

RELIGIOUS FREEDOM and THE BASIC LAW



by Iris Y.L. Tsang

Hong Kong has never in its history been a battleground of religious dissension. Over the past 146 years, religions of both Eastern and Western origin have found their way to this small enclave on the south-eastern coast of China. While the Anglican Episcopal Church has the status of being the official church of government, insofar as Hong Kong is a British Colony, she has not been conferred with any power to influence governmental policies, other than the performance of certain ceremonial and symbolic duties. Although we do not have a written constitution that confers religious liberty in a positive manner, the citizens of Hong Kong have enjoyed religious freedom in its fullest sense. Only in cases of gross immorality and fraud have our legislators and law enforcement agencies been forced to intervene.

It should come as no surprise, then, that when the Sino-British negotiations over the future of Hong Kong began in the early 1980's, they were the source of much anxiety and concern within Hong Kong society and among its churches.

In not a few congregations, believers were called upon to ready themselves to "suffer for the Lord" in the event of a possible future religious persecution. They were advised to memorize Bible texts against the day that Bibles might be banned. The development of small christian communities - 'house churches' - was also encouraged, for fear that public churches might one day be closed and church properties confiscated.

Such alarm and anxiety is understandable when we take into account the fact that many of our present day church leaders fled to Hong Kong shortly before or after the establishment of the People's Republic in 1949. During the persecutions of the Fifties and the Cultural Revolution, some of their own relatives and friends on the Mainland lost not only their liberties but their lives as well. As part of my own preparation for this paper, I reviewed once again the history of the Chinese church after 1949, and the controversies over China's religious policy that arose among both its mild and more extreme Marxist theoreticians during the years 1959 to 1965. These controversies continue, to a certain extent, to exist on the Mainland today. As a result, I am well aware and can appreciate the eagerness of the Church to maintain and preserve our present liberties in all aspects of religious life, especially as the Basic Law is now in the process of being drafted.

To sum up the long list of what different religious bodies have advocated over the past months in their submissions to the Basic Law Consultative Committee, their wishes are in essence: (1) preserve the status quo; (2) there should be no interference from the Mainland in religious activities when the sovereignty of Hong Kong reverts to China; (3) the Marxist-Leninist concept of religion should not apply in Hong Kong since Hong Kong will exist as a separate system under a socialist sovereignty.

There are several legal means whereby religious freedom may be guaranteed and protected:

- (1) by the application of the Constitution of the People's Republic of China.
- (2) by the clause(s), relating to religious liberties in Chapter III of the Basic Law;
- (3) by embodying the principle of religious freedom in other clauses of the Basic Law;
- (4) by enacting local legislation in the future Hong Kong

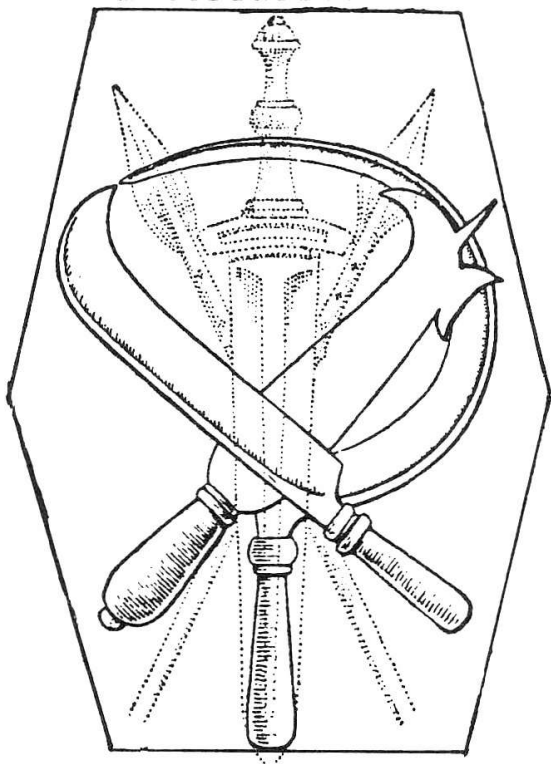
Special Administrative Region to protect various liberties, including the protection of religious activities;

- (5) by the possibility of the PRC ratifying the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

I. APPLICATION OF THE PRC CONSTITUTION

The PRC Constitution of 1982 set out to re-establish the social order after the fall of the Gang of Four. In a society where a planned economy is the norm, various other facets of life are also regulated by the Constitution; for instance, family planning is a parental obligation. The following clauses of the present Constitution are particularly threatening to the preservation of religious freedom in Hong Kong:

1. Article 24 - "The state ... educates the people in patriotism, collectivism, internationalism and communism and in dialectical and historical materialism."



2. Article 36 - "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 shall not be subject to any foreign domination."

3. Article 51 - "The exercise by citizens of the PRC of their freedoms and rights may not infringe upon the interests of the state, of Society and ..."

After 1997, Hong Kong will be under the sovereignty of China. The application of the Constitution and some statutes (for instance the Nationality Act and some sections of the Code of Criminal Law of the PRC) signifies the resumption of sovereignty. However, the Joint Declaration states that the laws of the HKSAR shall be the Basic Law, the laws previously in force in Hong Kong, and laws enacted by the HKSAR's legislature. This means that the source of law in Hong Kong does not include the PRC Constitution, apart from Article 31 mentioned elsewhere in the Declaration. In point of fact, sovereignty over Hong Kong is already sufficiently embodied in the application of the Basic Law which is to be passed by the People's Congress pursuant to Article 31 of the Constitution. Previously, legal experts in China have suggested that the Constitution, except for Article 31, will not apply to Hong Kong. However, recent thinking of the Basic Law Drafting Committee is that all clauses relating to the socialist system will not apply to Hong Kong, and there is a consensus that it would be impossible to state clause by clause those that are not applicable. The Basic Law would become too protracted by a listing of all of these clauses individually.

My own views on this matter are:

1. From a macro point of view, Hong Kong, as part of the PRC after 1997, will certainly accept the legitimacy of the Constitution over the whole of China. However, China is a vast country and within it there are several administrative regions. China exercises sovereignty over all of her territory, but Article 31 of her Constitution makes provision for special administrative regions. Certain ethnic minorities within China, owing to their special circumstances, have different codes for their Ethnic Self Administrative Regions apart from those stipulated in the PRC Constitution. Hong Kong will be in a similar position. She will have her own Basic Law, but the sovereignty of China will be upheld through Article 31 of the PRC Constitution, and by the fact that the Basic Law has to be formally promulgated by the People's Congress.

2. It is not advisable to state in our Basic Law that the PRC Constitution has legal validity in Hong Kong except for

those clauses which apply to a socialist system. To do so would be to engage our courts in endless debates on theoretical and ideological questions, which are not within the usual competence of the common law judges.

3. Chinese leaders and theoreticians have been advocating (中學為體)"Chinese learning as substance, Western learning for function" (西學為用). (It would certainly not be for the benefit of Hong Kong if socialist socio-political concepts were made to apply in Hong Kong, and only its capitalist economic system allowed to be preserved.) Capitalism implies a set of presupposed values that permeate every facet of life. Life-style is certainly one of the areas that falls within the realm of the "the one-country-two-systems" concept. Many of the fears and anxieties of religious organizations would be laid to rest should the question about the application of the PRC Constitution here be settled properly.

It has also been suggested that certain statutes which apply to every part of China should also apply to Hong Kong. If this be so, then the lack of a clear definition of what Article 91 of the Code of Criminal Law really entails might affect the relationships the churches of Hong Kong have with overseas organizations and ecclesiastical bodies.

Article 91 states: "Whoever colludes with foreign states in plotting to harm the sovereignty...and security of the motherland is to be sentenced..."

Article 165 also might affect the activities of some religious groups in Hong Kong: "Sorcerers or witches who use superstition to engage in the activities of rumor-mongering or swindling articles of property are to be sentenced..."

As Hong Kong has a rather self-contained legal system of her own, application of outside legislation must be considered with great care. As differences in the life-styles and the social systems of Hong Kong and the Mainland still remain substantial, it would be better to leave such internal matters to be dealt with by the SAR legislature.

II. RELIGIOUS LIBERTIES IN CHAPTER THREE OF THE BASIC LAW

The clause relating to religious freedom in the chapter



on Citizens' Rights and Obligations has given rise to a variety of points of view. There are some who would like to keep it as concise as possible. Others would prefer to adopt the more general style of the Universal Declaration of Human Rights or the International Covenants on Civil and Political Rights. In fact the question depends entirely on whether or not the whole of the Bill of

Rights (Chapter Three) will be drafted in accordance with the second view. It seems from the draft report submitted by the Sub-Group on Citizen's Rights and Obligations that the Basic Law Drafting Committee will propose as its own preference a more concise delineation of these rights, subject to the submission of opinions to be received during the coming months.

News releases have indicated that China is now considering ratifying the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. If this is so, and arrangements are made for these two Covenants to be directly applicable to Hong Kong, I would consider it cumbersome to spell out these clauses in great detail. However, the present proposed clause on religious freedom is just one sentence: "Every citizen of the SAR shall enjoy freedom of religion and belief", which adopts the exact wording of the Joint Covenants of General Principles(共同綱領) of 1949. We do need a clause that is more precise and less ambiguous in order to protect our present religious liberties and activities.

I suggest that the following elements should be included in a revised wording of the clause:

- Religious freedom does not only include the right to believe; it also includes the right to express the implications of faith through outward actions; for instance, to disseminate the faith and to take stands on public policy issues.

- The exercise of civil or political rights shall not be abridged by any provisions or conditions of an ecclesiastical or religious character.
- No interference by and subordination to religious organizations on the Mainland.

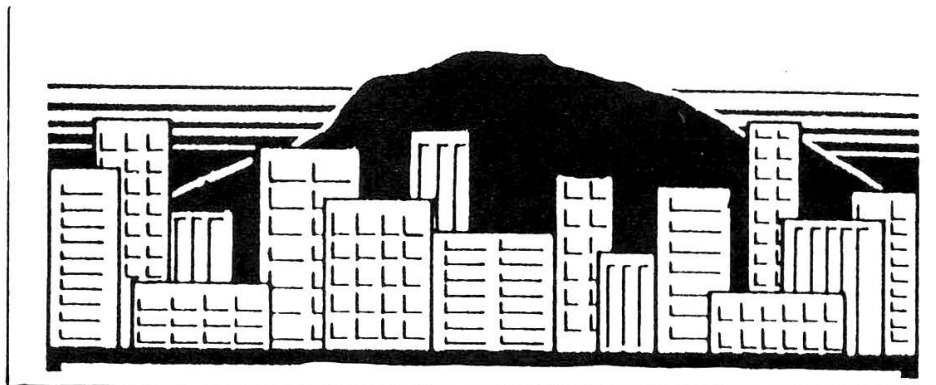
Liberties are the natural and inherent rights of every citizen. They are not gifts bestowed by a benevolent authority. While I do not favour the suggestion that a restrictive clause be included in the Bill of Rights, since such clauses are easily used to curtail religious freedom by arbitrary claims that those conditions have been breached. Restrictions, even though they be minor in light of the whole picture, may do serious damage to our liberties or customary practices. If any restrictions are necessary to combat cases of immorality or fraud, they should be dealt with by the internal legal mechanism of the SAR.

Further, I do not favour the drafting of a specific clause on religious policy. Hong Kong is a laissez-faire society - unlike China which has a planned economy and subsequent socio-political policy.

III. EMBODYING THE PRINCIPLE OF RELIGIOUS FREEDOM IN OTHER CLAUSES OF THE BASIC LAW

(i) The Legal Personality of the Churches and the Right to Acquire Property

The pledge in the Joint Declaration to protect private property will be stated in the Chapter on General Principles of the Basic Law. In



Soviet Russia, Lenin did not accord the Church the right of incorporation as a juridical person (Art. 12 of the 1918 Soviet Law). This right was still withheld in the legislation of 1929 (Art. 22), but special exceptions have been made since 1944. However, a religious association in that country still does not have the full right of a juridical person, but merely a limited right covering special situations. Therefore, churches there may not acquire property or other possessory titles. This is very different from the present situation in Hong Kong where churches may acquire a legal personality by incorporation, either by statute or as a limited company, just as any other social organization. If the present laws are to be preserved, religious organizations or their members should be allowed to continue to exercise the same rights as any other ordinary organization, which includes the right to acquire property. The Basic Law should therefore state clearly that all persons, (including natural and legal persons), organizations, and churches may have the right to hold private property.

(ii) Clauses in the Chapter on "General Principles"

It will be stipulated in the chapter on General Principles that our present life-style is to remain unchanged for 50 years. Since the present rights and liberties we enjoy are in the realm of "life-style", it is advisable to add that the rights and freedoms existing prior to the 1st of July 1997 will also be preserved. Words like "to remain unchanged" should not be used, since the vitality of our society will forbid any reduction to a static state of affairs.

(iii) Powers of the SAR Government

It has been stipulated in the Joint Declaration that the SAR will enjoy a high degree of autonomy, except in foreign and defense affairs. In view of the future likelihood that the powers of the SAR government will be enumerated in detail, it stands to reason that religious matters should be included within the competency of the SAR Government and spelled out in concise terms.

Further, it must also be clarified that the drafting of the Chapter on the Central government and SAR relationship should be in accord with the international connotation of autonomy, which in essence means that the greater entity should not interfere with the internal powers possessed by the autonomous region.

(iv) Other Liberties Enjoyed by Believers

The provisional draft of Chapter Three of the Basic Law affirms the equality of Hong Kong residents before the law, irrespective of their religious affiliation. Believers should enjoy equal civil and political rights along with everyone else. They also shall have the right of association, the right of religious expression, the right to publish freely, the right to state their views and stands on certain public policy issues, etc. The relationship of Church and State is a subtle one, and given the lack of any strong influence by religious institutions at the present time, it should not be mentioned in the Basic Law. Since the present Chinese norm for the interpretation of the Constitution is to prohibit whatever is not expressly permitted by law, it is also advisable that the principle of residual right be included in the text of the Basic Law. This principle refers to the legal right of every person to do anything that is not prohibited by law and does not injure or interfere with the rights and freedoms of others.

At present the draft text of the Bill of Rights limits the enjoyment of these rights only to residents of the SAR. All transient visitors to Hong Kong, - those living here for less than one year - may not enjoy such rights as stated in the Chapter, but only those rights provided by law (both common law and statutes). This is not a satisfactory manner of drafting, as it could mean that they are not entitled to the rights positively conferred in the Basic Law. It must be made clear that all people in Hong Kong (irrespective of their period of stay) are to enjoy the rights contained in the Chapter, except perhaps those pertaining to the

right to vote and to stand for election.

(v) Relations with Overseas Religious Organizations

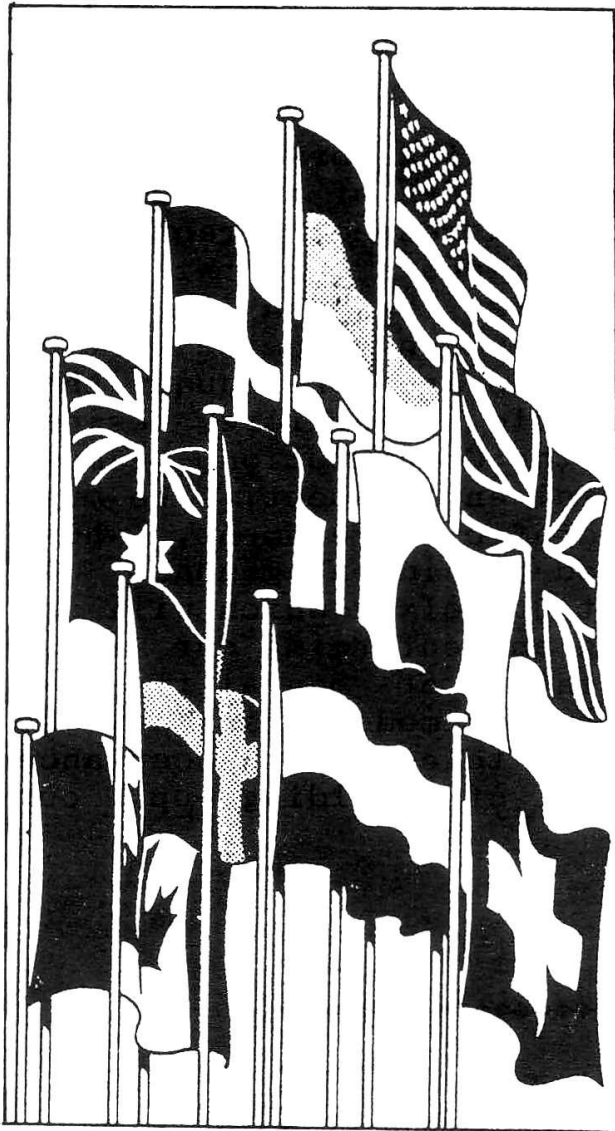
The relationship of local religious organizations to overseas organizations might be seen as involving "diplomacy", and "foreign affairs" in a subtle manner. Religious organizations should therefore be granted the same rights as organizations in other fields in order to maintain and develop relations and to conclude agreements with individuals, states, regions and relevant international organizations in the name of "Hong Kong, China". Chapter Five of the Draft Structure of the Basic Law should, therefore, add the religious field to its present listing.

IV. LOCAL LEGISLATION OF THE SAR

If the wording of the Bill of Rights is made too concise, some fear that the interpretation of certain words might mean different things to different people. The future SAR legislature may therefore enact particular ordinances that grant protection to specific activities in various ways. For instance, the Freedom of Press Act in Sweden defines that freedom in more detail than other countries. The Equal Opportunities Act of the United Kingdom and Freedom of Religion Act of Northern Ireland are further examples of this.

V. RATIFICATION OF THE TWO INTERNATIONAL COVENANTS

The news from official sources is that the PRC is considering ratifying the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. According to press releases, China does not wish "human rights" to become a monopoly of the West. The PRC considers that in China the standard spelled out by the two Covenants has been attained. Also by ratifying the Covenants, the international prestige of China may be enhanced. Irrespective of the motives behind the move, the ratification of these Covenants is good news for the people of Hong Kong, but many have been perplexed as to how the two covenants would be made operable in Hong Kong after 1997.



The future SAR legislature will still have to adopt the Covenants by formal motion in order for them to become part of the laws in our legal system.

In its ratification of the first Covenant, China would have to set up the machinery (under either the Foreign Affairs Bureau or the People's Congress) for submitting regular reports to the United Nation's Human Rights Commission. Since there are differences in the social systems and in the concepts of individual rights between the Mainland and Hong Kong, a separate branch consisting of delegates from Hong Kong should be set up to submit reports to the Commission.

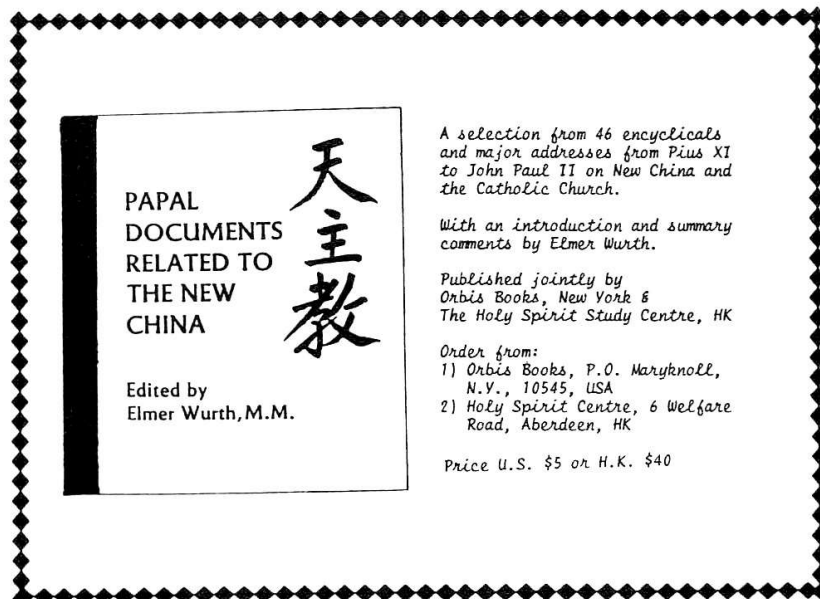
One problem for Hong Kong in this area is that the United Kingdom has not ratified the Optional Protocol of the First Covenant, which means that, at present, the Human Rights Commission has no jurisdiction

to hear and consider individual petitions against the UK for cases where rights have been breached in Hong Kong. In the Joint Declaration, it states that the provisions of the two Covenants "as applied to Hong Kong shall remain in force". As that right does not exist now, would China also ratify the Optional Protocol so that these rights can be extended to the HKSAR as well?

In conclusion, I would like to quote the words of a learned scholar, "In some cases, constitutional provisions for religious liberty are elaborate, but continually transgressed in practice; in others, the constitutional provisions are meager, but the laws, social customs, and the

temper of government and society are highly favourable to religious liberty."

Both China and Hong Kong are marching forward towards modernization, and one of the touchstones of a modernized society is the degree of tolerance and respect granted to people who share different views from one's own. With the gulf of differences that now exist between the "two systems", the amount of frustration and envy on the part of those who might question why "some men are more equal than others" cannot be considered negligible. Therefore, besides securing religious freedom through the Constitution, we must also make efforts to renew our social environment. We must seek to build a more open and democratic government, whose activities will not be predetermined by hidden agendas. We must seek to uphold an independent judiciary which will be just and impartial in interpreting and enforcing our laws. This will demand of us a modernization of mentality that will go hand-in-hand with the other four modernizations, so that we may bring an even increasing tolerance, acceptance and mutual respect to the task of building up our pluralistic society.



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