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It is written in Takeshi Nakano’s book that Masao Maruyama said about religions in the United States as follows: “The believers in religions, especially those in the monotheistic religions such as Christianity and Islam, tend to be intolerant toward other religions. That is because if they accept other religions, their faith will be shaken. If American had not incorporated the principles of liberty, equality, and fraternity into the fundamental law of the state, namely, the constitution, they could not have kept their social order, and such a situation would have led the United States to chaos.”

As Maruyama has suggested, the matter of freedom of religion and of conscience, as well as that of religious tolerance is of great significance for the believers. It is well known that the Protestant Dissenters who had resisted the Anglican Church lost their lives in civil wars, especially in the English Civil War (1642-1651) and the American War of Independence (1775-1783). They fought tooth and nail for freedom of religion and the separation of church and state. In other words, they had to be persecuted because of their faith. In that sense, freedom of religion is one of the most basic and essential rights of man. In this regard, the German public lawyer, Georg Jellinek (1851-1911) asserted that freedom of religion was not only the most fundamental human rights, but also the oldest human rights. To be sure, the fact that the rights to freedom of religion, of conscience, and of thought have been clearly defined in the constitutions of many countries shows that freedom of religion is the most basic and fundamental human rights. But as lawyers, political scientists, and historians have pointed out, it is open to question whether freedom of religion is the oldest human rights. Is it in fact possible to demonstrate that freedom of religion is the oldest right of man? Can it be regarded as the historical source of other liberties?

The purpose of this paper is to examine whether Jellinek’s argument that the origin of human rights consists in freedom of religion can be historically recognized as appropriate. As shown above, although many researches on this subject have been carried out, this question remains unsolved. It is proposed here that
freedom of religion is not necessarily the origin of human rights, and a part of Jellinek’s arguments cannot be scientifically proven.

2. Jellinek’s Three Main Points on the History and Origin of Human Rights

Jellinek’s main points on the history and origin of human rights stressed in his writing The Declaration of the Rights of Man and of Citizens (the first edition: 1805) are as follows: The first is that the legal historical origin of the codification of human rights does not lie in the French Declaration of the Rights of Man and of Citizens of August 26, 1789, but in the Virginia Bill of Rights of June 12, 1776. The second is that the model of the French Declaration of the Rights is not Jean-Jacques Rousseau’s treatise The Social Contract of 1762, but the bills of rights of North American states enacted in and after 1776. The third is that the historical source of the American bills of rights, including the Virginia Bill of Rights, consists in Protestants’ struggles for freedom of religion in the days of North American colonies, especially in the English Protestant theologian and the founder of the colony of Rhode Island, Roger Williams’ (circa 1603-1683) contributions to it. In following sections, I would like to consider these three points from the viewpoint of the history of law and religion.

2.1. The Legal Historical Origin of the Codification of Human Rights

Although the existence of “the United States Constitution” (Ratification: 1788) and “the first ten amendments to the United States Constitution” (Ratification: 1791) had been well known on the European Continent in the middle of the 19th century, little was known about that of the Virginia Bill of Rights. Therefore the French Declaration of the Rights had been considered as the legal historical origin of human rights by many scholars of those days. The existence of Virginia’s Bill of Rights and the constitutions of the other American states only became generally known overseas after American statute books had been published by order of the United States Senate in 1877. As Jellinek has pointed out, Connecticut’s charter of 1662 and Rhode Island’s charter of 1663 that are included in these books are probably the oldest written constitutions in the modern sense. But these charters were granted the people of two colonies by the English King, and they did not have the character of systematic provisions of human rights such as the American declarations of bills of rights. In this connection, Max Weber who had gotten his idea of “The Protestant Ethic and the Spirit of Capitalism” (1904-1905, 1920) from Jellinek suggested in this article that the first official document of a church which claimed the positive protection of freedom of conscience by the state was probably article 44 of the confession of the particular Baptists of 1644. Regardless of whether this is the oldest document of freedom of conscience or not, it cannot be regarded as the law enacted by the state. In other words, it is nothing but the statement of faith declared by a church. Therefore, as far as the first systematic law enacted by the state is concerned, Jellinek’s view that the legal historical origin of the codification of human rights consists in the Virginia Bill of Rights can be recognized as appropriate. In this regard, Carl Schmitt also agreed to his view by expressing that the state of Virginia issued the first declaration of basic rights on June 12, 1776, then Pennsylvania(September 28, 1776) and others followed.

2.2. The Model of the French Declaration of the Rights

There are some questions about Jellinek’s second point that the model of the French Declaration of the Rights is not Rousseau’s The Social Contract, but the bills of rights of North American states. I would like to take up only two questions here. The first question is that of Rousseau’s influence on the French Declaration of the Rights. Jellinek asserts that the principles of The Social Contract are at enmity with every declaration of rights since what is derived from these principles is not the right of the individual, but the omnipotence of the common will (volonté générale). According to his understanding of The Social Contract, everything that the individual receives as the nature of rights, including property, is gotten from the common will (volonté générale), which is the sole judge of its own limits, and ought not to be, and cannot be, restricted by the law of any power. In that sense, the common will is omnipotent, and freedom in Rousseau is that in the sense of participation in the state, but not that in the sense of freedom from the state. In other words, it is freedom in the democratic sense (“active freedom”), but not that in the liberalistic sense (“negative freedom”).

As for negative freedom, or spiritual freedom, Rousseau did not certainly claim it in The Social
Contract. But he stressed repeatedly active freedom, that is, participation of the people in civil government, political community, and the state. The right to participation belongs to the principle of sovereignty. Therefore it is clear that his idea has a close relationship with Article 3 of the French Declaration: "The principle of all sovereignty resides essentially in the nation. Neither body nor individual may exercise any authority which does not emanate directly from the nation." (11) And furthermore, concerning the common will, its primary purpose is to protect natural rights, namely, life, liberty, property, security, etc., not to infringe on them. The reason why the individual must transfer all his rights to the community, according to Rousseau, is recovering the spirit of individual's freedom and equity in the state of nature that has been lost in the processes of modernization and civilization. (14) In that sense, the aim of the common will in Rousseau coincides with that of all political association stipulated in Article 2 of the French Declaration, namely, that of the preservation of the natural and imprescriptible rights of man. Jellinek's misinterpretation about the common will is that he confused its means with the end and exaggerated an aspect of its power of compulsion.

As a matter of fact, it may be difficult to prove scientifically the direct relationship of cause and effect between The Social Contract and the French Declaration because there are not enough reliable materials. However, as Staughton Lynd has written, the fact that Rousseau had a great influence on the American Revolutionary thought and the writers of the American bills of rights shows the indirect relationship between the two. (15)

The second question is that of the comparison of the French and American Declarations. Jellinek compares the separate articles of the French Declaration with the corresponding articles from the American bills of rights, concretely from the declarations of Virginia, Massachusetts, Pennsylvania, Maryland, North Carolina, New Hampshire, and Vermont. Especially, among the articles of American declarations, he tries to seek out those that most nearly approach the form of expression in the French text in order to prove the influence that the American bills of rights had on the French Declaration. (16) In spite of his close examination, this trial is not necessarily successful. To be sure, the examination made it clear that the fundamental ideas of the American declarations generally matched each other, so that the same stipulation appeared repeatedly in different form in the greater number of the bills of rights. (17) But since only any similarity of the words and concepts between the two is stressed, it does not become clear whether the American Declarations are the source of the French Declaration. In other words, there is probability of the connection between the American bills of rights and the French Declaration, but not inevitability.

Furthermore, Jellinek claims that the American declarations are the source of the French Declaration on the grounds that the declarations of Virginia and of the other individual American states were the sources of the proposition of a drafter of the French Declaration, Marquis de Lafayette, and they influenced not only Lafayette, but all who sought to bring about the French Declaration. (18) It is well known that French volunteer soldiers, including Lafayette, who had participated in the American War of Independence, recognized the existence of declarations of individual American states. From such facts, Jellinek tries to prove the influence that the American bills of rights had on the French Declaration. However, that is nothing but circumstantial evidence. In order to prove it, more concrete and stronger evidence must be provided. In this respect, Otto Vossler's indication that Thomas Jefferson, the draftsman of the American Declaration of Independence, received the original text of the French Declaration from Lafayette and amended it is really worth paying attention to. According to Vossler, Jefferson who stayed in Paris as the American minister to France from 1785 to 1789 and Lafayette had argued about the contents of the original text of the French Declaration before Lafayette first presented it to the National Constituent Assembly. (19) In this regard, Lafayette wrote to Jefferson on July 4, 1789, "Will you send me the Bill of Rights with your notes — I hope to see you tomorrow. Where do you dine?", and Jefferson answered to Lafayette on July 6, 1789, "I will bring you the paper you desire tomorrow, and shall dine at the Dutchess Danville's where I shall be happy to meet you. (20) It is not clear whether they really dined at the Dutchess Danville's. But we can say with fair certainty that Jefferson contributed some suggestions to the original text of the French Declaration from the fact that there existed his notes written in the margin of the text. (21)
2.3. The Historical Origin of the American Bills of Rights

I would like to propose three objections to Jellinek’s third point that historical origin of the American bills of rights consists in Protestants’ struggles for freedom of religion, especially in the contributions of Roger Williams. The first is that concerning the origin of the codification of human rights, the thought of Roger Williams cannot be overrated. To be sure, Williams is an advocate of religious liberty and of separation of church and state, but it is in the second half of the 19th century that his works became generally known. His most writings were neither known nor read by George Mason, the drafter of the Virginia Bill of Rights, James Madison, the proposer of an amendment of its original bill, and Thomas Jefferson, the drafter of not only the Declaration of Independence (1776), but also the Virginia Act for Establishing Religious Freedom (1786). Moreover, According to Timothy L. Hall, most colonial and revolutionary Americans viewed Rhode Island founded by Williams not as a model of religious freedom but as a kind of social outhouse, or as an anarchic place. As for Williams himself, “almost no one in colonial New England ever praised his experiment, sought his advice, quoted his books, or tried to imitate his practices”. His demands for complete separation of church and state and for absolute religious liberty, not only for all Christians but also for Jews, Turks, and heathen provoked the people’s antipathy in colonial New England. From such facts, it is hard to say that Williams had a great influence on the codification of religious freedom and human rights in the 18th century.

The second is that the religious freedom in the bills of rights of American states is not that for all men, but that for Protestants. It is not generally known that not only Catholics and atheists, but also Baptists and Quakers were persecuted by the authorities from the 17th century to early in the 18th century. In the northeastern area such as Massachusetts where Williams was persecuted and exiled, Congregational Churches were the mainstream of Protestant churches in those days. For example, the percentage of main denominations of Massachusetts in 1776 is as follows: Congregationalist, 71.6 percent; Baptist, 14.3 percent; Quaker, 4.2 percent. The form of government of Congregational Churches was theocracy, and the principle of separation of church and state was not introduced. In the southern area such as Virginia, there were many Anglican. The percentage of main denominations of Virginia in 1776 is as follows: Anglican (Episcopal), 34.6 percent; Baptist, 29.9 percent; Presbyterian, 22.0 percent. Here too, the separation of church from state was not realized. In Massachusetts and Virginia, religion had a clear tendency toward state religion, and religious minorities were often suppressed by religious majorities.

According to Jefferson’s Notes on the State of Virginia, “several Acts of the Virginia assembly of 1659, 1662, and 1693, had made it penal in parents to refuse to have their children baptized; had prohibited the unlawful assembling of Quakers; had made it penal for any master of a vessel to bring a Quaker into the state.” Furthermore, according to Act of assembly of 1705, it was the object of punishment to deny “the being of a God, or the Trinity”, and to assert that “there are more Gods than one.” In spite of the legislators’ reflection of such religious persecutions, the words “God”, “Christian”, and “Christian religion” were stipulated in the articles of the declarations of American states. Let us take several cases below.

Virginia Declaration of Rights of June 12, 1776, XVI, “---- it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other.”

Constitution of Pennsylvania of September 28, 1776, II, “That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding: ---- Nor can any man, who acknowledges the being of a God, be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments or peculiar mode of religious worship.”

Constitution of Maryland of November 11, 1776, XXXIII, “That, as it is the duty of every man to worship God in such manner as he thinks most acceptable to him; all persons, professing the Christian religion, are equally entitled to protection in their religious liberty.”

Constitution of North Carolina of December 18, 1776, XIX, “That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences.”

Constitution of Vermont of July 8, 1777, III, “That all
men have a natural and unalienable right to worship ALMIGHTY GOD, according to the dictates of their own consciences and understanding, regulated by the word of GOD."

Constitution of Massachusetts of March 2, 1780, II, “It is the right as well as the duty of all men in society, publicly and at stated seasons, to worship the Supreme Being, the great Creator and Preserver of the universe.

Constitution of New Hampshire of June 2, 1784, V, “Every individual has a natural and unalienable right to worship GOD according to the dictates of his own conscience, and reason.”

Judging from cases shown above, it is concluded that the bills of rights of American states were stipulated on the assumption of God’s being in Christian sense. As space is limited, although I cannot examine in detail here, the first statute which the words such as “God”, “Christian”, and “Christian religion” were really deleted in the processes of codification of religious freedom was probably the first ten amendments to the United States Constitution (1791) drafted by Madison. A weak point of Jellinek’s arguments is that he overlooked such facts.

The third is that regarding the Virginia Bill of Rights, the preceding 15 sections except section 16 for religious freedom were drawn up in a relatively short span of time by the members of Virginia Convention, but the argument about a bill of section 16 could not come to a conclusion and was prolonged. Especially, a serious issue was whether the word “the fullest toleration in the exercise of religion” of Mason’s original text should be replaced by the word “the full and free excise of religion” of Madison’s amendment. It seemed to Madison that from the viewpoint of religious freedom, the word “toleration” was too weak. As Max Weber has pointed out, “religious toleration is peculiar neither to modern times nor to the West. It has ruled in China, in India, in the great empires of the Near East in Hellenistic times, in the Roman Empire and the Mohammedan Empires for long periods to a degree only limited by reasons of political expediency.” Because of the stronger and more positive meaning of freedom, Madison tried to imprint not “religious toleration” but “religious freedom” on the minds of all the people in Virginia.

After all, the argument reached a conclusion by a compromise between the original bill of Mason and its amendment of Madison, that is, by adopting the phrase “all men are equally entitled to the free exercise of religion”. In any case, it is clear that the preceding 15 sections (the right to suffrage, physical freedom, property right, freedom of the press, etc.) were not founded on freedom of religion. As far as the sections of the Virginia Bill of Rights are concerned, it is hard to accept Jellinek’s view that the source of human rights lies in freedom of religion.

3. Conclusion

I have presented some questions about Jellinek’s views of human rights in the preceding pages. The essential points are as follows: the first is that concerning the origin of the codification of human rights, the thought and behavior of Roger Williams cannot be overrated. The influence that he had on the codification of human rights was not greater than that of Thomas Jefferson and James Madison. The second is that it is certainly possible to regard the bills of rights in American states as the source of the French Declaration, but regarding freedom of religion, the right to freedom of religion and of conscience stipulated in them does not mean the universal and neutral right, but that for Protestant denominations. The third is that in my own view, the first article that has the universal and neutral character of religious freedom is probable the First Amendment (Amendment I) to the United States Constitution.

Moreover, regarding this theme, it is necessary to consider the political, economic and social conditions surrounding British colonies of North America, the economic and social relationship between England and America, and the historical and social significance of the American War of Independence. This is a future issue that I must work on.

Notes

(4) Jellinek (1901), 1-77.
(5) Ibid., 19f.
(6) Jellinek (1901), 20.
(7) Ibid., 22.
(10) Jellinek (1901), 11f.
(11) Ibid., 22.
(16) Jellinek (1901), 27-42.
(17) Ibid., 25.
(18) Ibid., 17f.
(19) Vossler (1964), 193.
(20) The Letters of Lafayette and Jefferson, Baltimore, 1929, 130f.
(22) Kubota, Y., Rojó Wiriamuzu (Japanese), Tokyo, 1998, If.
(27) The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States, 1909 (Virginia), 1541 (Pennsylvania), 819 (Maryland), 1410 (North Carolina), 1859 (Vermont), 957 (Massachusetts), 1281 (New Hampshire). The underlines are mine.
(28) The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins, ed. Neil H. Cogan, New York, 1997, 1-167. In particular, the First Amendment on freedom of religion, speech, press, and assembly is as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."
(29) Hashagen (1964), 134.

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【日本語要旨】

人権の起源とゲオルク・イェリネク
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本稿は、ゲオルク・イェリネクの『人および市民の権利宣言』（1895年初版）で喚起された人権の起源をめぐる問題に1つの決着をつけることを目的とする。イェリネクの主要論点は以下の3つである。第1は、人権の成文法化の法史的起源は、フランスの「人および市民の権利宣言」（「人権宣言」1789年）にあるのではなく、ヴェルニエの「権利の章典」（1776年）にあること、第2は、フランスの「人権宣言」のモデルは、当時の通説であったルソーの「社会契約論」（1762年）にあるのではなく、ヴェルニエの「権利の章典」を含む、アメリカ諸州の「権利の章典」にあること、第3は、このアメリカ諸州の「権利の章典」の歴史的源流は、北アメリカのイギリス植民地時代におけるプロテストメントの「信教の自由」獲得のための闘争、とりわけ政教分離主義者ロジャー・ウィリアムズの思想と行動にあることである。

本稿は、これら3つの論点に対する筆者の見解を述べたものであり、イェリネクの意見に反し、（1）ルソーの「社会契約論」がフランスの「人権宣言」に一定の影響力を与えたことは間違いない、彼のルソー観は一貫的にすきること、（2）1776年6月以降、アメリカ諸州に自由権を含む「権利の章典」が制定されていくが、その実態は、自由の享受にはほど遠く、北部では神権政府、南部では国家教会制の形態が取られていたこと、しかも（3）「信教の自由」の享受者は、アメリカ諸州の全人民ではなく、キリスト教信仰者、特にプロテストメントに限定されていたこと、（4）ロジャー・ウィリアムズの思想とアメリカ諸州における「権利の章典」制定との直接的な歴史的関係は存在しないこと等が強調される。普遍的、中立的意味での「信教の自由」の法史的起源は、ジェームズ・マディソンが起草したアメリカ合衆国憲法修正10箇条における第1条（1791年）にあるが、この制定過程の詳細な検討は今後の課題として残された。

（付記）本研究は、平成21 - 23年度科研費（基盤研究（C））（課題番号：21530010）の助成を受けたものである。