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Advances in Religious Liberty in Peru*

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I. INTRODUCTION

While Roman Catholicism has played a key role in Peru's societal and cultural development and has had a tremendous impact on the Peruvian government,¹ Peru has recently moved in the direction of greater religious pluralism. Early Peruvian constitutions identified Roman Catholicism as the national religion² and did not recognize other denominations.³ This prominent position of the Catholic

* Portions of this Article were originally prepared in Spanish and were translated by Scott E. Isaacson and members of the B.Y.U. Law Review.

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1. Rex A. Hudson, *PERU: A COUNTRY STUDY* ch. 2 (4th ed. 1993). The background information being referenced here may be found under the section entitled *Catholicism and Community* at <http://lcweb2.loc.gov/frd/cs/petoc.html#pe0066> (last visited Apr. 1, 2004).

2. Alfredo Quispe Correa, *The Evolution of Religious Beliefs in a Constitutional Text*, 1998 *BYU L. REV.* 357, 358.

3. *E.g.*, CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA PERUANA art. 8 (1823), *available at* <http://www.leyes.congreso.gob.pe/Imagenes/Constitu/Cons1812.pdf> (last visited Mar. 31, 2004) (“The Religion of the Republic is the Roman Catholic Apostolic Religion which excludes the exercise of any other religion.”); *cf.* CONSTITUCIÓN POLÍTICA DE LA MONARQUÍA ESPAÑOLA art. 12 (1812) (Spain), *available at* http://www.mju.es/asuntos_religiosos/menu_ni.html (last visited Mar. 31, 2004) (“The religion of the Spanish nation is and will be perpetually the Roman Catholic Apostolic, the only true religion. The Nation shall protect it through its wise and just laws, and shall prohibit the exercise of any other.”).

Church in Peru has had practical consequences in the acts of government and in the everyday lives of Peruvian citizens. However, despite the church's continued prominent role in state and cultural activities, recent trends indicate that Peru is acknowledging the importance of recognizing and working with other denominations as well.

The concept of *three generations* of human rights⁴ is useful in explaining the increasing religious liberty within Peru. The generational approach to human rights attempts to make sense of those values that are classified as human rights by grouping them into distinct categories or *generations*.⁵ Until very recently, all of the religious liberties recognized by Peru fit in the first generation human rights category—those tending to provide individual rights and shield people from state intervention.⁶ Recent developments suggest, however, that the Peruvian government has started making progress in institutionalizing certain second and third generation religious liberties—those relating to equality and solidarity, respectively.⁷

This Article discusses Peru's path toward achieving protection and institutionalization of religious liberty and analyzes how this process is intertwined with the evolution of the three generations of human rights. This Article begins, in Part II, by explaining the generational human rights model and its application to religious liberty. Part III summarizes Peru's traditional dealings with freedom of religion. In particular, this Part analyzes how Peru's traditional views regarding religion and religious rights reflect an almost exclusive recognition of first generation human rights. In addition, the Part demonstrates Peru's shortcomings in fully recognizing second generation religious liberties by describing the benefits the state provides the Catholic Church that it does not provide to other religions. Part IV discusses how this traditional concept of religious liberty is changing in Peru. This Part highlights three important legal

4. This *three generations* approach to human rights was introduced by Professor Karel Vasak in 1979 at the International Institute of Human Rights. John King Gamble et. al., *Human Rights Treaties: A Suggested Typology, an Historical Perspective*, 7 BUFF. HUM. RTS. L. REV. 33, 38 (2001). These "three generations correspond to the ideals of the French Revolution, *liberté, égalité, et fraternité*." *Id.*

5. *Id.*

6. WILLIAM F. FELICE, TAKING SUFFERING SERIOUSLY: THE IMPORTANCE OF COLLECTIVE HUMAN RIGHTS 31 (1996).

7. *Id.*

steps that Peru has taken that demonstrate the state's increased cooperation with non-Catholic faiths. The Part then describes how each of these three steps has moved Peru in the direction of greater institutionalization of certain second and third generation religious liberties. Part V offers a brief conclusion.

II. THE CONCEPT OF GENERATIONS OF HUMAN RIGHTS

A. Three Generations of Human Rights

Human liberty is one of the most precious and important rights that an individual can possess. From an ontological viewpoint, humans are free beings who inherently enjoy liberty. Thus, to be human is to enjoy liberty. This notion that human liberty is a self-evident right is demonstrated by the formal recognition of the idea in constitutions throughout the world. The inclusion of human rights in constitutions and legal documents has the effect of transforming these "philosophical principles into juridical orders."⁸ As one commentator has stated,

The concept of human rights or rights of man is a philosophical or ideological notion: that certain rights are necessary in order to be able to speak of the human being and of human dignity. But the judicial recognition of these rights converts them into binding orders that do not depend on each individual's [normative] convictions. "Human rights" are converted into "fundamental rights" or, in other words, into "public liberties." They pass, as such, from a concept of natural rights to a concept of positive law.⁹

This constitutional recognition of human liberties, however, still leaves open the question of what the actual content of these rights is.

The three generations of human rights framework attempts to explain how the content of human rights can take on different meanings at different times and in different places.¹⁰ Under this theory, human rights are defined in response to the values and needs that prevail in a specific time and locale.¹¹ The three generations of human rights paradigm argues that as time progresses, states

8. LUIZ LÓPEZ GUERRA, INTRODUCCIÓN AL DERECHO CONSTITUCIONAL [INTRODUCTION TO CONSTITUTIONAL RIGHTS] 102-03 (1994).

9. *Id.*

10. FELICE, *supra* note 6, at 31.

11. *Id.*

generally move from one generation (or definition) of human rights to another. Each generation represents a successively broader definition of human rights than the one before it.

First generation rights focus on the relationship between the individual and the state, and aim to protect the former from the latter.¹² These rights are based on principles of freedom and liberty,¹³ and they prohibit a state from interfering with an individual's freedom to do what he or she would like to do.¹⁴ Thus, these rights are considered negative rights because they were conceived as "freedoms from" rather than as positive "rights to."¹⁵ These rights include, inter alia, the freedoms of movement, opinion, association, contract, conscience, and worship.¹⁶

Second generation rights, which are collective in nature, arise as a result of the failure of first generation rights to adequately address equality issues.¹⁷ These kinds of rights have their roots in the social battles of the nineteenth century which had the effect of eroding the individualistic base of classical liberalism.¹⁸ Respect for human dignity and comparative equality came to be seen as prerequisites for lasting liberty, and in order to promote these new rights, a new worldview arose that focused on the state as an intervener rather than as a protector. Thus, instead of focusing on the relationship between the individual and the state, the new definition of human rights emphasized equality and focused on the relationship between people.¹⁹ Additionally, these rights were positive rights because they focused on the state's affirmative duty to promote certain benefits instead of simply focusing on "freedoms from" state intervention with certain activities.²⁰ Included within these second generation rights are social, economic, and cultural rights, such as the right to work, the right to education, and the right to welfare and benefits

12. *Id.*

13. *Id.*

14. Stephen P. Marks, *Emerging Human Rights: A New Generation for the 1980s?*, 33 RUTGERS L. REV. 435, 438 (1981).

15. *Id.*

16. *Id.*

17. See FELICE, *supra* note 6, at 31.

18. See Marks, *supra* note 14, at 438.

19. FELICE, *supra* note 6, at 31.

20. Marks, *supra* note 14, at 438.

from the state.²¹ All of these rights are based on some sort of principle of equality and require active state participation in their promotion.

Third generation rights are collective rights that benefit individuals and groups.²² These rights came about in response to the growing importance of “global interdependence, and correspond to the core value of fraternity.”²³ They may “be *invoked against* the State and *demande*d of [the State].”²⁴ The essential characteristic of third generation rights is that “they can be realized only through the concerted efforts of all the actors on the social scene: the individual, the State, public and private bodies and the international community.”²⁵ The idea of human solidarity is behind all of these rights: “the new human rights . . . exist in order to realize the community of efforts and responsibilities on a planetary scale.”²⁶ Third generation rights include the rights to quality of life, to an adequate environment, to peace, and to information,²⁷ as well as other new rights that are still not fully recognized as human rights.

Although it appears that each of these three kinds of rights has its own personality, in reality, each fundamental right and liberty is influenced by the other legally recognized human rights that exist at that time and place. For example, individualism, which inspired the

21. FELICE, *supra* note 6, at 31; David Kinley, *Human Rights, Globalization and the Rule of Law: Friends, Foes, or Family?*, 7 UCLA J. INT’L L. & FOREIGN AFF. 239, 251 (2002).

22. FELICE, *supra* note 6, at 32. Third generation rights respond to [t]he perception [that] the consequences of economic growth and, overall, of the industrial development over the conditions that make human life possible have given place to a growing preoccupation for the maintenance of these conditions. Goods that “are taken for granted” in other eras (drinkable water, clean air, absence of toxic or radioactive materials in the vital surroundings, food without additives or preservatives generated for illnesses) begin today, in many cases, to become scarce. This places in danger the welfare, and even the lives, not just of some individuals, but of great sectors of society, and even of society in general. This explains the fact that constitutions and international declarations have progressively accentuated the need to recognize, and to protect, some rights that differ from those classically consecrated

LÓPEZ GUERRA, *supra* note 8, at 110.

23. FELICE, *supra* note 6, at 31.

24. Marks, *supra* note 14, at 441 (quoting Karel Vasak, Lecture to the Tenth Study Session of the International Institute of Human Rights (July 1979)).

25. *Id.*

26. Antonio Enrique Perez Luño, *Las Generaciones de los Derechos Humanos*, DIÁLOGO CON LA JURISPRUDENCIA, 1998, at 280; *see also* FELICE, *supra* note 6, at 31–32; Marks, *supra* note 14, at 441.

27. Perez Luño, *supra* note 26, at 280.

individual rights of the first generation, also influences the second generation human rights, which arise out of egalitarianism. Similarly, first generation rights, with their focus on the fact that the individual should be entitled to enjoy certain liberties, and second generation rights, with their focus on the collective, have inspired the third generation idea that these individuals and groups may demand even more from the state.

B. The Relationship Between the Three Generations and Religion

These three generations of rights have had a significant impact on the development of religious liberty. Because religious freedoms are a subset of human rights, it follows that the evolution of religious freedoms and the freedom of conscience has paralleled the evolution of human rights. Thus, the generational approach to human rights can provide a valuable framework in explaining the development of religious liberties. For example, in Peru, religious rights were initially considered only as individual first generation rights that were to be protected against affirmative state action.²⁸ The state's attitude towards these rights was simply to avoid interference with them.²⁹

However, when second generation rights were born, religious liberty and the freedom of conscience took on a collective meaning. The focus shifted from the individual to the need for equality. Thus, states began to recognize these rights in legal texts not only as individual and private human rights, but also as rights that people can realize jointly with others.³⁰ The appearance of these rights in legal texts also encouraged people to manifest these rights externally and actively within their legal community.³¹ Furthermore, constitutions and international declarations began to recognize that religious liberty rights were based on both the state-individual relationship and the state-organization relationship. Uruguayan ambassador Miguel Angel Semino explained,

28. Javier Saldaña, *Libertad Religiosa y Pluralidad Religiosa* [Religious Liberty and Religious Plurality], in *DERECHOS FUNDAMENTALES Y ESTADO: MEMORIA DEL VII CONGRESO IBEROAMERICANO DE DERECHO CONSTITUCIONAL [FUNDAMENTAL RIGHTS AND THE STATE: RECORDS OF THE SEVENTH CONGRESS OF LATIN AMERICAN CONSTITUTIONAL RIGHTS]* 653, 654 (2002).

29. Marks, *supra* note 14, at 438.

30. See Allen N. Sultan, *Principal and Practical Foundations of a Global Constitutional Order*, 3 WASH. U. GLOBAL STUD. L. REV. 155, 171 (2004).

31. See *id.*

[T]he individual religious phenomenon becomes collective when the members of a determined creed group together, or associate together, in order to carry out tasks and ends that are derived from the religious faith that they profess. It is from here that the State should not only maintain relations with the faithful acting as individuals, but also with the religious associations: the churches.³²

States began to recognize the right of churches to organize and act within the systems of a free and equal society. Thus, the notion that individual liberties are exclusive determinants of human rights was abandoned in favor of a broader second generation definition that focuses on larger group rights.

Third generation human rights add an element of mutuality to the definition of religious liberties. Thus, the role of the state that has adopted third generation human rights is to promote not only mutual tolerance and peaceful coexistence, but also to foster an atmosphere of supportive coexistence.³³ The individual, the religious organizations, and the state are to work together to create an environment in which religious liberty can flourish. Behind this movement is the belief that “only the acceptance of the beliefs and convictions of others will permit and facilitate the acceptance of [one’s] own. Only religious pluralism [will] guarantee[] adequate and harmonious social interaction.”³⁴

The path to achieving the protection and institutional promotion of freedom of religion and conscience is a long path full of fundamentally human obstacles that requires the recognition of all three generations of rights. It is not enough simply to have religious liberty and freedom of conscience institutionalized in the constitutional norms and in international declarations; the state must also institutionalize the protection and promotion of these freedoms. In this sense, a state must, “[t]hrough the existence of the corresponding norms taken as a whole,” convert the fundamental rights “into something objective-institutional, something organized.”³⁵ This process requires that diverse actors change their

32. Miguel Angel Semino, *Libertad de Conciencia y Religión*, [*Freedom of Worship and Religion*] in LECTURAS SOBRE TEMAS CONSTITUCIONALES [LECTURES ABOUT CONSTITUTIONAL THEMES] No. 6 at 85 (1990).

33. See *supra* notes 22–27 and accompanying text.

34. See Guillermo García-Montúfar & Elvira Martínez Coco, *Antecedents, Perspectives, and Projections of a Legal Project About Religious Liberty in Peru*, 1999 BYU L. REV. 503, 509.

35. PETER HÄBERLE, LA LIBERTAD FUNDAMENTAL EN EL ESTADO CONSTITUCIONAL [FUNDAMENTAL LIBERTY IN A CONSTITUTIONAL STATE] 187 (1997).

attitudes. First, the state should adopt an accepting attitude toward appropriate legislation that expands religious liberties beyond their individual roots. Second, churches should understand that the goal is not to impose a proposal on the state and other institutions, but to share and cooperate in its establishment and implementation. Third, individuals should participate in the creation of the new institutions by adopting a supportive egalitarian attitude in full accord with human dignity.³⁶

Thus, the attainment and protection of religious liberty and freedom of conscience involves all three generations of rights. The state must first recognize the individual and collective right to freedom of conscience and religion. Additionally, the state must recognize the right of churches to organize and act with complete equality and freedom. Finally, adequate achievement and protection of religious liberty requires the participation of the state, religious organizations, and society in maintaining and supporting religious liberty.

III. HOW PERU HAS TRADITIONALLY DEALT WITH THE FREEDOM OF RELIGION

This concept of the three generations of human rights provides a useful framework for understanding the evolution of religious liberty in Peru. Although the Peruvian state presently recognizes the freedom of individuals to choose their own religion,³⁷ it does not recognize the equality of all religions.³⁸ The Catholic Church (“the Church”) still enjoys many benefits that other religions do not enjoy.³⁹ The Peruvian definition of religious liberty is thus largely first generational—the state provides individuals with freedom of worship, but does not actively do much to promote it or ensure equality for all religions. The state has, however, recently taken steps towards institutionalizing religious liberty as a second generation

36. See Marks, *supra* note 14, at 441.

37. García-Montúfar & Martínez Cocco, *supra* note 34, at 513 (“Congress promulgated Law 2193, the Law of Freedom of Worship, on November 11, 1915. Pursuant to this act, the last phrase of Article 4 of the Constitution of 1860 (which established the total protection of the Catholic Church by the state and which prohibited any other religion) was abolished.”); Melanie Adrian, *The Emergence of Religious Pluralism: A New Approach by the Peruvian Government*, 3 REVISTA: HARV. REV. LATIN AM., Fall 2003, <http://drclas.fas.harvard.edu/publications/tcontents.php> (last visited Mar. 31, 2004).

38. Adrian, *supra* note 37.

39. See *infra* Part III.B.

human right, and has even made some progress in terms of recognizing certain third generation religious liberties. In order to understand these advances, it is first necessary to gain an understanding of how Peru has traditionally dealt with religious liberty.

A. Peru's General Views Regarding Religion and Religious Rights

1. Secularism

Because there is no official state religion, and because the state respects freedom of worship throughout the country, the modern Peruvian state may be classified as a secular state.⁴⁰ However, this has not always been the case. Prior to 1915, public exercise of any non-Catholic religion was prohibited.⁴¹ This meant that prior to 1915 the Church and state were essentially a single entity—the Church was the base or support of the political system because everything, including government, was considered a manifestation of the divine.⁴² After 1915, however, a series of Peruvian constitutions began to adopt a system of state secularism and freedom of worship, and the secular state was born.⁴³

2. Religious Liberty in the Constitution

The Peruvian Constitution of 1993, the constitution in force today, establishes freedom of religion and freedom from discrimination for all Peruvian people.⁴⁴ Article 1 recognizes the importance of state respect for human rights, establishing that the ultimate purpose of society and the state is the defense of the human person and respect of human dignity.⁴⁵ Article 2 goes further, cataloguing certain personal fundamental rights. One of these rights

40. García-Montúfar & Martínez Cocco, *supra* note 34, at 514.

41. *Id.* at 513. Law 2193, modifying Article 4 of the Constitution of 1860, was passed in 1911, thereby eliminating the prohibition of the public exercise of any non-Catholic religion. *Id.*

42. *See, e.g.*, Carlos Valderrama Adriansén, La Libertad Religiosa en la Sociedad Plural Peruana [Religious Liberty in the Plural Peruvian Society], Address at the Annual Religious Liberty Conference (Sept. 19, 2003) (transcript on file with authors).

43. *See generally Peru: Constitutional Development*, in Hudson, *supra* note 1.

44. *See* CONSTITUCIÓN POLÍTICA DEL PERÚ art. 8 (1993).

45. *Id.* art. 1.

is the right of all religious denominations to worship freely.⁴⁶ Furthermore, Article 2 incorporates the concept of equality within the law and prohibits all discrimination “for reason of . . . race, sex, language, *religion*, [or] opinion.”⁴⁷ Thus, Articles 1 and 2 of the Peruvian Constitution reflect Peru’s support for the first generation right of the freedom to worship without state interference.

In addition to reflecting first generation rights, the Peruvian Constitution also reflects certain second generational rights in the context of religious liberty. For example, Article 14 requires that “religious education is imparted with respect for the freedom of conscience.”⁴⁸ Here, the article seeks to balance the second generation ideal that the state should take an active role in promoting human rights (education) with the first generation ideal of individual liberty. This egalitarian impulse is also reflected in Article 50, which recognizes the Catholic Church’s role in forming the history, culture, and morals of Peru and establishes that the Peruvian state collaborates with the Catholic Church. However, the article also states that “the State respects other confessions and may establish forms of collaboration with them.”⁴⁹ Thus, this article recognizes that non-Catholic denominations exist and that these organizations can form relationships with the individual and the state. Article 50 therefore recognizes second generation rights by implying the possibility of collaboration between the state and all denominations, not just the Catholic Church.

Nonetheless, the religious liberty that the Constitution envisions does not translate into equal treatment for all religions and the wholesale adoption of second generation rights. The Catholic Church still enjoys benefits not held by other religions.⁵⁰ Article 50, while codifying the importance of collaboration and respect, does not have much practical effect on the government’s treatment of

46. *Id.* art. 2. This right can be limited where the worship offends public morals or causes people to be persecuted for their opinions, ideas, or beliefs. *Id.*

47. *Id.* art. 2 (emphasis added).

48. *Id.* art. 14.

49. *See id.* art. 50. Article 50 was preceded by Article 86 of the Peruvian Constitution of 1979, which, in a very similar manner, established, “Within a regime of independence and autonomy, the State recognizes the Catholic Church as an important element in the historical, cultural, and moral formation of Peru. It pledges its collaboration. The State may also establish forms of collaboration with other religious faiths.” CONSTITUCIÓN POLÍTICA DEL PERÚ art. 86 (1979).

50. Adrian, *supra* note 37; *see also infra* Part III.B.

other denominations. The article simply declares that the state *may* establish forms of collaboration with other religions. If the article's intent is to merely state that Peru has the power to enter into agreements with other religions, Article 50 is almost altogether meaningless. While the article could be interpreted to mean that the state *should* establish forms of collaboration with other religions and build connections with non-Catholic groups, this is not a commonly adopted interpretation. Today, non-Catholic religious groups still cannot enter into any sort of collaboration with the state through any legally established procedure. Indeed, until very recently, Peru did not even formally recognize any specific non-Catholic religious groups.⁵¹ Thus, in practice, the Catholic Church still enjoys many benefits not enjoyed by any other religion.

*B. Peru's Treatment of the Catholic Church Compared to Peru's
Treatment of Other Religions*

Although the Constitution guarantees religious freedom and implies a right of equality for religious organizations, in practice, the state does not treat religious organizations in Peru equally. Roman Catholicism is still the only religion expressly named in the Constitution.⁵² The Catholic Church continues to have, without a doubt, a place of privilege in the state.⁵³ Because all Peruvian religions are not treated equally, and because the state does not provide certain benefits to non-Catholic religions, second and third generational religious liberties are in large part denied in the country. A few specific examples highlight this inequality of religious groups in Peru.⁵⁴

1. Agreements

Although the Peruvian Constitution of 1993 permits state cooperation with all religions,⁵⁵ the state's association with the Catholic Church is the only association formalized in an official agreement. This agreement, an international covenant, known as the Concordat, was commemorated between the Holy See and the

51. *See infra* Part IV.C.

52. *See* CONSTITUCIÓN POLÍTICA DEL PERÚ art. 50 (1993).

53. García-Montúfar & Martínez Coco, *supra* note 34, at 517–19.

54. *See id.* at 517–22.

55. *See* CONSTITUCIÓN POLÍTICA DEL PERÚ art. 50 (1993).

Republic of Peru in 1980.⁵⁶ Thus, even though the Constitution establishes that the state may cooperate with non-Catholic religions, there are no similar formal agreements of any kind between Peru and non-Catholic organizations.⁵⁷

2. *Independence and autonomy*

This international covenant with the Catholic Church guarantees the Church independence and total autonomy and specifically recognizes the Church as a legal entity under public law.⁵⁸ This means that the Catholic Church has a legal existence independent of the state—it does not have to apply to the government or register in any way in order to exist as a viable legal entity in Peru. It has full power to perform acts such as buying land, entering into contracts, and employing people, and does not require any sort of state authorization.⁵⁹

All non-Catholic religions, on the other hand, must form associations under the law of civil associations in order to operate legally.⁶⁰ Entities formed under this civil associations law are considered entities of private law. Therefore, they must draft and submit articles of formation to the state for approval.⁶¹ These entities exist by the will of the state. Article 81 of the Civil Code provides that if the association is religious in nature, its internal regimen is determined by what is established in its articles of formation.⁶² While the code thus grants a degree of autonomy to religious civil associations,⁶³ this does not remove the fundamental fact that these religious civil associations are legal entities of private law (not public law as is the Catholic Church), and as such, depend on the

56. García-Montúfar & Martínez Coco, *supra* note 34, at 517; Quispe Correa, *supra* note 2, at 362.

57. García-Montúfar & Martínez Coco, *supra* note 34, at 520; Quispe Correa, *supra* note 2, at 362.

58. García-Montúfar & Martínez Coco, *supra* note 34, at 518 (explaining that the covenant refers to the Church as an “[e]ntidad de derecho publico”). The word *derecho* could be translated as either law or right. Thus, the term implies an inherent status and not just a legal status. The Catholic Church is an entity of *public* as opposed to *private* law because it serves a public function and fills a social need. It exists and operates under its own canon law, and not pursuant to the laws of the local government.

59. García-Montúfar & Martínez Coco, *supra* note 34, at 517.

60. *Id.* at 520.

61. Código Civil [Civil Code] art. 81.

62. *Id.*; García-Montúfar & Martínez Coco, *supra* note 34, at 520.

63. Código Civil [Civil Code] art. 81.

government for their existence. This different legal status creates a significant difference in terms of independence and legal autonomy.

3. *Financial support*

State treatment of the Catholic Church also differs from state treatment of non-Catholic denominations in that the Catholic Church is the only religion that receives financial support from Peru. Certain Catholic bishops and other officials receive economic allowances from the state.⁶⁴ On the other hand, ministers of non-Catholic religions do not receive a similar benefit.⁶⁵ Thus, the fact that the Catholic Church receives state financial support while other religions do not further demonstrates the lack of true religious equality in Peru.

4. *Tax exemptions*

In addition to benefiting from state financial aid, the Catholic Church enjoys generous exemptions from various taxes including income, import, sales, and property taxes.⁶⁶ Although some of these exemptions are available to other religious organizations under the general non-profit tax exemption laws,⁶⁷ non-Catholic religions continue to pay some taxes that the Catholic Church does not pay. For example, some municipalities have imposed property fees and taxes on non-Catholic houses of worship while at the same time

64. Quispe Correa, *supra* note 2, at 362.

65. The system was originated in the past century when, upon abolishing the civil laws over the collection of ecclesiastical tithes, the state assumed responsibility for assigning a salary to the bishops and to his intermediate assistants.

66. García-Montúfar & Martínez Coco, *supra* note 34, at 518. The Catholic Church receives exemptions to the following taxes:

Tax on Rents (Legislative Decree No. 774), the General Tax to the Sales and Selective Consumption for the importation of donated goods (Legislative Decree[s] 775 and 821), the Ancient Excise Tax (Legislative Decree 776), . . . the Predial Tax (Legislative Decree 776). The Diocesan Seminaries and the Centers of Formation of Religious Communities, recognized by the Episcopalian Peruvian Conference, also enjoy [the exonerations, exemptions, and deductions of taxes for donations in their favor that the Universities enjoy].

Id. (citing Law of Universities, Law 23,733 art. 98).

67. Some exemptions are extended to all religious faiths, in some cases by the legal texts, and in others, by the adaptation of the spirit of the texts to the situation of religious liberty in the country. All religious faiths currently enjoy some exemptions from the following taxes: the rent tax, the general sales and selective consumer tax for the importation of donated goods, the sales tax, the vehicle registration tax, the property tax. *Id.*

exempting Catholic Church properties.⁶⁸ Other municipalities charge non-Catholic property owners assessments for services that are not charged to the Catholic Church.⁶⁹ Also, individual donors to the

68. *Id.* at 520–21. Regarding property taxes, Legislative Decree No. 776 establishes that properties owned by religious groups used as temples, convents, monasteries and museums should be exempt from taxation. Temples have generally been interpreted to mean buildings where religious groups meet regardless of the name given to such buildings by each group. *Id.* at 520. But convents and monasteries have not been interpreted broadly to cover residences of non-Catholic religious personnel or administrative offices of non-Catholic groups. *Id.* There certainly is little justification as to why the residences of some religious workers and administrative offices of some religions should be tax-exempt and not others. *Id.* at 521. Moreover, it has been the authors' experience that some municipalities have taken the erroneous position that the tax exemption should only apply to religions that are registered or recognized by the state, which until recently was only the Catholic Church. This interpretation has no support in Decree 776 (copy on file with authors), and Resolution No. 652-2-97 of the Tax Tribunal, July 12, 1997, (copy on file with authors) specifically states that no such registration is required in order to obtain the property tax exemption for religious use.

69. In 2000, the highest constitutional court of Peru affirmed the legality of these discriminatory fees. The authors represented the Peruvian Association of the Church of Jesus Christ of Latter-day Saints in a case against the city of Lima, Peru. Sala Civil Transitoria de la Corte Suprema de la Republica, A.V. 99-98, Casilla 381 (Feb. 3, 2000) (unpublished decision on file with authors) [hereinafter ASPERSUD]. The municipality of Lima charges fees for public street cleaning and public lighting to property owners, but the law exempts from these fees certain types of buildings including "temples and convents." The Municipality applies this exception only to the properties of the Catholic Church, and all other religious groups have to pay the fees applicable to their houses of worship. When this unequal treatment was challenged in the courts, the Supreme Constitutional Court of Peru ("the Court") held that this application of the law was not unconstitutional, principally on the ground "That at the time of the enactment of this law, the only *recognized* church was the Catholic Church . . . , and therefore, by historical interpretation, this exception only can be understood to refer to the temples and convents of the Catholic Church." *Id.* (emphasis added). Thus, the tax exemption is granted to the Catholic Church because it was the only church recognized by the state at the time of the adoption of the law. However, at the time of the ASPERSUD case, there was no way for any other religious groups to become recognized. Certainly it is sophistry to grant exemptions to *recognized* religious groups without providing any sort of mechanism by which *unrecognized* religious groups can ever become recognized. This is one of the reasons why the recent decrees by the Justice Ministry discussed below are considered by the authors to be very significant. For the first time, there exists a national registry of religion, and religious groups other than the Catholic Church can be officially registered. There is no direct tie between this registry and the municipal fees in question in the ASPERSUD case, but certainly the possibility is much greater that registered religious groups will be afforded equal treatment in such matters.

In the ASPERSUD case, the Court seemed to recognize the flimsiness of its rationale when it added: "[A]ccording to Article 50 of the current Political Constitution of Peru, the State respects other churches and may establish means of collaboration with them, and thus, the remedy rests in the right of the actor to negotiate a legislative solution." *Id.* The Court seems to be implying that the only solution to the obvious unequal treatment would be political. The existence of such unequal treatment is one of the factors, we believe, that has led to the recent adoption of the decrees discussed below in this Article.

Catholic Church receive tax deductions for charitable contributions to the Church while donors to other religious groups do not.⁷⁰ This imbalance, of course, gives people an incentive to donate money to the Catholic Church instead of non-Catholic denominations. Finally, even when non-Catholic churches can qualify for tax exemptions, some of these exemptions still require burdensome applications and annual renewals.⁷¹ None of these burdensome requirements apply to the Catholic Church.

5. Immigration benefits

Catholic Church officials also receive preferred status over non-Catholic officials when immigrating into Peru. The international covenant with the Catholic Church grants visas to all Catholic Church officials.⁷² A non-Peruvian representative of another religion, however, does not have this entitlement and must apply for a religious visa.⁷³ Furthermore, the non-Catholic official may be subject to quotas and the discretion of immigration officials at various times.⁷⁴

6. Military chaplains

Another inequality in Peru's treatment of religions stems from the fact that the agreement between the state and the Catholic Church establishes a program that provides for state-subsidized

Furthermore, in *ASPERSUD*, the Court dismissed a claim that such an interpretation was in violation of the constitutional prohibition against discrimination on the basis of religion, reasoning "That this does not constitute discrimination, as the plaintiff maintains, because the provision referred to is an exception to another provision and not a general rule itself, according to which, and in principle, we all must pay the cost of public services." *Id.* This reasoning is that a law may not be discriminatory so long as it is an exemption to a generally applicable law and not a generally applicable law itself. Thus, under the Court's reasoning, only generally applicable laws may be discriminatory, and an exception may never be, even if the exception were determined for completely arbitrary reasons. Apparently under this argument, a general law that taxes all people, but exempts people of a stated race or national origin, would not be discriminatory. Such a rationale for taxing one religious group and not another is at the very least unpersuasive and borders on being unprincipled.

70. García-Montúfar & Martínez Coco, *supra* note 34, at 518, 521.

71. *Id.* at 521.

72. *See id.* at 519.

73. *See id.*

74. As discussed *supra* Part III.A.2, the state could remedy this by interpreting Article 50 of the Constitution to mean that the state *should* work with other religious groups instead of reading it as the state *may* collaborate with other groups.

Catholic chaplains in the military. Although there is no formal legal obstacle to hiring chaplains of other religious faiths, there is also no formal program that deals with non-Catholic chaplains. Thus, although the agreement with the Church suggests that the state guarantees religious support for members of the military,⁷⁵ a second generation social right, the fact that this support is limited to the Catholic faith suggests unequal treatment of ecclesiastical leaders and members of other faiths.

It follows from all these examples that, although the Peruvian Constitution envisions religious liberty, the unequal treatment of religions by the state prevents the full realization of this ideal. Although Peruvians enjoy freedom of religion in the first-generation sense, Peru does not yet adequately recognize freedom of religion as a second and third generation right. However, the remainder of this Article discusses three recent developments in Peru that constitute important advances towards this ideal.

IV. THREE IMPORTANT LEGAL STEPS TOWARD INSTITUTIONALIZING RELIGIOUS LIBERTY AND PROVIDING EQUAL TREATMENT FOR ALL RELIGIOUS FAITHS

Constitutional recognition of a fundamental liberty or right may not always be sufficient to achieve effective protection of that right. In the context of religious liberty, the recognition of egalitarian and solidarity principles—characteristics of second and third generation human rights—may require more elaboration than the broad principles outlined in constitutional provisions. In some cases, particular constitutional provisions leave substantial discretion to the respective legislatures, which may lead to the impairment of a recognized right, or even worse, the absence of legislative action, leaving the recognized right devoid of practical content.⁷⁶ In other cases, while a constitutional provision may not require legislative action to protect the right identified, the terms of the provision may

75. García-Montúfar & Martínez Coco, *supra* note 34, at 519.

76. For example, Article 50 of the 1993 Peruvian Constitution declares that the state cooperates with the Catholic Church and “may establish forms of cooperation with [other religious faiths].” CONSTITUCIÓN POLÍTICA DEL PERÚ art. 50 (1993). Thus, this constitutional provision leaves substantial responsibility to the national legislature to legislate and effectuate cooperation with the Catholic Church and other religious faiths. The legislature, however, could have responded with inadequate or detrimental legislation contrary to the recognition of such cooperation, or could have failed to legislate at all on the subject matter, leaving void the effect of this particular constitutional provision.

be open to varying interpretations such that their resolution in the courts may be unpredictable.⁷⁷ Furthermore, even where there is constitutional and international recognition of freedom of religion and conscience, in practice it is often difficult to apply these abstract textual principles to certain concrete problems such as how the law should treat medical exemptions, conscientious objection, salutation of national symbols, and Sabbath day observance.⁷⁸

In order to deal with these concrete problems and to move religious liberties beyond basic first generation rights, Peru has recently taken several important steps. Although no sweeping religious liberty law has yet been adopted in Peru,⁷⁹ there have been

77. For example, Article 2, paragraph 3, of the 1993 Peruvian Constitution leaves much room for interpretation. Thus, while the provision declares that religious faiths may be freely exercised in public, little guidance is provided to the courts in order to interpret what constitutes a religious faith and, moreover, what freedoms are guaranteed in the free exercise clause. CONSTITUCIÓN POLÍTICA DEL PERÚ art. 2, para. 3 (1993). Furthermore, this provision is expressly limited by the requirement that the exercise of the religion does not “offend the morals or interrupt the public order.” *Id.* Such broad language invites a potentially wide variety of discrepancies between judicial opinions wrestling with proper constraints on the free exercise of religion.

78. Miguel Angel Semino makes reference to the following situations:

Certain religious groups deny permission for their members to submit to a blood transfusion because their beliefs prevent them from accepting it. A doctor that is confronted with such a situation is limited in that the transfusion is a necessity for life. What should he do? Other religious groups—also invoking their profession of faith—prohibit the salutation of national symbols, such as the flag and the anthem. Should they be sanctioned, criminally or civilly, for behaving in this manner? This same negative position towards patriotic symbols usually manifests itself in relation with military service or upon being drafted in times of war: it is the case of the conscientious objector. Should they be considered deserters or shall their religious convictions work as a cause of justification? Less tragic, but responding to a similar motive, is the case of those who refuse to work on the Sabbath days—or to teach classes—because it is their day of religious observance, while for the rest of the collective it is no different. Should they be dismissed for bad conduct or lack of cooperation with the company? Should their authority to teach be withdrawn?

Semino, *supra* note 32, at 85.

79. A draft of a suggested religious liberty law has, however, been prepared, largely by Professors Guillermo García-Montúfar and Elvira Martínez Coco. For a detailed review of the provisions of the proposed religion law, see García-Montúfar & Martínez Coco, *supra* note 34. Their paper was presented at the International Church-State Symposium, held in 1998 at Brigham Young University, and subsequently published in the Brigham Young University Law Review. The plan was presented to diverse delegations. On October 3, 2001, the Delegation Natale Amprimo Plá of the We Are Peru Democratic Party decided to make it their plan and to present it under N° 984-2001. The new plan followed along the same basic lines as the Delegation’s original plan (with relatively minor modifications), which was prepared in 1999 as a working document, and provided an initial point of discussion with members of the International Academy for Freedom of Religion and Belief. Members of the Academy participated in the 2003 forum, “The Constitution and the Freedom of Religion in Peru.”

three significant and recent legal developments that deal with the rights and legal status of religious groups in Peru. While these efforts are more discrete and modest in impact than a general religious liberty law, these legal developments nonetheless represent three important steps in the full development of religious liberty and equality in Peru and, therefore, merit comment and analysis.

In general, these legal developments demonstrate an expanding view of human rights. Religious liberty in Peru is in a period of transition from mere government recognition of freedom of conscience and worship for its citizens—first generation human rights—to government cooperation with citizens and organizations in the establishment of equal treatment for all religious faiths—second and third generation human rights.

A. Establishment of the Office of Interfaith Affairs

The first major recent development in the promotion of religious liberties beyond those of the first generation in Peru was the establishment of the Office of Interfaith Affairs.⁸⁰ The Office of Interfaith Affairs was established to resolve practical problems regarding the implementation of Article 50 of the Constitution,⁸¹ which establishes that the state “extends its cooperation” to the Catholic Church and may cooperate with non-Catholic faiths.⁸² As mentioned previously, some constitutional provisions leave substantial discretion to national legislatures when they implement the abstract principles espoused in the text. After a few failed attempts at solving this dilemma, the Office of Interfaith Affairs was designed to address the problem arising from the vague language of Article 50 of the Constitution.

Prior to the establishment of the Office of Interfaith Affairs, Peru established the Office of Ecclesiastical Affairs within the Ministry of Justice.⁸³ The Office of Ecclesiastical Affairs was to maintain forms of cooperation with the Catholic Church and other religious faiths, as

which was organized jointly by the Academy and the Ministry of Justice of Peru. The plan is currently being discussed in the Constitution Commission of Congress.

80. Decreto Supremo [Executive Decree] N° 026-2002-JUS (July 25, 2002).

81. *See supra* Part III.A.2.

82. CONSTITUCIÓN POLÍTICA DEL PERÚ art. 50 (1993).

83. The functions of the Ministry of Justice are set forth in Decreto Supremo [Executive Decree] N° 019-2001-JUS, art. 6(k) (June 19, 2002). Articles 71, 72(f), 79 and 80 describe the Office of Ecclesiastical Affairs and its duties.

directed by Article 50.⁸⁴ However, in practice this office only attended to matters relating to the Catholic Church. Although the phrase “other confessions” was prevalent throughout the applicable regulations that dealt with the office, the Office of Ecclesiastical Affairs took the position that it only had jurisdiction over religious groups with whom the state had established forms of cooperation.⁸⁵ Since the Catholic Church was the only church that had established a form of cooperation with the state, the office only dealt with the Catholic Church.⁸⁶ Additionally, because the office did not assume independent responsibility for establishing forms of cooperation with non-Catholic religions, and because there was no method for other denominations to establish forms of cooperation, such jurisdiction remained exclusive.

In order to remedy this situation, Peru adopted Executive Decree No. 026-2002-JUS on July 25, 2002. This decree modified the internal organization of the Ministry of Justice and created two new offices: the Office of Catholic Affairs and the Office of Interfaith Affairs.⁸⁷ Under the decree, the Office of Catholic Affairs is responsible for “[d]irect[ing] and coordinat[ing] actions tending to deepen the cooperation of the Executive Power . . . with the Catholic Church.”⁸⁸ The Office of Interfaith Affairs is responsible for “promot[ing]” cooperation between the Executive Power and “other non-Catholic religious faiths.”⁸⁹ Moreover, the promotion of cooperation with non-Catholic religious faiths was officially recognized for the purpose of “strengthening [] religious liberty.”⁹⁰

In addition to this positive development, the decree contains a concrete benefit for non-Catholic religions. The Office of Interfaith Affairs is specifically directed to “[i]ssue reports and process the

84. *Id.*

85. The Catholic Church was the only such entity. The relationship between the Catholic Church and the state is governed by Decreto Ley [Legislative Decree] N° 23211 (July 19, 1980), which authorizes the Concordat entered between the Peruvian State and the Holy See (the Vatican). This statement is based on the authors’ many years of experience with this office.

86. *See supra* section Part III.B.1.

87. Decreto Supremo [Executive Decree] N° 026-2002-JUS (July 25, 2002).

88. *Id.* art. 2 (amending Reglamento de Organización y Funciones del Ministerio De Justicia [Regulations of Organization and Function of the Ministry of Justice], art. 80(a)).

89. *Id.* art. 3 (amending Regulations of Organization and Function of the Ministry of Justice, art. 80B(a)).

90. *Id.*

approval of foreign donations sent to religious faiths.”⁹¹ This language is exactly the same as that contained in the regulations for the Office of Catholic Affairs.⁹² This means that the Ministry of Justice will process the paperwork allowing other religious organizations to import donations from abroad without requiring them to pay import taxes.⁹³

Despite these developments, the new legislation explicitly preserves some of the inequalities among the denominations. As was the case previously under the Office of Ecclesiastical Affairs, the Office of Catholic Affairs controls the payment of pensions to bishops and the payment of support payments to Catholic ecclesiastical personnel.⁹⁴ No such language appears in the regulations regarding the duties of the Office of Interfaith Affairs. Additionally, the regulations specify that the Office of Catholic Affairs may authorize certain immigration documents and other documents relating to ecclesiastical work outside of the country for Catholic officials.⁹⁵ This authority is not specifically granted to the Office of Interfaith Affairs. Furthermore, it is still not entirely clear how non-Catholic religious groups are to enter into forms of cooperation with Peru.

Still, the creation of this office at least marks the beginning of the construction of bridges between the state and other religious faiths. The office is the first governmental body directed to the needs of non-Catholic religious groups. Thus, in creating the office, Peru appears to recognize some need for equal treatment of all religious faiths and increased cooperation between the state and religious faiths. This push for institutional equality and increased cooperation, when viewed through the paradigm of the three generations of human rights, demonstrates that Peru is moving towards recognition of second and third generation religious liberties.

91. *Id.* (amending Regulations of Organization and Function of the Ministry of Justice, art. 80 B(c)).

92. *Id.* art. 2 (amending Regulations of Organization and Function of the Ministry of Justice, art. 80(e)).

93. *See infra* Part IV.B.

94. Decreto Supremo [Executive Decree] N° 026-2002-JUS, art. 2 (July 25, 2002) (amending Regulations of Organization and Function of the Ministry of Justice, art. 80(c)).

95. *Id.* art. 3 (amending Regulations of Organization and Function of the Ministry of Justice, art. 80(d)).

B. Extension of Tax Exemption for Foreign Donations to All Registered Non-Catholic Religious Faiths

Another major development in the expansion of religious liberty in Peru was the state's creation of a tax exemption for donated goods imported by non-Catholic religious faiths. Peruvian law gives certain goods donated from foreign sources preferential treatment over goods purchased and imported from foreign sources. These goods have faster processing time in customs and are exempted from import duties and fees.⁹⁶ In order to receive this benefit, the applicable ministry must first issue an approving resolution. For example, if the donated goods were for education, then the Ministry of Education has to approve their exemption from taxation. Thus, until recently, goods donated to religious institutions had to be approved first by the Office of Ecclesiastical Affairs.⁹⁷ This requirement proved to be an obstacle to non-Catholic groups because, as mentioned, the Office of Ecclesiastical Affairs took the position that it only had jurisdiction over the Catholic Church because the Catholic Church was the only religious entity that had formal relations with the government.⁹⁸ Thus, non-Catholic groups had to pay customs duties and taxes on goods that were to be used internally by the religious organization.⁹⁹

In February 2003, this situation changed radically. By way of executive order—Executive Decree N° 003-2003-JUS (“Executive

96. Decreto Ley [Legislative Decree] N° 21942 (Sept. 28, 1977). An executive order established the regulations and procedures for donations, including those for religious entities. The decree specifies that the customs office will process the release of the donated goods in no more than three business days and the receiving institution will be able to retrieve the goods within a period of five days. These are dramatic reductions of the normal processing time. However, in order to qualify for this treatment as a religious institution, the decree requires, among other things, that the donation be approved by the Office of Ecclesiastical Affairs. Decreto Supremo [Executive Decree] N° 127-91-PCM (Aug. 2, 1991).

97. Executive Decree N° 127-91-PCM.

98. Other religious faiths could still qualify for exemptions for donated goods, but only to the extent they could obtain authorizing resolutions from the ministries over education, health, women's rights and social development and the like. For example, if a church received a donation of medical supplies for a hospital, the church could obtain exemptions by registering the goods with the Ministry of Health and working through that office. In contrast, if these goods were donated to the Catholic Church, the Office of Ecclesiastical Affairs could exempt them. *See supra* notes 96–97 and accompanying text.

99. This interpretation was codified in the regulations, Decreto Supremo [Executive Decree] N° 025-93-JUS (1993), which established that all donations destined for the use of the Catholic Church could receive the preferential treatment mentioned above upon approval by the Office of Ecclesiastical Affairs.

Decree 003” or “the Decree”)—non-Catholic religious faiths were permitted to receive donations as religious entities.¹⁰⁰ They were thus entitled to receive the same tax exemption previously enjoyed only by the Catholic Church. This was a watershed event because it was the first time that any branch of the Peruvian government had expressly extended a specific entitlement previously reserved only to the Catholic Church, to non-Catholic religious faiths.¹⁰¹

Executive Decree 003, by permitting non-Catholic denominations to enjoy some of the same benefits previously enjoyed only by the Catholic Church, eliminated a significant hurdle in the path to full religious liberty in Peru. This precedent may have far-reaching effects as Peruvian courts interpret the tax-exempt status of religious entities. Again, this represents a broadening of the definition of human rights in Peru. By treating all religious groups equally in terms of the tax status of donations they receive, Peru has institutionalized the second generation concepts of equality and active state promotion of religious liberty. To the extent that this order represents a move towards increased cooperative coexistence, it also represents an incorporation of third generation human rights.

C. Establishment of a Register of Non-Catholic Religious Faiths

The final and most significant of these three developments was the creation of the Register for Non-Catholic Religious Faiths (“the Register”).¹⁰² The creation of the Register cemented the advancements made by the establishment of the Office of Interfaith Affairs and the extension of the import exemptions to non-Catholic denominations. As previously discussed, the reluctance of administrative agencies to recognize any religious entity that did not have a formal agreement with the state played a key role in the institutional discrimination against non-Catholic religious faiths. Because the state would extend privileges only to those religious entities recognized by the state, and at the same time provided no

100. Specifically, Executive Decree N° 003-2003-JUS modified Article 12 of Executive Decree N° 025-93-JUS, leaving the following terms: “Notwithstanding the scope of article 8 of Executive Decree N° 127-91-PCM, the National Office of Justice, within the Ministry of Justice, is responsible for processing approval of donations destined for the jurisdictions of the Catholic Church, as well as for non-Catholic faiths, through the Department of the Affairs of the Catholic Church and the Department of Interfaith Affairs, respectively.” Decreto Supremo [Executive Decree] N° 003-2003-JUS, art. 1 (Feb. 21, 2003).

101. *See supra* notes 66–71 and accompanying text.

102. Executive Decree N° 003-2003-JUS, art. 2.

mechanisms for recognition of non-Catholic religious entities, there was little hope that these privileges would be extended to other faiths. The establishment of the Register finally provided a solution to this problem.

The same executive order that granted the extension of import tax exemptions—Executive Decree 003—also provided for the establishment of the Register.¹⁰³ The Decree stated that the Ministry of Justice should approve a ministerial resolution that provides procedures for the registration of non-Catholic denominations.¹⁰⁴ On October 13, 2003, the Ministry of Justice approved Ministerial Resolution N° 377-2003-JUS (“Resolution 377” or “the Resolution”), implementing the Register and setting forth the applicable guidelines and procedures for registration.¹⁰⁵

It is important here to note what Resolution 377 does not do. First, unlike laws that establish similar registration schemes for religious groups in other countries,¹⁰⁶ the Resolution and the

103. In fact, Article 2 of Executive Decree N° 003-2003-JUS specifically declares, “The Office of Interfaith Affairs shall implement the Register of Non-Catholic Faiths with the end of carrying out the directions of Executive Decree N° 026-2002-JUS [establishing the Office of Interfaith Affairs] and the present order [extending import tax exemption to non-Catholic religious faiths].” *Id.* Moreover, Executive Decree N° 003-2003-JUS requires that only those legal entities duly inscribed in the Public Register shall be considered non-Catholic religious faiths. This is in accordance with Articles 77 and 81 of the Civil Code which require that religious faiths, in order to be considered legal entities, should form themselves as non-profit civil associations, which are those same ones that should inscribe in the Register of Legal Entities under the charge of the National Superintendency of Public Records. Of course, this registration is not required for the Catholic Church owing to the express recognition that the State of Peru grants to the Church through the Concordat realized with the Holy See, approved by Decreto Ley [Legislative Decree] N° 23211 (July 19, 1980).

104. Executive Decree N° 003-2003-JUS, art. 2.

105. Resolución Ministerial [Ministerial Resolution] N° 377-2003-JUS (Oct. 13, 2003). Article 2 of the Resolution authorizes a set of rules for registration, consisting of fourteen separate articles. Ministerial Resolution N° 377-2003-JUS, Normas Aplicables al Registro de Confesiones Distintas a la Católica [Applicable Rules for the Registration of Non-Catholic Faiths] [hereinafter Registration Rules]. The Resolution was published in the newspaper *The Peruvian*—the official newspaper for publishing legal norms—on October 15, 2003 and entered into effect on the day following publication. It is necessary to point out that this executive resolution has for a predecessor the “Plan of Regulation of the Register of Non-Catholic Faiths” which the Ministry of Justice published in *The Peruvian* on June 13, 2003. The intention of the Ministry of Justice was to inform the public of the work that was being realized and to solicit suggestions and opinions from interested sectors. During June and July of 2003, the Ministry of Justice received various suggestions and comments, incorporated them into the final plan, and approved the final plan for regulation of the Register.

106. For example, consider the laws of Chile, Ley N° 19.638 (Oct. 1, 1999), and Colombia, Ley 133 de 1994 (May 23, 1994). See generally Scott E. Isaacson, *A Practical Comparison of the Laws of Religion of Colombia and Chile*, 6 INT’L J. NOT-FOR-PROFIT L.

Register do not grant legal status to religious organizations. In Peru, legal status for religious organizations is still only obtained by the formation of a civil association under the general laws governing such entities. In other words, a religious group, if it desires to form a legal entity, must separately form and register itself as a civil association with the Register of Legal Personality in the National Superintendency of the Public Registry.¹⁰⁷ Only once the group is established as a legal entity under these laws can it be registered in the new Register. The primary purpose of the new Register is thus purely administrative. It is tied directly to processing the approvals necessary for the importation of donations.¹⁰⁸ The only explicit and direct benefit that flows from the act of registration is that religious groups can now import donations in an expedited manner without paying import taxes and fees.

Still, this final new advance in religious freedom in Peru is arguably the most important of the three discussed here. For the first time, Peru has created a national registry of religions. Religious groups are therefore not just entitled to certain tax exemptions previously enjoyed only by the Catholic Church—they are entitled to official state recognition upon their registration.¹⁰⁹

(Sept. 2003), *at* http://www.icnl.org/journal/vol6iss1/rel_isaacsonprint.htm (last visited Mar. 31, 2004).

107. For this, it is required that the religious faith organize itself as a not-for-profit civil association, in accordance with the rules established by Articles 77 and 81 of the Civil Code of Peru.

108. *See supra* Part IV.A.

109. Of course, one could generally criticize the adoption of such a registration scheme. Noting the inequality in legal status and treatment between the Catholic Church and other religious groups, one could simply say the only fair thing to do is simply grant the same legal status and benefits to all religious groups. Certainly, the Catholic Church did not and does not have to go through any registration process in order to enjoy its favored legal treatment. However, this utopian ideal is simply impractical given the historical and political realities of Peru and those of Latin America in general. The ideal of religious liberty and equality mandates the goal that all religious groups should be treated equally before the law. The means to get there, however, must take into account the real political and historical landscape. In our opinion, the ultimate goal will only be achieved gradually through the adoption of careful and wise laws eliminating obstacles and allowing other religious groups to achieve the same legal status and practical benefits as those enjoyed by the dominant church. Viewed in this light, the Resolution is a commendable step along this path.

I. Positive aspects of the Resolution

Although the Resolution is much more limited in scope and impact than the proposed complete Religious Liberty Law,¹¹⁰ it nevertheless is an important step towards greater religious freedom in Peru. The Resolution is particularly praiseworthy for the advancements made in the following areas:

a. Registration is not mandatory. It is important to note that registration is not mandatory for religious organizations; mandatory registration would likely infringe on religious liberty. People should be free to exercise and manifest their religious beliefs without first having to obtain permission from the government. At the same time, it is probably reasonable for governments to tie the acquisition of legal status or the obtaining of tax benefits to some sort of reasonable registration and review. The Resolution applies this important concept, stating that non-Catholic religious confessions can register “voluntarily in the Registry. Those religious faiths, and their members, that do not register, along with their members, will continue to enjoy the free exercise of religious liberty, recognized in the Peruvian Constitution.”¹¹¹

b. Reasonable requirements for registration. In order to register, a group must present a written application containing basic identifying information, such as the full name of the organization, a copy of the bylaws of the civil association and its inscription in the Public Registry, its legal address, its legal representative, and a “[d]ocument detailing its religious principles, its national history, and world history if appropriate, its creed, the most important sources of its doctrine, the forms of its principle worship, rites, and celebrations, and the rules for organizing its ministry.”¹¹² Additionally, the application must certify that the group has had an “actual presence” in Peru for more than ten years or that it is an official religion of a country that maintains diplomatic relations with Peru.¹¹³ This last requirement is problematic and will be discussed more completely below. Nevertheless, the registration process and requirements

110. *See supra* note 79.

111. Registration Rules, *supra* note 105, art. 1.

112. *Id.* art. 3.

113. *Id.*

overall are not burdensome or difficult. For the most part, the information required for registration is routine and not difficult or costly for religious groups or federations.¹¹⁴

c. Reasonable definition of religion. According to Resolution 377, in order to register, the religious entity must meet certain criteria.¹¹⁵ One of the biggest challenges in adopting a law dealing with religious matters is to define religion adequately.¹¹⁶ A full discussion of this complex and difficult issue is beyond the scope of this Article. Nevertheless, the Resolution reflects a careful attempt at a fair definition of religion. For such a relatively short and limited resolution, it devotes quite a bit of attention to this issue. First, religion is defined positively: “For purposes of the Registry, Confessions will be considered to be those made of natural persons that profess, practice, teach and share a determined religious belief, which includes creed, doctrine, worship, organization and ministry.”¹¹⁷ Later in the Resolution, Article 5 contains an extensive *negative* definition, listing various types of organizations that are not considered denominations and thus cannot register.¹¹⁸ Similar

114. The Registration Rules provides that there shall be a special section in the Register for the inscription of “Federations or Unions of Religious Faiths.” *Id.* art. 10. In practice, what this means is that individual religious faiths that have registered may form groups or federations and separately register in the name of the group or federation. This would allow the federated groups to import donations both individually and collectively. This provision reflects the structure of many evangelical churches where each congregation is a separate legal entity, but the congregations join together in national committees or federations for common purposes.

115. *Id.*; see also *infra* Part IV.C.2.a.

116. See W. Cole Durham, Jr. & Elizabeth A. Sewell, *Defining Religion, in* RELIGIOUS ORGANIZATIONS IN THE UNITED STATES: A STUDY OF LEGAL IDENTITY, RELIGIOUS FREEDOM AND THE LAW (James A. Serritella et al. eds., forthcoming 2004).

117. Registration Rules, *supra* note 105, art. 2.

118. *Id.* art. 5. The following types of entities are not considered “confessions”—i.e., religious denominations—for purposes of the registry:

- a) Those that commit crimes against security, order, morals, public health, or against the right of others to exercise their own religious liberty.
- b) Those involved in political, cultural, sport, commercial or similar, or other for profit activities.
- c) The study or experimentation of astrophysical phenomena, psychic or parapsychological, divination, astrology, magic, the diffusion of philosophic, humanistic or spiritualistic ideas, as well as evil or satanic rites.
- d) The providing of services for personal counseling using techniques involving the parapsychological, astrological or magical, through physical or mental exercise or through diet or alternative medicines.
- e) Others analogous to the descriptions in the previous two letters.

negative definitions have been adopted in the religious laws of Spain and Colombia.¹¹⁹ Although there could be some danger at the margins, this definition does not appear to pose a threat to any legitimate religious group.

d. The short turn-around for approval. Upon receiving an application for inscription in the Register, the time period for acceptance is very short. The Office of Interfaith Affairs has ten calendar days in which to either accept or deny the registration.¹²⁰ If the matter has to be sent to the Advisory Commission,¹²¹ the commission is obligated to issue its opinion within ten calendar days. These short time periods are commendable as they tend to make registration less burdensome on the applicants.

e. Limited discretion for denial or cancellation of registration. In some senses, a registration law is only as good as the discretion given the government official in charge of administering the registration

Id. The potential problems that could arise by denying some of these groups registration are beyond the scope of this paper.

119. Ley 133 de 1994, art. 5 (May 23, 1994) (Colom.) (“Not included within the scope of application of the present law are activities that are related to the study and experimentation of psychic or parapsychological phenomena; Satanism; magical, superstitious, or spiritualist practices; or other analogous practices foreign to religion.”). This text appears to be based on a similar provision in the Spanish 1980 Organic Law of Religious Freedom. Ley Orgánica 7/1980, de 5 de Julio, de Libertad Religioisa (B.O.E. 1980, 177), *available at* http://www.mju.es/asuntos_religiosos/menu_ni.html (last visited Apr. 1, 2004).

120. Registration Rules, *supra* note 105, art. 7. The Resolution states that the Office of Interfaith Affairs will issue its report on an application within ten calendar days. If the applicant has not complied with the requirements set forth in Article 3, the office shall so notify and the applicant shall have ten days in which to correct the application. If the matter has to go to the Advisory Commission it shall be sent within ten calendar days. If the applicant has not complied with the requirements set forth in article 3, the office shall so notify and the applicant shall have ten days in which to correct the application. If the matter has to go to the Advisory Commission it shall be sent within ten days and the commission has ten calendar days in which it issue its opinion. Once the application is approved, the Office of Interfaith Affairs shall issue a certificate of registration and assign a corresponding registration number. *Id.*

121. *See infra* Part IV.C.2.a (describing the Advisory Commission). In order to register, a religious entity must certify that the group has had an “actual presence” in Peru for more than ten years or that it is the official religion of a country that maintains diplomatic relations with Peru. The words in Spanish are “presencia efectiva”—effective or actual presence. The term is not defined in the Resolution; this problematical requirement is discussed in Part IV.C.2.a. If a religious entity does not meet either of the registration conditions, it can still apply, but its application will be reviewed by the Advisory Commission established in the Resolution. The Advisory Commission can issue an opinion about the possibility of the registration of the faith in spite of the fact that it does not meet one of these two requirements.

program. Excessive discretion can lead to denial of the practical benefits of registration to disfavored religious groups. In Resolution 377, there appears to be little room for abuse of discretion. The application can only be denied where the applicant has failed to meet the requirements of Article 3 (the basic registration requirements)¹²² or Article 5 (the list of entities that are not considered religious confessions).¹²³ Both of these are fairly clear requirements; thus, room for discretion in denial of the registrations appears to be limited.¹²⁴

Similar problems with possible abuse of discretion can arise with regard to the ability of a registration to be cancelled. Under Resolution 377, a registration may be cancelled voluntarily by the applicant or it may be cancelled by the Ministry of Justice where there is a violation of Articles 3 or 5 of the Resolution. This means that if the entity fails to satisfy the basic registration requirements or if it is found to be an entity that is defined not to be a religious faith, it can be denied registration. In the event of such a question, the Resolution provides that the entity shall have a “guaranteed right of defense.”¹²⁵

f. Reasonable appellate review provisions. Additionally, if the government attempts to cancel the registration, the applicant has the right to a defense and appeal.¹²⁶ In the event that appeal is necessary, the process is clear and reasonable. If an applicant desires to appeal there is an internal administrative appeal to the Vice Minister of Justice.¹²⁷ This concludes the administrative requirements and an aggrieved applicant may then take the matter to the civil courts for review.¹²⁸

g. Potential positive effects on local governments. This increased state commitment to recognizing and cooperating with these religious entities has practical benefits that, hopefully, will trickle down into the day-to-day operations of the various administrative

122. See *supra* notes 112–15 and accompanying text.

123. Registration Rules, *supra* note 105, art. 11.

124. *Id.*

125. *Id.*

126. *Id.* art 12.

127. Decisions by the Office of Interfaith Affairs may be appealed administratively to the Vice Minister of Justice. This appeal exhausts administrative appeals. *Id.*

128. *Id.*

agencies that deal with religious entities in Peru. The Resolution states that those faiths that are registered shall “enjoy all of the benefits that the law confers.”¹²⁹ The only concrete benefit is that the entity will be registered for purposes of the importation of donated goods.¹³⁰ However, the Resolution also states that “[r]eceipt of the Certificate of Registration confers the status of Non-Catholic Religious Faith, with all its effects, before all national, regional, local or other authorities, when it is required.”¹³¹ Therefore, possession of a certificate of registration and the accompanying official registration number will most likely have a beneficial impact on religious faiths when they seek approval for local tax exemptions, building permits and the like. Many of the taxes and fees paid currently by non-Catholic religious organizations are local municipal fees,¹³² and the religious groups have to make individual application for exemptions. A religion’s delivery of a certificate from the Office of Interfaith Affairs that shows that the group is officially registered with the ministry and has a registration number could be of great practical benefit in the processing of such matters. Such practical recognition of equal treatment may be the most important evidence yet of Peru’s recognition of the egalitarian principles characteristic of second and third generation human rights.

2. Shortcomings of the Resolution

Notwithstanding the many positive benefits of Resolution 377, there are still some provisions that may limit religious liberty. Any law-making effort is a political effort that inherently involves compromises. This is particularly true in an area as sensitive as religion.¹³³ Even though these limitations do not outweigh the numerous positive aspects of the Resolution, there are certain aspects of the law that should be reconsidered or modified.

a. The presence requirement for registration. The most troubling requirement of Resolution 377 is the requirement that in order to

129. *Id.* art. 13.

130. *See supra* Part IV.B.

131. Registration Rules, *supra* note 105, art. 8.

132. *See, e.g., supra* notes 68–69 and accompanying text.

133. The identification of these shortcomings is, of course, not meant as a personal criticism of anyone involved in the lawmaking process. Indeed, those who pushed for the adoption of this Resolution should be complimented.

register, an entity must have an effective presence in Peru for more than ten years or be an official religion of a state that has diplomatic relations with Peru.¹³⁴ There are many problems with such a requirement. First, the act does not define “effective presence” nor does it give any standard for deciding how this element is met. Furthermore, the purpose of this requirement is also questionable. It is unclear how the mere length of time that an entity is in the country has a legitimate bearing on whether it should be able to register in the national registry of religions. Proponents of the law may argue that a time period requirement is justifiable because only entities with some staying power should be allowed registration. But this in itself does not provide an adequate justification. Time in the country has no direct relevance as to whether a group may be a legitimate religious group entitled to equal tax treatment with other groups. This provision effectively treats new religious groups as second-class citizens for ten years before they can register. Thus, newer unregistered groups will have to pay fees and taxes, even though existing religious groups do not. This is an unreasonably burdensome and costly penalty merely for being a newer entity, especially considering that this requirement does not appear to further any legitimate governmental interest that could not be advanced by less burdensome alternatives. Such discrimination conflicts with the otherwise increasing trend of equal treatment for religious entities in Peru and is much harsher than the requirements in other Latin American countries.¹³⁵ Thus, even though Peruvian

134. Registration Rules, *supra* note 105, art. 3. This ten-year provision was a last minute addition to the Resolution. In informal discussions between the authors and officials of the ministry, the officials stated that this provision was suggested and lobbied for by certain non-Catholic religious groups. If this is accurate, it is unfortunate that any religious group would be in favor of such a limitation on the religious liberty of other groups; it is certainly unworthy of support by any fair-minded religious group.

135. The ten-year provision is strict compared to some religious liberty laws in similar countries. For instance, religious liberty laws in Colombia and Chile (two South American countries that have institutionalized religious liberty in comprehensive legislative enactments) do not require any minimum amount of time of existence in the country before inscribing in the Public Registry. See Ley N° 19.638 (Oct. 1, 1999) (Chile); Ley 133 de 1994 (May 23, 1994) (Colom.). However, Mexico does impose a time limit, albeit for a shorter period of 5 years. Ley de Asociaciones Religiosas y Cultos Públicos [Law of Religious Associations and Public Worship] art. 14 (July 15, 1992) (requiring a religion to have “realized religious activities in the Mexican Republic for a minimum of 5 years”). Spain, while not requiring a particular time limit, permits only those religious faiths “deeply rooted” in Spain to enter into agreements with the State, though other faiths may still register to receive some limited benefits. See Ley Orgánica 7/1980, de 5 de julio, de Libertad Religiosa (B.O.E. 1980, 177),

religious liberty law has taken many steps forward, there are still impediments to the full recognition of second and third generation religious liberties.

b. The amount of discretion granted to the Advisory Commission. Besides the ten-year requirement, another aspect of the Resolution deserves some mention as a possible concern. The Resolution provides for the creation of an Advisory Commission.¹³⁶ The members of the commission are representatives of the Ministry of Justice and “persons of known competence in material related to the Registry.”¹³⁷ The ministry appoints the members, and there can be up to seven members. This commission can review applications that do not meet some of the requirements set forth in Article 3 of the Resolution, including the ten-year requirement.¹³⁸ The commission can then render opinions to the Office of Interfaith Affairs on the “possibility of registering said Confession in spite of not meeting with one of said conditions.”¹³⁹ This would in theory allow an applicant who does not meet a requirement, including the ten-year presence requirement, to still register if the commission renders a favorable opinion. This is certainly commendable as an effort to be flexible and allow for exceptions to the normal requirements.

However, the Resolution does not set forth any standards for the commission to apply when reviewing the issues. Furthermore, because the members of the ministry are “persons of known competence in material related to the Registry,” it is likely that religious leaders or representatives of established religious groups will be appointed to fill some of the seven slots. The fact that these members of existing groups may play a role in the approval of newer applying groups is troubling. Because there are no objective standards guiding the Commission’s review, the potential conflicts of interest could become significant. While it is likely that the commission will act in good faith and be fair in its dealings, the appearance of bias or conflict of interest could be avoided by the establishment of standards for review that make clear that existing

available at http://www.mju.es/asuntos_religiosos/menu_ni.html (last visited Mar. 31, 2004).

136. Registration Rules, *supra* note 105, art. 6.

137. *Id.*

138. *Id.* art. 3.

139. *Id.*

religious groups are not to be involved in the process of approving the registration of new religious groups. Granting any religious groups favorable status or authority over other groups violates the egalitarian nature of second generation human rights. Furthermore, because the inclusion of representatives of established religions on the commission could disturb the solidarity between religious faiths, the advancement of third generation human rights, which require interdependence among organizations, individuals, and government, could be impeded.

V. CONCLUSION

Within the last few years, Peru has taken several positive steps towards greater religious liberty and equality. For the first time in its history, all religious groups that submit to a reasonable registration program can import donated goods for their own use free from taxes and fees. The establishment of this first national registry of religions could also have other indirect benefits. Many of the taxes and fees paid currently by non-Catholic religious organizations are local municipal fees, and the religious groups have to make individual application for exemptions. The fact that religious groups can now deliver a certificate from the Office of Interfaith Affairs that states the group is officially registered with the Ministry of Justice could be of great practical benefit in the processing of such matters. Finally, one should not underestimate the important symbolic and emotional effect that the first registry of non-Catholic religions in Peru creates. Such a registry provides an important validation of the legitimacy of other religious groups. Thus, the formation of the Register and Office of Interfaith Affairs is certainly a very positive step in the building of bridges between and among the state and religious organizations.

Returning to the theme of the three generations of human rights, these recent steps can also be seen as important steps along the way to the institutionalization of second and third generational rights. First, the 1993 Constitution, by establishing that the state can enter into agreements with non-Catholic denominations, laid the groundwork for a view of human religious liberties that extends beyond the traditional first generation rights and focuses on equality.¹⁴⁰ The recent decrees by the Ministry of Justice take a step

140. *See supra* Part III.A.2.

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towards the institutionalization of this equality of treatment of religious groups that is implicit in the Constitution. Hopefully these changes indicate a momentum within Peruvian society that will lead to the adoption of a complete religious liberty law similar to the proposal pending in Congress¹⁴¹ and towards the full recognition and implementation of religious liberty and equality in Peru.

141. *See supra* note 79 and accompanying text.