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**CHRISTIANITY IN
CHINESE PUBLIC LIFE**

Religion, Society, and
the Rule of Law

**Joel A. Carpenter and
Kevin R. den Dulk**



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Christianity in Chinese Public Life: Religion, Society, and the Rule of Law



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CHRISTIANITY IN CHINESE PUBLIC LIFE

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Political Constitution and the Protection of Religious Freedom: A Jurisprudential Reading of Article 36 of the Chinese Constitution



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Abstract: *The Chinese Constitution of 1982, Article 36, calls for the protection of religious freedom. But Westerners should understand that constitutionalism in China reflects a very different political context. There is a hierarchy of values in the Chinese Constitution, the author argues, which ranks the supremacy of the Communist Party and the construction of a modern socialist society above the protection of personal freedoms. Indeed, the term “protection” is transformed into something more akin to management and control in the Chinese context. Political reforms in China, including the new protections for property rights, all reflect this hierarchy of values. Even so, says the author, the growing body of case law on property disputes shows potential for gradual movement toward liberty in religion as well.*

Keywords: China; Constitution; political liberties; political reform; religious freedom

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Introduction

A constitution establishes basic rules for a nation's politics and governance, which means that both are subject to the constitution. This would seem to be a commonsense understanding of the relationship between a constitution and a political system. However, this basic relationship is a source of much confusion in the Chinese context. Constitutional law scholars today seem to have reached agreement upon the basic values of the Chinese Constitution: to protect freedom and restrain public power. Unfortunately, this is a superficial agreement, because there are still deep disagreements on the role and status of the Chinese Constitution in the nation's complex political and social environment. Many theoretical issues, even after heated discussion, remain controversial and thus complicate consensus. For example, scholars differ sharply over whether constitutional norms can be applied in the course of judicial judgment, or whether the newly enacted "Real Right Law" violates the Constitution.¹

The status of freedom of religious belief under the Chinese Constitution illustrates the problem. While Article 36 promises that citizens will "enjoy freedom for religious belief," the application of the article has been contentious. In this chapter I offer a jurisprudential analysis of the article, reflect on the basic principles of the Chinese Constitution, and provide some alternative answers to the complex issues mentioned earlier. As Rawls observes in his *Justice as Fairness*, one of the goals of political philosophy is to "narrow the divergence of philosophical and moral opinion so that social cooperation on a footing of mutual respect among citizens can still be maintained."² This chapter pursues that goal, which applies in China as well as in the West, although in a drastically different political context and cultural landscape. By exploring the moral status of religious belief within Chinese constitutionalism, I argue that we gain a better understanding of rule of law in general. Religious freedom is one of the moral signatures of our society that can be used to measure to what extent we can tolerate others, even when they violate other political values.

Constitutionalism in China since 1949

The nature of the constitutional order in any country is structured by the nation's legal and political practice. This means that the interpretation of

the constitution should take a country's cultural, historical, and political dimensions into account. This is particularly true in China, with its long history of cultural and political development. But this context raises a question: To what extent are these civilizational elements related to the core principles or values of a constitution, especially on the issue of the limitation of freedom?

We can get some perspective on this question by examining how constitutionalism has developed in China. Ever since the Opium War in 1840s, the seed of Western constitutionalism has been sown in the earth of China. Both the late Qing Dynasty and the Republic of China (1911–1949) conducted some constitutional experiments,³ but here I will focus on the development that followed the establishment of the new China since 1949. Simply speaking, the political process of the communist government has a thoroughly distinct view of law and politics, and it has undergone three stages. After a brief view of these stages, we can have a general notion of the development of constitutionalism in modern China.

The first stage (1949–1966). After the Communist Party came to power, it abandoned the legal system of the Nationalist government. At this stage, all the basic laws had not been enacted, for the party's main aims at this point were to stabilize the regime and develop the economy. Although the first constitution was enacted, political logic was mainly founded on the "class struggle" theory, which eventually led to the suppression of intellectuals. The legal practice of this period was dominated by ideology and susceptible to political aims.

The second stage (1966–1976). Even judged from the whole history of China, the period of the Cultural Revolution still occupies a distinctive status in Chinese history. Though sophisticated studies of this brief period have not come out yet in mainland China, the political and economic situation of this stage was almost anarchic (or a Hobbesian natural state).⁴ Normal legal practice was destroyed and constitutionalism was obstructed at this stage.

The third stage (1976–present). Learning from past political movements, the government after the Cultural Revolution sought to build a less insulated political society and establish the foundation for national prosperity. This is the background of the reform and opening-up policy, which defines the basic framework for political decisions. After the enactment of the 1982 constitution, the ideas of rule of law and human rights were written into the constitution by virtue of amendments. Some scholars,

citing significant advances toward an adequate legal system, claim that China is experiencing the best time to build rule of law.⁵

In the following sections I will explore the principles of Chinese constitutionalism through the analysis of religious freedom. The history of the rule of law in China is entering a special age. On the one hand, Chinese academia has been increasingly drawing on Western theories and terms. On the other hand, the legal practice of China is deeply influenced by distinctive cultural characteristics, including a cultural aversion to using law to settle disputes. These conflicts between law and practice are reflected in the regulation of religious affairs, and the cause of many misunderstandings in the dialogue between China and the West. Out of this background arises a primary thesis concerning the relationship between law and religion: we must clarify the legal status of religion in China. Only by determining the constitutional nature and status of religion can we know how we can enhance our understanding of constitutionalism and its practice in China.

The Chinese Constitution is more a political framework and historical declaration than a fundamental charter of freedom.⁶ Among the values within the Constitution, which are implied in the Preamble, the power of the party is the first priority, while religious freedom, as one sort of moral right, is much lower on the list of priorities. As a result, the latter is subject to the former. I maintain that this underlying relationship undermines the value of political liberty itself.

The constitutional protection of religious freedom: the system and its limitations

Article 36 of the Chinese Constitution (Freedom of Religious Belief Clause) states:

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.

Interpretation of this clause is not an easy task, partly because in the past scholars and practitioners resisted investing judicial resources in what they perceived as trivial issues related to Religion Clause cases. They had a difficult time seeing how the discussion of religion raised any serious issues of prudential and comprehensive social concern.⁷ Therefore, there was little effort in China to clarify the relationship between religious freedom and the features of the Chinese Constitution from a lawyer's point of view. A lawyer's point of view means not merely a doctrinal perspective, but an observation of the law's norms within a wider context of social change and historical transformation. So long as lawyers, judges, and government officials in China do not recognize the religious dimensions of social change and historic transformation in that country, there will be no urgency to develop a stronger body of law to adjudicate cases dealing with religion.

When focusing on the protection of religious freedom, most public commentary focuses on problems in institutional design rather than exploring the underlying moral principles in the political actions and regulations regarding religious affairs.⁸ To understand the Freedom of Religious Belief Clause well, the first step is to explore the constitutional structure of Chinese political and social practice.

Some would simply say that the Freedom of Religious Belief Clause recognizes that believers have the moral right to have a faith in some religion and religion is treasured as a social value in a plural society. However, according to various kinds of regulations in different fields, such as education, science, and technology, religion is usually considered as merely instrumentally useful, like a fire or a gun, and should be constrained and excluded from many fields where it is deemed not useful, education especially.⁹ Whether freedom of religion should be taken as intrinsically valuable is still controversial and this social situation interacts with the prevailing political notion of religion. In modern China, religion per se is a controversial issue. In the past thousand years, various sorts of religions have played a continuous and complex part in political development. Like in the West, sometimes religions have been the source of historical conflicts. This point cannot and should not be neglected in the study of law and religion.

Despite this history—indeed, perhaps because of it—China has a multi-level system to address religious freedom, which is comprised by Article 36 of the Constitution and several criminal and administrative

regulations. As a legacy of the reform and opening-up era, this system has been established to provide institutional guarantees to religious believers, while at the same time defining a limited scope to religious freedom. To put the arrangement in other words, the constitutional protection of religious freedom is in essence a systematic control and management of religious affairs. But the imposition of controls, of course, can conflict with religious freedom.

In order to have a full view of this system, we need to consider the role that religion has played in the historical changes and the tension between religion and politics. In ancient China, generally speaking, Confucianism was taken as an official ideology in most dynasties. So we can maintain that the ancient political system was a sort of theocracy.¹⁰ However, along with official status came official domination over religion. This is a long-standing tradition, since Chinese political regimes from the Tang Dynasty to the present have required a form of registration or licensing of religious groups and assumed the right to monitor and intervene in religious affairs.¹¹ As a deep-rooted tradition within an ancient pattern of state centralization, the tight control of government on religion in different periods has made a tremendous impact on the social structure and serves as a precursor to contemporary governmental management.

Arguments for religious liberty within Chinese constitutionalism

Along with the tremendous change in Chinese political systems and international relationships since the nineteenth century, the complex relationship between religion and politics and culture has developed in new ways. The Opium War triggered a frontal clash of Chinese and Western culture, and consequently Christianity began to strike against Chinese traditional culture and thought as an alien religion. In the twentieth century, the Chinese Communist Party introduced a variant of Marxism that particularly in its most revolutionary forms was often hostile to religion. Such a historical background shapes to a large extent the constitutional framework of religion in the second half of that century.

During the years of Chinese Communist Party rule, we have witnessed some steps away from *rule by law* (in roughly the first 30 years) toward the *rule of law* (in the recent 30 years).¹² The protection of religious freedom, for example, is closely connected to the transformation from rule

by law to rule of law. Although China is a communist country, there are many religious believers and organizations. The persistence of religion has led the government to deem religious belief as a freedom worthy of constitutional protection, regardless of the conflict between religion and the political conviction of the party. So the “Basic Views and Policies on Religion in Socialist China” states that

It is unrealistic to claim that religion will perish soon after the establishment of the socialist system and the development of the economy and culture, and it violates the basic view of Marxism on religion to think that religion can be eliminated by administrative order and other coercive measures; hence [this view that religion will perish soon] is completely wrong and harmful.¹³

Except in the Cultural Revolution period, the government’s political and legal practice on religion conforms to the spirit of this document. We can see that in the 1954 Constitution, the first constitution of new-built China, there is a single article that provides for the protection of religious freedom, although without any reference to relevant rights and obligations.¹⁴ The 1982 Constitution reaffirms the political and legal system of China, and it proclaims religious freedom explicitly as well, in its Article 36.

While the constitutional norms are the fundamental basis for the protection of freedom, it is essential to interpret the administrative regulations that put the constitution into effect. Normally there are two perspectives on how to interpret those regulations. One is the technical or institutional dimension; the other is the theoretical dimension. The technical dimension is related to questions such as who has the power to interpret the constitution, how can the constitution be enforced, and how can alleged violations of the Constitution be redressed. The theoretical dimension, however, focuses on the values that are manifested or hidden in the regulations, and the methodology to solve value conflicts by institutional adjustments.

It should be noted that the technical and theoretical dimensions are related. This is indeed true in the interpretation of Article 36. To some extent, the protection of religious freedom has made dramatic improvement since the 1980s due to the management and occasional aid of government. However, reflecting the prudential characterization of religion in the “Basic Views and Policies on Religion in Socialist China,” the Constitution treats religion warily as a constructive social practice

and does not help foster a positive image of religion. The value judgment implied in the Constitution that religious activities may be inclined to “disrupt public order, impair the health of citizens or interfere with the educational system of the state” leaves too much space for public power to misuse discretion and to interfere with religious activities. This posture toward religion is reinforced by “a legislative system regarding religious affairs whose extension and provision are wide-ranging and detailed.”¹⁵

Judged in the theoretical perspective, the protection of religious freedom presents a dilemma. Since religion is both personal and public, how can we make a stringent separation between the personal dimension and the public dimension of religion? Most provincial religious affairs regulations claim to regulate religious affairs in the relevant function or scope, which are affairs related to national interest and public social interest.¹⁶ This means these regulations only aim to serve as a guarantee to the national and public social interest by preventing possible harm and destruction caused by religious activities. Given the difficulty of separating the personal and public aspects of religion, legislators should constrain themselves from exercising excessive power in trying to manage the effects of specific religious activities on the public. However, most regulations have a prejudice that collective religious activities outside a designated religious places or in public would negatively influence the public interest and thus should be confined stringently to officially recognized houses of worship, seminaries, and similar places. Bias of this kind exists in most provincial regulations on religious affairs.

A second theoretical concern has to do with the theme of Article 36, which is to protect religious freedom, in accordance with the spirit of rule of law, which is written in Article 5 of the Constitution.¹⁷ Unfortunately the third clause of Article 36, stating that the state protects “normal religious activities,” is a deviation from the ideal of rule of law and undermines the spirit of the article. The first problem with this clause is that the word “normal” is vague and left to provincial governments to define for themselves. There is no other place than Article 3 of Regulations on Religious Affairs, as we can see, that has given a standard that is close to the meaning of “normal activities,” namely, activities that do not disrupt public order or harm national interests. However, in an atheism-dominant political atmosphere, people are inclined to deem most kinds of religious practice as deviating from normal social and political life, and as potentially disrupting, thus leaving religious believers at a disadvantage.

And since it has already been proved repeatedly in practice that the government is tempted to expand the scope of “the public interest,” this clause is restrictive in effect even though its purported purpose is to bestow freedom. For example, Article 5 of Regulations on Religious Affairs states that the religious affairs departments of the people’s governments at the county level or higher shall, according to law, exercise administrative control over religious affairs that involve state interests or the social welfare. This article undoubtedly reflects the model of “dual management by law and administration,”¹⁸ which leaves no room for independent judicial remedy of administrative over-reach.

Political constitution and the sequence of values

These technical dilemmas regarding protection of the right to religious belief can be overcome by legislation and gradual improvement in social construction. Although the 2004 Regulations on Religious Affairs is just an administrative regulation, not a law,¹⁹ it symbolizes the essential transition of a governmental model from administrative policies to law and regulations. While a social consensus is still developing about the benefits of having a basic law on religion, the positive contribution of religion in social service and charity, such as the role Christians played in aiding victims of the 2008 earthquake, has been gradually recognized to varying degrees. However, the deep theoretical dilemmas we have seen earlier cannot be solved by legislation. They have to be solved in ways that correspond to the organizing ideas and political tradition in which the Constitution is grounded. So it will be helpful for us to figure out why the right to religious belief is weakened by the Chinese constitutional structure as a whole.

There are several ways in which a constitution can fail in protecting freedom. One is vagueness of regulations, such as the “normal” criterion stipulated in Article 36. Another case is value conflict, which means the value of freedom is outweighed by other values. But it is still unclear as to what kind of value sequence is in the Chinese Constitution. In this section I will focus on how the Chinese Constitution prioritizes values. Although the Constitution has enumerated various kinds of political and social freedom, the limits of these freedoms are still uncertain and need more interpretation.

Among the many debates in contemporary constitutional studies, one is about the methodology of constitutional inquiry. Two representative theories are “constitution hermeneutics,” which focuses on the normative study of a constitutional text and advocates the supremacy of constitutional norms,²⁰ and “political constitution theory,” which argues that public law is a complex product of political discourse and constitution research should pay close attention to the influence of political discourse on constitution. Space constraint does not allow me to elaborate this methodological debate in detail. I simply note that I will employ the political constitution theory, which provides insight into the deep structure of constitutional phrases and ideas.

The most prominent advocate of this approach in China is Professor Chen Duanhong. In his formidable article titled “Constitutional Law as the Fundamental Law and Higher Law of Our Country,” he regards the essential character of the Chinese Constitution as “law of survival,” which purports to be saving the nation from extinction and ensuring its existence. This sense of purpose in the text defines a characteristic national ethic, affirms the fundamental hierarchy of values implied in the Preamble of Chinese Constitution, and guides almost all the constitutional amendments of the 1982 Constitution. The main theme of his article is “the five fundamentals,” which captures the Constitution’s lively feeling of political change and justifies the political actions of the party and government:

- (a) That Chinese people are led by the Communist Party is the first fundamental.
- (b) Socialism is the second fundamental.
- (c) Democratic centralism is the third fundamental.
- (d) Modern construction of socialism in China is the fourth fundamental.
- (e) Protecting fundamental rights of individuals is the fifth fundamental.²¹

These five fundamentals manifest collectively the instrumental value of the Constitution and the inner spirit of political action—to obtain prosperity—which reflects the core points of the political constitution in Chinese context. Political action is action undertaken for the sake of the common good of a society. The common goods of a society are such ends or purposes that are intrinsically worthwhile or instrumentally desirable to other ends.²² Hence we can regard this bundle of fundamentals as

formulating a hierarchy of political ends or values. The first three fundamentals lie at the first or ultimate level of value, which is the principle of allocation of power. The fourth one lies at the second level of value, which is the historical vocation and the national ideal. The fifth one lies at the third level of value, namely, the moral autonomy and dignity of an individual human being.

We can infer from the hierarchy that the Constitution is endowed with a special political morality. It might seem that the first two kinds of values are instrumentally desirable, in that they help achieve deeper and more universal ends, say, the protection and promotion of freedom or rights. However, this is merely an illusion. The truth is that the first level of value, specifically the leadership of the party, is the trump that occupies the core of political morality and can outweigh the other two kinds of values.²³ This value hierarchy, when observed from a historically and socially dynamic point of view, would give rise to frequent conflicts between different levels of values. This is difficult to understand without looking back at the historical record of political and constitutional transition. The challenges to religious freedom illustrate the point about how these conflicts arise.

The main purpose of the 1954 Constitution is to consolidate the revolutionary achievement in the form of law, reinforcing an independent road to development and the leadership of the Communist Party. The 1982 Constitution carried on this mission and made comprehensive regulations on the fundamental institution and mission of the country. The most remarkable political action in the 1980s and 1990s was the development of policies of reform and opening up. These policies function in two ways. On one hand, they reaffirm the leadership and legitimacy of the party in the light of its economic achievement. On the other hand, they reaffirm the basic task of the nation to concentrate on socialist modernization. At the same time, the new constitution states that individuals are entitled to more political space and economic rights or freedom. The highlight of this progress is that human rights were written into the Constitution in 2004. Furthermore, the enactment of Contract Law in 1999 and the Real Right Law in 2007 serve as great strides in protecting individual autonomy.

However, this does not mean that human dignity and moral autonomy are completely advocated in the improved legal system. On the contrary, I contend that it is the higher level of value for socialist construction in the Constitution that explains recent efforts to strengthen the right

to property or basic political freedoms such as freedom of association. More specifically, the logic behind these efforts is that by means of economic freedom or the right to property, individuals can transform wealth into a social force, which can better serve the purposes of socialist construction and the party. A typical example is the enactment of the Real Right Law. The two major tasks in the first article of the law, which provides its legislative purpose, state that the present law is enacted with a view to maintaining “the basic economic system of the state,” and thus protecting “the socialist market economic order.”²⁴

Moreover, although political freedoms such as freedom of speech or press do not concern wealth directly, their implementation is thought to be one of the most significant forces to promote spiritual civilization, which is a motivator of socialist construction. Socialist construction is composed of two main tasks: to achieve material abundance, and to enhance socialist morality. By means of political freedom, people can pursue spiritual virtue, which provides motivation and intellectual support for the material construction, according to Marxist philosophy.

To sum up, the wide variety of freedoms protected in the Constitution have less to do with human dignity or intrinsic value of life than with the collective morality needed for the accumulation of national material wealth. These kinds of freedoms characteristically are neutral and morally powerless in fighting against external restriction and invasion. Thus they cannot be classified as a conception of liberty, the political value that identifies those areas of freedom that government ought not limit or invade.

Religious freedom, however, cannot be simply classified as a neutral freedom that can be directed under the guidance of the first four fundamentals. In contrast with all the political or social rights or freedoms such as the right to work (Article 42), the right to religious freedom is essentially a political liberty in two ways. First, religion is per se a coherent system of viewing life and the world, and it usually regards a transcendent entity—a divinity—as the ultimate authority for personal conviction and action. This belief directly contravenes socialism and the ideological underpinnings of the party. Second, religion as a social force can unite people together to worship and to reform the spiritual and cultural structure of the society. This force differs from the inner logic of socialist construction and may even oppose it. Religion thus is a politically independent social element that does not fit with the Constitution’s highest values. In short, the protection of the right to religious belief as

stated in the Constitution is essentially a restriction of political liberty and a reduction of religion's intrinsic value to an instrumental value that is worthy of protection only if it serves the first two levels of value in the Constitution. This interpretation, I believe, reveals the main reason why the Constitution only protects "normal" religious activities and leaves the power of judgment to administrative institutions. It implicitly recognizes the religious challenge to its hierarchy of values and authority.

Constitutionalism and the court

Political development must take into account the diverse features of a country. But this fact raises a question: Can China adapt its own conception of constitutional values to more universal principles of constitutionalism? This question raises an even more fundamental theoretical issue: What is constitutionalism? My answer to these questions is that constitutionalism is a universal political principle, but in practice it can be implemented within different institutions. This is not to propose that there is a sort of Chinese characteristic constitutionalism, but that there may be a distinctive institutional design which conforms both to the political situation of China and to broader principles of constitutionalism, such as the supervision of power and the protection of freedom.²⁵

Apparently the value hierarchy of the current Constitution conforms to the party's vision of political progress but fails to live up to principles of constitutionalism. On the one hand, people's courts in China are endowed with particular political missions. On various occasions courts should play an instrumental role to sustain the political pursuit of values such as (b) and (d) mentioned earlier. One typical example of this kind of undertaking is the seventeenth Party Congress's appeal to courts to participate in "innovative" social management.²⁶ This has transformed the role of court from neutral adjudicator to active social participant.

On the other hand, the judicial view of the protection of religious freedom demonstrates another tension. From a judicial point of view, the most prominent concerns about the Constitution are the feasibility of judicial review and the judicial application of constitutional norms. The latter is usually stimulated by social appeals to basic rights in significant cases that have occurred in recent years. Observed in constitutional perspective, almost all the basic rights cases have the potential to transform institutions and reshape social perspectives, even to change priorities of

principle and value. Those cases mostly concern the rights of equality, political rights, the abolition of traditional regulatory measures, and the right to religious freedom. They cannot be simply classified as neutral freedoms that can be directed under the guidance of the first four fundamentals.²⁷

We can see that these issues are so crucial in touching the deep life-line of political and social reformation that if the courts can undertake the project to push forward and serve as the guardians of basic rights, the pace of healthy social change will be quickened and intrinsic values other than wealth-oriented desires will be socially identified and treasured. However, this is just an ideal, not the reality. According to Article 128 of the Constitution,²⁸ the courts are deeply constrained by the five fundamentals and are not eligible to make judgments on any possible conflicts between different levels of values. The Supreme People's Court is responsible to the National People's Congress and its Standing Committee. Local people's courts at different levels are responsible to the organs of state power that created them. Courts, in other words, have little independence. So during these three decades in the new era, we have already witnessed the impotence of the courts in most crucial political cases.

As to the protection of religious freedom, the court is more embarrassed in the sense that it almost closes the door for appeals regarding religious affairs and leaves it to administrative institutions. Just as is stated in the Regulations on Religious Affairs, the religious affairs department of People's governments at the county level or higher shall, according to law, exercise administrative control over religious affairs that involve state interests or the social welfare. There is still not a basic law on religious freedom to bind governmental actions. Technically, administrative legislation can get rid of the examination by the Standing Committee of the National People's Congress, and need not publicize conflicts of different sides and get legislative consensus. So this method is transferring the possible risk and disagreement that is caused by legislation to administrative measures.²⁹

Conclusion

There are two dramatic improvements to the Chinese constitutional system in the last two decades: the provision of the rule of law and

the respect for human rights in the Constitution. However, I am not optimistic about the protection of religious freedom as a liberty in the constitutional framework. The Constitution's underlying purposes have been disguised by the positive-sounding adornments of rule of law or human rights. This problem is perfectly demonstrated in the "National Human Rights Action Plan" (2009–2010). Human rights claimed in this plan remain instrumentally valuable and lie at a lower level of importance than social development, because

the Chinese government, in the light of the basic realities of China, gives priority to the protection of the people's rights to subsistence and development, and lawfully guarantees the rights of all members of society to equal participation and development on the basis of facilitating sound and rapid economic and social development.³⁰

The true nature of religious freedom as a political liberty will remain undermined by the hierarchy of values of the Constitution and the dual management by law and administration. This is the basic theme of this article. But we should not be so pessimistic about the future role of religious freedom in the political understanding and picture of social progress. Notwithstanding the five fundamentals fixed by the written Constitution, that sequence of values will not be steady forever. Now that the protection of free trade and the right to property is confirmed in the legal system, a relatively independent civil society will continue to grow, which will reshape national ethics and complicate a simple emphasis on property rights alone. I am fairly convinced that once the social power of religion, with its ability to mold new paradigms of life and motivate in-depth social cooperation, is fully brought to bear, it can induce a culturally heterogeneous sphere in which the sequence of values can adjust organically. Most importantly, there will be ample foundation for the transformation of national ethics from prosperity to liberty, and the ideological constitution to constitutionalism as well.

Notes

- 1 The "Real Right Law," enacted in 2007, establishes the basic law for regulating and protecting private property in China. See Han Dayuan, ed., *A True Record of the Legal Debates of the PRC in Sixty Years: The Constitution Volume* (Xiamen: Xiamen University Press, 2009), chs 10 and 17.

- 2 John Rawls, *Justice as Fairness* (Cambridge, MA: Harvard University Press, 2003), 2.
- 3 Du Wenzhong, *Constitutionalism of Modern China* (Beijing: Law Press, 2009), ch. 3.
- 4 Though there was a powerful central government during that period, people were surrounded by terrors, betrayals, and cruelties. What's worse, law enforcement agencies were destroyed by mass movements. In this sense we can say that the situation resembles a Hobbesian natural state.
- 5 Hou Xinyi, "A Country Heading for Democracy and Rule of Law," *Qian Jin Forum* 3 (2011): 41.
- 6 It states in the Preamble that "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; it is the fundamental law of the state and has supreme legal authority. The people of all nationalities, all state organs, the armed forces, all political parties and public organizations and all enterprises and undertakings in the country must take the Constitution as the basic norm of conduct, and they have the duty to uphold the dignity of the Constitution and ensure its implementation." This statement has the appearance of Western constitutionalism, but as we shall see, the matter in reality is more complicated.
- 7 See, e.g., Zhang Qianfan, *Introduction to Constitutional Law* (Beijing: Law Press, 2004), 561.
- 8 See, e.g., Ma Ling, "On Citizen's Exercise of Religious Freedom in Our Country," *Nanjing University Law Review* 2 (1999): 136–142; Yao Junkai, "On Religious Liberty and Its Protection by Rule of Law," *The Magazine of the Protestant Churches in China* 19 (2007): 32–35. Those articles mainly focus on the improvements of institutional protection of religious freedom, which are the uniform answers to problems of religion and politics.
- 9 See Du Jiwen, "A Discussion on the Problem of Incorporating Religious Theology into National Education System and Research Institutions," *Science and Atheism* 2 (2010): 25–28.
- 10 See Yang Yang, "On Confucianism and Its Theocracy Thought," *Qi Lu Journal* 1 (1999): 80–86.
- 11 Daniel H. Bays, "A Tradition of State Dominance," in Jason Kindopp and Carol Lee Hanmrin, eds, *God and Caesar in China* (Washington, DC: Brookings Institution Press, 2004), 26.
- 12 The Chinese phrases of rule by law and rule of law vividly show the different implications of the two kinds of legal ideal. Both are composed of two words. There is a character component that means knife in "rule by law," while there is one that means water in "rule of law." Knife means violence, i.e., taking law as an instrument to achieve certain political aims. Water, however, denotes supreme virtue. This implication captures the core points of rule of law,

namely, that governmental actions and legal practice should abide by some basic political ideals.

- 13 “Basic Views and Policies on Religion in Socialist China,” document found at the State Administration for Religious Affairs (SARA) website. <http://sara.gov.cn/gb/zcfg/zc/75352506-2bdo-11da-8858-93180af1bb1a.html>.
- 14 Article 88 of the 1954 Constitution: “Citizens of the People’s Republic of China Enjoy Freedom of Religious Belief.”
- 15 Feng Yujun, “An Investigation on the Enforcement of Religious Affairs Administrative Law in China,” *Law and Social Development* 1 (2011): 130.
- 16 See the newly promulgated *Regulations on Religious Affairs of Shandong Province* (2011), Article 48(b): “Religious affairs” refers to relevant affairs of religion that are related to national and public interests.
- 17 In the 1999 amendment of the Constitution, a new section was added to Article 5: “The People’s Republic of China practices ruling the country in accordance with the law and building a socialist country of law.”
- 18 A term given by Professor Gao Quanxi in his “Exploratory Study of Model of Duality in China’s Current Law-Based Management of Religion,” *China Law* 3 (2009): 75–78.
- 19 In China laws are typically created and enacted by National People’s Congress (NPC) and its Standing Committee. But under the empowerment of NPC, the State Council can legislate in some areas in the form of administrative regulation, such as economics, education, and culture. To some extent administrative regulations can work as specification of laws, but their legal effects are lower than laws.
- 20 See Lin Laifan, *From Constitutional to Normative Constitution* (Beijing: Law Press, 2001).
- 21 See Chen Duanhong, “Constitutional Law as the Fundamental Law and Higher Law of Our Country,” in his *Constituent Power and Fundamental Law* (Beijing: China Legal Publishing House, 2010), 283–292.
- 22 See Robert George, “Religious Liberty and Political Morality,” in his *In Defense of Natural Law* (New York: Oxford University Press, 1999), 127.
- 23 This is reaffirmed in the “Three Supremacies” thought given by the president of PRC, Hu Jintao, in a speech to chief justices and prosecutors in 2007. Three Supremacies refer to the supremacy of the leadership of the party, the supremacy of the people’s interests, and the supremacy of the constitutional law. This thought is articulated by many professors, and most notably, the president of the Supreme People’s Court, Wang Shengjun, in his “Insisting on the ‘Three Supremacies’: Guidelines for the Judicial Work Keeping Pace with the Times,” *Journal of Law Application* 10 (2008): 4–6.
- 24 See Article 1 of the Real Right Law: “For the purpose of safeguarding the basic economic system of the state, maintaining the socialist market economic order, clearly defining the attribution of the res, giving play to the

- utilities of the res and protecting the real right of the right holders, this Law has been formulated in accordance with the Constitution Law.”
- 25 This may seem like a vague political standpoint. For the limitation of space, I cannot give an in-depth explanation here as to why we need a parochial conception of constitutionalism that is suitable in a transformational society in China.
- 26 See Zhou Zhihua, “The Identification of Roles of Courts in the Innovation of Social Management,” *Legal Information* 11 (2010): 48–50; Dong Zhiliang, “Courts Are the Participants and Impellers of the Innovation of Social Management,” *Legal Information* 11 (2010): 54–56.
- 27 See Chen Duanhong, “Constitutional Law as the Fundamental Law and Higher Law of Our Country,” in his *Constituent Power and Fundamental Law* (Beijing: China Legal Publishing House, 2010), 314–315.
- 28 Article 128 of the Constitution states that the Supreme People’s Court is responsible to the National People’s Congress and its Standing Committee. Local people’s courts at different levels are responsible to the organs of state power which created them.
- 29 Liu Peng, “The Process of Rule of Law for Religion in China,” in his *Pu Shi Social Science Selected Papers* (Beijing: Pu Shi Social Science Institute, 2011), 48.
- 30 *National Human Rights Action Plan of China* (2009–2010). http://www.china.org.cn/archive/2009-04/13/content_17595407_2.htm.