

CONSTITUTION and RELIGIOUS FREEDOM -

AN OVERVIEW OF HONG KONG IN HISTORICAL PERSPECTIVE



by Anthony Rogers

An analysis of the present law of Hong Kong in respect of the existing religious freedom inevitably entails consideration of the historical development of the law, going back at least to Roman times. Any student of the history of law must consider the law as it existed at any particular period in the light of the political and social circumstances of the time.

Perhaps it could be said that amongst the conclusions that can be drawn from a historical analysis is that religious liberty, along with personal liberty, has always been a feature present during the days of enlightened lawgivers, who have subsequently recognised it to be of legal historical importance. Religious repression has for the most part been the tool of those wishing to control

political power for ulterior purposes, whether it be for their own gain or simply to prevent loss of their own positions. Religious repression through legal means has often resulted in utilisation and manipulation of men's inherent bigotry as a tool for political objectives. The vestiges of such usage can perhaps be seen in the sectarian violence still present in Northern Ireland.

Whereas later generations may show us to be wrong for reasons to which our eyes are blinded, it can be said with justification that the law of Hong Kong and the United Kingdom provides for religious freedom. The vestiges of religious intolerance are now difficult to find and are either purely ceremonial or so intertwined with established institutions that they can no longer be referred to as religious intolerance. The final liberalisation of the law manifested itself in the age of mechanisation and ease of transportation in the early half of the last century.

It must not, however, be lost sight of that religion, and in that we speak of the established churches of England and Scotland, formed and forms a basis of the law itself. The reigning monarch is the head of the church and the state at the same time; the important Common Law relating to such matters as contract and civil wrongs finds its footing in morality, and in particular, often christian morality, and much of the code of human behaviour ordained by the law, such as the laws relating to drunkenness, oaths, blasphemy, obscenity, to name but a few, find their roots in religion.

The origins of the Common Law can be traced by a direct route, now rather blurred by the changes of time, to the old Roman law. The early examples of religious intolerance which were exercised under Roman law against the early christians arose as a direct result of a fear of some undefined, foreign power. That early religious intolerance was regrettably reflected by the time of the emperors Theodosius and Justinian in the persecution of those who were not christian. Nevertheless, as a basic legal precept, one can discern even in those early days the rule that unless a particular religious belief or practice was specifically forbidden under the law, the practice was permitted and tolerated.

The early English laws are obscure. The practice of witchcraft was outlawed, but only because it was perceived as being basically evil.

Religious intolerance or control was not part of the law in England, at least from Roman times through to the great lawgiver, Henry II. The great changes of the Reformation were reflected in England in the reign of Henry VIII in the 16th century by drastic changes in the social structure. These changes in the Tudor times need not be chronicled, save to say that it was not until the Elizabethan and Jacobian period in the late 16th century and 17th century that matters began to settle. Even so and even in those days, it can be said that the only restrictions on freedom of religious belief and practice were those of positive laws, in other words, statutory laws and not through the Common Law of England, see e.g. Evans v. London Chamberlain (1767) 2 Burns Ecclesiastical Law 207 @ 218.

The Jacobian period brought with it a period of civil unrest followed by restoration of the monarchy with constant fear that pretenders to the throne would attempt to retake it. Coupled with that, the Popes had historically not only controlled large parts of Europe but also had on occasions used their arbitrary power to expel emperors from kingdoms and present others in their place, e.g. the expulsion of the Emperor Federick from his Kingdom in Sicily which was given to Charles of Anjou. It was fears of intervention as well as fears that the supporters of a pretender might be from a different religion that gave rise to the various statutes which restricted the religion which could and indeed had to be, observed to that of the one state church. It is evident that as the restrictions on the various religions were lifted, it was done on the basis that those adhering to different religions should take an oath of allegiance to the monarch. The gradual liberalisation in the 18th and early 19th century was brought about by various statutes which allowed more and more civil liberties to those who adhered to religions other than the official religion. The most important of the enabling acts was the Roman Catholic Relief Act of 1829. After the passing of this Act, virtually all restrictions on religious freedom disappeared. As has already been noted, it is perhaps not insignificant that it coincided with the time of increased travel, industrial change, and revolution generally.

There is now no discrimination between religions under the United Kingdom law, nor is it possible to discern provisions in any legislation which discriminate between religions or compel the observance of any particular religion. Those laws which are still in force, e.g. the Bill of Rights 1688 and the Act of Settlement 1700, which prohibit a Roman Catholic occupying the throne of England, do not constitute religious discrimination, for it can hardly be said to be discrimination when the monarch must himself be the head of the religion; hence, no one other than one of the persuasion of the Church of England should in all logicality become the Sovereign in any event. Again, those provisions which prohibit by statute the taking of offices in three of the leading schools in England are again no more than merely saying that the holders of one religious belief only may be appointed to a school of that religion.

It is a feature of the law of England, however, that anything that is not specifically forbidden under the law is allowed. Hence, after the repeal of the various Acts which required observance of the conformist Protestant faith, citizens were allowed to believe and practice any religion which they chose. It is perhaps noteworthy that it was not necessary to include any reference to religion in the Race Relations Act 1976, which sought to prevent discrimination between classes in society. There is no bar to those of any religious persuasion from taking any part in government or politics or the Administration.

Freedom of belief and observance did not mean, however, that the law was not predicated and still is upon precepts derived through religious beliefs. The most obvious of these in the United Kingdom is the observance of the Sunday day of rest with the consequent closing of shops. This relic, originally dictated by religion, has a practical consequence that those employed, particularly in manual and more menial tasks, are ensured a day of rest. Hence, when translated to Hong Kong, the observance of Sundays is not paramount to the extent that it does not extend to all, but a day of rest is obligatory. However, the Holidays Ordinance which dictates the holidays for banks, educational establishments, public offices and government departments provides in Schedule I that every Sunday shall be a public holiday. The law

relating to drunkenness, obscenity, libel, slander, perjury and no doubt a considerable number of other offences also find their roots in religious belief. It is interesting, however, that many of these constitute offences when committed in public but not in private.

Perhaps the least obvious laws which are derived at least in part from religious principles are the common law, in particular that relating to tort (civil wrongs). A reminder of this is presented by Lord Atkin in his now famous speech in the House of Lords in the landmark case relating to liability for negligence: Donoghue v. Stevenson [1932] AC 562 @ 580, wherein he compared the religious precept that one should "love the neighbour as thyself" with the legal precept that you must not injure your neighbour. It is clear from his speech that Lord Atkin equated the Common Law not merely to morality but to christian morality.

Two proclamations were issued by Captain Elliot in Hong Kong in 1841 at the time of the cession of the Island to the British Crown. The first proclamation declared that "Pending Her Majesty's further pleasure, the natives of the Island of Hong Kong and all natives of China thereto resorting shall be governed according to the laws and customs of China, every description of torture excepted", and, further, that "Pending Her Majesty's further pleasure, our British subjects and foreigners residing in or resorting to the Island of Hong Kong shall enjoy full security and protection according to the principles and practice of British law". His second proclamation was issued at the same time to the Chinese inhabitants of Hong Kong by which the inhabitants are secured "in the free exercise of their religious rites, ceremonies and social customs", and they are "to be governed, pending Her Majesty's further pleasure, according to the laws, customs and usages of the Chinese (every description of torture excepted)". It is therefore clear that at the cession of the Island to the British Crown, express reservation was made on behalf of the Sovereign insofar as Chinese were concerned as to the free exercise of their religious beliefs. Insofar as foreigners were concerned, they were to be governed by the same law as existed in the United Kingdom, which, by that stage, contained none of the disqualifications which had been prevalent in previous centuries.

The law of Hong Kong has, of course, progressed since the days of Captain Elliot, and the position of the common law is now governed by the Application of English Law Ordinance Cap.88 which provides in Section 3 that the Common Law and the rules of equity shall be in force in Hong Kong so far as they are applicable to the circumstances of Hong Kong or its inhabitants and subject to such modifications as such circumstances may require. Thus, Hong Kong, since its cession to the British Crown, has habitually enjoyed the privileges of the common law which, without expressing the concept of religious freedom as a positive matter have always safeguarded the rights of the citizens to hold and believe as they pleased, subject only to the statute law.

There has been no statute law in Hong Kong forbidding the observance or compelling the observance of any particular religion. There are, in contrast, a large number of Ordinances in Hong Kong which specifically provide for the needs of various religions and religious bodies. In particular, there are those which provide for the incorporation as a body corporate of the heads of various religious orders and bodies in Hong Kong. It is noteworthy that the concepts of many of these have travelled far from the old days of fear of foreign domination, and specifically recognised the appointment of individuals to specific positions from authorities outside Hong Kong.

Like the United Kingdom, there is no bar, whether statutory or otherwise, to any person holding religious beliefs, or to the clergy from holding offices or positions whether it be political or official. A notable example in recent years can be shown in a member of the clergy, the late Fr. Patrick McGovern, being a member of the Legislative Council.