

Article

Joyous Buddha, Holy Father, and Dragon God Desiring Sex: A Case Study of Rape* by Religious Fraud in Taiwan

Jianlin Chen **

ABSTRACT

This Article critically examines the intriguing criminalization of religious fraudulent sex in Taiwan and makes three contributions. First, this Article engages in a detailed doctrinal analysis of recent cases and identifies that there is a de facto falsity requirement in the judicial application of the forcible sex provision to religious fraudulent sex, even if such a requirement is not ostensibly required under the statutory language, academic theory, or the courts' articulated jurisprudence. Second, this Article finds that the courts' assessment of the falsity is in practice underpinned by a conceptualization of legitimate religion that categorically rejects any purported supernatural/religious claims that stipulate sex acts as integral to the ritual or otherwise necessary for divine intervention. This approach is an

DOI : 10.3966/181263242018091302002

* "Rape" is technically the outdated legal term of reference in Taiwan. After the 1999 legal reform, the proper terminology for the offence in Taiwan is "forcible sex." The more provocative label of "rape" is used in the title and sub-headings because of its greater familiarity to English-speaking common law readers, and also to reflect use of the term by feminist scholars writing on Taiwan in the English-language: e.g., Chih-Chieh Lin, *Failing to Achieve the Goal: A Feminist Perspective on Why Rape Law Reform in Taiwan has been Unsuccessful*, 18 DUKE J. GENDER L. & POL'Y 163 (2010); Marietta Sze-chie Fa, *Rape Myths in American and Chinese Laws and Legal Systems: Do Tradition and Culture Make the Difference*, 191 MARYLAND SERIES IN CONTEMP. ASIAN STUD. 1 (2007).

** Associate Law Professor (University of Melbourne), JSD & LLM (University of Chicago), LLB (University of Singapore). Admitted to the bar in New York and Singapore. For their insightful comments and critiques, special thanks to Yun-Ru Chen, Yu-An Hsu, Jimmy Khoo, James Liu, Loveday Liu, Phapit Triratpan and Sheng-wei Tsai, as well as participants in the workshops/seminars at the National Taipei University, National Taiwan University and University of Hong Kong. This Article benefits from the excellent research assistance from the Melbourne Law School Academic Research Service.

unconstitutional violation of religious freedom, in particular the duty of state neutrality. Third, this Article proposes an alternative approach where the courts simply focus on determining whether the defendant has exploited the victim's psychological vulnerability. This Article explains how the new constitutional issue (i.e., proportionate restriction of religious practices) raised under this alternate approach may be overcome, and further highlights the normative advantages in terms of deterring criminals and informing victims.

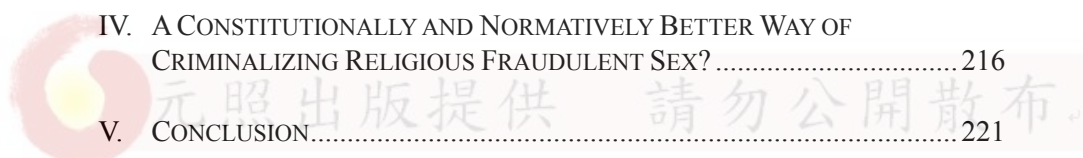
Keywords: *Religious Fraud, Fraudulent Sex, Forcible Sex, Religious Freedom, Rape Reform*



元照出版提供 請勿公開散布。

CONTENTS

I. INTRODUCTION	186
II. RAPE LAW IN TAIWAN	191
A. <i>Social and Legal Backdrop</i>	191
B. <i>Statutory Provision and Legislative History</i>	193
C. <i>Academic Debate and Judicial Pronouncement</i>	194
III. RAPE BY RELIGIOUS FRAUD	200
A. <i>The Current Doctrinal Approach</i>	201
B. <i>Unpacking the Doctrine</i>	203
1. <i>Falsity as a Necessary Requirement?</i>	204
2. <i>Evaluating the Falsity of Supernatural Claims and Religious Freedom</i>	206
C. <i>Constitutional?</i>	211
IV. A CONSTITUTIONALLY AND NORMATIVELY BETTER WAY OF CRIMINALIZING RELIGIOUS FRAUDULENT SEX?	216
V. CONCLUSION	221
REFERENCES	223



I. INTRODUCTION

Feigning divine tributes to Joyous Buddha to compel mother and daughters into foursome.¹

—聯合報 [*United Daily News*]

Messenger of God deceived 12 followers--676 sexual assaults over 10 years.²

—中國時報 [*China Times*]

Fake exorcism real sexual assault--“Dragon God” earning money while lying down, ordered to compensate 4.09 million.³

—自由時報 [*Liberty Times*]

For the uninitiated, it might be surprising to observe the regularity with which headlines like these appear in Taiwanese newspapers.⁴ After all, women deceived into sex by purported claims of divinity and the supernatural seem out of place in a modern society that boasts a highly educated population and unrestricted access to information.⁵ While the sensational captions and lurid details in even the mainstream broadsheet newspapers probably say more about the media culture and practices in Taiwan,⁶ these news stories are intriguing from a legal perspective since

1. Peng-Sheng Hu (胡蓬生), *Kuāng Huānxī Fō Gǎi Yùn Bī Mǔ Nǚ Wán 4P* (誑歡喜佛改運 逼母女玩4P) [*Feigning Divine Tributes to Joyous Buddha to Compel Mother and Daughters into Foursome*], LIANHE BAO (聯合報) [UNITED DAILY NEWS], Sep. 18, 2012, at B1.

2. *Shén De Shǐzhě Kuāng 12 Xìntú 10 Nián Xìng Qīn 676 Cì* (神的使者誑12信徒 10年性侵676次) [*Messenger of God Deceived 12 Followers-676 Sexual Assaults Over 10 Years*], CHUNG KUO SHIH PAO (中國時報) [CHINA TIMES], Sep. 11, 2012, at A9.

3. Ding-Chuan Wang (王定傳), *Jia Qūmó Zhēn Xìngqīn, 'Lóngwáng' Tàngwán Zhuàn, Pànpéi 4.09 Wàn* (假驅魔真性侵 「龍王」躺著賺 判賠409萬) [*Fake Exorcism Real Sexual Assault--“Dragon God” Earning Money while Lying Down, Ordered to Compensate 4.09 Million*], ZIYOU SHIBAO (自由時報) [LIBERTY TIMES], July 14, 2016, at B04D.

4. This Article recognizes the intense sensitivity in some quarters regarding how the choice of names for jurisdictions (e.g., Taiwan) can be indicative of one's political opinion on the hot-button issues of independence and reunification. The Article does not take a position on this issue, using the geographical indicators assigned to jurisdictions (i.e., Taiwan and Hong Kong) instead of their official titles (i.e., Republic of China, and Hong Kong Special Administrative Region), except where necessary for clarity (e.g., discussing the historical context of the Criminal Code).

5. XINGZHENG YUAN (行政院) [EXECUTIVE YUAN], 2016 NIÁN ZHONGHUA MINGUO NIANJIÀN (2016年中華民國年鑑) [THE REPUBLIC OF CHINA YEARBOOK 2016] 10-11 (2017) (Taiwan); Chris Horton & Austin Ramzy, *Taiwan Supplants Hong Kong for Free Speech in China's Shadow*, N.Y. TIMES, Apr. 15, 2018, at A14.

6. The above-mentioned headlines are taken from the three largest mainstream (as opposed to tabloid) newspapers, which span across the ideological spectrum. See H. Denis Wu & Cheryl Ann Lambert, *Impediments to Journalistic Ethics: How Taiwan's Media Market Obstructs News Professional Practice*, 31 JOURNAL OF MEDIA ETHICS 35, 41-45 (2016) (discussing the external, internal, and market forces that obstruct the ethical practice expected of journalists); Chao-Chen Lin (林照真), *Fēnxī yǔ Pīpàn Chuántǒng Bào zhǐ Zài Jùhé Xiànxàng Zhōng de Juésè-Yì Táiwān Sìdà Bào zhǐ Jítuán Wéilì* (分析與批判傳統報紙在聚合現象中的角色—以台灣四大報紙集團為例)

they are reporting on actual criminal cases in courts. Indeed, religious fraudulent sex (宗教騙色) is clearly a “thing” in the Taiwanese legal system. Annually, at least three to five such cases reach the final appellate court (*i.e.*, the Supreme Court).⁷ The police and the prosecution office have issued notices warning the public of the threat posed by such crimes.⁸ Notwithstanding the high conviction rate associated with “forcible sex” charges (*i.e.*, the most serious sexual offence--labelled as “rape” prior to the 1999 reform⁹), the Government has proposed legislative reform to create a specific offence targeting this perceived rampant social ill.¹⁰

Yet, as much as the persistent recurrence of religious fraudulent sex in a modern society appears odd,¹¹ it is the pervasiveness of the practice’s criminalization that is truly intriguing from a comparative legal perspective. Religious fraudulent sex sits at the intersection between religious fraud and fraudulent sex, both of which are highly controversial from a legal and normative perspective. In relation to religious fraud, there are immediate evidential and conceptual difficulties as to how the court will ascertain the veracity of the purported supernatural/religious claims, which is further compounded by concerns of infringing religious liberty.¹² The stakes are even higher for fraudulent sex.¹³ It is commonly perceived that deception is

[*The Analysis and Critique on the Role of Newspapers through Convergence: A Case Study of 4 Mainstream Newspapers in Taiwan*], 28 ZHONGGUÓ CHUÁNMEI XUÉ ZÁZHÌ (中華傳播學刊) [CHINESE JOURNAL OF COMMUNICATION RESEARCH] 3, 24-26 (2015). (discussing how market pressure has adversely impacted the quality of journalism in mainstream Taiwanese newspapers).

7. *Infra* III.

8. Yue-Dian Hsu (許育典) & Jing-Fan Chou (周敬凡), *Zōngjiào Zìyóu Zuòwéi Zōngjiào Zhàqī De Fànzuì Jiǎnyàn* (宗教自由作為宗教詐欺的犯罪檢驗) [*Examining the Crimes of Religious Fraud with the Right of Religious Freedom*], 21 DŌNG WÚ FǎLǚ HSUEH PAO (東吳法律學報) [SOOCHOW L. REV.] 1, 26 (2009).

9. *Infra* II.B.

10. Cheng-Zheng Siang (項程鎮), *Shén Gùn Piàn Sè Fǎ Wú Bù Tuī Dòng Tí Gāo Xíng Zé* (神棍騙色 法務部推動提高刑責) [*Religious Fraudulent-Ministry of Law Proposes Enhanced Criminal Sanctions*], ZIYOU SHIBAO (自由時報) [LIBERTY TIMES], Dec. 26, 2013, at B01.

11. For analysis and discussion regarding the continued flourishing of religion and superstitious beliefs in an increasingly modern and secular social environment, see Dong-Kyu Kim, *Reconfiguration of Korean Shamanship: Tradition and Modernity in the Construction of Korean Shamans’ Self-Identity*, 15 ACTA KOREANA 369, 389-90 (2012); Christopher Dole, *Mass Media and the Repulsive Allure of Religious Healing: The Cinci Hoca in Turkish Modernity*, 38 INT. OF MIDDLE EAST STUD. 31, 50-51 (2006).

12. *Infra* III.C.

13. At the very least, the emotional stakes appear higher, as illustrated by the not uncommon incidence of scholars consciously defending the self-perceived passionate tone of law journal articles: e.g., Corey Rayburn Yung, *Rape Law Fundamentals*, 27 YALE J.L. & FEMINISM 1, 1 (2015) (“A reader might think that my tone and rhetoric in the Introduction and throughout this Article are unduly harsh. Indeed, a reader might conclude that I have some personal animus toward Jed Rubenfeld. However, we have never met and have no personal connection of which I am aware. My choice to use strong language at times is, nonetheless, a conscious one.”); Michael Bohlander, *Mistaken Consent to Sex, Political Correctness and Correct Policy*, 71 J. CRIM. L. 412, 412 (2007) (“The style and tone of my remarks will betray that the topic causes me more than mere academic engagement. I will confess

widespread in sexual relationship.¹⁴ There is thus a heated debate as to whether it *could* and *should* be punished under the general provision for the most severe sexual offence (e.g., rape, forcible sex).¹⁵

This Article critically examines the ostensibly bold criminalization of religious fraud and fraudulent sex in Taiwan, and makes three contributions.

The first contribution is descriptive and doctrinal in nature. The issue of criminalizing religious fraudulent sex as ‘forcible sex’ has attracted considerable attention amongst Taiwanese scholars; whether specifically¹⁶ or as a prominent component in a general inquiry on forcible sex.¹⁷ Beyond synthesizing the Chinese-language literature on this point and making it available to an English-language audience, this Article investigates a doctrinal issue that has thus far eluded systematic scrutiny in the local literature. Scholars advocating for criminalization argue that the typical element of threat in religious fraudulent sex (e.g., adverse divine retribution for failure to have sex as part of a ritual) renders criminalization as ‘forcible sex’ jurisprudentially uncontroversial, since the threat was explicitly characterized as a feature of forcible sex before the 1999 legislative reforms expanding the scope of the offence.¹⁸ On the flip side, scholars advocating against criminalization would—in addition to raising concerns about evidential difficulties—contend that the actual inability of the defendant to effect divine retribution would negate the categorization as a threat, in

from the start that I have no sympathy for Herring’s proposal, and I will make no bones either about the fact that I view it as an example of exaggerated political correctness . . .”).

14. Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 YALE L.J. 1372, 1405 (2013); Hyman Gross, *Rape, Moralism, and Human Rights*, 2007 CRIM. L.R. 220, 224-25 (2007). For a collection of ancient and contemporaneous accounts of deception in sex, see WENDY DONIGER, *THE BEDTRICK: TALES OF SEX AND MASQUERADE* (2000).

15. See Jonathan Herring, *Mistaken Sex*, 2005 CRIM. L.R. 511, 511 (2005) (arguing that even a false proclamation of “I love you” to procure sex should be punished as rape under the U.K. post-2003 Sexual Offence Act); Rubenfeld, *id.* at 1379-80 (arguing that deceptive sex should generally not be criminalized as rape, as it is a crime against the right to self-possession rather than against sexual autonomy, according to his conceptualization of deceptive sex).

16. E.g., Da-Wei Lin (林大為), *Lùn Zhàshù Xìngjiāo Zuì: Jiānlùn ‘Zōngjiào Piànsè’ Anjiàn zhī Rènshì Yòngfǎ Wèntí* (論詐術性交罪—兼論「宗教騙色」案件之認事用法問題) [*A Study on Offense of Fraud-type Sexual Intercourse—Also on the Issues of Identifying Usage of “Sexual Fraud in Religion”*], 59 JŪNSHÌ Fǎ ZÁZHÌ (軍法雜誌) [MILITARY L.J.] 108 (2013); Chun-Jin Tu (涂春金) & Po-Chiang Liu (劉柏江), *Yì Zōngjiào Zhīmíng Xìngpiàn Xìngjiāo Shìfǒu Gòuchéng Qiángzhì Xìngjiāo Zuì?* (以宗教之名行騙性交是否構成強制性交罪?) [*Does Sexual Intercourse Obtained by Religious Deception Constitute Rape?*], 58 JŪNSHÌ Fǎ ZÁZHÌ (軍法雜誌) [MILITARY L.J.] 50 (2012).

17. E.g., Sheng-Wei Tsai (蔡聖偉), *Lùn Qiángzhì Xìngjiāo Zuì Wéifǎn Yìyuàn zhī Fāngfǎ* (論強制性交違反意願之方法) [*Forcible Means in the Crime of Forced Sexual Intercourse*], 18 CHUNG YEN YÜEN FǎXUÉ QÍKĀN (中研院法學期刊) [ACADEMIA SINICA L.J.] 41 (2016); Huang-Yu Wang (王皇玉), *Qiángzhì Shǒuduàn yǔ Bèihàirén Shòu Qīmán de Tóngyì: Yì Qiángzhì Xìngjiāo Wěixiè Zuì wéi Zhōngxīn* (強制手段與被害人受欺瞞的同意：以強制性交猥褻罪為中心) [*Force Methods and Agreement under Deception: Based on the Sexual Assault Crime*], 42 TAIDA FǎXUÉ LUNCONG (臺大法學論叢) [NTU L.J.] 381 (2013).

18. *Infra* II.B.

accordance with German jurisprudence, but would otherwise recognize that Taiwanese courts have not been reluctant to convict defendants.¹⁹

This raises a puzzling question: if religious fraudulent sex could and should be criminalized as forcible sex because of the threat element--and if the academic and judicial consensus is that veracity of the threat is immaterial as long as the victim believed it to be true²⁰--why is the practice not labelled as "sex by religious threat"? Or put more specifically, what is the role played by falsity? Is it a necessary element for conviction? This Article engages in a methodical review of recent religious fraudulent sex prosecutions and makes a notable finding. When setting out the jurisprudential basis for criminalizing religious fraudulent sex as forcible sex, the Supreme Court emphasized the defendant's exploitation of the victim's state of psychological vulnerability to supernatural/religious claims or practices that are contrary to prevailing social values.²¹ Falsity of the defendant's supernatural/religious claims is not explicitly mentioned, let alone required. However, in actual practice, the courts have always made a finding of falsity when convicting the defendant, even when there is no apparent necessity.²² Thus, this Article argues that falsity is, in fact, a *de facto* requirement in the judicial application of the forcible sex provision to the use of supernatural/religious claims, even if such a requirement is strictly speaking not required under the statutory language, academic theory, or the courts' articulated jurisprudence.

The second contribution builds upon this surprising doctrinal finding and highlights the constitutional deficiencies of the current judicial approach in Taiwan. It is theoretically possible for courts to establish the necessary falsehood in criminalizing religious fraudulent sex without violating the trite constitutional prohibition of state assessment of the veracity and legitimacy of religious beliefs.²³ For example, the courts may focus on the sincerity of the defendant's belief or the objectively verifiable aspect of the claims.²⁴ However, as revealed by this Article's examination of how falsity was ascertained in various religious fraudulent sex cases--especially in the contrasting context where the defendant was acquitted of a related monetary

19. Tu & Liu, *supra* note 16, at 60-61. See Tsai, *supra* note 17, at 62-63 (arguing that if the defendant has given the impression that he can control the manifestation of supernatural harm, and the harm involves body and life, it could be readily classifiable as a conventional threat).

20. Tsai, *id.* at 60-61; Wang, *supra* note 17, at 408-10.

21. *Infra* III.A.

22. *Infra* III.B.1.

23. COUNCIL OF EUROPE/EUROPEAN COURTS OF HUMAN RIGHTS, RESEARCH DIVISION, OVERVIEW OF THE COURT'S CASE-LAW ON FREEDOM OF RELIGION 19 (2013), https://www.echr.coe.int/documents/research_report_religion_eng.pdf; GERHARD ROBBERS, RELIGION AND LAW IN GERMANY 86-88 (2010); Hsu & Chou, *supra* note 8, at 11-13; KENT GREENAWALT, THE RELIGION AND THE CONSTITUTION: VOLUME I: FREE EXERCISE AND FAIRNESS 115-16 (2006).

24. *Infra* III.C.

fraud charge, but nevertheless was still convicted of forcible sex--the courts' assessment is underpinned by the prevailing judicial conceptualization of legitimate religious practices.²⁵ This conceptualization categorically denies any purported supernatural/religious claims that stipulate sex acts as integral to the ritual or otherwise necessary for divine intervention, and is thus an unconstitutional violation of religious freedom.

Noting the current breadth of support for the criminalization of religious fraudulent sex among scholars and the public in Taiwan, the third contribution is to propose an alternative approach for criminalization that has a sounder constitutional and normative footing. This Article argues that the *de facto* requirement of falsity should be eliminated entirely and that the courts should simply focus on determining whether the defendant has exploited the victim's psychological vulnerability. The absence of a falsity finding would require the courts to confront the separate constitutional question of whether the restriction of possibly genuine religious practices is sufficiently justified and proportionate vis-à-vis legitimate state interest. Indeed, avoidance of this difficult issue is arguably the reason why the courts in Taiwan adopted the *de facto* requirement of falsity in the first place. Nonetheless, this Article demonstrates how the proposed approach can plausibly pass constitutional muster in light of the limiting function played by the existing prerequisite of the victim's psychological vulnerability (*i.e.*, the defendant will be acquitted if the victim is not psychologically vulnerable or if the defendant was not aware of the victim's psychological vulnerability). Furthermore, the proposed approach is more in line with the underlying policy objective of reducing such activities. By categorically rejecting the defense of authentic/genuine religious belief, the proposed approach enhances deterrence, whilst also providing a clear warning to potential victims.

This Article is arranged into five parts. Part II presents the case study of Taiwan through discussing the socio-legal backdrop, the statutory provision in the context of the 1999 legislative reform, and the academic debate and judicial pronouncements on whether fraud could constitute forcible sex. Part III delves into the specific doctrines of religious fraudulent sex and demonstrates the *de facto* requirement of falsity. Part III further reviews the manner in which the courts approach the falsity requirement and highlights the unconstitutionality of the current approach. Part IV outlines the proposed approach and explains its constitutional and normative advantages. Part V concludes.

25. *Infra* II.B.2.

II. RAPE LAW IN TAIWAN

A. *Social and Legal Backdrop*

Taiwan is a wealthy and densely populated modern jurisdiction.²⁶ The Taiwanese population consists predominantly of ethnic Chinese/Han, with indigenous people and other ethnic groups making up less than 4 per cent of the population.²⁷ There is no official data specifically on religious composition since Taiwan's Census does not enquire about religious affiliation.²⁸ The Pew Research Center's 2012 global survey of religious groups provides an estimate of religious affiliation in Taiwan which--in order of proportion and as of 2010--shows the following distribution: Chinese folk religions (44.2%), Buddhism (21.3%), other religions (including new religious movements) (16.2%), unaffiliated (12.7%), and Christianity (5.5%).²⁹ A jurisdiction-wide survey undertaken in 2013 determined the distribution as follows: Buddhist (34.7%), Chinese folk religions (26.4%), Daoist (19.8%), unaffiliated (8%), Christianity (6.8%), other (≈5%).³⁰ The significant divergence between the two surveys of the statistics of Buddhist,

26. EXECUTIVE YUAN, *supra* note 5, at 10-11.

27. *Id.* For an historical perspective on Taiwan's demographic changes, see ELEANOR B. MORRIS WU, FROM CHINA TO TAIWAN: HISTORICAL, ANTHROPOLOGICAL, AND RELIGIOUS PERSPECTIVES 11-29 (2004) (discussing the social, economic, and political evolution of Taiwan from an anthropological and religious perspective); MARK A. ALLEE, LAW AND LOCAL SOCIETY IN LATE IMPERIAL CHINA: NORTHERN TAIWAN IN THE NINETEENTH CENTURY 16-30 (1994) (discussing the Han immigration and settlement pattern, and the interaction thereof with the governance regime of imperial China in Taiwan before 1895).

28. XÍNGZHÈNG YUAN (行政院) [EXECUTIVE YUAN], 2010 NIÁN RÈNKǒU HÉ JŪZHŪ RÈNKǒU PŪNKǒU (2010年人口和居住人口普查) [2010 POPULATION AND RESIDENCE CENSUS] 105 (2010) (Taiwan). The Ministry of Interior (Department of Civil Affairs) keeps statistics on the number of religious adherents amongst registered religious organizations, but with the explicit caveat that inclusion in statistical records (or for that matter, registration) does not in any way affect the legitimacy and legality of the religion: http://www.moi.gov.tw/dca/02faith_001.aspx (last visited May 1, 2018). Given that unregistered religious places of worship outnumbered registered religious establishments by several times, the official statistics are grossly under-reporting the number of religious adherents: CHIN-MIN CHENG (鄭志明), TÁIWÁN ZŌNGJIÀO ZŪZHĪ YŪ XÍNGZHÈNG (臺灣宗教組織與行政) [TAIWAN RELIGIOUS ORGANIZATION AND ADMINISTRATION] 23-24 (2010). For discussion about the legal status and prevalence of unregistered religious organizations/premises, see HWEI-SYIN CHEN (陳惠馨), ZŌNGJIÀO TUÁNTǐ YŪ FǎLŪ: FĒI YÍNGLì ZŪZHĪ GUĀNDIǎN (宗教團體與法律—非盈利組織觀點) [RELIGIOUS GROUP AND LAW: A NON-PROFIT ORGANIZATION POINT OF VIEW] 103-10 (2013).

29. PEW RESEARCH CENTER, THE GLOBAL RELIGIOUS LANDSCAPE 46 (2012), <http://assets.pewresearch.org/wp-content/uploads/sites/11/2014/01/global-religion-full.pdf>. For discussion and analysis of the statistics from the Taiwan Social Change Survey, held in 2004, which reveal relatively similar numbers, see Jiexia Elisa Zhai, *Contrasting Trends of Religious Markets in Contemporary Mainland China and in Taiwan*, 52 J. OF CHURCH AND STATE 94, 99-100 (2010).

30. WEN-SHAN YANG (楊文山), 2013 NIÁN Dì ÈR Cì SHÈHUì YÍXIANG DIǎOCHÁ (2013年第二次社會意向調查) [2013 SECOND SOCIAL INDICATION SURVEY] 16 (2014), https://srda.sinica.edu.tw/datasearch_detail.php?id=1050#download.

Chinese folk religions, and Daoism is reflective of the fact that the boundary between Chinese folk religions, Buddhism, Daoism, and even some of the new religious movements is difficult to draw.³¹ Notably, the Pew survey found that Taiwan has the largest population percentage claiming affiliation to other religions in the world.³² Indeed, sociologists have characterized the Taiwanese religious market as “bewilderingly diverse and pluralistic”,³³ and as a “haven” for all types of religions.³⁴

The rapid development of this vibrant religious market coincided with the democratization of Taiwan. The government of the Republic of China (“R.O.C.”) gained control of Taiwan after the end of World War II, and the cessation of fifty years of Japanese colonization.³⁵ While the R.O.C. is nominally a democratic regime, it imposed martial law--with the accompanying restrictions on civil liberties--on Taiwan until 1987.³⁶ Religious organizations, like all other civil societies, were subject to heavy state monitoring and regulation to prevent any circumvention of the ruling regime.³⁷ Yiguan Dao and other religious sects had been declared illegal and were also subject to persecution at one time or another.³⁸ Since the lifting of martial law, Taiwan has successfully transitioned into a constitutional democracy.³⁹ At the same time, with the cessation of heavy-handed state intervention on religious affairs, new religious movements have flourished alongside the revitalization of traditional religions.⁴⁰

The democratic transition did not alter the basic civilian legal system introduced to Taiwan by the R.O.C. government. The foundational statutes (including the Criminal Code) in force today remain premised upon the statutes that were enacted by the R.O.C. government between the late 1920s to mid-1930s for the whole of China. The R.O.C. laws were in turn heavily

31. Zhai, *supra* note 29, at 100-03; Joel Thoraval, *The Western Misconception of Chinese Religion: A Hong Kong Example*, 3 CHINA PERSPECTIVES 58, 63-64 (1996). See WU, *supra* note 27, at 133-77 (discussing the religious practices and beliefs of three Chinese temples in Taiwan).

32. PEW RESEARCH CENTER, *supra* note 29, at 39-41.

33. VINCENT GOOSSAERT & DAVID A PALMER, *THE RELIGIOUS QUESTION IN MODERN CHINA* 357 (2011).

34. HUIQIAO WU (吳惠巧), *TÁIWĀN ZŌNGJIÀO SHÈHUÌ GUĀNCHÁ* (臺灣宗教社會觀察) [SOCIAL OBSERVATIONS OF TAIWAN RELIGIONS] 24 (2005).

35. CHANG-FA LO, *THE LEGAL CULTURE AND SYSTEM OF TAIWAN* 2-4 (2006).

36. JIUNN-RONG YEH, *THE CONSTITUTION OF TAIWAN: A CONTEXTUAL ANALYSIS* 30-36 (2016).

37. GOOSSAERT & PALMER, *supra* note 33, at 214-15; YUNFENG LU, *THE TRANSFORMATION OF YIGUAN DAO IN TAIWAN: ADAPTING TO A CHANGING RELIGIOUS ECONOMY* 49 (2008). For critical overview of the current regulatory regime on religion in Taiwan, See JIANLIN CHEN, *THE LAW AND RELIGIOUS MARKET THEORY: CHINA, TAIWAN AND HONG KONG* 81-112 (2017).

38. LU, *id.* at 5.

39. BRUCE J. JACOBS, *DEMOCRATIZING TAIWAN* 5-18 (2012); Tay-Sheng Wang, *The Legal Development of Taiwan in the 20th Century: Toward a Liberal and Democratic Country*, 11 PAC. RIM L. & POL’Y J. 531, 535-39 (2002).

40. HAIYUAN QU (瞿海源), *ZŌNGJIÀO, SHÙSHÙ YŪ SHÈHUÌ BIÀNQIÀN* (宗教、術數與社會變遷) [RELIGION, SUPERSTITION AND SOCIAL CHANGE] 5-24 (2006); WU, *supra* note 34, at 24.

influenced by their Japanese and German counterparts.⁴¹ Jurisprudence and academic writings from Japan and Germany remain central to the understanding and evaluation of these foundational statutes.⁴²

B. *Statutory Provision and Legislative History*

Under the chapter titled, “Crimes against Sexual Autonomy”, article 221 of the Criminal Code prescribes the offence of “forcible intercourse” (強制性交) for anyone “who has sexual intercourse with a male or female by force, threat, intimidation, hypnosis or other means against the person’s will.”⁴³ The current version of the provision was amended in 1999 as part of broader legal reform propelled by Taiwanese feminist movements to advance the status, treatment, and protection of woman under the law.⁴⁴ Under pressure from women’s groups, these amendments were passed and enacted in an unusually speedy process (less than an year from draft to enactment), without the deadlocks, oppositions, and delays that otherwise commonly plague Taiwanese legislative politics.⁴⁵

Given that this is the first time that the provision has been amended since the code’s original enactment in 1934, it is worth examining the original provision and the 1999 changes in order to better understand the current provision. The original version of the article is situated under the chapter titled “Crimes against Sexual Morality.” It defines “rape” (強姦) as “engaging in extra-marital/improper sexual intercourse (姦淫) with a woman through force, threat, drug, hypnosis or other means that renders the woman unable to resist.”⁴⁶ This provision is presumably jarring from an English common law perspective, where the offence of rape has traditionally been a

41. TAY-SHENG WANG, *LEGAL REFORM IN TAIWAN UNDER JAPANESE COLONIAL RULE, 1895-1945: THE RECEPTION OF WESTERN LAW* 175-82 (2015).

42. Lin, *supra* note *, at 167-68.

43. Zhonghua Minguo Xing Fa (中華民國刑法) [Criminal Code] § 221 (promulgated Jan. 1, 1935, effective July 1, 1935, as amended June 13, 2018) (Taiwan).

44. Lin, *supra* note *, at 169-76; Sze-Chie Fa, *supra* note *, at 92-100. For a discussion of Taiwan’s women’s movement and feminist discourse after the end of martial law, See DORIS T. CHANG, *WOMEN’S MOVEMENTS IN TWENTIETH-CENTURY TAIWAN* 118-55 (2009).

45. Sze-Chie Fa, *supra* note *, at 98. For the procedural details of the amendment, See Sheng-Chieh Lee (李聖傑), *Xíngfǎ Dì Èr’èr’èr Tiáo Dì Yī Xiàng Dì Yī Kuǎn Èr Rén Yìshàng Gòngtóng Fàn Zhī’zhī Shìyòng Sīkǎo* (刑法第二二二條第一項第一款「二人以上共同犯之」之適用思考) [*A Study on Violent Sexual Offences Committed by More than Two Perpetrators*], 115 *ZHÈNGDÀ FAXUÉ PÍNLùn* (政大法學評論) [CHENGCHI L.R.] 1, 20-21 (2010). For discussion on the political division and legislative politics, See John F. Cooper, *Taiwan’s 2016 Presidential/Vice Presidential and Legislative Election: Reflections on the Nature of Taiwan’s Politics and Shifts Therein*, 224 *MD. SER. CONTEMP. ASIAN STUD.* 1, 5-12 (2016); Jinhyeok Jang, *The Dimensional Structure of Legislative Politics in Taiwan: An Exploratory Analysis of Bill Cosponsorship Networks, 1992-2012*, 51 *ISSUES & STUDIES* 119, 136-38 (2015).

46. Criminal Code § 221.

matter of consent (or more accurately, the lack thereof).⁴⁷ However, the provision, including its emphasis upon force/threat and the reference to an inability to resist, is actually based on the German criminal code and reflects a conception of rape common to many jurisdictions.⁴⁸

In any event, the legislative reasons accompanying the amendments explained the three legally significant changes.⁴⁹ First, the more neutral term of “sexual intercourse” is employed to avoid the negative connotations associated with the previous terminology. Second, the provision is expanded to include man as potential victim in accordance with principles of gender equality. Third, the requirement of “unable to resist” is removed because it is overly stringent and encouraged victims to vigorously resist their assailants at the risk of greater bodily harm.⁵⁰ In addition, Taiwanese feminist legal scholars have also alluded to the significance and desirability (vis-à-vis gender equality) of recognizing the new category of “crimes against sexual autonomy,” and classifying the offence of forcible rape therein,⁵¹ even if no immediate legal consequences arise from this reclassification.

C. Academic Debate and Judicial Pronouncement

The 1999 changes are *prima facie* amendments in the right direction, notwithstanding common critiques on the lack of thoughtfulness and clarity in the structure and language.⁵² Removal of the inability to resist

47. Karl Laird, *Rapist or Rouge? Deception, Consent and the Sexual Offences Act 2003*, 2014 CRIM. L.R. 492, 495-98 (2014); Rebecca Williams, *Deception, Mistake and Vitiating of the Victim's Consent*, 124 L. QTR. R. 132, 133-36 (2008).

48. Strafgesetzbuch [StGB] [Penal Code], 1953, § 177 (Ger.) in the GERMAN PENAL CODE OF 1871 (translated by Gerhard O. W. Muller & Thomas Burgenthal, 1961) (“Anybody who by force or threat of immediate bodily harm forces a woman to submit to extra-marital sexual intercourse or who misuses a woman for extra-marital sexual intercourse after he has for that purpose placed her into a state where she lacks any will power to resist or brought about her unconsciousness shall be punished by confinement in a penitentiary.”). See Bohlander, *supra* note 13, at 420-25 (discussing the extensive comparative review of criminal law provisions on rape by the Trial Chamber II of the International Criminal Tribunal for the Former Yugoslavia (ICTY)).

49. There are two other minor amendments. First, there is the addition of intimidation (恐嚇) to the list of means constituting forcible sex; although academic commentary and judicial interpretation consider ‘intimidation’ to be essentially the same as ‘threat’, such that its addition is somewhat superfluous: Tsai, *supra* note 17, at 59-60. Second, the use of drugs to commit forcible sex is now an “aggravating” factor which attracts a higher minimum sentence: Criminal Code § 221.

50. ART. 221 XING FA YI DONG TIAO WEN YU LI YOU (Art. 221, 刑法異動條文與理由) [Legislative Reasons for Criminal Code Amendment], Mar. 30, 1999 (Taiwan).

51. Chih-Chieh Lin (林志潔) & Mong-Hwa Chin (金孟華), *Héilǐ 'de Huáiyí? Yǐ Nǚxìng Zhǔyì Fǎxué Guāndiǎn Jiǎnshì Xíng Qīnhài Shěnpàn zhī Piānjiàn* (「合理」的懷疑？以女性主義法學觀點檢視性侵害審判之偏見) [What Constitutes Reasonable Doubt? A Feminist's Perspective on Taiwanese Rape Trials], 127 ZHENG DA FA XUE PINGLUN (政大法學評論) [CHENGCHI L. REV.] 117, 139 (2012).

52. E.g., Tu & Liu, *supra* note 16, at 55-56; LIN SHAN TIAN (林山田), XING FA GE ZUI LUN (刑法各罪論) [OFFENCE IN CRIMINAL CODE] 226-27 (2004). See also Lin & Chin, *id.* at 144-57 (an

requirement and the allusion to violation of will is certainly consistent with the general trend of modern rape reform, which seeks to redress outmoded patriarchal conceptions of sexual norms and morality.⁵³ However, the potential breadth of the new wording, “other means against the person’s will,” serves as a focal point for debate amongst scholars and regarding interpretation by the courts. Of particular relevance to this Article is whether the new wording could be interpreted to incorporate fraud and deception.

Taiwanese scholars have typically framed the controversy from the perspective of querying what level of compulsion is required by the defendant, to exert against the victim, before it constitutes forcible sex?⁵⁴ Three approaches can be discerned.

The first approach contended that a high-level of compulsion, akin to force and direct threat, must be present (“*high-level compulsion*”).⁵⁵ The rationales tend to be three-fold. The first rationale is structural. Since there are already other provisions in the Criminal Law Code which address the use of non-high-level compulsion to procure sex--abuse of authority (article 228); taking advantage of mental/intellectual defects (article 225); spousal impersonation (article 229)--the distinct crime of forcible offences therefore requires a differentiating level of compulsion, no less to justify its more severe penalty.⁵⁶ Second, they argue that violation of the legal interest of freedom (侵害自由法益) is--properly understood--the evil underpinning the offence of forcible sex, which is only sufficiently infringed by a high-level of compulsion.⁵⁷ Third, there is the policy argument regarding over-criminalization which might arise from any relaxation of the required level of compulsion.⁵⁸ Indeed, some of these scholars went further to suggest that, not only should article 221 be interpreted as requiring a high-level of compulsion, but the law should be amended in accordance with the (then pre-2016) more restrictive German approach which was limited to

empirical survey of judicial reasoning for acquittal in forcible sex cases, which found that judges continue to rely upon the rape myth concerning the reaction and behavior of women before, during, and after the alleged assault, despite removal of the requirement of unable to resist).

53. See also Vivien W. Ng, *Ideology and Sexuality: Rape Laws in Qing China*, 46 J. OF ASIAN STUDIES 57, 59-67 (1987) (discussing the misogynistic cult of chastity which underpins rape laws in the Qing dynasty).

54. For general overview of the debate, See Wang, *supra* note 17, at 395-98; Lin, *supra* note 16, at 111-17.

55. E.g., Jung-Chien Huang (黃榮堅), 2010 Nián Xíngshì Fǎ Fāzhǎn Huígù: Yùwàng Niándài, Yùwàng Xíngfǎ (2010 年刑事法發展回顧：慾望年代，慾望刑法?) [Developments in the Law in 2010: Criminal Law], 40 TAIWÁN FǎXUÉ LUNCONG (臺大法學論叢) [NTU L.J.] 1795, 1835 (2011); Tze-Tien Hsu (許澤天), Miànlín Héfǎ è Hài Wēixié Xià Dì Xìng Zìzhǔ (面臨合法惡害威脅下的性自主) [Sexual Autonomy under Legal Duress], 181 TÁIWÁN FǎXUÉ ZÁ ZHÌ (台灣法學雜誌) [TAIWAN L.J.] 120, 124-25 (2011); Tu & Liu, *supra* note 16, at 55-56; LIN, *supra* note 52, at 226-27.

56. Hsu, *id.* at 124-25.

57. Tu & Liu, *supra* note 16, at 55-56; Huang, *supra* note 55, at 1835.

58. LIN, *supra* note 52, at 226-27.

the threat of immediate bodily harm only.⁵⁹ Other scholars try to reconcile the addition of “other means against the person’s will” by suggesting that it means the use of existing circumstances of compulsion by the defendant that are otherwise not caused by the defendant (e.g., the victim had been physically restrained by a third person).⁶⁰

At the other end of the spectrum are scholars who take the position that there is no requirement of any level of compulsion (“*no compulsion*”). This argument focuses on the newly added phrase of “violation of will,” and the new categorization of “crimes against sexual autonomy,” and advocates that it should be understood in accordance with common usage; namely, that the victim subjectively does not wish to have sex with the defendant.⁶¹ In addition to legislative interpretation, this argument alludes to the policy argument concerning how such an expansive approach is necessary and desirable to ensure that sexual autonomy is not afforded lessor protection, when compared to a property interest, and that vulnerable victims are duly protected.⁶²

The third approach takes the middle-ground, arguing that some low-level of compulsion is needed (“*low-level compulsion*”). This approach agrees with the *high-level compulsion* camp that some level of compulsion is necessary to distinguish forcible sex from the other sexual offences.⁶³ However, this approach recognizes that insisting on a high-level of compulsion undermines the protection of sexual autonomy and effectively negates the legislative amendments; thus, it advocates an expansion of the type and degree of required compulsion. The type of compulsion, it is submitted, should not be restricted to those synonymous with force and threats, but could include the creation of a vulnerable situation (e.g., leaving the victim stranded, intoxication by the defendant, etc). The level of compulsion should be lowered to any compulsion that renders the victim “difficult to resist”, instead of “unable to resist.”⁶⁴

Each of the three approaches has distinct and natural implications as to

59. Hsu, *supra* note 55, at 124-25; LIN, *id.* at 226-27. See Tsai, *supra* note 17, at 54-57 (noting that most Taiwanese scholars opined that any form of threat will suffice after the 1999 reform, although observing that while there have been no restrictions on the type of threat under Taiwanese law, the potential for the scope to expand has been constrained by the pre-1999 requirement of “unable to resist”).

60. Tsai, *supra* note 17, at 85-93.

61. Lin, *supra* note 16, at 119-23.

62. *Id.* at 122-23. See also Chia-Wen Lee (李佳玟), *Shuō Shì Cái Suàn Tóngyì (Only Yes Means Yes): Zēngdìng Xíngfǎ `Wèidé Tóngyì Xìngjiāo Zuì'zhī Chūyì (說是才算同意(Only Yes Means Yes) — 增訂刑法「未得同意性交罪」之芻議)* [Only Yes Means Yes: A Proposal for the Offence of Nonconsensual Sex in the Criminal Law], 103 Táiběi Dàxué Fǎxué Lùncong (臺北大學法學論叢) [TAI. UNIV. L.R.] 53, 68-70 (2017) (criticism from a feminist perspective of the requirement for a high-level of compulsion, in terms of its underlying patricidal morality and restrictive scope).

63. Wang, *supra* note 17, at 398-99.

64. *Id.* at 399-400.

whether fraud could constitute forcible sex. Under the *high-level compulsion* position, only fraud that constitutes a threat (e.g., threatening to shoot the victim with a gun when the defendant did not have a firearm) would suffice.⁶⁵ This is because it is the threat that is doing the heavy-lifting, and the academic and judicial consensus has always been that veracity of the threat is immaterial, as long as the victim believed it to be true.⁶⁶ Under the *no compulsion* approach, all forms of fraud will suffice since violation of will--broadly understood--occurs whenever the victim's agreement to the sexual activity is made under a mistake induced by the defendant.⁶⁷ Again, the *low-level compulsion* conception seeks a compromise that, in circumstances where there is no element of threat, the fraud has to be of the type, method, scope, or risk of infringement of the legal interest of sexual autonomy.⁶⁸ This is similar to the U.S. position which requires fraud in the *factum*, as opposed to fraud in the *inducement*,⁶⁹ and the English common law jurisprudence, which requires fraud as to the "nature of the act."⁷⁰ As explained by Huang-Yu Wang, inserting a penis on the pretext of inserting a medical instrument for medical examination would constitute low-level compulsion, but not where the fraud is to consideration or purpose (e.g., sex on the promise of subsequent marriage; sex on the promise of payment).⁷¹

In terms of interpretation and application by the courts, it is undisputed even by *high-level compulsion* proponents that the courts have explicitly rejected the requirement for a high-level of compulsion since the 1999 reforms.⁷² However, ambiguity remains because the authoritative judicial interpretations issued by the Supreme Court⁷³ have not otherwise elected

65. Hsu, *supra* note 55, at 124.

66. Tsai, *supra* note 17, at 60-61; Wang, *supra* note 17, at 408-10.

67. Lin, *supra* note 16, at 119-23.

68. Wang, *supra* note 17, at 422-23.

69. Ben A. McJunkin, *Deconstructing Rape by Fraud*, 28 COLUM. J. GENDER & L. 1, 9-12 (2014); Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 BROOK. L. REV. 39, 157-61 (1998). For criticism that this distinction is unsatisfactorily contingent on how the specific act is described, See ALAN WERTHEIMER, CONSENT TO SEXUAL RELATIONS 206 (2003).

70. Laird, *supra* note 47, at 495-98; Williams, *supra* note 47, at 133-36. For academic discussion prior to the 2003 law reform in the U.K., See DAVID SELFE & VINCENT BURKE, PERSPECTIVES ON SEX, CRIME AND SOCIETY 79-86 (2nd ed. 2001).

71. Wang, *supra* note 17, at 422-23. *Cf.*, Tsai, *supra* note 17, at 76-78 (arguing that the fraud relating to medical instrument insertion does not violate the victim's will, because there is no consent or will to speak of in the first place, and suggesting that it may be better to explore criminalization under articles 225 and 228 instead).

72. E.g., Tu & Liu, *supra* note 16, at 57-58; Huang, *supra* note 55, at 1835.

73. Zuigao Fayuan (最高法院) [Supreme Court], 99 Niandu Di 7 Ci Xingshi Ting Huiyi Jueyi (99年度第7次刑事庭會議決議) [The Resolution of the 7th Criminal Division Conference of Supreme Court of 2010] (2010) (Taiwan); Zuigao Fayuan (最高法院) [Supreme Court], 97 Niandu Di 5 Ci Xing Shi Ting Huiyi Ji Lu (97年度第5次刑事庭會議紀錄) [Record of the 5th Criminal Divisions Joint Conference of the Supreme Court of 2008] (2008) (Taiwan). For discussion on the *de facto* precedential effect of these judicial interpretations, and how the bureaucratic nature of Taiwan's civilian court system magnifies their constraints on lower courts, See Kai-Ping Su, *Criminal Court*

between the *low-level compulsion* and *no compulsion* approaches.⁷⁴ favoring the *no compulsion* approach unsurprisingly consider the judicial interpretations as endorsing their preferred approach. Da-Wei Lin argues that the express negation of any requirement for the means to be similar or akin to the listed means (*i.e.*, force, threat, intimidate, hypnosis) in the relevant 2008(5) judicial interpretation is an endorsement of the *no compulsion* approach, which has been implicitly reflected in subsequent judicial decisions.⁷⁵ On the other hand, Huang-Yu Wang, who advocates the *low-level compulsion* view, pointed out that the 2008(5) judicial interpretation had cabined the other means with the phrase “violation of freedom of defendant’s intention” (妨碍被害人之意思自由), which is in fact an allusion to the legal interest of freedom, and therefore requires some level of compulsion.⁷⁶ Further, Huang-Yu Wang refers to a 2011 Supreme Court decision⁷⁷ which, by distinguishing between forcible indecent assault (article 224) and the separate offence of sexual harassment, expressly stipulates that low-level compulsion is a necessary element of the former.⁷⁸

A subsequent search by the author on Taiwan’s judicial database reveals that the 2011 Supreme Court decision did indeed trigger explicit discussion on the required level of compulsion in subsequent decisions. However, thus far, there are some inconsistencies among both the Supreme Court and the lower court (*i.e.*, High Court).⁷⁹ In a 2014 case on article 221, the Supreme Court acknowledged the three different approaches and explicitly recognized the *no compulsion* view.⁸⁰ This language has been replicated in a few subsequent High Court decisions.⁸¹ On the other hand, a number of recent High Court decisions have continued to state that low-level compulsion is required for the purposes of article 221,⁸² with one High Court decision

Reform in Taiwan: A Case of Fragmented Reform in a Not-Fragmented Court System, 27 WASH. INT’L L.J. 203, 218-21 (2017).

74. Tsai, *supra* note 17, at 67-68.

75. Lin, *supra* note 16, at 115-17.

76. Wang, *supra* note 17, at 403. She also notes that the 2010(7) judicial interpretation, which tried to reconcile the underage sex provision (article 227) with article 221, merely removes the low-level compulsion requirement for child under the age of seven without changing the general requirement: *id.* at 404-06.

77. Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 100 Tai Shang Zi No. 4578 (100台上字第4578號刑事判決) (2011) (Taiwan).

78. Wang, *supra* note 17, at 403-04.

79. For an outline of the judicial system and hierarchy, *See* LO, *supra* note 35, at 11-19.

80. Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 103 Tai Shang Zi No. 720 (103台上字第720號刑事判決) (2014) (Taiwan).

81. Taiwan Gaodeng Fayuan (臺灣高等法院) [Taiwan High Court], Xingshi (刑事) [Criminal Division], 106 Qin Shang Su Zi No. 98 (106侵上訴字第98號刑事判決) (2017) (Taiwan); Taiwan Gaodeng Fayuan (臺灣高等法院) [Taiwan High Court], Xingshi (刑事) [Criminal Division], 105 Qin Shang Su Zi No. 179 (105侵上訴字第179號刑事判決) (2016) (Taiwan).

82. *E.g.*, Taiwan Gaodeng Fayuan (臺灣高等法院) [Taiwan High Court], Xingshi (刑事)

acquitting the defendant because the means employed by the defendant (as alleged by the victim) did not fall into the low-level compulsion category.⁸³ Other High Court decisions have sought to steer clear of controversy by stating that forcible sex *includes* low-level compulsion; a statement which is clearly true, but which is not helpful in light of the underlying debate.⁸⁴

One possible reason as to why the issue regarding the required level of compulsion has not been affirmatively resolved by the judiciary is that the distinction between *low-level compulsion*, and *no-compulsion*, has thus far not been critical to any litigation outcomes that might otherwise be high-profile and controversial.⁸⁵ For scenarios where no physical force is applied to the victim, threat is already an accepted category of means that can violate will for the purpose of forcible sex, while separate offences are available to tackle any abuse of authority and taking advantage of victim's physical or mental incapacity. Fraudulent sex where the deception purely relates to consideration (e.g., promise of payment in exchange for sexual services) would be the archetypal test case for the *low-level compulsion* and *no-compulsion* distinction. However, the cases involving fraudulent sex that have come before the courts have thus far typically been restricted to either those that involve deception as to the nature of the act (e.g., insertion of penis instead of medical instrument),⁸⁶ or those which involve a threat (e.g., a defendant pretending to be a policeman and threatening to arrest the victim).⁸⁷ Such fraud would be punishable even under *low-level compulsion*.⁸⁸

[Criminal Division], 105 Qin Shang Su Zi No. 13 (105侵上訴字第13號刑事判決) (2016) (Taiwan); Taiwan Gaodeng Fayuan (臺灣高等法院) [Taiwan High Court], Xingshi (刑事) [Criminal Division], 104 Qin Shang Su Zi No. 62 (104侵上訴字第62號刑事判決) (2015) (Taiwan).

83. Taiwan Gaodeng Fayuan (臺灣高等法院) [Taiwan High Court], Xingshi (刑事) [Criminal Division], 105 Qin Shang Su Zi No. 228 (105侵上訴字第228號刑事判決) (2016) (Taiwan). The prosecution case is that the victim's cognitive and self-protection capacity is compromised due to the victim being troubled by relationship problems and the victim being a submissive person. The defendant took advantage of this opportunity to lure the victim into a motel room, and proceed to have sex with the victim despite the victim being reluctant.

84. E.g., Taiwan Gaodeng Fayuan (臺灣高等法院) [Taiwan High Court], Xingshi (刑事) [Criminal Division], 106 Qin Shang Su Zi No. 145 (106侵上訴字第145號刑事判決) (2017) (Taiwan).

85. C.f., Wang, *supra* note 17, at 393 (discussing how the public outcry and media pressure were key factors that influenced the expansion of "violation of will" to include sudden and limited-duration molestation; an expansion that is arguably jurisprudentially erroneous and which blurred the line between sexual harassment and forcible indecent assault).

86. E.g., Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 98 Tai Shang Zi No. 3312 (98台上字第3312號刑事判決) (2009) (Taiwan). For discussion of this case in the context of whether fraud as to legal interest would constitute violation of will, see Tsai, *supra* note 17, at 76-78.

87. E.g., Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 95 Tai Shang Zi No. 7201 (95台上字第7201號刑事判決) (2006) (Taiwan).

88. There are two cases that do not fit this pattern. In Zuigao Fayuan (最高法院) [Supreme

III. RAPE BY RELIGIOUS FRAUD

Amidst the legislative amendment and the ongoing scholarly debate on the scope and reach of forcible sex, there is a notable constant that has withstood the test of time. Courts--whether during the Republican era or in post-1945 Taiwan--have never been hesitant to punish religious fraudulent sex as rape or forcible sex. There is a line of cases tracing back to a 1939 decision in Shanghai,⁸⁹ and a 1963 decision in Taiwan,⁹⁰ which underlies the regular conviction of defendants who allude to supernatural and divine forces to procure sex.⁹¹ The willingness of courts to convict defendants, even under the original, pre-1999 provision, is particularly significant given the otherwise conservative approach adopted by Taiwanese courts.⁹² While there is a clear element of threat in these early cases, the convictions still represent a departure from the traditional German scholarly approach, which does not consider harm of a supernatural nature as constituting a threat. Under the general consensus of German jurisprudence, the subject matter of the threat must be such that it can be directly controlled by the person making the threat.⁹³

The courts' receptive attitude to punishing religious fraudulent sex has arguably been consolidated by the 1999 reforms. A search conducted by the author in the online judgment database reveals that there are easily, at least, three to five such cases which have reached the final appellate court (*i.e.*,

Court], Xingshi (刑事) [Criminal Division], 102 Tai Shang Zi No. 248 (102台上字第248號刑事判決) (2013) (Taiwan), the Supreme Court dismissed the conviction of forcible sex for a defendant who had lured an 11-year-old mildly mentally handicapped girl to have sex on the promise of providing money for her to buy clothes. The Supreme Court held that, while fraud renders the agreement to have sex defective, the psychological state of the defrauded party in making the decision to have sex is such that the defrauded party is still exercising free will, and thus there is no violation of will for the purposes of article 221. In addition, article 220 is already available to punish fraudulent sex, and thus it is not necessary to separately punish it under article 221. Similar reasoning is proffered in Taiwan Gaodeng Fayuan Tai Zhong Fen Yuan (臺灣高等法院臺中分院) [Taiwan High Court Taichung Ranch Court], Xingshi (刑事) [Criminal Division], 103 Shang Su Zi No. 1567 (103侵上訴字第1567號刑事判決) (2013) (Taiwan), where the High Court refused to convict the defendant--who allegedly lied about his HIV positive status before having sex with the victim--of forcible sex. In both cases, the defendants were still convicted and sentenced to lengthy prison terms despite acquittal of the forcible sex charges (*i.e.*, sex with a minor for the former, and engaging in risky sexual practices for the latter), such that the acquittal was not crucial. *See also* Huang, *supra* note 55, at 1831-38 (discussing the complications associated with the relationship between the article 221 (forcible sex) provision, and the article 227 (sex with a minor) provision, in scenarios where the victim is underage).

89. Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 28 Hu Shang Zi No. 25 (28滬上字第25號刑事判決) (1939) (Taiwan).

90. Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 52 Tai Shang Zi No. 1024 (52台上字第1024號刑事判決) (1963) (Taiwan).

91. *See* Tsai, *supra* note 17, at 61; Lin, *supra* note 16, at 114.

92. *See* Sze-Chie Fa, *supra* note *, at 74-84 (discussing the patriarchal rape myths that pervade the laws and legal system of Taiwan).

93. Tsai, *supra* note 17, at 62-63; Tu & Liu, *supra* note 16, at 60-61.

Supreme Court) each year, in the past five years; the vast majority of which have resulted in convictions.⁹⁴ Indeed, an earlier systematic review of forcible sex cases at the District Court level, conducted by Chih-Chieh Lin, is telling. The study found that Taiwanese judges still cling to the patriarchal rape myths that “real” rape will be evidenced by vigorous victim resistance. However, religious fraudulent sex is the one notable exception to the judicial reluctance to find forcible sex in scenarios involving two mentally capable adults having sex without the use of force or threat.⁹⁵

A. *The Current Doctrinal Approach*

In order to fully appreciate the prevailing judicial approach concerning the adjudication of forcible sex by religious fraud, it is worth reviewing the key findings of the 2013 Supreme Court decision, 最高法院102台上3692 (“*Judgment 102/3692*”). Having surveyed a series of Supreme Court cases determined since the 1999 reforms, Sheng-Wei Tsai identified this particular decision as providing the most detailed exposition of the doctrinal interpretation adopted by the courts.⁹⁶ Indeed, further searches conducted by the author in the online judgment database revealed that the key passage from *Judgment 102/3692* had been explicitly cited and adopted in numerous subsequent decisions, in both the lower courts (e.g., the High Court)⁹⁷ and the Supreme Court.⁹⁸

94. ZHONGHUA MINGUO SIFA YUAN (中華民國司法院) [JUDICIAL YUAN OF R.O.C.], Fa Xue Zi Liao Jian Suo (Cai Pan Cha Xun) (法學資料檢索(裁判查詢)) [LAW & REGULATION RETRIEVING SYSTEM], <http://jirs.judicial.gov.tw/FJUD/> (last visited Apr. 1, 2018).

95. Lin, *supra* note *, at 180-85. Chih-Chieh Lin labelled this category of cases as “religious compulsion”, although the conventional label in the Taiwanese literature is religious fraudulent sex: Tsai, *supra* note 17, at 61; Lin, *supra* note 16, at 111.

96. Tsai, *supra* note 17, at 62 n.69.

97. E.g., Taiwan Gaodeng Fayuan (臺灣高等法院) [Taiwan High Court], Xingshi (刑事) [Criminal Division], 106 Qin Shang Su Zi No. 293 (106侵上訴字第293號刑事判決) (2017) (Taiwan); Taiwan Gaodeng Fayuan Tai Nan Fen Yuan (臺灣高等法院臺南分院) [Taiwan High Court Tainan Ranch Court], Xingshi (刑事) [Criminal Division], 106 Qin Shang Su Zi No. 916 (106侵上訴字第916號刑事判決) (2017) (Taiwan); Taiwan Gaodeng Fayuan Gao Xiong Fen Yuan (臺灣高等法院高雄分院) [Taiwan High Court Kaohsiung Ranch Court], Xingshi (刑事) [Criminal Division], 104 Qin Shang Su Zi No. 52 (104侵上訴字第52號刑事判決) (2015) (Taiwan); Taiwan Gaodeng Fayuan Tai Nan Fen Yuan (臺灣高等法院臺南分院) [Taiwan High Court Tainan Ranch Court], Xingshi (刑事) [Criminal Division], 104 Qin Shang Su Zi No. 749 (104侵上訴字第749號刑事判決) (2015) (Taiwan); Taiwan Gaodeng Fayuan (臺灣高等法院) [Taiwan High Court], Xingshi (刑事) [Criminal Division], 103 Qin Shang Su Zi No. 112 (103侵上訴字第112號刑事判決) (2014) (Taiwan); Taiwan Gaodeng Fayuan Tai Zhong Fen Yuan (臺灣高等法院臺中分院) [Taiwan High Court Taichung Ranch Court], Xingshi (刑事) [Criminal Division], 102 Qin Shang Su Zi No. 157 (102侵上訴字第157號刑事判決) (2013) (Taiwan); Taiwan Gaodeng Fayuan Tai Zhong Fen Yuan (臺灣高等法院臺中分院) [Taiwan High Court Taichung Ranch Court], Xingshi (刑事) [Criminal Division], 101 Qin Shang Su Zi No. 237 (101侵上訴字第237號刑事判決) (2012) (Taiwan).

98. E.g., Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 104

From that passage,⁹⁹ one can identify five elements to forcible sex by religious fraud.

First, the victim is in a state of psychological vulnerability. The psychological vulnerability having arisen due to a combination of 1. setbacks in a relationship, health, and/or career; and 2. limitations to the victim's intellect. As a consequence of the psychological vulnerability (and accompanying feelings of helplessness), the victim's exercise of autonomy is compromised and the victim is easily influenced.

Second, the defendant employs methods that cannot be verified through science. Examples include divine power, supernatural force, religion, or superstition.

Third, the manifestation and purpose of the method is contrary to prevailing social values. Whether the method is contrary to prevailing social values is assessed on the method's outward appearance and via a common sense approach.

Fourth, the method suppressed the victim's thought process by alluding to a solution to the victim's problems.

Fifth, as a result of the defendant's methods, the victim made a decision to have sexual intercourse that was against the victim's self-interest and which would not have been undertaken by normal persons.

Two preliminary points should be addressed before tackling the central issue of how the falsity of the religious claims fits into the framework.

First, the allusion to a state of psychological vulnerability in the first element represents continuity of the pre-1999 reform cases that have to navigate the explicit "unable to resist" requirement.¹⁰⁰ However, it is worth noting the expansive scope of reasons that may give rise to a state of

Tai Shang Zi No. 2902 (104台上字第2902號刑事判決) (2015) (Taiwan). Sometimes the Supreme Court simply replicates this passage without reference to its source: *e.g.*, Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 106 Tai Shang Zi No. 456 (106台上字第456號刑事判決) (2017) (Taiwan); Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 103 Tai Shang Zi No. 3490 (103台上字第3490號刑事判決) (2014) (Taiwan). For discussion of the role of precedent in civilian jurisdictions, *See* MICHAEL BOHLANDER, *PRINCIPLES OF GERMAN CRIMINAL LAW* 15 (2009).

99. Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 102 Tai Shang Zi No. 3692 (102台上字第3692號刑事判決) (2013) (Taiwan) (「刑法第二百二十一條第一項規定所稱『其他違反其意願之方法』，並不以類似同條項所列舉之強暴、脅迫、恐嚇或催眠術等方法為必要，祇要行為人主觀上具備侵害被害人人性自主之行使、維護，以足使被害人人性自主決定意願受妨害之任何手段，均屬之。而人之智能本有差異，於遭逢感情、健康、事業等挫折，而處於徬徨無助之際，其意思決定之自主能力顯屬薄弱而易受影響，若又以科學上無法即為印證之手段為誘使（例如法力、神怪、宗教或迷信等），由該行為之外觀，依通常智識能力判斷其方法、目的，欠缺社會相當性，且係趁人急迫無助之心理狀態，以能解除其困境而壓制人之理性思考空間，使之作成通常一般人所不為而損己之性交決定，此行為即屬一種違反意願之方法。是以行為人若施以上開方法而使人為性交之行為，即與犯罪構成要件該當。」）

100. *supra* II.B.

psychological vulnerability. Beyond specific medical conditions, the setbacks regarding career and relationships are recognized in the non-exhaustive list. In addition, the state of psychological vulnerability is assessed subjectively, and takes into account the victim's intellectual capabilities. The victim's predicament need not be objectively dire. Indeed, the problems faced by the victims in *Judgment 102/3692* appear to be relatively trivial or mundane. One victim was seeking to reunite with her boyfriend, while another victim was facing "some difficulties at work."¹⁰¹ While the case will be more compelling if there is something more than mere relationship problems (e.g., maintaining a marriage with children and/or economic dependency) or career issues (e.g., personal or family financial difficulties that might arise if the victim loses their job), the Court had no difficulty affirming the forcible sex convictions of the defendant in relation to the *Judgment 102/3692* victims.¹⁰²

Second, the fifth element can be understood as a form of causation requirement. As noted in some of the Supreme Court decisions, the sex referred to in the passage (and which constitutes forcible sex) is distinct from ordinary sex associated with mutual love and attraction (一般男女歡愛之性行爲).¹⁰³ Indeed, in a 2012 case, the Court found that the defendant had engaged in threat-based religious fraud with the victim, but he was acquitted of forcible sex, because he and the victim were in a romantic relationship. The Court reasoned that, notwithstanding the religious aspect, the victim had a separate, independent reason for having sex with the defendant.¹⁰⁴

B. Unpacking the Doctrine

On the central issue of falsity of the religious claims, in accordance with the consensus shown by recent decisions, the starting point is that fraud is a form of method that would satisfy the third element (i.e., the manifestation and purpose of the method is contrary to prevailing social values). In *Judgment 102/3692*, after laying out the elements in the cited paragraph, the Court then stated that the elements had been satisfied because the defendant used the *false* pretense of improving luck through divine intervention to capitalize on the psychological vulnerability of the victims.¹⁰⁵ The reference to the falsity of the supernatural/religious claims pervades other decisions, and is evident in phrases such as the defendant "falsely claims" (誣稱)¹⁰⁶ or

101. 102 Tai Shang Zi No. 3692.

102. *Id.*

103. E.g., 106 Tai Shang Zi No. 456; 103 Tai Shang Zi No. 3490.

104. 101 Qin Shang Su Zi No. 237.

105. 102 Tai Shang Zi No. 3692.

106. Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 102 Tai Shang Zi No. 626 (102台上字第626號刑事判決) (2013) (Taiwan).

the victim is “mistaken” (誤信).¹⁰⁷ This is *prima facie* understandable, since the long-standing intrinsic moral objection to fraud¹⁰⁸ renders it the perfect candidate for methods whose means and purpose are deemed contrary to prevailing social values (*i.e.*, the third element). However, if the falsity of the supernatural/religious claims is indeed widely accepted by Taiwanese courts as a permissible avenue through which the conviction of forcible sex may be premised, then two important questions emerge. First, is the falsity of the supernatural/religious claims a *necessary* condition for conviction, as opposed to merely a *sufficient* condition? Second, how do the courts ascertain the falsity of the supernatural/religious claims, especially in light of constitutional constraints on religious freedom?

1. *Falsity as a Necessary Requirement?*

The short answer to the question of whether fraud is a necessary condition should ordinarily be a straightforward “no”. There is no such restriction in either the statutory provision or in the decision underlying *Judgement 102/3692*. Indeed, “threat” has always been listed as a means through which rape can be constituted, even before the 1999 reforms, with the academic and judicial consensus being that the objective veracity of the threat is immaterial.¹⁰⁹ It would seem strange that the prosecution has to establish the falsity of the supernatural/religious claims to secure a conviction, especially in light of the evidential difficulty of assessing such claims as recognized by scholars¹¹⁰ and the courts.¹¹¹

However, this is a live question in practice because the Taiwanese courts have always found supernatural/religious claims to be false when convicting the defendant. Indeed, the courts even alluded to the defendant’s deception (*e.g.*, 佯言亡魂纏身,¹¹² 繼藉口「解運」¹¹³) in decisions from the early

107. 106 *Tai Shang Zi No. 456*.

108. AARON LEVINE, *ECONOMIC MORALITY AND JEWISH LAW* 53 (2012); Barbara Biscotti, *Debtor's Fraud in Roman Law: An Opportunity for Some Brief Remarks on the Concept of Fraud*, 17 *FUNDAMINA: A J. OF LEGAL HISTORY* 1, 2-10 (2011). See Ariel Porat & Omri Yadlin, *A Welfarist Perspectives on Lies*, 91 *IND. L.J.* 617, 623-24 (2016) (observing the disparate legal treatment of non-disclosure and lies, and noting the deontological morality underpinning the distinction).

109. *Supra* II.C.

110. *E.g.*, Tsai, *supra* note 17, at 63; Tu & Liu, *supra* note 16, at 58.

111. *E.g.*, Taiwan Gaodeng Fayuan (臺灣高等法院) [Taiwan High Court], Xingshi (刑事) [Criminal Division], 105 *Qin Shang Su Zi No. 62* (105侵上訴字第62號刑事判決) (2016) (Taiwan); Taiwan Gaodeng Fayuan (臺灣高等法院) [Taiwan High Court], Xingshi (刑事) [Criminal Division], 102 *Qin Shang Su Zi No. 55* (102侵上訴字第55號刑事判決) (2013) (Taiwan).

112. 52 *Tai Shang Zi No. 1024*.

113. Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 56 *Tai Shang Zi No. 2210* (56台上字第2210號刑事判決) (1967) (Taiwan) (the Court also emphasized the lack of education and ignorance of the victim 「告訴人乃一自幼生長農村，未受教育，智識極端淺薄之村姑，與曾受教育之成年人不可等論」).

1960s. Reference to falsity, in this respect, is particularly telling. The decisions from this early era are known for their brevity (typically only a couple of paragraph), such that the inclusion of any phrase has extra significance.¹¹⁴ Given that the supernatural/religious claims from these decisions clearly manifested in the form of threats, and that courts deemed the victims to have experienced considerable fear as a result of such threats, it would be uncontroversial for the courts to sustain the convictions under the pre-1999 provision without making a falsity finding.

This pattern continued after the 1999 reforms. The central thrust of the *Judgment 102/3692* holding is that the “other means against the person’s will” includes the defendant’s exploitation of the state of psychological vulnerability through methods not verifiable by science. This is entirely consistent with the moderate and relatively uncontroversial *low-level compulsion* approach,¹¹⁵ which renders falsity of the supernatural/religious claims unnecessary. Indeed, close analysis here reveals a tension between the second and third elements of the *Judgment 102/3692* holding. While the defendant’s deception would readily satisfy the “contrary to social values” requirement under the third element, the assessment of whether the defendant is truthful or not runs counter to the second element’s condition regarding the scientifically unverifiable nature of the defendant’s method. However, the finding of falsity remains the common feature amongst all the convictions where defendants have relied upon supernatural/religious claims. An extensive case law search conducted by the author has yet to yield a case where the defendant has been convicted of forcible sex, where the court is not convinced as to the falsity of the defendant’s supernatural/religious claim.¹¹⁶

Thus, there appears to be a *de facto* requirement of falsity in the judicial application of the forcible sex provision to the use of supernatural/religious claims, even if such a requirement is strictly speaking not required under the statutory language, by academic theory, or in accordance with the holding in *Judgment 102/3692*. It is true that defendants are often charged with monetary fraud vis-à-vis the supernatural/religious claims which underlie forcible sex.¹¹⁷ In this sense, a court’s reference to the falsity of the

114. See Brian L. Kennedy, *Taiwan’s Criminal Justice System: Clash of Cultures*, 10 AMERICAN J. OF CHINESE STUD. 21, 24-25 (2003) (discussing the requirement for ‘detailed’ judgments in light of the post-martial law reforms to criminal procedure).

115. *Supra* II.C.

116. See also Tsai, *supra* note 17, at 62 (referring to some early cases and observing that the courts have treated such cases as fraud, rather than as involving a threat or intimidation). Acquittal in such cases tends to be rare, and is usually due to inconsistencies in the victim’s testimony, which raises doubt as to whether the sexual intercourse took place, rather than because the court doubted whether the defendant was in fact lying: e.g., Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 102 Tai Shang Zi No. 3088 (102台上字第3088號刑事判決) (2013) (Taiwan).

117. E.g., 106 Tai Shang Zi No. 456; Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑

defendant's claims, in the context of forcible sex, could arguably be a descriptor arising from the court's factual findings on the monetary fraud. Nonetheless, there are many cases in which the defendant is not charged with monetary fraud.¹¹⁸ There are also cases where the defendant was acquitted of the monetary fraud charges, but convicted of the forcible sex.¹¹⁹ As shown in the next section, the contrasting outcome in the latter scenario provides a revealing insight into how Taiwanese courts determine the veracity of supernatural/religious claims. At this juncture, it suffices to note that courts are seemingly determined to adjudicate the falsity of claims when convicting a defendant, even when there is no apparent need to do so.

2. *Evaluating the Falsity of Supernatural Claims and Religious Freedom*

The preceding section raises the following question: How have the Taiwanese courts actually established the falsity of supernatural/religious claims in the numerous and frequent convictions of forcible sex?

A survey of recent cases reveals a variety of ways in which the issue of falsity is approached. The choice of methods is often contingent upon the facts of the case; in particular, the type of supernatural/religious claims relied upon by the defendant.

The ostensibly simple scenario occurs where the religious premise proclaimed by the defendant is part of an established world religion. The existence of a set of clearly articulated and defined doctrines in established world religions potentially enables the courts to evaluate whether the defendant has misrepresented the religion in question, without delving into the more controversial question of whether the defendant's claim is objectively false.¹²⁰ In 最高法院103台上626 (“*Judgment 103/626*”),¹²¹ the

事) [Criminal Division], 103 Tai Shang Zi No. 2696 (103台上字第2696號刑事判決) (2014) (Taiwan); Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 103 Tai Shang Zi No. 626 (103台上字第626號刑事判決) (2014) (Taiwan); Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 102 Tai Shang Zi No. 4174 (102台上字第4174號刑事判決) (2013) (Taiwan).

118. *E.g.*, 103 Tai Shang Zi No. 3490; 103 Tai Shang Zi No. 720; Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 103 Tai Shang Zi No. 538 (103台上字第538號刑事判決) (2014) (Taiwan).

119. *E.g.*, Taiwan Gaodeng Fayuan (臺灣高等法院) [Taiwan High Court], Xingshi (刑事) [Criminal Division], 104 Qin Shang Su Zi No. 59 (104侵上訴字第59號刑事判決) (2015) (Taiwan); 102 Qin Shang Su Zi No. 55.

120. Peter Smith, *The Problem of the Non-Justiciability of Religious Defamations*, 18 ECC. L.J. 36, 37-38, 51-52 (2016); Caleb E. Mason, *What is Truth? Setting the Bounds of Justifiability in Religiously-Infllected Fact Disputes*, 26 J.L. & RELIGION 91, 93-104 (2011).

121. 103 Tai Shang Zi No. 626. The appeal is focused on relatively narrow grounds, with the full facts set out in Taichung Difang Fayuan (臺東地方法院) [Taichung District Court], Xingshi (刑事)

defendant claimed to be a Christian pastor and knew several of his victims in a Christian church setting. He told the victims that it was God's will that they should have sex with him, whether to avert misfortunes, or secure their place in Heaven. In convicting the defendant for forcible sex, the Court relied upon the following: 1) that the defendant was not in fact an accredited pastor from any church, and 2) that sex as a means to gain access to Heaven is clearly not a Christian doctrine.¹²²

This approach is, however, not applicable to the majority of cases where the religious premise underlying the defendant's claims derives either from Chinese folk religions, or from purported new religions founded by the defendant. For example, in *Judgment 102/3692*, discussed above in III.A, the defendant claimed to be well-versed in "Tame Head" spells (a form a black magic popularly practiced in Thailand and other parts of South East Asia),¹²³ and that fresh sperm is necessary to concoct the love charms and magic potions. In 最高法院106台上456 (*Judgment 106/456*), the defendant declared that he was the reincarnation of the "Dragon God" (龍王) and had developed a rather elaborate set of doctrines that prescribed divine significance to various sex acts,¹²⁴ in relation to which he had established a hierarchy of followers based upon their level of sexual participation and monetary donations.¹²⁵

Deprived of the ability to assess these claims with reference to established doctrines and practices, the courts tend to focus on the inconsistencies in the defendant's testimony. In the appeal leading to

[Criminal Division], 101 Qin Su Zi No. 70 (101侵訴字第70號民事判決) (2012) (Taiwan).

122. Notably, while the District Court alludes to both factors, the Supreme Court focuses only on the pastor point. There was also evidence that the defendant had actively engineered false evidence of his purported divinity. The High Court found that the defendant had coerced three victims, who believed that they had the ability to witness paranormal phenomenon, (靈異現象) to proclaim that the defendant was indeed God in front of other victims. This finding was based on the testimony of three victims who claimed that they had to affirm the defendant's divinity, even though their paranormal vision was both different and vague: See Taiwan Gaodeng Fayuan Tai Zhong Fen Yuan (臺灣高等法院臺中分院) [Taiwan High Court Taichung Ranch Court], Xingshi (刑事) [Criminal Division], 101 Qin Shang Su Zi No. 70 (101侵上訴字第70號刑事判決) (2012) (Taiwan).

123. Alexander Horstmann, *Reconfiguring Manora Rongkru: Ancestor Worship and Spirit Possession in Southern Thailand*, in *ENGAGING THE SPIRIT WORLD: POPULAR BELIEFS AND PRACTICES IN MODERN SOUTHEAST ASIA* 184, 184-85 (Kirsten W. Endres & Andrea Lauser eds., 2011). For a case study account, See generally Bertha Mo, *Black Magic and Illness in a Malaysian Chinese Community*, 18 SOC. SCI. & MED. 147 (1984).

124. For example, sexual intercourse is described by the euphemism, "forever Dragon education" (龍恆教育). Sperm is described as the "essence of Dragon" (龍精華), such that internal depositing will allow accumulation of the "Dragon's blessing" (龍福報).

125. "Dragon Girl" (龍女) is the highest level, followed by "Turtle Girl" (龜女), and then ordinary followers (信徒). The defendant's wife--who introduced some of the victims to the defendant and who assisted in persuading the victims by affirming the defendant's supernatural power--was also charged and convicted as an accomplice to the forcible sex. For critical analysis of circumstances where the presence of accomplices, who did not physically participate in the sex acts, would constitute an aggravating factor under article 222(1), See Lee, *supra* note 45.

Judgment 102/3692, the High Court noted how the defendant radically changed his defense. During the interview with the prosecutor, the defendant initially claimed that fresh sperm is indeed necessary for certain potions, but later claimed that he had never alluded to religious rituals in having sex.¹²⁶ In *Judgment 106/456*, the Supreme Court¹²⁷ and the High Court¹²⁸ both placed great emphasis upon the defendant's testimony that the "Dragon God" was in his consciousness, but that he might not be--objectively speaking--the "Dragon God" reincarnated.¹²⁹ According to the courts, this was evidence that the defendant was lying to the victims.¹³⁰

The two approaches to assessing whether the defendant has misrepresented the doctrines/practices of an established religion, as well as the examination of internal inconsistencies in the defendant's testimony, are *prima facie* plausible ways to navigate the evidential difficulties posed by the scientifically unverifiable nature of the defendant's claims. However, closer examination of the courts' reasoning--especially when compared with how the courts approached the issue of falsity for the purpose of monetary fraud committed concurrently with forcible sex charges--reveals that Taiwanese courts are, in fact, heavily influenced by specific notions of what constitutes legitimate religion when evaluating whether a supernatural/religious claim is fraudulent.

In *Judgment 102/3692*, the defendant was convicted of the forcible sex charges, but acquitted of the corresponding monetary fraud charges.¹³¹ The Court found that the defendant had collected NT 200,000 (about USD 6,700) from a victim for performing love charm rituals. However, there was insufficient evidence to find that the defendant had committed fraud. First,

126. *102 Qin Shang Su Zi No. 55*. See also Taiwan Gaodeng Fayuan Tai Nan Fen Yuan (臺灣高等法院臺南分院) [Taiwan High Court Tainan Ranch Court], Xingshi (刑事) [Criminal Division], 105 Shang Yi Zi No. 839 (105上易字第839號刑事判決) (2016) (Taiwan). (The defendant--who was the mother of the defendant convicted of forcible sex under the pretense of being the "Dragon God" reincarnate in *Judgment 106/456*--was convicted of monetary fraud. The Court rejected her defense that she never mentioned any religious/supernatural claims when interacting with the victims. There was ample evidence--demonstrated through photographs and her personal webpage--that the defendant proclaimed to be the reincarnation of the "White Snake Female Deity," [白蛇玉佛觀音] and could offer fortune telling services and other divine assistance).

127. *106 Tai Shang Zi No. 456*.

128. *105 Qin Shang Su Zi No. 62*.

129. 「伊不是龍王附身，只是意識裡面有龍王，是不是龍王附身都是伊在講，其實神明有很多，龍王也是一種，有沒有其實沒有這麼重要，以客觀來看，伊是沒有龍王附身云云。」

130. The defendant also admitted to creating fake Facebook profiles, in order to post accolades about the defendant's supernatural powers on his Facebook page. For other cases, See *104 Qin Shang Su Zi No. 59*. (defendant admits that sex as a form of supernatural revenge ritual is fraud).

131. *102 Qin Shang Su Zi No. 55*. (the monetary fraud acquittal was not appealed by the prosecutor when the defendant appealed to the Supreme Court). The defendant was also acquitted of forcible sex/indecent assault in relation to two other victims, despite essentially using the same pretense on them. The High Court found that there was a lack of evidence, as the victims' accounts did not reveal a sense of fear and vulnerability when deciding to participate in the sex acts.

the Courts recognized that “Tame Head” spells, together with charms, exorcism, witchcraft, spirit possession, and enchantment¹³² was part of a long tradition of folk religious practices and customs spanning thousands of years. Although considered as superstitions (迷信) by atheists, judges should not deny their veracity based upon subjective perception, especially where science cannot prove or disprove their existence. Second, there was evidence that the defendant did travel to Thailand to learn about “Tame Head” spells, and thus should be distinguished from a charlatan who boast about one’s ability without possessing any professional skill or knowledge. Mere ineffectiveness in terms of outcome is evidence of a lousy practitioner, but not necessarily a fraudulent practitioner. Taking these two factors into consideration, the Court held that even if the defendant’s subsequent claim that fresh sperm was a necessary ingredient of the ritual proved to be false,¹³³ this did not necessarily imply that the initial collection of funds was fraudulent.

These factors--namely, 1) the similarity with existing religious practices, and 2) the religious training/education of the defendant--are evident in other cases. In *Judgment 106/456*, the defendant was also convicted of monetary fraud for soliciting donations on the pretense that these offerings to the “Dragon God” would improve luck. The Court noted that the defendant was initially engaged in menial jobs (e.g., security guard, dish-washer). The defendant only set up the “Dragon God” altar after claiming to dream about a giant dragon upon his return from a trip to Thailand, and then supposedly taught himself all the purported rituals. In 最高法院 102 台上 4174 (“*Judgment 102/4174*”),¹³⁴ a professional fortune teller with a twenty-year practice was acquitted of the majority of monetary fraud charges. The Court noted that the defendant’s mode of operation and religious premises were similar to the various common folk religious practices involving luck-improvement rituals,¹³⁵ and observed that if those practices were considered to be fraudulent, then it would obviously be contrary to the “legal sentiment” (法律情感) of the public.

The defendant in *Judgment 102/4174* was, however, convicted of forcible sex and monetary fraud in relation to two victims; respectively, a daughter and her mother. The falsity was established by inconsistencies in

132. 「巫術、降頭、下蠱、驅魔、收驚、起乩。」

133. This claim was made subsequent to the payment of monies.

134. The appeal is focused on relatively narrow grounds, with the full facts and holding set out in Taiwan Gaodeng Fayuan Tai Zhong Fen Yuan (臺灣高等法院臺中分院) [Taiwan High Court Taichung Ranch Court], Xingshi (刑事) [Criminal Division], 101 Qin Shang Su Zi No. 1 (101侵上訴字第1號刑事判決) (2012) (Taiwan).

135. 「民間習俗上，寺廟預告某生肖或特定歲數之人，某年太歲當頭或犯沖或流年不利云云，為人施作『安太歲』、『祭煞』、『蓋魂』等消災法事；或針對特定需求之人，點『光明燈』、『平安燈』、『文昌燈』等以祈福，收取對價。」

the defendant's statement.¹³⁶ However, just as material to the courts is that the purported claim of curse-removal ritual involving sex acts is against the "chaste" nature of religions (宗教純潔性).

The latter statement arguably represents a frank articulation of the courts' true approach to evaluating the falsity of supernatural/religious claims in the context of forcible sex. The courts are generally willing to accommodate transactions or interactions that resemble commonly practiced folk religions, even if the payment of money is premised upon claims that cannot be scientifically or objectively verified. However, the courts draw a distinct red line when sex acts are involved, and seemingly subscribe to a conceptualization of religion that is intrinsically skeptical of any supernatural/religious claims involving sex as part of a purported religious ritual. Notably, courts do not shy away from explicitly recognizing a whole host of folk religious practices in their decision, including reference to exotic practices with specific terminologies, where it is difficult to find an English translation to do proper justice to expressions such as "rearing small ghost" (養小鬼), "Tame Head" (降頭),¹³⁷ and "cover soul" (蓋魂).¹³⁸ However, courts never refer to religious practices that involve sexual intercourse, even if the existence of such practices is not unheard of in the Chinese cultural context,¹³⁹ and in relation to which numerous victims appeared somewhat receptive.

136. Following the rituals involving sex, the victims secretly recorded a conversation with the defendant. In that conversation, the defendant told the mother ("A") and daughter ("B") that an evil curse had been cast on the B by her sister ("C") who had run away and did not have a good relationship with the mother. The defendant stated that C casted the curse by using the clothes, nail, and other objects given to her by B. However, B never gave these objects to C. B deliberately lied to the defendant about giving those objects as a kind of self-help entrapment.

137. 101 *Qin Shang Su Zi* No. 1.

138. 105 *Qin Shang Su Zi* No. 62.

139. E.g., Xu Jia Li (徐嘉莉), *Hú Sēng Xìng Mìzōng* (胡僧·性·密宗) [*Monks from Western Religions, Sex and Tantrism*], 23 *ZHONGSHAN DAXUE XUEBAO* (SHÈHUÌ KÈXUÉ BǎN) (中山大學學報社會科學版) [JOURNAL OF THE GRADUATES SUN YAT-SEN UNIVERSITY (SOCIAL SCIENCE)] 55, 56-60 (2002) (discussing the Tibetan Buddhist Tantric practice of using sex as a means of reaching nirvana, and the cultural understanding of such practices in China); HUGH B. URBAN, *SEX SECRECY, POLITICS, AND POWER IN THE STUDY OF RELIGION* 203-63 (2003) (discussing the practices of Tantric sex in the contemporary U.S. and India). See also Li-Chuan Chiu (邱麗娟), *Qīng Dài Mínjiān Mìmi Zōngjiào Huódòng Zhōng Nǎnnǚ Záichǔ xiànxàng De Tàntǎo* (清代民間秘密宗教活動中「男女雜處」現象的探討) [*The Study of the Phenomenon that Men and Women of Folk Secret Religious Sects Anticipated Meetings Together in Ch'ing Dynasty*], 35 *GUOLÌ TÁIWĀN SHĪFÀN DAXUE LISHI YANJIU TONGBAO* (國立臺灣師範大學歷史研究學報) [NATIONAL TAIWAN NORMAL UNIV. BULLETIN OF HISTORICAL RESEARCH] 141, 163-70 (2006). (discussing the various Qing dynasty criminal cases involving religious leaders/specialists engaging in illicit sexual relationships with their followers through various religious/supernatural pretenses).

C. *Constitutional?*

The manner in which courts established the falsity of supernatural/religious claims regarding sex raise serious concerns about the violation of religious liberty. In the past, courts and states have exhibited few inhibitions when making determinations as to what constitutes false religion and/or heresy.¹⁴⁰ However, contemporaneous discourses on religious liberty, whether with or without an accompanying anti-Establishment consideration, have duly recognized the limitations on the desirability, and capability, of modern secular courts to assess religious and spiritual matters. According to the jurisprudence of the European Court of Human Rights (“ECtHR”), it is an established principle that the duty of neutrality and impartiality under the religious freedom clause of the European Convention on Human Rights prohibits the state from assessing the legitimacy of religious beliefs.¹⁴¹ In the United States, both the majority and dissenting judgments in the landmark Supreme Court case on religious fraud, *U.S. v. Ballard*, unanimously agreed that the First Amendment mandates that courts may not inquire into the veracity of a religious belief, disagreeing only on whether the courts may utilize the insincerity of the defendant’s belief to sustain a fraud conviction.¹⁴² Even the English common law courts, despite the absence of a written constitution, have long developed the doctrine of non-justiciability which holds that “issues of the truth or falsity of religious doctrines [are] non-justiciable”.¹⁴³

140. *E.g.*, *R v. Lady Portington*, 91 Eng. Rep. 151 (a 16th century English case holding that under the monarch’s power and obligation to “see that nothing be done to . . . ‘Propagation of a false Religion’, the monarch may order a trust for ‘a superstitious use’ to be applied to a ‘proper use’”). For discussion of the Medieval Inquisition, arguably the most systematic attempt at policing religious truth in history, *See* Carole A. Myscofski, *The Magic of Brazil: Practice and Prohibition in the Early Colonial Period, 1590-1620*, 40 HISTORY OF RELIGION 153 (2000); Margaret Mott, *The Rule of Faith over Reason: The Role of the Inquisition in Iberia and New Spain*, 40 J. CHURCH & STATE 57 (1998). *See also* Jianlin Chen, *Deconstructing the Religious Free Market*, 3 J. OF L., RELIGION & STATE 1, 21-22 (2014) (discussing how restrictive definition of religion have been used by purported advocates of religious liberty to discriminatorily exclude other religions from the protection of religious freedom).

141. COUNCIL OF EUROPE/EUROPEAN COURTS OF HUMAN RIGHTS, *supra* note 23, at 19. *See* Anna Su, *Judging Religious Sincerity*, 5 OXFORD J. OF L. & RELIGION 28, 36-37 (2016) (discussing the recent emergence of the sincerity test to replace the belief-conduct distinction that was previously used to manage religious accommodation challenges under ECtHR jurisprudence). For a critical discussion on the desirability of continued adherence to the duty of neutrality and impartiality in the EU, *See* Andrea Pin, *Does Europe Need Neutrality? The Old Continent in Search of Identity*, 2014 B.Y.U. L. REV. 605 (2014).

142. *United States v. Ballard*, 322 U.S. 78, 84-87 (1944). *See* Stephen Senn, *The Prosecution of Religious Fraud*, 17 FLA. ST. U. L. REV. 325, 333-35 (1990) (observing that, notwithstanding common perceptions and subsequent court citation to the contrary, the Supreme Court did not in fact directly hold that the sincerity test may be used for securing convictions of religious fraud, but merely that questions of religious truth cannot be put to the jury).

143. *See* Frank Cranmer, *Case Comment: Thomas Phillips v. Thomas Monson*, 16 ECC. L.J. 393, 393 (2014). For a discussion on the doctrine of non-justiciability of religious issues in English courts,

In Taiwan, the Judicial Yuan (*i.e.*, the constitutional courts)¹⁴⁴ have interpreted the constitutional protection of religious freedom to entail state neutrality among different religions; namely, the state may not advantage or disadvantage any particular religion.¹⁴⁵ This principle of neutrality is further buttressed by the separate constitutional provision of religious equality (along with gender, race, class, and political party).¹⁴⁶ Indeed, when adjudicating religious fraud cases, the Taiwanese courts have frequently affirmed that the constitutional protection of religious freedom requires that the judiciary refrain from intervening in the realms of the supernatural and the divine.¹⁴⁷

The constitutional constraints do not necessitate a complete prohibition on all prosecutions of fraud involving religions. In *Judgment 103/626*, the defendant was—in addition to the forcible sex charges relating to claims about being God and access to Heaven—also convicted of monetary fraud.¹⁴⁸ The monetary fraud did not involve any religious elements.¹⁴⁹ It was a typical solicitation fraud where donations were sought for certain charitable purposes (*i.e.*, church building and doing charity), but which the defendant diverted for personal use. In such scenario, evidence such as bank statements, receipts, and other financial documents (or the absence thereof) handily authenticate or disprove a defendant's claim.¹⁵⁰ Religious freedom is

See Satvinder S. Juss, *The Justiciability of Religion*, 32 J. OF L. & RELIGION 285, 291-95 (2017).

144. For an outline of the judicial system and hierarchy, See LO, *supra* note 35, at 11-19. For discussion on the constitutional court, See Ming-Sung Kuo, *Moving Towards a Nominal Constitutional Court? Critical Reflections on the Shift from Judicial Activism to Constitutional Irrelevance in Taiwan's Constitutional Politics*, 25 WASH. INT'L L.J. 597, 605-34 (2016).

145. Sifa Yuan Dafaguan Jieshi No. 460 (司法院大法官解釋第460號解釋) [Judicial Yuan Interpretation No. 460] (July 10, 1998) (Taiwan). This understanding of religious freedom has been followed in subsequent interpretations: Sifa Yuan Dafaguan Jieshi No. 573 (司法院大法官解釋第573號解釋) [Judicial Yuan Interpretation No. 573] (Feb. 2, 2004) (Taiwan); Sifa Yuan Dafaguan Jieshi No. 490 (司法院大法官解釋第490號解釋) [Judicial Yuan Interpretation No. 490] (Oct. 1, 1999) (Taiwan).

146. ZHONGHUA MINGUO XIANFA (中華民國憲法) [CONSTITUTION OF R.O.C.] § 7 (1947) (Taiwan).

147. *E.g.*, Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 100 Tai Shang Zi No. 5493 (100台上字第5493號刑事判決) (2011) (Taiwan); Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 98 Tai Shang Zi No. 3709 (98台上字第3709號刑事判決) (2009) (Taiwan); Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 93 Tai Shang Zi No. 4456 (93台上字第4456號刑事判決) (2004) (Taiwan); 105 Qin Shang Su Zi No. 62; 101 Qin Shang Su Zi No. 1.

148. There were 11 victims of forcible sex (including indecent assault). Nine of these victims were also victims of monetary fraud, together with two other individuals.

149. For discussion on the distinction between religious fraud and a false claim that relates to religion but which is based on a secular factual claim, See Jorge O. Elorza, *Secularism and the Constitution: Can Government be Too Secular?*, 72 U. PITT L. REV. 53, 110-11 (2010); Marjorie Heins, "Other People's Faiths": *The Scientology Litigation and the Justiciability of Religious Fraud*, 9 HASTINGS CONST. L.Q. 153, 157-58 (1981).

150. Jianlin Chen, *Hong Kong's Chinese Temples Ordinance: A Cautionary Case Study of Discriminatory and Misguided Regulation of Religious Fraud*, 33 J. OF L. & RELIGION (forthcoming);

not directly implicated in such a scenario.

However, religious freedom is arguably violated by the courts' approach to forcible sex cases. The laudable recognition of the constraints posed by the constitutional protection of religion is duly reflected in the circumspect approach which courts adopt when dealing with monetary fraud charges, where the defendant is given the benefit of the doubt, even in somewhat dubious circumstances. Indeed, the courts' explicit recognition of a range of ostensibly superstitious practices (*e.g.*, Tame Head spells, fortune telling) as legitimate religious practices is a significant departure from the previous state policy of suppressing superstitious activities.¹⁵¹ Nonetheless, the Taiwanese courts have unfortunately succumbed to their preconceived notions on religion when it comes to forcible sex charges involving supernatural/religious claims, thus adopting a seemingly blanket rejection of any supernatural/religious claims that call for sex as part of a religious ritual and/or required for favorable divine interventions as false.¹⁵²

The constitutional implication in a scenario where the fraud involves the defendant claiming to part of an established religion is more complicated. As noted above in the discussion on *Judgment 103/626*, the courts are not assessing the religious truth *per se*, but are evaluating whether the defendant has misrepresented his religious affiliation (*i.e.*, is he in fact a Christian?), or the religious premises underlying his claims (*i.e.*, is the claim that sex is to one's admission to Heaven a Christian doctrine?). This avoids the immediate constitutional objection. Nonetheless, this evaluation still requires the courts to determine what the definition of a Christian is, and what the range of legitimate Christian doctrines is--a determination that remains controversial in other jurisdictions.

In the U.S., since the early twentieth century, many jurisdictions have enacted statutes that purport to regulate use of the term "kosher" (*i.e.*, Jewish dietary laws).¹⁵³ These statutes typically defined kosher as conforming to the requirements of Orthodox Judaism,¹⁵⁴ and require the government and

Senn, *supra* note 142, at 328.

151. CHEN, *supra* note 37, at 98-99; GOOSSAERT & PALMER, *supra* note 33, at 210.

152. See also Hsu & Chou, *supra* note 8, at 27-28 (rightly criticizing statements by judges that express expectations/understanding as to what religion should be, and out rightly dismissing certain religious claims on supernatural power).

153. Jonathan Cohen, *Kosher Slaughter, State Regulation of Religious Organizations, and the European Court of Human Rights*, 4 INTERCULTURAL HUM. RTS. L. REV. 355, 362-64 (2009); Shayna M. Sigman, *Kosher without Law: The Role of Nonlegal Sanctions in Overcoming Fraud within the Kosher Food Industry*, 31 FLA. ST. U. L. REV. 509, 551-54 (2004). See Elijah L. Milne, *Protecting Islam's Garden from the Wilderness: Halal Fraud Statutes and the First Amendment*, 2 J. OF FOOD L. & POL'Y 61 (2006) (discussing statutes that regulate use of the term "Halal"; namely, Muslim dietary laws). See also Awal Fuseini et al., *Halal Meat Fraud and Safety Issues in the U.K.: A Review in the Context of the European Union*, 1 FOOD ETHICS 127 (2017) (discussing the regulation of Halal meat fraud in the U.K.).

154. For a discussion of the religious dynamics in the different branches of Judaism in Israel, See

courts to determine whether the vendor's representation about the kosher nature of food is false.¹⁵⁵ Such statutes survived numerous constitutional challenges until the 1990s,¹⁵⁶ when the Circuit Courts and the state Supreme Courts began to strike down these statutes for violating the Establishment Clause; in particular, for advancing religion, and excessive state entanglement in religion.¹⁵⁷

Across the Atlantic in the U.K., the common law doctrine of non-justiciability of religion (from common-law) and the duty of neutrality and impartiality (from European Convention on Human Rights), are well established.¹⁵⁸ However, much controversy and ambiguity remains regarding the extent to which they prohibit the courts from assessing whether a doctrine or practice is indeed part of a particular religion. In the 2014 case of *Khaira v Shergill*,¹⁵⁹ the UK Supreme Court (the highest appellate court) "significantly unsettled" the prevailing judicial orthodoxy which avoided consideration of religious issues,¹⁶⁰ and held that courts could and should determine religious issues necessary to resolve civil litigation where the private rights of claimants are implicated. Notably, this would include addressing questions of doctrine and ecclesiology--such as whether a person "[is] a bishop or merely a self-styled bishop" or what constitutes extremist Islam--in the context of a religious defamation suit.¹⁶¹

From this comparative perspective, there are considerable problems with the Court's reasoning in *Judgment 103/626*. First, the fact that the defendant was not an ordained or accredited pastor from any church did not

generally Ephraim Tabory, *The Influence of Liberal Judaism on Israeli Religious Life*, 5 ISRAEL STUDIES 183 (2000).

155. Stephen F. Rosenthal, *Food for Thought: Kosher Fraud Laws and the Religion Clauses of the First Amendment*, 65 GEO. WASH. L. REV. 951, 972-83 (1997).

156. For a concise outline of the history of constitutional challenges to these laws, See Mark Popovsky, *The Constitutional Complexity of Kosher Food Laws*, 44 COLUM. J.L. & SOC. PROBS. 75, 84-92 (2010).

157. *Commack Self-Serv. Kosher Meats, Inc. v. Weiss*, 294 F.3d 415 (2nd Cir. 2002); *Barghout v. Bureau of Kosher Meat & Food Control*, 66 F.3d 1337 (4th Cir. 1995); *Ran-Dav's Country Kosher, Inc. v. State*, 608 A.2d 1353 (N.J. 1992). For analysis of these cases, See Popovsky, *id.* at 89-93; Sigman, *supra* note 153, at 554-56.

158. Baroness Hale of Richmond, *Secular Judges and Christian Law*, 17 ECCLESIASTICAL L.J. 170, 173-74 (2015). See COUNCIL OF EUROPE/EUROPEAN COURTS OF HUMAN RIGHTS, *supra* note 23, at 19-20 (discussing the ECtHR jurisprudence on the duty of neutrality and impartiality as applicable to state involvement/adjudication of religious issues).

159. *Khaira v. Shergill* [2014] UKSC 33.

160. See Juss, *supra* note 143, at 299-304 (discussing the significance and impact of the case, in light of previous judicial attitudes and practices).

161. *Shergill*, [2014] UKSC 33, at ¶57. See Smith, *supra* note 120, at 51-52 (discussing how the *Khaira* case is likely to lead to an increase in defamation cases involving religion). See also Aidan Wills, *Begg v BBC: Imam Fails in "Extremist Islamic Speaker" Libel Claim*, 28 ENTERTAINMENT L. REV. 68 (2017) (discussing a 2016 libel case where the court defined--with the aid of expert evidence--what constituted "extreme Islam," and an "extremist Islamic position," in order to determine where the broadcaster could rely on the justification defense when its presenter described the claimant as an extremist Muslim).

necessarily establish that the defendant was lying; the defendant merely introduced himself as a “pastor” (牧師), rather than as an “ordained/accredited pastor” or as a pastor from a particular church.¹⁶² Second, the High Court concluded--in a summary manner without reference to any expert witnesses--that the defendant’s claim that sex with him would grant access to Heaven had no basis in Christianity.¹⁶³ It is true that the defendant’s claim does appear outlandish in relation to any prevailing mainstream understanding of Christianity, whether in terms of the theological doctrine on salvation or attitudes towards pre-marital sex,¹⁶⁴ and that a religious expert testifying on this matter in court would in all likelihood have affirmed such. However, courts should exercise caution in making theological pronouncements; particularly in light of the long (and blood-stained) history of ecclesiastical disputes regarding whether alternative interpretations emerging within established religions can share that label (e.g., Protestantism, Mormonism, Jehovah’s Witnesses)¹⁶⁵ and which persists in the current era with the continued emergence of new religious movements.¹⁶⁶

Moreover, the issue of the deception’s materiality¹⁶⁷ presents a Catch-22 problem for the Court’s summary dismissal of the defendant’s claim as not being Christian. Both the Supreme Court and the High Court emphasized that the victims were devout Christians, and that the defendant took advantage of their religious piety to the Christian faith. However, if the

162. See Thomas Kidd, *Passing as a Pastor: Clerical Imposture in the Colonial Atlantic World*, 14 RELIGION AND AMERICAN CULTURE: A JOURNAL OF INTERPRETATION 149 (2004) (discussing clerical imposture in the context of challenges to the traditional religious authority of established churches).

163. In Hong Kong, the prosecution often presented Daoist and Buddhist religious experts to testify, respectively, that Daoist and Buddhist rituals would never include non-spousal sexual intercourse: e.g., HKSAR v. Luo Wei Lue, DCCC1105/2015 (verdict), ¶ 53 (D.C.); HKSAR v. Au Yeung Kwok Fu, DCCC 569/2009 (judgment), ¶ 45-49 (D.C.). For critical discussion of how falsity is established in the Hong Kong courts, see Jianlin Chen, *Lying about God (and Love?) to Get Laid: The Case Study of Criminalizing Sex under Religious False Pretense in Hong Kong*, 51 CORNELL INTERNATIONAL L. J. (forthcoming).

164. See generally S. A. NIGOSIAN, WORLD RELIGIONS: A HISTORICAL APPROACH 414-19 (3rd ed. 2000).

165. WILLIAM R. HUTCHISON, RELIGIOUS PLURALISM IN AMERICA: THE CONTENTIOUS HISTORY OF A FOUNDING IDEAL 11-58 (2003).

166. A good example in East Asia is the Eastern Lightning sect, which was “founded” in China in the early 1990s, and which preaches that Jesus has returned to Earth as a Chinese woman (i.e., Female Christ). The theological teachings of Eastern Lightning draw heavily upon the Bible and the movement considers itself to be Christian. The Chinese government and the Protestants, in a rare agreement on religious matters, considered the sect to be an “evil cult”: See Emily C. Dunn, “Cult,” *Church, and the CCP: Introducing Eastern Lightning*, 35 MODERN CHINA 96 (2009). In 2013, mainstream Christian organizations--in response to advertisements posted by the sect--purchased advertisements to state that the other party is not representative of true Christianity: Advertisement, HONG KONG DAILY NEWS, Oct. 15, 2013, at A7.

167. The defendant’s deception must be a causative factor in the victim’s decision to have sex: Lin, *supra* note 16, at 129-30.

defendant's claim were as obviously non-Christian as per the courts, it is somewhat inexplicable that the victims fail to detect the misrepresentation on Christian doctrines. This is especially so when victims are not part of a hierarchical religious organization or otherwise in a prior fiduciary relationship with the defendant such they are beholden to the defendant's theological interpretation.¹⁶⁸

To be clear, this Article is not suggesting that the victims were not deceived. Rather, this Article is arguing that the deception directly relates to the divinity of the defendant rather than the Christian nature of the defendant's claims. Judicial adjudication of the latter question may be more constitutionally palatable than the former, but such attempts to side-step difficult constitutional and evidential questions are not viable in many circumstances. The courts should at the very least be more sensitive to factors such as 1. the specificity of claims; 2. the use of religious experts; and 3) the materiality of religious affiliation.

IV. A CONSTITUTIONALLY AND NORMATIVELY BETTER WAY OF CRIMINALIZING RELIGIOUS FRAUDULENT SEX?

The previous Part identified how the *de facto* falsity requirement in forcible sex involving supernatural/religious claims inevitably placed courts at risk of unconstitutional violations of religious freedom. One immediate possible implication is to stop prosecuting such practices, as argued by Taiwanese scholars such as Chun-Jin Tu and Po-Chiang Liu.¹⁶⁹ However, there is much support in the Taiwanese academic literature in favor of punishing such practices as fraudulent sex.¹⁷⁰ For example, Da-Wei Lin advocates criminalization, given the need to protect the sexual autonomy of individuals who are superstitious and ignorant (比較迷信，不懂事).¹⁷¹ For Huang-Yu Wang, the prevalence of such practices in Taiwan is itself a key justification for departing from German jurisprudence, which otherwise excludes fraudulent sex from forcible sex, to ensure that such abuses of religion are punished.¹⁷² There also appears to be strong public demand--or at the very least acquiescence--concerning such prosecutions and convictions, as illustrated by their continued prevalence. Indeed, recent

168. Article 228, which criminalizes the abuse of authority to obtain sex, would also be available in such circumstances. For discussions about the problems of sexual misconduct by clergy, See Zanita E. Fenton, *Faith in Justice: Fiduciaries, Malpractice & Sexual Abuse by Clergy*, 8 MICH. J. GENDER & L. 45, 58-68 (2001); Janice D. Villers, *Clergy Malpractice Revisited: Liability for Sexual Misconduct in the Counseling Relationship*, 74 DENV. U.L. REV. 1, 37-48 (1996).

169. Tu & Liu, *supra* note 16, at 57-58.

170. Tsai, *supra* note 17, at 62.

171. Lin, *supra* note 16, at 136.

172. Wang, *supra* note 17, at 424-25.

legislative reform proposals to create a new sexual offence for “religious fraudulent sex” (神棍騙色罪), in order to combat such practices,¹⁷³ has been generally well received by the public, including religious organizations and women’s groups.¹⁷⁴

Resolving this fundamental question of whether religious fraudulent sex should be punished is beyond the scope of this Article, given the intricate and complex moral, societal, and policy considerations implicating the proper role of the state in sexual and religious relationships. Rather, this Article takes the prevailing position as a given, and instead focuses on the question: If we are going to criminalize these practices, is there a constitutional way of doing so?

The answer is, at least on first glance, straightforward and simple. Just stick to the holdings in *Judgment 102/3692*. As discussed in III.B.1, the statutory provision and *Judgment 102/3692* do not require the courts to establish the falsity of the defendant’s statement. The courts can simply apply the five elements framework articulated in *Judgment 102/3692*, without concerning itself with the veracity of the defendant’s supernatural/religious claims. In other words, the defendant would be convicted for “sexually exploiting psychologically vulnerable victims with religious methods”, rather than “religious fraudulent sex” (宗教騙色).

This approach does introduce new constitutional concerns regarding religious liberty. As noted in III.A., a required element for conviction is that the manifestation and purpose of the supernatural/religious method employed by the defendant is contrary to prevailing social values. This is probably why the courts have adopted the *de facto* requirement of falsity in the first place. One explanation for--or, at the very least, a practical benefit arising from--this *de facto* requirement is that the finding of falsity would exempt courts from explicitly criminalizing a religious practice. By finding that the defendant was merely co-opting supernatural/religious concepts and language to achieve sexual gratification from the victim, the courts can sidestep the thorny issue of whether a religious practice or teaching requiring sexual intercourse as a means to ward off supernatural retributions is compatible with prevailing social values. More importantly, for the purposes of this Article, the negation of the religious nature of the practice means that the court no longer needs to navigate the constitutional question of religious freedom. If the court were to proceed on the assumption that the defendant’s supernatural/religious claim is true, then the court would have to justify why

173. Siang, *supra* note 10.

174. Cheng-Zheng Siang (項程鎮) et al., *Fǎwùbù Nǐ xiūfǎ, Lìyòng Zōngjiào Piànsè Zuìzhòng Pàn 10 Nián* (法務部擬修法，利用宗教騙色最重判10年) [Ministry of Law Propose Law Amendments-Maximum Imprisonment of 10 years for Religious Fraudulent Sex], ZIYOU SHIBAO (自由時報) [LIBERTY TIMES], Oct. 12, 2010, at A01.

the state is using criminal sanctions to prohibit religious practices.

Thus, resolving the third element of the holding in *Judgment 102/3692*, without a finding of falsity, would require the courts to navigate the intricate minefield of constitutional balancing and the pronouncement of social values. However, these concerns are not necessarily insurmountable.

Article 13 of the Constitution stipulates that: “The people shall have freedom of religious belief.”¹⁷⁵ This right is circumscribed by article 23, which provides the usual public interest qualifier enabling “infringement upon the freedoms of other persons, to avert an imminent crisis, to maintain social order or to advance public welfare.”¹⁷⁶ In assessing whether legislation restricting religious practices unconstitutionally infringes upon religious freedom, the Judicial Yuan adopts a proportionality approach.¹⁷⁷ In 1999, the constitutionality of military conscription was affirmed by the Judicial Yuan on the grounds that the failure to provide exemption for conscientious objectors was not disproportionate, in consideration of national security and the needs of social development.¹⁷⁸ In 2004, the Judicial Yuan held that the provision in the Supervision of Temples Act which subjects all disposal of a temple’s property to the approval of the authorities-in-charge was unconstitutional, because there are “more than necessary restrictions” regarding the otherwise legitimate purpose of preventing improper disposition of religious property.¹⁷⁹ As recognized by Taiwanese scholars, the Judicial Yuan is essentially adhering to the Western European approach (in particular German jurisprudence) towards religious freedom.¹⁸⁰

Under this backdrop, a restriction on religious practice would pass constitutional muster if the restriction was to advance a legitimate interest,

175. CONSTITUTION OF R.O.C. § 13.

176. CONSTITUTION OF R.O.C. § 23.

177. For a concise summary and analysis of the Judicial Yuan cases involving religion, See CHENG, *supra* note 28, at 71-75. For an incisive discussion on the evolving practice of judicial review in Taiwan, See Chien-Chih Lin (林建志), *The Birth and Rebirth of the Judicial Review in Taiwan: Its Establishment, Empowerment, and Evolvement*, 7 TAIDA FÄXUÉ LUNCONG (臺大法學論叢) [NTU L. REV.] 167 (2012).

178. J.Y. Interpretation No. 490. See MINISTRY OF INTERIOR, MIN GUO BAI NIAN YI ZHENG YAN GE (民國百年役政沿革) [EVOLUTION OF CONSCRIPTION POLICY OVER HUNDRED YEAR] 193-94 (2011) (discussing the backdrop of religious resistance to military conscription in Taiwan). The legislation was amended after the decision, so that individuals may now apply for substitute non-military service on religious grounds: Art. 5, Tì Dai Yì Shì Shì Tiao Lì (替代役實施條例) [Enforcement Statute for Substitute Services].

179. J.Y. Interpretation No. 573. (the Judicial Yuan explicitly purports to apply the proportionality principle, notwithstanding the language of “more than necessary”). For discussion of the legislation in question, See Ming-Woei Chang (張明偉), *Xingxiàn Qián Lǐfǎ Zhī Yánjiū* (行憲前立法之研究) [*A Study on the Pre-Constitution Era Promulgations*], 44 TAIDA FÄXUÉ LUNCONG (臺大法學論叢) [NTU L.J.] 1705, 1711-16 (2015); CHENG, *supra* note 28, at 114-21.

180. CHEN, *supra* note 28, at 21-27; Hsu & Chou, *supra* note 8, at 6-14. For an overview of the German approach towards limitations on religious freedom, See ROBBERS, *supra* note 23, at 107-20.

and it was proportionate to the objective. The first prong should be uncontroversial. Sexual autonomy--the fundamental principle underpinning modern rape reform, including in Taiwan¹⁸¹--is undeniably an important societal interest that the state could and should legitimately advance. Preventing people from sexually exploiting others who are experiencing a state of psychological vulnerability is entirely consistent with such a goal.

Whether the blanket restriction of all purported supernatural/religious claims that sex is part of a religious ritual or is otherwise instrumental to improving luck and averting disaster can be described as proportionate is a more complicated issue. Such a restriction would result in an infringement of religious liberty where a defendant sincerely believed in those claims and/or where the claims are authentic religious practices. There is also a hint of majority religious bias underpinning such a prohibition. Similar to the way in which legislative exemptions are often automatically granted to mainstream religious practices,¹⁸² it is no coincidence that the underlying aversion to non-spousal sexual intercourse is consistent with the majority religious and cultural worldview of Taiwan, be it Buddhism, Daoism, Confucian morality, or Christianity.

On the other hand, the prerequisite condition of the victim's state of psychological vulnerability arguably serves to limit this blanket restriction to a level that is proportionate. While a potential defendant can no longer rely on the defense of genuine religious belief/practices (not that it is likely to work given the inherent judicial skepticism), he or she will only be convicted if the prosecution can establish that the victim was psychologically vulnerable. Thus, if the purported religious ritual involving sex acts was conducted in a relatively arms-length manner, the defendant would be acquitted. Indeed, in *Judgment 102/3692*, the defendant was acquitted in relation to charges concerning two other victims because--notwithstanding the Court's finding that the defendant's claims were false--the two victims did not testify that they felt coerced, pressured, or were otherwise reluctant to perform the sex acts.¹⁸³ The standard requirement of the necessary *mens reas* also means that if the defendant is not aware of the victim's psychological vulnerability (or, as is often the case, creates or aggravates the psychological vulnerability), the defendant would not be guilty. Finally, as a side note, the proposed approach is not entirely radical from a comparative perspective. There are other jurisdictions (*e.g.*, India, Malaysia, Singapore)

181. *Supra* II.B.

182. Jianlin Chen, *Money and Power in Religious Competition: A Critique of the Religious Free Market*, 3 OXFORD J.L. & RELIGION 212, 226-28 (2014); Zoë Robinson, *Rationalizing Religious Exemptions: A Legislative Process Theory of Statutory Exemptions for Religion*, 20 WM. & MARY BILL RTS. J. 133, 168-70 (2011).

183. 102 *Qin Shang Su Zi* No. 55.

that criminalize the use of any religious-based threat--whether true or false--to coerce another into performing an action which he/she is not legally obliged to perform.¹⁸⁴

Ultimately, this Article is unable to conclusively determine whether the holding in *Judgment 102/3692* (bereft of the *de facto* falsity requirement) would survive a constitutional challenge in the Judicial Yuan. Nonetheless, if the criminalization of such practices continues, it is preferable that Taiwan's courts adopt such an approach given that, at least, it has plausible constitutional validity, in contrast to the demonstrated unconstitutional determination of religious falsity under the existing approach.

In addition, there are practical benefits to this approach. Beyond the standard redistributive justification of punishing the morally culpable conduct of the defendant, the purpose of criminalization is arguably to reduce the incidence of such practices.¹⁸⁵ This is achieved through deterrence--the prospects of criminal sanctions are likely to dissuade some from engaging in the practice, at least on the margins.¹⁸⁶ Indeed, a key rationale for support of the legislative proposal to create a new offence of religious fraudulent sex, by religious organizations and women's groups, is the enhanced deterrent effect on potential fraudsters.¹⁸⁷ In this respect, the proposed approach is superior because it explicitly excludes the possibility of acquittal through the defense of authentic or genuine religious practices; a defense that is frequently raised under the current approach.¹⁸⁸ This bright-line rule will increase the *perceived* rate of conviction, in the eyes of the public, and thus enhance the deterrent effect.¹⁸⁹

Another possible way in which the proposed approach would be

184. There is a provision in the Indian Penal Code that criminalizes the inducement of a person to do an act by making that person believe that he will be the objective of "divine displeasure": § 508, Penal Code, c. 224 (2013) (India). For commentary on this provision, See JUSTICE K. T. THOMAS & M. A. RASHID, *THE INDIAN PENAL CODE* 1231-32 (34th ed. 2014). This provision is replicated in a number of English common law jurisdictions in South Asia and Southeast Asia: e.g., § 508, Penal Code, Act 574 (2015) (Malaysia); § 508, Penal Code, c. 224 (2008) (Sing.). For critical discussion of the Indian Penal Code, especially in relation to the U.K. criminal law statutes, See David Skuy, *Macaulay and the Indian Penal Code of 1862: The Myth of the Inherent Superiority and Modernity of the English Legal System Compared to India's Legal System in the Nineteenth Century*, 32 *MODERN ASIAN STUDIES* 513, 538-45 (1998).

185. Hsin-Wen Lee, *Taking Deterrence Seriously: The Wide-Scope Deterrence Theory of Punishment*, 36 *CRIMINAL JUSTICE ETHICS* 2, 6-10 (2017); Joshua Kleinfeld, *A Theory of Criminal Victimization*, 65 *STAN. L. REV.* 1087, 1100-13 (2013).

186. For a discussion of deterrence from an economic perspective, See RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 278-86 (8th ed. 2011).

187. Siang et al., *supra* note 174.

188. E.g., 106 *Tai Shang Zi No. 456*; 103 *Tai Shang Zi No. 2696*; 103 *Tai Shang Zi No. 538*.

189. The impact on the actual rate of conviction is likely to be modest given that courts have consistently rejected such a defense. Nonetheless, since this defense has not been categorically rejected by courts, potential defendants would--without the benefit of a systematic survey of court decisions--erroneously believe that they can "get off" if they can successfully convince (or deceive?) the courts into accepting that they are authentic religious practitioners.

superior in reducing the occurrence of such practices is through victim protection. One of the notable findings from this case study of Taiwan is the prevalence of religious fraudulent sex (at least in terms of court cases),¹⁹⁰ in an otherwise modern and highly-educated polity.¹⁹¹ Further sociological investigation is warranted to examine the various factors driving this surprising susceptibility to religious fraudulent sex. At this juncture, the Article suggests that a contributing reason is the *de facto* falsity requirement under the current approach.¹⁹² The judicial assessment of the veracity of supernatural/religious claims implies that there is a possibility of truth to such claims. In the absence of an explicit pronouncement that such claims are categorically false, the subsequent conviction of the defendant does not necessarily deny the possibility of such claims being true, when made by other persons. Indeed, potential victims may even extrapolate from the frequent and widely reported prosecutions and convictions of such “fraudulent” practices, that the state is actively policing these practices, and that the lack of prosecution of a purported religious specialist with considerable years of experience in the business is an implicit endorsement from the state. This renders potential victims more likely to believe the supernatural/religious claims (even if those claims appear outlandish with the involvement of sexual intercourse and the allusion to divinity).¹⁹³ Thus, the proposed approach sends a clearer and more straightforward message to potential victims that such practices are categorically illegitimate and subject to criminal sanctions, and that potential victims should *prima facie* refuse to engage in such practices.

V. CONCLUSION

In many ways, religious fraud is the perfect fraud. The allusion to divine intervention to provide miraculous cures for existing material, emotional, and physical hardships,¹⁹⁴ coupled with the difficulty faced by victims and

190. See also Ying-Chieh Huang (黃英捷), *Táiwān Dìqū Jìn Shí Niánlái Lìyòng Zōngjiào Dì Xing Fànzuì Chūtàn* (臺灣地區近十年來利用宗教的性犯罪初探) [A Preliminary Investigation on Sex Crimes under the Guise of Religions for the Past Ten Years in Taiwan Area] 24-36 (2012) (unpublished master thesis, Shu-Te University) (on file with Shu-Te University) (a survey of newspaper reports on sexual crimes involving religion over a ten-year period from 2001 to 2011).

191. See *supra* note 6 and accompanying text.

192. For similar analysis in Hong Kong where religious fraudulent sex are also regularly prosecuted, See Chen, *supra* note 163.

193. In 102 *Tai Shang Zi* No. 3692, one victim testified that she had believed the defendant because she had seen him on television.

194. The most effective scams typically exploit visceral factors in the circumstances of the intended victims (e.g., pain relief for severe physical discomfort, monetary reward for financial difficulties); Jeff Langenderfer & Terence A. Shimp, *Consumer Vulnerability to Scams, Swindles, and Fraud: A New Theory of Visceral Influences on Persuasion*, 18 *PSYCHOLOGY & MARKETING* 763, 768-69 (2001). See Bryan D. James, Patricia A. Boyle & David A. Bennett, *Correlates of*

law enforcement agencies in detecting falsehoods arising from the elusive and unverifiable nature of religion,¹⁹⁵ means that religion is one of the most effective deception avenues for potential fraudsters. In this regard, protecting vulnerable victims against sexual exploitation by charlatans under the guise of religion is an understandable and laudable sentiment. However, the constitutional protection of religious liberty demands that all state actors--especially the prosecutors and courts--are acutely aware of how religious prejudice, and other preconceived notions of what constitutes legitimate religion, will almost inevitably infect any attempted assessment of the veracity of supernatural/religious claims. In this regard, a direct frontal engagement of whether the state may justifiably criminalize all use of supernatural/religious claims to procure sex from psychologically vulnerable victims is constitutionally, and normatively, preferable to the current oblivion concerning the religious liberty considerations and the impact on defendant and victim behavior.



元照出版提供 請勿公開散布

Susceptibility to Scams in Older Adults without Dementia, 26 J. OF ELDER ABUSE & NEGLECT 107, 117-18 (2014) (an empirical study of the factors that correlate with susceptibility to scams).

195. Jonathan Turley, *Laying Hands on Religious Racketeers: Applying Civil RICO to Fraudulent Religious Solicitation*, 29 WM. & MARY L. REV. 441, 463-68 (1988).

REFERENCES

- Allee, M. A. (1994). *Law and Local Society in Late Imperial China: Northern Taiwan in the Nineteenth Century*. Stanford, California: Stanford University Press.
- Barghout v. Bureau of Kosher Meat & Food Control, 66 F.3d 1337 (4th Cir. 1995).
- Baroness Hale of Richmond (2015). Secular Judges and Christian Law. *Ecclesiastical Law Journal*, 17(2), 170-181.
- Biscotti, B. (2011). Debtor's Fraud in Roman Law: An Opportunity for Some Brief Remarks on the Concept of Fraud. *Fundamina: A Journal of Legal History*, 17(2), 1-13.
- Bohlander, M. (2007). Mistaken Consent to Sex, Political Correctness and Correct Policy. *Journal of Criminal Law*, 71(5), 412-426.
- Bohlander, M. (2009). *Principles of German Criminal Law*. Oxford and Portland, Oregon: Hart Publishing.
- Chang, D. T. (2009). *Women's Movements in Twentieth-Century Taiwan*. Urbana and Chicago: University of Illinois Press.
- Chang, M.-W. (張明偉) (2015). Xíngxiàn Qián Lǐfǎ Zhī Yánjiū (行憲前立法之研究) [A Study on the Pre-Constitution Era Promulgations]. *Taida Fǎxué Luncong* (臺大法學論叢) [National Taiwan University Law Journal], 44(4), 1705-1784.
- Chen, H.-S. (陳惠馨) (2013). *Zōngjiào Tuántǐ Yǔ Fǎlǜ: Fēi Yínglì Zǔzhī Guāndiǎn* (宗教團體與法律—非盈利組織觀點) [Religious Group and Law: A Non-Profit Organization Point of View]. Taipei, Taiwan: Juliu Book Company.
- Chen, J. (2014). Deconstructing the Religious Free Market. *Journal of Religion, Law and State*, 3, 1-24.
- Chen, J. (2014). Money and Power in Religious Competition: A Critique of the Religious Free Market. *Oxford Journal of Law and Religion*, 3(2), 212-234.
- Chen, J. (2017). *The Law and Religious Market Theory: China, Taiwan and Hong Kong*. Cambridge, United Kingdom: Cambridge University Press.
- Chen, J. (forthcoming). Hong Kong's Chinese Temples Ordinance: A Cautionary Case Study of Discriminatory and Misguided Regulation of Religious Fraud. *Journal of Law and Religion*, 33(3).
- Chen, J. (forthcoming). Lying about God (and Love?) to Get Laid: The Case Study of Criminalizing Sex under Religious False Pretense in Hong

- Kong. *Cornell International Law Journal*, 51(3).
- Cheng, C.-M. (鄭志明) (2010). *Táiwān Zōngjiào Zǔzhī Yǔ Xíngzhèng* (臺灣宗教組織與行政) [*Taiwan Religious Organization and Administration*]. Taiwan: Wenchin Publishing.
- Chiu, L.-C. (邱麗娟) (2006). Qīng Dài Mínjiān Mímì Zōngjiào Huódòng Zhōng 'Nánnǚ Záchǔ'xiànxàng De Tàntǎo (清代民間秘密宗教活動中「男女雜處」現象的探討) [The Study of the Phenomenon that Men and Women of Folk Secret Religious Sects Anticipated Meetings Together in Ch'ing Dynasty]. *Guólì Táiwān Shīfàn Dàxué Lìshǐ Yánjiū Tōngbào* (國立臺灣師範大學歷史研究學報) [*National Taiwan Normal University Bulletin of Historical Research*], 35, 141-176.
- Chung Kuo Shih Pao (中國時報) [China Times] (2012, September 11). Shén De Shǐzhě Kuāng 12 Xìntú 10 Nián Xìng Qīn 676 Cì (神的使者誣12信徒 10年性侵676次) [Messenger of God Deceived 12 Followers-676 Sexual Assaults Over 10 Years]. p. A9.
- Cohen, J. (2009). Kosher Slaughter, State Regulation of Religious Organizations, and the European Court of Human Rights. *Intercultural Human Rights Law Review*, 4, 355-386.
- Commack Self-Serv. Kosher Meats, Inc. v. Weiss, 294 F.3d 415 (2nd Cir. 2002).
- Cooper, J. F. (2016). Taiwan's 2016 Presidential/Vice Presidential and Legislative Election: Reflections on the Nature of Taiwan's Politics and Shifts Therein. *Maryland Series of Contemporary Asian Studies*, 224, 1, 1-79.
- Council of Europe/European Court of Human Rights, Research Division (2013). *Overview of the Court's Case-law on Freedom of Religion*. Retrieved from https://www.echr.coe.int/documents/research_report_religion_eng.pdf.
- Cranmer, F. (2014). Case Comment: Thomas Phillips v. Thomas Monson. *Ecclesiastical Law Journal*, 16(3), 393.
- Dole, C. (2006). Mass Media and the Repulsive Allure of Religious Healing: The Cinci Hoca in Turkish Modernity. *International Journal of Middle East Studies*, 38, 31-54.
- Doniger, W. (2000). *The Bedtrick: Tales of Sex and Masquerade*. Chicago & London: University of Chicago Press.
- Dunn, E. C. (2009). "Cult," Church, and the CCP: Introducing Eastern Lightning. *Modern China*, 35(1), 96-119.
- Elorza, J. O. (2010). Secularism and the Constitution: Can Government be Too Secular?. *University of Pittsburgh Law Review*, 72, 53-117.

- Falk, P. J. (1998). Rape by Fraud and Rape by Coercion. *Brooks Law Review*, 64, 39-180.
- Fenton, Z. E. (2001). Faith in Justice: Fiduciaries, Malpractice & Sexual Abuse by Clergy. *Michigan Journal of Gender and Law*, 8, 45-96.
- Fuseini, A., Wotton, S., Knowles, T. & Hadley, P. J. (2017). Halal Meat Fraud and Safety Issues in the U.K.: A Review in the Context of the European Union. *Food Ethics*, 1, 127-142.
- Goossaert, V. & Palmer D. A. (2011). *The Religious Question in Modern China*. Chicago & London: University of Chicago Press.
- Greenawalt, K. (2006). *The Religion and the Constitution: Volume I: Free Exercise and Fairness*. Princeton, New Jersey: Princeton University Press.
- Gross, H. (2007). Rape, Moralism, and Human Rights. *Criminal Law Review*, 2007(3), 220-227.
- Heins, M. (1981). "Other People's Faiths": the Scientology Litigation and the Justiciability of Religious Fraud. *Hastings Constitutional Law Quarterly*, 9, 153-197.
- Herring, J. (2005). Mistaken Sex. *Criminal Law Review*, 2005(7), 511-524.
- HKSAR v. Au Yeung Kwok Fu, DCCC 569/2009 (judgment), ¶ 45-49 (D.C.).
- HKSAR v. Luo Wei Lue, DCCC1105/2015 (verdict), ¶ 53 (D.C.).
- Hong Kong Daily News (2013, October 15). Advertisement. p. A7.
- Horstmann, A. (2011). Reconfiguring Manora Rongkru: Ancestor Worship and Spirit Possession in Southern Thailand. In Kirsten W. Endres & A. Lauser (Eds.), *Engaging the Spirit World: Popular Beliefs and Practices in Modern Southeast Asia*. (pp. 184-199). New York, NY: Berghahn Books.
- Horton, C. & Ramzyapril, A. (2018, April 15). Taiwan Supplants Hong Kong for Free Speech in China's Shadow. *New York Times*, p. A14.
- Hsu, T.-T. (許澤天) (2011). Miànlín Héfǎ è Hài Wēixié Xià Dì Xìng Zìzhǔ (面臨合法惡害威脅下的性自主) [Sexual Autonomy under Legal Duress]. *Táiwān Fǎxué Zá Zhì* (台灣法學雜誌) [*Taiwan Law Journal*], 181, 120-125.
- Hsu, Y.-D. (許育典) & Chou, J.-C. (周敬凡) (2009). Zōngjiào Zìyóu Zuòwéi Zōngjiào Zhàqī De Fànzuì Jiǎnyàn (宗教自由作為宗教詐欺的犯罪檢驗) [Examining the Crimes of Religious Fraud with the Right of Religious Freedom]. *Dōng Wú Fǎlǜ Hsueh Pao* (東吳法律學報) [*Soochow Law Review*], 21(1), 1-37.

- Hu, Peng-Sheng (胡蓬生) (September 18, 2012). Kuāng Huānxī Fō Gǎi Yùn Bī Mǔ Nǚ Wán 4P (誑歡喜佛改運 逼母女玩4P) [Feigning Divine Tributes to Joyous Buddha to Compel Mother and Daughters into Foursome]. *Lianhe Bao* (聯合報) [*United Daily News*], p. B1.
- Huang, J.-C. (黃榮堅) (2011). 2010 Nián Xíngshì Fǎ Fāzhǎn Huígù: Yùwàng Niándài, Yùwàng Xíngfǎ (2010年刑事法發展回顧：慾望年代，慾望刑法?) [Developments in the Law in 2010: Criminal Law]. *Taida Fǎxué Luncong* (臺大法學論叢) [*National Taiwan University Law Journal*], 40(S), 1795-1841.
- Huang, Y.-C. (黃英捷) (2012). *Táiwān Dìqū Jìn Shí Niánlái Lìyòng Zōngjiào Dì Xíng Fànzui Chūtàn* (臺灣地區近十年來利用宗教的性犯罪初探) [*A Preliminary Investigation on Sex Crimes Under the Guise of Religions for the Past Ten Years in Taiwan Area*]. (Unpublished master thesis). Kaohsiung, Taiwan: Shu-Te University.
- Hutchison, W. R. (2003). *Religious Pluralism in America: The Contentious History of a Founding Ideal*. New Haven and London, UK: Yale University Press.
- Jacobs, B. J. (2012). *Democratizing Taiwan*. Leiden and Boston, the Netherlands: Brill.
- James, B. D., Boyle, P. A. & Bennett, D. A. (2014). Correlates of Susceptibility to Scams in Older Adults without Dementia. *Journal of Elder Abuse and Neglect*, 26(2), 107-122.
- Jang, J. (2015). The Dimensional Structure of Legislative Politics in Taiwan: An Exploratory Analysis of Bill Cosponsorship Networks, 1992-2012. *Issues and Studies*, 51(4), 119-142.
- Juss, S. S. (2017). The Justiciability of Religion. *Journal of Law and Religion*, 32, 285-310.
- Kennedy, B. L. (2003). Taiwan's Criminal Justice System: Clash of Cultures. *American Journal of Chinese Studies*, 10(1), 21-27.
- Khaira v. Shergill [2014] UKSC 33.
- Kidd, T. (2004). Passing as a Pastor: Clerical Imposture in the Colonial Atlantic World. *Religion and American Culture: A Journal of Interpretation*, 14(2), 149-174.
- Kim, D.-K. (2012). Reconfiguration of Korean Shamanship: Tradition and Modernity in the Construction of Korean Shamans' Self-Identity. *Acta Koreana*, 15(2), 369-393.
- Kleinfeld, J. (2013). A Theory of Criminal Victimization. *Stanford Law Review*, 65, 1087-1152.
- Kuo, M.-S. (2016). Moving Towards a Nominal Constitutional Court?

- Critical Reflections on the Shift from Judicial Activism to Constitutional Irrelevance in Taiwan's Constitutional Politics. *Washington International Law Journal*, 25, 597-641.
- Laird, K. (2014). Rapist or Rouge? Deception, Consent and the Sexual Offences Act 2003. *Criminal Law Review*, 2014(7), 492-510.
- Langenderfer, J. & Shimp, T. A. (2001). Consumer Vulnerability to Scams, Swindles, and Fraud: A New Theory of Visceral Influences on Persuasion. *Psychology & Marketing*, 18(7), 763-783.
- Lee, C.-W. (李佳玟) (2017). Shuō Shì Cái Suàn Tóngyì (Only Yes Means Yes): Zēngdìng Xíngfǎ `Wèidé Tóngyì Xíngjiāo Zuì'zhī Chùyì (說是才算同意(Only Yes Means Yes) —增訂刑法「未得同意性交罪」之芻議) [Only Yes Means Yes: A Proposal for the Offence of Nonconsensual Sex in the Criminal Law]. *Táiběi Dàxué Fǎxué Lùncong* (臺北大學法學論叢) [*Taipei University Law Review*], 103, 53-118.
- Lee, H.-W. (2017). Taking Deterrence Seriously: The Wide-Scope Deterrence Theory of Punishment. *Criminal Justice Ethics*, 36(1), 2-24.
- Lee, S.-C. (李聖傑) (2010). Xíngfǎ Dì Èr'èr'èr Tiáo Dì Yī Xiàng Dì Yī Kuǎn `Èr Rén Yìshàng Gòngtóng Fàn Zhī'zhī Shìyòng Sīkǎo (刑法第二二二條第一項第一款「二人以上共同犯之」之適用思考) [A Study on Violent Sexual Offences Committed by More than Two Perpetrators]. *Zhèngdà Fǎxué Pínglùn* (政大法學評論) [*Chengchi Law Review*], 115, 1-54.
- Levine, Aaron (2012). *Economic Morality and Jewish Law*. New York, NY: Oxford University Press.
- Lin, C.-C. (林照真) (2015). Fēnxī yǔ Pīpàn Chuántǒng Bàozhǐ Zài Jùhé Xiàxiàng Zhōng de Juésè-Yì Táiwān Sìdà Bàozhǐ Jítuán Wéili (分析與批判傳統報紙在聚合現象中的角色 — 以台灣四大報紙集團為例) [The Analysis and Critique on the Role of Newspapers through Convergence: A Case Study of 4 Mainstream Newspapers in Taiwan]. *Zhōngguó Chuánméi Xué Zázhi* (中華傳播學刊) [*Chinese Journal of Communication Research*], 28, 3-34.
- Lin, C.-C. (2010). Failing to Achieve the Goal: A Feminist Perspective on Why Rape Law Reform in Taiwan has been Unsuccessful. *Duke Journal of Gender Law and Policy*, 18, 163-201.
- Lin, C. (林志潔) & Chin, M.-H. (金孟華) (2012). `Hélì 'de Huáiyí? Yǐ Nǚxìng Zhǔyì Fǎxué Guāndiǎn Jiǎnshì Xìng Qīnhài Shěnpàn zhī Piānjiàn (「合理」的懷疑？以女性主義法學觀點檢視性侵害審判之偏見) [What Constitutes Reasonable Doubt? A Feminist's Perspective on Taiwanese Rape Trials]. *Zhèng Dà Fǎ Xué Pínglùn* (政大法學評論) [*Chengchi Law Review*], 117-166.

- Lin, C.-C. (林建志) (2012). The Birth and Rebirth of the Judicial Review in Taiwan: Its Establishment, Empowerment, and Evolvement. *Taida Fǎxué Luncong* (臺大法學論叢) [*National Taiwan University Law Review*], 7, 167-222.
- Lin, Da-Wei (林大為) (2013). Lùn Zhàshù Xíngjiāo Zuì: Jiānlùn 'Zōngjiào Piànsè' Anjiàn zhī Rènshì Yòngfǎ Wèntí (論詐術性交罪—兼論「宗教騙色」案件之認事用法問題) [A Study on Offense of Fraud-type Sexual Intercourse-Also on the Issues of Identifying Usage of "Sexual Fraud in Religion"]. *Jūnshì Fǎ Zázhi* (軍法雜誌) [*Military Law Journal*], 59(5), 108-137.
- Lin, S. T. (林山田) (2004). *Xing Fa Ge Zui Lun* (刑法各罪論) [*Offence in Criminal Code*]. Taipei, Taiwan: Angle.
- Lo, C.-F. (2006). *The Legal Culture and System of Taiwan*. The Netherlands: Kluwer Law.
- Lu, Y. (2008). *The Transformation of Yiguan Dao in Taiwan: Adapting to a Changing Religious Economy*. Lanham, MD: Lexington Books.
- Mason, C. E. (2011). What is Truth? Setting the Bounds of Justifiability in Religiously-Inflected Fact Disputes. *Journal of Law and Religion*, 26, 91-139.
- McJunkin, B. A. (2014). Deconstructing Rape by Fraud. *Columbia Journal of Gender and Law*, 28, 1-46.
- Milne, E. L. (2006). Protecting Islam's Garden from the Wilderness: Halal Fraud Statutes and the First Amendment. *Journal of Food and Policy*, 2, 61-84.
- Ministry of Interior (2011). *min guo bai nian yi zheng yan ge* (民國百年役政沿革) [*Evolution of Conscription Policy over Hundred Year*].
- Mo, B. (1984). Black Magic and Illness in a Malaysian Chinese Community. *Social Science & Medicine*, 18(2), 147-157.
- Mott, M. (1998). The Rule of Faith over Reason: The Role of the Inquisition in Iberia and New Spain. *Journal of Church & State*, 40, 57-81.
- Muller, G. O. W. & Burgenthal T. (trans. 1961). *German Penal Code of 1871*. South Hackensack NJ: Sweet & Maxwell.
- Myscofski, C. A. (2000). The Magic of Brazil: Practice and Prohibition in the Early Colonial Period, 1590-1620. *History of Religion*, 40(2), 153-176.
- Ng, V. W. (1987). Ideology and Sexuality: Rape Laws in Qing China. *Journal of Asian Studies*, 46(1), 57-70.
- Nigosian, S. A. (2000). *World Religions: A Historical Approach*. Boston, MA: Bedford/St. Martin's.
- Penal Code, c. 224 § 508 (2013) (India).

- Penal Code, c. 224 § 508 (2008) (Singapore).
- Penal Code, Act 574 § 508 (2015) (Malaysia).
- Pew Research Center (2012). *The Global Religious Landscape*. Retrieved from <http://assets.pewresearch.org/wp-content/uploads/sites/11/2014/01/global-religion-full.pdf>.
- Pin, A. (2014). Does Europe Need Neutrality? The Old Continent in Search of Identity. *Brigham Young University Law Review*, 2014(3), 605-634.
- Popovsky, M. (2010). The Constitutional Complexity of Kosher Food Laws. *Columbia Journal of Law and Social Problems*, 44, 75-107.
- Porat, A. & Yadlin, O. (2016). A Welfarist Perspectives on Lies. *Indiana Law Journal*, 91, 617-663.
- Posner, R. (2011). *Economic Analysis of Law*. New York: Aspen Publishers.
- Qu, H. (瞿海源) (2006). *Zōngjiào, Shùshù yǔ Shèhuì Biànciān* (宗教、術數與社會變遷) [*Religion, Superstition and Social Change*]. Taiwan: Guiguan.
- Ran-Dav's Country Kosher, Inc. v. State, 608 A.2d 1353 (N.J. 1992).
- Robbers, G. (2010). *Religion and Law in Germany*. The Netherlands: Wolters Kluwer.
- Robinson, Z. (2011). Rationalizing Religious Exemptions: A Legislative Process Theory of Statutory Exemptions for Religion. *William & Mary Bill of Rights Journal*, 20, 133-177.
- Rosenthal, S. F. (1997). Food for Thought: Kosher Fraud Laws and the Religion Clauses of the First Amendment. *George Washington Law Review*, 65, 951-1013.
- Rubinfeld, J. (2013). The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy. *Yale Law Journal*, 122, 1372-1443.
- R v. Lady Portington, 91 Eng. Rep. 151.
- Selfe, D. & Burke, V. (2001). *Perspectives on Sex, Crime and Society*. London, Great Britain: Cavendish Publishing.
- Senn, S. (1990). The Prosecution of Religious Fraud. *Florida State Law Review*, 17, 325-352.
- Siang, C.-Z. (項程鎮) (2013, December 26). Shén Gùn Piàn Sè Fǎ Wù Bù Tuī Dòng Tí Gāo Xíng Zé (神棍騙色 法務部推動提高刑責) [Religious Fraudulent-Ministry of Law Proposes Enhanced Criminal Sanctions]. *Ziyou Shibao* (自由時報) [*Liberty Times*], p. B01.
- Siang, C.-Z. (項程鎮), Tang, C.-L. (湯佳玲) & Yang, C.-Y. (楊久瑩) (2010, October 12). Fǎwùbù Nǐ xiūfǎ, Liyòng Zōngjiào Piànsè Zuìzhòng Pàn

- 10 Nián (法務部擬修法·利用宗教騙色最重判10年) [Ministry of Law Propose Law Amendments-Maximum Imprisonment of 10 years for Religious Fraudulent Sex]. *Ziyou Shibao* (自由時報) [*Liberty Times*], p. A01.
- Sifa Yuan Dafaguan Jieshi No. 460 (司法院大法官解釋第460號解釋) [Judicial Yuan Interpretation No. 460] (July 10, 1998) (Taiwan).
- Sifa Yuan Dafaguan Jieshi No. 490 (司法院大法官解釋第490號解釋) [Judicial Yuan Interpretation No. 490] (Oct. 1, 1999) (Taiwan).
- Sifa Yuan Dafaguan Jieshi No. 573 (司法院大法官解釋第573號解釋) [Judicial Yuan Interpretation No. 573] (Feb. 2, 2004) (Taiwan).
- Sigman, S. M. (2004). Kosher Without Law: The Role of Nonlegal Sanctions in Overcoming Fraud Within the Kosher Food Industry. *Florida State Law Review*, 31, 509-601.
- Skuy, D. (1998). Macaulay and the Indian Penal Code of 1862: The Myth of the Inherent Superiority and Modernity of the English Legal System Compared to India's Legal System in the Nineteenth Century. *Modern Asian Studies*, 32(3), 513-557.
- Smith, P. (2016). The Problem of the Non-Justiciability of Religious Defamations. *Ecclesiastical Law Journal*, 18(1), 36-52.
- Su, A. (2016). Judging Religious Sincerity. *Oxford Journal of Law & Religion*, 5, 28-48.
- Su, K.-P. (2017). Criminal Court Reform in Taiwan: A Case of Fragmented Reform in a Not-Fragmented Court System. *Washington International Law Journal*, 27(1), 203-240.
- Sze-Chie Fa, M. (2007). Rape Myths in American and Chinese Laws and Legal Systems: Do Tradition and Culture Make the Difference. *Maryland Series in Contemporary Asian Studies*, 191, 1-109.
- Tabory, E. (2000). The Influence of Liberal Judaism on Israeli Religious Life. *Israel Studies*, 5(1), 183-203.
- Taichung Difang Fayuan (臺東地方法院) [Taichung District Court], Xingshi (刑事) [Criminal Division], 101 Qin Su Zi No. 70 (101侵訴字第70號民事判決) (2012) (Taiwan).
- Taiwan Gaodeng Fayuan (臺灣高等法院) [Taiwan High Court], Xingshi (刑事) [Criminal Division], 102 Qin Shang Su Zi No. 55 (102侵上訴字第55號刑事判決) (2013) (Taiwan).
- Taiwan Gaodeng Fayuan (臺灣高等法院) [Taiwan High Court], Xingshi (刑事) [Criminal Division], 103 Qin Shang Su Zi No. 112 (103侵上訴字第112號刑事判決) (2014) (Taiwan).
- Taiwan Gaodeng Fayuan (臺灣高等法院) [Taiwan High Court], Xingshi (刑

- 事) [Criminal Division], 104 Qin Shang Su Zi No. 59 (104侵上訴字第59號刑事判決) (2015) (Taiwan).
- Taiwan Gaodeng Fayuan (臺灣高等法院) [Taiwan High Court], Xingshi (刑事) [Criminal Division], 104 Qin Shang Su Zi No. 62 (104侵上訴字第62號刑事判決) (2015) (Taiwan).
- Taiwan Gaodeng Fayuan (臺灣高等法院) [Taiwan High Court], Xingshi (刑事) [Criminal Division], 105 Qin Shang Su Zi No. 13 (105侵上訴字第13號刑事判決) (2016) (Taiwan).
- Taiwan Gaodeng Fayuan (臺灣高等法院) [Taiwan High Court], Xingshi (刑事) [Criminal Division], 105 Qin Shang Su Zi No. 62 (105侵上訴字第62號刑事判決) (2016) (Taiwan).
- Taiwan Gaodeng Fayuan (臺灣高等法院) [Taiwan High Court], Xingshi (刑事) [Criminal Division], 105 Qin Shang Su Zi No. 179 (105侵上訴字第179號刑事判決) (2016) (Taiwan).
- Taiwan Gaodeng Fayuan (臺灣高等法院) [Taiwan High Court], Xingshi (刑事) [Criminal Division], 105 Qin Shang Su Zi No. 228 (105侵上訴字第228號刑事判決) (2016) (Taiwan).
- Taiwan Gaodeng Fayuan (臺灣高等法院) [Taiwan High Court], Xingshi (刑事) [Criminal Division], 106 Qin Shang Su Zi No. 98 (106侵上訴字第98號刑事判決) (2017) (Taiwan).
- Taiwan Gaodeng Fayuan (臺灣高等法院) [Taiwan High Court], Xingshi (刑事) [Criminal Division], 106 Qin Shang Su Zi No. 145 (106侵上訴字第145號刑事判決) (2017) (Taiwan).
- Taiwan Gaodeng Fayuan (臺灣高等法院) [Taiwan High Court], Xingshi (刑事) [Criminal Division], 106 Qin Shang Su Zi No. 293 (106侵上訴字第293號刑事判決) (2017) (Taiwan).
- Taiwan Gaodeng Fayuan Gao Xiong Fen Yuan (臺灣高等法院高雄分院) [Taiwan High Court Kaohsiung Ranch Court], Xingshi (刑事) [Criminal Division], 104 Qin Shang Su Zi No. 52 (104侵上訴字第52號刑事判決) (2015) (Taiwan).
- Taiwan Gaodeng Fayuan Tai Nan Fen Yuan (臺灣高等法院臺南分院) [Taiwan High Court Tainan Ranch Court], Xingshi (刑事) [Criminal Division], 104 Qin Shang Su Zi No. 749 (104侵上訴字第749號刑事判決) (2015) (Taiwan).
- Taiwan Gaodeng Fayuan Tai Nan Fen Yuan (臺灣高等法院臺南分院) [Taiwan High Court Tainan Ranch Court], Xingshi (刑事) [Criminal Division], 105 Shang Yi Zi No. 839 (105上易字第839號刑事判決) (2016) (Taiwan).
- Taiwan Gaodeng Fayuan Tai Nan Fen Yuan (臺灣高等法院臺南分院)

- [Taiwan High Court Tainan Ranch Court], Xingshi (刑事) [Criminal Division], 106 Qin Shang Su Zi No. 916 (106侵上訴字第916號刑事判決) (2017) (Taiwan).
- Taiwan Gaodeng Fayuan Tai Zhong Fen Yuan (臺灣高等法院臺中分院) [Taiwan High Court Taichung Ranch Court], Xingshi (刑事) [Criminal Division], 102 Qin Shang Su Zi No. 157 (102侵上訴字第157號刑事判決) (2013) (Taiwan).
- Taiwan Gaodeng Fayuan Tai Zhong Fen Yuan (臺灣高等法院臺中分院) [Taiwan High Court Taichung Ranch Court], Xingshi (刑事) [Criminal Division], 101 Qin Shang Su Zi No. 1 (101侵上訴字第1號刑事判決) (2012) (Taiwan).
- Taiwan Gaodeng Fayuan Tai Zhong Fen Yuan (臺灣高等法院臺中分院) [Taiwan High Court Taichung Ranch Court], Xingshi (刑事) [Criminal Division], 101 Qin Shang Su Zi No. 237 (101侵上訴字第237號刑事判決) (2012) (Taiwan).
- Taiwan Gaodeng Fayuan Tai Zhong Fen Yuan (臺灣高等法院臺中分院) [Taiwan High Court Taichung Ranch Court], Xingshi (刑事) [Criminal Division], 103 Shang Su Zi No. 1567 (103侵上訴字第1567號刑事判決) (2013) (Taiwan).
- Taiwan Gaodeng Fayuan Tai Zhong Fen Yuan (臺灣高等法院臺中分院) [Taiwan High Court Taichung Ranch Court], Xingshi (刑事) [Criminal Division], 101 Qin Shang Su Zi No. 70 (101侵上訴字第70號刑事判決) (2012) (Taiwan).
- Thomas, J. K. T. & M A Rashid, M. A. (2014). *The Indian Penal Code*. Gurgaon, India: Lexis Nexis.
- Thoraval, J. (1996). The Western Misconception of Chinese Religion: A Hong Kong Example. *China Perspectives*, 3, 58-65.
- Tsai, S.-W. (蔡聖偉) (2016). Lùn Qiángzhì Xíngjiāo Zuì Wéifǎn Yìyuàn zhī Fāngfǎ (論強制性交罪違反意願之方法) [Forcible Means in the Crime of Forced Sexual Intercourse]. *Chung Yen Yüen Fǎxué Qíkān* (中研院法學期刊) [*Academia Sinica Law Journal*], 18, 41-109.
- Tu, C.-J. (涂春金) & Liu, P.-C. (劉柏江) (2012). Yǐ Zōngjiào Zhīmíng Xíngpiàn Xíngjiào Shǐfǒu Gòuchéng Qiángzhì Xíngjiào Zuì? (以宗教之名行騙性交是否構成強制性交罪?) [Does Sexual Intercourse Obtained by Religious Deception Constitute Rape?]. *Jūnshì Fǎ Zázhi* (軍法雜誌) [*Military Law Journal*], 58(3), 50-64.
- Turley, J. (1988). Laying Hands on Religious Racketeers: Applying Civil RICO to Fraudulent Religious Solicitation. *William & Mary Law Review*, 29, 441-500.

- United States v. Ballard, 322 U.S. 78, 84-87 (1944).
- Urban, H. B. (2003). *Sex Secrecy, Politics, and Power in the Study of Religion*. Oakland, California: University of California Press.
- Villers, J. D. (1996). Clergy Malpractice Revisited: Liability for Sexual Misconduct in the Counseling Relationship. *Denver University Law Review*, 74, 1-64.
- Wang, D.-C. (王定傳) (2016, July 14). Jia Qūmó Zhēn Xìngqīn, 'Lóngwáng' Tǎngwán Zhuàn, Pànpéi 4.09 Wàn (假驅魔真性侵「龍王」躺著賺 判賠 409 萬) [Fake Exorcism Real Sexual Assault—"Dragon God" Earning Money while Lying Down, Ordered to Compensate 4.09 Million]. *Ziyou Shibao* (自由時報) [*Liberty Times*], p. B04D.
- Wang, H.-Y. (王皇玉) (2013). Qiángzhì Shǒuduàn yǔ Bèihàirén Shòu Qīmán de Tóngyì: Yǐ Qiángzhì Xìngjiāo Wěixiè Zuì wéi Zhōngxīn (強制手段與被害人受欺瞞的同意：以強制性交猥褻罪為中心) [Force Methods and Agreement under Deception: Based on the Sexual Assault Crime]. *Taida Fǎxué Luncong* (臺大法學論叢) [*National Taiwan University Law Journal*], 42(2), 381-432.
- Wang, T.-S. (2002). The Legal Development of Taiwan in the 20th Century: Toward a Liberal and Democratic Country. *Pacific Rim Law & Policy Journal*, 11, 531-559.
- Wang, T.-S. (2015). *Legal Reform in Taiwan under Japanese Colonial Rule, 1895-1945: The Reception of Western Law*. Seattle, WA: University of Washington Press.
- Wertheimer, A. (2003). *Consent to Sexual Relations*. Cambridge, New York: Cambridge University Press.
- Williams, R. (2008). Deception, Mistake and Vitiating of the Victim's Consent. *Law Quarterly Review*, 124(1), 132-159.
- Wills, A. (2017). Begg v BBC: Imam Fails in "Extremist Islamic Speaker" Libel Claim. *Entertainment Law Review*, 28(2), 68-72.
- Wu, E. B. M. (2004). *From China to Taiwan: Historical, Anthropological, and Religious Perspectives*. Sankt Augustin, Germany: Collectanea Serica.
- Wu, H. (吳惠巧) (2005). *Táiwān Zōngjiào Shèhuì Guānchá* (臺灣宗教社會觀察) [*Social Observations of Taiwan Religions*]. Taiwan: Dayuan.
- Wu, H. D. & Lambert, C. A. (2016). Impediments to Journalistic Ethics: How Taiwan's Media Market Obstructs News Professional Practice. *Journal of Media Ethics*, 31, 35-50.
- Xing Fa Yi Dong Tiao Wen Yu Li You (刑法異動條文與理由) [Legislative Reasons for Criminal Code Amendment], March 30, 1999 (Taiwan).

- Xíngzhèng Yuán (行政院) [Executive Yuan] (2010). *2010 Nián Rénkǒu Hé Jūzhù Rénkǒu Pǔkǔ* (2010年人口和居住人口普查) [2010 Population and Residence Census] (Taiwan).
- Xíngzhèng Yuán (行政院) [Executive Yuan] (2017). *2016 Nián Zhōnghuá Mínguó Niánjiàn* (2016年中華民國年鑑) [The Republic of China Yearbook 2016] (Taiwan).
- Xu, J. L. (徐嘉莉) (2002). Hú Sēng`Xìng` Mìzōng (胡僧·性·密宗) [Monks from Western Religions, Sex and Tantrism]. *Zhōngshān Dàxué Xuébào (Shèhuì Kēxué Bǎn)* (中山大學學報社會科學版) [Journal of the Graduates Sun Yat-Sen University (Social Science)], 23(1), 55-60.
- Yang, W.-S. (楊文山) (2014). 2013 Nián Dì Èr Cì Shèhuì Yìxiàng Diàochá (2013年第二次社會意向調查) [2013 Second Social Indication Survey]. Retrieved from https://srda.sinica.edu.tw/datasearch_detail.php?id=1050#download.
- Yeh, J.-R. (2016). *The Constitution of Taiwan: A Contextual Analysis*. Oxford, UK: Hart.
- Yung, C. R. (2015). Rape Law Fundamentals. *Yale Journal of Law and Feminism*, 27, 1-46.
- Zhai, J. E. (2010). Contrasting Trends of Religious Markets in Contemporary Mainland China and in Taiwan. *Journal of Church and State*, 52(1), 94-111.
- ZHONGHUA MINGUO SIFA YUAN (中華民國司法院) [JUDICIAL YUAN OF R.O.C.], Fa Xue Zi Liao Jian Suo (Cai Pan Cha Xun) (法學資料檢索 (裁判查詢)) [LAW & REGULATION RETRIEVING SYSTEM], <http://jirs.judicial.gov.tw/FJUD/>.
- Zhonghua Minguo Xianfa (中華民國憲法) [CONSTITUTION OF R.O.C.], January 1, 1947 (Taiwan).
- Zhonghua Minguo Xing Fa (中華民國刑法) [Criminal Code], July 1, 1935, as amended by June 2018 (Taiwan).
- Zuigao Fayuan (最高法院) [Supreme Court], 99 Niandu Di 7 Ci Xingshi Ting Huiyi Jueyi (99年度第7次刑事庭會議決議) [The Resolution of the 7th Criminal Division Conference of Supreme Court of 2010] (2010) (Taiwan).
- Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 28 Hu Shang Zi No. 25 (28滬上字第25號刑事判決) (1939) (Taiwan).
- Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 52 Tai Shang Zi No. 1024 (52台上字第1024號刑事判決) (1963) (Taiwan).

- Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 56 Tai Shang Zi No. 2210 (56台上字第2210號刑事判決) (1967) (Taiwan).
- Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 93 Tai Shang Zi No. 4456 (93台上字第4456號刑事判決) (2004) (Taiwan).
- Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 95 Tai Shang Zi No. 7201 (95台上字第7201號刑事判決) (2006) (Taiwan).
- Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 98 Tai Shang Zi No. 3312 (98台上字第3312號刑事判決) (2009) (Taiwan).
- Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 98 Tai Shang Zi No. 3709 (98台上字第3709號刑事判決) (2009) (Taiwan).
- Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 100 Tai Shang Zi No. 4578 (100台上字第4578號刑事判決) (2011) (Taiwan).
- Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 100 Tai Shang Zi No. 5493 (100台上字第5493號刑事判決) (2011) (Taiwan).
- Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 102 Tai Shang Zi No. 248 (102台上字第248號刑事判決) (2013) (Taiwan).
- Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 102 Tai Shang Zi No. 3088 (102台上字第3088號刑事判決) (2013) (Taiwan).
- Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 102 Tai Shang Zi No. 626 (102台上字第626號刑事判決) (2013) (Taiwan).
- Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 102 Tai Shang Zi No. 3692 (102台上字第3692號刑事判決) (2013) (Taiwan).
- Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 102 Tai Shang Zi No. 4174 (102台上字第4174號刑事判決) (2013) (Taiwan).
- Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 103 Tai Shang Zi No. 538 (103台上字第538號刑事判決) (2014) (Taiwan).

- Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 103 Tai Shang Zi No. 626 (103台上字第626號刑事判決) (2014) (Taiwan).
- Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 103 Tai Shang Zi No. 720 (103台上字第720號刑事判決) (2014) (Taiwan).
- Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 103 Tai Shang Zi No. 2696 (103台上字第2696號刑事判決) (2014) (Taiwan).
- Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 103 Tai Shang Zi No. 3490 (103台上字第3490號刑事判決) (2014) (Taiwan).
- Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 104 Tai Shang Zi No. 2902 (104台上字第2902號刑事判決) (2015) (Taiwan).
- Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 106 Tai Shang Zi No. 456 (106台上字第456號刑事判決) (2017) (Taiwan).
- Zuigao Fayuan (最高法院) [Supreme Court], 97 Niandu Di 5 Ci Xingshi Ting Huiyi Ji Lu (97年度第5次刑事庭會議紀錄) [Record of the 5th Criminal Divisions Joint Conference of the Supreme Court of 2008] (2008) (Taiwan).

刑法第211條在宗教騙色案件中的 適用：宗教自由視野下的分析

陳 建 霖

摘 要

在臺灣法律的實務中，俗稱的「宗教騙色」案件無疑是刑法第211條的重要應用對象。該類案件在法院判決中所占比重可觀，社會主流民意也大致支持刑法對其的懲治。本文通過系統地整理和分析近期涉及宗教騙色的法院判決，試圖釐清刑法第211條在宗教騙色案件中的適用引發的疑義與爭議。首先，本文發現雖然根據法律條款，學界理論以及司法解釋均不將詐欺視作刑法第211條的定罪要素，但在實務中法院往往會對行為人宗教論述的真實性進行審查，並只有在能認定其論述是虛假的情況下判定行為人有罪。其次，本文通過比較法院在判決中對宗教騙色以及宗教騙財的不同待遇，揭示了法官裁判標準往往蘊含特定的宗教價值觀，並據此指出其判斷宗教論述真偽的裁判標準有違憲法對宗教自由的保障。於此，本文建議法院應放棄將詐欺視作定罪要素的裁判慣例，直接以行為人利用被害人急迫無助的心理狀態、以宗教手段誘使性交做為犯罪主軸。這種裁判思路不僅符合宗教自由對公權力的約束，也能更有效地懾阻宗教騙色的案件發生。

關鍵詞：宗教詐欺、詐騙性交、強制性交、宗教自由、性侵害修法