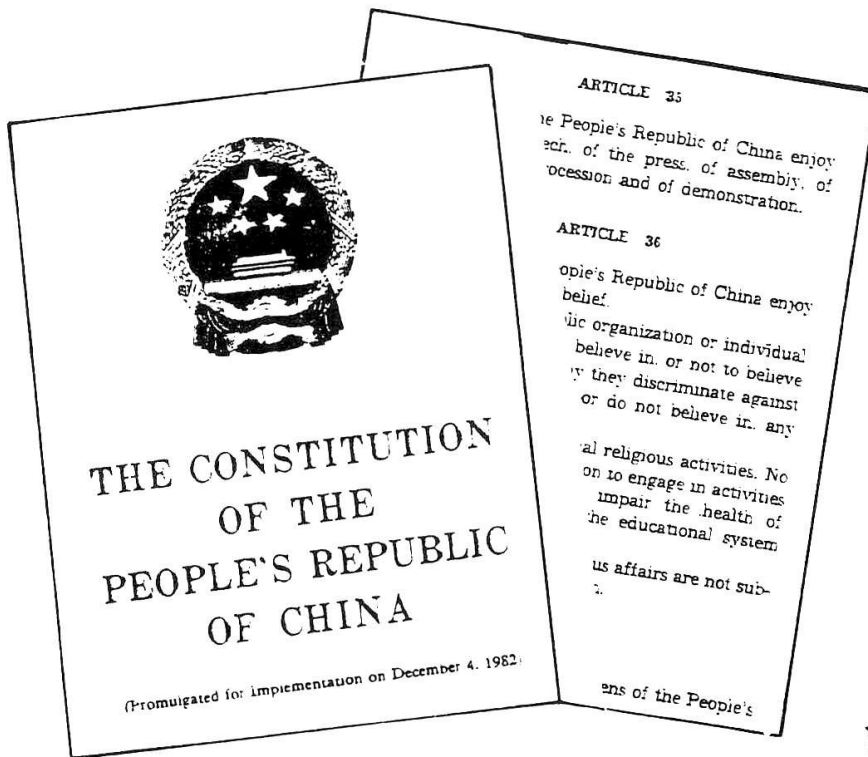


CHINESE CONSTITUTIONS

and RELIGIOUS FREEDOM



by Richard C. Bush

Except for the last hundred years or so, the idea of a constitution on which laws would be based and that government and people should follow is new to China. Both Confucianists and Legalists thought that the making and enforcing of laws was the ruler's responsibility. Confucianists historically have held that the laws, like the ruler himself, must be in accord with the moral order, whereas the Legalists placed no such restraints upon the ruler or his laws.

The Confucian insistence on the moral order, with the somewhat naive faith that if the ruler and his ministers followed the moral law and were themselves men of upright character all the people would follow suit, is different from similar Western traditions in two important respects. The European philosophers of the 17th and 18th centuries, who were so attracted to Jesuit reports of what they found

in Chinese thought and life, generally equated the moral order with a natural order, but for the Confucianists the moral order was built by humans not nature. These human beings were "under Heaven," to be sure, but the moral order is a human, not a strictly natural order, arising from the workings of society not the powers of nature. Secondly, the moral order as seen by the Confucianists, does not limit the power of the ruler, a la Hobbes or Locke, or Rousseau. The Confucianists

saw it as calling for fulfillment of the ruler's and the people's innate promptings as social beings... In particular, the Confucian moral order contained no belief in the rights of the individual as a limit on any kind of authority - including that of the clan, the family, parents, or husbands.¹

The end result is that laws are created and instituted by the state and that individuals belong to the state, their loyalty a basis for whatever standing or freedom they may enjoy.

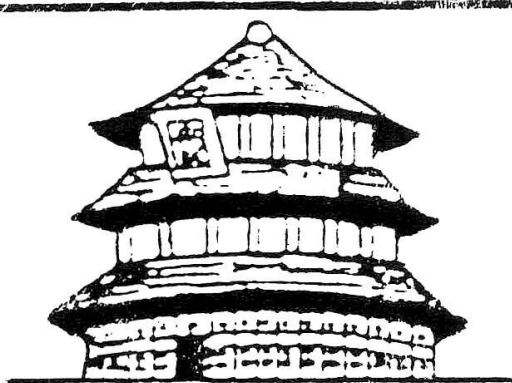
As the Qing Dynasty weakened during the 19th century, Chinese intellectuals began to read and hear more of Western thought, including legal and political institutions. This movement came to focus in the work of the Reformers at the end of the century, particularly in the thought of Kang Youwei, whose ideas were an interesting mixture of traditional Chinese thought, the idealistic wing of Neo-Confucianism, and Western ideas. In a Memorial to the Emperor in 1898 Kang wrote:

The reason countries East and West are strong is invariably because they have established constitutions and opened parliaments. In parliament the ruler and the people consult together on the affairs of state... The ruler and the millions of citizens are joined together in one body. How can the country not be strong? ²

One should note that this involves no appeal to people's rights (minquan) or people's rule (minzhu or democracy), but is rather an appeal to people as a basis (minben). Memorials were addressed to the ruler who, in his benevolence, would grant rights rather than recognize rights claimed or asserted by the people.

The reform movement was heading in the direction of a constitutional monarchy in the last decade of the 19th century when in 1898 it was cut off sharply by the Empress Cixi and Kang fled for his life. The movement for constitutional reform, including provisions for a national assembly as a check on a strong cabinet, nonetheless resulted in the approval by the Imperial Court of "Principles of the Constitution" on August 27, 1908. This was to have been the first step in a nine-year plan to draw up a constitution. The Empress Dowager apparently thought she could use this process to strengthen her fading power, and seems to have accepted, at least in some form, most of the reforms Kang Youwei and his associates had proposed a decade earlier. ³

The Qing "Principles" refer to freedom of speech, writing, publishing, and assembly, and there is even an implicit reference to running for office and voting. There is no reference to religious freedom or toleration, which may be related to the fact that dynastic leaders were still nervous about the possibility of rebellions resulting at least in part from religious motivations. The Eight Triagrams Rebellion in the early years of the nineteenth century and the more powerful and widespread Taiping Uprising at mid-century were still fresh in people's memories and could have inspired caution among political officials in an empire that was threatening to come apart at the seams.



There is an oblique reference to a religious outlook or world view in the Qing "Principles" which should be noted: "The emperor's dignity is sacred and cannot be violated."⁴ The emperor was still the Son of Heaven. As such, he would rule over a sacred kingdom in the constitutional monarchy envisaged, which, of course, was not to be.

Immediately after the 1911 Revolution, a provisional constitution was drafted which called for freedom to believe in religion (xinjiao ziyou). A "Temple of Heaven" draft of

1913 also called for freedom to believe in religion (xinyang zongjiaode ziyou) unless "limited by law." A revision of 1914 changed the last phrase to "within the scope of law."

A 1923 constitution has the interesting clause: "People have freedom to believe in religion and respect Confucius, unless limited by law." The Tutelage Constitution of 1913 gave to people freedom to believe in religion except where it violates good social custom and disturbs the social order. Drafts of 1934 and 1936 move back to simple phrases such as freedom to believe with the law.⁵

On December 25, 1946, as the Nationalist-Communist conflict began to heat up, the Nationalists issued their Constitution, which is still in force in Taiwan today. Article 88 states: "The people shall have freedom of religious belief."⁶ This and other rights granted in this Constitution derive from society, and therefore society or government, may restrict these rights, as happened in 1949 when the Kuomintang entered upon its Taiwan era. John H. C. Wu, a leader of the group which drafted the 1946 constitution said:

Rights are entrusted by society to the individual; society is the source of rights. The individual apart from society has no rights; at time of necessity it can also remove rights at least it can limit their scope.⁷

Most of the traditional rights are listed, but there are limits established by law and the party has the power to interpret the constitution. Suppression of civil liberties was justified during the late sixties (when I lived in Taiwan) on the basis of "We are a country at war," although the only war during most of those years was the shelling of off-shore islands by the Communists and shelling of mainland targets from the off-shore islands held by KMT forces on an alternate-day basis.

The handling of religious groups, both in China from the late twenties to the late forties, and in Taiwan from 1949 to the present, has not been consistent. The Reverend T. K. Chiu, my colleague here in Hong Kong for a few years in the early sixties, told me of his work as a pastor during

World War II in the city of Kunming, which was part of the area controlled by the Nationalists. Well in advance of each service he had to submit to KMT officials a copy of the sermon he intended to preach. These officials would check the sermon carefully, return it to him with their revisions, and then be present for his delivery of the sermon to see if he followed what had been written. There have been numerous instances in Taiwan of KMT harassment of leaders of the Presbyterian Church of Formosa and of institutions such as the Tainan Theological Seminary.

Five years after the victory of the Communist forces on the mainland, the People's Republic of China on September 20, 1954, adopted its first constitution. The clause on religious freedom closely parallels that in the 1946 Nationalist constitution: "Citizens of the People's Republic of China enjoy freedom of religious belief."⁸ It is significant that both constitutions speak of religious belief, which in the last analysis can be used to justify prohibition of religious activity on the grounds that religious belief may continue.

For Liu Shaoqi,

*The constitution is, on the one hand, an epitome of our past struggle and on the other, it provides us with a fundamental law on the basis of which to proceed with our present struggle.*⁹

This is in the context of a constitution being a class document - feudal/reactionary, bourgeois, or proletarian - and therefore it is basic to class struggle, indicating a process rather than a static condition.¹⁰ Indeed it was called a transitional document.

Liu defended the validity of having the clause on freedom of religious belief, in spite of the fact that "we punish those imperialist elements and traitors who don the cloak of religion but in effect engaged in counter-revolutionary activity."¹¹ He goes on to say that

Safeguarding freedom of religious belief is quite a different matter from safeguarding freedom of counter-revolutionary activities; these two just cannot be mixed up. Nor, similarly, will our

*Constitution and laws even provide the slightest facility for those elements who engage in counter-revolutionary activities under the cloak of religion. There is nothing difficult to understand in this reasoning.*¹²

It was of course the government, its organs and officials, which decided if, and on what grounds, an activity was counter-revolutionary.

Revised constitutions have been adopted by the People's Republic of China in 1975, 1978, and 1982. Article 28 of the 1975 Constitution, after saying that citizens have freedoms of speech, assembly, etc., goes on to assert the following:

*Citizens have freedom to believe in religion and not to believe in religion, and freedom to propagate atheism.*¹³

Precisely the same language is preserved in the Constitution adopted on March 5, 1978, after the Cultural Revolution. The advantage given to the atheist cause is obvious, but it must be remembered that from 1972 to September 1979 only a few Muslim mosques and Buddhist temples



were open, plus one Protestant chapel and one Catholic church, both in Beijing. Only foreign personnel from embassies, businesses, and so on came to worship until April, 1979, when Chinese began to participate again. Government and Party practice was weighted heavily against religion, regardless of what was said in the constitutional provision.

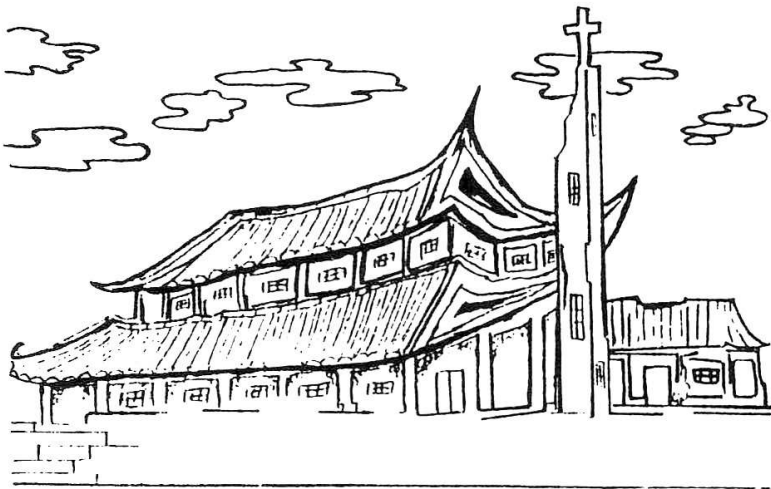
Finally in 1982 came a decided change, at least by comparison. In the Constitution promulgated on December 4, 1982, Article 36 has the following four paragraphs:

Citizens of the People's Republic of China enjoy freedom of religious belief.

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.

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.

Religious bodies and religious affairs are not subject to any foreign domination.¹⁴



The provision forbidding any compulsion to believe or not to believe in religion or forbidding any discrimination against those who believe or do not believe is salutary. The way is still open, however, for "compelling" or encouraging people to be atheists, which is more than not believing in religion." Although the "freedom to propagate

atheism" clause from the 1975 Constitution has been deleted, due largely to the efforts of Bishop Ding Guangxun and the Buddhist leader Zhao Puchu, the preaching and teaching of religion is limited to temple, church, and mosque, and atheism may be taught anywhere, including the schools.

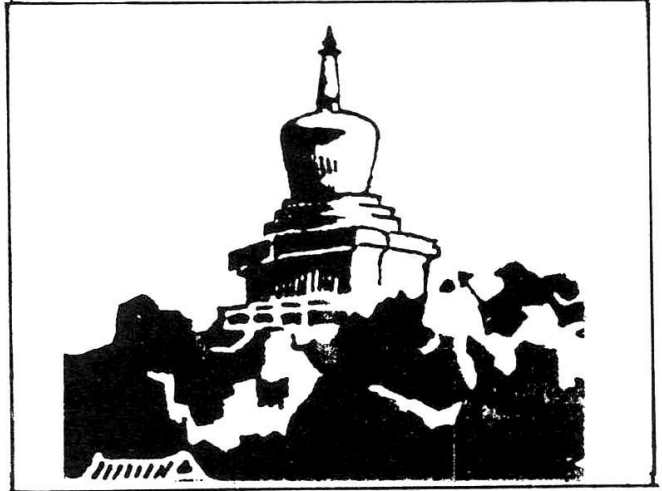
"Normal religious activities" are the more traditional ones, according to Document 19, "The Basic Viewpoint and Policy on the Religious Question During Our Country's Socialist Period," which was issued in 1982.¹⁵ The activities permitted and "protected" are public worship, the publication of scriptures, religious books, and educational materials, the preparation of clergy in seminaries, visitation of the sick in hospitals, study classes, and choir practice sessions. Presumably not normal are public rallies or demonstrations, and such practices as sorcery,

witchcraft, phrenology, fortune telling, and geomancy,¹⁶ Document 19 also maintains that the Communist Party is to do research on religion, but should not offend religious believers in what is published. Religious believers are to respect research done by the Party. One must ask about the possibility of believers doing research, especially since the Party research and activity is to promote something contrary to religion. For example, in a policy statement on ethnic minorities, Document 19 states: the Party looks forward to the time when such minorities and others "gradually... acquire a dialectical and historical materialistic world view, and gradually shake off the restraints of a religious ideology." Although this goal is not to be sought by pressure, it is to be promoted. The goal is still the demise of religion, although using a different approach than was followed in the first thirty years of the new China.

One must also ask why the 1982 Constitution framers added to the careful balancing of the freedom to believe and not to believe, and to the disallowance of compulsion or discrimination, the restrictions of paragraphs three and four. Religious activities which disrupt public order (have there been any?), which impair the health of citizens (dietary restrictions or failing to seek medical help?), and interfere with education (strictly in the hands of the state) seem almost inconceivable.

The fourth paragraph, forbidding any foreign religious domination, clearly seems directed to the Roman Catholic Church, many of whose priests and communicants still look to Rome as the source of spiritual guidance and authority. The Protestant movement in China is by no means entirely under the Three-Self Movement, but those who have resisted that movement hardly seem inclined to invite foreign leaders to supervise them. "Foreign domination" is of course, not a problem for other religious movements in China, and is no longer a problem for Protestants. The only conclusion to be drawn is that Chinese leaders have not forgotten a century of foreign domination of or interference in Chinese affairs by various agencies and governments from other countries. The association at times of missionaries with foreign government and business interests has resulted in deep-seated attitudes which are still a reality in present-day China.

This attitude is borne out in an article published in 1984 in celebration of the 35th anniversary of the founding of the People's Republic of China.¹⁷ In this article which deals with religion, phrases such as "Anti-imperialism" and "patriotic" appear again and again. Buddhism, Taoism, and Islam have feudal origins and must become more democratic, but it is quite clear that the overriding concern is for "patriotic political unity." International friendship and communication with other peoples is to be promoted, but on the assumption that the religious bodies of China are Chinese and are in no way subject to foreign leadership or control.



Professor Andrew Nathan, after examining a series of constitutions from twentieth century China finds that in spite of differences, there is a remarkable continuity.

First, in none of the constitutions were rights considered to be derived from human personhood; they were derived from citizenship in the state or, in the communist period, from membership in the progressive classes known collectively as "the people."

Second, the very variability of rights from constitution to constitution was an important point of continuity. Chinese constitution writers felt able to add and withdraw rights fairly casually because they held that rights are granted by the state and can be changed by the state.

Third, some rights in each Chinese constitution were programmatic - that is, they were presented as goals to be realized (especially Qing Principles, KMT Tutelage and the communist)... And in all constitutions the feature was implicit in the fact that rights were mentioned that in fact could not be enjoyed.

Fourth, every Chinese constitution implicitly or explicitly gave the government the power to limit rights by acts of legislation. The protection that rights offered lay in the fact that they could not be restricted except by law, not in their forming a limit to law.

Fifth, and consequent to the fourth point, none of the constitutions established an effective procedure for independent review of a law's constitutionality. The organ that made the law - emperor, parliament, ruling party, or people's congress - was considered to have sovereign power to do so, and could not be checked by any other branch of government.

Sixth, while all but the Qing constitution recognized popular sovereignty in principle, none provided for its effective exercise by the people. In no constitution was the executive directly elected. The national legislature was always elected either indirectly or by a limited electorate and had very limited authority in government affairs. The influence of the citizens over state policy was so buffered and checked as to be negligible in practice.¹⁸

Although Professor Nathan does not deal with religion in his masterful study of democratic movements and efforts in China, to which I am nevertheless much indebted, the conclusions just cited are helpful in looking at the question of religious freedom in Chinese constitutions. A colleague at the Chinese University of Hong Kong, Dr. Byron Weng, noted with me that "the people," in Nathan's first point, include only those who are not in the reactionary classes. Professor Weng went on to say with respect to number five that, although emperor, parliament, ruling party, or people's congress officially might not be checked by any other branch of government, numerous instances might be cited when any of the four have been circumvented by officials, agencies, or power groups.

In conclusion, there are several observations which can be made on the basis of what has been covered in these

中共中央印发《关于
我国社会主义时期宗教问题的
基本观点和基本政策》的通知

(一九八二年三月三十一日)

各省、市、自治区党委，各大军区、省军区、野战军党委，中央各部委，国家机关各部委党组，军委各总部，各军兵种党委，各人民团体党组。

中央书记处最近研究了宗教问题，形成了《关于我国社会主义时期宗教问题的基本观点和基本政策》的文件。这个文件，比较系统地总结了建国以来党在宗教问题上的正反两个方面的历史经验，阐明了党对宗教问题的基本观点和基本政策。各省、市、自治区党委和中央各部委，国家机关各部委的党组，在接到这个文件后，应对宗教问题进行一次认真的调查研究，并对有关各项政策的落实工作加以督促和检查。

中央认为，由这次宗教问题的总结可以¹⁹...我们在其他各方面的工作，各地区各...也都需要进一步系统地总结自己的经验¹⁹...“四人帮”以来，特别是十一届三中全会以来，我们党在总结自己的历史经验方面，已经取得¹⁹...巨大的成果。十一届六

remarks and which may have some relevance to the Hong Kong situation in which we are interested.

(1) The group which is assembled for this conference is entirely Christian and predominantly Catholic. Although it's important for us as an ecumenical Christian group to "get our act together," it is equally important that we stay in touch with friends in other religious communities, know what they are thinking, and be prepared to work with them.

(2) With a view to the Basic Law and other documents which some of you will participate in writing or to which you may contribute, some spelling out in detail of what we mean by religious freedom is essential. The trend in China away from all the Cultural Revolution involved seems to be clear, but we must never forget that the trauma of that period was endured by people when "freedom of religious belief" and other freedoms were clearly stated in their Constitution.

(3) Although I rejoice at the open churches and large congregations, increasing enrollments in seminaries, and a considerable production of literature by the churches and other religions of China, it still appears to be a "protected" church. I doubt if its bishops could have spoken in the forthright manner of the Catholic bishops of the Philippines, or that its people could demonstrate in the streets the way students are doing now.

(4) To turn to a more positive note, both Marxism and Christianity are changing. No one expected ten years ago that China could have changed so much since 1978-79. Because such changes are taking place, it's necessary that we keep the lines of communication open, try to hear and understand what is going on in China, and perhaps more important, let Chinese leaders know what we are thinking and doing.

(5) We have a responsibility to educate our Communist friends about what Christians believe, including the variety of belief, what our attitudes toward the world are, and what our hopes for humanity are. I have heard Hungarian pastors say they must "educate the Communists", and I have been in situations in China where Chinese Christian leaders are doing that very thing. It is not easy, but it must be done.

(6) We should strengthen and develop whatever we may be doing in the area of education of the laity. Seminary education for professionals is highly developed in Hong Kong when one considers the size of the Christian community here, but the total Christian community must have a thorough and lively understanding of the faith and a deep commitment to witness and what it may involve. If trouble should come, we are prepared to deal with it; if it does not come, as we hope, then the church is better prepared for its continuing life and work and mission.

(7) In conclusion, we should again be reminded that the Marxist view of life, the Chinese Communist system, penetrates every area of life. It is a total system. Its aim is still stated in a way that gives us pause. As the final paragraph of Document 19 puts it, after two or three generations:

All Chinese will have within their own country completely rid themselves of what is impoverishing, ignorant, and spiritually empty, and will have become a highly developed material and spiritual civilization, able to stand in the front ranks of mankind in a glorious world. At that time the vast majority of citizens in our country will have reached an awareness enabling them to deal with the world and their fellowmen from a scientific viewpoint, and no longer have any need to have recourse to an illusory world of gods to seek spiritual solace...

And so only when we enter this new age, will all that mirrors a religious face in our present actual world finally disappear. Each one of us party members, as each succeeding generation goes by, must put forth all our best efforts to bring about this brilliant future.¹⁹

Rather than close on that realistic, even grim reminder of what the long haul may entail, in spite of changes which are taking place, let me turn instead to my favourite author of high school and college days, Ralph Waldo Emerson, an American writer of the 19th century (the era of Karl Marx). In his essay entitled "The American Scholar" Emerson wrote:

*If there is any period one would desire to be born, is it not the age of Revolution, when the old and the new stand side by side and admit of being compared, when the energies of all men are searched by fear and by hope, when the historic glories of the old can be compensated by the rich possibilities of the new era? This time, like all times, is a very good one, if we but know what to do with it.*²⁰

It would be presumptuous for me to tell you what to do with the age of revolution, at least of change, which lies ahead for Hong Kong. I did live and work here from 1960 to 1965, and am privileged to return for this current academic year as a very temporary "visiting professor." My feeble efforts to keep informed about Hong Kong have been "searched by fear and hope" as I have talked with old friends and new friends about the "rich (and not so rich) possibilities of the new era." Because of you and them, my friends in Hong Kong, I dare to hope that 1997 will be a good time, and to hope that in some way we may celebrate it together.

NOTES

1. Andrew Nathan, Chinese Democracy (New York: Alfred A. Knopf, 1985), p.114.
2. Quoted in Nathan, CD, p.127.
3. The process is described by John H. Fincher, Chinese Democracy(Canberra: Australian University Press, 1981), pp.79-82. Fincher's and Nathan's works have the same title.
4. Xianfa Zhiliao Xuanbien, Volume II (Beijing University Press, 1980), p.251.

5. These early 20th century constitutions may be surveyed in Zhongwai Xianfa Xuanbien (Beijing: Beijing People's University, 1981).
6. Amos J. Peasley. ed., Constitutions of Nations, Volume II (The Hague: Martinus Nijhoff, 1966), p.282.
7. Quoted in Nathan, CD, p.116
8. Peasley, ed., Constitutions..., Volume II, p.275
9. As quoted by Chen Yung-ping, Chinese Political Thought (The Hague: Martinus Nijhoff, 1966), p.73.
10. Ibid., p.38.
11. Report on the Draft Constitution of the People's Republic of China (Beijing: Foreign Languages Press, 1954), p.37.
12. Ibid., p.38.
13. Zhongwai Xianfa Xuanbien, p.59.
14. The Constitution of the People's Republic of China Adopted December 4, 1982 (Beijing: Foreign Languages Press, 1983), p.32.
15. English translation by Janice Wickeri, Tao Fong Shan Ecumencial Institute, 1984.
16. Summarized in Nicholas Piediscalzi, "China's New Policy on Religion," The Christian Century, June 19-26, 1985, pp. 611-614.
17. Guanghuide Chengjiu (Beijing: Xinhua, 1984), pp.306-317.
18. Nathan,CD, pp. 111-112.
19. Document 19, J. Wickeri, trans., 1984.
20. In The Complete Essays and Other Writings of Ralph Waldo Emerson, Brooks Atkinson, ed. (New York: The Modern Library, 1940).