Government-sponsored Religious Education in Hong Kong after the Catholic Diocese of Hong Kong v Secretary for Justice

Shue Sing Churk
Jianlin Chen

Available at: https://works.bepress.com/jianlin_chen/24/
1. Background

In 2004, Hong Kong’s Education Ordinance (Cap 279) was amended to mandate ‘school-based management’ in most schools that received funds from the government. The practical effect of the amendments was the decentralization of the levels of authority from the school sponsoring bodies to the school level. The number of managers nominated by school sponsoring bodies now cannot exceed 60 per cent of the maximum number of managers allotted to the school’s governing committee (known as an ‘incorporated management committee’) under its constitution.

Catholic bishop Joseph Zen alleged that the amendments were a ‘conspiracy’ by the government to wrest control of Catholic schools from the Church. The Catholic Diocese of Hong Kong brought a suit to challenge the constitutionality of the amendments. The Church lost its case in both the Court of First Instance and in the Court of Appeal, and it then appealed to the Hong Kong Court of Final Appeal. In October 2011, the Court of Final Appeal affirmed the judgment of the lower courts in the Catholic Diocese of Hong Kong v Secretary for Justice, holding that there was no violation of either Article 136(1) or Article 141(3) of the Basic Law, Hong Kong’s de facto constitution. However, the court interpreted the Basic Law in such a way that it was
unconstitutional for the government to ban schools prayers and religious classes in publicly funded schools run by religious organizations.

This comment critically examines this important landmark case, which defined the relationship between church and state in Hong Kong. Specifically, this comment highlights the court’s problematic interpretation of Article 143(3) of the Basic Law, which, while attempting to reach a pragmatic compromise between preserving the government’s flexibility to modify existing educational policy and safeguarding the freedom of religious organizations, is nevertheless inconsistent with the text. This comment also discusses the implications of the case on the state establishment of religion.

2. The Ambit and Nature of Article 141(3)

Article 136 of the Basic Law concerns the continuity of the educational system and thus does not implicate religious freedom or religious organizations per se. The religious freedom issue that is the focus of this comment is found in the interpretation of Article 141(3). Article 141 provides that (paragraph numbers supplied):

(1) The Government of the Hong Kong Special Administrative Region shall not restrict the freedom of religious belief, interfere in the internal affairs of religious organizations or restrict religious activities which do not contravene the laws of the Region.

(2) Religious organizations shall, in accordance with law, enjoy the rights to acquire, use, dispose of and inherit property and the right to receive financial assistance. Their previous property rights and interests shall be maintained and protected.

(3) Religious organizations may, according to their previous practice, continue to run seminaries and other schools, hospitals and welfare institutions and to provide other social services.

(4) Religious organizations and believers in the Hong Kong Special Administrative Region may maintain and develop their relations with religious organizations and believers elsewhere.

The Court of Final Appeal overruled the Court of Appeal’s interpretation of Article 141(3). The Court of Appeal had held that Article 141(3) signified only that ‘religious organisations can continue running schools after 1st July 1997’, and no constitutional violation would arise unless the government engaged in any ‘discriminatory practices or in its effect to denude religious organizations of their right to establish and run such services’. In contrast, the joint judgment by Ma CJ and Ribeiro PJ, with Tang NPJ and Gleeson NPJ concurring, preferred to read Article 141 as a whole. They said that Article 141(1) lays down the ‘core right’ of the article: freedom of religious belief, freedom from interference in internal affairs, and freedom to take part in lawful religious activities in relation to religious organization. The court further held that

5 [2010] HKCA 31 [89].
‘the other parts of the article are ancillary and shore up that core right’. 6 They then proceeded with the following paragraph: 7

So read, the meaning given to the phrase ‘according to their previous practice’ relates to the core freedom addressed by Article 141. It is the religious dimension of their previous practice that receives protection as part of the core constitutional right to religious freedom as applicable to religious organizations. Thus, a legislative reform or executive direction which, for instance, banned morning prayers or religious instruction forming part of a religious organization’s previous practice, would fall foul of Article 141(3) and be unconstitutional.

Essentially, the Court of Final Appeal’s interpretation represents an expansion of the constitutional limitations placed on government intervention in the provision of education by religious organizations. However, this construction of the article was still not favourable to the appellant because the legal changes to school management neither directly affect the religious content of the education instructions nor alter the actual control of religious organizations over the schools. 8

Unfortunately, the reasoning in this key passage is flawed. First, it is difficult to see why Article 141(1) should be considered the article’s ‘core right’. Article 141(1) relates to the practice of religion and the ‘internal affairs’ of the religious communities, whereas Articles 141(2) to 141(4) contemplate the relationship between religious organizations and society as a whole. The court’s reasoning would effectively mean that the latter rights cannot be protected in isolation with the free practice of religion. This conclusion is apparently not true. For example, Article 141(2), which protects the property rights of religious organizations, 9 appears to be at best tangentially related to religious practice, especially when the court has narrowly conceptualized religious practice to involve primarily religious worship and/or explicit religious content. 10

Second, assuming that some form of ‘core right’ is intended in Article 141, it is still unclear why this right would necessarily entail a ‘religious dimension’. The plain language of Article 141(3) purports to protect the right of religious organizations to provide certain secular services, as most of the services mentioned in Article 141(3) obviously are not inherently grounded in ‘religious belief’ or the ‘religious activities’ mentioned in Article 141(1). 11 Therefore, it appears that Articles 141(1) and 141(3) concern two separate and distinct

6 Catholic Diocese (n 4) [76]–[77].
7 ibid [79].
8 This interpretation was actually adopted by the lawyer representing the government as a ‘fall back’ position: Catholic Diocese (n 4) [80], [93]–[95].
9 It is worth noting here that the site of Saint John’s Cathedral of the Anglican Church is the only freehold land in Hong Kong: Church of England Trust Ordinance (Cap 1014) s 6(1). For a discussion of the legal regime of real property instituted by the British colonial government, see Lawrence Wai-Chung Lai, ‘The Leasehold System as a Means of Planning by Contract: the Case of Hong Kong’ (1998) 69 The Town Planning Review 249, 251–58.
10 For example, a church property that is primarily used for worship would be protected but not for church property, that is, for the use of the office administration.
11 Cf the judgment of the Court of First Instance: [2007] 4 HKLRD 483 [168] (The CFI judge, Andrew Cheung J, made this similar observation about the non-religious nature of the activities covered in Article 141(3) to justify his interpretation that Article 141(3) is about ‘non-discrimination on the basis of religion rather than anything else’).
The only relationship these rights bear to one another is that they both protect the prerogative of religious organizations to do something. It is unclear which right lies closer to the ‘core’ than the other.

Third, even if we further grant that the ‘core right’ in Article 141 does relate to the religious dimension, it still does not necessarily follow that the word ‘practice’ in Article 141(3) refers to religious practice. Indeed, a reading of the Chinese text of the article (which should prevail over the English version, as the Basic Law was drafted originally in Chinese) would show that such an interpretation is highly unlikely to be true. Ban fa and xing ban are the Chinese words that should correspond to the English words of ‘practice’ and ‘run’, respectively. However, the translation of both words is problematic. Xing ban means ‘initiate; set up’. It connotes the founding of schools, hospitals, and so on, as opposed to the operation of schools, hospitals, and so on after establishment, as the English version would suggest. Ban fa usually refers to the way in which a problem is resolved. In this context, it is likely that the Chinese word refers to how schools, hospitals, and so on are established. Religious practice cannot be a ban fa, at least not a ban fa to xing ban. It should be noted that the Court of Appeal approved a similar interpretation of the Chinese term xing ban, but this point was not even discussed by Ma CJ and Ribeiro PJ in their judgment.

Nevertheless, it is clear that the Court of Final Appeal and the Court of Appeal are faced with the unenviable task of trying to strike a balance between pragmatically preserving the government’s flexibility in changing educational policies and giving effect to the constitutional protection of religious organizations’ right to provide social services. Both courts emphatically rejected the appellant’s interpretation which would effectively immunize all aspects of the provision of education and other social services prior to the Handover from government-compelled changes. The courts recognized the desirability of the government’s being empowered to make changes to the management of these publicly funded institutions in light of public interest concerns or of progress in the management system. However, the Court of Final Appeal wanted to flesh out this constitutional protection beyond the right to establish schools, thereby reaching the compromise of protecting pre-Handover practices while limiting the protection only to the ‘religious dimension’.

3. Establishment of Religion?

Notwithstanding the adverse outcome of the case and the subsequent order to reimburse the litigation cost to the government, the Catholic Church might have had reason to applaud the decision of the Court of Final Appeal. Ma CJ and Ribeiro PJ, in their joint judgment, observed that it would be

12 [2010] HKCA 31 [89].
13 Catholic Diocese (n 4) [65]–[70]; [2010] HKCA 31 [79].
14 Catholic Diocese (n 4) [71]; [2010] HKCA 31 [79]–[80]. Curiously, the Court of Appeal placed a heavy emphasis on the publicly funded nature of social service providing institutions as a justification for the right of the government to intervene, even as it acknowledged that the applicability of Article 141(3) is not restricted by whether the institutions received public funds: [2010] HKCA 31 [79]–[83]. This qualifier of ‘publicly funded’ was actually absent from the CFI judgment.
unconstitutional for the Government to ban school prayers or religious classes, even in publicly funded schools. This ruling is echoed by Bokhary PJ’s opinion that the previous practices of ‘organising prayers and providing religious instructions’ are protected by Article 141(3).

The legal changes at the heart of this litigation affect the aided schools—schools which are ‘very largely financed by public funds…[where] the government provides the land and the school building and meets all recurrent running costs [including human resource expenditure].’ Aided schools, which comprise 75 per cent of all primary and secondary schools, are the predominant type of school in Hong Kong. Schools run by religious organizations are qualified to receive government funding as aided schools; indeed, 65 per cent of all aided primary and secondary schools are religiously affiliated.

The public funding received by the aided schools ostensibly confers two important limitations on religious instructions. First, religious observances can only consist of 1.5 normal school hours per week, with any additional religious instruction to be provided as an addition to normal school hours. Normal school hours can be set by the school but are subject to the approval of the Education Bureau. Second, ‘No pupil shall be compelled to attend religious instruction or to participate in any religious observances and separate provision shall be made for all pupils not wishing to attend such activities. All pupils shall be informed of this requirement at the commencement of each school year.’

In any event, it is permissible and common for religiously affiliated aided schools to expressly promote their religion. The Catholic Church has been most candid when it has spoken about its aim of providing education in Hong Kong. According to its own documents, the vision and primary aim of Catholic schools include:

With Christ as the foundation of the whole educational enterprise, to endeavour to present the Christian concept of life according to the Gospel…

The Church’s submission to the Court of Final Appeal states even more explicitly that:

[The Church] has sought to achieve the vision and mission by requiring all its aided schools to have at least two periods of religious study per week, as well as daily morning prayers.

15 Catholic Diocese (n 4) [79].
16 ibid [101].
17 ibid [4]–[8].
18 See n 28 below.
19 Note that the limitations discussed here only apply to ‘aided schools’ that are bound by the Code of Aid. Two types of schools other than government schools are funded by the government: aided schools and schools under the Direct Subsidy Scheme (DSS). In the 2011/12 school year, 69.7 per cent of all 524 secondary day schools in Hong Kong were aided schools, whereas 12.0 per cent were DSS schools. See the Education Bureau’s replies to LegCo members’ initial written questions in Examining the Estimates of Expenditure 2012–13 (Question Serial No 1228, Reply Serial No EDB 056, Appendix 1(c)). The difference between the two types of schools is that aided schools receive a larger amount of grants but exercise a lower degree of control over the curriculum, fees, and so on.
20 Code of Aid for Primary School, s 19; Code of Aid for Secondary School, s 19.
21 Code of Aid for Primary School, s 20; Code of Aid for Secondary School, s 20.
22 Catholic Education Office, Diocese Synod Documents, Group Six – Education and Culture (2.10.2006), para 3.1, as reproduced in Catholic Diocese (n 4) [17].
23 Catholic Diocese (n 4) [18].
This aided-school scheme is uncontroversial on its face. Religious organizations can be effective providers of social services and can serve as valuable partners for the government in this regard. As noted by Bokhary PJ in his concluding remark, even though the Catholic Diocese does receive substantial government aid, the contribution by the Catholic Diocese in the field of education raises an interesting question of ‘Who is aiding whom?’ The permissibility of religious instruction, while more controversial, is arguably counterbalanced by the requirement of an opt-out regime for students, which, if actually observed and enforced, is an acceptable compromise between the freedom of religious organizations and the obligation of the state to non-adherents.

The problem with the Court of Final Appeal’s interpretation is that it may effectively entrench the state establishment of a particular religion. Catholic schools constitute 23 per cent of the aided primary and secondary schools in Hong Kong. Together with Protestant-affiliated aided schools, publicly funded Christian schools make up 58 per cent of the total number of schools. This proportion vastly outnumbers aided schools by other religious organizations by a factor of 8:1 and government schools by a factor of 7:1. These figures are in contrast with the percentages of the general population affiliated with Catholicism and Protestantism, which are 5 per cent and 6.7 per cent, respectively. This disproportionality is no accident, given that Christian proselytism had always received support, usually tacitly but sometime expressly, in the formulation of education policy by the British colonial government.

To a large extent, the Court of Final Appeal’s constitutional entrenchment of religious prayers and other forms of previously practiced religious instruction in publicly funded schools is predicated upon the character of the Basic Law itself. Indeed, the Basic Law was a political compromise formulated during the transition period that was designed to maintain the status quo of the various

---


25 Catholic Diocese (n 4) [103].

26 Tan noted that despite the existence of a religious education inspectorate within the Education Department since the 1980s, it ‘seldom interfered with . . . denominational instruction given in class time or the compulsory nature of religious education and activities for all students in some schools’: John Kang Tan, ‘Church, State and Education in Hong Kong during the Political ‘Transition’ (1997) 33 Comparative Education 211, 220.

27 This is the approach taken by the European Court of Human Rights, which encourages the teaching of religion, even in public schools, but prohibits indoctrination: Puja Kapai, ‘Freedom of Conscience and Religious Belief’ in Johannes Chan and CL Lim (eds) *Law of the Hong Kong Constitution* (Sweet & Maxwell 2011) 744–45.

28 The numbers are based on the data extracted from ‘Secondary School Profiles’ and ‘Primary School Profiles’ for the 2013/14 school year compiled by the Committee on Home–School Co-operation, a Consultative Committee appointed by the Permanent Secretary for Education. The website of the Committee is <http://www.chsc.hk/index-lang-1.html> accessed 7 April 2014.

29 ‘This disproportionalism is no accident, given that Christian proselytism had always received support, usually tacitly but sometime expressly, in the formulation of education policy by the British colonial government.’


31 Christians enjoy a disproportionate degree of influence over Hong Kong’s society compared to that of Buddhist and Taoist communities. Such influence was at least in part derived from the historical cooperative church and state relationship in England. Not only did the Christians build schools and establish social services, they also had influence on the socialization and on specific social issues in Hong Kong by exerting pressure on the colonial government. Peter C Phan, *Christianities in Asia* (John Wiley & Sons 2010) 186–88; Chunwah Kwong, *Confucianism, Taoism, Buddhism, and Christianity and the Restructuring of Their Public Roles in Hong Kong* (PhD thesis, Baylor University 1999) 71–73.
social institutions after the handover to Chinese sovereignty.\textsuperscript{31} Thus, the term ‘previous practices’ and similarly worded phrases are a common baseline for the constitutional protection set out in the Basic Law.\textsuperscript{32} In terms of public funding for religious education, the practical consequence is the perpetuation of the prior \textit{de facto} state establishment of Christianity via the disproportionate public funding of schools affiliated with the Christian faith and the few attendant restrictions on how schools may use the funds for religious propagation.

It is thus somewhat ironic that Bokhary PJ stated that: ‘Freedom of religion is a freedom to follow any faith or none. Neither belief of any kind nor unbelief is officially imposed or promoted’ (emphasis added)\textsuperscript{33} right before concurring with Ma CJ and Riberio PJ that previous religious activities in the provision of social services are constitutionally entrenched.

This may very well be a normative statement referring to how the law should be, rather than a description of the current law in Hong Kong. If the law, in fact, prohibits the official promotion of religion, no less the promotion of a particular religion above others, then a more circumspect appreciation of the actual, practical effects of the ‘previous practices’ would be necessary to avoid unwittingly entrenching the government education policy formulated in a political and legal institution that clearly does not recognize such a prohibition.

4. Conclusion

Regardless of whether the Court of Final Appeal’s judgment was in error, \textit{Catholic Diocese} is now the seminal case defining the relationship between church and state in Hong Kong, despite its being pathetically under-discussed. A final glimmer of hope for advocates of the separation of church and state may be Bokhary PJ’s statement, in which he seems to derive the non-establishment of religion directly from the freedom of religion. This interpretation is not an implausible way to understand, for example, Article 18 of the International Covenant on Civil and Political Rights. Further research is needed in this respect.


\textsuperscript{32} A few of the numerous examples follow: art 103 (public employees); art 108 (tax policy); art 129 (civil aviation management).

\textsuperscript{33} \textit{Catholic Diocese} (n 4) [101].