
Regulating Religious Fraud in Taiwan and Hong Kong: A Comparative Study on the Convergences and Deviations in the Understanding of Religious Freedom

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Abstract

Religious fraud regulation appears, prima facie, to be at odds with liberal democratic notions of religious liberty since the determination of religious falsity inherent in regulating religious fraud runs counter to the demands of State neutrality. Yet, despite a proud commitment to liberal democratic notions of religious liberty, Taiwan and Hong Kong have not shied away from purported legal interventions to protect the public from perceived charlatans purveying religious falsehoods. This article critically examines how religious fraud has been tackled via specific legislation and general criminal law provisions in Taiwan and Hong Kong. Building on the surprising findings that (i) the judicial review of a similar statute aimed at combating religious fraud produced radically different outcomes despite adoption of the International Covenant on Civil and Political Rights in both jurisdictions and (ii) religious fraudulent sex is zealously punished in both jurisdictions under general criminal law provisions, despite the different underlying legal traditions of German civil law and English common law respectively, this article explores the cultural and political factors shaping the understanding of religious freedom in Taiwan and Hong Kong.

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Introduction

By definition, the core human right of religious freedom is also a right to propagate false religion. Borne out of the bloodied history of violent contestations over which religion is the true one, religious freedom—at least according to the liberal democratic conception—imposes great constraints on State power to interfere in religious matters, particularly the prohibition of attempts by the State to evaluate the legitimacy and veracity of a religious belief.¹ This is beyond even the most robust free-speech regime, where otherwise stringent limitations of censorship do not preclude the State from advocating a particular opinion, ideology, or interpretation of facts.²

It is, thus, surprising to find that religious fraud remains an ongoing legal concern in Taiwan and Hong Kong. Both jurisdictions proudly proclaim adherence to liberal democratic notions of human rights and civil liberty—the legislature has faithfully incorporated the International Covenant on Civil and Political Rights (ICCPR)³ into domestic law, while courts regularly refer to jurisprudence from other Western liberal democracies (for example, Europe, the USA, and Canada) when interpreting those rights.⁴ However, this first-ever comparative investigation of how religious fraud is regulated in Taiwan and Hong Kong found that both jurisdictions have been active in employing legal tools—both specific legislation and general criminal law provisions—in attempts to protect the public from perceived charlatans purveying religious falsehoods.

Such regulation of religious fraud poses a critical challenge to Taiwan and Hong Kong as to whether they do, in fact, subscribe to liberal democratic notions of religious liberty (especially that of the Western conception). Yet this inquiry is further complicated by the surprising similarities and differences between the Taiwan and Hong Kong approaches.

First, when the apex courts in both jurisdictions reviewed a similar fraud prevention statute in the early 2000s, they reached radically different conclusions, despite theoretically using the same standard of religious liberty protection (including that of the ICCPR). In Taiwan, the Judicial Yuan struck down the Supervision of Temples Act for both insufficiently justified restrictions on religious practices and discriminatory targeting of only Buddhism and Daoism.⁵ On the other hand, the Court of Final Appeal found no constitutional problems with the Chinese Temples Ordinance, despite the substantially more intrusive regulations that are, similarly, only applicable to Buddhism, Daoism, and Chinese folk religions.⁶

¹ See II.

² John D Inazu, 'The First Amendment's Public Forum' (2015) 56 *William & Mary L Rev* 1159, 1182, 1186; Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (University of Toronto Press 1997).

³ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

⁴ See III.B.

⁵ See IV.C.1.

⁶ See IV.C.2.

Second, Taiwan and Hong Kong have zealously punished religious fraudulent sex under general criminal provisions, notwithstanding substantial differences in both structure and wording arising from the different legal traditions of, respectively, German civil law and English common law. In Taiwan, courts dealing with cases where defendants have used false supernatural/religious claims to obtain sex from victims have adopted an uncharacteristically liberal approach when interpreting the elements of forcible sex to achieve high rates of conviction.⁷ In Hong Kong, religious fraudulent sex is regularly prosecuted and punished under the 'procurement by false pretense' offence that was originally meant to tackle the sex trade.⁸

This article critically explores the underlying socio-political factors *vis-à-vis* these legal interventions and posits that the long-standing Chinese cultural aversion to sex in a religious context, interfacing with the disparate political power of Chinese religions, may account for this convergence and deviation in regulating religious fraud. More broadly, this article highlights how religious fraud—through ostensibly negating religious liberty concerns with the finding of falsity—is an insidiously potent avenue for eroding religious freedom, especially when purported advocates of liberal democratic values succumb to the intrinsic popular distaste for minority and fringe religious practices.

This article is organized into seven parts. Part 2 presents a brief literature review of the liberal democratic conception of religious freedom and the corresponding constraints on religious fraud regulation. Part 3 sets up the case study with the social backdrop and legal framework in Taiwan and Hong Kong. Part 4 scrutinizes the disparate outcome in the judicial review of legislation that specifically targets Chinese religions on account of fraud prevention. Part 5 analyses the vigorous prosecution and conviction of religious fraudulent sex. Part 6 explores the possible cultural and political reasons and discusses how religious fraud regulation implicates religious freedom. Part 7 concludes the article.

Religious freedom and religious fraud

With the recognition and establishment of religious freedom as a core human right and fundamental civil liberty,⁹ religious fraud as a legal concern should have been banished as a historical relic. After all, it is the bloodied trifles among polities over which is the true religion,¹⁰ and the brutal suppression of

⁷ See V.C.1.

⁸ See V.C.2.

⁹ Kristine Kalanges, *Religious Liberty in Western and Islamic Law* (OUP 2012) 1–5. For a concise discussion of the recognition and protection of religious freedom in international and domestic legal instruments, see SI Strong, *Transforming Religious Liberties: A New Theory of Religious Beliefs for National and International Legal Systems* (CUP 2017) 17–33.

¹⁰ For discussion of the European wars of religion in the medieval era, see generally Wolfgang Palaver, Harriet Rudolph and Dietmar Regensburger (eds), *The European Wars of Religion: An Interdisciplinary Reassessment of Sources, Interpretations and Myths* (Ashgate 2016); Mack P Holt, *The French Wars of Religion* (CUP 2005) 1562–629. See also *R v Lady Portington* (1795) 1

heretics and cults by ruling regimes,¹¹ that spurred the emergence of religious freedom in the first place.

The content and application of religious freedom is subjected to much debate and controversy. There is a diverse variety of church–State models around the world—no less in Asia.¹² Coalitions of Muslim-majority countries have been pushing for a distinct understanding of religious freedom that purports to reflect Islamic religious tradition and that accounts for the different constitutional protections and State practices in their domestic legal systems that can be hostile towards religious minorities.¹³ Buddhist constitutionalism—the legal project of using written constitutions to protect and preserve Buddhism in jurisdictions such as Thailand and Sri Lanka—reflects the closely intertwined and legally mediated relationship between the governing elites and Buddhist monks.¹⁴ In proud proclamation of its Socialist ideology, the constitution of the People’s Republic of China (PRC) restricts religious freedom only to ‘normal’ religious activities,¹⁵ while the State actively criminalizes ‘evil cults’.¹⁶ However, for jurisdictions that aspire to liberal democratic notions of religious liberty (especially of the Western conception), any State endeavour to tackle religious fraud would risk running afoul of two related fundamental principles.

First, the State may not evaluate the veracity of religious claims. This well-established principle among liberal democratic conceptions of religious liberty reflects an appreciation of the fact that the State lacks the capabilities to assess

Salk 162; 91 ER 151 (a 16th century English case holding that under the monarch’s power and obligation to ‘see that nothing be done to...Propagat[e]...a false Religion’, the monarch may order a trust for ‘a superstitious use’ to be applied to a ‘proper use’).

¹¹ Ani Sarkissian, *The Varieties of Religious Repression: Why Governments Restrict Religion* (OUP 2015) 1–3. For a discussion of the Medieval Inquisition, see generally Carole A Myscofski, ‘The Magic of Brazil: Practice and Prohibition in the Early Colonial Period, 1590–1620’ (2000) 40(2) *History of Religion* 153; Margaret Mott, ‘The Rule of Faith over Reason: The Role of the Inquisition in Iberia and New Spain’ (1998) 40 *J Church & State* 57.

¹² See Ran Hirschl, *Constitutional Theocracy* (Harvard University Press 2010) 1–20 (discussing the rise of constitutional theocracy, a church–State arrangement where constitutionalism—the key apparatus of the modern State—is utilized to explicitly and substantially advance a specific religion or religious denomination).

¹³ Jonathan Fox, *The Unfree Exercise of Religion: A World Survey of Discrimination against Religious Minorities* (CUP 2016) 158–62; Kalanges (n 9) 82–3, 114–39. For example, see Paul Marshall, ‘The Ambiguities of Religious Freedom in Indonesia’ (2018) 16(1) *Rev Faith & International Affairs* 85, 87–92 (critically discussing the situation of religious freedom in Indonesia, highlighting its strengths and shortcomings).

¹⁴ Benjamin Schonthal, ‘Formations of Buddhist Constitutionalism in South and Southeast Asia’ (2017) 15(3) *Intl J Constitutional L* 705, 707–8.

¹⁵ 宪法 [Constitution] (2004) (PRC), art 36. For discussion on the boundary between protected ‘normal’ religious activities and ‘abnormal’ religious practices, see Jianlin Chen, *The Law and Religious Market Theory: China, Taiwan and Hong Kong* (CUP 2017) 58–62.

¹⁶ 刑法 [Criminal Law] (promulgated by National People’s Congress, 14 March 1997, effective 1 October 1997, amended 25 February 2011) (PRC), art 300. See Guobin Zhu, ‘Prosecuting “Evil Cults”: A Critical Examination of Law Regarding Freedom of Religious Belief in Mainland China’ (2010) 32 *Human Rights Q* 471, 488–91 (discussing the law and other related regulations and policy documents). For an incisive discussion of the varieties of ways in which current non-democratic regimes repress religions, see generally Sarkissian (n 11).

the spiritual realm.¹⁷ The European Court of Human Rights (ECtHR) jurisprudence has firmly held that the State is prohibited from assessing the legitimacy of religious beliefs (or the means used to express such belief) under the religious freedom clause of the European Convention on Human Rights.¹⁸ In the USA, the consensus of the otherwise divided Supreme Court in *US v Ballard*—the landmark case on religious fraud—was that the courts may not evaluate the authenticity and truthfulness of a religious claim under the First Amendment.¹⁹ English common law courts have also developed—in the absence of an express constitution or bill of rights—the non-justiciability doctrine, whereby ‘issues of the truth or falsity of religious doctrines [are] non-justiciable.’²⁰

Second, the State may not discriminate between/among religions. The equality clause in international human rights instruments and domestic constitutions of liberal democracies explicitly prohibits discrimination on the basis of religion.²¹ For example, Article 26 of the ICCPR provides that ‘[a]ll persons are equal before the law. ...[T]he law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as...religion.’ Yet this equality clause is not, strictly speaking, necessary, since courts interpreting the constitutional protection of religious freedom typically impute the requirement of religious equality as a necessary component of religious freedom. Under ECtHR jurisprudence, this is the duty of neutrality and impartiality.²² Similarly, the US Supreme Court has struck

¹⁷ Andrew Koppelman, ‘Corruption of Religion and the Establishment Clause’ (2009) 50 *William & Mary L Rev* 1831, 1835; MD Litonjua, ‘Religious Zealotry and Political Violence in Christianity and Islam’ (2009) 35(2) *Intl Rev Modern Sociology* 307, 308–11; Steven H Shiffrin, ‘The Pluralistic Foundations of the Religion Clauses’ (2004) 90 *Cornell L Rev* 9, 44–5.

¹⁸ Research Division, ‘Overview of the Court’s Case-law on Freedom of Religion’ (Council of Europe/European Court of Human Rights 2013) 19; Anna Su, ‘Judging Religious Sincerity’ (2016) 5 *OJLR* 28, 36–7; Nicholas Gibson, ‘Faith in the Courts: Religious Dress and Human Rights’ (2007) 66(3) *CLJ* 657, 686–7.

¹⁹ *United States v Ballard* 322 US 78 (1944) 84–7. For a critical discussion of the case and the sincerity test, see William P Marshall, ‘Smith, Ballard and the Religious Inquiry Exception to the Criminal Law’ (2011) 44 *Tex Tech L Rev* 239, 255; Ira C Lupu, ‘Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion’ (1989) 102 *Harvard L Rev* 933, 953–4. For a recent discussion of the general ‘hands-off’ approach to religious doctrine applied by the US courts, see Samuel J Levine, ‘Recent Applications of the Supreme Court’s Hands-Off Approach to Religious Doctrine’ in Holly Fernandez Lynch, I Glenn Cohen and Elizabeth Sepper (eds), *Law, Religion, and Health in the United States* (CUP 2017) 77–9.

²⁰ Satvinder S Juss, ‘The Justiciability of Religion’ (2017) 32 *JL & Religion* 285, 291–5; Peter Smith, ‘The Problem of Non-Justiciability of Religious Defamation’ (2016) 18(1) *Ecclesiastical LJ* 36, 40–42; Frank Cranmer, ‘Case Comment: *Thomas Phillips v Thomas Monson*’ (2014) 16(3) *Ecclesiastical LJ* 393, 393.

²¹ The USA is the notable exception in that its Equal Protection Clause does not explicitly mention religion. However, religion would easily be considered a suspect class where any differential treatment would trigger strict scrutiny: Caroline Mala Corbin, ‘Nonbelievers and Government Speech’ (2012) 97 *Iowa L Rev* 347, 379.

²² Research Division (n 18) 19. For a critical discussion on the desirability of continued adherence to the duty of neutrality and impartiality in the EU, see Andrea Pin, ‘Does Europe Need Neutrality? The Old Continent in Search of Identity’ [2014] *Brigham Young UL Rev* 605.

down legislation that targets specific religions or religious practices *qua* religion.²³

In such a constitutional context, the immediate difficulty is that a charge of religious fraud by its very definition requires a determination of religious falsehood. How could the State ascertain and establish the necessary element of falsity without contravening the first principle? In addition, it is, *prima facie*, religious discrimination where an entire religious movement (as opposed to an individual) is targeted for State sanctions (for example, denial of legal recognition, criminal prosecutions, or an outright ban) for its perceived fraudulent nature.²⁴

This does not necessarily mean that all State attempts to tackle religious fraud are unconstitutional. For starters, religious freedom is not directly implicated in scenarios where—notwithstanding involvement of a purported religious leader or religious organization—the alleged falsehood is objectively verifiable (for example, donations are solicited for construction of a place of worship, but the collected funds are diverted for personal use).²⁵ Similarly, the sincerity test espoused in *US v Ballard* could arguably allow for criminal prosecutions of religious fraud that pass constitutional muster, especially if accompanied by procedural safeguards and substantive restrictions to mitigate the risks of an objective assessment of religious truth and a religious bias against unpopular and unorthodox religious groups.²⁶ Religious discrimination can also be avoided if care is taken to ensure that the wording, application, and impact of regulations on religious fraud do not single out any particular religion.²⁷

²³ *Eg Church of the Lukumi Babalu Aye v City of Hialeah* 508 US 520 (1993). See Susan Gellman and Susan Looper-Friedman, 'Thou Shalt Use the Equal Protection for Religion Cases (Not Just the Establishment Clause)' (2008) 10 U Pennsylvania J Const L 665, 666–8, 738–41 (arguing for greater use of the Equal Protection Clause instead of the First Amendment and observing that the prevailing lack of this otherwise obvious avenue might simply be due to path dependent neglect).

²⁴ See Joseph Zand, 'New Religious Movements and Freedom of Thought, Conscience and Religion in the European Convention on Human Rights' Jurisprudence' (2013) 6(2) Ankara Bar Rev 84, 91–101 (discussing the discriminatory denial of legal recognition of the Church of Scientology in Europe); Anne SY Cheung, 'In Search of a Theory of Cult and Freedom of Religion in China: The Case of Falun Gong' (2004) 13 Pacific Rim L & Policy J 1, 21–6 (discussing the persecution of Falun Gong in China).

²⁵ Jianlin Chen, 'Hong Kong's Chinese Temples Ordinance: A Cautionary Case Study of Discriminatory and Misguided Regulation of Religious Fraud' (2018) 33(3) JL & Religion, doi:10.1017/jlr.2019.10; Stephen Senn, 'The Prosecution of Religious Fraud' (1990) 17 Florida State UL Rev 325, 328.

²⁶ Examples include the right to bench trial, the inadmissibility of prejudicial evidence, and limits on individuals that may be prosecuted: see Nathan S Chapman, 'Adjudicating Religious Sincerity' (2017) 92 Wash L Rev 1185, 1231–9; Paul Horwitz, 'Scientology in Court: A Comparative Analysis and Some Thoughts on Selected Issues in Law and Religion' (1997) 47 DePaul L Rev 85, 147–50.

²⁷ For discussion of how discriminatory effects of facially-neutral and generally applicable laws may be unconstitutional, see Joy Milligan, 'Religion and Race: On Duality and Entrenchment'

Taiwan and Hong Kong: same, same but different?²⁸

This part examines how the social backdrop and legal framework of Taiwan and Hong Kong share important similarities (that is, ethnicity and commitment to human rights) and differences (that is, religious demographics and legal tradition).

Social backdrop

Taiwan and Hong Kong share a couple of important socio-economic similarities. Both are wealthy, modern, highly educated, and densely populated polities. Both societies consist predominantly of the ethnic Chinese/Han, with other ethnic groups making up no more than 5 per cent of the population.²⁹ Recently, both Taiwan and Hong Kong have also been making international headlines for civil disobedience movements that are underpinned by hostility against the perceived anti-democratic agenda of the PRC.³⁰

However, while both jurisdictions are spared the brutal imposition of atheistic Communist rule by the PRC,³¹ they have very different religious landscapes. There are no official statistics of religious affiliations in both jurisdictions. Using the Pew Research Center's 2012 global survey of religious groups as a benchmark, the religious demographics for Taiwan are—in descending order of size—Chinese folk religions (44.2 percent), Buddhism (21.3 percent), other religions (including new religious movements) (16.2 percent), unaffiliated (12.7 percent), and Christianity (5.5 percent). For Hong Kong, these statistics are: unaffiliated (56.1 percent), Christian (14.3 percent), Buddhist (13.2 percent), affiliated with Chinese folk religions (12.8 percent), Islamic (1.8 percent), affiliated with other religions

(2012) 87 *New York UL Rev* 393, 436–40; Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (OUP 2001) 168–99.

²⁸ Jenny Sue Kostecki-Shaw, *Same, Same but Different* (Henry Holt 2011) (a children's book about two boys, one living in America and the other living in India, who learn about how similar their lives are despite living in ostensibly different environments).

²⁹ Executive Yuan, *The Republic of China Yearbook 2015* (Executive Yuan 2016) 10–11; Information Services Department, *Hong Kong Yearbook 2016*, edited by Poon Lai Fong (2017) 33–5.

³⁰ Yongshun Cai, *The Occupy Movement in Hong Kong: Sustaining Decentralized Protest* (Routledge 2017) 1–3; Ming-sho Ho, 'Occupy Congress in Taiwan: Political Opportunity, Threat, and the Sunflower Movement' (2015) 15(1) *J East Asian Studies* 69, 69–70. For an edited collection comparing the movements in the two jurisdictions, see Brian Christopher Jones (ed), *Law and Politics of the Taiwan Sunflower and Hong Kong Umbrella Movements* (Routledge 2017); see also Albert HY Chen, 'A Tale of Two Islands: Comparative Reflections on Constitutionalism in Hong Kong and Taiwan' (2007) 37 *Hong Kong LJ* 647, 648 ('for both Hong Kong and Taiwan, mainland China plays the role of being "the Other"').

³¹ Fenggang Yang, 'The Red, Black, and Gray Markets of Religion in China' (2006) 47(1) *The Sociological Q* 93, 100; Pitman B Potter, 'Belief in Control: Regulation of Religion in China' (2003) 174 *China Q* 317, 317–18. The Cultural Revolution from the 1960s to 1970s was particularly devastating for all things religious: see generally Richard Curt Kraus, *The Cultural Revolution: A Very Short Introduction* (OUP 2012).

(1.4 percent), and Hindu (0.4 percent).³² One important complication of these statistics is that the syncretic nature of Chinese religious practices and the possibility of simultaneous religious identities renders it difficult to delineate any precise boundaries between Buddhism, Daoism, Chinese folk religions, and even some of the new religious movements.³³ Indeed, even individuals who claim no religious affiliation may engage in ritualistic practices associated with Chinese folk religions and superstitions.³⁴ Nonetheless, there is, unquestionably, a stark difference in terms of the proportion of Christians (Hong Kong has more than double that of Taiwan) and Chinese religions broadly defined to include Buddhist, Daoist, and Chinese folk religions (Hong Kong has less than half that of Taiwan).

Legal framework

In terms of legal systems, each jurisdiction reflects a side of the great global divide of civil law and common law. Taiwan is a civilian jurisdiction. Its foundational statutes (including the Criminal Code) are based on their Japanese and German counterparts, while jurisprudence and academic writings from Japan and Germany remain influential in interpretation and evaluation of the law.³⁵ Hong Kong continues to operate an English common law legal system after its handover to the PRC in 1997.³⁶ Its legislation (including its criminal law) is largely based on corresponding English statutes, and English court cases remain persuasive and are regularly cited in Hong Kong courts.³⁷

Notwithstanding this difference of legal systems, both jurisdictions proudly proclaim to be ardent supporters of constitutionalism and international human rights as they attempt to transition from regimes that ostensibly lack both. In Taiwan, martial law—and the accompanying restrictions on civil liberties—was lifted only in 1987.³⁸ Since then, Taiwan has successfully

³² Pew Research Center, 'The Global Religious Landscape' (2012) 46–7.

³³ Jinghao Zhou, *Chinese vs Western Perspectives: Understanding Contemporary China* (Lexington Books 2014) 134–6; Francesca Tarocco, 'Pluralism and Its Discontents: Buddhism and Proselytizing in Modern China' in Juliana Finucane and R Michael Feener (eds), *Proselytizing and the Limits of Religious Pluralism in Contemporary Asia* (Springer 2014) 241–2.

³⁴ Jiexia Elisa Zhai, 'Contrasting Trends of Religious Markets in Contemporary Mainland China and in Taiwan' (2010) 52(1) *J Church & State* 94, 100–3; Joel Thoraval, 'The Western Misconception of Chinese Religion: A Hong Kong Example' (1996) 3 *China Perspectives* 58, 63–4.

³⁵ Tay-Sheng Wang, *Legal Reform in Taiwan under Japanese Colonial Rule, 1895–1945: The Reception of Western Law* (University of Washington Press 2015) 175–82; Chih-Chieh Lin, 'Failing to Achieve the Goal: A Feminist Perspective on Why Rape Law Reform in Taiwan Has Been Unsuccessful' (2010) 18 *Duke J Gender & Policy* 163, 167–8.

³⁶ See Johannes Chan, 'From Colony to Special Administrative Region' in Johannes Chan and CL Lim (eds), *Law of the Hong Kong Constitution* (2nd edn, Sweet & Maxwell 2015).

³⁷ Johannes Chan, 'The Judiciary' in Johannes Chan and CL Lim (eds), *Law of the Hong Kong Constitution* (2nd edn, Sweet & Maxwell 2015); Kwai Hang Ng, 'Is There a Chinese Common Law? An Empirical Study of the Bilingual Common-Law System of Hong Kong' (2011) 8(1) *J Empirical Legal Studies* 118, 119–20.

³⁸ Jiunn-Rong Yeh, *The Constitution of Taiwan* (Hart 2016) 30–6.

transitioned into a vibrant democracy backed up by robust judicial review by the constitutional courts (that is, the Judicial Yuan through to the Council of Grand Justices).³⁹ Notably, the constitutional courts have regularly and positively referred to international human rights instruments (including the ICCPR) and foreign jurisprudence in their decisions since the 1990s,⁴⁰ while the government has formally incorporated both the ICCPR and the International Covenant on Economic, Social and Cultural Rights into domestic legislation in 2009.⁴¹

As a former British colony, there is a lack of institutional and democratic checks on the exercise of legal power by the colonial government in Hong Kong.⁴² Nonetheless, it is commonly perceived that there has been a generally high degree of civil liberties enjoyed in Hong Kong (even during colonial rule),⁴³ notwithstanding an emerging body of historical scholarly research that suggests a grimmer reality.⁴⁴ The then-pending resumption of Chinese sovereignty provided fresh impetus to provide for express guarantees of

³⁹ Bruce J Jacobs, *Democratizing Taiwan* (Brill 2012) 5–18; Tay-sheng Wang, 'The Legal Development of Taiwan in the 20th Century: Toward a Liberal and Democratic Country' (2002) 11 *Pacific Rim L & Policy J* 531, 535–9. For an incisive discussion on the evolving practice of judicial review in Taiwan, see Ming-Sung Kuo, 'Moving Towards a Nominal Constitutional Court? Critical Reflections on the Shift from Judicial Activism to Constitutional Irrelevance in Taiwan's Constitutional Politics' (2016) 25 *Washington Intl LJ* 597, 605–34; Chien-Chih Lin, 'The Birth and Rebirth of the Judicial Review in Taiwan: Its Establishment, Empowerment and Evolvement' (2012) 7 *Natl Taiwan UL Rev* 167.

⁴⁰ Fort Fu-Te Liao, 'Partly Virtual, Partly Real: Taiwan's Unique Interaction with International Human Rights Instruments' (2010) 16 *Asian YB Intl L* 25, 43–6. See Wen-Chen Chang, 'The Convergence of Constitutions and International Human Rights: Taiwan and South Korea in Comparison' (2011) 36 *North Carolina J Intl L & Commercial Regulation* 593, 608–18 (comparatively discuss the different ways in which constitutional courts in Taiwan and South Korea have utilized international human rights law in constitutional adjudication).

⁴¹ 公民與政治權利國際公約及經濟社會文化權利國際公約施行法 [Act to Implement the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights] (ROC) (2009). International Covenant on Economic, Social, and Cultural Rights (16 December 1966, 993 UNTS 3). For discussion about the historical context, political dynamics, and legal implications of this purported self-ratification, see Billy Chia-Lung Tai, 'Human Rights in Taiwan: Self Ratification and Review of the Two Covenants in Taiwan' (2017) 19 *Flinders LJ* 263, 275–86; Mark L Shope, 'The Adoption and Function of International Instruments: Thoughts on Taiwan's Enactment of the Act to Implement the ICCPR and the ICESCR' (2012) 22 *Indiana Intl & Comp L Rev* 159, 165–71.

⁴² Chan (n 36) 9–12; GB Endacott, *Government and People in Hong Kong 1841–1962: A Constitutional History* (Hong Kong University Press 1964) 4–6.

⁴³ Eg Chen (n 30) 656–7.

⁴⁴ See Michael Ng, 'When Silence Speaks: Press Censorship and Rule of Law in British Hong Kong, 1850s–1940s' (2017) 29(3) *L & Literature* 425 (a historical archival survey that reveals the colonial government's 'active and pre-emptive press censorship of Chinese newspapers' in Hong Kong and 'demythologizes the much-congratulated rule of law in the former colony'); Ronnie C Chan, 'What You Are Not Supposed to Know About Hong Kong' in Ming K Chan (ed), *China's Hong Kong Transformed: Retrospect and Prospects Beyond the First Decade* (City University of Hong Kong Press 2008) 100–3 (discussing the various 'half-truths' regarding the perceived level playing field and various freedoms—of market, politics, press, and academia—under British colonial rule that were, in reality, much more circumscribed).

human rights and civil liberties, no less in light of the Tiananmen Square 'Incident' in 1989.⁴⁵ The Hong Kong Bill of Rights Ordinance was enacted in 1991 to incorporate the ICCPR as an avenue to allow courts to strike down laws and administrative actions that contravene the human rights guarantee contained therein.⁴⁶ Article 39 of the Basic Law (Hong Kong's de facto constitution, operating since 1997) further buttressed the ICCPR within the Hong Kong constitutional order.⁴⁷ In this regard, jurisprudence of the ECtHR is regularly cited by Hong Kong courts as persuasive authority when interpreting the Hong Kong Bill of Rights Ordinance, in light of how the European Convention on Human Rights closely resembles the ICCPR.⁴⁸

Same but different: regulating Chinese temples

In the early 2000s, the highest judicial authorities in Taiwan (that is, the Judicial Yuan) and Hong Kong (that is, the Court of Final Appeal) each reviewed a piece of legislation that was designed to tackle fraudulent practices in places of worship associated with Chinese religions. Despite the similarities of the reviewed legislation and the underlying constitutional framework, the courts reached radically different conclusions. The legislation was struck down in Taiwan but upheld in Hong Kong. This part sets out the historical context, specifics of the legislation, judicial reasoning in the court decisions, and political dynamics subsequent to the rulings.

Historical context

Taiwan: nationalist government in Republican China

The Supervision of Temples Act was promulgated by the Republic of China (ROC) in 1929.⁴⁹ This statute was part of a series of regulations ostensibly intended to regulate perceived misuse and misappropriation of a temple's property and to direct the use of that property for charitable and

⁴⁵ Carole J Petersen, 'Sexual Orientation and Gender Identity in Hong Kong: A Case for the Strategic Use of Human Rights Treaties and the International Reporting Process' (2013) 14 *Asian-Pacific L & Policy J* 28, 42–6; Chen (n 30) 659–65.

⁴⁶ Hong Kong Bill of Rights Ordinance, Cap 383 (1997) (HK).

⁴⁷ Basic Law (1997) (HK). See Dinusha Panditaratne, 'Basic Law, Hong Kong Bill of Rights and the ICCPR' in Johannes Chan and CL Lim (eds), *Law of the Hong Kong Constitution* (2nd edn, Sweet & Maxwell 2015) 525–32.

⁴⁸ Johannes Chan and CL Lim, 'Interpreting Constitutional Rights and Permissible Restrictions' in Johannes Chan and CL Lim (eds), *Law of the Hong Kong Constitution* (2nd edn, Sweet & Maxwell 2015) 576–7; Daniel R Fung, 'Constitutional Reform in China: The Case of Hong Kong' (2004) 39 *Texas Intl LJ* 467, 472–3; Roda Mushkat, 'International Law in HKSAR' (1998) 28 *California Western Intl LJ* 353, 371–5. Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950, 213 UNTS 221).

⁴⁹ 監督寺廟條例 [Supervision of Temples Act] (ROC) (1929).

educational purposes.⁵⁰ There was, however, a strong underlying concern about fraudulent practices by charlatans who either conducted illegal activities under the guise of religion or otherwise engaged in superstitious activities that are contrary to social interests.⁵¹ Indeed, in addition to these regulations on the management affairs of temples, the ROC government also issued administrative directives seeking to abolish shrines associated with improper or frivolous religious values, such as soliciting monies through the pretence of divinity.⁵² This singling out of Chinese religious practices reflected the convergence of Christian influence within the ruling Nationalist Party and the modernist ethos of Chinese elites, both of which are hostile to Chinese traditional religious practices they have deemed superstitious.⁵³ The targeted religious communities did raise strong opposition to these laws and policies, but achieved only limited success in mitigating the level of State intervention and regulatory control, given their lack of effective organization and mobilization.⁵⁴

Hong Kong: British imperial rule in the Crown Colony

The Chinese Temples Ordinance⁵⁵ was enacted by the British colonial government in 1928. The purported legislative objective was uncannily similar to that of Taiwan's Supervision of Temples Act. The Long Title stated that the statute was meant to 'suppress and prevent abuses in the management of Chinese temples and in the administration of the funds of Chinese temples'.⁵⁶ The Explanatory Note of the bill further elaborated that the legislation was 'to prevent the exploitation of the ignorant by charlatans', given that '[t]here has been an alarming growth of pseudo-religious establishments in recent years.

⁵⁰ Haiyuan Qu, *宗教、術數與社會變遷 (二): 基督宗教研究、政教關係研究 [Religion, Fortune Telling and Social Change: Research on Christian Religion and Church-State Relationship]* (Laureate 2006) vol 2, 214–34.

⁵¹ Chin-Min Cheng, *臺灣宗教組織與行政 [Taiwan Religious Organization and Administration]* (Wenchen Publishing 2010) 75–87.

⁵² Jyun-wei Hu, '國民政府的「淫祠」政策 [“Lustful Shrines” Policy of the Nationalist Government]' (2015) 19 *New History of National Taipei University* 59, 61–74; Huaqing Guo, '国民党政府的宗教管理政策述略 [The Policy and Strategy of Managing Religion of the Nationalist Government]' (2015) 2 *Studies in World Religions* 24, 32–4.

⁵³ Vincent Goossaert and David A Palmer, *The Religious Question in Modern China* (University of Chicago Press 2011) 68–83; Robert P Weller, 'Within and Beyond the Market: Religions, Moralities, and Philanthropies in Chinese Societies' in Johnathan B Imber (ed), *Markets, Morals & Religion* (Transaction Publishers 2008) 232.

⁵⁴ Ji-wu Li, '论民国佛教界与中国宗教立法 [Chinese World of Buddhism and Religious Legislation in the Period of the Republic of China]' (2014) 43(3) *J Shaanxi Normal U (Philosophy and Social Sciences Edition)* 85, 88–91; Jinlong Chen, '民国《寺庙管理条例》的颁布与废止 [The Implementation and Abolishment of the Nationalist “Temple Regulation”]' (2008) 284 *Fa Yin* 54, 55–8; Qu (n 50) 226–30.

⁵⁵ Chinese Temples Ordinance, Cap 153 (1997) (HK) (Chinese Temples Ordinance).

⁵⁶ *Ibid.*

Many of the keepers are simply fortune tellers of an unrecognized and objectionable kind.⁵⁷

According to official accounts, the Chinese Temples Ordinance was initiated by the Chinese community.⁵⁸ Vincent Goossaert and David Palmer observe that the local Chinese elites were inspired by similar legislation passed in Mainland China (including the predecessors of the Supervision of Temples Act),⁵⁹ notwithstanding the lack of explicit reference to those laws in the legislative process.⁶⁰ However, it is also readily apparent that the Chinese Temples Ordinance is quite consistent with the governance ethos of the British colonial government. Five years after the Chinese Temples Ordinance was enacted, the colonial government, influenced by Christian teachings, further strengthened the criminalization of fortune telling.⁶¹ Given how Chinese temples were the focal point of the Chinese community,⁶² the regulatory powers under the Chinese Temples Ordinance also facilitated the prevailing political control strategy of endorsing a pro-government local organization/community over its less co-operative rivals.⁶³ Indeed, as was typical of the domineering political dynamic of the colonial regime,⁶⁴ there was minimal discussion of (and objection to) the legislation despite its substantially more severe regulatory burdens.⁶⁵ Indeed, the only amendment made, initiated upon petition by the keepers of To Yuen, was to allow the government to discretionarily exempt

⁵⁷ *Fok Ho Chiu v The Chinese Temples Committee* [2003] HKCU 1087 (HC), para 17.

⁵⁸ The promoters were the two appointed Chinese members of the legislative body: Official Reports of Proceedings (Legislative Council of Hong Kong, 26 April 1928) 33. See Attorney Generals Chamber, 'Report on Ordinance No 7 of 1928' (1928) 1 ('This Ordinance was introduced on the strong recommendation and urgent rest of the leaders of the Chinese community'); see also JC McDouall, 'The Secretariat for Chinese Affairs' in *The Government and The People* (Hong Kong Government Press 1962) 141–2 ('It was in the 1920s that responsible Chinese leaders became alarmed at the way in which the keepers of many Chinese temples in Hong Kong were misusing their position in a greedily commercial spirit, and were exploiting the people who came to worship or to seek guidance').

⁵⁹ Goossaert and Palmer (n 53) 205.

⁶⁰ See Official Reports of Proceedings (Legislative Council of Hong Kong, 26 April 1928) 33.

⁶¹ Official Reports of Proceedings (Legislative Council of Hong Kong, 5 November 1980) 158 ('Our predecessor must have taken heed of the exhortation in Deuteronomy not to follow abominable practices of divination, soothsayer or augurer, sorcerer, charmer or medium or wizard or wizard or necromancer'). For a concise historical account of the criminalization of fortune telling in the UK, see Steve Greenfield, Guy Osborn and Stephanie Roberts, 'From Beyond the Grave: The Legal Regulation of Mediumship' (2012) 8(1) *Intl JL in Context* 97, 101–2.

⁶² John M Carroll, 'Chinese Collaboration in the Making of British Hong Kong' in Tak-Wing Ngo (ed), *Hong Kong's History: State and Society under Colonial Rule* (Routledge 1999) 23; Elizabeth Sinn, *Power and Charity: The Early History of the Tung Wah Hospital* (OUP 1989) 15–17.

⁶³ Stephen WK Chiu and Ho-fung Hung, 'State Building and Rural Stability' in Tak-Wing Ngo (ed), *Hong Kong's History: State and Society under Colonial Rule* (Routledge 1999) 82–5.

⁶⁴ For a discussion of the colonial constitutional history, including the largely symbolic but immaterial representation of the native Chinese population that made up 98% of the colony population, see Endacott (n 42) 89–96, 126–62.

⁶⁵ See IV.B.

certain Chinese temples from the regulatory requirements of the Chinese Temples Ordinance.⁶⁶

Legislation specifics

Taiwan: Supervision of Temples Act

The Supervision of Temples Act defined 'temples' (the subject matter of the regulation) as 'regardless of label, any religious building that is managed by either Buddhist monks or Daoist priest'.⁶⁷ Temples that were constructed and managed by private entities were excluded explicitly from the scope of the regulation.⁶⁸

As compared with its regulatory predecessors, which involved prescriptions on the conduct and practices (including religious propagation) of the Buddhist monks and Daoist priests managing the temples,⁶⁹ the Supervision of Temples Act focused primarily on a temple's property. Article 5 stipulated that the property and religious artifacts of the temple should be registered with the local authority.⁷⁰ Article 9 stipulated that the temple should provide a half-yearly financial report to the local authority and also publicly disclose those reports.⁷¹ Article 8 required any transfer of the temple's immovable property and religious artefacts to be approved by both the temple's religious organization and the local authority.⁷² In terms of usage of a temple's funds and income, Article 7 restricted any expenditure to religious propagation, religious practices, and 'other legitimate expenses',⁷³ while Article 10 provided that the temple should engage in charitable work in accordance with its financial circumstances.⁷⁴ The penalty for violating these provisions was removal of the monk/priest managing the temple,⁷⁵ the exception being the reporting provision under Article 9, where no consequences for violation were prescribed.

⁶⁶ Official Reports of Proceedings (Legislative Council of Hong Kong, 26 April 1928) 32–3, 41. To Yuen are places where members of religious orders reside and also perform Chinese religious ceremonies.

⁶⁷ Supervision of Temples Act, art 1. The actual language used is '僧道', which could literally be translated as simply 'monks and priests' without specifying any particular religious affiliations. However, a prior judicial interpretation has explicitly confirmed that '僧道' does not include Christian religious specialists: Qu (n 50) 226–7. A subsequent regulation promulgated in 1936 also expressly excluded places of worship associated with Christianity, Islam, and Tibetan Buddhism from the obligation of registration on all temples: 寺廟登記規則 [Temples Registration Regulation] (ROC) (1936) art 13.

⁶⁸ Supervision of Temples Act, art 3(3). Temples that are managed by the government or local public organizations are also exempted: *ibid* arts 3(1), 3(2); as are temples located in regions heavily populated by non-Han ethnicities (eg Tibet, Mongolia, Qinghai): *ibid* art 12.

⁶⁹ Chen (n 54) 55–6; Qu (n 50) 222–4.

⁷⁰ Supervision of Temples Act, art 5.

⁷¹ *Ibid* art 9.

⁷² *Ibid* art 8.

⁷³ *Ibid* art 7.

⁷⁴ *Ibid* art 10.

⁷⁵ *Ibid* art 11.

Hong Kong: Chinese Temples Ordinance

The Chinese Temples Ordinance defines 'Chinese temples' as 'all Miu (廟, temples), Tsz (寺, Buddhist monasteries), Kun and To Yuen (觀及道院, Taoist monasteries), and Om (庵, nunneries).'⁷⁶ Reflecting the underlying concern about fraud by 'pseudo-religious establishments' and hostility towards fortune telling, a supplementary functional definition is also provided.⁷⁷ Chinese temples include:

every place where (i) in accordance with the religious principles governing Miu, Tsz, Kun, To Yuen, or Om, worship of gods or communication with spirits or fortune-telling is practised or is intended to be practised; and where (ii) fees, payments, or rewards of any kind whatsoever are charged to or are accepted from any member of the public for the purpose of worship or communication with spirits or fortune-telling or any similar purpose, or in return for joss candles or incense sticks, or on any other account whatsoever.⁷⁸

The Chinese Temples Ordinance does not specify whether private ownership would exempt a Chinese temple from regulation, and the Court of Final Appeal confirmed that private temples owned by an individual, clan, family, or 'long are not so exempted.⁷⁹

Regulatory control under the Chinese Temples Ordinance is more extensive and onerous than that under the Supervision of Temples Act. For starters, the requirement of registration under the Chinese Temples Ordinance extends beyond the particulars of its financial assets, and includes the governance structure and the worshipped deity.⁸⁰ There is the requirement that the Chinese temple be housed in a complete and separate building specifically erected and used solely for the purpose of the Chinese temple.⁸¹ This was a challenging condition to satisfy, given the high price of property and the prevalence of multi-story buildings in densely populated urban areas, even in the 1930s.⁸² The Chinese Temples Ordinance also grants the potent power of search and seizure—usually reserved for more severe circumstances such as illicit drugs, corruption, immigration, and customs control—to the relevant government official regulating Chinese temples.⁸³ Any registered Chinese temple or place suspected of housing a Chinese temple could be searched and have their documents/objects seized without need for a court order.⁸⁴

⁷⁶ Chinese Temples Ordinance, s 2.

⁷⁷ See II.A.2.

⁷⁸ Chinese Temples Ordinance, s 2.

⁷⁹ *Secretary for Justice v To Kan Chi* [2000] HKCU 1030 (CFA), 16.

⁸⁰ Chinese Temples Ordinance, s 5.

⁸¹ *Ibid* s 4.

⁸² Gillis Heller and Daphne SW Wong, 'The History of Exclusionary Zoning Laws in Hong Kong' (2010) 40 *Hong Kong LJ* 609, 611–14.

⁸³ Andrew Bruce, *Criminal Procedure: Trial on Indictment* (LexisNexis Butterworths 2016) paras 652–750. Interestingly, the author failed to mention the Ordinance when discussing the statutes that authorize search and seizure without a warrant.

⁸⁴ Chinese Temples Ordinance, s 14.

However, all of these pale in comparison with the provisions for the actual management of the Chinese temples.⁸⁵ Section 7 provides that all ‘revenues, funds, investments and properties’ of Chinese temples are ‘under the absolute control’ of the Chinese Temples Committee (CTC), which is comprised of government officials and government-appointed individuals.⁸⁶ That section provides that ‘[i]n order to make such control effective’, the CTC may compel the transfer to the government of properties/assets that were held on behalf of or for the purposes of any Chinese temple.⁸⁷ Unsurprisingly, the Chinese Temples Ordinance requires that revenues be used for religious ceremonies and building maintenance, and the surplus be used for charitable purposes. What is stark is that the Chinese temples do not even have the discretion of doing the charitable works themselves; the surplus is meant to be transferred to a government-affiliated charitable fund for the Chinese people.⁸⁸ Finally, the CTC could determine ‘what...the customary ceremonies of any particular Chinese temple [are] and what amount may be spent on any particular authorized object and what surplus may be transferred to the General Chinese Charities Fund’.⁸⁹

Judicial review

Taiwan: *Judicial Yuan Interpretation no 573*

The *Judicial Yuan Interpretation no. 573* originated from an internal temple dispute where the transfer of a temple’s land was voided on the grounds of the failure to get approval from the religious organization to which the temple belonged, thereby contravening Article 8 of the Supervision of Temples Act.⁹⁰ The transferee applied for constitutional review, arguing that Article 7 (equal protection), Article 13 (religious freedom), and Article 15 (property rights) of the Supervision of Temples Act had been violated.⁹¹

The Judicial Yuan agreed. The court recognized that the approval requirement (of both the religious organization and the government) is pursuant to

⁸⁵ Section 15 stipulates that any violation of these requirement would trigger a fine of HK \$ 500—a substantial sum in 1928. The sum was raised to HK \$1,000 in 1948. There has been no revision since then, resulting in the current practical insignificance of the fine—the fine for eating on the subway train is double that: Schedule 2, Mass Transit Railway By-Laws, Cap 556B (2000) (HK).

⁸⁶ Chinese Temples Ordinance, s 7.

⁸⁷ *Ibid* s 7(6); Chinese Temples Ordinance, Cap 153 (1928) (HK), s 7(2).

⁸⁸ Chinese Temples Ordinance, s 8(1).

⁸⁹ *Ibid* s 8(2).

⁹⁰ 最高法院86台上1164. For academic discussion, see Chen (n 15) 85–6; Hwei-Syin Chen, 宗教團體與法律: 非盈利組織觀點 [Religious Group and Law: A Non-Profit Organization Point of View] (Chuliu 2013) 91–2.

⁹¹ All three of these provisions are to be read in conjunction with art 23, which provides that ‘[a]ll the freedoms and rights enumerated in the preceding articles shall not be abridged by law except such as may be necessary to prevent infringement upon the freedoms of others, to avert an imminent danger, to maintain social order, or to promote public welfare.’

the legitimate purpose of preventing improper disposition of religious property. However, the court found that the blanket requirement of government approval was—in addition to the fatal ambiguity of the criteria of government approval—disproportionate to the legislative objective and, thus, unconstitutionally infringed upon religious freedom and property rights.⁹² In addition, the specific targeting of only Buddhist and Daoist places of worship without similar restriction on other religions contravened the duty of religious neutrality and religious equality under Article 13 and Article 7. The Judicial Yuan held that the Supervision of Temples Act would be ineffective two years after the judgment. The granting of the two-year grace period, a common practice in Taiwan and constitutional courts in civil law jurisdictions,⁹³ was due to the time needed for overhauling the regulatory regime on religious property.

Hong Kong: *Secretary for Justice v To Kan Chi*

*Secretary for Justice v To Kan Chi*⁹⁴ also concerned a dispute over a temple's property, though the contention was between, on the one hand, private entities (a tso⁹⁵ and a clan) claiming ownership and control over all the temple's assets, and, on the other hand, the government asserting that those assets belonged to charity and, thus, refusing to transfer to those private entities the payout for government acquisition of those assets. The government's position was premised on two grounds: a charitable trust and the regulatory controls under the Chinese Temples Ordinance. The Court of Final Appeal rejected the charitable trust argument.⁹⁶ However, the court upheld the constitutionality of the Chinese Temples Ordinance and held that the CTC would be given an opportunity to object and/or take appropriate action pursuant to section 7(1) (that is, the 'absolute control' clause).⁹⁷

In a somewhat surprising contrast to *Judicial Yuan Interpretation no. 573*, the court in this case focused only on whether the Chinese Temples Ordinance violated Article 105 of the Basic Law (that is, protection of property rights).⁹⁸ The

⁹² *Judicial Yuan Interpretations no 573* (2004). The Judicial Yuan also held that the requirement of approval by the religious organization failed to take into account the differences in governance among the different temples.

⁹³ Chen (n 30) 672–3, 678–80.

⁹⁴ [2000] HKCU 1030 (CFA). For critical analysis of the case, see Chen (n 25).

⁹⁵ See *Tang Kai-chung v Tang Chik-shang* [1970] HKLR 276, 279–80 ('Speaking generally, a Tso may be shortly described as an ancient Chinese institution of ancestral land-holding whereby land derived from a common ancestor is enjoyed by his male descendants for the time being living for their lifetimes and so from generation to generation indefinitely').

⁹⁶ The courts found that the temples were indeed owned by the private entities such that the private entities may withdraw and otherwise use the temple's assets at their discretion, but subject to Chinese law and custom: *Secretary for Justice v To Kan Chi* [2000] HKCU 1030 (CFA), 23.

⁹⁷ *Secretary for Justice v To Kan Chi* [2000] HKCU 1030 (CFA) 23–4 ('we would stay the order for payment out of court of the Funds until 30 days after service of a copy of the court's judgment in the present appeal by the Tso and the Clan's solicitors on the Chinese Temples Committee').

⁹⁸ Basic Law (1997) (HK), art 105 ('The Hong Kong Special Administrative Region shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use,

court began the analysis by observing that the Chinese Temples Ordinance primarily sought to regulate the management and administration of Chinese temples without purporting to affect ownership of the temple's assets.⁹⁹ The court did note that '[i]f the Ordinance operated to take away the [owner of Chinese temple]'s Chinese law and custom right at any time to alter the purpose to which all or any part of the property of the [Chinese temple] is devoted, that would be a confiscatory statute that violated the constitutional right to property.¹⁰⁰ However, applying the 'leading principle of statutory construction that, unless compelled to do so by clear words, the courts do not construe a statute as confiscatory',¹⁰¹ the court construed the regulatory control over revenue and property to apply only to assets that were 'for the time being devoted to the due observance of the temple's customary ceremonies and the maintenance of its temple buildings and temple properties', thereby redeeming the constitutionality of the Chinese Temple Ordinances.¹⁰²

Political aftermath

Taiwan

In many ways, the judicial outcome in *Judicial Yuan Interpretation no. 573* was inevitable, if belatedly so. In 1946, the first ROC constitutional national assembly had already requested that the Supervision of Temples Act be repealed on constitutional grounds.¹⁰³ After the interruption posed by the civil war with the Chinese Communist Party and the consequent retreat of Taiwan,¹⁰⁴ the Nationalist government had been engaging in numerous legislative attempts at a replacement since 1950, with an ongoing public consultation process on yet another attempt amidst the litigation leading up to *Judicial Yuan Interpretation no. 573*.¹⁰⁵ The various drafts of legislative bills varied in terms of the specifics of the regulatory control, but an obvious constant (right from the beginning) was the purported application of the regulatory regime to all religions, not just Buddhism and Daoism.¹⁰⁶ Moreover, all these legislative attempts were repeatedly stalled by strong opposition from religious organizations over the perceived intrusive and onerous regulatory control.¹⁰⁷ In such a context, it was uncontroversial, socially and politically, when the Judicial

disposal and inheritance of property and their right to compensation for lawful deprivation of their property'.

⁹⁹ *Secretary for Justice v To Kan Chi* [2000] HKCU 1030 (CFA) 19–20.

¹⁰⁰ *Ibid* 20–1.

¹⁰¹ *Ibid* 19. For a recent invocation and application of the principle in the UK Supreme Court, see *In re Peacock* [2012] 1 WLR 550, 560.

¹⁰² *Secretary for Justice v To Kan Chi* [2000] HKCU 1030, 21.

¹⁰³ Cheng (n 51) 75.

¹⁰⁴ Yeh (n 38) 30–6.

¹⁰⁵ Cheng (n 51) 75–81.

¹⁰⁶ For critical discussion of the various proposals, see *ibid*: Qu (n 50) 235–51.

¹⁰⁷ Cheng (n 51) 75–81.

Yuan struck down the statute for both infringing religious freedom and violating religious equality.

Hong Kong

In its own way, the judicial outcome in Hong Kong was also consistent with the prevailing socio-political ethos. The Hong Kong government had reviewed all the existing laws *vis-à-vis* the human rights guarantee set forth in the Hong Kong Bill of Rights Ordinance just a few years prior to the *To Kan Chi* decision. While it made amendments to several statutes pursuant to the review (for example, partial repeal of libel criminalization),¹⁰⁸ the Chinese Temples Ordinance somehow did not raise an eyebrow on the reviewing committee, either in terms of religious freedom or religious equality.

The *To Kan Chi* decision did not spur any notable scholarly or political debate,¹⁰⁹ unlike the high-profile conflict between the Catholic Church and the government over the 2004 legislative change that required all government-subsidized schools to have no more than 60 per cent of the school's governing committee appointed by the school-sponsoring bodies.¹¹⁰ The government did not take any steps *vis-à-vis* the Chinese Temples Ordinance; though, in 2012, the government did acknowledge that it had not been enforcing the statute for the past five years despite receiving complaints regarding unregistered temples.¹¹¹ The Secretary for Home Affairs acknowledged that the non-enforcement was due to 'respect [of] the autonomy of religious organizations' and 'prevailing community expectations of protecting private property rights' and that the government had begun to review the Chinese Temples Ordinance.¹¹²

The review culminated in a public consultation exercise in 2015—the Review of the Chinese Temples Ordinance Public Consultation Document (the Review).¹¹³ The Review acknowledged that 'some provisions in the Ordinance

¹⁰⁸ Chen (n 30) 679–80.

¹⁰⁹ The case was not mentioned at all in the leading and otherwise comprehensive textbook on Hong Kong constitutional law: Johannes Chan and CL Lim (eds), *Law of the Hong Kong Constitution* (2nd edn, Sweet & Maxwell 2015).

¹¹⁰ Education Ordinance, Cap 279 (1997) (HK), s 40AL(3). The Catholic Church alleged that the government was trying to take over control of schools affiliated with Catholic churches, and unsuccessfully challenged the amendment all the way to the Court of Final Appeal: *Catholic Diocese of Hong Kong v Secretary for Justice* [2011] HKCEA 71. For critical discussion of the decision, see Shue Sing Churk and Jianlin Chen, 'Case Comment: Government-sponsored Religious Education in Hong Kong after *Catholic Diocese of Hong Kong v Secretary for Justice*' (2014) 3(2) *Oxford JL & Religion* 340.

¹¹¹ Official Reports of Proceedings (Legislative Council of Hong Kong, 18 January 2012) 4762–3. See also Joseph Bosco, 'Chinese Popular Religion and Hong Kong Identity' (2015) 14(1) *Asian Anthropology* 8, 13–14 (noting how a variety of spirit writing groups and private temples and halls are not publicly registered).

¹¹² Official Reports of Proceedings (Legislative Council of Hong Kong, 27 November 2013) 3334; Official Reports of Proceedings (Legislative Council of Hong Kong, 18 January 2012) 4762–3.

¹¹³ Home Affairs Bureau, *Review on the Chinese Temples Ordinance Public Consultation Document* (March 2015).

appear to be outdated in the present day context' and sought to replace the various onerous regulatory controls with a voluntary registration scheme.¹¹⁴ Tellingly, the proposed voluntary registration scheme and newly proposed empowering of the Secretary of Home Affairs to be a party to any related legal proceedings as 'an additional safeguard on top of...the role of the [Secretary of Justice] as the protector of charities'¹¹⁵ were meant to be applicable only to Chinese temples. As explained in the Review, the existing regulatory control on Chinese temples was not necessary because 'members of the public are now much more aware of the risks associated with "pseudo-religious establishments"' and there was now various, generally applicable laws targeting fraud and malpractice.¹¹⁶ However, the voluntary registration scheme for Chinese temples was still desirable: to inform the public, to enhance transparency, and to enable 'Chinese temples [to] gain public confidence'.¹¹⁷

There was limited public attention to the Review. The Review received a few responses that were generally supportive of the attempt to 'update' the law.¹¹⁸ However, the proposed amendments were stalled at the post-consultation committee stage due to strong opposition by pro-democracy legislators.¹¹⁹ In the most unexpected and ironic twist, given their political parties' purported ardent commitment of promoting human rights and civil liberties,¹²⁰ the pro-democracy legislators were objecting to the reduction in regulatory control

¹¹⁴ Ibid 1–3.

¹¹⁵ Ibid 6. See Wong Yan Lung, 'The Secretary for Justice as the Protector of the Public Interest: Continuity and Development' (2007) 37 *Hong Kong LJ* 319, 333–4 (discussing the circumstances where the Secretary for Justice may intervene in litigations on the account of public interest).

¹¹⁶ Home Affairs Bureau, *Review on the Chinese Temples Ordinance Public Consultation Document* (March 2015) 3.

¹¹⁷ Ibid 4–5 (the information to be provided and regularly updated for the purpose of registration includes 'purpose of establishing the temple, the god(s) to be worshipped, major events involved, its owner(s) and administrator(s), its assets donated by the public and the uses of such donations').

¹¹⁸ Home Affairs Bureau, *Public Affairs Forum: Summary of Comments on the Review on the Chinese Temples Ordinance* (PAF Summary 6/2015, June 2015).

¹¹⁹ The political participants in Hong Kong can be largely divided into two camps, namely, the 'pro-establishment' camp (which favours a closer relationship in terms of China's role in Hong Kong economic and social life) and the 'pan-democrats' camp (which advocates for greater autonomy for Hong Kong, including a more liberal democratic institution that is distinct from the Chinese government's conceptualization of good governance). See Bill KP Chou, 'Election without Fair Representation: Hong Kong's Legislative Council and Its Implications for Non-liberal Regimes' in Zheng Yongnian, Lye Liang Fook and Wilhelm Hofmeister (eds), *Parliaments in Asia: Institution Building and Political Development* (Routledge 2014) 229–30; Joseph YS Cheng, 'Democratization in Hong Kong: A Theoretical Exception' in Edmund SK Fung and Steve Drakeley (eds), *Democracy in Eastern Asia: Issues, Problems and Challenges in a Region of Diversity* (Routledge 2014) 229–30.

¹²⁰ Lam Wai-man, 'Hong Kong: The Hong Kong Legislative Council: Where Politics Matters More than Size' in Nicholas DJ Baldwin (ed), *Legislatures of Small States: A Comparative Study* (Routledge 2013) 141–2; Ho-fung Hung and Iam-chong Ip, 'Hong Kong's Democratic Movement and the Making of China's Offshore Civil Society' (2012) 52(3) *Asian Survey* 504, 508–11.

over Chinese temples. One legislator argued that the '[a]dministration should not relax its control over Chinese temples under the pretext of upholding religious freedom'.¹²¹ Another 'strongly objected' to the proposed change, given how it 'might affect or lessen the protection afforded to members of the public against unlawful activities of deceitful pseudo-religious establishments'.¹²² These objections were levelled, notwithstanding that the committee was specifically notified that '[a]t present, other than Chinese temples, other religious facilities in Hong Kong are not subject to similar restraints as imposed by the relevant provisions in the Ordinance'.¹²³

Different but same: criminalizing religious fraudulent sex

The divergence in how statutes regulating Chinese religions are treated in Taiwan and Hong Kong can be contrasted with the equal zeal of prosecuting and convicting religious fraudulent sex. This part discusses the general criminal law provisions on fraudulent sex, the actual use of these provisions to punish religious fraudulent sex, how courts establish the core element of falsity, and the underlying political dynamics of such prosecutions.

Criminal law provisions on fraudulent sex

Taiwan: forcible sex and violating will

The current Criminal Code in Taiwan was enacted in 1934 by the ROC in Mainland China. The provisions relating to sexual offences remained unchanged until 1999. Prior to 1934, fraudulent procurement of sex was limited to spousal impersonation, as per the specific offence under Article 229.¹²⁴ The general provision of rape under Article 221 was narrowly defined as 'engaging [in] extra-marital/improper sexual intercourse (姦淫) with a woman through force, threat, drug, hypnosis or other means that renders the woman unable to resist'.¹²⁵ Under this emphasis on forceful relinquishing of the victim's will to resist, fraud is, *prima facie*, excluded.¹²⁶ Indeed, the requirement of the

¹²¹ Legislative Council Secretariat, *Panel on Home Affairs: Minutes of Special Meeting* (LegCo Paper no CB(2)1968/14-15, 5 May 2015) 9 (Kenneth Chan Ka-lok).

¹²² *Ibid* 10 (Helena Wong Pik-wan).

¹²³ Secretary for Home Affairs, *Supplementary Information on the Review on the Chinese Temples Ordinance* (LegCo Paper No CB(2)1346/14-15, 4 May 2015).

¹²⁴ 刑法 [Criminal Code] (ROC) (1934), art 229.

¹²⁵ *Ibid* art 221.

¹²⁶ Jung-Chien Huang, '2010 年刑事法發展回顧: 慾望年代, 慾望刑法? [Developments in the Law in 2010: Criminal Law]' (2011) 40(S) Natl Taiwan ULJ 1795, 1835; Tze-Tien Hsu, '面臨合法惡害威脅下的性自主 [Sexual Autonomy under Legal Duress]' (2011) 181 Taiwan LJ 120, 124-5.

victim's inability to resist had resulted in acquittals in circumstances where the victims were deemed to have insufficiently resisted the defendant's sexual advances.¹²⁷

The 1999 amendments to the sexual offences provisions of the Criminal Code were part of the broader legal reform advocated by the Taiwanese feminist movement to provide for better treatment and protection of women under the law.¹²⁸ The new Article 221 now prescribes the offence of 'forcible intercourse' (強制性交) for those 'who have sexual intercourse with a male or female by force, threat, intimidation, hypnosis or other means against the person's will'.¹²⁹ The most significant legal change (at least for purposes of this article) is the removal of the requirement of 'unable to resist' and replacing it with 'against the person's will'.¹³⁰

The extent to which this legal change expanded the scope of Article 221 had been up for debate. The dispute had been framed *vis-à-vis* the level of compulsion that the defendant must apply to the victim before it constitutes forcible sex, with Taiwanese scholars disparately arguing for (i) high-level compulsion (that is, akin to force and direct threat); (ii) low-level compulsion (that is, putting the victim in a vulnerable situation such that it is difficult for the victim to resist); and (iii) no compulsion (that is, as long as the victim subjectively does not wish to have sex with the defendant).¹³¹ Each of these approaches distinctively affects the type of fraud that would be criminalized under Article 221. If high-level compulsion were required, the fraud had to constitute a threat (for example, the defendant did not have a firearm but threatened to shoot the victim with a gun if the victim did not submit to sex acts).¹³² If low-level compulsion were the benchmark, the fraud had to be of the type, method, scope, or risk of infringement of the legal interest of sexual autonomy (for example, the defendant purports to insert a medical instrument for

¹²⁷ Marietta Sze-chie Fa, 'Rape Myths in American and Chinese Laws and Legal Systems: Do Tradition and Culture Make the Difference' [2007] *Contemporary Asian Studies* 1, 77–8.

¹²⁸ *Ibid* 92–100. For a discussion of Taiwan's women's movement and feminist discourse after the end of martial law, see Doris T Chang, *Women's Movements in Twentieth-Century Taiwan* (University of Illinois Press 2009) 118–55.

¹²⁹ 刑法 [Criminal Code] (ROC) (2016) art 221.

¹³⁰ According to the legislative reasons accompanying the amendments, the removal of the requirement was because the requirement was overly stringent and encouraged victims to vigorously resist their assailants, at the risk of greater bodily harm: 刑法異動條文與理由 [Legislative Reasons for Criminal Code Amendment], 30 March 1999, art 221.

¹³¹ For a general overview of the debate, see Huang-Yu Wang, '強制手段與被害人受欺騙的同意:以強制性交猥褻罪為中心' [Force Methods and Agreement under Deception: Based on the Sexual Assault Crime] (2013) 42(2) *Natl Taiwan ULJ* 381, 395–8; Da-Wei Lin, '論詐術性交罪 兼論「宗教騙色」案件之認事用法問題 [A Study on Offense of Fraud-type Sexual Intercourse: Also on the Issues of Identifying Usage of "Sexual Fraud in Religion"]' (2013) 59(5) *Military LJ* 108, 111–17.

¹³² Hsu (n 126) 124. The academic and judicial consensus is that as long as the victim believed the threat to be true, then it is immaterial whether the defendant can in fact carry out the threat: Sheng-Wei Tsai, '論強制性交罪違反意願之方法 [Forcible Means in the Crime of Forced Sexual Intercourse]' (2016) 18 *Academia Sinica LJ* 41, 60–1; Wang (n 131) 408–10.

medical treatment, but inserts his penis instead).¹³³ If no compulsion were necessary, then any form of fraud that materially induced the victim would suffice.¹³⁴

The authoritative judicial interpretations issued by the Supreme Court in 2008 and 2010 have unequivocally stipulated that high-level compulsion is not necessary after the 1999 reform.¹³⁵ However, the judicial interpretations did not explicitly address the issue of whether low-level compulsion or no compulsion is the preferred approach.¹³⁶ The unresolved debate among scholars over the proper interpretation of these judicial interpretations¹³⁷ mirrors the ambiguity and inconsistencies in subsequent court judgments. Some courts affirmed that low-level compulsion is essential¹³⁸ and some courts stipulated that no compulsion is necessary,¹³⁹ while a few judgments sought to avoid controversy by simply stating that forcible sex *includes* low-level compulsion.¹⁴⁰ In terms of punishment of fraudulent sex, this ambiguity has not been crucial to any prosecutorial outcome, since most cases involving an element of fraud tend to be either threat-based (for example, a defendant pretending to be a policeman and threatening to arrest the victim),¹⁴¹ related to the legal interest of sexual autonomy (for example, the insertion of a penis instead of medical instrument),¹⁴² or punishable by other provisions (for example, abuse of authority; taking advantage of victim's physical or mental incapacity; or sex with a minor).¹⁴³

Hong Kong: vitiating consent and procurement

Hong Kong, as per its English common law tradition and as distinct from the German civilian approach,¹⁴⁴ approached the general rape offence via the lack

¹³³ Wang (n 131) 422–3.

¹³⁴ Lin (n 131) 119–23.

¹³⁵ 最高法院九十九年度第七次刑事庭會議決議：最高法院九十七年度第五次刑事庭會議紀錄。For discussion of the de facto legally binding precedent effect of these judicial interpretations and how the bureaucratic nature of the Taiwan civilian court systems magnifies their constraints on lower courts, see Kai-Ping Su, 'Criminal Court Reform in Taiwan: A Case of Fragmented Reform in a Not-Fragmented Court System' (2017) 27(1) *Washington Intl LJ* 203, 218–21.

¹³⁶ Tsai (n 132) 67–8.

¹³⁷ See Lin (n 131) 115–17 (arguing for no compulsion); Wang (n 131) 403–4 (arguing for low-level compulsion).

¹³⁸ Eg 最高法院100台上4578; 高等法院105侵上訴228; 高等法院104侵上訴62.

¹³⁹ Eg 最高法院103台上720; 高等法院106侵上訴98; 高等法院105侵上訴179.

¹⁴⁰ Eg 高等法院106侵上訴145.

¹⁴¹ Eg 最高法院95台上7201.

¹⁴² Eg 最高法院98台上3312. For discussion of the case in the context of whether fraud as to the legal interest would constitute violation of will, see Tsai (n 132) 76–8.

¹⁴³ Eg 最高法院102台上248 (dismissing the conviction of forcible sex of a defendant who lured an 11-year-old, mildly mentally handicapped girl to have sex on the promise of provision of monies to buy clothes, but otherwise convicting the defendant for sex with a minor).

¹⁴⁴ See Michael Bohlander, 'Mistaken Consent to Sex, Political Correctness and Correct Policy' (2007) 71(5) *J Criminal L* 412, 420–5 (a comparative review of criminal law provisions on rape).

of consent. Section 118 of the Crimes Ordinance defines 'rape' as having 'unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it'.¹⁴⁵ This, in turn, put the spotlight on what sort of deception would vitiate consent. In an interesting resemblance to Taiwan, spousal impersonation is explicitly stipulated in the statutory provision as sufficient to constitute rape.¹⁴⁶ The English common law courts have further established that deception relating to the 'nature of the act' will vitiate consent.¹⁴⁷ The Court of Final Appeal affirmed this approach in Hong Kong.¹⁴⁸

This otherwise often-criticized narrow approach towards fraudulent sex¹⁴⁹ is supplemented by the 'procurement by false pretences' offence. Section 120 of the Crimes Ordinance punishes any person who 'procures another person, by false pretences or false representations, to do an unlawful sexual act'.¹⁵⁰ The provision originated in an 1885 English provision that was meant to punish the middleman who lured women and girls into prostitution.¹⁵¹ When the provision was introduced in Hong Kong in 1978, it was also part of a legislative reform package designed to tackle prostitution.¹⁵² Indeed, there was some early legal ambiguity over whether the provision was applicable to (besides the middleman) the individual who actually engaged in the sexual intercourse.¹⁵³ Nonetheless, it is now firmly established within legal circles (both academic and practice) that the procurement offence served as a useful lesser

¹⁴⁵ Crimes Ordinance, Cap 200 (1997) (HK), s 118(3)(a).

¹⁴⁶ *Ibid* s 118(2).

¹⁴⁷ Karl Laird, 'Rapist or Rouge? Deception, Consent and the *Sexual Offences Act 2003*' [2014] (7) Criminal LR 492, 495–8; Rebecca Williams, 'Deception, Mistake and Vitiating of the Victim's Consent' (2008) 124(1) LQR 132, 133–6. For an academic discussion right before the 2003 law reform in the UK, see David Selfe and Vincent Burke, *Perspectives on Sex, Crime and Society* (2nd edn, Cavendish Publishing 2001) 79–86.

¹⁴⁸ *Chan Wai Hung v HKSAR* [2000] HKCU 611 (CFA), 3–6.

¹⁴⁹ The 2003 legislative reform in the UK expanded the category of fraud to expressly encompass 'purpose of the act': Sexual Offences Act 2003 (UK) s 76. For an overview of the reform, see generally Jennifer Temkin and Andrew Ashworth, 'The *Sexual Offences Act 2003*: (1) Rape, Sexual Assaults and the Problems of Consent' [2004] (5) Criminal LR 328. Similar reform is proposed in Hong Kong: Law Reform Commission of Hong Kong, 'Consultation Paper: Rape and Other Non-Consensual Sexual Offences' (2012) 43–4.

¹⁵⁰ Crimes Ordinance, Cap 200 (1997) (HK) s 120. '[U]nlawful sexual act' interpreted by the English and Hong Kong courts as 'surplusage' and encompassing all sexual acts: in UK, see *Regina v R* [1992] 1 AC 599, 610–11 (HL); in Hong Kong, see: *HKSAR v Au Yeung Kwok Fu* [2012] HKCU 223 (CA), paras 25–30.

¹⁵¹ Home Office, 'Setting the Boundaries: Reforming the Law on Sex Offences' (2000) 29–30. For academic commentary, see JR Spencer, 'Sex by Deception' (2013) 9 Archbold Rev 6, 6. When the procurement offence was introduced into Hong Kong law in 1978, it was added, together with a whole host of other offences relating to prostitution, under the overall legislative objective of tackling the exploitation of women and girls for the purpose of prostitution: Official Reports of Proceedings (Legislative Council of Hong Kong), 21 December 1977, 334–9. For example, the other introduced offences included 'trafficking [for the purpose of prostitution]' (s 130), 'causing prostitution' (s 131), 'living on earnings of prostitutions of others' (s 137), and 'letting of premise for use as vice establishment' (s 143).

¹⁵² Official Reports of Proceedings (Legislative Council of Hong Kong, 21 December 1977) 334–9.

¹⁵³ *R v Williams* (1898) 62 JP 310. See Spencer (n 151) 6–7.

offence to target fraudulent sex that would otherwise not constitute rape.¹⁵⁴ Indeed, the theoretical reach of the provision is extensive, given the absence of any restriction on the type and category of fraud. Even fraud relating to the consideration will suffice, as evidenced by how section 120 has been used in Hong Kong to prosecute and convict individuals who have had sex with sex workers on the false promise of payment.¹⁵⁵

Prosecuting and convicting religious fraudulent sex

Taiwan

The courts in Taiwan are not typically renowned for their progressive approach to sexual offences. Taiwanese legal scholar Chih-Chieh Lin conducted a systematic survey of how the District Court addressed forcible sex cases over a ten-year period immediately after the 1999 reform. She found that, despite the purportedly feminist-oriented changes to the statutory provisions, the surveyed judgments revealed the persistence of patriarchal rape myths that held that vigorous resistance on the part of the victim is instrumental in the finding of 'real rape'.¹⁵⁶ However, religious fraudulent sex is a notable exception to the general judicial aversion to finding forcible sex in circumstances that involved two mentally capable adults having sex without allusion to force or threat.¹⁵⁷

This willingness to extend Article 221 to punish religious fraudulent sex is a long-standing feature of judicial practice. Even under the purportedly more restrictive pre-1999 provision, the courts have regularly convicted defendants who procured sex through proclamations of supernatural and divine forces since the enactment of the Criminal Code.¹⁵⁸ Notably, while the clear element of threat (that is, divine retribution and other adverse supernatural consequences) arguably fits the statutory provision, this jurisprudence still departs from German academic opinions and judicial practice, which do not regard supernatural harm as constituting necessary threat for purposes of forcible offence, given the lack of direct control of supernatural events by the person making the threat.¹⁵⁹

¹⁵⁴ Law Reform Commission of Hong Kong (n 149) 68; Bethany Simpson, 'Why Has the Concept of Consent Proven So Difficult to Clarify?' (2016) 80(2) JCL 97, 110; Laird (n 147) 509; Spencer (n 151) 8.

¹⁵⁵ Eg *HKSAR v Kwan Chung Wang* 關仲宏, DCCC599/2015 (sentencing) (DC); *HKSAR v Fung Kwok Ho* 馮國豪, DCCC712/2015 (sentencing) (DC); *HKSAR v Nyamdoe Zoljiargal* [2014] HKEC 1021 (CFI).

¹⁵⁶ Lin (n 35) 180–4.

¹⁵⁷ *Ibid* 184–5. Chih-Chieh Lin labelled this category of cases 'religious compulsion', though the conventional label in the Taiwanese literature is 'religious fraudulent sex': Tsai (n 132) 61; Lin (n 131) 111.

¹⁵⁸ Eg 最高法院 28滬上25; 最高法院 52台上1024. See Tsai (n 132) 61; Lin (n 131) 114.

¹⁵⁹ Tsai (n 132) 62–3; Chun-Jin Tu and Po-Chiang Liu, '以宗教之名行騙性交是否構成強制性交罪? [Does Sexual Intercourse Obtained by Religious Deception Constitute Rape?]' (2012) 58(3) Military LJ 50, 60–1.

Unsurprisingly, this pattern is not affected by the 1999 reform. This author's online search reveals three to five such cases reaching the final appellate court (that is, the Supreme Court) annually in the past five years, with the vast majority of cases resulting in convictions.¹⁶⁰ The broadening of Article 221 in the 1999 reform did allow Taiwan's courts to consolidate and refine the applicable principles when dealing with religious fraudulent sex. This culminated in the 2013 Supreme Court judgment 最高法院102台上3692 (*Judgment 102/3692*), identified by Taiwanese scholars as constituting the most detailed exposition of the relevant legal doctrines.¹⁶¹ It has also been explicitly cited and adopted in numerous subsequent decisions, whether in the lower courts (for example, the High Court)¹⁶² or the Supreme Court itself.¹⁶³ *Judgment 102/3692* essentially defined forcible sex by religious fraud as the defendant having employed methods that cannot be verified through science (for example, divine power, supernatural force, religion, or superstition) and that are contrary to prevailing social values, in order to sexually exploit a victim who is in a state of psychological vulnerability due to a combination of (i) setbacks to relationship(s), their health, and/or their career and (ii) any limitations of the victim's intellect. Notably, the courts have taken a rather generous subjective approach towards the victim's psychological vulnerabilities, such that the victim need not be facing problems that are objectively severe. In *Judgment 102/3692*, the victim's predicament appears banal. One victim was trying to get back together with her boyfriend; another victim was facing 'some difficulties at work'.¹⁶⁴

Judgment 102/3692 does raise an immediate issue as to falsity. As per the court's holding, falsity is not even included as a necessary element of the offence. However, there is a *de facto* requirement of falsity in judicial practice. According to the author's database searches, there are, thus far, no cases where the defendant is convicted of forcible sex without the court categorizing the defendant's supernatural/religious claim as false.¹⁶⁵ Indeed, the courts

¹⁶⁰ 司法院法學資料檢索(裁判查詢) <<http://jirs.judicial.gov.tw/FJUD/>> accessed 5 April 2019. For a systematic and critical analysis of the findings, see Jianlin Chen, 'Joyous Buddha, Holy Father, and Dragon God Desiring Sex: A Case Study of Rape by Religious Fraud in Taiwan' (2018) 13(2) *Natl Taiwan ULJ* 183.

¹⁶¹ Tsai (n 132) 62, fn 69.

¹⁶² Eg 高等法院106侵上訴293; 高等法院臺南分院106侵上訴916; 高等法院高雄分院104侵上訴52; 高等法院臺南分院104侵上訴749; 高等法院103侵上訴112; 高等法院臺中分院102侵上訴157; 高等法院臺中分院101侵上訴237.

¹⁶³ Eg 最高法院104台上2902. Sometimes, the Supreme Court simply replicates the exact passage without mention of its origin: eg 最高法院106台上456; 最高法院103台上3490. For discussion of the role of precedent in civil law jurisdictions, see Michael Bohlander, *Principles of German Criminal Law* (Hart Publishing 2009) 15.

¹⁶⁴ 最高法院102台上3692.

¹⁶⁵ See also Tsai (n 132) 62 (referring to some early cases and observing that the courts have treated such cases as fraud rather than threat or intimidation). Acquittal for such cases tends to be rare and is usually due to inconsistencies of the victim's testimony raising doubt as to whether the sexual intercourse(s) did in fact take place, rather than because of the court doubting whether the defendant is in fact lying: eg 最高法院102台上3088.

identified the defendant's claims as false (for example, 佯言亡魂纏身,¹⁶⁶ 繼藉口「解運」)¹⁶⁷ even in the early 1960s judgments when there was no necessity to do so under the statutory framework and prevailing academic theory. One possible explanation of—or at least a practical benefit arising from—this consistent practice of categorizing the defendant's supernatural/religious claims as false when convicting the defendant is that it allows the court to avoid the constitutional problem of criminalizing a religious practice. After all, there is no constitutional right of protection where the defendant is only pretending to be religious. Similarly, deception would readily qualify as contrary to the prevailing social values *vis-à-vis* the holding in *Judgment 102/3692*.

Hong Kong

Given how the falsehood in religious fraudulent sex relates to the purpose of the act (that is, the defendant claims that the sex is part of a religious ritual when it is only for the defendant's sexual gratification) rather than the nature of the act, the victim is almost certainly deemed to have adequately consented to the sex act(s), thus negating a finding of rape. On the other hand, the expansive scope of the procurement offence renders it jurisprudentially and doctrinally straightforward to prosecute and convict the defendants.

Indeed, not only does the prosecution rely on the procurement offence to punish religious fraudulent sex, religious fraud also appears to be the primary use of the procurement offence. In a 2012 consultation paper, the Law Reform Commission reported that the procurement offence was used in a total of 16 cases over a 10-year period from 2001 to 2011.¹⁶⁸ An updated systematic search by the author identified 11 reported decisions over the period from March 2007 to March 2017. Among these, seven cases involved religious fraud.¹⁶⁹

Finding of falsity

These regular prosecutions and high rates of conviction for religious fraudulent sex in Taiwan and Hong Kong raise an immediate question: how did the courts establish the necessary element of falsity (or at the very least, the *de facto* requirement, as in the case of Taiwan)?

¹⁶⁶ 最高法院 52台上1024.

¹⁶⁷ 最高法院 56台上2210 (the courts also emphasized the lack of education and ignorance of the victim: '告訴人乃一自幼生長農村, 未受教育, 智識極端淺薄之村姑, 與曾受教育之成年人不可等論').

¹⁶⁸ Law Reform Commission of Hong Kong (n 149) 68.

¹⁶⁹ For a critical discussion of the cases, see Jianlin Chen, 'Lying about God (and Love?) to Get Laid: The Case Study of Criminalizing Sex under Religious False Pretense in Hong Kong' (2018) 51 *Cornell Intl LJ* 553.

Taiwan

In Taiwan, the approach taken by the courts depends on the type of supernatural/religious claims employed by the defendant; in particular, whether the religious premise is that of an established world religion.

In the relatively uncommon scenario where the defendant associates himself with an established world religion, the courts have evaluated the claims *vis-à-vis* the perceived doctrines of that religion without engaging in the more controversial question as to whether the claim is objectively true. For example, the defendant in 最高法院103台上 626 (*Judgment 103/626*) claimed to be a Christian pastor and told victims that they should have sex with him because it was God's will and it was necessary to either avoid misfortune or secure their position in Heaven.¹⁷⁰ The courts convicted the defendant of forcible sex. The courts found that the defendant had used fraudulent means because (i) the defendant was not an accredited pastor of any church and (ii) sex as a means to gain access to Heaven is clearly not a Christian doctrine.¹⁷¹ Notably, the courts did not rely on any expert testimony from Christian religious specialists with regard to the second prong.

The majority of the religious fraudulent sex cases in Taiwan involve either Chinese folk religions or purported new religions founded by the defendant. For example, one defendant claimed that he needs fresh sperm to concoct love charms and magic potions under the general practice of 'Tame Head' spells.¹⁷² Another example is where the defendant claimed to be the reincarnation of the 'Dragon God' (龍王) and promulgated a rather elaborate set of doctrines where different divine blessings are attributed to various sex acts.¹⁷³

In these scenarios, the courts would try to highlight any inconsistencies in the defendant's testimony. For example, the change in defence by the defendant between his statements during police interrogation (for example, fresh sperm

¹⁷⁰ 最高法院103台上626. The appeal is focused on relatively narrow grounds, and the full facts are set out in 臺中地方法院101侵訴70.

¹⁷¹ Notably, while the District Court alludes to both factors, the Supreme Court focuses only on the 'pastor' point. There was also evidence that the defendant actively engineered false evidence of his purported divinity. The High Court found that the defendant coerced three victims who believed they had the ability to witness paranormal phenomena (靈異現象) to proclaim in front of other victims that the defendant was indeed God. This finding was made based on testimonies of the three victims, who claimed that they had to affirm the defendant's divinity even though their paranormal vision was both different and vague: see 臺中地方法院101侵訴70.

¹⁷² 最高法院102台上3692. 'Tame Head' is a form a black magic popularly practiced in Thailand and other parts of South East Asia. Alexander Horstmann, 'Reconfiguring Manora Rongkru: Ancestor Workshop and Spirit Possession in Southern Thailand' in Kirsten W Endres and Andrea Lauser (eds), *Southern Thailand, Engaging the Spirit World: Popular Beliefs and Practices in Modern Southeast Asia* (Berghahn Books 2011) 184–5. For a case study account, see generally Bertha Mo, 'Black Magic and Illness in a Malaysian Chinese Community' (1984) 18(2) *Social Science & Medicine* 147.

¹⁷³ For example, sexual intercourse is described with the euphemism 'forever Dragon education' (龍恆教育). Sperm is described as the 'essence of Dragon' (龍精華) such that internal depositing will allow accumulation of 'Dragon's blessing' (龍福報).

necessary for potions) and those uttered during the trial (for example, no mention of any religious ritual when performing the sex acts) may be used to impute falsehood.¹⁷⁴ Evidence of deceptive activities, such as the creation of fake Facebook profiles to post glowing reviews of the defendant's divine prowess on the defendant's webpage, is also relied upon where available.¹⁷⁵ Any admission by the defendant that sex could not be part of a religious ritual also allowed the court to readily reach a finding of falsity.¹⁷⁶

Utilizing internal inconsistencies in the defendant's testimony is an effective way to overcome evidential difficulties. However, closer examination of how courts have evaluated the veracity of the religious claims of defendants in cases of religious monetary fraud reveals that the courts' assessment is premised on a specific conceptualization of what constitutes legitimate religion. Compared with the high rate of convictions for religious fraudulent sex, monetary fraud involving religious claims often results in acquittal, even in situations where the defendant was simultaneously charged and convicted of forcible sex for essentially the same claims. In *Judgment 102/3692*, the courts found that the defendant had lied about the claims regarding fresh sperm being necessary for 'Tame Head' spells, but, nonetheless, recognized that 'Tame Head' spells, together with charms, exorcism, witchcraft, spirit possession, and enchantment, are part of a long tradition of folk religious practices and customs spanning thousands of years, so that judges should not deem them false even if they may be considered superstitions (迷信) by atheists and cannot be verified by science.¹⁷⁷

Similarly, a professional fortune teller with 20 years of experience was convicted of forcible sex with two victims but was acquitted on most of the monetary fraud charges.¹⁷⁸ For the monetary fraud, the courts have observed that the defendant's claims and practices are similar to the various common folk religious practices involving luck-improvement rituals, and noted that if those practices were to be considered fraudulent, that would obviously be contrary to the 'legal sentiment' (法律情感) of the public. On the other hand, the defendant's purported claims about a curse-removal ritual involving sex acts goes against the 'chaste' nature of religion (宗教純潔性) and is, thus, fraudulent.¹⁷⁹

This disparate treatment of religious monetary fraud and religious fraudulent sex illustrates how the Taiwan courts are, on the one hand, generally

¹⁷⁴ 高等法院102侵上訴55.

¹⁷⁵ 最高法院106台上456.

¹⁷⁶ 高等法院104侵上訴59.

¹⁷⁷ 最高法院102台上3692.

¹⁷⁸ 最高法院102台上4174. The appeal is focused on relatively narrow grounds, and the full facts and holding are set out in 高等法院臺中分院101侵上訴1.

¹⁷⁹ The courts also relied on the inconsistencies of the defendant's statement where he mistakenly claimed that a certain curse had been placed on the victim when the purported curse-caster could not possibly have had the necessary ingredients for the curse. The defendant was mistaken because the victim told the defendant that the victim handed the ingredients (victim's clothes and items) to the purported curse-caster when the victim did not indeed do so.

willing to accommodate transactions/interactions that resemble commonly practised folk religions even if there may be doubts as to veracity of the claims, but, on the other hand, they seemingly reject as false all supernatural/religious claims that call for sex as part of a religious ritual and/or are required for favourable divine interventions.¹⁸⁰ Indeed, while the courts have acquitted some defendants for forcible sex charges involving religious claims, it is because of doubt as to whether the alleged sexual intercourse actually took place.¹⁸¹ The author's search on such cases has yet to yield a case where the courts found that a defendant's religious/supernatural claims involving sex were not false.

Hong Kong

A similar approach to establishing the falsity of a defendant's supernatural/religious claims is adopted in Hong Kong. The courts will ostensibly try to rely on inconsistencies in the defendant's testimony when possible. For example, the trial judge in *HKSAR v Au Yeung Kwok Fu* noted that the defendant was able to provide details of the sexual intercourse despite previously claiming that he was possessed by a divine being during the ritual and, thus, had no recollection of, or control over, his actions.¹⁸² Admission by the defendant that sexual intercourse had no exorcistic or luck-improving effect would also immediately establish falsity.¹⁸³

However, the courts are not hesitant to assume the defendant's claims are false even when no such inconsistencies are present, such as when the defendant elects to remain silent. For example, in *HKSAR v Ho Ka Po Tony*, the court accepted the victim's testimony as credible and found that the defendant did make the supernatural/religious claim (that is, that sex is part of a ritual to remove the 'Tame Head' curse) and did have sex with the victim. The court then proceeded to conclude that the victim 'was deceived' by the defendant without any discussion as to why the pretence was false.¹⁸⁴ Similar problems occur when the defendant testifies that the sex was voluntary and unrelated to any supernatural/religious claims, as in *HKSAR v Wong Mei Yin & Lo Fun Yi*.¹⁸⁵ The trial judge, having adopted the victim's version of events, simply

¹⁸⁰ See also Yue-Dian Hsu and Jing-Fan Chou, '宗教自由作為宗教詐欺的犯罪檢驗 [Examining the Crimes of Religious Fraud with the Right of Religious Freedom]' (2009) 21(1) *Soochow LR* 1, 28 (rightly criticizing statements by judges that expressed expectations/understanding as to what religion should be, and outright dismissing certain religious claims of supernatural power).

¹⁸¹ Eg 最高法院102台上3088.

¹⁸² *HKSAR v Au Yeung Kwok Fu*, DCCC 569/2009 (judgment) (DC), paras 130–3; *HKSAR v Au Yeung Kwok Fu*, [2012] HKCU 223 (CA) para 21.

¹⁸³ *HKSAR v Yuen Yuk Kin* [阮毓健], CACC454/2011 (CA) paras 56–69.

¹⁸⁴ *HKSAR v Ho Ka Po Tony* [2013] HKEC 829 (DC) paras 38–46.

¹⁸⁵ DCCC70/2010 (verdict) (DC).

determined that the defendant's representation that sex was a necessary part of the exorcism ritual 'was false, without any basis, and that ordinary reasonable and honest people will deem such representation as false'.¹⁸⁶

Even the presentation of facts in the judgment can be telling. In *HKSAR v Chow Kam Wah*, the judge (in a sentencing judgment after the jury trial) summarized the facts. For the procurement charges, the judge stated that '[t]he defendant told the victim that the sexual intercourse was part of the exorcism ritual. The defendant thus procured sexual intercourse with the victim by falsely representing that by having sexual intercourse with him the ghost following the victim would be exorcised'.¹⁸⁷ This is in sharp contrast to how the judge presented the facts for the rape conviction (which occurred four months after the last ritual). The judge wrote that the defendant had 'raped the victim' because the 'evidence disclosed that...the defendant forcibly removed her shorts and underpants and had sexual intercourse with her against her will'.¹⁸⁸ The use of 'forcibly' and 'against her will' reflected the core element of the rape offence, but the judge apparently considered the falsehood (the core element of the procurement offence) of the defendant's claim to be self-evident.

Indeed, like their Taiwanese counterparts, Hong Kong judges occasionally make revealing statements that arguably underscore the real dynamic at play. The trial judge in *Au Yeung Kwok Fu* wrote:

I neither accept nor believe that any religion or belief which has helping others and advocating kindness as its fundamental value will coopt mortal sexual lust as a component of religious worship/rituals. If there are really such teachings, I consider them as only belonging to heretics and evil cults which sought to use these teachings and twisted logics to satisfy one's desire. These people are packaging sexual intercourse as a religious or mystical product.¹⁸⁹

Notably, this passage was not challenged on appeal.¹⁹⁰

Political dynamic

Taiwan

There is broad support in Taiwan for the punishment of religious fraudulent sex via forcible sex convictions. Some Taiwanese scholars have argued against prosecuting religious fraudulent sex, given the evidential difficulties and possible infringement of religious liberty.¹⁹¹ However, even they would

¹⁸⁶ *HKSAR v Wong Mei Yin & Lo Fun Yi*, DCCC70/2010 (verdict) (DC) para 103.

¹⁸⁷ *HKSAR v Chow Kam Wah*, HCCC80/2010 (sentencing) (HC) 2.

¹⁸⁸ *Ibid.*

¹⁸⁹ *HKSAR v Au Yeung Kwok Fu*, DCCC 569/2009 (judgment) (DC) para 141.

¹⁹⁰ *HKSAR v Au Yeung Kwok Fu* [2012] HKCU 223 (CA).

¹⁹¹ Tsai (n 132) 63; Tu and Liu (n 159) 57–8.

acknowledge that the general consensus in the academic literature is in favour of criminalization.¹⁹² Recent examples include Da-Wei Lin supporting these prosecutions on the grounds of protecting the sexual autonomy of individuals who are rather superstitious and ignorant (比较迷信, 不懂事)¹⁹³ and Huang-Yu Wang recognizing and justifying this departure from German jurisprudence in light of the perceived prevalence of such practices in Taiwan.¹⁹⁴ The regularity of the prosecutions and the accompanying high-profile media reporting have not spurred any public outcry, indicating at the very least acquiescence to such punishment. Indeed, legislative reform proposals have been formulated by the government since 2011 to create a new, specific sexual offence of 'religious fraudulent sex' (神棍騙色罪). The proposals are generally supported by the public, including religious organizations and women's groups.¹⁹⁵

Hong Kong

In comparison, the issue of religious fraudulent sex is essentially absent from Hong Kong academic discourse.¹⁹⁶ One possible reason is language. The majority of these recent religious fraudulent sex cases are in Chinese, in which scholars working in the English common law system of Hong Kong may not always be fluent. In addition, while the mainstream broadsheet newspapers in Taiwan regularly carry reports on legal proceedings relating to religious fraud (and with sensational headlines to boot),¹⁹⁷ the media reporting on such cases in Hong Kong tends to be restricted to tabloids, which are predominantly in Chinese.¹⁹⁸ The prosecution does take religious fraudulent sex seriously, as evidenced by regular prosecutions.

¹⁹² Tsai (n 132) 62.

¹⁹³ Lin (n 131) 136.

¹⁹⁴ Wang (n 131) 424–5.

¹⁹⁵ Cheng-Zheng Siang et al. '法部擬修法 利用宗教騙色 最重判10年 [Ministry of Law Propose Law Amendments – Maximum Imprisonment of 10 years for Religious Fraudulent Sex]' *Liberty Times* (12 October 2010) A01.

¹⁹⁶ The *Au Yeung Kwok Fu* case (the first case in this case study) was mentioned in a book chapter of the leading constitutional law textbook in Hong Kong. However, the book chapter's depiction of the case's holding (ie, assuming the defendant was genuinely performing a religious ritual, the restrictions were justified given the necessity of protecting public health, public morality, and the fundamental freedoms of others) was erroneous given that there was no mention of religious freedom at all in the judgments (whether at trial, sentencing, or appeal), and that the courts found the defendant was lying: see Puja Kapai, 'Freedom of Conscience and Religious Belief' in Johannes Chan and CL Lim (eds), *Law of the Hong Kong Constitution* (2nd edn, Maxwell 2015) 892.

¹⁹⁷ Eg Ding-Chuan Wang, '假驅魔真性侵「龍王」騎著賺 判賠409萬 [Fake Exorcism Real Sexual Assault: 'Dragon God' Earning Money while Lying Down, Ordered to Compensate 4.09 Million]' *Liberty Times* (14 July 2016) B04D; Peng-Sheng Hu, '誣歡喜佛改運 逼母女玩4P [Feigning Divine Tributes to Joyous Buddha to Compel Mother and Daughters into Foursome]' *United Daily News* (18 September 2012) B1.

¹⁹⁸ Eg <<https://www.hk01.com/tag/14108/>> accessed 5 April 2019.

Religious fraud and the limits of religious freedom

No religious liberty for false religions

Religious freedom is proudly proclaimed by the government in both Taiwan and Hong Kong. The official yearbook for Taiwan declares that '[t]he people of Taiwan enjoy complete freedom of religion, as affirmed by numerous observers and demonstrated by the nation's rich spectrum of religious traditions from around the world'.¹⁹⁹ Similarly, the official yearbook for Hong Kong begins its chapter on religion and custom as follows: 'Hong Kong's Basic Law guarantees religious freedom, allowing a diversity of faiths to coexist harmoniously'.²⁰⁰ Compared with the harsh persecution of various religions that is still commonplace around the world, it is undeniable that Taiwan and Hong Kong are generally good places to be for religious adherents and religious organizations.

However, this case study of how religious fraud is regulated does indicate that the high degree of 'religious freedom' enjoyed in these two jurisdictions is not without important qualifications. In both jurisdictions, there is a notable wariness about certain portions of the population being deceived by false supernatural/religious claims, such that general criminal provisions are vigorously enforced against perceived religious fraud while, at the same time, formulating/considering specific legislation to address the problem.

There are notable differences in the legal responses of Taiwan and of Hong Kong (in particular the disparate outcomes relating to legislation targeting Chinese religions), and this difference provides insight into the socio-political factors at work in the way that religious freedom is actually conceived of and protected. However, these differences are actually just different manifestations of the same conceptual approach to religious freedom. In both jurisdictions, the conceptualization of religious freedom is, in fact, underpinned by a specific notion of what constitutes legitimate, 'real' religion that would be protected, and other illegitimate, 'pseudo-', or otherwise false religions that are excluded from protection. The common denominator of illegitimate and false religions in both jurisdictions is supernatural/religious claims involving non-spousal sex—as evidenced by the ready and unfailing judicial finding of falsity and the occasional honest articulation of the judicial attitude.²⁰¹ Beyond religious fraudulent sex, Taiwan has taken a more liberalized approach such that, as long as the practices resemble existing folk religious practices, they would be accorded the protection of religious freedom and the consequent 'benefit of the doubt' when assessing the veracity of a claim. On the other hand, these perceived superstitious activities have remained suspect in Hong Kong, so that they are treated as immediately obvious and otherwise compelling justification for intrusive State intervention in the affairs of the associated religions (that is, Chinese religions).

¹⁹⁹ Executive Yuan, *The Republic of China Yearbook 2016* (Executive Yuan 2017) 267.

²⁰⁰ Information Services Department (n 29) 329.

²⁰¹ See V.C.

Reasons

This approach towards religious freedom is, *prima facie*, inconsistent with the liberal democratic notions of religious freedom set out above in the second part of this article: the State is not supposed to determine the legitimacy of religious claims, however dubious, unorthodox, or suspicious they might be; that is an issue for the individual to resolve, not the State, with all the inherent bias of the majority religious worldview. Nor is the State supposed to discriminate on the basis of religion just because of perceived risk of harm associated with that religion. Any risk of harm should be targeted by generally applicable legislation, not through the proxy of the associated religion.

This begs the question of why. What could explain both (i) this departure by Taiwan and Hong Kong from the liberal democratic notions of religious freedom *vis-à-vis* criminalization of religious fraudulent sex and (ii) the divergence between Taiwan and Hong Kong *vis-à-vis* specific legislation targeting Chinese religions?

Cultural?

Given that Taiwan and Hong Kong are both societies constituted predominantly by ethnic Chinese, a possible explanation is cultural and historical in nature. As discussed in the third section of this article, the Chinese Temples Ordinance was inspired by the predecessors to the Supervision of Temples Act. Yet, while commentators have identified the modernist ethos among Chinese elites (together with Christian influence) as the driving force behind these regulations, this legal hostility towards superstitious activities and perceived illegitimate pseudo-religious organizations predated the Republican China.

The Great Qing Legal Code contained numerous provisions that explicitly prescribed what constitutes legitimate religious practices and criminalized evil cults that deceive the populations,²⁰² reflecting the ruling regime's apprehension over the threat of both subversive rebellion and corruption of social morals.²⁰³ The Qing government was particularly concerned about degradation of traditional sexual norms and imposed severe punishments on religious leaders/specialists who engaged in illicit sexual relationships with their followers through various religious/supernatural pretences.²⁰⁴ Indeed, the fact pattern of these pre-modern cases bears uncanny resemblances to the

²⁰² Chen (n 90) 16–20.

²⁰³ I-Chiao Wang, '清朝乾嘉時期庶民社會的邪教恐懼與秩序危機以檔案中的民間秘密宗教案件為中心' [Crisis and Fear in Rural Society in the Qian-Jia Reign: Focus on the Qing Archives of Popular Religion and Sectarian] (2011) 20 NCCU Collectanea of History 95, 97–9.

²⁰⁴ Li-Chuan Chiu, '清代民間秘密宗教活動中「男女雜處」現象的探討 [The Study of the Phenomenon that Men and Women of Folk Secret Religious Sects Anticipated Meetings Together in Ching Dynasty]' (2006) 35 Natl Taiwan Normal U Bulletin Historical Research 141, 163–70.

modern cases in Taiwan and Hong Kong, be it the self-proclamation of divinity, the exploiting of a victim's despondency over their dire circumstances, or the pretext that sex is an essential component of religious rituals.²⁰⁵

At this juncture, it must be noted that this aversion towards religious movements perceived as unorthodox—especially those that deviate from traditional sexual norms—is by no means a uniquely Chinese cultural or historical phenomenon. In nineteenth-century America, there was vigorous and concerted opposition towards 'cults' deemed to threaten Christianity.²⁰⁶ In particular, the Mormons were actively persecuted by legal and extra-legal methods both for the theological teachings of its founder that were perceived as peculiar (including claims of an angel directing him to discover buried ancient plates engraved in an unknown language that only he could decipher) and for the practice of polygamy (which was widely—if arguably wrongly—imagined by the public to be dominated by 'lascivious males with hyperactive libidos').²⁰⁷ The religious freedom clauses in many early state constitutions in the USA explicitly exclude 'licentiousness' or 'licentious acts' from the ambit of free exercise protection.²⁰⁸ More recently in Western European countries (including France and Germany), religious movements perceived as 'cults' by the State had attracted responses from the government that 'overall could be characterized as one of suspicion fueling efforts to exert social control'.²⁰⁹ Indeed, the recent 'sex cults' criminal prosecution of the organization called NXIVM (which attracted extensive media attention because of the involvement of actress Allison Mack) is but a recent manifestation of the long-standing revulsion and moral panic relating to perceived deviant sex in a religious context.²¹⁰

²⁰⁵ For detailed discussion of the various cases, see *ibid* 152–8.

²⁰⁶ J Gordon Melton, 'The Countercult Monitoring Movement in Historical Perspective' in James A Beckford and James T Richardson (eds), *Challenging Religion* (Routledge 2013) 94–5.

²⁰⁷ Elijah L Milne, 'Blaine Amendments and Polygamy Laws: The Constitutionality of Anti-Polygamy Laws Targeting Religion' (2006) 28 *Western New England LR* 257, 263–71. See also Tisa Wenger, *We Have a Religion: The 1920s Pueblo Indian Dance Controversy and American Religious Freedom* (University of North Carolina Press 2014) 136 (in the context of discussing alleged associations of Native American dance ceremonies with rampant sexual activities and consequent government attempts to suppress such ceremonies in 1920s USA, the author observed that '[t]he charges of sexual immorality were part of a long tradition of Christian polemical rhetoric accusing so-called 'heathens' and other religious rivals of sexual deviance').

²⁰⁸ Marci A Hamilton, 'The "Licentiousness" in Religious Organizations and Why it is Not Protected under Religious Liberty Constitutional Provisions' (2010) 18 *William & Mary Bill Rights J* 953, 970–6.

²⁰⁹ James T Richardson, 'Minority Religions (Cults) and the Law: Comparisons of the United States, Europe and Australia' (1995) 18 *U Queensland LJ* 183, 194–5. See Keturah A Dunne, 'Addressing Religious Intolerance in Europe' (1999) 30 *California Western Intl LJ* 117, 121–8 (discussing the French regime).

²¹⁰ Scott Johnson and Rebecca Sun, 'Her Darkest Role: Actress Allison Mack's Descent from "Smallville" to Sex Cult' *Hollywood Reporter* (16 May 2018).

Political?

While the criminalization of religious fraudulent sex is consistent with the long-standing Chinese cultural aversion towards non-marital sex and sects perceived as unconventional, it does not explain the disparate judicial and political responses to the Chinese Temples Ordinance and the Supervision of Temples Act.

In a way, the seed of the stark contrast in the outcomes of judicial review in the 2000s was sown 50 years earlier when, at the outset, the proposed amendments to the Supervision of Temples Act acknowledged the religious inequality of the existing legislation and sought to expand its reach to all religions.²¹¹ This foreshadowed the Judicial Yuan's finding of breach of the duty of religious neutrality and religious equality under Article 13 and Article 7.²¹² This also facilitated the finding of disproportionate restrictions on the religious practices through rallying religious organizations that are not associated with Chinese religions to join the Chinese religions in objecting to any new legislation. In particular, Christian churches and religious organizations were understandably vocal and vigorous in their opposition to the proposed reform,²¹³ given how even a mild form of regulation is a deterioration of the status quo of no regulation. Thus, even though there is no agreement on what an appropriate replacement would be, there is a consensus that the existing Supervision of Temples Act is excessively onerous.

In comparison, the British colonial government in Hong Kong was never overly concerned about religious equality. There was no such guarantee (or any other human rights guarantee) in the Hong Kong Letters Patent and Royal Instructions to provide any legal constraints,²¹⁴ and the statutes are littered with examples of explicit preference for Christianity and discrimination against traditional Chinese religions.²¹⁵ Some examples include how the legal definition of marriage is defined as 'Christian marriages or equivalent of a Christian marriage'²¹⁶ so that no Buddhist or Daoist temples were recognized as licensed places of worship (that is, able to issue marriage certificates) before the Handover;²¹⁷ or how the Prison Rules only grants the right of regular access without prior notification—and the right to 'administer the Holy Sacrament of the Lord's Supper'²¹⁸—to government-appointed

²¹¹ See IV.D.1.

²¹² See IV.C.1.

²¹³ Qu (n 50) 79–81.

²¹⁴ Chen (n 30) 656–7.

²¹⁵ For a comprehensive survey, see J Chen (n 15) 127–34.

²¹⁶ Marriage Ordinance, Cap 181 (1997) (HK), s 40.

²¹⁷ <<http://www.gld.gov.hk/egazette/pdf/20040810/cgn200408101537.pdf>> accessed 5 April 2019. See Carmen Ng, *香港佛教史* [Buddhist History of Hong Kong] (Chunghwa Bookstore 2015) 239.

²¹⁸ Prison Rules, Cap 234A (2015) (HK), rule 169 ('(1) The chaplains shall administer the Holy Sacrament of the Lord's Supper on suitable occasions to all prisoners who wish to communicate. (2) The time of the celebration of Holy Communion shall be notified in advance, and it

'chaplains' who, unsurprisingly, were all either Catholics or Protestant Christians;²¹⁹ or how Christian ministers were given an explicit exemption from jury service (with Jewish ministers added in 1948), but no such exemptions for officials of any other religions existed during colonial times.²²⁰ Thus, it was almost inevitable that there was never any real pressure (or even an awareness of the need) to reform the Chinese Temples Ordinance in a more religiously egalitarian or neutral fashion.

But that is the past. Why do such attitudes persist in the 2000s, decades after the implementations of the ICCPR? An immediate response from post-colonial scholars would be that the colonial legacy is not so readily dispelled.²²¹ In Hong Kong, many commentators have recognized the disproportionate Christian influence in Hong Kong politics,²²² with some scholars estimating that 75 per cent of top administrative positions are still held by Catholics and Protestants.²²³ More fundamentally, the century of colonial rule may have dramatically altered the religious landscape (and its consequent political dynamics). In-depth sociological studies are required for any meaningful analysis of reasons for religious conversions and changes in religious demographics. However, notwithstanding their similarities in cultural and ethnic composition, the stark differences in the religious composition of Taiwan and Hong Kong—Hong Kong having more than double the ratio of Christians and less than half the ratio of Chinese religions (that is, Buddhist, Daoist, and Chinese folk religions)—are eerily consistent with the colonial preference for Christianity and the suppression of Chinese religions. Chinese religions in Hong Kong are now essentially a religious minority of a lower socio-economic profile, in sharp contrast with their Taiwanese counterparts that constitute a firm majority with less disproportionate under-representation on various

shall be the duty of the communicants to inform the chaplains of their intention before the appointed times').

²¹⁹ Wing Hong Chiu and Kevin Kwok-yin Cheng, 'Self-Perceived Role and Function of Christian Prison Chaplains and Buddhist Volunteers in Hong Kong Prisons' (2013) 57(2) *Intl J Offender Therapy & Comparative Criminology* 154, 158. See also Danielle Boaz, 'Obeah, Vagrancy, and the Boundaries of Religious Freedom: Analyzing the Proscription of "Pretending to Possess Supernatural Powers" in the Anglophone Caribbean' (2017) 32(3) *JL & Religion* 423, 442–7 (discussing how attempts by African elites to challenge the Western oriented hierarchy of religion through alluding to the similarities of certain African-derived religions with Western belief systems ends up reinforcing the evolutionary scale of religion and which continues to leave other African-derived religious practices unprotected).

²²⁰ Jury Ordinance, Cap 3 (1997) (HK) s 5(1).

²²¹ Horst Feldmann, 'The Long Shadows of Spanish and French Colonial Education' (2016) 69(1) *Kyklos Intl Rev for Social Sciences* 32; Eda Ulus, 'Workplace Emotions in Postcolonial Spaces: Enduring Legacies, Ambivalence and Subversion' (2015) 22(6) *Organization* 890, 891–2.

²²² Che-Po Chan and Beatrice Leung, 'The Voting Propensity of Hong Kong Christians: Individual Disposition, Church Influence and the China Factor' (2000) 39(3) *J for the Scientific Study of Religion* 297, 298–300.

²²³ Amy Barrow and Joy L Chia, 'Pride or Prejudice? Sexual Orientation, Gender Identity and Religion in Post-Colonial Hong Kong' (2016) 46 *Hong Kong LJ* 89, 104–5.

socio-economic indicators.²²⁴ This, perhaps, explains why the Hong Kong government is prepared to table a legislative amendment that, while seeking to reduce the onerous regulatory burden, still specifically targets traditional Chinese religions. Old habits die hard.

However, one other puzzle remains. Why did the pro-democracy legislators opposed to this relaxation in fact double down on the need to maintain the existing 1928-era legislation? A newspaper report in the local English-language mainstream newspaper (*South China Morning Post*) subtly suggested religious animosity by specifically mentioning that the two pro-democracy legislators who opposed the government's reform proposal for the Chinese Temples Ordinance were 'Catholic' and 'Protestant Christian' respectively, while not mentioning the religious affiliation of the pro-Establishment legislator who 'argued that the "discriminatory and draconian" ordinance should be repealed as it targeted only Chinese temples.'²²⁵ This is a plausible hypothesis, though other political considerations—such as addressing demands from its political base that may not be sympathetic to Chinese religions or simply an instinctive blanket opposition to government policies—may be at work.²²⁶

However, what is as significant from the passage is that the pro-Establishment legislators were—with some irony—the proponents of civil liberty. They correctly identified the fatal constitutional flaw of the Chinese Temples Ordinance, both when interviewed for the newspaper report and during the committee meetings.²²⁷ However, they were rather mute in their opposition: there were neither attempts to raise public awareness or otherwise garner public support for its repeal nor efforts to bring litigation to seek judicial review of the statute. One possibility is that they wanted to maintain the cordial relationship they had with the executive government, but they may also have been wary of raising an over-eager objection to this 'discriminatory and draconian' law that would invite public and political scrutiny of the question of whether they would make similar criticisms of how religion is regulated in Mainland China.²²⁸

²²⁴ For example, of the thirteen religiously affiliated universities in Taiwan, eight are Christian and five are Buddhist. In Hong Kong, Christian affiliated primary and secondary schools outnumber schools associated with other religions by a factor of eight: Chen (n 15) 103–6, 140.

²²⁵ Fanny WY Fung, 'Monastery Row Puts 1928 Law in Spotlight' *South China Morning Post* (19 October 2015) C2.

²²⁶ See also Sarkissian (n 12) 8–23 (discussing the various socio-political factors that explain why a State may choose to repress certain religions).

²²⁷ Legislative Council Secretariat, *Panel on Home Affairs: Minutes of Special Meeting* (LegCo Paper no CB(2)1968/14-15, 5 May 2015).

²²⁸ For critical discussion of the heavy State regulation of religion in China, see Ping Xiong, 'Freedom of Religion in China under the Current Legal Framework and Foreign Religious Bodies' (2013) 3 *Brigham Young UL Rev* 605, 610-16; Richard Klein, 'An Analysis of China's Human Rights Policies in Tibet: China's Compliance with the Mandates of International Law Regarding Civil and Political Rights' (2011) 18 *Intl L Students Assoc J Intl & Comp L* 115.

Implications: the precariousness of freedom

More research is warranted to unpack the connections between the cultural and political factors that underpin the understanding of religious freedom *vis-à-vis* religious fraud regulation in Taiwan and Hong Kong. However, a couple of preliminary implications may be drawn from this case study.

First (and akin to how the definition of religion has been a contentious focal point over the scope of religious freedom), religious fraud is a potentially potent avenue for infringement of religious freedom (or at least the liberal democratic conception thereof). History is littered with examples of purported proponents of religious liberty rationalizing discriminatory laws, policies, or practices through a narrow definition of what 'religion' is for purposes of religious freedom.²²⁹ Non-Christian religions were historically excluded from the definition of religion in England,²³⁰ while the Act of Toleration that sought to accommodate Protestant dissenters initially excluded Catholics, Jews, and atheists.²³¹ John Locke's advocacy of religious liberty and freedom was meant only for Protestant Christian denominations; Catholicism, 'Mohammedanism' (Islam), and atheism were explicitly excluded.²³² Native Americans have struggled in the USA to have their sacred cultural practices recognized as a religion (as opposed to mere 'custom') and thus gain legal protection from attempted State suppression on purported public policy grounds.²³³ More recently, in Europe, Scientology and other marginal religious groups have encountered substantial difficulty in gaining State recognition (and the accompanying benefits) as religions.²³⁴

²²⁹ See Jianlin Chen, 'Deconstructing the Religious Free Market' (2014) 3 *JL Religion & State* 1, 21–2.

²³⁰ Russell Sandberg, *Law and Religion* (CUP 2011) 42. See Danielle Boaz, 'Fraud, Vagrancy and the 'Pretended' Exercise of Supernatural Powers in England, South Africa and Jamaica' (2018) 5(1) *L & History* 54, 56–62 (discussing the criminalization of witchcraft in Britain under the Witchcraft Act of 1735 and the Vagrancy Act of 1824).

²³¹ Samantha Knights, *Freedom of Religion, Minorities and the Law* (OUP 2007) 3; Andrew Lynch, 'The Constitutional Significance of the Church of England' in Peter Radan et al (eds), *Law and Religion: God, the State and the Common Law* (Routledge 2015) 178–9; Justin Champion, 'Toleration and Citizenship in Enlightenment England: John Toland and the Naturalization of the Jews' in Ole Peter Grell and Roy Porter (eds), *Toleration in Enlightenment Europe* (CUP 2000) 133–4.

²³² A James Reichley, *Faith in Politics* (Brookings Institution Press 2002) 91; Jonathan I Israel, 'Spinoza, Locke and the Enlightenment Battle for Toleration' in Ole Peter Grell and Roy Porter (eds), *Toleration in Enlightenment Europe* (CUP 2000) 103–4.

²³³ Tisa Wenger, *We Have a Religion: The 1920s Pueblo Indian Dance Controversy and American Religious Freedom* (University of North Carolina Press 2014) 237–8. For a sharp critical account that labelled the US government denial of Native American religious freedom as 'spiritual genocide', see Steve Talbot, 'Spiritual Genocide: The Denial of American Indian Religious Freedom, from Conquest to 1934' (2006) 21(2) *Wicazo Sa Review* 7.

²³⁴ Zand (n 24) 94–9. See also Sarkissian (n 12) 16 (discussing how politicians may selectively target small religious groups that otherwise do not threaten the political regime if such religious groups are nevertheless considered unacceptable or offensive to larger mainstream religious groups).

Modern courts have strived to mitigate any discrimination in the definition of religion by adopting an expansive and functional approach that focuses on what role the belief system plays in the individual's life rather than on manifestations of similarity to existing established religions.²³⁵ It is also increasingly common for international human rights instruments and domestic constitutional provisions to protect both religions and non-theistic beliefs.²³⁶ For example, the ICCPR protects 'the right to freedom of thought, conscience and religion' and the '[f]reedom to manifest one's religion or beliefs'.²³⁷

From the perspective of upholding liberal democratic notions of religious liberty, such developments are welcome. However, religious fraud remains an Achilles' heel. As demonstrated in the case study of Taiwan and Hong Kong, there is a receptive audience among politicians, legal elites, and the public at large eager for vigorous punishment of perceived religious fraud. The finding of falsity and deception in such cases provides—at first blush—an apparent negation of the need to engage with religious liberty considerations. The perils and risks of infringing religious liberty during the assessment of supernatural/religious claims are real, but, unfortunately, they manifest in the technical and procedural aspects and are, thus, easily ignored, especially for practices that are outside of mainstream religions.

Second, religious freedom is at greatest peril when purported proponents of civil liberties, human rights, and liberal democratic values abandon their advocacy in favour of political expediency and/or due to human weakness. It is difficult to overstate how perplexing and unusual it is that the Chinese Temples Ordinance is still on the books in Hong Kong. To play the comparative trump card, even the 'travel restrictions' issued by the current US government that targets predominantly Muslim-majority countries dare not make any explicit reference to religion, despite campaign promises of a 'Muslim ban'.²³⁸ Yet

²³⁵ Eg *United States v Seeger* 380 US 163 (1965). See Lori G Beaman, 'Defining Religion: The Promise and the Peril of Legal Interpretation' in Richard Moon (ed), *Law and Religious Pluralism in Canada* (University of British Columbia Press 2008) 192–3; Steven Goldberg, *Bleached Faith: The Tragic Cost When Religion Is Forced into the Public Square* (Stanford University Press 2008) 111–13.

²³⁶ Donald L Beschle, 'Does a Broad Free Exercise Right Require a Narrow Definition of "Religion"?' (2012) 39 *Hastings Constitutional LQ* 357, 380–1.

²³⁷ ICCPR (n 3) art 18.

²³⁸ Adam Liptak, 'In Travel Ban Hearing, Judges Zero in on Trump's Remarks as a Candidate' *New York Times* (9 May 2017) 15; Joe Palazzolo, 'Travel Ban Ruling: Decision Raises Opposing Views' *Wall Street Journal* (27 June 2017) A4. See also Iselin Frydenlund, 'Religious Liberty for Whom? The Buddhist Politics of Religious Freedom during Myanmar's Transition to Democracy' (2017) 35(1) *Nordic J of Human Rights* 55, 68–72 (critically discussing a package of four pieces laws regulating religions passed in Myanmar in 2015 that were specifically designed to prevent 'Islamization' of Myanmar by targeting certain perceived Muslim religious practices, but which mostly refers to 'religion' in generic terms with minimal explicit mention of Islam). State measures targeting Islam are certainly not a new phenomenon in the USA, with the recent notorious example being the prohibition of judicial consideration of Shari'a law in Oklahoma and other states. Notwithstanding the accompanying allusion of 'international law' in these statutes, explicit mention of Shari'a law allows the courts to readily strike down these laws as unconstitutional discrimination of religion: Asma T Uddin and Dave Pantzer, 'A

somehow the reform proposal by the government continues to single out Chinese religions on the basis of fraud prevention. It is as if religious equality does not apply to Chinese religions in Hong Kong.

However, the most telling aspect is how purportedly pro-democracy legislators vigorously advocated for retaining the statute in its current (1928) version. Pro-establishment legislators, usually criticized for their lack of keen interest in upholding civil liberties, did identify and raise objections relating to the discriminatory nature of the Chinese Temples Ordinance. However, their objections were mild and limited in light of their political constraints and ideological outlooks. Thus, once the pro-democracy legislators abandoned their post as purported stewards of human rights and civil liberties, there was no longer any meaningful resistance to the blatant violation of religious equality.

Conclusion

The status of religious freedom in Taiwan and Hong Kong has, thus far, escaped critical examination within international literature, especially when compared with the neighbouring Mainland China, where copious ink has been spilled over the undeniably more dire circumstances for religious organizations and religious adherents.²³⁹ This is unfortunate, as the highly touted global image of Hong Kong and Taiwan as bastions of religious freedom have not precluded the use of constitutionally and normatively problematic means of regulating religious fraud. Beyond an immediate critique of the current practices, this case study also illustrates how liberal democratic notions of religious freedom can easily be imperilled by long-standing cultural attitudes that are incompatible with the demands of State neutrality on religious matters and—both more unfortunately and devastatingly—can be derailed when purported advocates of liberal democratic values surrender their values out of human weakness and political expediency.

First Amendment Analysis of Anti-Sharia Initiatives' (2012) 10 First Amendment LR 363, 370–8; Jaron Ballou, 'Sooners vs Shari'a: The Constitutional and Societal Problems Raised by the Oklahoma State Ban on Islamic Shari'a Law' (2012) 30 Law & Inequality 309, 317–20. See also Jay Wexler, 'Government Disapproval of Religion' [2013] Brigham Young UL Rev 119, 134–50 (critically discussing the recent emergence of constitutional claims of government disapproval of religion and the utility of an 'endorsement test' in addressing such cases).

²³⁹ Eg Evan Mascagni, 'The Legal Process of Cultural Genocide: Chinese Destruction of Tibetan Culture v US Destruction of Native American Culture' [2011] U District Columbia L Rev 241; Eleftherios Georgiou, 'China: Where the Failure to Adhere to Domestic Political Laws Often Leads to Religious Oppression' (2000) 20 New York L School J Intl & Comp L 355, 374–82.