

## SYMPOSIUM: DEBATING RELIGION AND PUBLIC LIFE IN CONTEMPORARY CHINA

# FREEDOM IN HANDCUFFS: RELIGIOUS FREEDOM IN THE CONSTITUTION OF CHINA

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### ABSTRACT

Article 36 of the Chinese Constitution tells only part of the story about religious freedom in China. The Chinese constitution establishes five restrictions on the religious freedom described in Article 36. First, the Chinese Constitution establishes state atheism as an official ideology. All Chinese citizens, whether religious believers or not, are required to be educated in Marxist ideology and under the leadership of the Chinese Communist Party. Second, religious freedom, along with other rights in the Chinese Constitution, are merely legal rights, rather than fundamental rights. The National People's Congress can therefore pass legislation limiting individuals' religious freedom. Third, the Chinese Constitution enumerates basic obligations of citizens that limit religious freedom. Fourth, Article 36 protects only the inner freedom of religious belief, not freedom for religious practice. Finally, the second half of Article 36 places limitations on religious practices. Religious freedom in the Chinese Constitution is thus a highly limited freedom. To improve religious freedom protections in China it is necessary to amend the Constitution rather than simply promote full implementation in its current form.

**KEYWORDS:** religious freedom, Chinese Constitution, fundamental rights

### INTRODUCTION

China's religious freedom has been the target of sustained and harsh criticism from scholars and writers around the world.<sup>1</sup> There are severe religious freedom violations year after year in China. Some people have lost their jobs while others have been arrested, arbitrarily detained,

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1 Eric Carlson shows how the religious regulations are used to “constrain religion within government-set parameters rather than to protect freedom of religious belief.” Eric R. Carlson, “China’s New Regulations on Religion: A Small Step, Not a Great Leap, Forward,” *Brigham Young Law Review* 2005, no. 3 (2005): 747–97, at 781. See also United States Department of State, Bureau of Democracy, Human Rights and Labor, “China (Includes Tibet, Hong Kong, and Macau) 2017 International Religious Freedom Report,” in *International Religious Freedom Report for 2017*, <https://www.state.gov/reports/2017-report-on-international-religious-freedom/china-includes-tibet-hong-kong-and-macau/>.

tortured, and even killed for their religious beliefs.<sup>2</sup> Propagating religion is prohibited in public places.<sup>3</sup> Although the Chinese government will never admit to these violations, many reports prove their existence. For example, in the past two years, the government in Zhejiang province in southeast China has removed and sometimes burned down crosses from as many as two thousand churches.<sup>4</sup> Since the end of the last century, Falun Gong, labeled an “evil cult” by the Chinese government, has been banned, and many of its practitioners have been persecuted.<sup>5</sup> International newspapers often report news about pastors or bishops being sentenced in China.<sup>6</sup> Of course, more importantly, only five religions—Buddhism, Taoism, Islam, Protestantism, and Catholicism—are formally recognized by the Chinese government. All religious activities are restricted to state-approved religious sites. Any religious activities in the public square are strictly illegal and prohibited. In short, the freedom to manifest religion is extremely limited in China.

Some socialists have described the complex situation and analyzed the heavy regulation of religion in contemporary China.<sup>7</sup> However, from the legal point of view, there is a legal system for

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- 2 Human Rights Watch, “China and Tibet,” in *World Report 2002*, 205–15; Amnesty International, *People’s Republic of China: The Crackdown on Falun Gong and Other So-Called “Heretical Organizations,”* March 23, 2000.
  - 3 See Zongjiao Shiwu Tiaoli (宗教事务条例) [Regulations on Religious Affairs] (promulgated by the State Council, July 7, 2004, effective March 1, 2005; rev’d by the State Council, June 14, 2017, effective February 1, 2018) art. 44, 2017 *State Council Gazette*, no. 26. ([http://www.gov.cn/gongbao/content/2017/content\\_5225861.htm](http://www.gov.cn/gongbao/content/2017/content_5225861.htm)); Beijing Shi Zongjiao Shiwu Tiaoli (北京市宗教事务条例) [Regulation on Religious Affairs in Beijing Municipality] (promulgated by the Standing Committee of the People’s Congress Beijing Municipality, July 18, 2002, effective Nov. 1, 2002; revised by the Standing Committee of the People’s Congress of Beijing Municipality, July 28, 2006), article 27, 2006 *Gazette of Beijing Municipal People’s Government* 9, at 11.
  - 4 “Chinese Government Accused of Burning Crosses in Christian Crackdown,” *CBS News*, March 10, 2016, <https://www.cbsnews.com/news/china-communist-party-crackdown-on-christians-religious-freedom/>.
  - 5 Levi Browde, “After 17 Years of Persecution, Falun Gong Survives,” *Diplomat*, July 21, 2016, <https://thediplomat.com/2016/07/after-17-years-of-persecution-falun-gong-survives/>. Of course, discussing Falun Gong raises the vexed question of the definition of “religion.” Falun Gong has been discussed as an ideology, as a form of qigong, as an ethical code, as a religion, and in relation to other issues; Hua Shiping and Xia Ming, “Guest Editor’s Introduction,” in “The Falun Gong: Qigong, Code of Ethics, and Religion,” special issue, *Chinese Law & Government* 32, no. 6 (1999): 5–13, at 5. However, the Western world has always regarded Falun Gong as a religion and condemned China’s violation of the religious freedom of Falun Gong practitioners; US Department of State, “China (Includes Tibet, Hong Kong, and Macau),” 2. Benjamin Penny provides some good reasons to define Falun Gong as a modern Chinese religion by seriously examining Falun Gong teachings, beliefs, practice, and its history. Benjamin Penny, *The Religion of Falun Gong* (Chicago: University of Chicago Press, 2012), 24–35.
  - 6 Bao Guohua, a Protestant pastor, and his wife, Xing Wenxiang, were sentenced to fourteen and twelve years in prison, respectively, in 2016; Edward Wong, “Pastor in China Who Resisted Cross Removal Gets 14 Years in Prison,” *New York Times*, February 26, 2016, <https://www.nytimes.com/2016/02/27/world/asia/china-zhejiang-christians-pastor-crosses.html>. Jin Tianming, the lead pastor of Shouwang Church in Beijing, has been under house arrest since 2011, and more than one hundred churchgoers were detained because they were trying to hold an outdoor prayer service after having failed to secure permission to open a church; Barbara Demick, “Chinese Police Detain Members of Unregistered Church,” *Los Angeles Times*, April 11, 2011, <https://www.latimes.com/local/la-xpm-2011-apr-11-la-fg-china-church-crackdown-20110411-story.html>. Bishop Thaddeus Ma Daqin, a Shanghai Catholic bishop, was under house arrest after dramatically resigning from the government-controlled Catholic Patriotic Association during his ordination at St. Ignatius’s Cathedral in Shanghai in 2002. See Andrew Jacobs, “China Reportedly Strips Shanghai Bishop of His Title,” *New York Times*, December 12, 2012, <https://www.nytimes.com/2012/12/13/world/asia/china-is-said-to-strip-shanghai-bishop-of-his-title.html>.
  - 7 For example, Fenggang Yang offers a broad overview of the Chinese religious situation and proposes a triple-market model: “a red market (officially permitted religions), a black market (officially banned religions), and a gray market (religions with an ambiguous legal/illegal status).” Fenggang Yang, “The Red, Black, and Gray Markets of Religion in China,” *Sociological Quarterly* 47, no. 1 (2006): 93–122, at 97.

protecting the religious freedom of citizens in China. Article 36 of the Chinese Constitution expressly provides that Chinese citizens “enjoy freedom of religious belief.”<sup>8</sup> It prohibits religious discrimination and forbids state organs, public organizations, or individuals to compel anybody to believe—or not—in any particular religion. The Regulations on Religious Affairs, which was enacted by the State Council in 2005 and amended in 2017, allows state-registered religious organizations to possess property, publish literature, train and choose clergy, collect donations, and take advantage of preferential tax policy.<sup>9</sup>

The question arises as to why the Chinese Constitution says that freedom of religion is protected when, in reality, it does not allow people to enjoy this right. It is easy to conclude that China’s constitution is not enforced and plays little role in China’s legal system, being only a symbolic document. As William Jones observed in 1985, “The constitution seems to bear no relation to the actual government of China.”<sup>10</sup> That is to say, the structure and values set out in the constitutional text are not consistent with the Chinese social reality.<sup>11</sup> Observers have characterized the Chinese Constitution as a national policy declaration or political outline rather than as a legally enforceable document.<sup>12</sup> It is a combination of slogans, rather than law. In other words, China’s Constitution is a “dead letter” that “lacks any effective review mechanism” ensuring constitutionality, so that the implementation of the Constitution “is left unguarded against official violations.”<sup>13</sup> The Chinese Constitution is a merely formal “constitution,” and is not a legally binding constitution. It is a classic example of what has been called a “sham constitution.”<sup>14</sup> This is conventional wisdom and widely accepted by Chinese and Western scholars.<sup>15</sup> At least two direct consequences follow

8 Of course, “freedom of religious belief” is an official translation of the Chinese constitution. National People’s Congress of the People’s Republic of China, <http://www.npc.gov.cn/englishnpc/constitution2019/201911/1f65146fb6104dd3a2793875d19b5b29.shtml>. In the discussion that follows, I show that the Chinese Constitution sets a series of restrictions on religious activities in order to prevent religious influence on politics and society. In this regard, it would be more accurate to translate the concept in Article 36 as “freedom from religion.”

9 See Zongjiao Shiwu Tiaoli (宗教事务条例) [Regulations on Religious Affairs] (promulgated by the State Council, July 7, 2004, effective March 1, 2005; revised by the State Council, June 14, 2017, effective February 1, 2018) articles 8, 44, 45, 55, 56 and 59, 2017 *State Council Gazette*, no. 26. ([http://www.gov.cn/gongbao/content/2017/content\\_5225861.htm](http://www.gov.cn/gongbao/content/2017/content_5225861.htm)).

10 William C. Jones, “The Constitution of the People’s Republic of China,” *Washington University Law Quarterly* 63, no. 4 (1985): 707–35, at 710.

11 Surya Deva, “The Constitution of China: What Purpose Does It (Not) Serve?” *Jindal Global Law Review* 2, no. 2 (2011): 55–77, at 74; Jiang Shigong, “Written and Unwritten Constitutions: A New Approach to the Study of Constitutional Government in China,” *Modern China* 36, no. 1 (2010): 12–46, at 13.

12 See Donald C. Clarke, “Puzzling Observations in Chinese Law: When Is a Riddle Just a Mistake?,” in *Understanding China’s Legal System: Essays in Honor of Jerome A. Cohen*, ed. C. Stephen Hsu (New York: New York University Press, 2003), 93–121, at 105; Cai Dingjian, “Xianfa Zhidu de Fazhan yu Gaige” [Development and reform of the constitutional system], *Ling Dao Zhe*, no. 25 (2008), <http://reading.caing.com/105849/105893.html>.

13 Zhang Qianfan, “A Constitution without Constitutionalism? The Paths of Constitutional Development in China,” *International Journal of Constitutional Law* 8, no. 4 (2010): 950–76, at 952.

14 See generally David S. Law and Mila Versteeg, “Sham Constitutions,” *California Law Review* 101, no. 4 (2013): 863–952.

15 For example, according to Carl Minzner, “on paper, the Chinese constitution recognizes a range of civil rights, including the freedom of association, religion, and speech, as well as equal rights for women and guarantees against unlawful deprivation of personal freedom. But the lack of any mechanisms to enforce the constitution, combined with official efforts to ensure continued party control over Chinese society, mean that many of these provisions have little value in practice.” Carl Minzner, “China,” in *Countries at the Crossroads 2011: An Analysis of Democratic Governance*, ed. Jake Dizard, Christopher Walker, and Vanessa Tucker (Washington,

from these observations. First, the Chinese Constitution is largely ignored. Law students have little motivation to study a constitution that plays no role in real life.<sup>16</sup> The result is that both the positive and negative aspects of the Chinese Constitution are hardly explored at all. Second, experts, organizations, and governments attempting to effect positive change in China's constitutionalism and the rule of law (including religious freedom) have chosen to pressure the Chinese government to implement the Constitution,<sup>17</sup> not realizing that there is an issue not only with the implementation of the Constitution but also with its stipulations. The Constitution itself must be brought under scrutiny and not be dismissed in the heat of the battle for implementation.

Religious freedom in the Chinese Constitution is a limited and conditional freedom. The present religious policy and religious freedom of China, deploying "religious freedom" in a limited sense, are basically in line with the spirit and provisions of the Chinese Constitution. The understanding of religious freedom in the Chinese Constitution should not be drawn exclusively from Article 36, neglecting the rest of the constitution. Nor should we draw a parallel with the US Constitution and the religion clauses of the First Amendment. In short, these are two completely different documents although both of them are called "constitutions."<sup>18</sup>

In this article, I first examine the problems commonly cited by scholars when criticizing China's religious freedom policies and review how the Constitution could be taken seriously in the eyes of the Chinese government. Next, I critically examine the potential limitations that the Chinese Constitution places on religious freedom. The Chinese Constitution effectively creates at least four classes of limitations on religious freedom. I examine the limitations resulting from the national ideology and the limitations that constrain the nature of fundamental rights. I examine the stipulation of certain duties of citizens and then examine the limitations in Article 36 itself. These limitations can have unforeseen consequences that seriously limits citizens' religious freedom. I conclude by arguing that the religious freedom in Article 36 of the Chinese Constitution is a freedom in handcuffs. This means that we should pressure the Chinese government not only to

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DC: Freedom House, 2012), 136. Similarly, Eric Kolodner writes, "the absence of an independent judiciary further ensures the Party's monopoly over constitutional interpretation. Because no entity can enforce the Constitution against high political authority, the government is under no pressure to respect citizens' constitutional liberties. The nonjusticiability of the Constitution allows government officials to violate citizens' religious rights with impunity." He goes on to note that the "1982 Constitution does not even allow citizens to appeal to the Procurate for alleged violations of their rights by the bureaucracy." Eric Kolodner, "Religious Rights in China: A Comparison of International Human Rights Law and Chinese Domestic Legislation," *Pacific Basin Law Journal* 12, no. 2 (1994): 407–30, at 422–23. However, Paul Gewirtz offers that there are three approaches concerning constitutional enforcement worldwide: "popular constitutionalism," "political constitutionalism," and "judicial constitutionalism." Paul Gewirtz, "Constitutional Enforcement: Who Should Do it and How?" (unpublished paper), 2, accessed February 16, 2020, <https://law.yale.edu/sites/default/files/china-law-documents/gewirtz-constitutionalismarticleenglishincompletedraft222016.pdf>. Over the past years, the most visible efforts to implement the Chinese constitution in China have been examples of "popular constitutionalism." Gewirtz, "Constitutional Enforcement," 4–5.

16 I have met Western scholars who think that China does not even have a constitution. Also telling is the fact that most Chinese law students are reluctant to choose constitutional law as their major when they pursue graduate degrees.

17 Zhang Qianfan argues "to turn its constitution into constitutionalism, China needs a set of institutional arrangements that holds its government responsible to the citizens so that it will faithfully enforce the Constitution and laws." Zhang Qianfan, "A Constitution without Constitutionalism?," 976.

18 More than thirty years ago, Owen Fiss compared the free speech guarantees of the Chinese Constitution with the Free Speech Clause of the First Amendment of the US Constitution and noted the key gaps between the Chinese Constitution and US Constitution. Owen M. Fiss, "Two Constitutions," *Yale Journal of International Law* 11, no. 2 (1986): 492–503, at 492.

implement the Constitution but also to amend the Constitution and remove its stated limitations on religious freedom.

### TAKING THE CHINESE CONSTITUTION SERIOUSLY

The conclusion that China's Constitution is a merely symbolic document does not itself answer the question of why the Chinese government took the trouble of creating constitutional provisions with which they do not comply. As Jerome Cohen has observed, "one of the major unresolved puzzles of Chinese constitutionalism is to ascertain why these freedoms continue to be asserted when to do so flies in the face of the everyday experience of Chinese people." He continues that this is true particularly when retention of such symbols of freedom courts either popular concern or "the risk that large numbers of people may actually try to enjoy those freedoms."<sup>19</sup> One possible answer is that the Chinese Constitution "purports to establish a government that appears quite recognizable to Westerners."<sup>20</sup> In other words, the Chinese government uses this Constitution to whitewash its autocratic character. This may be one aspect,<sup>21</sup> but it is not the whole story. In an era in which "constitutionalism is commonly identified with a written constitution,"<sup>22</sup> the Chinese Constitution does have ideological significance in light of norms by which the legitimacy of the government is judged. But if the goal were purely symbolic, the Chinese Constitution could be made to appear closer to Western constitutional standards. But instead, the Chinese Constitution retains many characteristics of Chinese socialism.<sup>23</sup>

In addition, the importance of the Chinese Constitution is reflected in the fact that leaders speak of it seriously. The Chinese government has repeatedly revised the constitution in the past thirty years, indicating that it cares very much about what it stipulates. China has had four constitutions (1954, 1975, 1978, and 1982) since 1949, when the Chinese Communist Party (CCP) came to power. The current constitution of China was promulgated in 1982 and has been amended five times (1988, 1993, 1999, 2004, and 2018). The 1982 Constitution is generally viewed as far better than any of its predecessors according to a systematic survey.<sup>24</sup> This periodical revision of the Constitution makes the Chinese Constitution one of the most frequently revised, if not the most

19 Jerome Alan Cohen, "China's Changing Constitution," *China Quarterly*, no. 76 (1978): 794–841, at 832.

20 Jones, "The Constitution of the People's Republic of China," 707.

21 The direct cause that led to the making of the constitution was a prompting from Soviet Union leader Joseph Stalin. One of the reasons Stalin provided was that Western countries would criticize China for not having a constitution and would note that its government is unelected.

22 Louis Henkin, "A New Birth of Constitutionalism: Genetic Influences and Genetic Defects," in *Constitutionalism, Identity, Difference and Legitimacy: Theoretical Perspective*, ed. Michel Rosenfeld (Durham: Duke University Press, 1994), 39–53, at 40.

23 As Ernest Caldwell argues, "Criticism is frequently leveled at China on the grounds that although the Chinese constitution grants . . . a range of individual rights . . . it does not provide institutional mechanisms to enforce these rights." Ernest Caldwell, "Horizontal Rights and Chinese Constitutionalism: Judicialization through Labor Disputes," *Chicago-Kent Law Review* 88, no. 1 (2012): 63–91, at 65. However, Caldwell points out, approaches that focus on Chinese political issues that "impede the institution of western-style judicial review mechanisms, often construe a 'right' as merely having vertical effect"; Caldwell "examines a series of court cases involving employer-employee labor disputes" and finds that "lower court judges actively engaged in constitutional interpretation and openly invoked and enforced *horizontally* oriented socio-economic rights to prosecute exploitative labor practices." Caldwell, 63.

24 Chiu Hungdah, "The 1982 Chinese Constitution and the Rule of Law," *Review of Socialist Law* 11, no. 2 (1985): 143–60, at 155.

frequently revised, constitution in the world. At present, the Chinese Constitution, which is only thirty-eight years old, contains fifty-two amendments, double that of the US Constitution, which has endured two hundred years. Although it is easy for the Chinese government to make multiple revisions, it is clear from these periodic modifications that the Chinese government is constantly revising the constitution to keep pace with the times. If the Chinese Constitution is simply dismissed as a dead letter, it is difficult to explain not only its origination but also why the CCP feels the need to repeatedly amend it, if they have no intention of following it. Why enshrine constitutional guarantees for the right to religious freedom, among others, when the CCP obviously opposes such rights? Actually, the Chinese government attaches great importance to what the Constitution does and does not provide. If the government thinks certain rights or freedoms should not be granted to the citizens, it will never be included in the Constitution. For example, the 1975 Constitution added the freedom to strike, which subsequently was dropped from the 1982 Constitution. The 1954 Constitution laid down the freedom to change residence, which was also abolished under the current Constitution. All these revisions indicate that the Chinese government takes the Constitution seriously in at least some sense.

Second, both the Chinese Constitution and the CCP's constitution require the CCP to abide by the Constitution. The Chinese Constitution states that it "has supreme legal authority" and "all political parties" which, of course, includes the CCP, "must abide by the constitution."<sup>25</sup> The new party Constitution adopted in 2017 also requires that "the party must conduct its activities within the limits permitted by the Constitution and the laws of the state."<sup>26</sup> This shows that abiding by the Constitution is not only required of the Chinese people, but also is required of party members themselves.

Third, Chinese leaders have come to realize the importance of the Constitution and have increasingly stressed the importance of implementing it. In the past twenty years, party leaders have several times highlighted the need to abide by the country's Constitution. In January 1999, then Chinese president Jiang Zemin conducted a meeting to collect the opinions of citizens outside the party regarding draft amendments of the Constitution. As he pointed out, "the Constitution is the basic law of the country and has a very important role in national life." He stressed, "it is extremely important to protect the dignity of the Constitution and to ensure the enforcement of the Constitution."<sup>27</sup> Former president Hu Jintao also emphasized that "governing the country according to the law must adhere to the Constitution" and "all comrades of the party, all staff of state departments, and people of the whole country must study the constitution, abide by it, safeguard it and ensure its implementation."<sup>28</sup> He also stressed that fully implementing the Constitution is

25 Xianfa preamble, ¶ 13 (1982). Unless otherwise noted, all subsequent citations are to the 1982 promulgation of the Constitution. The translation I have used for this article is an official English translation of the Chinese constitution. National People's Congress of the People's Republic of China, <http://www.npc.gov.cn/englishnpc/constitution2019/201911/1f65146fb6104dd3a2793875d19b5b29.shtml>.

26 Constitution of the Chinese Communist Party preamble, ¶ 30 (2017).

27 On January 31, 1999, the Central Committee of the Communist Party of China held a symposium of non-party organizations, inviting the heads of the Democratic Party's Central Committee, the National Federation of Industry and Commerce, and non-party representatives to give advice on amending the Constitution. Jiang Zemin delivered a speech at this symposium. See "Zhonggong Zhongyang Zhaokai Dangwai Renshi Zuotanhui" [The Central Committee of the Communist Party of China held a symposium of non-party organizations], *Renmin Ribao*, February 1, 1999, at 1.

28 "Hu Jintao: Zai Shoudu Gejie Jinian Quanguo Remin Daibiao Dahui Chengli 50 Zhounian Dahui Shang de Jianghua" [Hu Jintao: Speech on the 50th Anniversary of the National People's Congress], *Renmin Ribao*, September 16, 2004, at 1. Unless otherwise noted, all translations from the Chinese are mine.

very important and indispensable in state governance and social management and in accelerating the construction of a socialist country.<sup>29</sup> In December 2012, at a congress marking the thirtieth anniversary of the Constitution's implementation held in Beijing, Xi Jinping, general secretary of the party's Central Committee, pledged to "promote the authority of the Constitution":

To fully implement the Constitution is the primary task and the basic work in building a socialist nation ruled by law. The Constitution is the country's basic law and the general rule in managing state affairs. The Constitution is of supreme legal status, authority and efficacy, and it is fundamental, stable, lasting and concerns the overall situation. The people of all nationalities, all state organs, the armed forces, all political parties and public organizations, and all enterprises and institutions in the country must take the Constitution as the basic standard of conduct and bear the duty to uphold the dignity of the Constitution and ensure its implementation. No organization or individual may have the privilege of being above the Constitution and the law. All acts in violation of the Constitution or laws must be legally pursued.<sup>30</sup>

Although what was said does not equal what was done, it nonetheless suggests that complying with the Constitution has become central to China's official political language.

Fourth, China has recently organized a Constitution Day, and established a constitutional oath system to promote respect for and implementation of the Constitution. In October 2014, the CCP's Central Committee approved the Decision Concerning Several Major Issues in Comprehensively Advancing Governance According to Law, making December 4 (the current constitution was passed on December 4, 1982) China's National Constitution Day. By July 2015, the Standing Committee of the National People's Congress passed a decision on implementing the Constitution Oath System. According to the fortieth amendment of the Constitution in 2018, the state staff are required to publicly make the following oath to abide by the Constitution before taking office:

I pledge to be loyal to the PRC Constitution, to safeguard the authority of the Constitution, to perform obligations imposed by law, to be loyal to the country and to the people, to be fully committed in performing my official duties, to have integrity and always work in the interest of the public, to accept the supervision of the people, and to work hard for the great cause of building a prosperous, democratic, civilized, harmonious and beautiful socialist country!<sup>31</sup>

Both the setting up of a National Constitution Day and the establishing of a constitutional oath system are aimed at promoting the rule of law and highlighting the importance of upholding China's Constitution.

29 "Hu Jintao: Jianding Buyi Yanzhe Zhongguo Tese Shehuizhuyi Daolu Qianjin Wei Quanmian Jiancheng Xiaokang Shehui er Fendou" [Hu Jintao: Firmly march on the path of socialism with Chinese characteristics and strive to complete the building of a moderately prosperous society in all respects], *Renmin Ribao*, November 8, 2012, at 1.

30 "Xi Jinping: Zai Shoudou Gejie Jinian Xianxing Xianfa Gongbu Shixing 30 Zhounian Dahui Shang de Jianghua" [Xi Jinping: Speech on the 30th anniversary of the promulgation of the current constitution in all sectors of the capital], *Renmin Ribao*, December 5, 2012, at 2.

31 Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Shixing Xianfa Xuanshi Zhidu de Jueding (全国人民代表大会常务委员会关于实行宪法宣誓制度的决定) [Decision of the Standing Committee of the National People's Congress on Implementing the Constitutional Oath System] (promulgated by the Standing Committee of the National People's Congress, July 1, 2015, effective January 1, 2016; revised by the Standing Committee of the National People's Congress, February 24, 2018), *Renmin Ribao*, February 25, 2018, at 3.

Unlike the US Constitution, the Chinese Constitution is not a social contract that limits the power of government. Rather, it was formulated under the leadership of the CCP and represents the institutionalization and legalization of the party's position and policies. In the words of the last paragraph of the preamble of the Chinese Constitution, "this constitution affirms the achievements of the struggles of the Chinese people of all nationalities and defines the basic system and basic tasks of the state in legal form."<sup>32</sup> In short, the Chinese Constitution does not so much protect the fundamental rights and freedoms of every citizen as define the future direction of the whole country. With the development of legislation and legal reforms, a number of administrative laws and regulations has been issued implementing various aspects of the Constitution, making the Constitution much more relevant in practical terms. It is becoming much more common for Chinese scholars to argue that certain legal reforms are constrained by the present constitutional arrangement.<sup>33</sup> Thus, the CCP and the Chinese government are under increasing pressure to implement the Constitution.

Returning to the initial question, since the Constitution purports to protect freedom of religion and the Chinese government has stressed the implementation of the Constitution, why are there a large number of cases in which religious freedom has been violated? The answer is that the Chinese Constitution provides only a very limited protection for religious practice. Article 36 of the Constitution protects freedom of religious belief and "normal" religious activities. The government has the power to decide which activities are "normal" and which are "abnormal." This leaves open the possibility that the government can deem various religious practices "abnormal" and thus outside the sphere of legal protection.

"In any legal system there is a gap between stated ideal and actual social practice, and the Chinese would be the first to acknowledge that they are no exception to this rule."<sup>34</sup> Article 36 has not prevented widespread and sometimes brutal persecution of religious beliefs and practices. It needs to be stressed that this reality is not a difference between the Constitution on paper and the Constitution in practice. The Chinese Constitution superficially appears to be a document providing religious liberty, but in essence it has set multiple limits on civil rights, including so-called religious freedom. When people are concerned about how to implement the Chinese Constitution, they ignore the fact that it is not a Constitution worthy of implementation in regard to its stipulations on religious freedom. In other words, strict implementation of the Constitution does not bring about full religious freedom in China. In the following section, I analyze the constitutional restrictions on religious freedom, uncovering the problems with the religious freedom clause (Article 36) in the Chinese Constitution.

## NATIONAL IDEOLOGY RESTRICTIONS ON RELIGIOUS FREEDOM

Inquiry into the religious freedom guarantees of the Chinese Constitution, simply as a stated ideal, must begin with recognition of the fact that Article 36 tells only part of the story. In matters of interpretation, it is important to understand context. In the words of the late Justice Antonin Scalia, "In textual interpretation, context is everything, and the context of the Constitution tells us not to expect nit-picking detail, and to give words and phrases an expansive rather than narrow interpretation—though not an interpretation that the language will not bear."<sup>35</sup> The context of the

32 Xianfa preamble, ¶ 13.

33 J. Chen, *Chinese Law: Towards an Understanding of Chinese Law, Its Nature and Development* (Boston: Kluwer Law International, 1999), 58n7.

34 Fiss, "Two Constitutions," 493.

35 Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law*, ed. Amy Gutmann (Princeton: Princeton University Press, 1997), 37.



entire Chinese Constitution offers a more complete picture of religious freedom in China. Although Article 36 of the Chinese Constitution purports to protect religious freedom, other provisions in the same Constitution place multiple restrictions on it. As noted, in this section I focus on the limitations on religious freedom.

The Chinese Constitution was based on Western models, and it looks familiar and seems broadly consistent with constitutions elsewhere in terms of general principles such as popular sovereignty, state institutions and their powers, and fundamental rights. However, the purposes of constitutions vary from country to country. The purpose of the United States Constitution can be understood to “form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity.”<sup>36</sup> In general, the Chinese Constitution serves by contrast to “energize the people to better serve the state and contribute to a stronger China; symbolize national unity; affirm the policies of those in power; and set forth the ideals and goals for society to achieve.”<sup>37</sup> That is why the Chinese Constitution begins with an unusually lengthy preamble that traces the long and glorious history of China and sets forth basic goals. The last paragraph in the preamble of the Chinese Constitution summarizes and clearly states the purpose of the Constitution: “in legal form, [it] affirms the achievements of the struggle of the Chinese people of all nationalities and defines the basic system and basic task of the State.”<sup>38</sup>

The Chinese Constitution is ideology-ridden, but no part is more heavily so than its preamble, which is called the “secret” to understanding the Chinese Constitution.<sup>39</sup> The first sentence of the preamble states that China is a country with one of the longest histories in the world, a great source of pride for the Chinese people. But it is a history characterized by national humiliation at the hands of foreign powers from the mid-nineteenth century to 1949, when the CCP, led by Mao Zedong, came to power. The legitimacy of Mao Zedong and the party’s government, then, is grounded in their overthrow of the reactionary rule of imperialism, feudalism, and bureaucratic-capitalism and in their subsequent unification of the whole country and the establishment of the New China. The preamble cites major achievements under the CCP in defending the nation against foreign aggression and feudal autocracy, developing the economic and social order, and improving the living standard of the people. This historical narrative is used to justify the legitimacy of the CCP and bestows the party with the authority to rule, stating that the country is a “dictatorship of the proletariat” operating “under the leadership of the party and the guidance of Marxism-Leninism and Mao Zedong Thought.”<sup>40</sup>

Being a communist state, Marxism-Leninism and the Chinese communist ideology are the guiding principles of China and are enshrined in the preamble of the Chinese Constitution. Atheism thus constitutes the official stance of both the CCP and the whole country.<sup>41</sup> Karl Marx of course had an ambivalent attitude toward religion, viewing it primarily as “the *opium* of the people.”<sup>42</sup> Vladimir

36 U.S. Constitution, preamble.

37 Randall Peerenboom, “Social Foundations of China’s Living Constitution,” in *Comparative Constitutional Design*, ed. Tom Ginsburg (Cambridge: Cambridge University Press, 2012), 138–63, at 139.

38 Xianfa preamble, ¶ 13.

39 Yash Ghai, *Hong Kong’s New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (Hong Kong: Hong Kong University Press, 1997), 84–86, 89–92.

40 Xianfa preamble, ¶ 7.

41 Fenggang Yang, “Exceptionalism or Chinamerica: Measuring Religious Change in the Globalizing World Today,” *Journal for the Scientific Study of Religion* 55, no. 1 (2016): 7–22, at 9.

42 Karl Marx, “Introduction to ‘Contribution to the Critique of Hegel’s Philosophy of Law,’” in *Karl Marx and Frederick Engels: Collected Works*, vol. 3, *Marx and Engels: 1843–44* (New York: International Publishers,

Lenin took that attitude a step further: “We must combat religion—that is the ABC of *all* materialism, and consequently of Marxism.”<sup>43</sup> In this sense, the Chinese Constitution establishes an atheistic state, rather than a secular state. This is the background of China’s restriction on religious freedom.

The restriction of religious freedom has four aspects. First, the official atheist ideology has “accustomed government officials and society at large to view religion as a mere superstition—a product of ignorance—or as an unstable force in society.”<sup>44</sup> Even though there is a theoretical conflict between Marxist doctrine and religion, contemporary Chinese leaders reject the immediate and comprehensive abolition of religion. The CCP contends that religion is a historical product that will disappear only when socioeconomic and cultural conditions have improved to the extent that people no longer require this opiate.<sup>45</sup> In the CCP’s eyes, it is difficult to “liberate” people from the influence of religion, and so they must be patient while working hard to achieve it. Thus, the CCP has chosen to take a more gradual approach to the issue. As Anna Scott Bell has noted, “in a training document issued by the Organization Committee of the [CCP’s] Central Committee, [Marxism and religion] are explicitly linked, with the document exhorting cadres to resist foreign ideological influences.”<sup>46</sup> The document states: “We must remain steadfast in our faith in Marxism, never lose our bearings when discussion becomes heated about Western constitutional democracy, ‘universal values,’ and ‘civil society,’ and avoid losing our sense of self under the influence of feudal superstitions and religion.”<sup>47</sup>

Religion has long been treated as a negative phenomenon in China. The government has repeatedly stressed that religious individuals should “merge religious doctrines with Chinese culture, abide by Chinese laws and regulations, and devote themselves to China’s reform and follow the steps of socialist modernization in order to contribute to the realization of the Chinese Dream of national rejuvenation.”<sup>48</sup> The Central Committee of the CCP has acknowledged since 2006 the

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1975), 175–87, at 175. The phrase “the opium of the people” has sparked widespread controversy. Actually, Marx believed that religion had both positive and negative functions in society. On the one hand, religion can reduce people’s immediate suffering and provide them with pleasant illusions that give them the strength to carry on. On the other hand, religion can weaken the drive toward revolution and thus can function like opium for an individual. For more on the meaning of “the opium of the people,” see Andrew M. Mckinnon, “Reading ‘Opium of the People’: Expression, Protest and the Dialectics of Religion,” *Critical Sociology* 31, no. 1/2 (2005): 15–38.

43 Vladimir Ilyich Lenin, “The Attitude of the Workers’ Party to Religion,” in *Lenin Collected Works*, vol. 15, *March 1908–August 1909*, trans. Andrew Rothstein and Bernard Isaacs (Moscow: Progress Publishers, 1973), 402–13, accessed March 31, 2020, <https://www.marxists.org/archive/lenin/works/1909/may/13.htm>.

44 Zhang Qianfan and Zhu Yingping, “Religious Freedom and Its Legal Restrictions in China,” *Brigham Young University Law Review* 2011, no. 3 (2011): 783–816, at 783, citing Lawrence Cox, “Freedom of Religion in China: Religious, Economic and Social Disenfranchisement for China’s Internal Migrant Workers,” *Asia-Pacific Law & Policy Journal* 8, no. 2 (2007): 371–430, at 397n85.

45 Guanyu Woguo Shehui Zhuyi Shiqi Zongjiao Wenti de Jiben Guandian he Jiben Zhengce (关于我国社会主义时期宗教问题的基本观点和基本政策) [The Basic Viewpoint and Policy on the Religious Question During Our Country’s Socialist Period] (promulgated by the Central Committee of the CCP, March 31, 1982), accessed March 15, 2020, <http://www.sara.gov.cn/zjzc/316531.jhtml>.

46 Anna Scott Bell, “Revisionist Religion: Xi Jinping’s Suppression of Christianity and Elevation of Traditional Culture as Part of a Revisionist Power Agenda,” *Georgetown Journal of Asian Affairs* 3, no. 1 (2016): 67–93, at 75.

47 Zai Ganbu Jiaoyu Peixun Zhong Jiaqiang Lixiang Xinnian he Daode Pinxing Jiaoyu (在干部教育培训中加强理想信念和道德品行教育) [Notice on Strengthening Ideals and Beliefs and Moral Character Education in Cadre Training] (promulgated by the Organization Department of the CPC Central Committee, July 21, 2014), *Renmin Ribao*, July 21, 2014, at 4.

48 “China Focus: President Xi Calls for Improved Religious Work,” accessed March 31, 2020, <http://english.cctv.com/2016/04/24/ARTIKBl07gAkeahog9eazQj160424.shtml>.

positive role religion can play in the establishment of a harmonious socialist society,<sup>49</sup> but it is also has aimed at tightening governmental control.

Second, as noted above, adhering to Marxist-Leninist ideology, the CCP is an atheistic party. All CCP members are required to be atheists and to unremittingly propagate atheism. Any CCP member who forsakes the party's worldview of dialectical materialism and converts to any religion is to be severely punished. In May 2015, the newsletter of the party's Central Commission for Discipline Inspection published an article warning that any CCP member who is found to have religious beliefs or to take part in any religious activities would be disciplined. According to this article, CCP members do not enjoy a right to religious freedom.<sup>50</sup> Xi Jinping, the president of China and the general secretary of the CCP, emphasized in a speech that CCP cadres must act as "unyielding Marxist atheists . . . and bear in mind the party's tenets." He also told them to "consolidate their faith," oddly employing a religious phrase.<sup>51</sup> In other words, Marxism is the only and necessary "religious belief" of the party's members. "There can be no doubt about the fact that the founding ideological principle that Communist Party members cannot be religious believers has been upheld by our party from the outset . . . Communist Party members . . . are fighters in the vanguard for a communist consciousness . . . they are firm Marxists, and also atheists."<sup>52</sup> This means that the CCP's official adherence to militant atheism has not changed.

Third, all citizens, both religious and non-religious, must be trained in Marxism-Leninism. The Chinese Constitution stresses the effort "to strengthen the construction of socialist spiritual civilization."<sup>53</sup> The construction of socialist spiritual civilization includes two aspects: cultural construction and ideological construction. Cultural construction refers to education, science, health, and sports development. The Chinese Constitution stipulates from Articles 19 to 22 that the state is to actively develop these disciplines. Ideological construction involves civic ideals, morality, and law education. Article 24 of the Chinese Constitution stipulates that "the State strengthens the building of socialist spiritual civilization through spreading education in high ideals and morality, general education, education in discipline and the legal system, and through promoting the formulation and observance of rules of conduct and common pledges by different of the people in urban and rural."<sup>54</sup> The state advocates "the civic virtues of love for the motherland, for the people, for labor, for science and for socialism; it educates the people in patriotism, collectivism, internationalism and communism and in dialectical and historical materialism; it combats the decadent ideas of capitalism and feudalism and other decadent ideas."<sup>55</sup>

In the eyes of the Chinese Constitution, atheism is the only correct worldview. Section two of Article 24 in the Chinese Constitution authorizes the state to foster education in "dialectical and

49 Zhonggong Zhongyang Guanyu Goujian Shehui Zhuyi Hexie Shehui Ruogan Zhongda Wenti de Jueding (中共中央关于构建社会主义和谐社会若干重大问题的决定) [Decisions of the CCP Central Committee on A Number of Major Issues in Relation to the Establishment of a Harmonious Socialist Society] (promulgated by the Plenary of the CCP Congress, October 11, 2006), *Renmin Ribao*, October 19, 2006, at 2.

50 Gu Yuanshan, "Jianshou 'Dangyuan Buneng Xinjiao' de Tieguiju" [Adhere to the iron rule of "Party members cannot believe in religion"], *Zhongguo Jijian Jiancha Bao*, May 24, 2015, 2.

51 "Fazhan Zhongguo Tese Shehui Zhuyi Zongjiao Lilun Quanmian Tigao Xinxingshi xia Zongjiao Gongzuo Shuiping" [Develop a theory of socialist religion with Chinese characteristics, and comprehensively improve the level of religious work in the new situation], *Renmin Ribao*, April 24, 2016, 1.

52 Gu Yuanshan, "Jianshou 'Dangyuan Buneng Xinjiao' de Tieguiju," 2.

53 Xianfa art. 24, § 1.

54 Xianfa art. 24, § 1.

55 Xianfa art. 24, § 2.

historical materialism” for all people in China.<sup>56</sup> Atheism is an indispensable component of dialectical and historical materialism.<sup>57</sup> In the words of Wang Zuoan, who was then head of the State Administration of Religious Affairs, “For a ruling party which follows Marxism, we need to help people establish a correct world view.”<sup>58</sup> Thus, in *Qiu Jiandong v. Sichuan University*, the plaintiff claimed that “his right to religious freedom was infringed by a passage in *The Philosophical Principle of Marxism*, a textbook which stated that ‘religion is, in nature, spiritual opium for the working people.’”<sup>59</sup> The court declined to review the case and rejected the claims.<sup>60</sup> Sichuan University is of course a public institution which represents the government in carrying out its educational functions. The Chinese government is granted under Article 24 of the Constitution the power to monopolize education in the area of citizen’s beliefs. This also explains why the philosophical principles of Marxism constitute a compulsory course for all Chinese students.

As legal scholar Michael Perry has written, “the internationally recognized human right to religious and moral freedom is entrenched in the constitutional law of the United States.”<sup>61</sup> The US Constitution deploys the separation of powers (executive, legislative, and judicial) to restrain the violation of religious freedom. The Chinese Constitution comes from a different political approach. According to Chen Duanhong, a law professor at Peking University, there is a hierarchy of five fundamental values implied and affirmed in the preamble of the Chinese Constitution: the first fundamental value is that “the Chinese people are under the leadership of the CCP”; the second is “adherence to socialism”; the third is “democratic centralism”; the fourth is “modern construction of socialism in China”; and the fifth is “the protection of the fundamental rights and freedoms of individuals.”<sup>62</sup> The fundamental rights of individuals, including religious freedom, are placed at the lowest level of value in the Chinese Constitution. When there is any conflict between different levels of value, the latter value is subjected to the former, and all the values are subjected to the first, which stands supreme. It is clear from this hierarchical approach that the first value, the leadership of the CCP, is the “fundamental law” of the Chinese Constitution and the “absolute constitutional law” of China.<sup>63</sup>

In summation, the Chinese Constitution establishes Marxism as the national ideology. Religious freedom protected in Article 36 is subject to the national ideology and the hierarchical values in the

56 Xianfa art. 24, § 2.

57 The leaders of the CCP have discussed the relationship between atheism and dialectical and historical materialism in detail. See Zhonggong Zhongyang Wenxian Yanjiushi, Zhonggong Zhongyang Bianyiju [Party Literature Research Office of the CCP & Compilation and Translation Bureau of the CCP Central Committee], ed., *Makesi Engesi Liening Sidalin Maozedong Dengxiaoping Jiang ze min Lun Wei Wu Lun he Wu Shen Lun* [Marx, Engels, Lenin, Stalin, Mao Zedong, Deng Xiaoping and Jiang Zemin on Materialism and Atheism] (Beijing: CCP Central Literature Press, 1999).

58 Ben Blanchard, “China’s 100 Million Religious Believers Must Banish Their ‘Superstitions,’ Says Official,” *Independent*, April 21, 2013, <https://www.independent.co.uk/news/world/asia/chinas-100-million-religious-believers-must-banish-their-superstitions-says-official-8581982.html>.

59 Qianfan and Yingping, “Religious Freedom and Its Legal Restrictions in China,” 788.

60 Zhou Wei, Li Cheng, and Li Hao, *Fating shang de xianfa: pingdeng ziyou yu fan qishi de gongyi susong* [The Constitution in the courts: Equality, freedom and anti-discrimination public interest litigation] (Jinan: Shan Dong Ren Min Press, 2011).

61 Michael J. Perry, *Human Rights in the Constitutional Law of the United States* (Cambridge: Cambridge University Press, 2013), 131.

62 Chen Duanhong, “Lun Xian Fa Zuo Wei Guo Jia de Gen Ben Fa yu Gao Ji Fa” [On China’s constitution as higher law and fundamental law of China], *Zhong wai faxue/Peking University Law Journal* 20, no. 4 (2008): 485–511, at 494.

63 Chen, “Lun Xian Fa Zuo Wei Guo Jia de Gen Ben Fa yu Gao Ji Fa,” 494.

Preamble of the Chinese Constitution. The guiding ideology and first value in the Chinese Constitution, the claim that the Chinese people are led by the Communist Party, forms the “backbone” of the Constitution and is “frequently invoked to restrain . . . moves towards the informal expansion of civil and political rights.”<sup>64</sup>

#### LEGAL RESTRICTIONS ON RELIGIOUS FREEDOM

All rights granted by the Chinese Constitution, including the right to religious freedom, are fundamental *legal* rights, rather than *fundamental* rights, even though they are called fundamental rights or basic rights. This means that these rights are vested by the Constitution and are not inalienable human rights but are instead subject to legal restrictions. Fundamental rights refer to rights that are so basic that governments, including the congress, cannot overturn or violate them. In other words, the Chinese Constitution does not acknowledge that the right to religious freedom is a kind of morality of human rights.<sup>65</sup> According to Perry, “a commitment to the morality of human rights also requires a commitment to certain limitations on democracy.”<sup>66</sup> On Perry’s account, the government can regulate religious freedom only if it can satisfy three conditions:

- *The legitimacy condition:* The government action at issue (law, policy, etc.) must serve a legitimate government objective. The specific government action at issue might be not the law (policy, etc.) itself but that the law does not exempt the protected conduct.
- *The least burdensome alternative condition:* The government action—which, again, might be that the law does not exempt—must be necessary to serve the legitimate objective, in the sense that the action serves the objective significantly better than would any less burdensome government action.
- *The proportionality condition:* The legitimate objective served by the government action must be sufficiently weighty to warrant the burden imposed by the government action.<sup>67</sup>

Contrary to these norms, as I argue, the Chinese constitution establishes a system of legislative supremacy. There is no judicial review of the constitutionality of legislative actions. The judiciary has no power to supervise the legislative or executive branch, when either exceeds its authority. The legislature is nominally the supreme branch in the Chinese Constitution. The Chinese Constitution does not prohibit the congress from infringing upon constitutional rights, instead empowering congress to restrict them. In short, the Chinese government does not need any conditions or reasons to pass laws curtailing religious freedom.

Neither traditional Chinese philosophy nor contemporary political philosophy subscribe to the Western notion that human beings have certain rights that are inalienable; that is, they are granted by the Creator God and must not be taken away.<sup>68</sup> As Daniel Bell has written, “the idea that all

64 Ann Kent, Waiting for Rights: China’s Human Rights and China’s Constitutions: 1949–89, *Human Rights Quarterly* 13, no. 2 (1991): 170–201, 188.

65 For the purposes of this article, the terms *fundamental rights* and *human rights* are equivalent and used interchangeably.

66 Michael J. Perry, *A Global Political Morality: Human Rights, Democracy, and Constitutionalism* (Cambridge: Cambridge University Press, 2017), 63.

67 Perry, *A Global Political Morality*, 70 (internal citations omitted).

68 Many scholars have argued that Chinese traditional cultural lacks respect for the individual and has never developed an adequate conception of human rights. See Marx Weber, *The Religion of China: Confucianism and*

human beings, simply because they are human, have certain inalienable political rights,' was essentially foreign to Asian political thought."<sup>69</sup> Fundamental rights are a strange concept in traditional China. In Confucian morality, the very identity of human persons is reducible to a web of social relationships.<sup>70</sup> As Henry Rosemont explains,

For the early Confucians there can be no *me* in isolation, to be considered abstractly: I am the totality of roles I live in relation to specific others. I do not *play* or *perform* these roles; I *am* these roles. When they have all been specified I have been defined uniquely, fully, and altogether, with no remainder with which to piece together a free, autonomous self.<sup>71</sup>

Human rights has long been a sensitive subject in China under the rule of the CCP. The CCP initially used the idea of human rights to obtain the support of Chinese people in order to defeat the National Party.<sup>72</sup> However, after the CCP came to power, human rights became a threat to their newly gained authority and a threat to their new establishment.<sup>73</sup> With the inclusion of the phrase "the State respects and preserves human rights" in the 2004 Constitution and the release of the National Human Rights Action Plan of China in 2009, the CCP began to accept a concept of human rights. Human rights became less of a sensitive subject in China's public debates, as the Chinese government did not recognize human rights as natural or fundamental rights. Rather, they came to see rights as vested or granted to a citizenry by the government. Thus, any religious freedom, either of belief or practice, is subject to the goodwill (or lack thereof) of the government.

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*Taoism* (New York: Free Press, 1951), 235–36; Peter K. Y. Woo, "A Metaphysical Approach to Human Rights from a Chinese Point of View," in *The Philosophy of Human Rights: International Perspectives*, ed. Alan S. Rosenbaum (London: Aldwych Press, 1980), 113–24, 118–21; James C. Hsiung, "Human Rights in East Asian Perspective," in *Human Rights in East Asia: A Cultural Perspective*, ed. James C. Hsiung (New York: Paragon House, 1985), 1–30, at 10–12; Hung-chao Tai, "Human Rights in Taiwan: Convergence of Two Political Cultures?," in *Human Rights in East Asia*, 89–92. However, this view has been criticized by some scholars. See Ambrose Y. C. King, "Weber and Modern State Building in China," *Twenty-First Century*, no. 3 (1991): 56–72; Xia Yong, "Human Rights and Chinese Tradition," in *Human Rights: Chinese and Dutch Perspectives*, ed. Peter R. Baehr et al. (The Hague: Martinus Nijhoff, 1996), 77–90.

- 69 Daniel A. Bell, "The East Asian Challenge to Human Rights: Reflections on an East West Dialogue," *Human Rights Quarterly* 18, no. 3 (1996): 641–67, at 650 (quoting an unpublished manuscript by Jack Donnelly). Whether or not the concept of human rights exists in Asian political thought remains a hotly contested question. Central to the debate is the question, "Which rights are fundamental, universally valid human rights, and which ones are locally valid, 'peripheral' rights?" Daniel A. Bell, "Which Rights Are Universal?" *Political Theory* 27, no. 6 (1999): 849–56, at 849. For related discussion, see Benedict Shing Bun Chan, "An East and West Debate on Human Rights" (PhD diss. University of Maryland, 2011). Elsewhere Bell acknowledges, "the East Asian region is a complex mix of societies, cultural traditions, and political viewpoints" and "values change significantly over time in response to various internal and external pressures and this is evident in the region." He points out, "some traditional values in some East Asian societies . . . may diverge from some human rights ideas and practices typically endorsed in Western countries." Bell, "The East Asian Challenge to Human Rights," 644. However, some scholars call for diverse approaches in understanding human rights in Asia. Randall Peerenboom, Preface to *Human Rights in Asia: A Comparative Legal Study of Twelve Asian Jurisdictions, France and the USA*, ed. Randall Peerenboom, Carole J. Peterson, and Albert H. Y. Chen (London: Routledge, 2006), x–xi, at x.
- 70 Seung-Hwan Lee, "Was There a Concept of Rights in Confucian Virtue-Based Morality?" *Journal of Chinese Philosophy* 19, no. 3 (1992): 241–61, at 256.
- 71 Henry Rosemont, Jr., "Why Take Rights Seriously? A Confucian Critique," in *Human Rights and the World's Religions*, ed. Leroy S. Rouner (Notre Dame: University of Notre Dame Press, 1988), 167–82, at 177.
- 72 For more on the history of the CCP's use of human rights language, see Sun Pinghua, *Human Rights Protection System in China* (Berlin: Springer, 2014), 24–26.
- 73 Julia Ching, "Human Rights: A Valid Chinese Concept?," in *Confucianism and Human Rights*, ed. Wm. Theodore de Bary and Tu Weiming (New York: Columbia University Press, 1998), 67–82, at 77–80.

In a certain sense, parliamentary supremacy, the system adopted by the People's Congress, was established by the Chinese Constitution. Although many definitions of the doctrine of parliamentary supremacy exist, the most enduring is that supplied by legendary Oxford law professor Albert Venn Dicey in his classic book, *Introduction to the Study of the Law of the Constitution*.<sup>74</sup> In his words, parliamentary supremacy means that the Westminster Parliament has “the right to make or unmake any law whatever,” such that “no person or body is recognised by the law of England as having a right to override or set aside” its legislation.<sup>75</sup> Constitutional supremacy is different from parliamentary supremacy. In a constitutional supremacy state, the United States for example, the constitution is a higher order law, prior and superior to the powers of the legislative, judicial, and executive branches of government.<sup>76</sup>

The Chinese Constitution establishes parliamentary supremacy in the form of the NPC. Article 2 of the Chinese Constitution states that all power in the country “belongs to the people.” And “the National People's Congress and the local people's congress at various levels are the organs through which the people exercise state power.” Article 57 of the Chinese Constitution officially established that “the National People's Congress of the People's Republic of China is the highest organ of state power.”<sup>77</sup> The National People's Congress as the supreme and highest organ of state power is not counterbalanced, at least in theory, by the other departments of the government.<sup>78</sup> Both the administrative and judicial branches are elected by it, and these organs are responsible to and supervised by the National People's Congress.<sup>79</sup> Such a status is “implied in the unitary constitutional structure, where the highest power is singularly lodged in the central (national) government and its laws and regulations enjoy unlimited supremacy.”<sup>80</sup> Although the Constitution is regarded as the supreme law and is superior to laws passed by the National People's Congress in the hierarchy of China's laws, the Congress has the right to interpret the Constitution. It is also easy for the

74 A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed. (London: Macmillan and Company, 1915).

75 Dicey, *Introduction to the Study of the Law of the Constitution*, 38. Dicey's analysis was regarded to have been made irrelevant by the constitutional reforms since 1997 and by Britain's entry into the European Communities in 1973. Vernon Bogdanor contended that England was “now in transition from a system based on parliamentary sovereignty to one based on the sovereignty of a constitution, albeit a constitution that is inchoate, indistinct and still in large part uncoded.” See Vernon Bogdanor, *The New British Constitution* (Oxford: Hart Publishing, 2009), xiii. See also Erin F. Delaney, “Judiciary Rising: Constitutional Change in The United Kingdom,” *Northwest University Law Review* 108, no. 2 (2014): 543–605, at 546.

76 Lord Irvine of Lairg, “Sovereignty in Comparative Perspective: Constitutionalism in Britain and America,” *New York University Law Review* 76, no. 1 (2001): 1–22 (describing the difference between constitutional and parliamentary supremacy). Of course, whether judicial supremacy has superseded constitutional supremacy in today's America remains controversial. See Neal Devins and Louis Fisher, *The Democratic Constitution*, 2nd ed. (Oxford: Oxford University Press, 2015), especially chapter 1.

77 Xianfa, art. 57. Of course, it is questionable whether China's Parliamentary sovereignty is equal to the people's sovereignty. The representatives of the National People's Congress are not elected directly, but indirectly, by Chinese citizens. The power to elect and remove deputies is retained by the CCP. Consequently, these representatives retain their legislative seats without challenge from the people. See M. Ulric Killion, “China's Amended Constitution: Quest for Liberty and Independent Judicial Review,” *Washington University Global Study Law Review* 4, no. 1 (2005): 43–80, at 69.

78 Thomas E. Kellogg, “Constitutionalism with Chinese Characteristics? Constitutional Development and Civil Litigation in China,” *International Journal of Constitutional Law* 7, no. 2 (2009): 215–46, at 216.

79 Xianfa art. 3, § 3.

80 Zhang Qianfan, *The Constitution of China: A Contextual Analysis* (Oxford: Hart Publishing, 2012), 124.

Congress to amend the Constitution.<sup>81</sup> As Zhang Qianfan and Zhu Yingping point out, “In practice, both central and local authorities [the NPC and the local people’s congress at various levels] have enacted laws and regulations imposing restrictions on religious freedom.”<sup>82</sup> For example, all citizens have the obligation to perform military service regardless of religious belief. Otherwise, they will be punished according to the Military Service Law enacted by the NPC in 1984. This provision fails to accommodate the special needs of those individuals who have religious reasons for objecting to military service. Furthermore, as Zhang Qianfan and Zhu Yingping point out, “Article 300 of China’s Criminal Law, which was amended by the NPC in 1997, provides that “[w]hoever organizes or utilizes superstitious sects, secret societies . . . or sabotages the implementation of the state’s laws and executive regulations” shall be sentenced to imprisonment of a fixed term between three and seven years.”<sup>83</sup>

A related problem with the legislative supremacy is that the basic rights in the Chinese Constitution are legal rights. The extent to which these rights are protected is entirely dependent on the legislature. In addition, the basic rights in the Chinese Constitution involve all legal relationships, including not only relationships between the government and the individual, but also between private individuals. In practice, some lower court judges actively draw on constitutional principles when adjudicating private litigation involving “horizontally” oriented rights issues. Thus, Chinese constitutional rights are more important in ordering the relationship between non-state individuals than between the state and the individual. That means when an individual’s constitutional rights are allegedly infringed upon by another individual, the state, in the form of the judiciary, makes a decision protecting the individual’s constitutional rights.<sup>84</sup>

In other words, the legal system of China is more about controlling the people than about restricting the power of the government over the people. Scholars such as John Head have interpreted this in light of China’s attempt to achieve a “thin” rule of law. He has observed that “the flurry of legal reform undertaken in China in the past three decades has moved the country at breathtaking speed toward meeting that goal of a ‘thin’ rule of law.”<sup>85</sup> However, even today China does not meet standards of a liberal democratic version of a “thick” rule of law. A “thick” rule of law is a legal system that is in the best interests of the people. Disagreements abound as to “just what version of a ‘thick’ rule of law, if any, China aspires toward today.”<sup>86</sup> It is beyond doubt that China needs to move in the direction of what those seeking legal reform have identified as a “substantive version of the rule of law,” one that “protects certain basic rights” and promotes

81 According to Article 64 of the Chinese Constitution, “Amendments to the Constitution are to be proposed by the Standing Committee of the National People’s Congress or by more than one-fifth of the deputies to the National People’s Congress and adopted by a vote of more than two-thirds of all the deputies to the Congress. Laws and resolutions are to be adopted by a majority vote of all the deputies to the National People’s Congress.” Xianfa art. 64, § 1, 2. In reality, most laws and resolutions are to be adopted by a vote of more than two-thirds of all the deputies to the Congress. Although there is no exact data, few deputies vote against any draft law.

82 Zhang Qianfan and Zhu Yingping, “Religious Freedom and Its Legal Restrictions in China,” *Brigham Young University Law Review* 2011, no. 3 (2011): 783–816, at 790. Zhang Qianfan and Zhu Yingping demonstrate in their article that Chinese laws and regulations tend to limit the freedom of religion in China.

83 Qianfan and Yingping, 783.

84 See Caldwell, “Horizontal Rights and Chinese Constitutionalism,” 75.

85 John W. Head, “Feeling the Stones When Crossing the River: The Rule of Law in China,” *Santa Clara Journal of International Law* 7, no. 2 (2010): 25–83, at 81.

86 Head, “Feeling the Stones When Crossing the River,” 82.



a certain version of justice.<sup>87</sup> But, for now at least, fundamental rights, including religious freedom, cannot be deployed by citizens to restrict the government.

### CITIZEN'S DUTIES RESTRICT RELIGIOUS FREEDOM

Religious freedom, as one of the basic rights in the Chinese Constitution, is subject to the basic duties of every citizen as may be specified. A right is an entitlement or prerogative that an individual or organization has that lets him or her act in a certain way, or that lets him or her demand certain treatment from the government. Examples include a right to practice religion and a right to be treated equally by laws. A duty is the obligation that a person has to take a certain action or refrain from a certain action. "There has been a long and winding philosophical debate among Western philosophers on whether, or to what extent, rights and duties are correlative."<sup>88</sup>

The Chinese Constitution subscribes to the view that there can be no rights without duties.<sup>89</sup> Chapter 2 of the Chinese Constitution is titled "Basic Rights and Duties of Citizens." Unlike the Bill of Rights in the US Constitution, this chapter, as its title suggests, provides the basic rights of citizens and the basic duties or responsibilities that every citizen is required to perform. While providing a particular right to the citizen, the Constitution often states simultaneously duties to the state. For example, Article 36 says that "the state protects normal religious activities" but adds that no religious affairs may be "subject to any foreign domination."<sup>90</sup> Article 40 guarantees the "freedoms and privacy of correspondence," but at the same time allows public security departments or surveillance organs to censor people's correspondence in accordance with procedures prescribed by law to "meet the needs of state security or of investigation into criminal offenses."<sup>91</sup> Article 42 of the Chinese Constitution provides that Citizens "have the right as well as the duty to work," but the "duty" may be specified by the state in a way that violates the individual's freedom.<sup>92</sup> Article 46 provides that citizens "have the right as well as the duty to receive education," but the state reserves the right to specify the institutional program and curriculum pursued.<sup>93</sup> Other provisions in this chapter specifically spell out required duties that, when not performed, limit basic rights listed in the same chapter. For example, the first article of the chapter, "Basic Rights and Duties of Citizens" (Article 33), states, "every citizen enjoys the rights and at the same time must perform the duties prescribed by the Constitution and the law."<sup>94</sup> In other words, "every right allowed Chinese citizens is matched by a corresponding duty."<sup>95</sup> Although the term used in

87 Matthew Stephenson, "A Trojan Horse behind Chinese Walls? Problems and Prospects of U.S.-Sponsored 'Rule of Law' Reform Projects in the People's Republic of China," *UCLA Pacific Basin Law Journal* 18, no. 1 (2000): 64–97, at 96.

88 Marina Svensson, *Debating Human Rights in China: A Conceptual and Political History* (London: Rowman & Littlefield, 2002), 39. See also David Enoch, "A Right to Violate One's Duty," *Law and Philosophy* 21, no. 4/5 (2002): 355–84; Jeremy Waldron, "Dignity, Rights, and Responsibilities," *Arizona State Law Journal* 43, no. 4 (2011): 1107–36.

89 The emphasis on the unity of rights and duties is attributed to Karl Marx. Claims of this nature continue to appear in constitutional law and jurisprudence textbooks in China.

90 Xianfa art. 36, §§ 3, 4. I analyze Article 36 in the next section.

91 Xianfa art. 40. These aspects of articles 36 and 40 were noted by Hungdah, "The 1982 Chinese Constitution," 149.

92 Xianfa art. 42, § 1.

93 Xianfa art. 46, § 1.

94 Xianfa art. 33, § 3.

95 Kent, "Waiting for Rights," 179.

this article is “at the same time,” duties are seen as prior to rights. Whatever rights the Constitution may grant, Article 51 requires that “the citizen may not infringe upon the interests of the State, of society or of the collective, or upon the lawful freedoms and rights of other citizens in exercising their freedom and rights.”<sup>96</sup> In short, every citizen enjoys his basic rights and freedoms only when he performs his basic duties. It can be concluded that the Chinese Constitution performs a game of “give and take” in outlining basic rights.

In addition to specific duties<sup>97</sup> and general duties,<sup>98</sup> the Chinese Constitution sets out five duties from Article 52 to 56 that every citizen must perform. These five mandatory duties limit the religious freedom in Article 36: (1) “safeguard the unification of the country and the unity of all its nationalities”; (2) “abide by the constitution and other laws, keep State secrets, protect public property, observe labor discipline and public order and respect social ethics”; (3) “safeguard the security, honor and interests of the motherland”; (4) “perform military service and join the militia in accordance with law”; (5) “pay taxes in accordance with law.”<sup>99</sup>

First, national unity and security as stipulated by Article 52 and 54 are the top priorities of the Chinese government and are also the most acceptable political policies for the Chinese people. Therefore, these are often the most effective justification used by the government to restrict the rights of citizens. The Chinese government maintains that China must prohibit “any organization or individual from splitting the country, disseminating extremist religious thoughts, inciting ethnic hatred, undermining national unity, disturbing social order, or impairing citizens’ physical and mental health in the name of religion.”<sup>100</sup> However, the Chinese government’s primary concern is national unity and security for the sake of maintaining the power of the CCP.

The desire for national unity and security is central to the reason why the Chinese government prohibits religious organizations from making foreign alliances. Catholic and Protestant missionaries were expelled from China when the CCP came to power in 1949. Although China’s relations with the Vatican have been changing since early 2018, there may still be a long way to go because of many problems involved. In the past few years, with the increase of terrorist activity, the Chinese government began to strengthen controls on religion, especially in Xinjiang and Tibet, in the name of maintaining regional stability and safety. It is true that separatist and terrorist activity, whether or not based on religion, cannot be tolerated by any country in the world, and should be dealt with firmly. To take an example outside of China, “the U.S. government curtailed the political and civil liberties of non-citizens, expanded the detention and surveillance powers of law enforcement agencies, tortured detainees and tightened government secrecy as a result of the terrorist attacks of September 11, 2001.”<sup>101</sup> At

96 Xianfa art. 51.

97 For example, married Chinese couples are assigned the duty to practice family planning and help the state in controlling the growth of the population. Parents have the duty to rear and educate their children. Adult children have the duty to look after and help their parents. Xianfa art. 49. In addition, it is the duty of the Chinese citizens to receive education and to work. Xianfa arts. 46, 42.

98 Article 51 is actually a general duty to all rights and freedoms in the Constitution.

99 Xianfa arts. 52–56.

100 See The State Council Information Office of the PRC, “Xin Jiang de Zong Jiao Xin Yang Zi You Zhuang Kuang” [White paper: freedom of religious belief in Xinjiang], *Renmin Ribao*, June 3, 2016, at 10.

101 James A. Piazza and James Igoe Walsh, “Transnational Terror and Human Rights,” *International Studies Quarterly* 53, no. 1 (2009): 125–48, at 125, citing Human Rights Watch, *World Report 2004: Human Rights and Armed Conflict* (New York: Human Rights Watch, 2004); Hina Jilani, “Anti-Terrorism Strategies and Protecting Human Rights,” *Amnesty Magazine* (2005).

the same time, such counterterrorism efforts provide excuses for governments to over-restrict religious freedom.<sup>102</sup>

Second, the obligation to abide by the Constitution and various laws provides a “legitimate” basis for the legislature and local authorities to restrict and curtail religious freedom. The provision in criminal law concerning “evil cults” is an example. Article 300 of the existing criminal law identifies six categories of criminal behavior related to “evil cults.”<sup>103</sup> Article 300 thereby provides a legal basis for eliminating Falun Gong activities.<sup>104</sup> Presently, at least fourteen religions or denominations are officially labeled “evil cults” by the Chinese government.<sup>105</sup> Yet it is not clear who has the power to identify an evil cult.<sup>106</sup>

Article 9 of the Advertising Law of China (2015) provides that “an advertisement shall be prohibited from . . . containing any . . . religious content.”<sup>107</sup> This provision not only prohibits

102 According to Human Rights Watch, “more than 140 governments have passed counterterrorism legislation since September 11 . . . Of particular concern is the tendency of these laws to cover a wide range of conduct far beyond what is generally understood as terrorist” [many of the laws] can ban and have been used to stifle peaceful political dissent or to target particular religious groups.” “In the Name of Security: Counterterrorism Laws Worldwide since September 11,” <https://www.hrw.org/report/2012/06/29/name-security/counterterrorism-laws-worldwide-september-11#page>.

103 Article 300 of China’s criminal law subjects to criminal prosecution “whoever organizes or utilizes superstitious sects, secret societies or evil cults to (1) undermine the implementation of the laws, (2) undermine the implementation of administrative rules and regulations of the State; (3) cheat another person; (4) causes death to the person; (5) rape a woman; (6) swindle money or property.” In particular, the first two categories of criminal behavior (undermining the implementation of the laws and administrative rules and regulations of the state) are vague and can be invoked by the authorities to restrict religious freedom. See Xing Fa (刑法) [Criminal Law] (promulgated by the National People’s Congress, July 1, 1979, revised by the National People’s Congress, March 14, 1997, effective October 1, 1997) art. 300, 1997 *Standing Committee of the National People’s Congress Gazette* volume 2, at 192.

104 It should be asked whether Falun Gong is an evil cult according to Chinese law. Article 300 of the criminal law “failed to clarify the definition of ‘evil cults’ and the degree of severity of related crime.” Ronald C. Keith, Zhiqiu Lin, and Shumei Hou, *China’s Supreme Court* (New York: Routledge, 2014), 72. In 1999, the Supreme People’s Court and the Supreme People’s Procuratorate jointly issued “Interpretation on Several Questions in Law Concerning Criminal Cases of Organizing and Using Evil Cult Organization” and defined “cult” “with reference to specific patterns of undesirable behavior.” Keith, Lin and Hou, *China’s Supreme Court*, 72. According to this new definition, “Evil Cult Organizations are organizations established by utilizing the name of religion, Qi Gong, or other names, in which the leader is deliberately deified. The organization makes and spreads superstition and heresy to deceive and tempt others, to recruit and control its members, and to harm society.” See Guanyu Banli Zuzhi he Liyong Xiejiao Zuzhi Fanzui Anjian Juti Yingyong Falv Ruogan Wenti de Jieshi (关于办理组织和利用邪教组织犯罪案件具体应用法律若干问题的解释) [Interpretation on Several Questions in Law Concerning Criminal Cases of Organizing and Using Evil Cult Organization] (promulgated by the Supreme People’s Court, October 9, 1999, and the Supreme People’s Procuratorate, October 8, 1999) art. 1, 1999 *Supreme People’s Court Gazette* 202. Some scholars thought that this interpretation expanded the field of punishable behavior under Article 300, increasing the range of severe criminal law punishment. Keith, Lin and Hou, *China’s Supreme Court*, 72.

105 On June 3, 2014, state news agency Xinhua ran a front-page piece providing the names of fourteen groups officially identified as “evil cults”: the Shouters (呼喊派), the Disciple Society (门徒会), the Lingling Sect (灵灵教), All Sphere Church (全范围教会), Lord God Sect (主神教), New Testament Church (新约教会), Guanyin Method (观音法门), Anointed King (被立王), the Unification Church (统一教), Three Grades of Servants (三班仆人派), True Buddha School (灵仙真佛宗), Children of the Heavenly Father (天父的儿女), Dami Mission (达米宣教会), and World Elijah Gospel Mission Society (世界以利亚福音宣教会).

106 Of the fourteen “evil cults” identified by the Chinese government, seven were identified by the Ministry of Public Security, and the other seven were identified by the General Office of the CCP and General Office of the State Council of the People’s Republic of China.

107 Guanggao Fa (广告法) [Advertising Law] (promulgated by the Standing Committee of the National People’s Congress, October 27, 1994, revised April 24, 2015, effective September 1, 2015) article 9, 9, 2015 *Standing Committee of the National People’s Congress Gazette* 405.

preaching but also restricts religious expression. On June 1, 2014, Pastor Wang Yi of the Early Rain Reformed Church in Chengdu, Sichuan Province, was arrested in the name of “illegal advertising” while distributing anti-forced-abortion leaflets.<sup>108</sup> On the whole, as described in the preceding section, the article on religion of the Chinese Constitution does not prohibit the legislature from interfering with religious activities in the manner of the Constitution of the United States. Instead, it requires citizens to abide by whatever legislation is passed. This, in effect, empowers the legislature to restrict religious freedom.

Thirdly, the obligation to perform military service and join the militia in accordance with law once again restricts religious freedom. Article 3 of the Military Service Law of China clearly stipulates that all citizens of the PRC, regardless of religious belief, have the obligation to perform military service according to the provisions of this law. That means that no one in China can refuse to serve in the military based on religious belief. Jehovah’s Witnesses (although not currently recognized as a legitimate group by the Chinese government) would have to serve in the military under the existing Chinese Constitution. Jehovah’s Witnesses have been confronted with the issue of compulsory military service in many lands and have received support from many Constitutions.<sup>109</sup> However, in the Chinese Constitution, the obligation of citizens to the state is superior to any rights, including that of religious freedom.

Finally, paying taxes in accordance with law is also an obligation of religious organizations in China. Major tax exemptions enjoyed by religious organizations only apply to the land occupied by religious temples and churches. According to the Provisional Regulations on Real Estate Tax, “the real property of religious temples, parks, and places of historic interest or scenic beauty for their own use are exempt from property tax.”<sup>110</sup> “The ‘real property of religious temples for their own use’ refers to the buildings where religious rites are held and the houses for the religious staff to live in, but only if they are used by the organization and not leased to another unit.”<sup>111</sup>

At present, the problem of tax exemption for religious organizations in China is obvious. In order to qualify for tax exemption, the law stipulates that religious organizations cannot engage in profit-making activities and may not collect fees, raise funds, or accept donations in violation of relevant regulations. These regulations, to a large extent, restrict religious organizations from offering charitable services or raising funds because religious organizations are not-for-profit groups and do not engage in commercial profit-making activities. They have no income and cannot engage in charitable activities. Therefore, the so-called tax exemption makes no sense to religious groups.

Article 59 of the Regulations on Religious Affairs in 2017 provides that

Religious groups, religious schools, religious activity sites, and religious professionals shall implement state provisions on tax management, lawfully pay taxes and enjoy tax benefits. Religious groups, religious schools, and religious activity sites shall handle tax registrations for religious professionals in accordance

108 Murong Xuecun, “China’s Clampdown on ‘Evil Cults,’” editorial, *New York Times*, June 17, 2014, <https://www.nytimes.com/2014/06/18/opinion/murong-chinas-clampdown-on-evil-cults.html>.

109 Of course, in addition to Muslim countries, some Asian countries have also banned Jehovah Witnesses for refusing to serve in the military, among them Singapore, Japan, and South Korea. In July 2000, Taiwan revised its military service law and introduced alternative service to recognize conscientious objection.

110 Fang Chan Shui Zan Xing Tiao Li (房产税暂行条例) [Provisional Regulations on Real Estate Tax] (promulgated by the State Council, September 15, 1986; effective October 1, 1986, revised January 8, 2011) art. 5, 3, 2011 *State Council Gazette*, supplement, [http://www.gov.cn/gongbao/content/2011/content\\_1860812.htm](http://www.gov.cn/gongbao/content/2011/content_1860812.htm).

111 Leon E. Irish, Jin Dongsheng, and Karla W. Simon, *China’s Tax Rules for Not-for-Profit Organizations: A Study Prepared for the World Bank* (Beijing: World Bank, 2004), 14n8.

with law. Tax departments shall lawfully implement taxation management for religious groups, religious schools, religious activity sites, and religious professionals.<sup>112</sup>

Thus, whether and to what extent religious organizations can enjoy tax exemption remains a pending issue.

In summary, the above-mentioned basic obligations of citizens in the Chinese Constitution limit the basic rights of citizens, including religious freedom. More importantly, these provisions about basic obligations are exceedingly vague, in the cases of national unity and security, or very general, in the case of provisions requiring individuals to abide by the Constitution and the laws. Thus, these vaguely and generally phrased provisions can be and are often invoked by the authorities of the People's Republic of China to restrict the freedoms of the citizen otherwise protected under the Constitution.<sup>113</sup>

### RELIGIOUS CLAUSE RESTRICTIONS ON RELIGIOUS FREEDOM

Finally, but even more importantly, Article 36 of the Chinese Constitution itself provides for a very limited religious freedom insofar as it provides for religious freedom at all. Article 36 consists of four sections and “is actually the most comprehensive of all the articles in the protections that it seems to offer citizens.”<sup>114</sup> The full article reads as follows:

- (§ 1) Citizens of the People's Republic of China enjoy freedom of religious belief.
- (§ 2) No State organ, public organization or individual may compel citizens to believe in, or not to believe in, any religion; nor may they discriminate against citizens who believe in, or do not believe in, any religion.
- (§ 3) The State protects normal religious activities. No one may make use of religion to engage in activities that disrupt public order, impair the health of citizens or interfere with the educational system of the State.
- (§ 4) Religious bodies and religious affairs are not subject to any foreign domination.<sup>115</sup>

Section 1 of this article specifies that citizens enjoy freedom of religious belief, but the last three sections place severe limits on that freedom. Furthermore, Section 1 only protects the “freedom of religious belief,” rather than freedom of religion, not to mention freedom of religious activities. According to section three, only “normal religious activities,” as opposed to all religious activities or legal religious activities, are protected by the State. Section 2 seems to be a neutrality clause stating that all state organs, public organizations, and individuals are to remain neutral between different denominations and between the religious and nonreligious. However, Section 3 provides grounds for nullifying this neutrality by stipulating that “religious activities shall not disrupt public order, endanger the health of citizens, or interfere with the state's educational system.”<sup>116</sup> Section 4 goes yet further, forbidding foreign domination of religious affairs.

112 See Zongjiao Shiwu Tiaoli (宗教事务条例) [Regulations on Religious Affairs] (promulgated by the State Council, July 7, 2004, effective March 1, 2005; revised by the State Council, June 14, 2017, effective February 1, 2018), article 59, 2017 *State Council Gazette*, no. 26, [http://www.gov.cn/gongbao/content/2017/content\\_5225861.htm](http://www.gov.cn/gongbao/content/2017/content_5225861.htm).

113 Hungdah, “The 1982 Chinese Constitution,” 149.

114 Joann Pittman, “What Does the Chinese Constitution Say about Religion?,” *ChinaSource* (blog), March 19, 2013, <https://www.chinasource.org/blog/posts/what-does-the-chinese-constitution-say-about-religion>.

115 Xianfa art. 36.

116 Brent Fulton, *China's Urban Christians: A Light that Cannot Be Hidden* (Cambridge: Lutterworth Press, 2016), 127.

While religious belief is protected, Article 36 does not guarantee the right to worship or otherwise practice religion. *Zong jiao xin yang zi you* (freedom of religious belief, 宗教信仰自由), rather than *zong jiao zi you* (freedom of religion, 宗教自由) is stipulated. Often called CCP Document No. 19 of 1982, The Basic Viewpoint and Policy on the Religious Question during Our Country's Socialist Period, sets the foundation for the current religious policy. Document 19 defines "freedom of religious belief" as follows:

What do we mean by freedom of religious belief? We mean that every citizen has the freedom to believe in religion and also the freedom not to believe in religion. Every citizen also has the freedom to believe in this religion or that religion. Within a particular religion, s/he has the freedom to believe in this sect or that sect. A person who was previously a nonbeliever has the freedom to become a religious believer, and one who has been a religious believer has the freedom to become a nonbeliever.<sup>117</sup>

In short, Section 1 of Article 36 guarantees the freedom of an individual's inner belief. Section 2 ensures the inner freedom to choose religious belief excluding any external interference. But internal belief is a private, personal matter. The state has neither the power nor the ability to interfere in the private beliefs of individuals.

Sections 3 and 4 of Article 36 guarantee normal religious activities. As Joann Pittman has pointed out, "this concept of 'normal religious activities' is at the heart of the religious regulatory regime in China."<sup>118</sup> Although the term "normal" has never been clearly defined,<sup>119</sup> a clue to its interpretation is found in the government's policy. Generally speaking, "the potential for religious authority to challenge and undermine state authority has led to a wavering and incoherent doctrine both internationally and within many countries with respect to such issues as separation of church and state and reasonable restrictions on religious practice."<sup>120</sup> Clearly, from a practical point of view, the Chinese government retains the right to declare what religious activity is considered "normal" and what is not. Therefore, it can be said that what the government permits is considered "normal"; what it does not permit is considered "abnormal." As Eric Kolodner points out, "During a 1988 conference on religion and socialism, government officials attempted to define what constitutes 'normal' religious practice."<sup>121</sup> Kolodner goes on to quote from a summary of the discussion:

The so-called normal religious activities . . . refer to the religious activities other than the religious activities that are abnormal and illegal . . . It is in itself abnormal to put forward the term "normal religious activities." The emergence of such an abnormal phenomenon is due to the fact that in carrying out religious activities, a

117 "The Basic Viewpoint and Policy on the Religious Question during Our Country's Socialist Period, Document No. 19 (March 31, 1982)," *Chinese Law & Government* 33, no. 2 (2000): 17–34, at 22.

118 Joann Pittman, "Religious Policies in China: Defining Normal," *ChinaSource* (blog), December 3, 2013, <https://www.chinasource.org/resource-library/articles/religious-policies-in-china-defining-normal>.

119 "International law provides little useful guidance in distinguishing normal from abnormal religious activities and legitimate groups from cults." Randall Peerenboom, "An Empirical Overview of Rights Performance in Asia, France, and the USA: The Dominance of Wealth in the Interplay of Economics, Culture, Law, and Governance," in Peerenboom, Petersen, and Chen, *Human Rights in Asia*, 1–64, at 28; see also Carol Evans, "Chinese Law and the International Protection of Religious Freedom," *Journal of Church and State* 44, no. 4 (2002): 749–74, at 766–67.

120 Peerenboom, "An Empirical Overview of Rights Performance in Asia, France, and the USA," 28.

121 Eric Kolodner, "Religious Rights in China: A Comparison of International Human Rights Law and Chinese Domestic Legislation," *UCLA Pacific Basin Law Journal* 12, no. 2 (1994): 407–30, 422.

small number of people, as actuated by some abnormal purpose, conduct religious activities in an excessively frequent and long manner.<sup>122</sup>

John Tong has determined that “normal religious activities” can best be interpreted by looking at the “bottom lines” of the government’s policy toward religious activity in China.<sup>123</sup> By examining some important documents published by the CCP and the central government of the PRC, Tong found four “bottom lines,” two from the speech of Li Weihan, former CCP head of the United Front department in 1980, the other two from Document 19. The first bottom line is the principle of “avoiding two extremes and keeping the middle way,” which means a “certain number” of churches are to be opened and a “certain number” of seminarians and sisters to be trained.<sup>124</sup> The second bottom line is that “while ‘winning over and uniting the greatest number of religious persons to serve socialism, we must also isolate the few reactionaries among them.’ This foreshadowed pressures that would later be brought to bear on the key leaders of the ‘underground’ church.”<sup>125</sup> The third bottom line is that “churches must adhere to the principle of the independent and autonomous administration of their own affairs. They must not permit any foreign religious body to come to China to do missionary work and they should oppose the diffusion of religious propaganda from abroad.”<sup>126</sup> The fourth bottom line is that “[f]oreign donations must be given without any strings attached. Small sums may be accepted, but large donations may not be accepted without government approval.”<sup>127</sup> According to the new rules released by the State Administration of Foreign Exchange governing the administration of foreign funds donated to or by domestic institutions, religious organizations accepting funds of 1 million RMB (around \$162,800) or more must obtain permission from the State Administration for Religious Affairs (for national-level religious groups) and from the relevant provincial government (for local religious groups and sites).<sup>128</sup>

Clearly the guarantee of religious activities freedom in Article 36 of the Chinese Constitution is not as absolute as similar guarantees in the constitutions of many Western nations. It can be seen from the above analysis that this guarantee is conditioned, first by whatever definition of “normal” activities the state wishes to invoke, and second by the state’s interest in guiding social and individual development, including the exclusion of foreign religious influence. In addition, the caveat in Section 3 of Article 36 is that no one can use religion to disrupt public order, interfere with the educational system of the state, or impair the health of citizens. This is not wholly unfamiliar for US citizens, as case law has maintained similar restrictions on religion when it would cause, for example, imminent lawless action or would injure others.<sup>129</sup> However, what merits close attention is that this section prohibits anyone from making use of religion to interfere with the educational

122 “Religious Issues in Socialism Discussed,” *Foreign Broadcast Information Service*, CHI 88-106, June 2, 1998: 33, quoted in Kolodner, “Religious Rights in China,” 422.

123 John Tong, “The Church from 1949 to 1990,” in *The Catholic Church in Modern China: Perspectives*, ed. Edmond Tang and Jean-Paul Wiest (Eugene: Wipf and Stock, 2013), 7–27, at 18.

124 Tong, “The Church from 1949 to 1990,” 19.

125 Tong, 19.

126 Tong, 20.

127 Tong, 20.

128 See Guanyu Jingnei Jigou Juanzeng Waihui Guanli Youguan Wenti de Tongzhi (关于境内机构捐赠外汇管理有关问题的通知) [Notice of the State Administration of Foreign Exchange on Issues Concerning the Administration of Foreign Exchange Donated to or by Domestic Institutions] (promulgated by State Administration of Foreign Exchange, December 25, 2009, effective March 1, 2010) article 8, §2, <http://www.safe.gov.cn/hubei/2019/0428/939.html>.

129 See *Cantwell v. State of Connecticut*, 310 U.S. 296 (1940); *Chaplinsky v. State of New Hampshire*, 315 U.S. 568 (1942).

system of the state but does not prohibit the state from making use of education to interfere with religion.

There are some local governments making use of education to interfere with the religious practices of both children and adults. For example, local religious management officials in Wugang City of Hunan Province in February 2012 required parents to sign a guarantee promising not to participate in any “evil cult” activities as a prerequisite for their children registering in local public schools.<sup>130</sup> Many universities require students to sign a letter of commitment to ensure that they do not participate in religious activities.<sup>131</sup>

All in all, as Pittman argues, “while the first half of [Article 36] seems to grant some measure of religious freedom,” it protects only the inner freedom of religious belief, not the freedom of religious practice. The second half of the article “actually places limitations or restrictions” on religious freedom. As Pittman concludes, “not only does [Article 36] not guarantee noninterference in religious affairs by the state, it spells out how and where the state can interfere” with religious activities.<sup>132</sup>

## CONCLUSION

From the above analysis, it can be seen that religious freedom in the Chinese Constitution is beset with problems. The term religious freedom is deployed, but it is unclear what it means. On the basis of the Chinese Constitution, citizens are free to believe what they want, but the government reserves the right to set the boundaries as to how the beliefs are practiced. And, more importantly, the limitations the government sets are dependent upon the Chinese Constitution. The Constitution establishes multiple limitations on religious freedom. First, the Chinese Constitution establishes state atheism as an official ideology, rather than remaining secular and neutral. All Chinese citizens, whether religious believers or not, are required to be educated by the atheistic government and under the leadership of the CCP. Second, religious freedom, among other rights in the Chinese Constitution, is a legal right, rather than a fundamental right, which means that these so-called rights and freedom are vested by the Constitution, and since they are not inalienable, they are subject to legal restrictions. The NPC can and does pass legislation, to a certain extent, limiting individuals’ religious freedom. Third, the Chinese Constitution stipulates basic obligations of citizens that limit religious freedom. Fourth, Article 36 of the Chinese Constitution protects only the inner freedom of religious belief, not the freedom of religious practice. And the second half of

130 Anti-cult education is part of the current primary and secondary school education in China. See Guanyu Jin Yi Bu Zai Zhong Xiao Xuexiao Kaizhan Fan Xiejiao Jiaoyu de Tongzhi (关于进一步在中、小学校开展反邪教教育的通知) [Notice of the Ministry of Education on Further Education against Cult in Primary and Secondary Schools] (promulgated by Ministry of Education, Apr. 12, 2002), [http://www.moe.gov.cn/jyb\\_xxgk/gk\\_gbgg/moe\\_o/moe\\_8/moe\\_24/tmull\\_271.html](http://www.moe.gov.cn/jyb_xxgk/gk_gbgg/moe_o/moe_8/moe_24/tmull_271.html). The Ministry of Education reiterated this point in 2007. See Zhong Xiao Xue Deyu Gongzuo Zhinan (中小学德育工作指南) [Guidelines of Moral Education in Primary and Secondary Schools] (promulgated by Ministry of Education, August 17, 2017), [http://www.moe.gov.cn/srcsite/A06/s3325/201709/t20170904\\_313128.html](http://www.moe.gov.cn/srcsite/A06/s3325/201709/t20170904_313128.html).

131 My university requires all students to sign a letter of commitment to ensure that they do not participate in religious activities. One of my students refused to sign on the grounds of religious freedom based in the Constitution. However, he was criticized by the university’s political counselor and was threatened with the cancellation of his scholarship to attend university.

132 Joann Pittman, “Regulating Religion,” *ChinaSource* (blog), October 10, 2016, <https://www.chinasource.org/blog/posts/regulating-religion>.



Article 36 places restrictions on religious freedom. In sum, religious freedom in the Chinese Constitution is an exceedingly limited form of freedom.

Although it is true that “China’s Constitution is unenforceable, and plays little role in China’s legal system,”<sup>133</sup> it cannot be ignored that the Chinese Constitution itself establishes many limitations on religious freedom. To promote religious freedom in China, it is necessary to amend the Constitution rather than merely to promote its implementation. Many Chinese people believe that the actual implementation of the Constitution would be sufficient to protect their fundamental rights.<sup>134</sup> However, implementation is insufficient for the promotion of religious freedom. Article 36 of the Chinese Constitution provides a sort of religious freedom, but the goal of this clause and the whole Constitution is not to preserve religious liberty to the fullest extent possible, but rather to keep religions subservient to socialist society. It is possible to protect religious freedom through the implementation of the Constitution only by removing the constitutional handcuffs on religion. As for how to amend the Constitution in regard to religious freedom protections, further research is required.

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133 Yan Lin and Tom Ginsburg, “Constitutional Interpretation in Law-making: China’s Invisible Constitutional Enforcement Mechanism,” *American Journal of Comparative Law* 63, no. 2 (2015): 467–92, at 467.

134 Chen Jianfu, “The Revision of the Constitution in the PRC: A Great Leap Forward or a Symbolic Gesture?,” *China Perspectives*, no. 53 (2004): 15–32, at 23.