

## **PAST WOUNDS, PRESENT SCARS: A HISTORICAL-LEGAL ANALYSIS OF RELIGION, REGULATION, AND RIGHTS IN ARTICLE 36 OF THE CHINESE CONSTITUTION**

**Joseph Chu\***

### **Abstract**

This article focuses on the role of written constitutions and religion in the Chinese context, with a focused examination of the “no foreign domination qualifier” (“NFDQ”) of religion in Article 36 of the Chinese Constitution, for which little to no dedicated research has been conducted to date. The article conducts a historical-legal analysis to uncover reasons for the inclusion of the NFDQ in the Chinese Constitution, aiming to identify the nature of this unique clause. By examining treaties involving foreign control of Christianity imposed by various Western powers on nineteenth century China and their effects, the article identifies the NFDQ as both constitutionally denouncing past foreign control of religion, as well as mandating indigenous-Chinese management of religion in China. Based on this, the article examines how past foreign control of Christianity relates to the formation and structure of the Three-Self Patriotic Movement and Chinese Christian Association, the two national bodies tasked with overseeing Christianity in China. The article concludes by arguing that awareness of historical antecedents is indispensable for a proper understanding of the modern legal system governing religion in China and should not be neglected in discourse on the relationship between the state

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\* BA (Hons) (NYU); LLB (Hons) (Adel); BCL (Oxon); DPhil Law Candidate (Oxon). I wish to convey my deep thanks to Professor Paul T Babie of the University of Adelaide for his constant guidance, feedback, and support. I also wish to express my gratitude to Professor Zheng Ge of Shanghai Jiaotong University for the initial advice he gave at this article’s conception. All and any errors remain my own.

and religion in China today.

KEYWORDS: constitutional law, Christianity, China, regulation of religion, historical-legal analysis, written constitutions, international treaties

## INTRODUCTION

While constitutions are often seen as influencing power and rights in the present, they themselves are equally influenced by the past.<sup>1</sup> It follows, therefore, that the constitution of a country may be shaped and informed by a vast array of historical antecedents, which when understood, allow for more careful consideration of a constitution's content, structure, and role in society. With its 5,000 years of recorded history,<sup>2</sup> China is no exception, and its Constitution is both embedded with and within history which must be recognized for a holistic understanding of the constitution's significance. In particular, Article 36 of the Chinese Constitution, deals with the rights and responsibilities of citizens in relation to religion.<sup>3</sup> This contains a globally unique 'no foreign domination qualifier' ("NFDQ"), which states that "religious groups and religious affairs shall not be subject to control by foreign forces."<sup>4</sup> No other constitution in the world contains the same clause.<sup>5</sup>

While the existence of the NFDQ is acknowledged by academics and governments alike,<sup>6</sup> virtually no research specifically dedicated to the NFDQ currently exists and reasons for inclusion of the NFDQ and its relevance remain unexplored. This article therefore employs historical-legal analysis to investigate factors behinds the inclusion of the NFDQ in the Constitution and its role in the wider Chinese

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1. See BRUCE ACKERMAN, *REVOLUTIONARY CONSTITUTIONS: CHARISMATIC LEADERSHIP AND THE RULE OF LAW* 1–2 (2019); see also WILLIAM B. SIMONS, *THE CONSTITUTIONS OF THE COMMUNIST WORLD*, at xiv–xv (1980).

2. See J.A.G. ROBERTS, *A HISTORY OF CHINA* 3–4 (3d ed. 2011); see also Rhoads Murphey, *The Historical Context*, in *UNDERSTANDING CONTEMPORARY CHINA* 33, 36 (Robert E. Gamer ed., 4th ed. 2012).

3. XIANFA art. 36 (1982) (China).

4. *Id.*

5. A review of the texts of the constitutions of the world currently in force reveals no identical clause. See *infra* "The No Foreign Domination Qualifier."

6. *Id.*; see U.S. DEP'T OF JUST., *CHINA (INCLUDES TIBET, XINJIANG, HONG KONG, AND MACAU) 2020 INTERNATIONAL RELIGIOUS FREEDOM REPORT* 5–6 (2020); see also Quanxi Gao, *On Rule of Law and Religious Organizations in China*, 8 *THE REV. FAITH & INT'L AFFS.* 53, 54 (2010); see also Ping Xiong, *Freedom of Religion in China Under the Current Legal Framework and Foreign Religious Bodies*, 2013 *BYU L. REV.* 605, 610 (2013).

constitutional framework, using as case studies treaties signed between 1842–1901 between Qing China and Western powers that dealt with Christianity and foreign control of religion. As will be seen, despite its relatively unknown status, the NFDQ reveals essential considerations that must be kept at the forefront of any attempt to understand the modern constitutional and legal regime governing religion in China.

The following section below sets out the purpose and parameters of the research, showing why the 1842–1901 period and treaties signed therein were selected for study. This is followed by an overview of the Chinese Constitution, Article 36, the NFDQ and respective literature on each topic.

Having canvassed the necessary background, the article then conducts a historical-legal analysis by examining the texts of nineteenth century treaties between China and Western powers that dealt with Christianity, as well as their consequences. Reflecting on the findings from the historical-legal analysis, the article then identifies the constitutional denunciation and mandating roles of the NFDQ and discusses the relevance of the NFDQ as displayed in contemporary examples in China today through the Three-Self Patriotic Movement and the Chinese Christian Association.

#### PURPOSE, SCOPE, AND FRAME

##### PURPOSE

This article has three primary goals: to explore historical-legal antecedents of the NFDQ, to promote historical-legal analysis as a means of studying Chinese law and religion, and to contribute English-language research to academic discourse on Chinese constitutional law, especially insofar as it pertains to religion. While treaties and religious incidents in nineteenth century China have been the subject of scholarly attention,<sup>7</sup> there has yet been no attempt at drawing an explicit connection between them and the NFDQ in Article 36 of the

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7. Chan Hoiman & Ambrose Y. C. King, *Religion*, in UNDERSTANDING CONTEMPORARY CHINA 373, 394–95 (Robert E. Gamer ed., 4th ed. 2012); Miwa Hirono, *Evangelism and Its Unintended Consequences: Christian Missionaries in the Nineteenth and Early Twentieth Centuries*, in CIVILIZING MISSIONS: INTERNATIONAL RELIGIOUS AGENCIES IN CHINA 73, 74 (2008); PATRICIA BUCKLEY EBBEY, CHINA: A CULTURAL, SOCIAL AND POLITICAL HISTORY 224–26 (2005); David Cheung, 3.3 *The Treaty System*, in HANDBOOK OF CHRISTIANITY IN CHINA VOLUME TWO: 1800 TO THE PRESENT 296, 296–331 (R.G. Tiedemann ed., 2010) [hereinafter Cheung, 3.3]; ROBERTS, *supra* note 2, at 166–67; SU KAIMING, MODERN CHINA: A TYPICAL HISTORY 101 (1985).

Constitution. By examining treaty texts and surrounding circumstances, this article argues that instances where religious affairs and bodies were under foreign control left significant historical legacies that prompted the NFDQ's inclusion in Article 36 of the Constitution. This demonstrates why understanding the NFDQ and its history is critical to properly contextualizing law and religion in China today.

Second, historical-legal analysis is an important and undervalued approach for understanding the Chinese Constitution, especially so in discourse of Article 36 and the NFDQ. Though Article 36 has received academic attention, much of the literature is devoted to normative assessment of Article 36 and pointing out perceived insufficiencies in the wording and application of the text of the article.<sup>8</sup> Existing literature also makes plentiful use of comparisons between the Chinese constitutional system and that of other countries, such as that of the United States,<sup>9</sup> which though helpful at canvassing differences between systems, risks neglecting consideration of the Chinese constitutional system in its own dynamic context.<sup>10</sup> Historical-legal approaches avoid this risk, and can instead assess the significant qualitative historical, cultural, and political influences that impacted the development of the Constitution, and specifically the NFDQ.

Even where existing literature on Chinese constitutional law makes mention of history, rarely are these mentions more than cursory introductions.<sup>11</sup> As noted above, no research specifically explores the history behind the NFDQ in Article 36. This gap in the literature is concerning because, without the understanding of antecedents that a historical-legal analysis provides, it is impossible to understand the long-term political and social factors that have affected (and continue to affect) the development of a constitution, its impact on contemporary religion, and to a broader extent, law itself. The need for historical-legal understanding becomes especially apparent where scholarship suggests changes to Article 36 but fails to consider any history, rendering such suggestions incomplete at best and disingenuous at worst.<sup>12</sup> In short, historical-legal analysis

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8. See *infra* "Historical Legal Analysis."

9. See, e.g., Zhang Qianfan & Zhu Yingping, *Religious Freedom and Its Legal Restrictions in China*, 2011 BYU L. REV. 783, 783 (2011).

10. Tian Feilong, *Analysis of the Shortcomings in China's Legal Code on Religion and an Exploration of the Path to the Rule of Law in Religion*, 8 CHINESE L. & RELIGION MONITOR 26, 26 (2012).

11. See THOMAS CHIU ET AL, LEGAL SYSTEMS OF THE PRC 33 (1991); see also Zhang & Zhu, *supra* note 9, at 784; see also JIANFU CHEN, CHINESE LAW: CONTEXT AND TRANSFORMATION 79-90 (2008).

12. See, e.g., Songfeng Li, *Freedom in Handcuffs: Religious Freedom in the*

provides a necessary component for a holistic understanding of law.<sup>13</sup>

Finally, this study contributes to expanding the body of English-language scholarship examining Chinese constitutional law with a focus on the relationship between the constitution and religion. Situating this work within the English-language scholarly community, one finds a disappointing lack of awareness and understanding of the history and structure of the Chinese constitutional and legal structures and how they impact the modern regulation of religion. This ought to give pause, especially considering the focus given to religion in China in international political discourse. Given the scarcity of existing scholarship, the article provides a much-needed assessment for the English-language community of Chinese constitutional law and its relationship to modern Chinese governance of religion.

Yet, limitations must be admitted at the outset. While historical-legal research provides much needed context, there is little doubt that it (or any methodological approach, for that matter) cannot exhaustively prove a causal relationship between law and surrounding factors.<sup>14</sup> Therefore, rather than attempt to prove that historical factors led to the inclusion of the NFDQ in Article 36, this article instead conducts a series of case studies of prominent treaties and incidents. In doing so, the article mounts an argument aimed at demonstrating the likelihood of certain treaties and incidents — identified as instances of foreign control over religious bodies and affairs — playing a part in the framing of Article 36.

As discussed in the literature review below, although substantial literature has been devoted to suggesting changes to Article 36, not enough academic attention has been given to a holistic understanding of the article, including its history and position within the wider Chinese constitutional system. This article, therefore, neither suggests changes to Article 36 nor conducts a normative assessment, but instead focuses on the historical-legal factors relating to the development of one of its clauses, the NFDQ. The broader contemporary regulatory system governing religion in China is a substantive topic that is beyond the scope of the historical-legal analysis. It will only be referenced in relation to examples of the NFDQ

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*Constitution of China* 35 J.L. & RELIGION 133, 137 (2020).

13. See, e.g., Kali Murray, *Serendipity and Care: Cultural and Social History in Property Law*, in RESEARCHING PROPERTY LAW 77, 88 (2016). Though Murray focuses on property law, the principle that observing a diverse range of evidentiary sources can lead to innovative analysis applies to other areas of law as well, especially constitutional law, where political and social factors blend into the legal outcomes.

14. Laurence Lee Howe, *Historical Method and Legal Education*, 36 BULL. AM. ASS'N UNIV. PROFESSORS 15–1955 346, 349 (1950).

in practice where relevant.

#### SCOPE OF RESEARCH

There are many potential factors that could be considered in historical-legal analyses of law. This article focuses its approach by drawing case studies only from treaties imposed by Western empires on Qing Dynasty China and incidents that involved Christian missionaries and believers in relation to those treaties between 1842–1901. The relevant time-period spans from the Treaty of Nanking in 1842 to the signing of the Boxer Protocol in 1901.<sup>15</sup>

This time-period was chosen for three reasons: the availability of primary source material, the commonalities between treaties and incidents, and the prevalence of Western control of Christianity in China during this period. First, the accessibility of the original texts of treaties signed in this period allows close examination of source material conducive for historical-legal analyses, avoiding undue reliance on secondary sources. Second, the treaties and religious incidents during this period involved only Christianity,<sup>16</sup> which allows for a focused analysis of foreign control over one religion. Finally, the 1842–1901 period is selected because it spans between the first and last treaties signed by the Qing government with Western powers, and it was during this period that many instances of foreign control over religious affairs and bodies in China were observed.

While Christianity is only one of several non-indigenous religions practiced in China, it presents a unique opportunity for historical-

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15. *Treaty of Peace, Friendship, and Commerce Between Her Majesty the Queen of Great Britain and Ireland and the Emperor of China*, China–Gr. Brit., Aug. 29, 1842, [hereinafter *Treaty of Nanking*]; *Xin Chou Tiaoyue* (辛丑条约) [*Xinchou Treaty*], Sept. 7, 1901, *TREATIES BETWEEN THE EMPIRE OF CHINA AND FOREIGN POWERS: TOGETHER WITH REGULATIONS FOR THE CONDUCT OF FOREIGN TRADE, ETC.; ETC.; ETC.* 312 (William Frederick Mayers ed., 4th ed. 1902) [hereinafter *Boxer Protocol*].

16. See *Traité d'amitié, de Commerce et de Navigation Conclu à Tien-Tsin*, le 27 Juin 1858, entre la France et la Chine [*Treaty of Friendship, Commerce and Navigation Concluded at Tien-Tsin*, June 27, 1858, *Between France and China*], China–Fr., art. 13 Jun. 27, 1858, VII *RECUEIL DES TRAITÉS* 413 [hereinafter *French Treaty of Tien-Tsin*]; see also *Трактатъ , заключенный въ Тянь-цзинѣ* [*Treaty Concluded in Tianjin*], China–Russ., Jun. 13, 1858 I *Sbornik diĕistvuiūshchikh traktatov, konventsiĭ i soglasheniĭ, zakliūchennykh Rossiĕi s drugimi gosudarstvami* [Collection of current treaties, conventions and agreements concluded by Russia with other states] 249 [hereinafter *Russian Treaty of Tianjin*]. The term Christianity is used in various treaties to refer to Protestantism, Catholicism as well as Russian Orthodox Christianity. For example, art. 13 of the French Treaty of Tianjin uses the phrase “La religion Chrétienne”, while art. 8 of the Russian Treaty of Tianjin uses the same phrase, despite Russian Orthodox Christianity and Catholicism being prevalent in both France and the Russian Empire. French Treaty of Tienstin, *supra* art. 13; Russian Treaty of Tianjin, *supra* art. 8.

legal analysis when compared to other religions. Further research can (and should) be conducted on the history of foreign control of other religions and the possible impact such history had on the inclusion of the NFDQ in Article 36. However, Christianity presents a useful example for historical-legal analysis both because it is the religion that has been the most prominently introduced over the last two centuries in China,<sup>17</sup> and more importantly because it is explicitly mentioned in operative clauses of many treaties between Qing Dynasty China and Western powers. However, as little research has been done that specifically addresses foreign control of religion, this article will by necessity engage with existing historical research conducted by Chinese and Western scholars that concerns wider topics and discussions of Western imperialism and Christianity in nineteenth century China.

Having set the parameters of the analysis, the following Part provides an overview of the literature on Chinese constitutional theory, Article 36 of the Constitution, and the NFDQ.

## THE CHINESE CONSTITUTION

The history of the Chinese Constitution and theories of Chinese constitutional law may not be well known among the English-language legal community. The following sections therefore provide overviews of the Chinese Constitution, Article 36, and the NFDQ, and serve as background for the historical-legal analysis.

### A. AN OVERVIEW OF THE CHINESE CONSTITUTION

The People's Republic of China ("PRC") adopted its Constitution in 1954, five years after the establishment of the New Republic in 1949.<sup>18</sup> From this fact alone, the Chinese historical context already differs from that of some other countries, as the PRC Constitution -- as important as it was and remains -- was not the document that created the State but rather a document that was developed and adopted after the PRC had already been founded, and after the government had already been exercising leadership over the country

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17. Earliest records of Christianity entering China date back to at least 635 AD, which was earlier than the recorded introduction of Islam. However, the nineteenth century was the time in which a great increase in missionary activity was observed in China that exceeded previous periods. See MEI KANGJUNG & ZHU CHENGMING, *CHRISTIANITY IN CHINA* 1 (2005).

18. Chen Quing Bai, *Chinese Constitutional Law*, 26 BRACON L.J. 77, 78 (1994) [hereinafter Chen, *Chinese Constitutional Law*].

for half a decade.<sup>19</sup> Therefore, a historical understanding in the Chinese constitutional context is critical as the adoption of the Constitution did not mark a beginning as much as a continuation and consolidation of the PRC.

This history takes on further significance upon considering the content of the Constitution itself. The Constitution commences with a substantial preamble (over 1700 words in the original Chinese and 1200 words in official English translation) that begins with the recognition that “China is one of the countries with the longest histories in the world,” before retracing the history from the late Qing dynasty era in 1840 through the founding of the People’s Republic in 1949, all the way up to the contemporary adoption of Xi Jinping’s Thought on Socialism with Chinese Characteristics for a New Era.<sup>20</sup> The preamble is replete with significant touchstones of modern Chinese history, governance principles, and national aspirations, which include the leadership role of the Communist Party of China (“CPC”), the five principles of Chinese foreign policy, and the vision for modernization.<sup>21</sup> Not only does the content of the preamble show the importance of history in the Chinese constitutional context, but its amendment history further highlights this importance. The preamble has been amended at various points to emphasize particular events – a practice that is rarely, if ever, done in other constitutional contexts.<sup>22</sup>

The first constitution from 1954 was replaced in 1975 and again in 1978, during a period of political change within China.<sup>23</sup> The current constitution was adopted in 1982 and has been changed by five amendments since then.<sup>24</sup> Divided into four chapters, the Constitution sets out the General Principles of the country, the Fundamental Rights and Duties of Citizens, the Structure of the State, and finally, the National Flag, Anthem, National Emblem, and Capital.<sup>25</sup>

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19. A provisional Constitution was in place in 1949, but the 1954 Constitution is deemed the first formal Constitution of the PRC. *See* Chen, *supra* note 18, at 78; *See also* CHIU ET AL., *supra* note 11, at 30.

20. XIANFA, preamble (1954) (China).

21. *Id.*

22. *See id.* (mentioning ‘resistance to American aggression’ in light of the Korean War); *see also* Hungdah Chiu, *The 1982 Chinese Constitution and the Rule of Law*, 11 REV. SOCIALIST L. 143, 144 (1985), *reprinted in* 4 CONTEMP. ASIAN STUD. 1, 4 (1985) [hereinafter Chiu, *The 1982 Chinese Constitution*].

23. Chiu, *The 1982 Chinese Constitution*, *supra* note 23, at 2–3.

24. SHIPING HUA, CHINESE LEGAL CULTURE AND CONSTITUTIONAL ORDER 104, 121 (2019).

25. *Constitution*, NAT’L PEOPLE’S CONG. OF THE PEOPLE’S REPUBLIC OF CHINA, [http://www.npc.gov.cn/zgrdw/englishnpc/Constitution/node\\_2825.htm](http://www.npc.gov.cn/zgrdw/englishnpc/Constitution/node_2825.htm) (last visited



## APPROACHES TO CHINESE CONSTITUTIONAL THEORY

While this article does not focus on the operation of the Chinese constitutional system *per se*, understanding contemporary scholarship on Chinese constitutional theory provides a necessary background of the discipline. In particular, the following sections examine the two overarching theories of normative and contextualist constitutionalism.

While not all scholarship can be divided into neatly defined camps, a review of the literature reveals that existing scholarship on Chinese constitutional theory can be loosely classified into two overarching perspectives: normative constitutionalism and contextual constitutionalism. This classification of approaches to the Chinese Constitution is developed by building upon the work of Jiang Shigong, Larry Catá Backer, and Shiping Hua, each of whom suggest their own divisions for understanding contemporary scholarship on Chinese constitutional theory.<sup>26</sup>

Both normative and contextual constitutionalism adhere to a different ethos. Fundamentally, however, one commonality shared by the two approaches is the identification of what appears to be a gap between what is written in the text of the Constitution and the political reality in China.<sup>27</sup> Though this gap is often a source of criticism against the Chinese constitutional system,<sup>28</sup> normative and contextual constitutionalists address this gap from substantially different directions, as discussed below.

Most of the existing literature falls under normative constitutionalism, which argues -- to varying degrees -- that the Chinese constitutional system needs to replicate characteristics found in Western (typically United States) models of constitutionalism to be effective or legitimate.<sup>29</sup> Examples of normative constitutionalist approaches are found in the works of Li Songfeng, Lin Laifan, and

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Feb. 26, 2024) [hereinafter *Constitution*].

26. HUA, *supra* note 24, at 121; Jiang Shigong, *Written and Unwritten Constitutions: A New Approach to the Study of Constitutional Government in China*, 36 MOD. CHINA 12, 13 (2010) [hereinafter Jiang, *Written and Unwritten*]; Larry Catá Backer, *Toward a Robust Theory of the Chinese Constitutional State: Between Formalism and Legitimacy in Jiang Shigong's Constitutionalism*, 40 MOD. CHINA 168, 168 (2014).

27. Jiang, *Written and Unwritten*, *supra* note 26, at 13; RALPH H. FOLSON & JOHN H. MINAN, *LAW IN THE PEOPLE'S REPUBLIC OF CHINA: COMMENTARY, READINGS AND MATERIALS* 23–24 (1989).

28. Jiang, *Written and Unwritten*, *supra* note 26, at 13; ZHANG QIANFAN, *THE CONSTITUTION OF CHINA: A CONTEXTUAL ANALYSIS* 97 (2012).

29. Jiang, *Written and Unwritten*, *supra* note 26, at 15.

Zhang Qianfan.<sup>30</sup>

On the other hand, contextual constitutionalism advocates for an approach that takes a constitution within its own context, placing significant emphasis on studying the political, historical, and cultural dynamics that affect the exercise of power.<sup>31</sup> An important proposition of contextual constitutionalism is that constitutional study should give full consideration to all factors that regulate the exercise of power in practice, not only the written constitution.<sup>32</sup> The most prominent example of contextual constitutionalism is found in the work of Jiang and recognized by Backer.<sup>33</sup>

Another important argument from contextual constitutionalist literature is that, while Western systems have their own merit, there is no reason why other countries' constitutional systems -- which exist in different contexts -- must replicate Western-style constitutional systems to be considered legitimate.<sup>34</sup> Contextual constitutionalists thereby contend that any constitutional system should be able to develop within its own culture, history and political environment.<sup>35</sup>

The focus of this article is not to decide between various approaches to Chinese constitutional law, as a historical-legal understanding is important regardless of which perspective is adopted. Since all both normative and contextual constitutionalism are inherently forward looking, in that they tend to advocate for certain changes or suggest further developments,<sup>36</sup> any such change should be informed by history to ensure that future progress is not divorced from the past. The following sections provide an overview of key notions found in normative and contextual constitutionalism.

#### NORMATIVE CONSTITUTIONALISM: A SPECTRUM

The first approach identified is normative constitutionalism,

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30. See Li, *supra* note 12, at 116–17; see also ZHANG, *supra* note 28, at 98; see also LIN LAIFAN (林来梵), CONG XIANGA GUIFAN DAO GUIFAN XIANFA: GUIFAN XIANFA XUE DE YI ZHONG QIANYAN (从宪法规范到规范宪法: 规范宪法学的一种前言) [FROM CONSTITUTIONAL NORMS TO A NORMATIVE CONSTITUTION: A FOREWORD OF NORMATIVE CONSTITUTIONAL THEORY] 7 (2001).

31. See, e.g., Catá Backer, *supra* note 26, at 172 (“[C]onstitutionalism is not merely a legal subject, but more importantly a political one.”).

32. *Id.* at 174–77.

33. Jiang, *Written and Unwritten*, *supra* note 26; Catá Backer, *supra* note 26.

34. Catá Backer, *supra* note 26, at 187.

35. *Id.*

36. See ZHANG, *supra* note 28, at 98; Jiang, *Written and Unwritten*, *supra* note 26, at 37.

which takes the general approach of using certain criteria of constitutionalism (typically derived from the United States and other Western systems) as the universal standard by which other models are assessed.<sup>37</sup> However, close examination of literature reveals there are at least three distinct subsets of normative constitutionalism, which are labelled as the macro-normative, adjudicationist, and revisionist branches of normative constitutionalism.<sup>38</sup> While all three of these subsets still fit within the general normative constitutionalism approach and often intersect, they adopt slightly different emphases, which in turn affects the overall conclusions from their respective literature.

### 1. Macro-Normative Constitutionalism

Macro-normative constitutionalism is marked by its advocating for major changes to the Chinese Constitution, or even the scrapping of the current Constitution, in favor of a new version that is aligned to Western (typically United States) standards that would include concepts such as a strict separation of powers.<sup>39</sup> Some scholars of this approach take the view that, unless the Chinese Constitution undergoes drastic changes so that it can replicate indicia of Western constitutions, it is illegitimate and that China is a country “with a constitution but without constitutionalism.”<sup>40</sup> This “constitution without constitutionalism” critique comes from what normative constitutionalists perceive as the absence or non-enforcement of constitutional articles in the Chinese Constitution that dictate a separation of powers, checks and balances, or judicial review that restrains the exercise of government power.<sup>41</sup> However, macro-normative constitutionalism is itself criticized on the basis that it places undue emphasis on formalism (in looking only at certain indicia of constitutions) and that it virtually disregards factors extrinsic to the text of the constitution in the Chinese context that also play a role in regulating and defining the exercise of power.<sup>42</sup>

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37. Jiang, *Written and Unwritten*, *supra* note 26, at 15.

38. *Id.*

39. *Id.*; LIN, *supra* note 30; *See also* Li, *supra* note 12;

40. *See, e.g.*, Zhang, *supra* note 28, at 261 (“With a constitution but without constitutionalism, China today is prone to many crises of worldwide impact due to its sheer size and ever-growing economic power.”).

41. *Id.*; Chiu, *The 1982 Chinese Constitution*, *supra* note 19, at 13–14.

42. Jiang, *Written and Unwritten*, *supra* note 26, at 16 (“Due to limitations in their perspectives and methodologies, mainstream constitutional scholars not only fail to understand the political significance of the formalist character of the written constitution but also neglect the living constitution and the unwritten constitution

## 2. Adjudicialism

Adjudicialism is the second subset of normative constitutionalism. This approach is primarily concerned with advocating for the introduction of judicial adjudication of the Constitution, or the formation of a constitutional council -- similar to that in France -- that will be responsible for interpreting and enforcing the Constitution.<sup>43</sup> Those of this perspective do not go as far as macro-normative constitutionalists in advocating for major overhauls or replacement of the Chinese Constitution. However, for adjudicialists, the lack of judicial or supervisory enforcement has a damaging effect on the legitimacy of the Chinese constitutional system as under this perspective there is nothing that can ensure that governing powers are confined to the legal limits on their power as expressed in the words of the Constitution.<sup>44</sup>

By focusing on a means of reviewing constitutionality, adjudicialism is similar to macro-normative constitutionalism in that it advocates strongly for adopting practices found in Western constitutional systems.<sup>45</sup> A criticism of this approach, however, is that though adjudicialism raises the notion of accountability, it points to Western models as a proper path while giving little consideration, if any, to whether these models could -- and should -- be adopted in the Chinese constitutional system, which exists in a drastically different historical, political, and cultural context.<sup>46</sup>

## 3. Revisionism

Finally, the third subset of normative constitutionalism identified is the revisionism approach, which focuses solely on the text of the Constitution and its interpretation.<sup>47</sup> Revisionism is closely tied to adjudicialism because its focus on the interpretation of constitutional texts inherently raises the question of how the meaning of such texts are determined.<sup>48</sup> However, literature adopting the

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displayed in real political life in China.”).

43. Chiu, *The 1982 Chinese Constitution*, *supra* note 19, at 155.

44. Huanzhong Chen, *A Brief Overview of Law and Religion in the People's Republic of China*, 2 *BYU L. REV.* 465, 468-69 (2003); Gao *supra* note 6, at 56.

45. Chen, *Chinese Constitutional Law*, *supra* note 18, at 89-90.

46. Jiang Shigong (强世功), *Xianfa Sifa Hua de Bei Lun (宪法司法化的悖论)* [*Paradoxes in the Discourse of Constitutional Adjudication*] 2 *ZHONGGUO SHEHUI KEXUE (中国社会科学)* [CHINESE SOC. SCIS.] 18, 19 (2003).

47. See Jiang, *Written and Unwritten*, *supra* note 26, at 15.

48. *Id.* (discussing that revisionists are concerned with “what the text of the constitution should be” or “what the text is”).

revisionist perspective is more concerned with addressing the meaning and definitions of certain words used in the Constitution rather than advocating explicitly for a means of judicial adjudication of constitutionality.<sup>49</sup>

The conclusions drawn by scholars such as Tian, who for example takes a revisionist approach to understanding Article 36, are that greater definition is required to constitutional phrases, either through linguistic amendments to the Constitution or the adoption of legislative interpretations to constitutional articles.<sup>50</sup> While understanding the meaning of texts is an inherently important part of law, revisionism has been critiqued as placing an undue emphasis to the written word at the expense of considering relevant external factors such as the “political spirit and reality of China.”<sup>51</sup>

While understanding the meaning of texts is an inherently important part of law, revisionism has been critiqued as placing an undue emphasis to the written word at the expense of considering relevant external factors such as the political spirit and reality of China.<sup>52</sup>

#### CONTEXTUAL CONSTITUTIONALISM

Standing in contrast to normative constitutionalism is contextual constitutionalism, which advocates for a holistic approach that considers the political, historical, and cultural dynamics that both affect the development of a constitutional system and its operation in practice.<sup>53</sup> The most prominent example of contextual constitutionalism comes from Jiang in his work examining the written and unwritten constitutional system of China.<sup>54</sup> Jiang criticizes normative constitutionalism as being unduly fixated on formalism — such as the specific words used in the Constitution, or the absence of particular concepts and phrases used in other constitutions — as formalism restricts the study of the Chinese constitutional system only to the written elements in the Constitution.<sup>55</sup> As a result,

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49. See, e.g., Tian, *supra* note 10, at 31 (“The constitutional term ‘protect’ itself suggests that the state is pro-active, and the constitutional term ‘normal’ suggests that the state has the authority to choose.”); Zhang & Zhu, *supra* note 9, at 800 (analyzing the constitutional definitions of “evil cults” as easily manipulatable).

50. Tian, *supra* note 10, at 31.

51. Jiang, *Written and Unwritten* *supra* note 26, at 15.

52. *Id.*

53. See *id.* at 15–16.

54. *Id.* at 16.

55. Jiang Shigong, *How to Explore the Chinese Path to Constitutionalism? A Response to Larry Catá Backer* 40 MOD. CHINA 196, 211 (2014).

formalism ignores the significance of rules or practices that may not be in the written Constitution but may be just as powerful as what is written in text.<sup>56</sup> Jiang further critiques the normative constitutionalism approach as being unable to assess the Chinese Constitution objectively and on its own terms, as the literature invariably uses Western (typically U.S.) models of constitutionalism as standards against which the Chinese system is judged.<sup>57</sup> Arguments for reform of the Chinese constitutional system are often made more so that the Chinese system can more closely resemble a Western one, without regard as to whether such reforms are appropriate or helpful in the Chinese cultural and political context.<sup>58</sup> Contextual constitutionalism, as seen in Jiang's work, instead takes a historical-empirical approach that, rather than pre-determining what the Chinese constitutional scheme should look like, examines what has in fact controlled, guided, and regulated the exercise of power in China.<sup>59</sup>

Jiang argues that the written constitution serves to "affirm and reinforce the fundamental law" of China, which is that China as a nation-state is constituted by the leadership of the CPC within the system of multiparty cooperation.<sup>60</sup> This "fundamental law" finds its roots not in the constitution's text itself, but rather earlier during the revolution that led to the establishment of the new People's Republic in 1949 under the leadership of the CPC, which as discussed above, predates the adoption of the Constitution.<sup>61</sup> Given the fundamental law of the CPC's leadership in China, Jiang thereby considers the instruments that form the parameters of the CPC's operations, such as the CPC's Constitution and doctrines, form a part of China's unwritten constitution (in the sense they are not explicitly included in the constitution's text).<sup>62</sup> Recognizing therefore that there are other elements of the unwritten constitution apart from the CPC's Constitution and doctrines, Jiang argues that study of the Chinese Constitution should not ignore these extrinsic political, historical, and cultural elements, because they assist in providing a proper explanation of the political reality in China.<sup>63</sup>

Backer agrees with Jiang's approach, and advocates for

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56. *Id.*

57. Jiang, *Written and Unwritten*, *supra* note 26, at 14–16.

58. *See id.* at 14–15.

59. *Id.* at 15–16.

60. *Id.* at 23.

61. *Id.*

62. *See, e.g., id.* at 26–27 ("The party's constitution is not only a normative charter, but also an effective constitution. Its contents and political effects make it an integral part of the unwritten Chinese constitution.").

63. *Id.* at 42.

contextualizing constitutionalism within China's "unique socio-political milieu" rather than seeking to study the Chinese Constitution merely through the lens of formal and written components drawn from Western systems, against which the Chinese system will be seen as lacking.<sup>64</sup> The importance of understanding the history of a country and of the development of its constitution is also highlighted by Bruce Ackerman, who, while not examining explicitly the Chinese Constitution, argues for the need to consider the historical and cultural dynamics that influence the formation of a constitution, and warns against the dismissal of constitutions merely because they may be classified as *Communist* under Cold War mentalities.<sup>65</sup> Whether one agrees with Jiang's model of understanding Chinese constitutionalism, it nonetheless presents a unique perspective that is not limited by formalism, but allows a holistic examination of constitutionalism, which at its core is the system which regulates, guides and governs the exercise of power.

While historical-legal analysis is compatible with all the approaches to Chinese constitutional law, it may be particularly useful in contextual constitutionalism. As described above, Jiang arrives at his model of the Chinese constitutional system through historical-empirical observations as to the factors that have guided and controlled the exercise of power.<sup>66</sup> Similarly, the historical-legal analysis in this article utilizes case studies to arrive at the argument that the association between Christianity and imperialism stemming from the treaties and religious incidents was a significant factor leading to the inclusion of the NFDQ in Article 36.<sup>67</sup> This article therefore contributes a historical-legal analysis that should be considered regardless of which approach to Chinese constitutional theory is adopted, but especially contributes to the academic discourse by adopting a methodology of examining the Chinese constitutional system within its own political, cultural, and historical context.

#### AN OVERVIEW OF ARTICLE 36

Having considered the Chinese Constitution and approaches to its study, this section turns to Article 36, which addresses the rights and responsibilities of citizens in relation to religious belief and

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64. Catá Backer, *supra* note 26, at 172.

65. Ackerman, *supra* note 1, at 1–2, 7–8.

66. See generally Jiang, *Written and Unwritten*, *supra* note 26.

67. See *infra* "Historical Legal Analysis."

activities.<sup>68</sup> Article 36 was introduced in the 1982 version of the Constitution.<sup>69</sup> Before the introduction of Article 36, the previous constitution made an unelaborated mention of freedom of religious belief while containing provision for propagation of atheism.<sup>70</sup> As of the 1982 Constitution, all mentions of atheism have been dropped.<sup>71</sup> The text of Article 36 is set out below, with the NFDQ emphasized:

### Article 36

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.* [The NFDQ]<sup>72</sup>

The impact of the normative constitutionalism and constitutional adjudication approaches is evident in the literature on Article 36. For instance, one article describes Article 36 as a provision of “freedom in handcuffs” and simultaneously argues for the removal of all constitutional restrictions on religious freedom.<sup>73</sup> By focusing solely on the written text, this article does not address why restrictions (such as the NFDQ) were included in the first place and whether the reason for their original inclusion should affect proposals for change. Reviewed literature similarly can be characterized as either advocating for mechanisms for adjudication and enforcement of Article 36 or arguing for substantial changes to be made to the text of Article 36 so that it more clearly reflects notions such as a strict

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68. See XIANFA art. 36 (1982) (China).

69. See *id.*

70. See XIANFA art. 46 (1978) (China).

71. See XIANFA art. 36 (1982) (China) (emphasis added).

72. *Id.*

73. Li, *supra* note 12, at 116, 137.



separation between religious and government affairs.<sup>74</sup> Because Article 36 forms only a part of the body of laws, regulations, and policies that govern religious affairs and bodies in China, existing literature has consistently examined Article 36 in conjunction with other regulations and laws.<sup>75</sup> Literature that specifically focuses on Article 36 by itself is rare.<sup>76</sup>

### 1. The No Foreign Domination Qualifier

The NFDQ, found in the last clause of Article 36, constitutes a unique term not found in other constitutions. Even if one were inclined to argue that the inclusion of this term is the result of China being under communist leadership, this argument finds little support as neither the constitutions of previous communist states (such as the USSR) nor the constitutions of presently ‘communist’ states (Cuba, Democratic People’s Republic of Korea (“DPRK”), Laos, and Vietnam) contain a clause that closely mirrors the NFDQ.<sup>77</sup> Article 68 of the Constitution of the DPRK, for example, contains the prohibition that “Religion must not be used as a pretext for drawing in foreign forces or for harming the State or social order.”<sup>78</sup> However, the NFDQ still stands unique because, unlike the DPRK provision, it does not provide an explicit prohibition against an action, but rather qualifies and declares that religious bodies and affairs are not subject to foreign domination. By a plain reading of both the original Chinese text of the constitution, and its English translation, the wording of the NFDQ is not operationalized to place a responsibility on individual citizens.<sup>79</sup>

Given its uniqueness, the NFDQ is particularly worthy of historical-legal analysis. As will be seen, case studies of past treaties and their consequences—which came not from actions of Chinese citizens but from Western powers and their citizens possessing extraterritoriality in China—provide the most compelling explanation as to why the NFDQ is framed the way it is as a declaration rather than a prohibitive responsibility.

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74. Tian, *supra* note 10, at 32; Zhang & Zhu, *supra* note 9, at 808.

75. Tian, *supra* note 10, at 32.

76. *Id.*

77. See SIMONS, *supra* note 1, at xiv– xv.

78. JOSEONMINJUJUINHONGHWAOK SAHOEJUUIHEONBEOP  
(조선민주주의인민공화국 사회주의헌법) [SOCIALIST CONST. OF THE DEMOCRATIC  
PEOPLE’S REPUBLIC OF KOREA], art. 68.

79. See XIANFA art. 36 (1982) (China); *Constitution*, *supra* note 25.

## 2. Scholarly Consideration of the NFDQ

To date, little research specifically examines the NFDQ; that which does fails to go beyond an acknowledgement of the NFDQ's existence.<sup>80</sup> Among these comments are passing descriptions of the NFDQ as the product of "foreign bullying"<sup>81</sup> and as a means of preserving national unity and security for the sake of "maintaining the power of the [CPC]."<sup>82</sup> While arguments could be put forward in support of these descriptions, the connection between the NFDQ and these descriptions have never been elaborated. Even where the NFDQ is discussed by Tian in comparatively greater detail, focus is given only to an attempt at discerning the meaning of the words of the NFDQ, concluding with a statement that the NFDQ's "connotation is undefined and its denotation is too broad."<sup>83</sup> Such limited treatment of the NFDQ exemplifies the difficulties encountered by a strict formalist and textualist approach, while showing how a historical-legal analysis could provide a means of better understanding the Constitution as it is not bound only to the text. Therefore, while a study of the NFDQ is not possible without consideration of the written text, this article goes further and employs a historical-legal analysis of the NFDQ to contribute to a more holistic understanding and more meaningful engagement with this part of the Constitution.

### HISTORICAL-LEGAL ANALYSIS

#### A. THE NFDQ: A PRELIMINARY INTERPRETATION

This section analyzes the NFDQ and serves as the basis for the historical-legal analysis which follows. Rather than provide watertight definitions of the terms of the NFDQ, this section presents a preliminary interpretation of the clause. As noted in the literature review, few attempts have been made at understanding the meaning of the NFDQ. Therefore, providing a preliminary interpretation of the NFDQ is not only the first step for the historical-legal analysis, but also contributes to the academic understanding of the clause.

Before working towards a preliminary interpretation of the NFDQ, there are three erroneous understandings of the clause that need to be addressed. First, as revealed by a plain reading of Article

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80. Gao, *supra* note 6, at 54; Xiong, *supra* note 6, at 610.

81. Xiong, *supra* note 6, at 610.

82. Li, *supra* note 12, at 130.

83. Tian, *supra* note 10, at 32.

36, the NFDQ does not prohibit or denounce religions that are inherently foreign to China.<sup>84</sup> Of the five state-recognized religions (Catholicism, Buddhism, Islam, Protestantism and Daoism), four did not originate in China.<sup>85</sup> Daoism is the only state-recognized religion indigenous to China, with the others having entered China at different points across history.<sup>86</sup> Second, the NFDQ does not prohibit or denounce foreign citizens from being involved in religious activities or even holding teaching positions within religious bodies.<sup>87</sup> Finally, the NFDQ, by its terms, does not operate to place a personal responsibility or burden on persons holding religious beliefs in China.<sup>88</sup> While an effect of the NFDQ may be that administrative and regulatory agencies ensure that religious affairs and bodies are not subject to foreign control, the clause itself does not purport to require citizens to do or refrain from taking a specific action.<sup>89</sup>

With these potentially erroneous interpretations set aside, the following sections provide a working interpretation of the NFDQ, referring to both the original Chinese text and English translation as necessary. At the outset, it is important to remember that the clause is not so much an imperative statement as it is a declarative one. Although one could theoretically read-in the phrase “must not be” instead of “are not” in the NFDQ, declarative language has been used in both Chinese and English. Without examining now why this may be the case (further explored after the historical-legal analysis), it suffices at this point to emphasize the importance of not treating the NFDQ solely as a prohibitive command.

There are several distinct phrases within the NFDQ worth examining, as they provide the parameters in which a preliminary interpretation can be reached. The constitution itself provides no definition in the terms used in the NFDQ, nor has existing literature attempted to define them.<sup>90</sup> First, “religious bodies” and “religious affairs” are identified as the two key elements that are not subject to

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84. XIANFA art. 36 (1982) (China).

85. See *Zongjiao Yuanxiao Jibenxinxi* (宗教院校基本信息) [*Basic Information on Religions*], GUOJIA ZONGJIAO SHIWU JU (国家宗教事务局) [NAT’L RELIGIOUS AFFS. ADMIN.], <https://www.sara.gov.cn/resource/common/zjcxccxt/zjyxjbx.html> (last visited May 18, 2024).

86. Chan & King, *supra* note 7, at 382.

87. See, e.g., *Zhonghua Renmin Gongheguo Jingnei Waiguoren Zongjiao Huodong Guanli Guiding* (中华人民共和国境内外国人宗教活动管理规定) [Administrative Rules for the Religious Activities of Foreigners within the Borders of the People’s Republic of China] (promulgated by the State Council Legislative Office Order No 144, effective Jan. 31, 1994).

88. XIANFA art. 36 (1982) (China).

89. *Id.*

90. *Id.*

foreign domination.<sup>91</sup> From a plain and ordinary interpretation of these terms, one can infer that “religious bodies” could refer to bodies or organizations tasked the governance and conduct of religious matters, which could include local bodies such as churches as well as larger bodies such as religious regulatory organs. Similarly, a plain and ordinary meaning of the term “religious affairs” could be taken to mean the business, conduct, and dealings involving religion or religious matters. In other words, religious bodies and religious affairs are a considerably broad phrase that captures the operation of religion in China.

The next phrase, “foreign” which in the English exists only in one word, is actually made up of several words in the original Chinese version. In the Chinese version of the constitution, “外国势力” (or *wàiguó shìlì*) is used and is translated as “foreign” in the English translation of the constitution.<sup>92</sup> The Chinese term can be translated literally as “the power or influence of foreign countries,” and thereby refers not simply to a foreign entity, but specifically to the power and influence of foreign nations.<sup>93</sup> This literal translation will be used as the definition of “foreign,” and the significance of this wording will be further elucidated by the historical-legal analysis.

Finally, the word “domination” is taken to mean control and governance. Although domination in the English language has the connotation of a complete or overshadowing control,<sup>94</sup> the original Chinese word ‘支配’ (or *zhīpèi*) can refer to all levels of control, whether that would be administration, allocation, or total command.<sup>95</sup>

Therefore, by considering specific phrases, it is possible to develop this preliminary interpretation of the NFDQ: religious affairs or bodies in China are not subject to any level of control, administration, or influence by the power and influence of foreign countries. This interpretation provides a reasoned and informative—but neither exhaustive nor determinative—understanding of the NFDQ, which is used as the basis for the historical-legal analysis to which we now turn.

#### HISTORICAL LEGAL ANALYSIS

This historical-legal analysis draws case studies from two

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91. *Id.*

92. See XIANFA art. 36 (1982) (China); *Constitution*, *supra* note 25.

93. 外国的, CAMBRIDGE CHINESE (SIMPLIFIED) – ENGLISH DICTIONARY (ONLINE); 势力, CAMBRIDGE CHINESE (SIMPLIFIED) – ENGLISH DICTIONARY (ONLINE).

94. *Dominate*, MACQUARIE DICTIONARY (ONLINE).

95. 支配, CAMBRIDGE CHINESE (SIMPLIFIED) – ENGLISH DICTIONARY (ONLINE).

sources: texts of treaties imposed by Western powers on Qing China that deal directly with religion, and incidents involving missionaries that occurred because of such treaties taking effect. Since the focus of this historical-legal analysis is the NFDQ, the scope of the case studies selected is limited to treaties and related events that have a direct relationship with foreign control of religion. As a result, the historical-legal analysis will not focus on the opium trade, Taiping Uprising or the Boxer Uprising which, although important, are beyond the scope of the analysis.<sup>96</sup>

The historical-legal analysis consists of two phases. The first involves the examination of treaties signed between Qing China and Western powers at the conclusion of various conflicts, with excerpts from the treaties of Nanking (1842), Huangpu (1844), Wangxia (1844), and Tianjin (1858–61)<sup>97</sup> being examined in-depth as representative treaties that concerned foreign domination of religious bodies and affairs in China. Analysis of the treaties demonstrates that by processes which are described as direct, contextual, and consequential association, the treaties put religious bodies or affairs under foreign control, leading to Christianity and its expansion in nineteenth century China becoming synonymous with Western imperialism. This is argued later in the article to provide the impetus for the constitutional denunciation purpose of the NFDQ.

The second phase of the historical-legal analysis turns to specific case studies of events that followed and surrounded the treaties. Namely, the Juye Incident (1897), the death of Auguste Chapdelaine (1856), and the involvement of missionaries in the treaty processes are highlighted as events that took place as consequences of the treaties placing religion in China under differing degrees of foreign control and resulted either in direct imperialist advances by Western powers (e.g., usurpation of Chinese territory) or in further treaties that placed religion even more firmly under foreign domination.

To situate the treaties and their surrounding events within their contemporary historical scene, the next section provides context regarding interactions between Western powers and Qing China in the nineteenth century. In particular, the section highlights how the growth in Western missionary movements coincided with a period of

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96. See generally JOSEPH W. ESHERICK, *THE ORIGINS OF THE BOXER UPRISING* (1987); David Cheung, 3.4 *The Boxer Uprising*, in *HANDBOOK OF CHRISTIANITY IN CHINA VOLUME TWO: 1800 TO THE PRESENT* 338, 338–43 (R.G. Tiedemann ed., 2010) [hereinafter Cheung, 3.4]; Kathleen L. Lodwick, 4.1 *Missionaries and Opium*, in *HANDBOOK OF CHRISTIANITY IN CHINA VOLUME TWO: 1800 TO THE PRESENT* 354, 354–60 (R.G. Tiedemann ed., 2010).

97. Tianjin was romanized as Tientsin or Tien-Tsin or Tientsin prior to the standard English spelling of Tianjin. All of the treaties refer to the same city.

Western imperialist expansion.

### 1. Nineteenth Century China: Historical Context

By way of introduction, it is helpful to briefly set forth the historical context in China and parts of the Western world around the 1842–1900 period. At the turn of the nineteenth century, a period of Christian missionary zeal arose in Europe and the United States, which at times was linked with nationalism, especially in the cases where religious and national affairs were closely associated.<sup>98</sup> Missionary efforts had turned towards China, which at that point was seen as the most populous and least Christian nation on the earth.<sup>99</sup> This zeal has been noted by a historian as marked by a “need to [] battle against paganism.”<sup>100</sup> Prior to this increase of Western missionary efforts in China in the nineteenth century, Christian missionaries had entered China on several occasions to differing degrees of success.<sup>101</sup> However, even when Christianity was opposed by the Chinese people or authorities prior to the nineteenth century, opposition has been recorded to have been on the grounds of Christianity being heterodoxic to traditional Chinese thought, rather than because Christianity was associated with foreign control or domination.<sup>102</sup>

The first British Protestant missionary to China, Robert Morrison, arrived in 1807.<sup>103</sup> Morrison’s arrival was followed by those of Elijah Bridgman and Karl Gützlaff, the first missionaries to China from the United States and Germany respectively.<sup>104</sup> These missionaries, and others like them, arrived in China during a time of natural disasters, corruption within the Qing government, and the mass importation of opium by certain Western powers.<sup>105</sup> Indeed, though the missionaries

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98. David Cheung, *3.1 Developments in Western Christianity*, in HANDBOOK OF CHRISTIANITY IN CHINA VOLUME TWO: 1800 TO THE PRESENT 282, 286, 297 (R.G. Tiedemann ed., 2010) [hereinafter Cheung, 3.1]; Bernadette Li, *Western Missionaries in China*, 46 VINCENTIANA 1, 1 (2002).

99. Cheung, 3.1, *supra* note 98, at 283.

100. *Id.* at 282.

101. Li, *supra* note 12, at 1; Chan & King, *supra* note 7, at 393–94.

102. Chan & King, *supra* note 7, at 393–94.

103. ROBERTS, *supra* note 2, at 195; Cheung, 3.1, *supra* note 98, at 283.

104. Cheung, 3.1, *supra* note 98 at 284; MICHAEL C. LAZICH, E.C. BRIDGMAN (1801–1861): AMERICA’S FIRST MISSIONARY TO CHINA 1 (2000); JESSIE GREGORY LUTZ, OPENING CHINA: KARL F. A. GÜTZLAFF AND SINO-WESTERN RELATIONS, 1827–1852, at 38–39 (2008).

105. BUCKLEY EBBEY, *supra* note 7, at 211–19; ROBERTS, *supra* note 2, at 170–77; David Cheung, *3.2 Chinese Historical Context*, in HANDBOOK OF CHRISTIANITY IN CHINA VOLUME TWO: 1800 TO THE PRESENT 291–95 (R.G. Tiedemann ed., 2010) [hereinafter Cheung, 3.2].

coming to China during the time belonged to a number of different groups, one unifying element between them was the common dependence on ships run by opium traders for carriage of personnel and remittances.<sup>106</sup> More importantly, however, these missionaries had come to China seeking converts the same time that Western imperialist powers had come to China seeking trade and political concessions, the latter of which were secured by conflicts and the treaties that followed them.<sup>107</sup>

## 2. Case Studies: Treaties

As a result of many armed conflicts with Western powers in which Qing China was defeated, China was not in a position to negotiate treaties that were favorable to its interests.<sup>108</sup> Treaties that imposed onerous reparations as well as trade and political obligations were consequently accepted by Qing China, which at the end of conflicts was not able to negotiate with equal bargaining power.<sup>109</sup> Table 1 summarizes these significant treaties between Qing China and Western powers. Although most of the terms in the treaties dealt with trade and political concessions, effects on religion particularly relevant to the historical-legal analysis are highlighted in the table, with excerpts from the treaties of Nanking, Huangpu, Wangxia, Tianjin and Peking to be examined in closer detail.

**Table 1**

### *Summary of Relevant Treaties*

<b>Treaty (Year)</b>	<b>Western parties</b>	<b>Notable effects</b>
Treaty of Nanking (1842) <sup>110</sup>	Great Britain	Opening up of five ports to British residence, trade, and enterprise. Ceding of Hong Kong to British Crown

106. Cheung, 3.1, *supra* note 98, at 285.

107. Cheung, 3.2, *supra* note 105, at 294–95.

108. *Id.*; BUCKLEY EBBEY, *supra* note 7, at 204–05.

109. Cheung, 3.3, *supra* note 7, at 296; BUCKLEY EBBEY, *supra* note 7, at 205; SU, *supra* note 7, at 28; ROBERTS, *supra* note 2, at 166.

110. Treaty of Nanking, *supra* note 15, art. II, III.

Treaty of the Bogue (1843) <sup>111</sup>	Great Britain	British subjects to enjoy privileges of 'most favored nation' (see discussion below)
Treaty of Huangpu (1844) <sup>112</sup>	France	French subjects given access to same port as British. Inviolability of French property declared. French subjects given 'extraterritoriality' (see discussion below)
Treaty of Wangxia (1844) <sup>113</sup>	United States	Opens same ports as British and French to US subjects US subjects receive special protection
Treaties of Tianjin (1858-61) <sup>114</sup>	Great Britain France United States Russia Germany	Each separate treaty provides for Western subjects to receive 'extraterritoriality', 'most favored nation' privileges, and to differing degrees allows missionaries to enter all of China to propagate religion. To

111. Supplementary Treaty Between Great Britain and China, China-Gr. Brit., Oct. 8, 1843, 31 BSP 132 [hereinafter Treaty of the Bogue].

112. Traité d'Amitié de Commerce et de Navigation Conclu à Whampoa, le 24 Octobre 1844, entre la France et la Chine [Treaty of Friendship, Commerce and Navigation Concluded at Whampoa, October 24, 1844, Between France and China] China-Fr., Oct. 24, 1844, V RECUEIL DES TRAITÉS 230 (entered into force Aug. 25, 1845) [hereinafter Treaty of Huangpu].

113. Treaty with China, China-U.S., Jul. 3, 1844, 8 Stat. 592 [hereinafter Treaty of Wangxia].

114. Treaty of Peace, Friendship, and Commerce Between Great Britain and China, China-Gr. Brit., Jun. 26, 1858, 48 BSP 47 [hereinafter British Treaty of Tien-tsin]; French Treaty of Tien-Tsin, *supra* note 16; Treaty of Peace, Amity, and Commerce, Between the United States of America and China, China-U.S., Jun. 18, 1858, 12 Stat. 1023 [hereinafter U.S. Treaty of Tientsin]; Russian Treaty of Tianjin, *supra* note 16; FREUNDSCHAFTS-, Handels- und Schiff-fahrts -Vertrag zwischen den Staaten des Deutschen Zoll- und Handels-Vereins, den Grossherzogthümern Mecklenburg-Schwerin und Mecklenburg-Strelitz, sowie den Hansestädten Lübeck, Bremen und Hamburg einerseits, und China andererseits [Friendship, Trade and Shipping Treaty Between the States of the German Customs and Trade Association, the Grand Duchies of Mecklenburg-Schwerin and Mecklenburg-Strelitz, and the Hanseatic Cities of Lübeck, Bremen and Hamburg, and China], China-Ger., Sept. 2, 1861, II Treaties, Conventions, Etc. Between China and Foreign States 115 [hereinafter German Treaty of Tianjin].



		differing degrees, the treaties also dictate that the Qing government has no authority to interfere with Western missionaries or Chinese converts to Christianity.
Supplementary Treaty of Tianjin (1858) <sup>115</sup>	France	Qing government magistrate responsible for execution of French missionary denounced
Convention of Peking (1860) <sup>116</sup>	France	French missionaries allowed to purchase land across all of China, Christianity is permitted to be openly practiced and propagated across China
Subsequent Treaties (1862–68) <sup>117</sup>	Belgium Denmark Holland	Separate treaties gave subjects of some countries ‘extraterritoriality’, and further provision for propagation of Christianity throughout all of China.

115. Articles Séparés Servant de Complément au Traité Conclu entre S. M. l’Empereur des Français et S. M. l’Empereur de la Chine, à Tientsin [Separate and Secret Articles Serving as a Complement to the Treaty of Tientsin Concluded Between His Majesty the Emperor of the French and His Majesty the Emperor of China], China-Fr., Jun. 27, 1858, VII RECUEIL DES TRAITÉS 427 [hereinafter Supplementary Treaty of Tientsin].

116. Convention de Paix Additionnelle au Traité de Tien-Tsin Conclue à Pékin [Additional Peace Convention to the Treaty of Tien-Tsin Concluded in Peking], China-Fr., Oct. 25, 1860, VIII RECUEIL DES TRAITÉS 135 [hereinafter French Convention of Peking].

117. Traité d’amitié, de Commerce et de Navigation entre la Belgique et la Chine [Treaty of Friendship, Commerce, and Navigation Between Belgium and China], Belg.-China, Nov. 2, 1865, 6 Recueil des Traités et Conventions Concernant le Royaume de Belgique 202; Treaty of Tientsin, China-Den., Jul. 13, 1863, II Treaties, Conventions, Etc. Between China and Foreign States 313 [hereinafter Treaty of Amity, Commerce, and Navigation Between Denmark and China]; Treaty of Tientsin, China-Neth., Oct. 6, 1863, II Treaties, Conventions, Etc. Between China and Foreign States 339 [hereinafter Treaty Between the Netherlands and China]; Trattato d’amicizia, Commercio e Navigazione tra l’Italia e la Cina [Treaty of Friendship, Commerce, and Navigation Between Italy and China], China-It., Oct. 26, 1866, 2 Trattati e Convenzioni 207 [hereinafter Italian Treaty of Peking]; Treaty of Tientsin, China-Port., Aug. 13, 1862, II Treaties, Conventions, Etc. Between China and Foreign States 251 [hereinafter Treaty of Friendship, Commerce, and Navigation Between Portugal and China].

Before discussing the effects of the treaties in reference to specific texts, it should be noted that mentions of Christianity and religion were absent from the earlier treaties (pre-1858) which instead dealt with opening up ports in which subjects of Western powers could reside and conduct their enterprises, which as discussed later, included missionary work.

Having set out the various treaties imposed on Qing China by Western powers, the next sections examine the direct, contextual, and consequential association between Christianity and Western imperialism that arose from the treaties that put religious bodies and affairs subject to varying degrees of foreign control.

*a. Direct Association*

The instances where the treaties create a direct association between Christianity and Western imperialism are found in those articles which directly mention religion and place it under foreign control. There are several examples of direct association, and three representative instances are considered below. First, Article XIII of the French Treaty of Tianjin (1858) read:

The Christian religion having as its aim to bring men to virtue, the members of all Christian sects will have full security of their persons, property, and religious practices, and *effective protection will be given to missionaries who peacefully go into the interior of the country*, with passports of the kind mentioned in Article VIII.

No hindrance will be brought by the authorities of the Chinese empire to the right which is recognized for every individual in China to embrace Christianity if he wishes and to follow its practices without being liable to any penalty inflicted for this fact.

All that has been previously written, proclaimed or published in China by order of the government central to Christian worship, is completely abrogated, and remains without value in all the provinces of the empire.<sup>118</sup>

Article VI of the French Convention of Peking (1860) provided:

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118. French Treaty of Tien-Tsin, *supra* note 114, art. XIII (emphasis added).

In accordance with the Imperial Edict issued on March 20, eighteen hundred and forty- six, by the august Emperor Tao-Kouang, the religious and charitable establishments which were confiscated from Christians during the persecutions of which they were the victims, will be returned to their owners through the Minister of France in China, to whom the Imperial government will deliver them, with the cemeteries and other buildings which depended on them.<sup>119</sup>

Finally, Article VIII of the British Treaty of Tianjin (1858) contained this clause:

The Christian religion, as professed by Protestants or Roman Catholics, inculcates the practice of virtue, and teaches man to do as he would be done by. *Persons teaching it or professing it therefore, shall alike be entitled to the protection of the Chinese Authorities; nor shall any such, peaceably pursuing their calling, and not offending against the laws, be persecuted or interfered with.*<sup>120</sup>

These three excerpts provide the most representative examples of treaties that placed religion under foreign domination, thereby giving a direct association between Christianity and Western imperialism. By their own terms, these articles effectively take religion (or a part of it) out of Chinese sovereignty and place it under foreign control and domination. This is most evident in the final clause of Article XIII of the French Treaty of Tianjin, which ‘completely abrogated’ all and any previous law concerning Christianity made by Chinese authorities, leaving Christianity in China at the unfettered discretion and direction of the missionaries and preachers, who were themselves subjects of Western powers seeking trade and political concessions.<sup>121</sup> A close, direct, association between Christianity and Western imperialism therefore emerges from these treaties.

*b. Contextual Association*

In addition to direct association between Christianity and Western imperialism arising from articles that placed religion under foreign domination, contextual association also occurred. Contextual

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119. French Convention of Peking, *supra* note 117, art. VI.

120. British Treaty of Tianjin, *supra* note 114, art. VIII (emphasis added).

121. French Treaty of Tien-Tsin, *supra* note 114, art. XIII.

association arises when articles concerning religion were placed in the same treaties as articles which dictated onerous trade and political concessions imposed on Qing China. Contextual association differs from direct association in that articles concerning religion did not need to require that religion be under direct foreign control—as was the case in the examples above. Instead, these religious articles bring about a contextual association between Christianity and Western imperialism when they were placed alongside other articles that brought trade, legal rights, or political factors under foreign control. The clearest examples of articles that placed non-religious factors under foreign control were the articles dealing with “extraterritoriality” and the “most favored nation” (“MFN”) clauses.<sup>122</sup> Extraterritoriality referred to the privilege which nationals of Western powers enjoyed, granting them immunity from laws in Qing China and instead making them only subject to the laws of their own nation. Article XI of the United States Treaty of Tianjin (1858) contains a representative example of an extraterritoriality clause:

[C]itizens of the United States, either on shore or in any merchant vessel, who may insult, trouble, or wound the persons or injure the property of Chinese, or commit any other improper act in China, *shall be punished only by the consul or other public functionary thereto authorized, according to the laws of the United States.*<sup>123</sup>

Extraterritoriality represented a significant affront to sovereignty in Qing China because it was unreciprocated—it only affected foreign citizens in China, as opposed to Chinese persons in other nations.<sup>124</sup> Therefore, extraterritoriality gave effective immunity to foreign citizens in China.

The effects of articles imposing onerous or unequal obligations were further exacerbated by the most favored nation articles, inserted in treaties to afford citizens of one Western power privileges equal to citizens of another Western power if the latter’s treaties conferred more favorable concessions. Again, the United States Treaty of Tianjin (1858) contains a representative example, found in Article XXX:

The contracting parties hereby agree that should at any time the Ta-Tsing [Qing] Empire grant to any nation, or the merchants or citizens of any nation, any right, privilege, or favor, connected either

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122. See Su, *supra* note 7, at 64–65.

123. U.S. Treaty of Tientsin, *supra* note 114, art. XI (emphasis added); see also British Treaty of Tientsin, *supra* note 114, art. XVI.

124. Chinese persons, who were either not allowed into Western countries, or allowed only as laborers and or coolies, were nevertheless subject to the laws of Western nations in which they resided. *But see* Italian Treaty of Peking, *supra* note 115, art. LIV.

with navigation, commerce, political or other intercourse which is not conferred by this Treaty, *such right, privilege, and favor shall at once freely enure to the benefit of the United States*, its public officers, merchants, and citizens.<sup>125</sup>

MFN articles effectively eroded China's ability to negotiate separately with each Western power, as one concession granted to a Western power would be effectively granted to another, even if the latter was not a party to the present treaty. Though MFN and extraterritoriality articles did not concern religion directly, religious concessions were included in the privileges that could be extended by MFN articles.<sup>126</sup>

MFN and extraterritoriality, as seen in the articles above, exemplify onerous and unequal terms that were imposed on Qing China, where elements of the state (such as its ability to enforce its own laws and policies or negotiate its own treaties) were placed under foreign control and domination. Though it was arguably enough that the articles pertaining to Christianity were included in the same treaty as articles, the argument for contextual association arising is even stronger where articles pertaining to religion—which may in fact not be excessively onerous in comparison—are placed immediately adjacent to articles granting MFN privileges to Western powers, or extraterritoriality to its subjects, which are arguably the most prominent affronts to State sovereignty and examples of imperialist domination. Recall Article XXX of the United States Treaty of Tientsin, which conferred MFN privileges to U.S. citizens.<sup>127</sup> Article XXIX directly preceded the MFN article, and read:

The principles of the Christian religion, as professed by the Protestant and Roman Catholic churches, are recognized as teaching men to do good, and to do to others as they would have others to do to them. Hereafter those who quietly profess and teach these doctrines shall not be harassed or persecuted on account of their faith. Any person, whether citizen of the United States or Chinese convert, who, according to these tenets, peaceably teach and practice the principles of Christianity, shall in no case be interfered with or molested.<sup>128</sup>

Though Article XXIX is nevertheless an instance of foreign control of religious affairs, its intensity and impact are not as pronounced as articles conferring obtrusively direct foreign control of religion, such

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125. U.S. Treaty of Tientsin, *supra* note 113, art. XXX (emphasis added).

126. See ROBERTS, *supra* note 2, at 196.

127. U.S. Treaty of Tientsin, *supra* note 113, art. XXX.

128. *Id.* art. XXIX.

as Article XIII of the French Treaty of Tianjin.<sup>129</sup> However, because Article XXIX precedes the MFN clause in Article XXX, the association between Christianity and imperialism as epitomized by the MFN still arises.<sup>130</sup> Therefore, because clauses concerning religion were placed in the same treaties as (and at times alongside) articles imposing onerous trade and political concessions, a contextual association between Christianity and imperialism, as expressed through foreign control, was arguably inevitable.

*c. Consequential Association*

Consequential association is the final form of association and occurs when articles that allow foreign domination in ways not explicitly tied to religion are effectively used for religious purposes, leading to effective foreign control of religion. Unlike direct and contextual association, consequential association contains a link between Christianity and Western imperialism which emerges not from the text of the treaty, but from its application. This form of association was most prevalent in the pre-1858 period, where the treaties imposed on Qing China did not mention religion at all.<sup>131</sup> However, because the treaties granted subjects of Western powers the rights to reside or engage in their 'enterprise' in port cities of China, this ultimately included the teaching and propagation of Christianity as an enterprise.<sup>132</sup> Article II of the Treaty of Nanking (1842) with the British Empire was the first among many articles which likely gave rise to consequential association.<sup>133</sup> The provision granted a general right for British nationals to reside in five port cities and to 'carry[] on their mercantile pursuits:

His Majesty the Emperor of China agrees, that British Subjects, with their families and establishments, shall be allowed to reside, for the purpose of carrying on their commercial pursuits, without molestation or restraint at the Cities and Towns of Canton, Amoy, Foochow-fu, Ningpo, and Shanghai . . . .<sup>134</sup>

Such articles were duplicated in Article III of the Treaty of Wangxia (1844)<sup>135</sup> with the United States, and Article II of the Treaty

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129. See French Treaty of Tien-Tsin, *supra* note 115, art. XIII.

130. U.S. Treaty of Tientsin, *supra* note 113, art. XXIX, XXX.

131. See Cheung, 3.3, *supra* note 7, at 296.

132. See *id.* at 296-97.

133. See Treaty of Nanking, *supra* note 15, art. II.

134. *Id.*

135. Treaty of Wangxia, *supra* note 114, art. III ("The citizens of the United States are permitted to frequent the five ports of Kwang-chow, Amoy, Fuchow, Ningpo, and

of Huangpu (1844) with France.<sup>136</sup> Although the treaties with France and the United States did not result directly from a conflict with Qing China, they nevertheless arose in the aftermath of the First Opium War that had elicited the Treaty of Nanking (1842) with the British Empire.<sup>137</sup> Therefore, because the five ports created by these treaties were in effect opened through force, the influx of Christian missionaries into these ports produced a consequential association between Christianity and Western imperialism.

Consequential association is not as powerful a link as direct and contextual association but is arguably the chronological precursor to the stronger forms of association which arose when treaties began making explicit mentions of Christianity and foreign control over religious affairs after 1858.

### 3. Case Studies: Surrounding Circumstances

Having identified the direct, contextual, and consequential means by which the association between Christianity and Western imperialism as expressed through foreign control on religion in China arose, this section turns to case studies of surrounding circumstances which further strengthened this association. Incidents of foreign control on religion occurred both before and after treaties were signed. In some cases, these incidents happened because existing treaties granted certain actions,<sup>138</sup> while in other cases these incidents had a substantial impact on the drafting and imposition of a new treaty.<sup>139</sup> While numerous events could be used as case studies, the following sections use the Juye Incident,<sup>140</sup> the death of Auguste

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Shanghai, and to reside with their families and trade there, and to proceed at pleasure with their vessels and merchandise to and from any foreign port and either of the said five ports, and from either of the said five ports to any other of them.”)

136. Treaty of Huangpu, *supra* note 113, art. II (“From now on, French people and their families are authorized to transport, settle and engage in commerce in complete safety, without hindrance or restriction of any kind, in the ports and places of Canton, Emoui, Fou-Chou, Ning-po, and Chang-Hai. French ships will be able to trade freely in the said ports, stay there and move from one to the other, according to their convenience.”)

137. See ROBERTS, *supra* note 2, at 166–67.

138. See generally Jost Oliver Zetzsche, 2.2.2 *Protestant Missionaries in Late Nineteenth-Century China*, in HANDBOOK OF CHRISTIANITY IN CHINA VOLUME TWO: 1800 TO THE PRESENT 175 (R.G. Tiedemann ed., 2010).

139. See generally Murray A. Rubinstein, 2.2.1 *The Protestant Missionary Enterprise, 1807–1860*, in HANDBOOK OF CHRISTIANITY IN CHINA VOLUME TWO: 1800 TO THE PRESENT 151 (R.G. Tiedemann ed., 2010).

140. See generally R.G. TIEDEMANN, 1.1.4. *Published Collections of Edicts and Memorials*, in HANDBOOK OF CHRISTIANITY IN CHINA VOLUME TWO: 1800 TO THE PRESENT

Chapdelaine,<sup>141</sup> and the involvement of missionaries in the treaty process<sup>142</sup> as representative incidents that further entrenched the association between Christianity and imperialism as expressed through foreign control of religion.

*a. Surrounding Circumstances Leading to Direct Foreign Domination: The Juye Incident*

The first type of incidents that exacerbated the association between Christianity and Western imperialism (as expressed through foreign control of religion) are those that led to direct imperialist gains by Western powers. The Juye Incident (1897–98) provides the most prominent example of this. It demonstrates how foreign control of religious affairs, as enabled by the treaties, led to incidents which were then used by Western powers to achieve further imperialist goals.<sup>143</sup>

Under the Tianjin Treaties with various Western powers, missionaries were given the right to propagate Christianity throughout the entire Chinese mainland.<sup>144</sup> The Juye Incident involved the deaths of two German missionaries.<sup>145</sup> And although the German Treaty of Tianjin did not explicitly mention the right to propagate Christianity in the whole mainland, Article XL of the German Treaty of Tianjin conferred ‘most favored nation’ privileges on German citizens.<sup>146</sup> Recalling the discussion above, the MFN article meant that German citizens were to enjoy the same privileges given to other Western citizens, which in this case, included the right to propagate Christianity throughout the mainland.

In November 1897, two German missionaries were killed by the ‘Big Swords Society’ traditional peasant group in Zhang Jia village in

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12, 18 (R.G. Tiedemann ed., 2010); Cheung, 3.4, *supra* note 97, at 339 (“It may very well be that scholars in general conclude that the murder of the two SVD missionaries (Juye case of 1897) in precisely the province where Germany wanted to acquire a naval base must be proof of Anzer’s close association with secular imperialist interests.”)

141. See generally Jean Charbonnier, 2.4.1. *Chinese Catholics in the Early Nineteenth Century*, in HANDBOOK OF CHRISTIANITY IN CHINA VOLUME TWO: 1800 TO THE PRESENT 223 (R.G. Tiedemann ed., 2010) (“In 1856, the French missionary Auguste Chapdelaine MEP (1814–1856) was tortured and executed in a remote area of Guangxi together with his Chinese catechist Agnes Cao Guiying (1821–1856).”)

142. See generally Cheung, 3.3, *supra* note 7, at 297 (“[I]nsistence on and implementation of ‘treaty rights’ by missionaries and Chinese Christians also contributed to the frequent conflicts between converts and non-Christians.”)

143. See, e.g. ROBERTS, *supra* note 2, at 192.

144. Zetzsche, *supra* note 138, at 175.

145. TIEDEMANN, *supra* note 140, at 18; ROBERTS, *supra* note 2, at 192.

146. German Treaty of Tianjin, *supra* note 115, art. XL.



north-eastern China.<sup>147</sup> While the motives for the murders by the ‘Big Swords Society’ were not clear, the Imperial German Navy mobilized its forces and seized the Jiaozhou area under the pretext of protecting missionaries and executing justice against the perpetrators.<sup>148</sup> By taking over the area and forcing the Qing government to submit to ‘negotiating’, the German Empire secured a 99-year lease during which the Jiaozhou area and its capital of Tsingtau became territory of the German Empire.<sup>149</sup>

The Juye Incident demonstrated how a treaty granting foreign control over religious affairs (in this case permitting the movement of missionaries throughout all of China) could lead to incidents that were used by Western powers for further imperialist gain. Therefore, the consequence of the treaties is not simply that the association between Christianity and imperialism arose because the treaties allowed for foreign control of religion, but also that these treaties—and foreign control of religion—made further Western imperialist actions possible. In other words, the association that arises because of the text of the treaties is reinforced by the effects of the treaties.

Surrounding Circumstances Leading to Further Treaties Imposing Foreign Domination on Religious Affairs: The Death of Auguste Chapdelaine

The second type of incident which reinforced the association between Christianity and Western imperialism were post-treaty incidents that led to further treaties allowing greater foreign control over religion. The primary example of this type of incident is the execution of French missionary Auguste Chapdelaine, whose death was used as a basis for French attempts to seek revision of existing treaties.<sup>150</sup> When such attempts failed, it resulted in French military engagement in the Second Opium War.<sup>151</sup>

Chapdelaine was killed in 1856 in a village in Guangxi province,<sup>152</sup> which notably was not one of the port cities in which French

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147. ESHERICK, *supra* note 96, at 155; *see also* ROBERTS, *supra* note 2, at 192; SU, *supra* note 7, at 62.

148. Charbonnier, *supra* note 141, at 223; *see also* ESHERICK, *supra* note 96, at 155–56; SU, *supra* note 7, at 62.

149. SU, *supra* note 7, at 62; *see also* ROBERTS, *supra* note 2, at 192.

150. Charbonnier, *supra* note 141, at 223.

151. ROBERTS, *supra* note 2, at 169; SU, *supra* note 7, at 33; *see also* BUCKLEY EBBEY, *supra* note 7, at 224–25 (providing other examples of similar incidents where French consular employees and missionaries engaged in violent conflict with local Chinese authorities and citizens).

152. Yangzong Su, *The Formation of Chinese Conceptions Regarding Christianity: A Reinterpretation Based on the Anti-Opium Movement of the Nineteenth Century* 42 (Dec. 2016) (Ph.D dissertation, University of Birmingham) (on file with author).

nationals were allowed to operate at the time.<sup>153</sup> Under the Treaty of Huangpu, only (what are now) the cities of Guangzhou, Xiamen, Fuzhou, Ningbo, and Shanghai had been opened up for French trade, residence, and enterprise.<sup>154</sup> It is suggested that Chapdelaine first entered Guangzhou, which was one of the five port cities opened by the pre-1858 treaties, and subsequently moved inland to Guangxi.<sup>155</sup> While details are scarce surrounding his behavior in Guangxi, he was captured and executed under the authority of the magistrate of Xilin county.<sup>156</sup> Upon failure of French attempts to use Chapdelaine's death to negotiate revisions to existing treaties,<sup>157</sup> Chapdelaine's death was employed as a justification for French intervention in the Second Opium War in 1857 (which was already being fought between Qing China and Great Britain) and resulted in the Treaties of Tianjin, signed with France and several other Western powers.<sup>158</sup>

As discussed in the previous sections, the French Treaty of Tianjin's stipulations on foreign control of religion were by far the most onerous at the time, including the clause that "all that has been previously written, proclaimed or published in China by order of the government central to Christian worship, is completely abrogated, and remains without value in all the provinces of the empire."<sup>159</sup>

At the time of the conflicts between Qing China and Western powers, Western missionaries were by and large the only foreign nationals who had attained an adequate grasp of the Chinese language to act as interpreters and drafters in the treaty process.<sup>160</sup> This is shown by the fact that Bridgman, Gützlaff, and Morrison's son (all of whom were missionaries) served as translators and drafters for various treaties—a fact still recalled by Chinese Christians today.<sup>161</sup>

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153. See Treaty of Huangpu, *supra* note 114, art. II. This was the only treaty signed between France and China at this point in history.

154. *Id.*

155. *Museum Praises Murderers of a Catholic Saint, "Enemy of the People"*, ASIA NEWS (Nov. 7, 2016), <https://www.asianews.it/news-en/Museum-praises-murderers-of-a-Catholic-saint-%E2%80%9Cenemy-of-the-people%E2%80%9D-38003.html>.

156. See Supplementary Treaty of Tientsin, *supra* note 82, art. I-II.

157. Huang Yen-Yu, *Viceroy Yeh Ming-Ch'en and the Canton Episode (1856-1861): 4. The Canton Episode* (1941), 6 HARV. J. ASIATIC STUD. 94, 106-08 (1941).

158. See ROBERTS, *supra* note 2, at 169.

159. French Treaty of Tien-Tsin, *supra* note 14, art. VIII.

160. LUTZ, *supra* note 104, at 100-01.

161. *Id.*; Cheung, 3.3, *supra* note 7, at 298; *China Refutes Distortions About Christianity*, MISSION OF CHINA TO THE E.U. (Mar. 9, 2004), [http://eu.china-mission.gov.cn/eng/more/zjzc/200403/t20040309\\_8303503.htm](http://eu.china-mission.gov.cn/eng/more/zjzc/200403/t20040309_8303503.htm) [hereinafter PRC Embassy Statement].

The fact that Christian missionaries had served in the process of drafting treaties that contained onerous trade and political concessions granted to imperialist powers, strengthened the association between Christianity and imperialism as expressed in foreign control over religion. This is because the personnel representing Christianity (i.e., missionaries) were also those who directly interfaced with the Qing authorities in concluding onerous treaties. While the role of missionaries in the treaty process usually took the form of translators for Western envoys, there were at least one instance where it has been claimed missionaries themselves would make clandestine, unilateral insertions of additional clauses in the treaties, as occurred in the drafting of the Convention of Peking (1860).<sup>162</sup> As noted by several sources, French missionary Louis-Charles Delamarre, who was the translator for the treaty, inserted an additional clause in the Chinese version of Article VI.<sup>163</sup> The supposedly authoritative French version read as follows:

In accordance with the Imperial Edict issued on March 20, eighteen hundred and forty- six, by the august Emperor Tao-Kouang, the religious and charitable establishments which were confiscated from Christians during the persecutions of which they were the victims, will be returned to their owners through the Minister of France in China, to whom the Imperial government will deliver them, with the cemeteries and other buildings which depended on them.<sup>164</sup>

However, the Chinese version included the additional clause at the end of the article, which read:

並任法國傳教士在各省組買天地建造自便 [Translated: It is, in addition, permitted to French Missionaries to rent and purchase land in all the provinces, and to erect buildings thereon at pleasure.]<sup>165</sup>

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162. Su, *supra* note 152, at 192–93.

163. Cheung, 3.3, *supra* note 7, at 299–300.

164. French Convention of Peking, *supra* note 117, art. VI.

165. The original Chinese signed copy is held by the Ministry of Foreign Affairs of the Republic of China and is accessible online. See *Zhonghua minguo waijiaobu baocun zhiqian qingjiminguoshiqi tiaoyue xiedingjiansuoxitong* (中華民國外交部保存之前清及民國時期條約協定檢索系統) [Ch'ing Dynasty and ROC Treaties and Agreements Preserved by the Ministry of Foreign Affairs of the Republic of China (Taiwan)], WAIJIAO BU (外交部) [MINISTRY OF FOREIGN AFFAIRS.], <<https://mofaarchives.npm.gov.tw/index.php?act=Treaty/search/undefined/eyJhY2NudW0iOiJiLClzZWYyZGI0ItdlClk0Gdyb3VwIjpbJikxMCIsJikxMyJldlClwCWzpbHRlcil6W3sicHFmaWVsZCI6InBxX3IlYXJzIiwicHF0ZXItcyI6WyIxODYwIEMuRS4iXX1dLClzb3J0YnkiOmsibW9kZSI6ImkxZ2FzYyI9LClmYWVldHNieSI6InBxX3IlYXJzIn0%3D#91000044001>> (last visited June 4, 2024)

The consequence of the missionary's addition is not only that the clause was introduced that gave French missionaries the right to purchase land and properties at their pleasure, but also that the association between Christianity and foreign control of religion is further entrenched, as a foreign missionary was now in effect dictating property and economic rights that were to be enforced across China.

#### THE ROLE AND RELEVANCE OF THE NFDQ

Having examined the treaties and their consequences in relation to foreign control of religion, this section synthesizes findings from the historical-legal analysis to arrive at possible reasons for the inclusion of the NFDQ in the Chinese Constitution. There is currently no research dedicated to the NFDQ and based on the results of the historical-legal analysis, there are at least two reasons for the NFDQ's inclusion: a constitutional denunciation and a constitutional mandate. These two reasons effectively give the NFDQ a dual role within the wider constitutional context that results in both symbolic and practical implications for understanding religion in China today.

First, the NFDQ serves as a constitutional denunciation of foreign control of religious bodies and affairs, that, as seen in the case study of Christianity in historical-legal analysis, was a product of Western imperialism. Second, the NFDQ serves as a constitutional guide and mandate for ensuring that the regulation and operation of religious bodies and affairs are not dictated by foreign powers. While there may be other reasons for the NFDQ's inclusion, the historical-legal analysis provides evidence that at the very least, the constitutional denunciatory and mandatory functions are the two key purposes of the NFDQ.

This section therefore explores the NFDQ in relation to the two identified roles beginning with the significance and relevance of the NFDQ as a constitutional denunciation embedded within an operative article. Then, the constitutional mandating function of the NFDQ is examined through contemporary regulations that place a strong emphasis on indigenous control of religious bodies and affairs, using the Chinese Christian Council ("CCC") and the Three-Self Patriotic Movement ("TSPM"), as two prime examples of the NFDQ in practice.<sup>166</sup>

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166. MINGZHI CHEN, U. S. COMM'N ON INT'L RELIGIOUS FREEDOM, STATE-CONTROLLED RELIGION AND RELIGIOUS FREEDOM VIOLATIONS IN CHINA 1 (2022) [hereinafter CHEN, U.S. COMM'N ON INT'L RELIGIOUS FREEDOM].

## CONSTITUTIONAL DENUNCIATION

The NFDQ's first function is to provide a focused constitutional denunciation of foreign control over religious bodies and affairs, epitomized by nineteenth century treaties and surrounding events. The denunciation that the NFDQ provides is focused on imperialism with a specific relation to religion and ensures that historical legacies of foreign domination are never absent from wider considerations of the freedom of religious belief as provided by Article 36.<sup>167</sup>

## 1. A Focused Denunciation

As will be recalled, the Chinese Constitution is both embedded within history and itself replete with historical touchstones that must be understood to properly evaluate contemporary Chinese policies and values.<sup>168</sup> The importance of history is seen in the preamble of the Constitution which, relevantly, makes four mentions of imperialism.<sup>169</sup> However, mentions of imperialism in the preamble are embedded within a wider overarching account of history.<sup>170</sup> On the other hand, the NFDQ provides a specific denunciation of imperialism as it was expressed through foreign control over religion.<sup>171</sup>

By making a declarative statement that religious bodies and affairs are not subject to any foreign control,<sup>172</sup> the NFDQ makes a firm denunciation of the past in which religious bodies and affairs were subject to foreign control, the nineteenth century treaties being the clearest instances. Granted, neither the period for which foreign control of religious bodies and affairs was most prevalent nor any treaties are mentioned within the NFDQ itself. However, this can be explained by the nature of the NFDQ as a clause of Article 36. Since the NFDQ is found in Article 36, which is an operative article of the Constitution, its role is arguably not to provide details of history, even though that history is very important and provides reasons for the inclusion of the NFDQ in the first place. Instead, by simply making a declaration that religious bodies and affairs are not subject to foreign control, the times in which religious bodies and affairs were under

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167. Liwan Wang, *Parliamentary Diplomacy in the Chinese Constitution and Foreign Policy*, 11(2-3) HAGUE J. DIPL. 253, 260 (Mar. 2016).

168. *Id.*

169. XIANFA preamble (1982) (China).

170. *Id.*

171. *Id.* art. 36.

172. *Id.*

foreign control is denounced even without references to specific treaties and incidents. In other words, the NFDQ can provide a focused denunciation of a particular aspect of imperialism that a more general section of the Constitution, such as the preamble, cannot provide.

## 2. An Unforgotten Denunciation

Not only does the NFDQ denounce past instances of foreign control of religious bodies and affairs, but its inclusion in Article 36 specifically--as opposed to the preamble or hypothetically in another portion of the Constitution--means that the denounced past is remembered when considering the freedom of religious belief more generally.

Article 36 is found in Chapter 2, which contains the Rights and Responsibilities of Citizens.<sup>173</sup> Because Article 36 not only contains the NFDQ, but also sets forth the freedom of religious belief, the freedom from compulsion to believe (or not believe) in a religion, and the protection of normal religious activities,<sup>174</sup> an initial reading of the article may lead to consideration of the NFDQ without awareness of the past. The inclusion of the NFDQ guarantees that to an extent, awareness of the past involving foreign control of religious bodies and affairs is not absent from understandings of freedom of religious belief in the Chinese context. In other words, the presence of the NFDQ in Article 36 means that conceptions regarding freedom of religious belief cannot be complete without consideration of the historical legacies as encapsulated by the NFDQ. Again, even though the specific instances of foreign control of religious bodies and affairs are not mentioned, the NFDQ qualifies the freedom of religious belief such that foreign domination is at least considered when addressing the rights protected by Article 36. The literature reviewed has shown that in considering Article 36, little academic attention has been given to the NFDQ. Given the findings from the historical legal analysis, this neglect of the NFDQ is perhaps symptomatic of existing literature's incomplete treatment of Article 36 which has failed to make full considerations of freedom of religious belief in the Chinese historical context.

## 3. Constitutional Mandate

In addition to being a constitutional denunciation that both

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173. *Id.*

174. *Id.*

focuses on the denunciation of imperialism within the religious context and ensures that past foreign control of religious bodies and affairs are present in considerations of Article 36, the NFDQ also serves as a mandate for ensuring that religious bodies and affairs in China remain under indigenous control.

The NFDQ, in declaring religious bodies and affairs are not subject to any foreign domination, may serve as an indirect mandate because the NFDQ does not place a direct obligation on state organs or citizens.<sup>175</sup> Instead, the NFDQ serves as a backdrop for the regulation and management of religious bodies and affairs in China, providing an emphasis that such regulation and management must always highlight indigenous, as opposed to foreign, control. Though the NFDQ is not operationalized to place an explicit obligation on state organs and citizens, its effects are nonetheless reflected in contemporary religious regulations and governing articles for religious bodies. Two prime examples of these effects are found in the constitutive documents of the CCC and TSPM.

#### THE NFDQ IN PRACTICE

The CCC and TSPM are governmentally established organizations charged with the oversight and guidance of Christian religious bodies and affairs in China.<sup>176</sup> Known often together as the “lianghui” (“两会”) or “two-organizations,”<sup>177</sup> the TSPM focuses primarily on practical operation religious bodies whilst the CCC is the ‘national educational organization of Chinese Christianity’.<sup>178</sup>

Though neither the constitutive documents of the CCC nor TSPM make specific mention of foreign domination or the NFDQ explicitly, they contain corresponding affirmative expressions of indigenous religious governance,<sup>179</sup> the opposite of the foreign control denounced by the NFDQ. Furthermore, though both the CCC and TSPM, in fact, predate the NFDQ,<sup>180</sup> the most recent iterations of the

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175. *Id.*

176. CHEN, U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, *supra* note 166, at 3–4.

177. ZHONGGUO JIDUJIAO SANZI AIGUO YUNDONG WEIYUANHUI ZHANGCHENG (中国基督教三自爱国运动委员会章程) [CONSTITUTION OF THE CHINESE CHRISTIAN THREE-SELF PATRIOTIC MOVEMENT COMMITTEE] Nov. 28, 2018, art. 1, <https://www.ccctspm.org/cppccinfo/52>, [hereinafter TSPMC CONSTITUTION].

178. *Id.* art. 3; ZHONGGUO JIDUJIAO XIEHUI ZHANGCHENG (中国基督教协会章程) [CONSTITUTION OF THE CHINESE CHRISTIAN COUNCIL] Nov. 28, 2018, art. 2, <https://www.ccctspm.org/cppccinfo/51>, [hereinafter CCC CONSTITUTION].

179. TSPMC CONSTITUTION, *supra* note 177, art. 3; *see also* CCC CONSTITUTION, *supra* note 178, art. 4.

180. Alan Miller, 3. *Scene (The Chinese World)*, in HANDBOOK OF CHRISTIANITY IN

constitutive documents for both organizations, adopted in November 2018, reiterate the existing commitment to indigenous control of religious bodies and affairs.<sup>181</sup> Article 3 of the TSPM's constituting document, for example, contains the following provision for the purpose of the organization:

### Article 3

The purpose of this association is: to adhere to the Three-Self principles of self-governance, self-support, and self-propagation, to run the church independently . . . .<sup>182</sup>

Article 4 of the CCC's constitutive document contains the exact same wording as the excerpt quoted from the TSPM's constituting document,<sup>183</sup> which further highlights the emphasis on indigenous control of Christianity in China. Without making mention of the NFDQ, both the TSPM and the CCC exhibit the characteristics of an organization modeled in accordance with the NFDQ.

The NFDQ as a mandate for indigenous control of religious bodies and affairs not only prevents the foreign control that was seen in the case studies of nineteenth century China but arguably goes further. By denouncing foreign control over religious bodies and affairs, the NFDQ is simultaneously recognizing the need for indigenous control of the same in China, which provides constitutional affirmation for organizations such as the TSPM and CCC who have as a goal the promotion of self-governance, self-support, and self-propagation of religion. In the context of Christianity, which as seen in the historical-legal analysis is easily associated with imperialism, the TSPM and CCC are modeled in accordance with the NFDQ, which has been recognized to play an important role in changing perceptions of Christianity in China.<sup>184</sup>

In summary, the historical-legal analysis reveals the identification of the NFDQ as a focused constitutional denunciation of the past that also has persisting effects on contemporary regulation of religious bodies and affairs in China. In the case of Christianity, the NFDQ's effects can arguably be extended to a counter-associative effect found in the TSPM and CCC, both aimed at separating

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CHINA VOLUME TWO: 1800 TO THE PRESENT 848, 852 (R.G. Tiedemann ed., 2010).

181. Richard Madsen, *Religious Policy in China*, in HANDBOOK ON RELIGION IN CHINA 17, 27-31 (Stephan Feuchtwang ed., 2020).

182. TSPMC CONSTITUTION, *supra* note 177, art. 3.

183. CCC CONSTITUTION, *supra* note 178, art. 4.

184. PRC Embassy Statement, *supra* note 161.



Christianity from the legacy of Western imperialism that resulted in foreign domination of religious bodies and affairs.

## CONCLUSION

When describing the introduction of foreign religions into China, one prominent Chinese scholar stated that when “Buddha came to China, [he was riding] on white elephants, [but Jesus] Christ was borne on cannon balls.”<sup>185</sup> Through historical-legal analysis, this article has argued that the sentiment captured by this scholar’s statement, and the association between Christianity and imperialism in nineteenth century China was a fundamental historical reason for the inclusion of the NFDQ in the Chinese Constitution.

Focusing on the content and structure of the treaties that brought religious bodies and affairs under foreign control has highlighted the direct, contextual, and consequential ways in which an association arose between religion, and more specifically Christianity, and imperialism. Events surrounding the treaties, such as the deaths of missionaries or their involvement in the treaty process, were influential in reinforcing the association between Christianity and imperialism as they illustrated that foreign control of religious bodies and affairs preceded or facilitated the furtherance of Western imperialist interests in China.

The historical-legal analysis has shown that the NFDQ plays both a constitutional denunciation and mandating function, by ensuring that past instances of foreign control over religion are recognized and not repeated. Reflecting on the two purposes of the NFDQ should therefore influence the wider understanding of the freedom of religious belief in China today by providing an awareness of the history behind how religious ‘rights’—as provided for in the treaties examined—have at the very least been associated with, and in some instances used for, foreign imperialism.

This article has focused its examination on Christianity in nineteenth century China because it was during this time that the most illustrative instances of foreign control over religious bodies and affairs were observed. However, as little research has been conducted in drawing the links between history and contemporary Chinese laws, further historical-legal research needs to be done not only in relation to the NFDQ but for Chinese constitutional scholarship. If constitutions are both embedded in history and embedded with history themselves, there are perhaps few instances where historical-

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185. JIANG MENGLIN, *TIDES FROM THE WEST: A CHINESE AUTOBIOGRAPHY* 3–4 (2008).

legal understandings are more important and essential than in the context of Chinese civilization and society that has lasted 5,000 years and counting.