inner part of man and lies beyond the sphere of interference by the laws of the State. To force upon a nation a particular form of belief by the establishment of a state religion is very injurious to the natural intellectual development of the people, and is prejudicial to the progress of science by free competition. No country, therefore, possesses by reason of its political authority, the right or the capacity to an oppressive measure touching abstract questions of religious faith. By the present Article, a great path of progress has been opened up for the individual rights of conscience, consistent with the direction in which the Government has steered its course since the Restoration.

Belief and conviction are operations of the mind. As to forms of worship, to religious discourses, to the mode of propagating a religion and to the formation of religious associations and meetings, some general legal or police restrictions must be observed for the maintenance of public peace and order. No believer in this or that religion has the right to place himself outside the pale of the law of the Empire, on the ground of his serving his god and to free himself from his duties to the State, which, as a subject, he is bound to discharge. Thus, although freedom of religious belief is complete and is exempt from all restrictions, so long as manifestations of it are confined to the mind; yet with regard to external matters such as forms of worship and the mode of propagandism, certain necessary restrictions of law or regulations must be provided for, and besides, the general duties of subjects must be observed. This is what the Constitution decrees, and it shows the relation in which political and religious rights stand toward each other.⁶⁸

Here Itō construed the constitutional guarantee of religious freedom as the great achievement of modern civilization after referring to the religious persecution in the past both in the East and the West. Then, he rejected the establishment of a state church and the implementation of a religion by the state on the understanding that freedom of conscience was innate in the human being, perfect, and beyond the State's sphere of interest. Finally, he explained the limitations of religious freedom and clarified that religious practices, or the outer expressions of re-

68. Itō, *Commentaries*, pp. 58-61.

ligious belief, were related to the peace and order of the state and, therefore, were subject to the civic duties which the state had the authority to define by law and enforce upon citizens.

The drafters clearly observed that the religious freedom guarantee was in the trend of modernization and that the Japanese constitution adopted it positively. A comparison of this material with Roesler's commentary on religious freedom shows that Itō, in his comparative succinctness, presented a broader vision than the German social scientist. Itō saw historical progress not only in the Western world but also in the Eastern society, proving an approach to the global process of progress. He further clarified the capitulation of Roesler's permissiveness to the establishment of a state religion, observing its innate contradiction to human liberty. He defined the limitation of the religious freedom guarantee to religious practice and explained it in the manner that supported his consciousness of the separation of the civil and ecclesiastical authorities. Itō's Commentaries, therefore, represented the principle of religious freedom and the separation of church and state.

As observed earlier, Inoue did not mention the divinity of the Emperor. However, Itō, when he examined both Inoue's and Roesler's drafts, decided to include the provision on the divinity and the inviolability of the Emperor which appeared in the Roesler draft, along with the enumeration of the royal prerogatives which was also lacking in the Inoue drafts. In the process of deliberation, the article was changed several times especially regarding the inclusion of the phrase, "the person," of the Emperor after the Italian and other European constitution, and finally, was settled with the simple phrase, "The

Emperor is sacred and inviolable," of Article 3 of the Meiji Constitution. This indicates that the clause on the divinity and the inviolability of the Emperor was an adoption of the precedence of the European Constitutions where it was considered as one of the royal prerogatives. Therefore, it is impossible to interpret this as meaning that Itō intended to establish the theocratic foundation of the state by including this article.

The disqualification of priests from being elected to the houses was another feature of Inoue's draft. To this article, Itō Miyoji raised an objection stating that the representative councils should present the interests of every possible circle in the nation and that disqualifying priests from being elected to the House of Representatives on to the Council of Elders was a contradiction to the principle of representative government and a discrimination against religions, and he recommended its repeal. Itō Hirobumi agreed with Itō Miyoji, accepted the recommendation, and eliminated this provision.⁶⁹

These additional delineations should confirm that Itō distinguished the civil activity of men of religion from the intrusion of religion into the civil affairs, and that he did not confuse the boundary between religion and government.

The draft Meiji Constitution was completed under the leadership of Itō Hirobumi with the cooperation of Roesler, Inoue Kowashi, Itō Miyoji, and Kaneko Kentarō by March, 1888, and was submitted to the Emperor during April, 1888. The Emperor in turn sent it to the Privy Council, newly opened for its ratification. The congress started on May 8, 1888, and last-

⁶⁹. Inada, II, pp. 139-140.

ed until July 13, 1888.

At the Privy Council, conservative councillors questioned the desirability of the article guaranteeing religious freedom. Privy Councillor Sasaki Takayuki, Imperial Councillor and a close friend of Motoda, expressed his fear that the constitutional guarantee of religious freedom would introduce confusion in the custom which had obliged government officials to participate in Shintō ceremonies under the auspices of the Emperor, because the constitution would logically release from this obligatory custom those who believed in a religion that prohibited its followers from participating in the ceremony of other religions. To be noted is that, in this statement, Sasaki admitted verbally that the abstention from the Shintō ceremony on the part of officials would constitute neither negligence of duty as subjects nor the violation of peace and order. Sasaki's question was answered by Itō Miyoji, who first distinguished the constitution's principle applicable to the citizens in general from the code for the officials which was the specific regulation needed because of the function of the officials, and second pointed out that no law existed to oblige officials to attend Shintō ceremony by that date. This invited another critical comment from Torio Koyata, a retired general and a sponsor of ultra-nationalism with a seat in the *Genrōin*. Torio claimed that such an instance as Sasaki envisioned would interfere with the essential body politic of the Japanese Empire and the government should prepare suppressive measures against the possible arising of such a deplorable incident. Itō Miyoji tried to refute Toriō, but Itō Hirobumi suspended the argument with a comment that religious matters were to be handled by the men of religion

and not by the officials of the temporary government, and asked the congress to vote on the original article. Eighteen of twenty councillors attending supported the original proposition and the article was ratified as it stood.⁷⁰

At the time when the making of the constitution was in process, even Sasaki, the man who was one of the most conservative and reluctant to grant religious freedom to government officials, thus admitted the constitutional principle of religious freedom for the people in general, including their freedom from being obliged to attend Shintō ceremony, and did not regard Shinto worship as the duty of a subject or as a sign of conformity to peace and order of society. The passage of Article 28 proved that a view that even government officials were not enforced to participate in the official Shintō ceremony, presented by Itō Miyoji and opposed by Torio, was backed up by great majority of the councillors. Thus, the guarantee of religious freedom had substantial support in the making of the Meiji Constitution.

After the ratification congress, the Meiji Constitution was promulgated as a grant of the Emperor to the subjects on February 11, 1889. Cabinet ministers and representatives from provinces assembled at the Imperial palace and mass festivities followed in celebrating the issuance of the constitution. The document provided: Japanese subjects shall, within limits not prejudicial to peace and order and not antagonistic to their duties as subjects, enjoy the freedom of religious belief.⁷¹

To summarize, the constitutional guarantee of religious freedom was from the beginning an integral part of the Meiji leaders'

70. Shimizu, *Teikoku*, pp. 231-235.

71. Itō, *Commentaries*, p. 58.

concern with Japan's relation with the Western powers. The first attempt constitutionally to regulate the position of religion was made by the proponent of modernization, Kido Kōin, while he was with the Iwakura Mission vested with the objectives of treaty revision and investigation of the modern systems of the West. This plus the fact that the first draft constitution which prohibited Christianity was quickly revised to guarantee religious freedom in reflection of Japan's abolition of the open prohibition of Christianity in concession to the pressure from the Western powers attest this origin of the constitutional guarantee of religious freedom. The constitutional guarantee of religious freedom was a by-product of the Meiji leaders' attempt to obtain the recognition of the Western powers for Japan. It is therefore no wonder that the earlier governmental draft constitutions of the *Genrōin* wrote for the conditional guarantee of religious freedom by importing such a provision in European constitutions.

When the constitutional movement prevailed among the intellectuals both in and out of the government in the early 1880's, a variety of orientations toward the religious issue appeared. A draft article made by an ultra-conservative prescribed the establishment of a state religion and a theocratic government and opposed the principle of religious freedom. The great majority, however, stipulated the guarantee of religious freedom within some limits such as law, customs, peace and order. The draft articles included few instances that provided the unconditional guarantee of religious freedom with the supposition that the people and the government were intrinsically opposed to each other. Most of those who were concerned, whether in

or out of the government, expected the constitution to have the conditional guarantee of religious freedom.

When Itō prepared the Meiji Constitution, he was not uninterested in religious matters. His posture regarding the religious issue may be summarized as the denial of the constitutional establishment of a state religion, the adoption of the conditional guarantee of religious freedom emphasizing both the guarantee of freedom for people and the function of control for the state, and the position of the separation of religion and government.

In the final analysis, the conditional guarantee of religious freedom was in conformity with the practice of the modern civilized nations of the West and also with the proposition of the great majority of those contemporary intellectuals who were interested in the constitutional issue. It neither presupposed the conventional service to the State Shintō or opposed the desire of the people at large. The conditional guarantee of religious freedom was a positive assertion of the principle of religious freedom and the separation of church and state.

(To be continued.)