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Dual Lenses: Using Theology and International Human Rights to Assess China's 2005 Regulations on Religion

Joel A. Nichols*

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I. INTRODUCTION

As a communist state, religion remains closely regulated in China. But despite common understandings among many Americans, it is not true that Christianity is illegal in China. To be sure, one must be a member of the Communist Party (and therefore a professed atheist) to be in the highest levels of the central government, and the government does closely monitor the religious activities of China's residents, but there are hundreds of thousands of legal Christians in China—and even more “unregistered” Christians. Although reliable estimates are notoriously hard to come by (in part because of this combination of registered and unregistered believers), it is reasonable to assume that there are between 35 and 110 million Christians in China's 1.3 billion member population.¹ And there are also many

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1. See International Religious Freedom Report 2005 (China), U.S. State Department (released by Bureau of Democracy, Human Rights, and Labor), <http://www.state.gov/g/drl/rls/irf/2005/51509>.

believers of other faiths, including Buddhism, Islam, Taoism, and folk religions.² With such high numbers of religious believers in an avowedly atheist state, it is unsurprising that the Communist Party would “prefer[] to co-opt and harness religion rather than to fight it.”³

One of the main ways that China has sought to harness religion is to require official state registration by religious groups. Five religious groups or categories have been officially recognized by the Chinese government: Buddhism, Catholicism,⁴ Taoism, Islam, and Protestantism. (Official Protestantism in China is usually known as the Three-Self Patriotic Movement, or TSPM).⁵ Existing alongside these five, monolithic registered groups are a host of unregistered Chinese religious groups (such as Christian “house churches” and the like). Adherents of these unregistered groups are frequently in danger of persecution by virtue of their religion, as they operate outside the bounds of the law. Of course, these groups often refuse to register precisely because they are unwilling and unable to give even tacit approval to the state’s policies regarding the promotion of communism, or because they are unwilling to permit possible state interference in their internal religious teachings, or because they are unwilling to join the tenets of the five permissible registered groups.

htm (last visited July 10, 2006); see also Jason Kindopp, *Policy Dilemmas in China’s Church-State Relations: An Introduction*, in *GOD AND CAESAR IN CHINA* 1, 2 & nn.2-3 (Jason Kindopp & Carol Lee Hamrin eds., 2004) (estimating 12 million Catholics and 45-60 million Protestants in 2000). For a slightly varying estimate, including all religious adherents (and not just Christians), see Eric R. Carlson, *China’s New Regulations on Religion: A Small Step, Not a Great Leap, Forward*, 2005 *BYU L. REV.* 747, 771 (2005) (listing about 200 million religious believers in China, and contending that only about 140 million belong to registered religious groups).

2. International Religious Freedom Report 2005, *supra* note 1.

3. Carlson, *supra* note 1, at 749.

4. As discussed below, Catholicism as recognized by the Chinese government is not necessarily co-extensive with normal conceptions of Roman Catholicism under the direction of the Pope. See, e.g., Breffni O’Rourke, *China: Mixed Signals on Catholic Appointments Hint at Internal Policy Differences*, RADIO FREE EUROPE/RADIO LIBERTY, May 17, 2006, <http://www.rferl.org/featuresarticle/2006/5/FB421B58-2180-4704-8B9D-A586D24D7951.html> (last visited June 7, 2006) (discussing tensions between China and the Vatican over China’s ordination of “Catholic” bishops without the official consent and blessing of the pope); *China Names New Catholic Bishop*, BBC NEWS (May 7, 2006), <http://news.bbc.co.uk/2/hi/asia-pacific/4982530.stm> (last visited June 7, 2006) (same). The Chinese government believes that Rome is a foreign power and therefore is wary of allowing papal control over the local Chinese Catholic congregations.

5. See Yihua Xu, “Patriotic” Protestants: *The Making of an Official Church*, in *GOD AND CAESAR IN CHINA*, *supra* note 1, at 107.

On November 30, 2004, China's State Council promulgated a new set of regulations governing internal religious affairs in China.⁶ These new "Regulations on Religious Affairs" became effective March 1, 2005⁷— and presumably supplanted and replaced a host of provincial and local regulations touching upon religion in China. While China does not have a "federal" system in the same way that the United States does, it appears to most scholars that the plain intent of the new regulations was to be supreme over all the land. Indeed, the primary goal of Chinese officials in passing the regulations was "to help expand government management of religious affairs."⁸

These new regulations on religion must be analyzed and assessed on their face, for there are not yet any "implementing guidelines," which are often issued to interpret the meaning of regulations for the local officials who must enforce them. Further, these new regulations do *not* have any impact on religious foreigners in China (e.g., missionaries), who remain governed by Decrees 144 and 145.⁹ Although it is often stated that such persons are not allowed to evangelize in China (and indeed, it would be illegal to do so under applicable law), such foreigners are often asked to "teach" at universities—often with a wink and a nod from local officials who know that there is more going on than just the usual academic instruction. While this "sometime" enforcement of the law¹⁰ is quite problematic and troubling for foreign missionaries (in that what was once

6. Carlson, *supra* note 1, at 747 & n.3. See generally James Tong, *A New Framework for State-Religion Relations: The Regulations on Religious Affairs of China, March 2005*, <http://www.christianityinchina.org/download/forumpacketfinal.pdf>, at 5-19 (last visited July 10, 2006) (discussing the legislative and political events involved in promulgating the regulations, and discussing the process for educating local officials about the new regulations).

7. Regulations on Religious Affairs (Decree of the State Council of the People's Republic of China, No. 426), *English translation reproduced in* Carlson, *supra* note 1, at 782-97 [hereinafter Regulations]. For alternative translations of the Regulations, see sources cited at Carlson, *supra* note 1, at 782 n.136.

8. United States Commission on International Religious Freedom, *Annual Report of the U.S. Commission on International Religious Freedom*, <http://www.uscirf.gov/countries/publications/currentreport/2006annualRpt.pdf#page=19> (2006), at 26 [hereinafter USCIRF Report] (last visited June 28, 2006).

9. See Regulations Governing the Religious Activities of Foreign Nationals Within China (1994), http://www.chinaculture.org/gb/en_aboutchina/2003-09/24/content_24874.htm (last visited July 6, 2006) (representing Decree 144 as signed by Premier Li Peng on Jan. 31, 1994); *Regulation Governing Venues for Religious Activities*, http://www.chinaculture.org/gb/en_aboutchina/2003-09/24/content_24884.htm (last visited July 6, 2006) (representing Decree 145 as signed by Premier Li Peng on Jan. 31, 1994).

10. Lawrence A. Uzzell, Statement at the Hearing of the United States Commission on International Religious Freedom (February 7, 2005), <http://users.sisqtel.net/cliles/IRFW/archives/2005/2005-03-01.htm> (last visited July 13, 2006).

protected may soon be unprotected, without any change in the written law), further discussion of foreign religious missionaries must wait until another day.

While I am admittedly not an expert on China, there are some tools at my disposal that may nonetheless yield useful insights into assessing the new regulations. Specifically, there are two vantage points—two rubrics or templates, if you will—that I will offer to look at these new regulations on religion. In the title, I have called these two “lenses,” for they provide two varying (but sometimes overlapping) ways to view the regulations. Using these lenses provides important insight into import and impact of the regulations for the citizens of China. The two lenses are: (1) theology and (2) international human rights law. About nine years ago, in an analogous context, I was assessing a new set of laws regulating religion in Russia and wrote, “In situations [like this], we would be wise to remember that human rights law cannot provide all of the answers when theology is so deeply implicated.”¹¹ Accordingly, at that time I focused almost exclusively on providing a theological framework through which a new set of regulations on religion could be understood. In Section II below, I will again heed my own advice and offer theology as the first lens through which to view the regulations.

But, while not distancing myself too much from that statement, my intention and focus here is largely to turn it on its head. Thus, in Section III, I proffer that international human rights laws can provide a useful point of departure in assessing the efficacy or offensiveness of the new Chinese law, even though theology is strongly implicated. The reason for my shift in emphasis is simple: for the Russian law, I was writing in a group of mostly lawyers assessing the law under the auspices of Emory Law School. In that context, I feared that the scholars were using human rights language to critique the new law while failing to adequately take into account theological rationales and perspectives. For this Chinese law, I have been asked as a law professor to discuss the law with a number of theologians under the auspices of Fuller Theological Seminary. This explains my heightened concern for stressing the norms of the international community (as expressed in human rights documents) as a benchmark for assessment purposes; however, I certainly do not intend to eschew theology and will contend that it has an important role to play in assessing the impact of the law.

After describing what these two lenses have to offer, Section IV briefly addresses a few of the more controversial and troubling aspects of the regulations. To be fair, there is much to be praised in the new regulations, as they appear on paper to be a significant progressive step—especially if they are interpreted in favorable ways. In that vein, Section V will offer a few

11. Joel A. Nichols, *Mission, Evangelism, and Proselytism in Christianity: Mainline Conceptions as Reflected in Church Documents*, 12 EMORY INT'L L. REV. 563, 656 (1998).

concluding observations for moving forward in ways that will promote the rule of law generally, and particularly with respect to religious freedom for believers in China.

II. THE FIRST LENS: THEOLOGY

Literally translated, “theology” addresses “words or sayings about God.” But this definition is too limited, for we commonly think about theology as a ground of religious explanation for actions. On a larger scale, we often think of theology as informing our decisions about things from polity or church structure to style of worship, to more core beliefs like doctrines of salvation, sin, grace, and the atonement. For example, a local group of Catholic believers desires to maintain connections with bishops, cardinals, and the Pope not out of personal feelings of attachment to those men, but because of deeply held theological beliefs about ecclesiology and church polity. They sincerely believe that the Pope is the Vicar of Christ, the successor to Peter, the one who is quite literally the head of the church. This is plainly a “theological” belief. It is clear that we should be able to say quite comfortably that a government cannot (or at least should not) dictate the internal theology of the local Catholic church by telling it that it must disassociate from Rome and the Pope. Nonetheless, throughout history governments have struggled with allowing local religious believers to submit themselves to a “foreign power” such as the Pope; indeed this remains an ongoing problem in China under the new regulations.

A host of other examples could easily be adduced to illustrate other theological beliefs that are potentially subject to governmental interference. One might imagine these on a continuum from individual, personal religious belief and practice, moving to group religious practice, and then moving to external interaction with non-believers. Such theological beliefs would include, among others: (1) an obligation to believe what one wants, and to worship God in particular ways or methods set forth by relevant religious texts, traditions, or other dictates; (2) an obligation to meet regularly (usually weekly) with one’s fellow believers (and the attendant right to decide for oneself who those fellow believers are); or (3) an obligation to engage the outside world, such as providing assistance to the poor. This last example involves the interaction of the believers with the world around them, and highlights the theological need for religious groups to have the same access and ability to establish non-governmental organizations (NGOs) as other groups. While governmental regulation should be more permissible by degrees at this outer boundary, the entire spectrum is laden with internal theological beliefs.

It may be illustrative, in order to indicate the potential impact that laws may have on theological beliefs, to delve more carefully into one topic.¹² By way of example, consider evangelism (which nears the end of the spectrum where a religious group's beliefs impact the world around them). The spreading of the faith is critical for every faith tradition. If one generation fails to pass on their beliefs to the next generation, the faith tradition will die. If members of a faith tradition fail to share their beliefs with persons who hold different (or no) beliefs, the faith tradition cannot grow. For Christians, these two avenues of faith transmission (internally, to the children, and externally, to non-Christians) similarly must not be neglected for the purpose of propagating their beliefs. But faith transmission is also important because of theological and scriptural mandates, as Christians are commanded both to teach their children and to "make disciples" of non-believers.¹³ Historically, there have been several different words used to describe this effort: witness (*martyria*), proselytism, mission, evangelism. Similarly, there have been a number of methods advocated for spreading the faith: proclamation, witness, Eucharistic celebration, social activism, martyrdom, and, unfortunately, even the use of force. While there is wide consensus in modern times against the use of force for conversion, there remains a surprising lack of unanimity on appropriate methods of evangelism.

For the four main groups of Christians,¹⁴ there are differing emphases and understandings of "mission" or "evangelism," which may lead to differing activities or methods of evangelism. Catholics stress that proclamation of the Gospel is a useful beginning point, but mission must also include social action, including the notion of liberation and the advocacy of political and economic freedom. All those born into the Church and baptized as infants are considered Christians, and it is the responsibility of the Church to nurture the faith of those persons as well as to spread the Gospel to other lands. Evangelical Protestants perceive of evangelism primarily as proclamation—in large measure because for evangelicals an individual's relationship with God is considered primary, personal, and grounded in individual intellectual commitment to certain truths. Evangelicals take the Great Commission of Matthew 28 very literally and believe that every individual in every nation needs to be told the Gospel

12. The following three paragraphs draw heavily on Nichols, *supra* note 11.

13. See, e.g., *Deuteronomy* 6:7 (NRSV) ("Recite [these words] to your children and talk about them when you are at home and when you are away, when you lie down and when you rise."); *Matthew* 28:19-20 (NRSV) ("Go therefore and make disciples of all nations, baptizing them in the name of the Father and of the Son and of the Holy Spirit, and teaching them to obey everything that I have commanded you.").

14. These four main groups are Roman Catholicism, Evangelical Protestantism, the Conciliar Ecumenical Movement, and Eastern Orthodoxy. Nichols, *supra* note 11, at 567 (citing *NEW DIRECTIONS IN MISSION AND EVANGELIZATION 1: BASIC STATEMENTS, 1974-1991* (James A. Scherer & Stephan B. Bevans eds., 1992)).

message so that they will have the personal opportunity to make an individual commitment. The Conciliar Ecumenical movement (mostly typified by mainline Protestantism) focuses more on ecumenism and unity among Christian churches than on proclamation. Not only is evangelism thought to occur through proclamation, but also through Eucharistic celebration, social action, and prayer. This movement especially decries any perceived “competition” among Christian groups for evangelistic candidates and places more emphasis on working with existing and indigenous Christian groups. Eastern Orthodox churches have a well-defined theology that undergirds their stance on evangelism, stressing unity and Eucharistic celebration more than evangelistic proclamation. For Orthodox believers, membership in the church is often connected to belonging to a particular body of people and frequently tied to ethnic or nationalistic groups. The Eucharist and social witness of the church are seen as the prime ways of sharing the Gospel, while proclamation is relegated to an equal or even subordinate role. Any interreligious competition is especially decried.

Drawing upon these varying understandings of evangelism, different Christian communities may place emphasis on the act of verbally sharing the Gospel with strangers, the act of celebrating Eucharist weekly in community, or the act of providing food and shelter to those in need. But regardless of the manifestation of evangelism by a particular Christian community (deriving from their varying theologies), it cannot be overemphasized that there is no disagreement about the need for evangelism in general *and* that the basis for evangelism is theological. It is therefore imperative that China’s government appreciate this “lens” of theology, understanding that the Christian religion itself mandates the spreading of the faith, so that it can legislate accordingly. It is critical that allowance be made for Christians (and other religious believers) to raise their own children in accordance with their faith and to share their faith with non-believers as their theology commands. This is not to say that there is an unfettered right to impose one’s beliefs on another person, for the right to attempt to convince people to change their religious beliefs stands in tension with the other person’s rights to privacy and to be left alone. But the difficulty of striking this delicate balance should not be used to justify outlawing the theologically-mandated sharing of one’s faith through appropriate means.

III. THE SECOND LENS: INTERNATIONAL HUMAN RIGHTS LAW

The second lens through which we should view China's new religious regulations is international human rights law.¹⁵ While "law" can have a number of different definitions, it is best understood for our present purposes as a means of social ordering. The "international" aspect of international human rights law widens the vantage point to view the entire world community ordering itself as it defines, establishes, or reiterates norms. And, as discussed below, freedom to maintain, change, or practice a religion is a human rights issue. Thus, international human rights law is useful as a measuring stick, or a benchmark, by which lawyers and other observers may assess proposed or current laws touching upon religion.

International human rights law respecting religion or belief includes two key components: freedom of conscience and freedom of exercise.¹⁶ Freedom of conscience may roughly be described as a person's freedom to believe and hold whatever theological beliefs she wants. Freedom of exercise is the right to act upon those beliefs dictated by one's conscience. Freedom of conscience is known as "non-derogable" at international law, meaning that no one (whether a state or individual) may lawfully take it away or restrict it at all under any circumstances.¹⁷ By contrast, freedom of exercise may be restricted in some circumstances, but only upon "necessary and proportionate" grounds.¹⁸ This means that persons have the right to act out their religious beliefs *unless* the government restricts them; the government is permitted to restrict such action only when it is absolutely necessary to "protect public safety, order, health, or morals or the fundamental rights and freedoms of others."¹⁹ An analogous way to think about this concept in terms more familiar to American lawyers is that the free exercise of religion may be regulated, but will be subject to something akin to "strict scrutiny."²⁰ That is, any regulation restricting the practice of religion must derive from a compelling state interest (or a reason for the government to intervene at all) *and* the governmental intervention must use the least restrictive means possible (it must restrict the right of exercise in the most minimal way possible).²¹ One thing notably absent from these international law guidelines is any mention of the necessity of

15. See generally NATAN LERNER, RELIGION, BELIEFS, AND INTERNATIONAL HUMAN RIGHTS (2000).

16. See JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 238 (2d. ed. 2005); see also LERNER, *supra* note 15, at 10.

17. WITTE, *supra* note 16, at 237.

18. *Id.*

19. E.g., International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 18, U.N. Doc. A/6316 (Mar. 23, 1976) [hereinafter ICCPR].

20. See WITTE, *supra* note 16, at 235.

21. Cf. *Gonzales v. O Centro Espirita*, 126 S. Ct. 1211, 1216-17 (2006) (describing strict scrutiny test, in case law and in the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1(b)).

disestablishing a church. While the First Amendment of the United States Constitution contains free exercise and disestablishment as its two touchstones, international law does not conclusively specify that an established religion is contrary to the freedom of religion or belief.²²

Also of key importance at international law is that rights to freedom of religion and belief are not solely individual rights, but also group (or collective) rights. Thus, not only does an individual have a right to make a pilgrimage to a particular place at a particular time, but a community of like-minded believers also has the right to travel together. Or more commonly, a community of believers has rights to gather at a set time, to worship in certain collective ways, to hold property in common, to exclude some people from their assembly, and the like. The collective nature of religious rights is important, because it is unusual for most religious rights to be practiced in pure solitude.

International law also takes into account the varying theologies of evangelism discussed previously. For example, another key feature of international law regarding religion or belief is the right to “have or to adopt” a belief of one’s choosing.²³ This language is widely interpreted to embody a right to change one’s belief, in addition to holding or adopting it. And if there is a right to believe, and a right to change one’s belief, then there is necessarily a right to evangelize in order to convince others regarding religious beliefs. But just as theology must admit that evangelism may be tempered by legitimate regulation so as to respect the privacy of others, so too international law counterbalances the freedom to change one’s belief (and to evangelize) with the other person’s right to be left alone and to be free from “coercion.”²⁴ This balancing admits of the possibility of some government intervention (to prevent “coercion”) but makes clear that the right to propagate one’s faith remains generally undeterred. Further, the right of parents to educate their children in the faith is explicitly protected from state interference.²⁵

The rights mentioned above are primarily delineated in three places in international documents. The first adumbration of these rights is in the 1948 Universal Declaration of Human Rights.²⁶ While not a binding treaty, the sentiments embodied therein are generally thought to be a good articulation

22. Steven D. Smith, *Intramural Dialogue and the Malaise of Religious Freedom*, 35 VAND. J. TRANSNAT’L L. 359, 364 (reviewing LAW AND RELIGION (Rex J. Ahdar ed. 2000)).

23. ICCPR, *supra* note 19, at art. 18.

24. *Id.*; see also Universal Declaration of Human Rights, G.A. Res. 217 A (III), art. 18 (Dec. 10, 1948) [hereinafter Universal Declaration] (discussing the right to “change ... religion or belief”).

25. ICCPR, *supra* note 19, at art. 18.

26. See Universal Declaration, *supra* note 24.

of human rights that should be respected by all governments. Article 18 of the Universal Declaration declares: “Everyone has the right to freedom of thought, conscience, and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”²⁷

The second document that elaborates these rights is the International Covenant on Civil and Political Rights (1966) [“ICCPR”]. The ICCPR is a convention to which states can bind themselves—but the status of China is a bit unclear. China has signed the ICCPR but has not yet ratified it.²⁸ Without such ratification, China is bound by the ICCPR only to the extent that it codifies customary international law. But China’s signature itself obligates China to refrain from taking “any actions that would run counter to the object and purpose” of the ICCPR until China either ratifies or disavows it.²⁹ The ICCPR follows up on the Universal Declaration of Human Rights, and spells out the rights discussed above.³⁰

The third international document that elaborates the rights of religious persons in China is the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.³¹ The 1981 Declaration does not have the status of a treaty, but is effectively a restatement of the basic human rights of freedom of religion and belief. It is accordingly applicable to all states, including China. While not formally binding by enforcement, it is quite useful as a benchmark to assess a state’s compliance with international standards on freedom of religion or belief. One way to measure such compliance comes through the United Nations Special Rapporteur, appointed by the U.N. Commission on Human Rights specifically to monitor compliance with issues under the 1981 Declaration.³²

27. *Id.* at art. 18.

28. Natasha Parassram Concepcion, *Human Rights Violations Against Muslims in the Xinjiang Uighur Autonomous Regions of Western China*, 8 HUM. RTS. BRIEF 19, 20 (2000).

29. *Id.* at 21.

30. ICCPR, *supra* note 19, at art. 18.

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Id.

31. G.A. Res. 36/55, U.N. Doc. A/RES/36/55 (Nov. 25, 1982).

32. See Abdelfattah Amor, *The Mandate of the UN Special Rapporteur*, 12 EMORY INT’L L. REV.

The 1981 Declaration addresses a number of specific rights in some detail, including: the right to worship (including the right to assemble); the right to maintain and establish places for such worship; the right to establish and maintain charitable and humanitarian institutions; the right to speak and write about one's faith; the right to solicit voluntary financial contributions; the right to train and educate clergy; and the right to establish and maintain communications with fellow believers at both the national and international levels.³³

These and other elucidations of religious human rights are useful in very practical ways in protecting the rights of religious believers in various countries. One recent example is the case of Ake Green.³⁴ Green is a pastor in Sweden who was imprisoned for preaching to his own congregation about sexual morality—specifically for condemning homosexual behavior during a sermon to his congregants in 2003.³⁵ The authorities viewed this as contravening Swedish laws that prohibited discrimination or ill speech (incitement) on the basis of sexual orientation, despite the fact that Green never advocated violence of any kind toward homosexuals. Green was initially convicted, but in 2005 his conviction was overturned on appeal. The legal reasoning in the case turned, in large part, on Article 18 of the ICCPR and the incompatibility of punishing Green for speaking his religious beliefs. Whatever one thinks of the contents of Green's views, the case underscores the advantages of having measurable international benchmarks for religious rights.

Among Christian groups—and especially conservative, evangelical Christian communities—there is often a surprising resistance to endorsing human rights, including religious human rights. There are at least three reasons to adopt and use the language and mechanisms of the modern human rights regime for religion and belief, which are at least partially illustrated by the Green case. First, evangelical Christians should care about human rights for purely “parochial” reasons.³⁶ That is, it is in one's self-interest to look out for religious human rights of others, for it helps ensure that one's own rights to speak, believe, and worship will concomitantly be protected. Second, and more importantly, human rights are important of their own

945-50 (1998) (describing how the Special Rapporteur provides a general survey and specific on-site evaluations of member states of the United Nations).

33. G.A. Res. 36/55, at art. 6, U.N. Doc. A/RES/36/55 (Nov. 25, 1982).

34. See, e.g., The Becket Fund for Religious Liberty, *Sweden – Criminalizing Religious Speech – Ake Green*, <http://www.becketfund.org/index.php/case/93.html> (last visited July 10, 2006).

35. *Id.*

36. ALLEN HERTZKE, *FREEING GOD'S CHILDREN: THE UNLIKELY ALLIANCE FOR GLOBAL HUMAN RIGHTS* 36 (2004).

accord. Human rights derive from the notion that there are certain rights that inhere in people simply because they are human. A basic respect for human dignity virtually compels this conclusion—and, in Christian terms, a theological respect for the creation of humans in the image of God logically and necessarily leads to the same result.³⁷ Third, religious rights may well be thought of as an embodiment of all human rights, for within religious rights are the right to assemble, the right to speak, the right to be free from deprivation without due process of law, the right to be free from governmental control, and the like.

Despite the importance of this catalog of religious rights, there is little by way of accountability structures in place in the international community. Instead, monitoring and enforcement of these religious rights are left mostly to independent countries (and, to some extent, the Special Rapporteur).³⁸ Since 1998, the United States has maintained a special commission on religious freedom whose purpose is to monitor the status of freedom of religion and belief vis-à-vis the benchmarks of international law, and to issue independent policy recommendations to the United States.³⁹ While these annual reports are not binding, they do influence United States' policy and are oftentimes a useful point of reference and a catalyst for discussion between the United States and other countries. With respect to China, the latest Commission report was quite critical of the regulation of religion overall, including criticism of the 2005 regulations.⁴⁰ In addition to the pressure from the United States government (including the Commission reports), other governments, and non-governmental monitoring organizations, China also has other strong incentives at the moment to conform to international norms on religious freedom, including the attention garnered by the upcoming 2008 Olympics in Beijing and the increased scrutiny of its human rights record in connection with China's recent admittance to the World Trade Organization.⁴¹ While these reasons alone do not ensure full compliance with international norms, the time is ripe for China to align itself more fully with the international community on matters of freedom of religion and belief. The lens of international human rights law can be a helpful aid in evaluating whether that alignment is occurring.

37. See *Genesis* 1:26 (NRSV) ("Then God said, 'Let us make humankind in our image, according to our likeness.'").

38. See, e.g., Peng Liu, *Unreconciled Differences: The Staying Power of Religion, in GOD AND CAESAR IN CHINA*, *supra* note 1, at 149, 154-58 (discussing dialogue between Canadian and Chinese officials regarding religious freedom, and between Norwegian and Chinese officials).

39. See USCIRF Report, *supra* note 8.

40. See *id.*

41. See Kim-Kwong Chan, *China's Socioeconomic Changes and the Implications for the Religion-State Dynamic in China*, 2004 B.Y.U. L. REV. 325, 325 (2004).

IV. LOOKING THROUGH THE LENSES AT CHINA'S NEW LAW

Using these dual lenses of theology and international human rights law yields a set of insights that might prove useful in assessing the tone and effect of the new law and any forthcoming accompanying implementing regulations. I do not propose to grant a comprehensive assessment of the regulations, as some others have already begun to do.⁴² And in this short space I cannot even do justice to the regulations just through these two lenses (leaving aside many historical, cultural, and political arguments that must be addressed). But it is nonetheless useful to highlight some provisions that appear particularly problematic as written or as potentially interpreted. While it is likely that China will issue implementing guidelines to assist local officials in interpreting and carrying out these regulations, no such implementing guidelines have been issued to date. In fact, it appears that the implementing guidelines for Shanghai for the 2005 regulations were withdrawn after reservations were raised by the United States Commission on International Religious Freedom and by international legal scholars. The U.S. Commission further plans “to offer Chinese officials a detailed analysis of the new regulations and to compare them with international human rights standards regarding the freedom of thought, conscience, and religion or belief.”⁴³ That process will hopefully prove useful and yield more salutary interpretations and clarifications that both accord fully with prevailing international norms and also respect the various theologies of the sundry religions.

Registration. The new regulations require religious organizations to register with the state, which necessarily implies some level of state control over the activities.⁴⁴ There are also detailed provisions regarding the registration of venues for gathering for religious activities and collecting religious donations.⁴⁵ The notion of registering at all is a severe problem and hindrance for many religions, especially for those denominations who want to keep the government out of the internal affairs of the church. Given China's history of suppressing religious groups, there may be good reason to refrain from cooperating too closely with the government—both for internal

42. See, e.g., Carlson, *supra* note 1; Lauren Homer, *The New Regulation on Religious Affairs in China: A Legal Analysis* (April 7, 2005), <http://www.christianityinchina.org/download/forumpacketfinal.pdf>, at 92-123; cf. Carolyn Evans, *Chinese Law and the International Protection of Religious Freedom*, 44 J. CHURCH & STATE 749 (2002) (assessing China's policies toward religion up to 2002 in light of international human rights instruments respecting freedom of religion).

43. See USCIRF Report, *supra* note 8, at 26.

44. See Regulations, *supra* note 7, at 783-84, art. 6.

45. *Id.* at 786-90, arts. 12-26.

theological reasons (such as believing that there is a clear distinction between earthly and spiritual functions) and for practical and historical reasons, such as a history of persecution. It seems especially likely that evangelical Christian groups would be reticent to register, given their often counter-majoritarian theology and their likely hesitation to cooperate too closely with a state that is not known for welcoming divergent theological belief and teaching. Members of currently unregistered house churches would also be particularly likely to refrain from handing over the names of members and leaders and meeting places (as is required under the regulations) because of the government's history of imprisoning many house church leaders and members.⁴⁶ In short, there appears to be no obvious need for required registration other than continued governmental control and monitoring of churches.

A quite separate concern, and not inconsequential, is the difficult practical administration of registration. The regulations make no provision for the length of time it will take churches to register, nor do they seem to allow for any grace period.⁴⁷ If the registration itself is at all difficult or time-consuming, or if the government bureaucracy is inefficient in processing the thousands of registrations, then churches may potentially be penalized. It is unclear whether there is a grace period, whether the process will be tedious, and whether there will be enough time to complete the task even if religious groups should choose to undertake it.

Education. Religious education is also a problem under the new regulations, as state approval is required.⁴⁸ Concerns about state control of religious curriculum again arise, and it is readily apparent that the dictates of both theology and international human rights law would mandate parental control over the religious education of their children, without governmental interference.⁴⁹ These detailed provisions for registration and state control of religious schools run counter to such parental control.

The Ban Against "Foreign Influence." The regulations seek to control the inner workings of a church further by prohibiting "foreign forces" from having control of religious affairs and requiring "independence."⁵⁰ This is especially problematic for the Catholic Church, which is apparently prohibited from looking to the Vatican for leadership, control, and

46. See USCIRF Report, *supra* note 8, at 22 (referring to "severe penalties" for unregistered religious groups); see also Carlson, *supra* note 1, at 772 (identifying additional disincentives for registration). See generally Regulations, *supra* note 7.

47. See Regulations, *supra* note 7, at 783-84, art. 6 (providing no specific time period within which a "religious body" must register).

48. See *id.* at 784-85, art. 8 (requiring an "application," "examination," and "a decision of approval or disapproval" by the religious affairs department of China's State Council); see also Carlson, *supra* note 1, at 759 (detailing the procedure set out in Articles 8 and 9 for state approval).

49. See Regulations, *supra* note 7, at 785, art. 9 (listing six "conditions" that must be met in order to establish formalized religious education).

50. See *id.* at 783, art. 4.

ordination.⁵¹ This also presents problems for the Orthodox Christian community in looking to external leadership and for Tibetan Buddhists in looking to the Dalai Lama.⁵²

Religious Publications. The new regulations only allow religious publications to be printed by state-approved agencies.⁵³ Once again, this keeps religious activities within the control of the state. In this case, the state will have control over the content of religious brochures and information, and it will also be able to control access to printing presses and even the possible dissemination of literature. A further problem is that there are logistically not enough state printing presses to keep up with demand, meaning that presumably much of the religious literature will not be able to be reproduced legally even when permissible by the state.

Evangelism. While not mentioned in the new regulations, evangelism by foreigners continues to be disallowed under the 1994 law.⁵⁴ This directly contradicts both the internal theology of religious groups as well as the dictates of international law. Evangelism by Chinese citizens does not appear to be addressed directly, but the regulations stress that citizens must “respect each other and co-exist in harmony”⁵⁵ and that religious publications must not “jeopardize the harmonious co-existence between religious and non-religious citizens.”⁵⁶ Provisions such as these leave open the possibility that many direct forms of evangelism will be disallowed.

Governmental Supervision of Religious Personnel, Doctrine, and Practice. The new regulations give the government the authority to “determine” whether religious leaders are qualified, as they must also be registered with the government.⁵⁷ Thus, the government in this manner potentially exercises one more set of controls on the theology and teachings of religious groups by effectively having a veto over leadership positions. This is obviously problematic from a church autonomy perspective, and runs quite counter to the premise at international law that a religious group may determine its own leadership.

51. See *id.*; see also *id.* at 791, art. 27 (assigning oversight of the ordination of Catholic bishops to the State Council’s religious affairs department); Carlson, *supra* note 1, at 771.

52. See Regulations, *supra* note 7, at 791, art. 27 (mandating that the “succession of living Buddhas in Tibetan Buddhism” be overseen and approved by certain governmental religious affairs departments).

53. See *id.* at 784, art. 7.

54. See Regulations Governing the Religious Activities of Foreign Nationals Within China (1994), http://www.chinaculture.org/gb/en_aboutchina/2003-09/24/content_24874.htm (last visited July 6, 2006) (representing Decree 144 as signed by Premier Li Peng on Jan. 31, 1994).

55. See Regulations, *supra* note 7, at 782, art. 2.

56. *Id.* at 784, art. 7(1).

57. *Id.* at 790-91, art. 27; see also *id.* at 786, art. 12, 791, art. 28.

Other issues. There are some laudable omissions of potential governmental control from the new regulations, but it is unclear what the import of those omissions will be. For example, there is no mention of the Three-Self Patriotic Movement (TSPM). It is unclear, though, whether that means that non-TSPM groups are qualified to register under the regulations, or whether TSPM status is simply assumed even though not mentioned. (That is, it is possible that Protestant groups not adhering to TSPM will not even be allowed to register.)⁵⁸ Further, there is no mention of the “five recognized religions” previously discussed at Chinese law. Again, it is unclear whether this means that other religious groups may be recognized at law if they apply, or whether these five recognized religions remain the only possible categories.

Several other concerns about vagueness in the regulations could be raised as well. For example, while the regulations allow for “normal religious activities,” they do not clarify what “normal” means.⁵⁹ In fact, the regulations do not even include any definition of “religion” or “religious belief.” Further, it is not at all clear how likely it is that the state will regulate other religious matters, or on what basis the state will deem religious practices contrary to the “health, safety, and welfare” of the country.⁶⁰ In short, using the lenses of theology and international human rights law provides an entire set of questions for which there are no ready answers—and for which those answers that do exist appear to tend far too much toward state control. China needs to address these and other difficulties in the regulations as it attempts to respect religious beliefs and to conform more closely to accepted international norms.

V. MOVING FORWARD

While it is neither my intention nor purpose to prescribe future changes for China, I would be remiss if I did not make at least a few tentative observations in conclusion. In addition to the concerns raised above, it is imperative that China begin and continue to enact a series of structural reforms with the objective of establishing a level of certainty respecting the law. That is, China’s purpose must be not just to comply with and conform to international standards for purposes of World Trade Organization status, or even to comply for its own inherent value, but, more fundamentally, to

58. For further developments on this issue, see Maureen Fan, *In China, Churches Challenge the Rules: Bold Congregations Risk Official Wrath*, WASHINGTON POST, October 1, 2006, at A19 (describing several house churches that have registered with the government but do not adhere strictly to TSPM beliefs and practices, and are therefore in “a sort of legal netherworld”).

59. See Regulations, *supra* note 7, at 783, art. 3.

60. For example, religious publications are disallowed in several circumstances, including if they “jeopardize the harmony between different religions” or “discriminate against or insult religious or non-religious citizens.” *Id.* at 784, art. 7.

move toward a system that is governed by the “rule of law” rather than “rule by law.” China must seek to further predictability and certainty in the law and its application as opposed to creating “laws” that are used as after-the-fact justifications for otherwise arbitrary government actions.⁶¹

Determining how to move toward greater governance by such rule of law is not easy, but should include at least the following:

1. There is a need for precedent and certainty in the law, and groups should know in advance what legal consequences might follow from their decisions. Larry Uzzell recently observed that, in Russia, “the rule of law is a sometime thing, whether the laws be libertarian or repressive And formal laws and regulations seem irrelevant: a congregation can be legally registered and have all its papers in perfect order and still be denied access to public arenas.”⁶² This seems equally true about China’s laws on religion at present. China’s “sometime” enforcement leads to uncertainty, confusion, and favoritism, and should be avoided.

2. There is a need to pass laws that are clear, and not vague. Or, in the instant case, the implementing guidelines that aid the local officials need to have enough detail that people know what will be enforced. This is particularly true in a legal regime such as China that forces religious groups to register.

3. There is a need for legal remedies if people are wrongly prosecuted under the law.

4. There is a need for an independent judiciary. Citizens need to be able to take comfort in the fact that laws will be equally and fairly applied in a non-arbitrary fashion, and that the courts will act as a check on other state actors. This can only occur if judges are allowed to operate and make decisions independently of other state organs, without fear of repercussions from those state organs and organizations.

61. See, e.g., Randall Peerenboom, *Let One Hundred Flowers Bloom, One Hundred Schools Contend: Debating Rule of Law in China*, 23 MICH. J. INT’L L. 471, 476 (2002); Carlson, *supra* note 1, at 747; USCIRF Report, *supra* note 8, at 26-28.

62. Uzzell, *supra* note 10.

5. China should move toward increasing its receptivity toward comparative and international approaches in crafting and interpreting its laws. This has begun to occur with these 2005 regulations on religions and is a salutary move.

6. Any restrictions on the free exercise of religion must be necessary and proportionate, and commensurate with international obligations.

7. Finally, and quite importantly, there is a need to move toward a much greater general separation of government from religion. Religious freedom will be more secure overall if the functions of the state and religious groups are less intertwined. Among other things, this will mean that religious groups should not have to register at all. It will also mean that religions will be able to publish their own literature (without state interference) and to instruct their children in their faith as they see fit.