

# HONG KONG'S CHINESE TEMPLES ORDINANCE: A CAUTIONARY CASE STUDY OF DISCRIMINATORY AND MISGUIDED REGULATION OF RELIGIOUS FRAUD

JIANLIN CHEN

Associate Law Professor, University of Melbourne

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## ABSTRACT

The Chinese Temples Ordinance was promulgated by the British colonial government in Hong Kong to address the alarming growth of “pseudo-religious establishments” exploiting the ignorant masses of uneducated Chinese residents. This article critically examines the ordinance and the 2015 proposed amendments as a case study of the potential pitfalls in state responses to religious fraud. First, this article demonstrates the discriminatory nature of the ordinance, which perceived Chinese religions as particularly prone to fraudulent practices and deserving of specific regulatory controls that are not applicable to any other religions. Tellingly, this discriminatory approach—while unconstitutional and undesirable—continues to underpin the proposed reform. Second, this article delineates the conceptual distinctions within religious fraud and the interaction dynamics between religious donors and recipients and argues that the government-sanctioned registration scheme under the ordinance is neither justified nor appropriate to address religious fraud premised on promises of divine intervention in exchange for financial contributions.

## INTRODUCTION

Fraud has always been the bane of civilization, provoking sanctions in ancient legal systems,<sup>1</sup> and it continues to plague societies all over the world regardless of development status.<sup>2</sup> With the most effective scams typically premised on exploitation of visceral factors in the circumstances of the intended victims (such as pain relief for severe physical discomfort, monetary reward for financial difficulties),<sup>3</sup> it is perhaps no surprise that religion is one of the favorite delivery mechanisms for fraudsters.<sup>4</sup> Religion can be a source of comfort and courage in times of adversity and

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1 AARON LEVINE, *ECONOMIC MORALITY AND JEWISH LAW* 53 (2012); Barbara Biscotti, *Debtor's Fraud in Roman Law: An Opportunity for Some Brief Remarks on the Concept of Fraud*, 17 *FUNDAMINA* 1, 2–10 (2011).

2 Valentin-Stelian Badescu, *Fraud in Electronic Commerce*, 2 *PERSPECTIVES OF BUSINESS LAW JOURNAL* 8, 9 (2013); Jeff Langenderfer & Terence A. Shimp, *Consumer Vulnerability to Scams, Swindles, and Fraud: A New Theory of Visceral Influences on Persuasion*, 18 *PSYCHOLOGY & MARKETING* 763, 763 (2001).

3 Langenderfer & Shimp, *supra* note 2, at 768–69. See Bryan D. James, Patricia A. Boyle & David A. Bennett, *Correlates of Susceptibility to Scams in Older Adults without Dementia*, 26 *JOURNAL OF ELDER ABUSE & NEGLECT* 107, 117–18 (2014) (discussing an empirical study on the factors that correlate with susceptibility to scams).

4 Nicholas Barborak, *Saving the World, One Cadillac at a Time: What Can Be Done When a Religious or Charitable Organization Commits Solicitation Fraud?*, 33 *AKRON LAW REVIEW* 577, 583–88 (2000); Stephen Senn, *The Prosecution of Religious Fraud*, 17 *FLORIDA STATE UNIVERSITY LAW REVIEW* 325, 326–29 (1990); Jonathan Turley, *Laying Hands on Religious Racketeers: Applying Civil RICO to Fraudulent Religious Solicitation*, 29 *WILLIAM & MARY LAW REVIEW* 441, 447–63 (1988).

hardship;<sup>5</sup> however, the very allusion to supernatural forces that potentially offers miraculous solutions to existing material, emotional, and physical hardships can easily be manipulated by con artists to swindle the faithful. The elusive nature of religion further impedes detection of fraud by both victims and law enforcement agencies.<sup>6</sup>

The moral reprehensibility and human costs of perverting the sacred to prey on vulnerable victims renders religious fraud widely perceived as a social evil and the subject of frequent calls for more government action to address the problem.<sup>7</sup> Nevertheless, such state intervention to suppress religious fraud is not without controversy. The chief concerns relate to religious liberty, with regulation of religions by the state often viewed skeptically by courts (and at times, the public), which are wary of restricting religious practices and perpetuating religious discrimination.<sup>8</sup> There is also the reluctance of secular government to determine the veracity of religious matters.<sup>9</sup>

I use the Chinese Temples Ordinance<sup>10</sup> [the “Ordinance”] in Hong Kong as a case study of the potential pitfalls in designing a regulatory scheme to combat religious fraud. Promulgated by the British colonial government in 1928 with the primary aim of addressing the alarming growth of “pseudo-religious establishments” exploiting the ignorant masses of uneducated Chinese residents, the Ordinance imposed a wide range of regulatory controls on places of worship for Chinese religious practices.<sup>11</sup> The regulatory controls included mandatory registration, building restrictions, power of search and seizure without warrant, and, most starkly, the grant to a newly instituted government body of the “absolute control” over all the financial assets of all Chinese temples.<sup>12</sup> A public consultation exercise in 2015—Review on the Chinese Temples Ordinance Public Consultation Document [the “Review”]—proposed abolishing the onerous regulatory controls in favor of a voluntary registration scheme that was designed to facilitate informed decisions by religious donors amidst greater public awareness of the risk associated with “pseudo-religious establishments.”<sup>13</sup>

5 Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 WILLIAM & MARY LAW REVIEW 1831, 1907 (2009); LARRY WITHAM, MARKETPLACE OF THE GODS: HOW ECONOMICS EXPLAINS RELIGION 190 (2010); SAMANTHA KNIGHTS, FREEDOM OF RELIGION, MINORITIES, AND THE LAW 8 (2007); Jane Wills et al., *Religion at Work: the Role of Faith-based Organizations in the London Living Wage Campaign*, 2009 CAMBRIDGE JOURNAL OF REGIONS, ECONOMY AND SOCIETY 443, 453–54.

6 Turley, *supra* note 4, at 463–68. See Sami Pihlström, *Religion and Pseudo-Religion: An Elusive Boundary*, 62 INTERNATIONAL JOURNAL FOR PHILOSOPHY OF RELIGION 3 (2007) (discussing how the boundary between religion and pseudo-religion can be drawn only vis-à-vis the internal logic of religion and not by secular conceptual distinctions).

7 E.g., Senn, *supra* note 4, at 328–32; Turley, *supra* note 4, at 468–76.

8 See Paul Horwitz, *Scientology in Court: A Comparative Analysis and Some Thoughts on Selected Issues in Law and Religion*, 47 DEPAUL LAW REVIEW 85, 102–27 (1997) (analyzing the comparative treatment of scientology by the legislature and courts in the United States, England, Australia, and Germany and discussing how the difference in constitutional text, political history, and judicial attitudes contribute to the differences in treatment); Turley, *supra* note 4, at 463–65 (discussing the judicial and public opposition towards attempts by the state to tackle fraudulent religious practices); Gerhard Robbers, *The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in Germany*, 19 EMORY INTERNATIONAL LAW REVIEW 841, 864–65 (2005) (discussing how the German Constitutional Court grappled with the thorny issue by holding that the government’s labelling of a new religious movement as “destructive” and “pseudo-religious” is an unconstitutional infringement of religious liberty and state neutrality, but that the government is permitted to call the religious movement a “sect” and warn of the risk of young people coming under the influence of that movement).

9 Caleb E. Mason, *What Is Truth? Setting the Bounds of Justifiability in Religiously-Infllected Fact Disputes*, 26 JOURNAL OF LAW & RELIGION 91, 93–104 (2011).

10 Chinese Temples Ordinance (1997) Cap. 153 (H.K.) [hereinafter 1997 Chinese Temples Ordinance].

11 The syncretic conceptualization and broad definition of Chinese religions is discussed in the sub-subsection below titled “Regulatory Burdens and Control.”

12 *Infra*, the sub-subsection “Regulatory Control.”

13 *Infra*, the subsection “Reform Proposal.”

This article offers a critical examination of both the ordinance and the review to highlight two deficiencies in Hong Kong's approach. The first deficiency is legal. The Ordinance constitutes impermissible religious discrimination by the state in singling out Chinese religions—and no other religion—for specific regulatory burdens. One might understand, if not barely excuse, this blatant prejudicial treatment of indigenous religions by a colonial regime operating under no express constitutional restraints on substantive human rights.<sup>14</sup> However, it is startling that this discriminatory approach continued to inform the Review in 2015. While the replacement of the onerous regulatory controls with a voluntary registration scheme can alleviate constitutional objections over unjustified restrictions on religious liberty, the proposed reform remains susceptible to an equal protection challenge given that the voluntary registration scheme applies only to Chinese religions.

The second deficiency is conceptual. The Ordinance and the Review approach religious fraud as a singular phenomenon, namely fraudulent practices by purportedly religious organizations or practitioners. However, this approach overlooks important conceptual distinctions. Depending on its nature and manifestation, religious fraud can be differentiated along two dimensions. The first dimension concerns whether the fraudulently induced transfer of wealth is more of a passive charitable donation or a transaction with an expectation of reciprocal benefit. The second concerns whether the underlying falsehood relates to a secular fact or a claim of religious truth. I argue here that state intervention (especially public enforcement and regulatory supervision) is least justified where the prevailing religious fraud is transactional in nature and premised on a false proclamation of favorable divine intervention. This is due to the questionable social and individual harm inflicted by such fraud and the sufficient incentive for and ability of potential fraud victims to detect and avoid such fraud. This argument is particularly relevant for Chinese religious practices, which are often premised on an exchange relationship between the adherents and the worshiped deity.<sup>15</sup>

Additionally, the proposed reform fails to appreciate the unique manner in which decisions on religious offerings are made. Religious adherents inevitably want to ensure that their offerings are made to true deities. However, the inability of adherents to observe and verify the quality of divine intervention whether before or after the religious offerings are made means that the perceived credibility of the religious organizations or practitioners becomes the primary characteristic relied on during the selection process.<sup>16</sup> I argue that while a registration scheme operated and validated by the government as per the proposed reform is likely to enhance the perceived credibility of the registered religious organizations in the eyes of the public as intended, this gain in credibility is misleading and undeserved given that the information solicited by the registration scheme has no direct connection to the central supernatural concerns of the adherents.

The article has three main sections. The first, "Law in Context" presents the Ordinance. The second, "Constitutionality," addresses the legality of the ordinance and proposed reform. The third, "Conceptual Pitfalls in Regulating Religious Fraud," discusses how the conceptualization of religious fraud that underpins both the ordinance and the review is deficient, and further

14 Dinusha Panditarantne, *Basic Law, Hong Kong Bill of Rights and the ICCPR*, in LAW OF THE HONG KONG CONSTITUTION 521, 525 (Johannes Chan & C.L. Lim eds., 2d ed. 2015); NORMAN MINERS, THE GOVERNMENT AND POLITICS OF HONG KONG 68–82 (5th ed. 1991).

15 ENCYCLOPEDIA OF PSYCHOLOGY AND RELIGION 145 (David A. Leeming, Kathryn Madden & Stanton Marlan eds. 2010); Tik-sang Liu, *A Nameless but Active Religion: An Anthropologist's View of Local Religion in Hong Kong Macau*, 174 CHINA QUARTERLY 373, 389 (2003). *Infra*, sub-subsection "The Sliding Scale of Justified State Intervention."

16 This insight is premised on the analogy of credence goods analysis in the economics literature: *infra*, subsection "Religion as Credence Goods: The Unintended Impact of Registration."

challenges the justifiability of the ordinance in general and the appropriateness of the registration scheme in particular.

## LAW IN CONTEXT

Below I provide the historical background of the ordinance, specifics of the regulations, the state of enforcement, and proposed reforms to the ordinance.

### *Historical Background*

Hong Kong was a British colony from 1842 until the resumption of Chinese sovereignty in 1997.<sup>17</sup> The acquisition of Hong Kong—a combined landmass of only 1,100 square kilometers and devoid of natural resources<sup>18</sup>—was motivated more by expansion of trade than traditional territorial conquest.<sup>19</sup> This desire to maintain an environment relatively conducive to commerce served as a pragmatic restraint on the exercise of legal power by the colonial government, notwithstanding the lack of institutional or democratic checks and balances.<sup>20</sup> This desire also accounted for the limited state involvement in the welfare and affairs of the resident population, the overwhelming majority of which was Chinese.<sup>21</sup>

These circumstances rendered curious the Ordinance's heavy intervention in a practice not engaged in beyond the Chinese community and that did not directly affect the foreign expatriate community.<sup>22</sup> The Long Title of the Ordinance states that the Ordinance is meant to “suppress and prevent abuses in the management of Chinese temples and in the administration of the funds of Chinese temples.”<sup>23</sup> As explained in the Explanatory Note of the bill introducing the Ordinance, the Ordinance is necessary “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. Many of the keepers are simply fortune tellers of an unrecognized and objectionable kind. Some of these temples occupy a single floor for a few months at a time until they have dealt with all the dupes of the district, when they move elsewhere.”<sup>24</sup> Additionally, recovery “for the benefit of the community the control over public temples which have been slipping into private hands” and preventing “establishment of temple as purely business speculations” are stated as legislative objectives in the Explanatory Note.<sup>25</sup>

17 For a concise and legal-oriented historical account of Hong Kong, see Johannes Chan, *From Colony to Special Administrative Region*, in *LAW OF THE HONG KONG CONSTITUTION*, *supra* note 14, at 4.

18 HONG KONG YEARBOOK 2014 (Stuart M. I. Stoker ed.), <http://www.yearbook.gov.hk/2014/en/index.html> (last visited Mar. 2, 2016).

19 G.B. ENDACOTT, *GOVERNMENT AND PEOPLE IN HONG KONG, 1841–1962: A CONSTITUTIONAL HISTORY* 6–16 (1964).

20 Chan, *supra* note 17, at 9–12; ENDACOTT, *supra* note 19, at 4–6.

21 ELIZABETH SINN, *POWER AND CHARITY: THE EARLY HISTORY OF THE TUNG WAH HOSPITAL*, HONG KONG 29 & 209–12 (1989); ENDACOTT, *supra* note 19, at 4–5.

22 It is worth noting that the 1920s was a period that witnessed increasing pressures for social change in Hong Kong. Factors contributing to these pressures included the rapid rise in population and increased political awareness in Britain on social rights; see GAVIN ÜRE, *GOVERNORS, POLITICS AND THE COLONIAL OFFICE 28–42* (2012) (discussing attempts of social reform in the areas of employment of children, rent control, and *mui tsai*, a Chinese custom of daughter adoption that some critics equate with slavery).

23 1997 Chinese Temples Ordinance.

24 *Fok Ho Chiu v. The Chinese Temples Committee* [2003] H.K.C.U 1087 ¶ 17 (H.C.).

25 *Id.*

A notable aspect of the Ordinance is that the promoters of the bill leading to the Ordinance were the two appointed Chinese members of the Legislative Council of Hong Kong.<sup>26</sup> Indeed, during a 1961 radio broadcast series aimed at educating the public on the functions and operations of the colonial government, the secretary of Chinese Affairs stated that the Ordinance was enacted after the then secretary of Chinese Affairs was approached by “responsible Chinese leaders [who] became alarmed” at the abuses in Chinese temples.<sup>27</sup> Given the sensitivity of the British colonial government to the demands of the Chinese local elites, it is certainly plausible that the Ordinance was less an example of colonial oppression of indigenous religion and more an attempt by the local elites to regulate (or suppress) religious competitors.<sup>28</sup> Nevertheless, it is worth noting that criminalization of fortune telling, despite being an “accepted part of the way of life in Chinese communities,” was specifically enhanced in 1933 under influence of Christian exhortation against the practice.<sup>29</sup> Additionally, it is apparent that this entrenchment, or favoring, of Chinese temples that were acceptable or friendly to the colonial power was conducive to the colonial government’s maintenance of political dominance and control over the colony, especially because Chinese temples are the focal point of the Chinese community, serving functions beyond religious worship to include governance and dispute resolution.<sup>30</sup>

In any event, given the composition of the colonial legislative council in 1928,<sup>31</sup> there was unsurprisingly little objection or even discussion regarding the enactment of the Ordinance.<sup>32</sup> An amendment that granted discretionary power to the government to exempt Chinese temples from the

26 Official Reports of Proceedings (Legislative Council of Hong Kong), Apr. 26, 1928, at 33. See also ATTORNEY GENERALS CHAMBERS, REPORT ON ORDINANCE NO. 7 OF 1928, at 1 (1928) (“This Ordinance was introduced on the strong recommendation and urgent request of the leaders of the Chinese community.”).

27 J.C. McDouall, *The Secretariat for Chinese Affairs*, in THE GOVERNMENT AND THE PEOPLE 138, 141–42 (1962) (“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.”).

28 URE, *supra* note 22, at 19–20 & 24–25. See VINCENT GOOSSAERT & DAVID A PALMER, THE RELIGIOUS QUESTION IN MODERN CHINA 205 (2011) (arguing that the Ordinance was pushed for by local Chinese elites inspired by similar laws passed in mainland China by the KMT government in 1928). See also QU HAIYUAN, 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, VOL 2: RESEARCH ON CHRISTIAN RELIGION AND CHURCH-STATE RELATIONSHIP] 214–24 (Laureate 2006) (outlining the legislative history and specifics of such laws in mainland China).

29 Official Reports of Proceedings (Legislative Council of Hong Kong), Nov. 5, 1980, at 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 necromancer.”). For a concise historical account of the criminalization of fortune telling in the United Kingdom, see Steve Greenfield, Guy Osborn & Stephanie Roberts, *From Beyond the Grave: the Legal Regulation of Mediumship*, 8 INTERNATIONAL JOURNAL OF LAW IN CONTEXT 97, 101–02 (2012).

30 John M. Carroll, *Chinese Collaboration in the Making of British Hong Kong*, in HONG KONG’S HISTORY: STATE AND SOCIETY UNDER COLONIAL RULE 13, 23 (Tak-Wing Ngo ed., 1999); SINN, *supra* note 21, at 15–17. It is also worth noting that the British colonial government is apt at advancing its governance objectives through supporting pro-government local organization/community over their less co-operative rivals: Stephen W.K. Chiu & Ho-fung Hung, *State Building and Rural Stability*, in HONG KONG’S HISTORY: STATE AND SOCIETY UNDER COLONIAL RULE, *supra*, at 74, 82–85 (discussing how in the 1950s the colonial government utilized the Societies’ Ordinance to declare illegal the existing representative organization for rural villages in the New Territories so as to shift the locus of power to the newly created pro-government representative organization).

31 For a discussion of the colonial constitutional history, including the largely symbolic but immaterial representation of the native Chinese population that made up 98 percent of the colony’s population, see ENDACOTT, *supra* note 19, at 89–96 & 126–62.

32 Official Reports of Proceedings (Legislative Council of Hong Kong), Apr. 26, 1928, at 41.

requirements under the Ordinance was adopted in the final version upon petitions by keepers of To Yuen (places where Chinese religious ceremonies are performed but that are primarily the residences of members of religious orders).<sup>33</sup>

### *Regulatory Burdens and Control*

#### Scope of Legislation

The Ordinance applies to all Chinese temples. “Chinese temples” are defined to cover “all Miu (廟, temples), Tsz (寺, Buddhist monasteries), Kun and To Yuen (觀及道院, Taoist monasteries), and Om (庵, nunneries).”<sup>34</sup> This broad definition reflects the syncretic nature of Chinese religious practices, where there is a subtle dynamic of accommodation among Confucianism, Taoism, and Buddhism that allows the possibility of simultaneous religious identities.<sup>35</sup>

Additionally, given the explicit concern over fraud by self-professed fortune tellers, a functional definition of Chinese temples is included in the Ordinance.<sup>36</sup> 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.<sup>37</sup>

There has been some confusion as to whether the Ordinance targets only “public” Chinese temples, such as a large monastery containing a large number of monks that is deemed to be owned by all the people of the relevant faith.<sup>38</sup> The Court of Final Appeal in 2000 confirmed that the Ordinance applied even to private temples owned by an individual, clan, family, or *t’ong*.<sup>39</sup>

#### Regulatory Control

The Ordinance imposes various regulatory requirements on Chinese temples. First, there is the requirement of registration.<sup>40</sup> Detailed information must be disclosed in the registration process, most notably the governance structure of the temple and the particulars of all its financial assets.<sup>41</sup> The court confirmed that the various regulatory controls over Chinese temples under the Ordinance

33 *Id.* at 32–33, 41.

34 1997 Chinese Temples Ordinance, § 2.

35 JINGHAO ZHOU, CHINESE VS. WESTERN PERSPECTIVES: UNDERSTANDING CONTEMPORARY CHINA 134–36 (2014); Anna Xiao Dong Sun, *The Fate of Confucianism as a Religion in Socialist China: Controversies and Paradoxes*, in STATE, MARKET, AND RELIGIONS IN CHINESE SOCIETIES 229, 232–33 & 236 (Fenggang Yang & Joseph B. Tamney eds., 2005). See also Alvin P. Cohen & Yeh Jaw, *A Chinese Temple Keeper Talks about Chinese Folk Religion*, 36 ASIAN FOLKLORE STUDIES 1, 5–16 (1977) (a practitioner’s exposition of the doctrines and practices of Chinese folk religions).

36 1997 Chinese Temples Ordinance, § 2.

37 *Id.*

38 Secretary for Justice v. To Kan Chi [2000] H.K.C.U. 1030, at 6–7 (C.F.A.) (discussing the various well-recognized types of temple ownership).

39 *Id.* at 16.

40 1997 Chinese Temples Ordinance, § 5.

41 *Id.*

remained fully applicable for unregistered Chinese temples.<sup>42</sup> There is one benefit for Chinese temples that duly register: fortune-telling, which was criminalized under the Summary Offences Ordinance until 1980,<sup>43</sup> is legal if conducted in registered Chinese temples.<sup>44</sup>

There is a restriction on where Chinese temples may be sited. Unless an exemption is granted, not only must a Chinese temple be housed in a complete and separate building but that building must also be erected and used solely for the purpose of the Chinese temple.<sup>45</sup> This requirement is particularly onerous in the densely populated urban area of Hong Kong, where land is expensive and multi-story buildings were the norm even in the 1930s.<sup>46</sup>

The Ordinance also grants the power of search and seizure to the executive branch. Without needing to seek a court order, the relevant Secretary may authorize a search—with “such force as may be necessary”—of registered Chinese temples or places suspected to contain Chinese temples and seize any book, document, or object that appears to contain evidence of contravention of the Ordinance.<sup>47</sup> This is in fact an unusual grant of warrantless search and seizure authority. In Hong Kong, such power tends to be restricted to the better-recognized contexts of drugs, corruption, and immigration and customs control.<sup>48</sup>

Violation of these requirements constitutes a criminal offense punishable by a fine. The fine was initially set at HKD 500<sup>49</sup>—a substantial sum in 1928<sup>50</sup>—and was raised to HKD 1,000 in 1948.<sup>51</sup> There has been no further revision, resulting in the current insignificance of the sanctions. As a matter of comparison, the fine for food consumption on the Mass Transit Railway is HKD 2,000.<sup>52</sup>

However, the Ordinance remains far from toothless. The most intrusive and direct intervention by the Ordinance is the control of financial affairs. All “revenues, funds, investments and properties” of Chinese temples are “under the absolute control” of the Chinese Temples Committee. The

42 *To Kan Chi* [2000] H.K.C.U., at 17–21. The court did also hold that where the Chinese temples are owned by a private entity, such as a *t'ong*, the *t'ong* retains the right to withdraw the assets from the purposes of Chinese temples in accordance with the internal procedures relating to *t'ong* management and thus remove those assets from the regulatory control under the Ordinance. While seemingly a generous interpretation in favor of religious autonomy, this interpretation is compelled by the need to stave off constitutional challenge under Article 105 Basic Law property right protection (the right of withdrawal is instrumental in finding that the Ordinance is not confiscatory), and this right of withdrawal is subject to contention by the Chinese Temples Committee. *Id.* at 18–21.

43 Official Reports of Proceedings (Legislative Council of Hong Kong), Nov. 5, 1980, at 158. The relevant provision has been interpreted by the Hong Kong court in 1980 as essentially a strict liability criminal offenses—the mere act of professing to tell fortunes will suffice without any finding of intent to deceive. *Mak Yuk-Kiu v. Tin Shing Auto Radio CTR Ltd* [1981] H.K.C.U. 13 (H.C.). The issue arose in the context of a car accident tort claim, where the fact that the victim of a car accident is a fortune-teller (and hence whose income is potentially illegal) would bar recovery from dependents. The court found that the income was illegal, and would bar a claim of loss earnings by the victim, but not a loss of maintenance out of earnings by dependents.

44 Official Reports of Proceedings (Legislative Council of Hong Kong), Mar. 16, 1933, at 22.

45 1997 Chinese Temples Ordinance, § 4.

46 Gillis Heller & Daphne S.W. Wong, *The History of Exclusionary Zoning Laws in Hong Kong*, 40 HONG KONG LAW JOURNAL 609, 611–14 (2010).

47 1997 Chinese Temples Ordinance §14.

48 ANDREW BRUCE, CRIMINAL PROCEDURE: TRIAL ON INDICTMENT ¶¶ 652–750 (2016) (Interestingly, the author failed to mention the Ordinance when discussing the statutes that authorize search and seizure without a warrant.).

49 Chinese Temples Ordinance (1928) Cap. 153, § 15 (H.K.) [hereinafter 1928 Chinese Temples Ordinance].

50 For a discussion of the historical evolution of the Hong Kong currency regime, in particular the sociopolitical circumstances surrounding the instituting of Hong Kong currency, see TONY LATTER, HONG KONG'S MONEY: THE HISTORY, LOGIC AND OPERATION OF THE CURRENCY PEG 33–41 (2007).

51 1997 Chinese Temples Ordinance, § 15.

52 Mass Transit Railway By-Laws, Schedule 2 (2000) Cap. 556B (H.K.).

committee comprises government officials and government-appointed individuals.<sup>53</sup> This “absolute control” is accompanied by the corresponding power of the committee to compel the transfer of properties and assets that are held on behalf of or for the purposes of any Chinese temple to the government.<sup>54</sup> The Ordinance further spells out the substantive rules relating to use of revenues by Chinese temples. The revenues shall be first applied to “due observance of the customary ceremonies and the maintenance of temple buildings and temple properties,” and any remaining surplus “may be transferred” to a charitable fund for Chinese people.<sup>55</sup> Furthermore, it is at the discretion of the committee to determine the amount of expenditure and charitable transfer, and even what customary ceremonies should be observed.<sup>56</sup> Finally, the power to intervene in the financial affairs of Chinese temples is completed by the committee’s power to close any Chinese temples deemed falling into disuse or having insufficient revenues for maintenance and transfer the assets of those closed Chinese temples to the charitable fund.<sup>57</sup>

### *Enforcement, or Lack Thereof*

Given such extensive and draconian regulatory control over indigenous religious practices by a foreign colonial power, it is surprising that there has been barely any outcry about the Ordinance, whether during the democratization process in the 1980s or post-Handover.<sup>58</sup> The key reason is perhaps that the Ordinance has never been vigorously enforced, or at least not in recent times.<sup>59</sup> Unregistered Chinese temples continue to flourish unaffected by the Ordinance’s purported registration requirement. Legislative records since 1997 report that enforcement of the Ordinance against unregistered Chinese temples has been limited despite official recognition of the need for registration.<sup>60</sup> Indeed, the secretary of Home Affairs acknowledged on record in 2012 that the government had not enforced the Ordinance against unregistered Chinese temples for the past 5 years despite receiving complaints from members of the public regarding unregistered temples.<sup>61</sup>

Perhaps the best example to illustrate the limited enforcement of the Ordinance is the Tsing Wan Kun Chinese temple. This prominent temple, with a history of over one hundred years and assets in the hundreds of millions, registered belatedly amidst litigation against the government over the temple’s ownership.<sup>62</sup> Tellingly, the Chinese Temples Committee had full notice of the

53 1997 Chinese Temples Ordinance, § 7; 1928 Chinese Temples Ordinance, § 7.

54 1997 Chinese Temples Ordinance, § 7(6); 1928 Chinese Temples Ordinance, § 7(2).

55 1997 Chinese Temples Ordinance, § 7(1).

56 *Id.* § 7(2).

57 *Id.* § 7(1).

58 *E.g.*, Thomas In-sing Leung, *Crises and Transformation: The Implications of 1997 for Christian Organizations in Hong Kong*, in *POLITICS AND SOCIETY IN HONG KONG TOWARDS 1997*, at 62, 75–78 (Charles Burton ed., 1992).

59 *Cf.* McDouall, *supra* note 27, at 141–42 (in describing the works of the Secretariat for Chinese Affairs in a radio broadcast to the public, the then Secretariat for Chinese Affairs took time to discussing the origin, the legal controls and the beneficial effects of the Ordinance). *See also* *Illegal Temple: Blind Man Convicted and Bound Over*, *SOUTH CHINA MORNING POST*, June 25, 1934, at 3 (A newspaper report about the conviction of an individual under the Ordinance for operating an altar that is not registered. The case was brought because of “a complaint by a gentleman of the disturbance created by the beating of drums and cymbals and the coming and going of worshippers to this temple.”).

60 Official Reports of Proceedings (Legislative Council of Hong Kong), May, 28, 1997, at 47–48.

61 Official Reports of Proceedings (Legislative Council of Hong Kong), Jan. 18, 2012, at 4762–63. *See also* Joseph Bosco, *Chinese Popular Religion and Hong Kong Identity*, 14 *ASIAN ANTHROPOLOGY* 8, 13–14 (2015) (noting how a variety of spirit writing groups and private temples and halls are not publically registered).

62 *Secretary for Justice v. To Kan Chi* [2000] H.K.C.U. 1030, at 2, 17 (C.F.A.).



existence of the temple by 1963 due to protests over the sale of temple property but chose not to take any action.<sup>63</sup>

At present, according to a 2015 official account, there are 600 Chinese temples in Hong Kong, with only 350 duly registered in accordance with the Ordinance.<sup>64</sup> Moreover, despite the Ordinance, the vast majority of registered temples are neither managed by the Chinese Temples Committee nor have their revenue monitored for transfer to the fund.<sup>65</sup> According to official government statements, the nonenforcement is due to respect of the autonomy of religious organizations<sup>66</sup> and “prevailing community expectations of protecting private property rights.”<sup>67</sup>

### *Reform Proposal*

There has been renewed public interest in the Ordinance since the 2010s. Spurred by residents' complaints over environmental nuisances and land use conflicts arising from Chinese temples in urban areas and also public scrutiny of the highly lucrative but illegal—potentially fraudulent—sale of columbarium niches by Chinese temples, there have been a series of queries by legislators to the secretary for Home Affairs over the management of Chinese temples and the enforcement of the Ordinance.<sup>68</sup> It was revealed in the responses from the secretary for Home Affairs that the government had undertaken a comprehensive review of the Ordinance. This culminated in the Review in March 2015.

Acknowledging that “some provisions in the Ordinance appear to be outdated in the present day context,”<sup>69</sup> the main thrust of the Review is an intention to dismantle the existing onerous regulatory controls over Chinese temples. The Review recommends removing the absolute control that the Chinese Temples Committee can exercise over the financial matters of the temples, recognizing that if the powers were indeed exercised, “it may arouse concern over the protection of property rights.”<sup>70</sup> In conjunction, the Review also recommends removal of the “complete and separate building” land use stipulation and the power of warrantless search and seizure without further explanation beyond the “outdated” nature of these restrictions.<sup>71</sup> In terms of registration, the Review recommends replacing the existing mandatory requirement with a voluntary registration scheme that is backed by the power of the committee to conduct random checks to verify the information. The purported purpose of the proposed registration scheme is to inform the public, enhance transparency, and enable Chinese temples to gain public confidence.<sup>72</sup>

63 To Kan Chi v. Pui Man Yau, CACV 32/1999 (C.A.).

64 Home Affairs Bureau, *Review on the Chinese Temples Ordinance Public Consultation Document*, Mar. 2015, at 2 of Annex I.

65 Official Reports of Proceedings (Legislative Council of Hong Kong), Dec. 8, 2010, at 3406.

66 Official Reports of Proceedings (Legislative Council of Hong Kong), Jan. 18, 2012, at 4762–4763; Official Reports of Proceedings (Legislative Council of Hong Kong), Dec. 8, 2010, at 3406.

67 Official Reports of Proceedings (Legislative Council of Hong Kong), Nov. 27, 2013, at 3334.

68 Official Reports of Proceedings (Legislative Council of Hong Kong), Nov. 27, 2013, at 3333–3334; Official Reports of Proceedings (Legislative Council of Hong Kong), Jan. 18, 2012, at 4761–4763; Official Reports of Proceedings (Legislative Council of Hong Kong), Apr. 7, 2011, at 8913; Official Reports of Proceedings (Legislative Council of Hong Kong), Dec. 8, 2010, at 3405–3409.

69 Home Affairs Bureau, *supra* note 64, at 1.

70 *Id.* at 3.

71 *Id.* at 2–3.

72 *Id.* at 4–5 (The information to be provided and regularly updated for the purpose of registration include “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.”).

Nevertheless, the recommended changes are not all one-sided in the direction of reducing regulatory control. The aforementioned liberalization is counterbalanced by a recommendation to empower the secretary of Home Affairs to be a party to any legal proceedings involving Chinese temples to “defend the interest of the general public where necessary and justified.” Notably, this will “provide an additional safeguard on top of . . . the role of the [secretary of Justice] as the protector of charities.”<sup>73</sup>

The Review received underwhelming public attention. There were very few responses submitted, all of which were generally supportive of the attempt to “update” the law.<sup>74</sup>

CONSTITUTIONALITY

Hints of constitutional concerns emanate from the proposed Review and the official explanations of forbearance in enforcing the Ordinance. Concerns about the autonomy of religious organizations and protection of property rights echo provisions of the Basic Law (Hong Kong’s de facto constitution). Article 141(1) of the Basic Law provides that “[t]he Government of the Hong Kong Special Administrative Region shall not restrict the freedom of religious belief, interfere in the internal affairs of religious organizations or restrict religious activities which do not contravene the laws of the Region.” Property rights are not only generally protected by Article 105<sup>75</sup> but also given specific mention vis-à-vis religious organizations.<sup>76</sup>

This raises the question—which has surprisingly received no academic attention thus far—as to whether the Ordinance is even constitutional to begin with.

*Unconstitutional Takings?*

The issue of whether the Chinese Temples Ordinance contravenes Article 105 of the Basic Law was in fact addressed by the Court of Final Appeal (the highest appellate court in Hong Kong) in *Secretary for Justice v. To Kan Chi*.<sup>77</sup> The case involved a dispute over the ownership of the Chinese temple Tsing Wan Kun, with private entities (a tso<sup>78</sup> and a clan) seeking to claim full ownership of and control rights over the temple (and its substantial assets in property and cash) against the government’s objection to the transfer of certain cash funds to those private entities. The government’s position was premised on a charitable trust, and in the alternative, the regulatory controls under the Ordinance. Rejecting the charitable trust argument and upholding the

73 *Id.* at 6. See Wong Yan Lung, *The Secretary for Justice as the Protector of the Public Interest: Continuity and Development*, 37 Hong Kong Law Journal 319, 333–34 (2007) (discussing the circumstances where the Secretary for Justice may intervene in litigations on the account of public interest).

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

75 XIANGGANG JIBEN FA [Basic Law], art. 105 (H.K.) (“The Hong Kong Special Administrative Region shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their property.”).

76 *Id.* art. 141(2) (“Religious organizations shall, in accordance with law, enjoy the rights to acquire, use, dispose of and inherit property and the right to receive financial assistance. Their previous property rights and interests shall be maintained and protected.”).

77 *Secretary for Justice v. To Kan Chi* [2000] H.K.C.U. 1030 (C.F.A.).

78 *Tang Kai-chung v. Tang Chik-shang* [1970] H.K.L.R. 276, at 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.”).

constitutionality of the Ordinance, the court granted a temporary stay of the transfer to give the Chinese Temples Committee an opportunity to object to or take appropriate action pursuant to its control over the funds under section 7(1) of the Ordinance.<sup>79</sup>

The court approached the constitutional issue with an inquiry as to whether the Ordinance was deemed “confiscatory” or “regulatory.” Noting the “leading principle of statutory construction that, unless compelled to do so by clear words, the courts do not construe a statute as confiscatory,”<sup>80</sup> the court held that the Ordinance was in fact regulatory because it primarily addressed the management and administration of Chinese temples without purporting to address ownership.<sup>81</sup> In reaching this conclusion, the court observed 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, it would not be regulatory but confiscatory.”<sup>82</sup> Thus, to salvage the constitutionality of the Ordinance, the court chose to construe the control of revenue and property under the Ordinance to apply only to assets that are “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.”<sup>83</sup>

This holding preceded the seminal Hong Kong decision on regulatory takings, which potentially provides an alternative avenue for constitutional challenges to property deprivation that otherwise falls short of formal confiscation. Regulatory takings were first given explicit judicial recognition in *Fine Tower Associates Ltd v Town Planning Board*.<sup>84</sup> There, the Court of Appeal surveyed the U.K./European approach of “de facto deprivation” in *Sporrong and Lönnroth v. Sweden*<sup>85</sup> and *Grape Bay Ltd v. A-G of Bermuda*<sup>86</sup> in addition to the U.S. regulatory takings jurisprudence from *Lucas v. South Carolina Coastal Council*<sup>87</sup> and *Penn Central Transportation Co. v. City of New York*<sup>88</sup> and held that the legal test of unconstitutional regulatory takings is whether there is “de facto deprivation” in which there is “the removal of any meaningful use, or all economically viable use.”<sup>89</sup>

The Ordinance is also likely to survive this test of regulatory takings. The Chinese Temples Committee’s control over the assets of the temples is meant to facilitate the continued operation of the temples. While there may be restrictions as to the types of religious ceremonies that may

79 *To Kan Chi*, 2000 H.K.C.U. at 23–24 (“[W]e would stay the order for payment out of court of the Funds until 30 days after service of a copy of the Court’s judgement in the present appeal by the Tso and the Clan’s solicitors on the Chinese Temples Committee.”).

80 *Id.* at 19. For a recent invocation and application of the principle in the U.K. Supreme Court, see *In re Peacock* [2012] 1 W.L.R. 550, 560 (Supreme Ct.).

81 *To Kan Chi*, 2000 H.K.C.U. at 19–20.

82 *Id.* at 20–21.

83 *Id.* at 21.

84 *Fine Tower Associates Ltd v. Town Planning Board* [2008] 1 H.K.L.R.D. 553 (C.A.). Application for leave for appeal to the Court of Final Appeal was rejected in *Fine Tower Associates Ltd v. Town Planning Board* [2008] H.K.E.C. 616 (C.A.). For a discussion of the case and the relevant principles, see Michael Wilkinson, *Land, in LAW OF THE HONG KONG CONSTITUTION*, *supra* note 14, at 441, 478–81.

85 *Sporrong and Lönnroth v. Sweden*, App. Nos. 7151/75, 7152/75, 5 Eur. H.R. Rep. 35 (1983).

86 *Grape Bay Ltd v. A-G of Bermuda* [2000] 1 W.L.R. 574 (PC).

87 *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

88 *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978).

89 *Fine Tower Associates Ltd* [2008] 1 H.K.L.R.D. at 560–64 (C.A.). For academic discussions on the normative aspects and subsequent applications of regulatory takings in Hong Kong, see Oliver Jones, *Right to Property, in LAW OF THE HONG KONG CONSTITUTION*, *supra* note 14, at 1085, 1102–05; Jianlin Chen, *Ho Tung Gardens Saga and the Basis of Compensation under the Antiquities and Monuments Ordinance: A Comparative and Incentive Case Study on Regulatory Takings*, 43 HONG KONG LAW JOURNAL 835, 847–48 (2013).

be carried out on the premises and how funds may be utilized, they do not amount to a deprivation of all meaningful use or economic value of those assets. One may still operate a Chinese temple as a Chinese temple under the Ordinance.

### *Religious Autonomy and Religious Freedom*

While the *To Kan Chi* case arguably reached the right conclusion vis-à-vis Article 105 of the Basic Law, it is surprising that no challenges were raised with respect to Article 141 of the Basic Law, which concerns religious liberty. It is difficult to imagine a more clear-cut example of a statute that “interfere[s] in the internal affairs of religious organizations” than the extensive and “absolute” controls over financial affairs, including the Chinese Temples Committee’s power to dictate the specific types of customary rites that Chinese temples are allowed to perform.<sup>90</sup> The constitutionality of the Ordinance should also be pertinent to the parties, given how the Hong Kong government (as the second defendant) relied on the Ordinance from the beginning in the trial court to dispute the claims of the plaintiff.<sup>91</sup> That the initial litigation took place prior to the Handover in July 1997 (i.e., the corresponding effective start date of the Basic Law) does not excuse the omission during the appeal process, whose entirety took place post-Handover.<sup>92</sup> This omission is unfortunate, whether vis-à-vis the adverse outcome for the private litigants or as a missed opportunity to assess colonial legal relics against the new constitutional protections.<sup>93</sup>

The key consideration of the Hong Kong courts in evaluating the constitutionality of a particular legislative restriction on religious freedom is the requirement of proportionality.<sup>94</sup> This approach echoes the jurisprudence of the European Court of Human Rights<sup>95</sup> and examines whether the purpose of the legislation is legitimate and whether the restrictions are no more than necessary to accomplish the legitimate purpose.

The courts have generally taken an expansive view as to purposes that the state can legitimately pursue, preferring instead to strike down laws and regulations on the grounds that the restrictions have gone too far.<sup>96</sup> The primary legislative objectives of the Ordinance—namely preventing abuses in management of Chinese temples and fraud by pseudo-religious establishments<sup>97</sup>—appear to fit into conventional categories of legitimate purposes, such as public order and public morals.<sup>98</sup> The key issue is thus whether the restrictions are excessive.

90 *Supra*, the sub-subsection titled “Regulatory Control.”

91 *To Kan Chi v. Pui Man Yau*, CACV 32/1999 (C.A.); *To Kan Chi v. Pui Man Yau*, HCMP 2084/94 (C.F.I.).

92 The decision of the court of first instance was delivered in November 1998, and the Court of Appeal heard the appeal in December 1999 and rendered the decision in February 2000. The Article 105 challenge was only raised in the Court of Final Appeal.

93 See *infra* notes 116–19 regarding the Hong Kong Bill of Rights Ordinance that was enacted in 1991.

94 *Leung Kwok Hung v. Hong Kong* [2005] 8 H.K.C.F.A.R. 229, ¶¶ 30–38; Johannes Chan & C.L. Lim, *Interpreting Constitutional Rights and Permissible Restrictions*, in *LAW OF THE HONG KONG CONSTITUTION*, *supra* note 14, at 565, 592–602.

95 ROBIN C.A. WHITE & CLARE OVERY, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 312–15, 325–32 & 478 (5th ed. 2010); STEVEN GREER, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS: ACHIEVEMENTS, PROBLEMS AND PROSPECTS* 201–13 (2006). For a critical discussion of the legal theory imbedded in these two concepts, see GEORGE LETSAS, *A THEORY OF INTERPRETATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 17–36 & 99–119 (2007).

96 Chan & Lim, *supra* note 94, at 592–602. See CAROLYN EVANS, *FREEDOM OF RELIGION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 142–49 (2001) (discussing the relevant jurisprudence of the European Court of Human Rights).

97 *Supra*, the subsection “Historical Background.”

98 EVANS, *supra* note 96, at 149–55 & 159–60.

Notably, the point is arguably conceded in the Review. In the Review, the Home Affairs Bureau recommends the repeal of all the mandatory controls and restrictions on the revenues of Chinese temples on the grounds that there is “now various legislation providing protection and remedies against fraud, malpractices and misuses of funds, as well as environmental and safety problems that associated with organizations.”<sup>99</sup> In these circumstances, the indiscriminate imposition of control over all Chinese temples without regard to actual or potential wrongdoing is likely to be deemed excessive by the courts even with a wide margin of appreciation.

### *Religious Discrimination*

The above constitutional analysis reveals that the forbearance of the executive government toward vigorously enforcing the Ordinance is politically prudent to avoid a potentially embarrassing judicial nullification of the Ordinance. While it has survived an Article 105 property rights challenge in the highest court, the Ordinance is at risk of an Article 141 challenge for disproportionate interference in the internal affairs of religious organizations.

However, the Ordinance has a more severe constitutional deficiency that has been inexplicably omitted in the official discourse over the nonenforcement and reform of the Ordinance. This deficiency is religious discrimination. The most striking feature of the Ordinance is not the extensive regulatory controls imposed on religious organizations but that those regulatory controls are specifically imposed on Chinese temples only. There are no corresponding regulations for any other religious organizations or places of worship.<sup>100</sup> Indeed, even the modest requirement of registration is peculiar to Chinese temples.

While this blatant discriminatory treatment of Chinese temples understandably reflects the then-hostility (or at the very least indifference) of the British colonial government toward non-Christian religions,<sup>101</sup> the negative association of Chinese temples with “pseudo-religious establishments” eerily continues to pervade the Review. The proposed dismantling of regulatory control over Chinese temples was not due to a less adverse conceptualization of Chinese religious practices. Rather, it was because “members of the public are now much more aware of the risks associated with ‘pseudo-religious establishments’”<sup>102</sup> and there is now various generally applicable legislation that targets fraud and malpractice.<sup>103</sup> In the same vein, the proposed voluntary registration scheme that is designed to inform the public and allow “Chinese temples [to] gain public confidence”<sup>104</sup> applies only to Chinese temples without any counterpart or perceived need for other religious organizations. Finally, while all religious organizations with charitable or significant public interests are already subject to intervention by the secretary of Justice, the Review sees a need to provide an additional safeguard—in the form of the power to intervene by the Secretary of Home Affairs—for Chinese temples.

In a sense, this guarded skepticism towards Chinese temples may be understood given the perceived prevalence of fraud associated with Chinese religions and related superstitious practices. A

99 Home Affairs Bureau, *supra* note 64, at 3.

100 See generally ch. 335 (Religion), HALSBURY'S LAWS OF HONG KONG (LexisNexis).

101 *Supra*, the subsection “Historical Background.”

102 Home Affairs Bureau, *supra* note 64, at 3.

103 *Id.* at 3. See B. Wang et al., *Characteristics of Emissions of Air Pollutants from Burning of Incense in Temples, Hong Kong*, 377 SCIENCE OF THE TOTAL ENVIRONMENT 52, 59 (2007) (discussing how air pollution in Chinese temples, arising from the burning of incense, can exceed safety guidelines to the health detriment of visitors and residents of nearby areas).

104 Home Affairs Bureau, *supra* note 64, at 4–5.

common form of fraud in “street deception cases” involved the fraudster—working alone or with partners—approaching the victim and claiming that the victim (or the victim’s loved ones) would suffer grave misfortunes (such as illness or accident) in the near future unless some form of Chinese religious rituals involving valuables or hefty “donations” were performed. These fraud are common despite targeted enforcement, with hundreds of reported cases each year and typically constituted 25 percent to 50 percent of total reported “street deception” cases.<sup>105</sup> Where the fraudsters were apprehended, they were typically charged either under section 17 of the Theft Ordinance (“obtaining property by deception”)<sup>106</sup> or on conspiracy to defraud, contrary to Common Law and punishable under section 159C(6) of the Crimes Ordinance.<sup>107</sup> Once convicted, they were typically sentenced to several years of imprisonment.<sup>108</sup> In a similar vein, sale and operation of private columbarium niches by Chinese temples have provoked public concerns both for the negative externalities to surrounding neighborhood (e.g., air pollution, traffic) and potential fraud of selling niches which contravenes land use regulations (i.e., illegal and liable to be demolished).<sup>109</sup> There have also been high profile legal disputes within the management team of Chinese temples over alleged misappropriation of temple fund and other malpractices.<sup>110</sup>

However, these unscrupulous practices could and should have been tackled through religious-neutral laws. The prosecutions and convictions of the religious “street deception cases” under general criminal law provisions on fraud are not per se unconstitutional, notwithstanding potential evidentiary complications as will be discussed below.<sup>111</sup> Similarly, the recent enactment of the Private Columbaria Ordinance<sup>112</sup> that imposes a licensing scheme for *all* private columbaria *regardless* of religious affiliation (or for that matter, non-religious columbaria) is the proper approach—at least from the legal perspective—to address the public concerns over private columbaria. Likewise, any deficiencies in governance structure of Chinese temples are by no means unique to Chinese temples. The 2013 Law Commission report on reforming charities law in Hong Kong noted the lack of transparency and accountability in the management and running of many charities<sup>113</sup> and recommended various measures (such as registry, public disclosure, financial reporting) to promote public trust and confidence in the *entire* charitable or nonprofit sector.<sup>114</sup>

More fundamentally, even if Chinese religions are indeed more prone to these unscrupulous practices as a matter of fact,<sup>115</sup> it is still a clear constitutional violation. The Basic Law sets forth the standard right of equality without specifying the prohibition of discrimination on the grounds of religion or other usual suspect classes.<sup>116</sup> However, state action may also be challenged under the Hong Kong Bill of Rights Ordinance, a statute enacted in 1991 to incorporate the

105 Hong Kong v. Xu Maiqing, DCCC 795/2005, ¶¶ 3–7, 9 (D.C. 2005) (Legal Reference System) (H.K.).

106 Theft Ordinance (2017) Cap. 210. *E.g.*, Hong Kong v. Zhu Huiying, DCCC 399/2014 (D.C. 2014) (Legal Reference System) (H.K.).

107 Crimes Ordinance (1997) Cap. 200. *E.g.*, Hong Kong v. Luo Xiuting, DCCC 801/2014 (D.C. 2014) (Legal Reference System) (H.K.).

108 The starting point for sentencing is two to three years of imprisonment for each charge.

109 Official Reports of Proceedings (Legislative Council of Hong Kong), Nov. 27, 2013, at 3333–36.

110 *E.g.*, *Solicitor Seeks Court Order to Oust Disgraced Nun from Ting Wai*, EJ INSIGHT, Aug. 8, 2016.

111 *Infra*, sub-subsection “Secular Facts versus Religious Truth.”

112 Private Columbaria Ordinance (2017) Cap. 630.

113 LAW REFORM COMMISSION OF HONG KONG, REPORT: CHARITY, at 19–21 (2013). This is especially so if the charities are not one of the few statutory charities established under a specific Ordinance.

114 *Id.* at 227–33.

115 In light of the colonial legacy, one might argue that the current image of Chinese religions is unduly tainted by the vicious cycle of biased enforcement reinforcing negative perception.

116 XIANGGANG JIBEN FA [Basic Law] art. 25 (“All Hong Kong residents shall be equal before the law.”).

International Covenant on Civil and Political Rights in Hong Kong.<sup>117</sup> While the precise relationship among the Basic Law, Bill of Rights Ordinance, and the International Covenant on Civil and Political Rights can be controversial for courts determining the substantive content of constitutional rights or assessing the legality of restrictions on rights,<sup>118</sup> the general consensus is that either the Basic Law or the Hong Kong Bill of Rights Ordinance will suffice in providing grounds for a constitutional challenge.<sup>119</sup> In this regard, article 22 of the Hong Kong Bill of Rights Ordinance, echoing article 26 of the International Covenant on Civil and Political Rights, explicitly prohibits discrimination on the grounds of religion.<sup>120</sup>

Given how the international jurisprudence on religious equality is dominated by difficult issues, such as how facially neutral and generally applicable laws can have discriminatory effects (whether inadvertent or insidiously intentional) on religious minorities<sup>121</sup> and whether affirmative action toward or specific benefits to certain religions constitute impermissible religious discrimination,<sup>122</sup> it is almost refreshing to have a much simpler case of laws that explicitly target religious practices of a particular faith for unique regulatory burdens. Indeed, it is telling that while publicly touting the intention of implementing a “Muslim ban,” the actual wordings of the travel restrictions issued by the Trump administration explicitly targeted only nationality without any mention of religion.<sup>123</sup> With the intense judicial scrutiny triggered by differential treatment of a protected class such as religion,<sup>124</sup> it is difficult to imagine how the current government can plausibly justify singling out only

117 Hong Kong Bill of Rights Ordinance (1997) Cap. 383; Panditaratne, *supra* note 14, at 525–32; Simon Young, *Restricting Basic Law Rights in Hong Kong*, 34 HONG KONG LAW JOURNAL 109, 115–17 (2004). *See also* XIANGGANG JIBEN FA art. 39 (H.K.) (“The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region. The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.”).

118 For a concise overview and analysis of this issue, *see* Panditaratne, *supra* note 14; PETER WESLEY-SMITH, CONSTITUTIONAL AND ADMINISTRATIVE LAW IN HONG KONG 319–27 (2nd ed. 1994).

119 Panditaratne, *supra* note 14, at 538–59; Young, *supra* note 117, at 115–17.

120 Hong Kong Bill of Rights Ordinance, art. 22 (“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”).

121 Joy Milligan, *Religion and Race: On Duality and Entrenchment*, 87 NEW YORK UNIVERSITY LAW REVIEW 393, 436–40 (2012); JULIA K. STRONKS, LAW, RELIGION, AND PUBLIC POLICY: A COMMENTARY ON FIRST AMENDMENT JURISPRUDENCE 32 (2002); EVANS, *supra* note 96, at 168–99. *See* Robin Charlow, *The Elusive Meaning of Religious Equality*, 83 WASHINGTON UNIVERSITY LAW QUARTERLY 1529, 1531–41 (2005) (discussing the multidimensional nature of religious equality).

122 VINCENT D. ROUGEAU, CHRISTIANS IN THE AMERICAN EMPIRE: FAITH AND CITIZENSHIP IN THE NEW WORLD ORDER 101–09 (2008); Balázs Schanda, *Freedom of Religion and Minority Religions in Hungary*, in REGULATING RELIGION: CASE STUDIES FROM AROUND THE GLOBE 279, 285, 292–93 (James T. Richardson ed., 2004). *See* Rex Ahdar & Ian Leigh, *Is Establishment Consistent with Religious Freedom?*, 32 MCGILL LAW JOURNAL 635 (2004) (arguing that religious freedom does not necessarily require religious equality and that mild establishment is compatible with religious freedom).

123 Adam Liptak, *In Travel Ban Hearing, Judges Zero in on Trump's Remarks as a Candidate*, NEW YORK TIMES, May 9, 2017, at A15; Joe Palazzolo, *Travel Ban Ruling: Decision Raises Opposing Views*, WALL STREET JOURNAL, June 27, 2017, at A4. For analysis on the discriminatory impact of the executive orders, *see* Abed Ayoub & Khaled Beydoun, *Executive Disorder: The Muslim Ban, Emergency Advocacy, and the Fires Next Time*, 22 MICHIGAN JOURNAL OF RACE & LAW 215, 234–39 (2017).

124 Secretary for Justice v. Yau Yuk Lung [2007] 3 H.K.C. 545, 554–55 (C.F.A.). *See* CLARE OVERY & ROBIN WHITE, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 427–29 (2006); Daniel O. Conkle, *Religious Truth, Pluralism, and*

places of worship involving Chinese religions to the exclusion of other religions, especially when the malpractices perceived to be associated with Chinese religions could (and should be) tackled by existing or new laws that are religiously neutral.

Thus, from an outsider’s perspective, it is bewildering as to how the committee working on the Review failed to pick up this constitutional issue, especially when the committee was aware of the fact 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.”<sup>125</sup> It is also both ironic and telling that pro-democracy legislators<sup>126</sup> have expressed disapprovals for the proposed reform. Notwithstanding their political parties’ purported ardent commitment of promoting human rights and civil liberties,<sup>127</sup> Kenneth Chan opined that the “Administration should not relax its control over Chinese temples under the pretext of upholding religious freedom,”<sup>128</sup> while Helena Wong “strongly objected” to the voluntary registrations scheme on account that the scheme “might affect or lessen the protection afforded to members of the public against unlawful activities of deceitful pseudo-religious establishments.”<sup>129</sup> These legislators may well be simply advocating the opinions and wishes of their constituents. Yet one would imagine that they would have channeled those concerns into proposals that are consistent with constitutional rights (e.g., proposing laws and regulations generally applicable to *all* religious organizations) rather than so wholeheartedly endorse a colonial-era legislation that explicitly discriminates against a particular religion.

More research will be necessary to unpack the sociopolitical dynamics between religious organizations and political institutions. As a preliminary conjecture, the common and proud proclamations of perceived religious freedom in Hong Kong that stood in sharp contrast with the heavy state

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*Secularization: The Shaking Foundations of American Religious Liberty*, 32 *CARDOZO LAW REVIEW* 1755, 1755–56 (2011) (discussing the interesting point that while the U.S. Supreme Court and American legal scholars opined similar conclusion, the perceived unconstitutionality stemmed from the Free Exercise clause rather than Equal Protection clause); Russell L. Weaver, *The Free Exercise Clause of the United States Constitution*, in *LAW AND RELIGION: GOD, THE STATE AND THE COMMON LAW* 60, 71–73 (Peter Radan et al. eds., 2005); *Employment Division v. Smith*, 494 U.S. 872 (1990). See also Susan Gellman & Susan Looper-Friedman, *Thou Shalt Use the Equal Protection for Religion Cases (Not Just the Establishment Clause)*, 10 *UNIVERSITY OF PENNSYLVANIA JOURNAL OF CONSTITUTIONAL LAW* 665, 666–68 & 738–41 (2008) (arguing for greater use of the Equal Protection clause and observing that prevailing lack of this otherwise obvious avenue might simply be due to path dependent neglect).

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

126 The political participants in Hong Kong can be largely divided into two camps: the “pro-establishment” camp, which favors a closer relationship in terms of China’s role in Hong Kong economic and social life; and the “pan-democrats” camp, which advocates 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 K.P. Chou, *Election without Fair Representation: Hong Kong’s Legislative Council and Its Implications for Non-liberal Regimes*, in *PARLIAMENTS IN ASIA: INSTITUTION BUILDING AND POLITICAL DEVELOPMENT* 228, 229–30 (Zheng Yongnian, Lye Liang Fook & Wilhelm Hofmeister eds., 2014); Joseph Y.S. Cheng, *Democratization in Hong Kong: A Theoretical Exception*, in *DEMOCRACY IN EASTERN ASIA: ISSUES, PROBLEMS AND CHALLENGES IN A REGION OF DIVERSITY* 224, 229–30 (Edmund S.K. Fung & Steve Drakeley eds., 2014).

127 Lam Wai-man, *Hong Kong: The Hong Kong Legislative Council—Where Politics Matters More than Size*, in *LEGISLATURES OF SMALL STATES: A COMPARATIVE STUDY* 137, 141–42 (Nicholas D. J. Baldwin ed., 2013); Ho-fung Hung & Iam-chong Ip, *Hong Kong’s Democratic Movement and the Making of China’s Offshore Civil Society*, 52 *ASIAN SURVEY* 504, 508–11 (2012).

128 Legislative Council Secretariat, *Panel on Home Affairs: Minutes of Special Meeting*, May 5, 2015, LegCo Paper No. CB(2)1968/14–15, at 9.

129 *Id.* at 10.



intervention and repression of religion in mainland China<sup>130</sup> might have rendered it impossible for many to imagine that there is an existing statute in Hong Kong whose disregard of religious liberty and religious equality would not pale in comparison with the actual regime in China.<sup>131</sup>

In any event, while the recommended changes in the Review undeniably represent a substantial relaxation of the regulatory controls that will alleviate constitutional concerns over disproportionate restrictions on religious autonomy, they are still driven by the notion that Chinese religious practices are a peculiarly potent source of religious fraud. Given the continued imposition of regulatory measures only on Chinese temples and no other religious organizations, the amended Ordinance—as and when it is enacted amidst much more urgent legislative priorities—remains at risk of a challenge on the basis of religious discrimination.

### CONCEPTUAL PITFALLS IN REGULATING RELIGIOUS FRAUD

The unconstitutionality of the Ordinance and the proposed reform does not negate the possibility of legally permissible state regulations on religious fraud. For example, a voluntary registration scheme applicable to all religious organizations is likely to survive both religious freedom and equality challenges. A closer look at the normative considerations implicated is thus warranted. Below I identify the two conceptual deficiencies inherent in the regulatory approaches toward religious fraud adopted in the Ordinance and the Review and highlight how these deficiencies compromise the desirability of state intervention in general and of a voluntary registration scheme in particular.

#### *Harm of Pseudo-Religious Establishments: The Different Types of Religious Fraud*

Deceitful practices by “pseudo-religious establishments” are a pertinent concern of the Ordinance, both at its inception and during the recent reform. This is unsurprising. Fraud is commonly perceived as an unqualified harm—it is not only morally repulsive but also disrupts the proper operations of the market.<sup>132</sup> Fraud thus frequently leads to severe criminal sanctions against the

130 Leung, *supra* note 58, at 75–78 (noting the religious policy in China and observing earlier at 63 that “Hong Kong people enjoy religious freedom . . . Since the government puts few limitations upon religious communities”). See also Michael Ng, *When Silence Speaks: Press Censorship and Rule of Law in British Hong Kong, 1850s–1940s*, LAW & LITERATURE, 14–26 (2017) (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 CHINA’S HONG KONG TRANSFORMED: RETROSPECT AND PROSPECTS BEYOND THE FIRST DECADE 97, 100–03 (Ming K. Chan ed., 2008) (discussing the various “half-truth” regarding the perceived level playing field and various freedom—market, political, press, and academic—under British colonial rule that are in reality much more circumscribed).

131 Ping Xiong, *Freedom of Religion in China under the Current Legal Framework and Foreign Religious Bodies*, 2013 BRIGHAM YOUNG UNIVERSITY LAW REVIEW 605, 610–16 (2013); Richard Klein, *An Analysis of China’s Human Rights Policies in Tibet: China’s Complicity with the Mandates of International Law Regarding Civil and Political Rights*, 18 ILSA JOURNAL OF INTERNATIONAL & COMPARATIVE LAW 115 (2011). See also JIANLIN CHEN, *THE LAW AND RELIGIOUS MARKET THEORY: CHINA, TAIWAN AND HONG KONG 157–60* (2017) (discussing from the perspective of the law and religious market theory the deficiency of the actual Hong Kong approach to law and religion).

132 Petrica-Mihail Marcoci & Gheorghe Bogdan Birzu, *Several Considerations on Industrial Fraud*, ANNALS CONSTANTIN BRĂNCUȘI UNIVERSITY TÂRGU JIU JURIDICAL SCIENCE SERIES 147, 147–48 (2011); Mary M. Calkins, *My Reputation Always Had More Fun Than Me: The Failure of eBay’s Feedback Model to Effectively Prevent Online Auction Fraud*, 7 RICHMOND JOURNAL OF LAW & TECHNOLOGY 33, 33–34 (2001).

perpetrator<sup>133</sup> and generous civil remedies for the victims.<sup>134</sup> Statutes and regulations designed to combat fraud are common in a whole host of settings ranging from commerce<sup>135</sup> to marriage.<sup>136</sup>

However, there are important conceptual distinctions among the different fraudulent practices that are commonly associated with purported religious entities. It is fraud when a temple solicits religious donations from the public under the proclaimed objective of temple renovation but applies the funds to sustain the lavish lifestyle of its leaders. It is also fraud when a temple solicits religious donations from its adherents under a false promise of divine reward. Close examination reveals that the two scenarios differ in terms of (1) the interaction between the fraudster and victim and (2) the nature of the falsehood.

### Transaction versus Charity

The first conceptual distinction is whether the provision of funds is transactional or charitable. This conceptual distinction echoes the evolution in how the harm of religious fraud is perceived in Hong Kong. The Review approaches the issues of religious fraud and pseudo-religious establishments mainly from the perspective of regulating charitable organizations. The proposed voluntary registration scheme is designed to provide information to the public with the view of facilitating more informed decisions when donating to Chinese temples. Indeed, “public concerns over the transparency of charity donations” was an explicit rationale underpinning the proposal.<sup>137</sup> This aim can be contrasted with the legislative objectives when the Ordinance was first introduced. At that time, the activities associated with Chinese temples were perceived as more transactional in nature. Laws are necessary to prevent “charlatans”—many of whom are “simply fortune tellers of an unrecognized and objectionable kind”—from duping ignorant individuals. Additionally, there is explicit concern over the “establishment of temples as purely business speculations.”<sup>138</sup>

Admittedly, there is no clear-cut definitional boundary between transaction and charity,<sup>139</sup> and individuals making religious donations often do so with overlapping motivations. Indeed, a hybrid conception—giving to charity for divine reward—is a common religious doctrine.<sup>140</sup> However, this conceptual distinction remains useful because it highlights the different dynamics between fraudster

133 Theft Ordinance (1997) Cap. 210, §§ 17–19. See Fraud Act 2006, c. 35 (2006) (U.K.).

134 Damages for fraudulent misrepresentation include all actual damage directly flowing from the fraudulent inducement without much limitation as to remoteness or foreseeability, unlike in the case for negligent misrepresentation that is so limited: *Smith New Court Sec. v. Scrimgeour Vickers* [1997] AC 254, 267, 269 (HL). There may also be statutory provisions for exemplary damages for a defendant successfully resisting fraudulent litigation claims: Julian Fulbrook, *Tasneem v Morley: Personal injury—Road Traffic Accidents—Damages*, 2014(2) JOURNAL OF PERSONAL INJURY LAW C91 (2014).

135 An example is the Bills of Sale Ordinance (1997) Cap. 20, which establishes a registry and compels registration of transfers of rights/interests in personal chattel that fall short of a complete transfer. For a critical discussion as to its utility in combating fraud in the modern era, see Graham S. McBain, *Repealing the Bill of Sale Acts*, 2011 JOURNAL OF BUSINESS LAW 475 (2011).

136 The institution of a public register of marriage and the requirement for a period of public notice prior to marriage. Marriage Ordinance (1997) Cap. 181, §§ 6–10, 23–26 (instituting a public register of marriage and requiring a period of public notice prior to marriage).

137 *Supra*, the subsection “Reform Proposal.”

138 *Supra*, the subsection “Historical Background.”

139 See Brian L. Frye, *Solving Charity Failures*, 93 OREGON LAW REVIEW 155, 181–88 (2014) (discussing the donation model versus the reward model of crowdfunding for charitable projects).

140 Gary Anderson, *The Challenge of Charity*, in CHARITY: THE PLACE OF THE POOR IN THE BIBLICAL TRADITION 1, 4–6 (2013); James Leiby, *Charity Organization Reconsidered*, 58 SOCIAL SERVICE REVIEW 523, 530 (1984).

and victim, in particular the incentive or the ability of the potential victims to detect fraud and the impact of prevalent fraud on the activity levels of the victims.

Where religious offerings are primarily charitable, there is a more distant and passive relationship between the giver and recipient. The giver will naturally want to be judicious when selecting a recipient of charitable giving. However, in the relative absence of expectations as to a commensurate reward in return for the contribution,<sup>141</sup> the giver often devotes much less scrutiny to the actual usage of the donated funds.<sup>142</sup> Echoing this expectation of the individual donor, there are limited private remedies available for charitable fraud. Deceit is a basis for revoking a charitable gift.<sup>143</sup> However, once the funds have been handed over to the recipient in the absence of fraudulent solicitation, there is generally no legal recourse available to the donor for any dissatisfaction or discrepancies as to how the recipient utilized the funds.<sup>144</sup> In any event, the difficulty as to detection and evidence, coupled with the generally small amount contributed by each individual donor, makes it unrealistic to expect vigorous private enforcement against fraudulent practices among charities even if private remedies are available.<sup>145</sup> In such circumstances, there is a strong case for aggressive state or regulatory supervision over the activities of religious organizations. If the fraudulent practices are perceived to be unchecked by the public, there may be a paralyzing distrust that severely and indiscriminately curtails public donations to all purported charitable organizations, whether legitimate or otherwise.<sup>146</sup>

In comparison, religious offerings that are akin to transactions imply a more intimate and active dynamic between the giver and recipient. The expectation of a promised reward or the deliverable in this transactional context means that the giver is much more particular as to the recipient's actions, even after the transfer of funds. A potential recipient must also engage with the giver more closely to ascertain the particular expectation of the giver and assure the giver that that expectation will be met.<sup>147</sup> The size of the gift—whether in absolute terms or relative to the overall wealth of the giver—also tends to be significantly larger than in a charitable setting, providing more incentive for the giver to be informed and careful in the selection. Thus, even if contractual remedies may not be readily available due to ambiguity as to whether religious giving under promises of divine intervention should be deemed a contract between the giver and recipient<sup>148</sup> and the

141 For a good discussion as to egoistic, altruistic, and mixed motivations behind charitable giving, see ARNOLD DASHEFSKY & BERNARD LAZERWITZ, CHARITABLE CHOICES: PHILANTHROPIC DECISIONS OF DONORS IN THE AMERICAN JEWISH COMMUNITY 11–16 (2009); Neeli Bendapudi, Surendra N. Singh & Venkat Bendapudi, *Enhancing Helping Behavior: An Integrative Framework for Promotion Planning*, 60 JOURNAL OF MARKETING 33, 40–43 (1996). See also Amihai Glazer & Kai A. Konrad, *A Signaling Explanation for Charity*, 86 AMERICAN ECONOMIC REVIEW 1019, 1019–21 (1996) (discussing how—in light of the data indicating the paucity of anonymous donations—charitable donations are often motivated by donor's desire to signal status).

142 Khrista Johnson, *The Charitable Deduction Games: Catching Change*, 31 GEORGIA STATE UNIVERSITY LAW REVIEW 289, 292–93 (2015).

143 PETER LUXTON, THE LAW OF CHARITIES 801 (2001).

144 *Id.*

145 Turley, *supra* note 4, at 468. See also Langenderfer & Shimp, *supra* note 2, at 768 (“When the amount requested by a swindler is small, scam victims may not pay attention to the details of the proposed transaction because they may not be especially interested; their motivation is limited, so diligent thought is not worth the effort.”).

146 Joseph Mead, *Confidence in the Nonprofit Sector through Sarbanes-Oxley-Style Reforms*, 106 MICHIGAN LAW REVIEW 881, 884–86 (2008); Yolanda Demianczuk, *Charity Regulation in the Russian Federation*, 35 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 477, 482–84 (1997).

147 *Cf.* Bendapudi, Singh & Bendapudi, *supra* note 149, at 45–46 (discussing the need for sophisticated and well-designed promotional strategies to ensure more effective solicitation of charitable donations).

148 See Barborak, *supra* note 4, at 602–03 (criticizing the exemption of religious organizations from deceptive sale statutes in the United States).

reluctance of judges to adjudicate matters involving religious elements,<sup>149</sup> the necessity for default state or regulatory oversight remains less compelling because the giver is in a much better position to detect and avoid fraud. Additionally, the fact that the giver is motivated less by altruistic motives and more by expected gains from the “transaction” means that the prevalence of fraudulent practices will inflict a more muted reduction of activities compared to the charity scenario. The giver will be more circumspect in selection, but is likely to still take calculated risks of being defrauded where the desired benefit outweighs the perceived risk.<sup>150</sup>

### Secular Facts versus Religious Truth

Another dimension in which religious fraud may be differentiated is the nature of falsehood. In the above examples, both the proclaimed objective of temple renovation and the promise of divine intervention are false; however, the former is a secular factual claim that can be readily verified.<sup>151</sup> Bank statements, receipts, and other financial documents will easily prove or disprove whether funds have indeed been used for temple renovation or for some other purpose. It must be noted that even where secular factual claims are involved, an important distinction must be made between a false representation as to a fact in existence and a false claim as to intention of future performance. Depending on the manner in which the purpose of temple renovation is articulated by the recipient, the falsehood may only be a false claim of intention that is subjected to a more difficult evidential inquiry into subjective intention.<sup>152</sup> Nevertheless, even if a false claim of intention cannot be established, any discrepancy between the stated purpose and the actual use of the funds can still be identified and verified, whether to sustain a civil claim of breach (perhaps in contract or trust), a criminal charge of embezzlement, or—at the very least—public discrediting of the recipient.<sup>153</sup>

It is different for religious claims. For the promise of divine intervention, the veracity of the representation depends on the existence of the relevant divine entity(s) and the manner in which divine interventions are made. While it is possible—although extremely complicated and highly controversial—for secular courts or states to determine the correct religious doctrine for a given religion,<sup>154</sup> it is impossible to objectively verify whether the attributed divine entity actually exists. The recognition of the limitation on states’ ability to assess the spiritual realm underpins the modern discourse over religious freedom,<sup>155</sup> including the aversion to consciously shaping religious practices and

149 Mark Herbert, *Religious Issues in Litigation*, 2015 PRIVATE CLIENT BUSINESS 137, 142–43 (2015); Mason, *supra* note 9, at 93–104; Senn, *supra* note 4, at 329; Turley, *supra* note 4, at 463–65.

150 See Roger Bate, *Fatal Pharmaceuticals: The Indian Counterfeit Drug Market*, 11 GEORGETOWN JOURNAL OF INTERNATIONAL AFFAIRS 125, 126–27 (2011) (discussing how the prevalence of counterfeit and substandard drugs in India has not dampened the consumption due to strong demand by low-income consumers who are compelled to take the risk).

151 Senn, *supra* note 4, at 328.

152 G.H. TREITEL, *THE LAW OF CONTRACT* 331–32 (11th ed. 2003); Diane Skapinker & J.W. Carter, *Breach of Contract and Misleading or Deceptive Conduct in Australia*, 113 LAW QUARTERLY REVIEW 294, 305–06 (1997).

153 J.E. PENNER, *THE LAW OF TRUSTS* 130–32 (7th ed. 2010); LUXTON, *supra* note 143, at 386–87 & 798–801.

154 Peter Smith, *The Problem of the Non-Justiciability of Religious Defamations*, 18 ECCLESIASTICAL LAW JOURNAL 36, 37–38 & 51–52 (2016); Mason, *supra* note 9, at 510.

155 Koppelman, *supra* note 5, at 1835; M. D. Litonjua, *Religious Zealotry and Political Violence in Christianity and Islam*, 35 INTERNATIONAL REVIEW OF MODERN SOCIOLOGY 307, 308–11 (2009); Steven H. Shiffrin, *The Pluralistic Foundations of the Religion Clauses*, 90 CORNELL LAW REVIEW 9, 44–45 (2004).

doctrines via state instruments.<sup>156</sup> However, this poses particular problems for litigation where the falsity of religious claims is a required element of the criminal offense or cause of action.

Unless the court declines to adjudicate the issue altogether (such as invoking the doctrine of non-justiciability),<sup>157</sup> courts confronted with this issue tend to resolve it via sincerity. In the classic U.S. Supreme Court case on religious fraud, *U.S. v. Ballard*, the court held that where there are no objectively demonstrable falsehoods in the alleged religious fraud (such as representation of religious credentials from specified religious institutions), the factual finding of falsehood could be premised on whether the alleged fraudsters sincerely believed their religious claims.<sup>158</sup> A similar approach was adopted in Hong Kong, where the credibility of the defendant in articulating a religious basis for sexual intercourse (in particular, any internal inconsistencies in the account) was the key determinant of whether the offense of sexual intercourse by false pretenses was established.<sup>159</sup> Academic commenters have endorsed this approach, albeit with cautions as to the dangers of bias against unconventional or minority religious practices<sup>160</sup> and evidentiary issues.<sup>161</sup>

That the victims of religious fraud are typically naïve and emotionally, financially, or physically vulnerable has been used to justify public enforcement and regulatory supervision by academics<sup>162</sup> and the courts.<sup>163</sup> Nevertheless, one must ask what are the precise harms arising from fraudulent representation on matters that cannot be objectively verified. From the victim's perspective, a person donating to a temple under fraudulent claims as to the funds' usage is deprived of funds that could have been properly applied to the desired cause of temple renovation. However, the difference between making religious offerings to a recipient who sincerely believes his or her religious proclamations and a recipient who does not is less clear, especially if the donor continues to believe that the recipient was sincere in his or her proclamations.<sup>164</sup>

156 Andrew Koppelman, *And I Don't Care What It Is: Religious Neutrality in American Law*, 39 PEPPERDINE LAW REVIEW 1115, 1120 (2013); RESEARCH DIVISION, OVERVIEW OF THE COURT'S CASE-LAW ON FREEDOM OF RELIGION 19 (Council of Europe/European Courts of Human Rights 2013); William Marshall, *What Is the Matter with Equality? An Assessment of the Equal Treatment of Religion and Nonreligion in First Amendment Jurisprudence*, 75 INDIANA LAW JOURNAL 193, 208 (2000).

157 Frank Cranmer, *Case Comment: Thomas Phillips v Thomas Monson*, 16 ECCLESIASTICAL LAW JOURNAL 393, 393 (2014) (noting how a private prosecution against a Mormon church leader for soliciting religious contributions "while at the same time knowingly promoting theological doctrines which 'might be untrue or misleading'" was summarily dismissed for, among other things, "issues of the truth or falsity of religious doctrines were non-justiciable"). For a discussion of the doctrine of nonjusticiability of religious issues in the English courts, see Smith, *supra* note 154, at 40–42.

158 *United States v. Ballard*, 322 U.S. 78, 84–87 (1944).

159 *Hong Kong v. Au Yeung Kwok Fu* [2012] H.K.C.U. 223, ¶¶ 32–33 (C.A.). For cases where prosecution alleged that the sexual intercourse was procured by false religious claims, but where the defendants denied making the religious claims at all, see *Hong Kong v. Yeung Shing Sang* [2014] H.K.C.U. 1243 (C.A.); *Hong Kong v. Chow Kam Wah* [2012] H.K.C.U. 2447 (C.A.). *Cf.* Jianlin Chen, *Lying about God (and Love?) to Get Laid: The Case Study of Criminalizing Sex under Religious False Pretense in Hong Kong*, 51 CORNELL INTERNATIONAL LAW JOURNAL 553, 566–78 (2018) (critically discussing how Hong Kong courts evaluated the veracity of the religious claims in seven religious fraudulent sex cases over a ten year period). *See also* Jianlin Chen, *Joyous Buddha, Holy Father, and Dragon God Desiring Sex: A Case Study of Rape by Religious Fraud in Taiwan*, 13 NATIONAL TAIWAN UNIVERSITY LAW REVIEW 183, 201–11 (2018) (discussing similar religious fraudulent sex prosecutions in Taiwan).

160 STRONKS, LAW, *supra* note 121, at 109; Horwitz, *supra* note 8, at 143–50; Senn, *supra* note 4, at 336–41.

161 Greenfield, Osborn & Roberts, *supra* note 29, at 103–04.

162 Senn, *supra* note 4, at 329–31.

163 *Hong Kong v. Au Yeung Kwok Fu*, DCCC 569/2009, ¶¶ 11–13 (D.C.).

164 *See Ballard*, 322 U.S. at 94–95 (1944) (Jackson, J., dissenting) ("The chief wrong which false prophets do to their following is not financial . . . the real harm is on the mental and spiritual plane . . . When they are deluded and

The same ambiguity applies from the social perspective. Beyond the moralistic rationale of punishing unscrupulous individuals,<sup>165</sup> there is limited social harm caused by the proliferation of insincere pronouncements of religious truth in the modern context where there is easy accessibility to a vast array of religious claims arising from both traditional organized religions and emerging religious movements. Unlike the negative impact of counterfeit goods on commercial markets,<sup>166</sup> the existence of false religious claims can hardly disrupt the “religious market,” which has not abated despite being swamped with allegations and counter-allegations of false religions since time immemorial.<sup>167</sup>

### The Sliding Scale of Justified State Intervention

Putting the two dimensions together, we can map the different types of religious fraud on a sliding scale in terms of the normative desirability of state intervention, especially in the forms of public enforcement and regulatory supervision.<sup>168</sup> The case of state intervention is strongest where the religious fraud concerns contributions that are charitable in nature and in which falsehoods involve secular factual claims. On the other hand, state intervention is unnecessary and may even be counterproductive where the religious fraud involves transactions based on false (that is, insincere under the current legal regime) claims of religious truth.<sup>169</sup> For other combinations and hybrid scenarios, the desirability of intervention is more ambiguous and will require case-by-case analysis.

This insight normatively challenges the necessity of the Ordinance, whether in its existing form or in the proposed reform.

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then disillusioned, cynicism and confusion follow. The wrong of these things, as I see it, is not in the money the victims part with half so much as in the mental and spiritual poison they get.”)

165 Senn, *supra* note 4, at 331–32.

166 Trang Huyen My Pham & Muhammad Ali Nasir, *Conspicuous Consumption, Luxury Products and Counterfeit Market in the UK*, 13 *EUROPEAN JOURNAL OF APPLIED ECONOMICS* 72, 73–76 (2016); Thorsten Staake, Frédéric Thiesse & Elgar Fleisch, *Business Strategies in the Counterfeit Market*, 65 *JOURNAL OF BUSINESS RESEARCH* 658, 658 (2012); Bate, *supra* note 150, at 126–30.

167 For discussions about proselytization and corresponding resistance/reactions, see Stephen C. Berkwitz, *Religious Conflict and the Politics of Conversion in Sri Lanka*, in *PROSELYTIZATION REVISITED: RIGHTS TALK, FREE MARKETS AND CULTURE WARS* 199, 203–04 (Rosalind I.J. Hackett ed., 2008). See also Ballard, 322 U.S. at 94 (1944) (Jackson, J., dissenting) (“Scores of sects flourish in this country by teaching what to me are queer notions. It is plain that there is wide variety in American religious taste. The [defendants] are not alone in catering to it with a pretty dubious product.”).

168 The emphasis is made given how state intervention could arguably include granting civil remedies to private litigants, whether in lieu of or in addition to public enforcement and regulatory supervision. While the involvement of judiciary (or other adjudicating tribunal) means that there is some overlap in the legal and normative considerations of these forms of state intervention (such as the evidential and constitutional complication of evaluating religious truth), there are sufficient key distinctions—both practical (such as the amount of state resources) and constitutional (e.g., more leeway afforded to the exercise of power by private entities)—to exclude it from the scope of this article.

169 An example is the Fraudulent Mediums Act 1951 in the United Kingdom. This legislation aimed to criminalize fraudulent practices of spiritualist mediumship. Falsehood is defined based on subjective intent, and an element of reward is required. The legislation has been criticized as ineffective and unintendedly “amounts to professional recognition” of the spiritual mediums. The legislation was replaced in 2008 during harmonization of domestic consumer protection laws with EU laws: see Greenfield, Osborn & Roberts, *supra* note 29, at 103–06 & 112–13.

First, the singling out of Chinese religious practices for regulatory supervision is ironic given how Chinese religions are commonly practiced in Hong Kong. Unlike monotheistic religions that tend to place greater emphasis on faith in the designated supreme being with the goal of eternal salvation,<sup>170</sup> Chinese religious practices are premised more on an exchange relationship between the deity and the adherent.<sup>171</sup> Adherents perform religious rites and make religious offerings in expectation of favorable divine intervention in their daily affairs.<sup>172</sup> While considerations of the afterlife are not entirely absent from Chinese religions, religious offerings in Chinese religions tend to be largely transactional and are premised on the potency of divine intervention in return.<sup>173</sup> This is the category of religious fraud where state intervention is least justified.

Second, while it is true that religious offerings in some of the larger and more publicly oriented Chinese temples bear a resemblance to charitable contributions and hence justify at least some form of state intervention in combating fraudulent practices, the close resemblance to conventional charitable contributions is precisely why it is preferable to address this issue under regulations generally applicable to all charities rather than carving out a specific regime. A specific regime, such as the Ordinance, further complicates the already “fragmented” charity regulation regime in Hong Kong where both the public and charities face a confusing array of inconsistent standards in reporting, governance, and accounting.<sup>174</sup>

#### Religion as Credence Goods: The Unintended Impact of Registration

Notwithstanding the questionable basis for state intervention as expounded in the previous section, one might plausibly argue that it is not a serious deficiency in the Review given that the central piece of the proposed reform—the voluntary registration scheme—appears a mild and benign regulatory action. Public disclosure of information, whether via a registration scheme or otherwise, is a popular regulatory tool because it enables the regulator or the state to avoid allegations of inaction or inattention without prompting backlash from regulated entities over perceived onerous regulatory burdens.<sup>175</sup> Indeed, where the regulatory context is primarily voluntary transactions between two private (or at least non-governmental) entities, the availability of more verified information appears

170 Sarah Claerhout & Jakob De Roover, *Conversion of the World: Proselytization in India and the Universalization of Christianity*, in PROSELYTIZATION REVISITED: RIGHTS TALK, FREE MARKETS AND CULTURE WARS, *supra* note 167, at 53, 65; David Tracy, *The Christian Understanding of Salvation-Liberation*, 7 *BUDDHIST-CHRISTIAN STUDIES* 129, 130–32 (1987).

171 See generally S.A. NIGOSIAN, *WORLD RELIGIONS: A HISTORICAL APPROACH* 414–19 (3d ed. 2000) (discussing how the different religions differ in their conceptions of religious path and goals).

172 *ENCYCLOPEDIA OF PSYCHOLOGY AND RELIGION*, *supra* note 15, at 145; Liu, *supra* note 15, at 389.

173 ZHENG ZHIMING, 臺灣宗教組織與行政 [TAIWAN RELIGIOUS ORGANIZATION AND ADMINISTRATION] 330 (2010); DONG FANGFAN, 臺灣的宗教大觀 [THE RELIGIONS IN TAIWAN] 70–72 (Avanguard 2008). See Yunfeng Lu, Byron Johnson & Rodney Stark, *Deregulation and the Religious Market in Taiwan: A Research Note*, 49 *SOCIOLOGICAL QUARTERLY* 139, 143 (2008) (discussing how the perceived efficacy in granting the wishes of worshippers is an important factor in the success of Chinese folk temples in Taiwan); Adam Yuet Chau, *The Politics of Legitimation and the Revival of Popular Religion in Shaanbei, North-Central China*, 31 *MODERN CHINA* 236, 252–253 (2005) (discussing the activities of a successful Chinese temple that include divine blessing and magical curative spring water).

174 LAW REFORM COMMISSION OF HONG KONG, *supra* note 113, at 19–20.

175 ROBERT BALDWIN, MARTIN CAVE & MARTIN LODGE, *UNDERSTANDING REGULATION: THEORY, STRATEGY, AND PRACTICE* 228–29 & 277–80 (2d ed. 2012); Cary Coglianese, *Engaging Business in the Regulation of Nanotechnology*, in *GOVERNING UNCERTAINTY: ENVIRONMENTAL REGULATION IN THE AGE OF NANOTECHNOLOGY* 46, 55–56 (Christopher J. Bosso ed., 2010).

an unqualified good in facilitating more informed interactions—and better outcomes—between the two entities.<sup>176</sup>

However, as much as the utility of a registration or accreditation scheme is widely acknowledged in a whole host of commercial contexts involving consumers,<sup>177</sup> the peculiar nature of religious activities as true credence goods demands special consideration vis-à-vis a state-operated registration scheme. Credence goods is an economic concept for products (including intangible products, such as services) whose quality cannot be judged whether before or after purchase or consumption, rendering the credibility of the supplier particularly salient in the calculus of consumers.<sup>178</sup> Common examples include medical treatment, legal services, and automobile repairs. Because the market for such credence goods may break down if consumers are paralyzed by the fear of being defrauded, a whole host of government interventions ranging from licensing to certification to sellers' liability have been advocated as necessary to mitigate the severe information asymmetry for consumers.<sup>179</sup>

In this regard, religion is the ultimate credence good. Religion's allusion to divinity, the spiritual realm, the afterlife and other effectively unverifiable concerns means that the inability of consumers or adherents to evaluate the true quality of the "product" is due to the absence of an objective way to verify the core claims of religious truth, and not simply the lack of information or expertise as with other more typical scenarios.<sup>180</sup> This contravenes the key premise of state intervention for more conventional credence goods, namely that the state enjoys economies of scale in information and expertise and is thus able to assess the otherwise elusive qualities of the product or service. This mismatch can cause unintended and even counterproductive consequences when the state tries to intervene in religious matters. For example, state action intending to suppress a religion (ranging from persecution of leaders to milder discriminatory treatment) will not only increase the cost of religious activities thereby pressuring adherents to leave the religion, but will simultaneously cause the rise of perceived credibility of the religion—given how these sacrifices by religious leaders and adherents can be interpreted as mutually reinforcing signals to both adherents and outsiders of the value of the religion and the strength of religious commitment.<sup>181</sup> The interplay between the two factors can lead to a variety of outcome. For example, the state suppression could reduce the overall numbers of adherents without being able to eradicate a highly committed core that continues to operate

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176 Brian Roe & Ian Sheldon, *Credence Good Labeling: The Efficiency and Distributional Implications of Several Policy Approaches*, 89 AMERICAN JOURNAL OF AGRICULTURAL ECONOMICS 1020, 1020–21 (2007); Hayne E. Leland, *Quacks, Lemons, and Licensing: A Theory of Minimum Quality Standards*, 87 JOURNAL OF POLITICAL ECONOMY 1328, 1329 (1979).

177 E.g., Joshua Hall, *Higher-education Accreditation: Market Regulation or Government Regulation?*, 17 INDEPENDENT REVIEW: JOURNAL OF POLITICAL ECONOMY 233, 234 (2012); Roe & Sheldon, *supra* note 176, at 1020–21.

178 Uwe Dulleck, Rudolf Kerschbamer & Matthias Sutter, *The Economics of Credence Goods: An Experiment on the Role of Liability, Verifiability, Reputation, and Competition*, 101 AMERICAN ECONOMIC REVIEW 526, 526–27 (2011); Uwe Dulleck & Rudolf Kerschbamer, *On Doctors, Mechanics, and Computer Specialists: The Economics of Credence Goods*, 44 JOURNAL OF ECONOMIC LITERATURE 5, 6–9 (2006); Winand Emons, *Credence Goods and Fraudulent Experts*, 28 RAND JOURNAL OF ECONOMICS 107, 107 (1997).

179 Camille Chaserant & Sophie Harnay, *The Regulation of Quality in the Market for Legal Services: Taking the Heterogeneity of Legal Services Seriously*, 10 EUROPEAN JOURNAL OF COMPARATIVE ECONOMICS 267, 284–85 (2013); Roe & Sheldon, *supra* note 176, at 1021; Leland, *supra* note 176, at 1329 & 1342.

180 WITHAM, *supra* note 5, at 61–62; ANTHONY GILL, *THE POLITICAL ORIGINS OF RELIGIOUS LIBERTY* 41–42 (2008).

181 WITHAM, *supra* note 5, at 61–65; RODNEY START & ROGER FINKE, *ACTS OF FAITH: EXPLAINING THE HUMAN SIDE OF RELIGION* 106–13 (2000).



underground.<sup>182</sup> In other contexts where the suppressions are milder or successfully infused with theological meaning, the targeted religion may even experience overall growth.<sup>183</sup>

In the specific context of the voluntary registration scheme under the Review, there is a risk that it may generate unwarranted perceived credibility of the registered Chinese temples by the public. The proposed registration scheme requires the provision, updating, and audit of information as to the “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.”<sup>184</sup> This information coincides with particulars that are typically solicited for regulatory supervision of charitable organizations in other jurisdictions.<sup>185</sup> However, none of this information engages directly with the authenticity of the underlying claims of religious truth, especially the key expectation of favorable divine intervention under the religious transaction conceptualization of Chinese religious practices.<sup>186</sup> Unless the individual adherents are fully aware of the specifics of the registration scheme and appreciate the causative relationship (or lack thereof) between the registered information and the characteristic or quality that is being assessed, then the status as a Chinese temple duly registered with a supervisory government entity designated to monitor Chinese temples is likely to give the false impression that the underlying claims of religious truth are somehow state sanctioned and hence more credible. In this regard, it is telling that even legislators mistakenly assumed greater significance and scope for the existing registration scheme.<sup>187</sup>

Indeed, this risk of the public giving undue credence to a state-sanctioned registration scheme of more modest intent and design was identified in a 2013 Law Commission report on reforming charities law in Hong Kong.<sup>188</sup> In question is the list of organizations that have been granted tax exemption status for being a “charitable institution or trust of a public character” by the Inland Revenue Department. Although the tax authority is not responsible for registering or monitoring charities, it is common for members of the public to misconceive the list as a formal and supervised register of charitable organizations.<sup>189</sup> It is unfortunate that this laudable insight was lost in the reform of the Ordinance only a couple of years later.

182 JAMES W. TONG, *REVENGE OF THE FORBIDDEN CITY: THE SUPPRESSION OF THE FALUNGONG IN CHINA, 1999–2005*, at 205 (2009) (discussing the vigorous enforcement of the criminalization of the Falungong sect by the Chinese government that has largely eliminated its public presence in China without eradicating the continued practice of its teachings in private or in secret); Anne S.Y. Cheung, *In Search of a Theory of Cult and Freedom of Religion in China: The Case of Falun Gong*, 13 *PACIFIC RIM LAW & POLICY JOURNAL* 1, 21–26 (2004).

183 To use another example from China, only state-sanctioned religious organizations are considered legal. Independent Protestant “churches” that refused to join the official Protestant church organization are thus technically in a state of legal ambiguity that involves general tolerance (but no official reorganization) punctuated with occasional and limited crackdowns. However, this has not impeded the continued growth of such “churches.” Given that sociologists have observed that the differences in theology and doctrines between official and underground churches are not particularly significant, one possible explanation is that credibility gained from refusing to submit to state control outweighs the resulting discriminatory inconvenience: Fenggang Yang, *The Red, Black, and Gray Markets of Religion in China*, *SOCIOLOGICAL QUARTERLY* 93, 97–98 (2006); Jacqueline E. Wenger, *Official vs. Underground Protestant Churches in China: Challenges for Reconciliation and Social Influence*, 46 *REVIEW OF RELIGIOUS RESEARCH* 169, 170–71 (2004).

184 Home Affairs Bureau, *supra* note 64, at 4–5.

185 LAW REFORM COMMISSION OF HONG KONG, *supra* note 113, at 226–37.

186 *Supra*, sub-subsection “The Sliding Scale of Justified State Intervention.”

187 *E.g.*, Official Reports of Proceedings (Legislative Council of Hong Kong), Nov. 27, 2013, at 3333–36 (thinking the registration scheme covers proper conduct of columbarium businesses by the temples).

188 LAW REFORM COMMISSION OF HONG KONG, *supra* note 113, at 20.

189 *Id.* at 20, 104.

## CONCLUSION

Discriminatory at its core and misguided in its manifestation, the Ordinance should have been abolished in its entirety due to its clear constitutional violations and questionable normative justifications. More broadly, this case study highlights how religious fraud is not always amenable to the various state interventions typically employed to combat conventional scams. A circumspect analysis as to the differing nature and unique dynamics of religious fraud is necessary to ensure a justified and appropriate regulatory response.

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