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Antecedents, Perspectives, and Projections of a Legal Project About Religious Liberty in Peru *

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I. INTRODUCTION

The Catholic Church is undoubtedly “an important element in the historical, cultural, and moral development of Peru”¹ This role has been recognized in the Peruvian Constitution. However, Peru is also “multicultural and multilingual” and within it a great “diversity of beliefs, rites and devotions” flow together.² As Silva Santisteban has appreciated,

in the panorama of beliefs, rites and ceremonies, in its different levels of integration of the Catholic religion, or in the ample extent of diffusion of the native traditions, are reflected in some manner the social and economic differences which correspond to the diverse groups of humans that live together in the national territory.³

All groups, including minority groups, have the right to believe in a religion that they hold to be true. Further, they have the right not to be persecuted for their convictions. This implies that a modern democratic state must have an open and tolerant attitude toward all faiths; it also requires legislative

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1. CONSTITUCIÓN POLÍTICA DEL PERÚ 1993, art. 50.

2. Alfredo Quispe Correa, *The Evolution of Religious Beliefs in a Constitutional Text*, 1998 BYU L. REV. 357, 367.

3. Fernando Silva Santisteban, *El Pensamiento Mágico-Religioso en el Perú Contemporáneo* [*Magic-Religious Thought in Contemporary Peru*], in 12 HISTORIA DEL PERÚ [HISTORY OF PERU] 13 (Juan Mejía Baca ed., 1981).

equality for all religions. This article focuses on the antecedents of religious liberty in Peru, the reach of its constitutional establishment, and the manner in which concrete norms of collaboration between the Catholic Church and other religious faiths have developed. Based on these points, this article discusses whether religious freedom referred to in the Peruvian Constitution results in real and effective equality. This article also offers a proposal to increase the liberty of religion and conscience as a fundamental right.

II. THE RIGHT TO FREEDOM

Freedom is the most important fundamental human right.⁴ Without it, our acts are deficient of substance and value. For these reasons, freedom is considered the essential nucleus of the political system of constitutional democracy.⁵ Without freedom, it is impossible to conceive a democratic system where dissent and criticism are fundamental pillars. It is only in a society organized in terms of justice that a person can realize ontological freedom.⁶ Therefore, it is indispensable to assure "the phenomenological unfolding of freedom. A free being claims the freedoms or human rights that tend to normatively eliminate the impediments and arbitrariness that opposes such realization."⁷

Defining freedom is extremely difficult. According to Montesquieu, there is no word that has more meanings and that has touched the spirits in so many different ways, as freedom.⁸ Freedom is the foundation of both life and mankind. We are free because we are capable of choosing and withstanding the obvious consequences of our decisions. One cannot be free in uniformity. It is only possible to conceive freedom in plurality, diversity, variety, and in the reaffirmation

4. Heidegger noted that freedom is "the foundation of foundation"; Spinoza said that freedom consists of "following nature"; Hegel stated that it is the plasma of "self-determination"; while Sartre has said that "to be a man is to be free."

5. *See generally* CARLOS FERNÁNDEZ SESSAREGO, *NUEVAS TENDENCIAS EN EL DERECHO DE LAS PERSONAS* [NEW TRENDS IN THE RIGHT OF PERSONS] (Universidad de Lima ed., 1990).

6. *See id.*

7. *Id.* at 393.

8. *See* CHARLES MONTESQUIEU, *THE SPIRIT OF THE LAWS* (J.V. Prichard ed., George Bell & Sons 1902).

of our own essence through our personal choices. As Marcel affirmed, to be free is to say "I am."

Beginning with the affirmation of Sartre that freedom is a doing realized by a being,⁹ Espinoza correctly maintained that "there is only freedom in . . . choice."¹⁰ We are therefore authentically free when making our own decisions and resolving our problems and conflicts. On the other hand, when we allow others and circumstances to decide for us, we are slaves and prisoners of ourselves and the world around us. Freedom cannot be conceived without free will. Being free is being "responsible" for one's self and one's decisions. And the manner in which we live up to that responsibility, and how it is revealed to us, is through the anguish of choosing for oneself.¹¹

This freedom is the characteristic that allows humans to distinguish themselves from other animals. "The human being is forced to decide freely. Or inversely; in being forced to decide, he is free."¹² Additionally, we will only be able to speak of true equality among human beings by the acknowledgment and protection of the real force of the right to freedom sustained in "the inherent dignity of the human person in being free"¹³

From these basic tenets we reach the conclusion that the foundation of religious liberty is the dignity of man, as expressed in Article 3 of the Peruvian Constitution of 1993.¹⁴ As asserted by Haba, a "man is (or is not) more or less free. This constitutes a question of fact. He is free if he can actually do, or cease to do, by his own free will, this or that thing."¹⁵

9. See JEAN-PAUL SARTRE, *BEING AND NOTHINGNESS* (Hazel Barnes trans., 1966).

10. JUAN ESPINOZA ESPINOZA, *ESTUDIOS DE DERECHO DE LAS PERSONAS [STUDIES OF THE RIGHTS OF PERSONS]* 175 (Lima Huallaga ed., 1996).

11. See CARLOS FERNÁNDEZ SESSAREGO, *EL DERECHO COMO LIBERTAD: PRELIMINARES PARA UNA FILOSOFÍA DEL DERECHO [THE RIGHT AS FREEDOM: PRELIMINARIES FOR A PHILOSOPHY OF LAWS]* 60 (Librería Studium ed., 1987).

12. Hermann Petzold Pernía, *Naturaleza Humana, Libertad y Desarrollo [Human Nature, Freedom and Development]*, in 43 *ESTUDIOS DE DERECHO [STUDIES OF RIGHTS]* 30 (1984).

13. *Id.* at 393.

14. CONSTITUCIÓN POLÍTICA DEL PERÚ 1993, art. 3.

15. Enrique Haba, *Derechos Humanos, Libertades Individuales y Racionalidad (Algunas observaciones de orden metodológico) [Human Rights, Individual Liberties and Legal Rationale]*, in 40 *REVISTA DE DERECHO Y CIENCIAS POLÍTICAS [JOURNAL OF LAW AND POLITICAL SCIENCES]* 246 (1976).

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If the realization of freedom is indeed a question of fact, then in order to know if an individual or a social class is actually free, it is necessary to analyze real situations. It is not enough to consider what is stated in the judicial norms (which tend to be the same for everyone). Similarly, it is not enough to normatively recognize the fundamental rights in international instruments or constitutions. Often, in practice, the realization of freedom is not concretely expressed; it is not developed by creating equal rights in specific arenas; it is not applied by all tribunals; and it is not respected by all administrative state branches.

One must be cautious because the “norms transform into norms—a facade that allows a clean conscience to those who benefit from status quo and conceal, before international and even public opinion, the violations of human dignity that are frequently committed in those countries.”¹⁶ Only the confrontation between constitutional norms and their corresponding development can affirm that true religious liberty exists in a country.

III. THE FREEDOMS OF CONSCIENCE AND RELIGION AS SPECIFIC MANIFESTATIONS OF THE RIGHT TO FREEDOM

The historical antecedents of the freedoms of conscience and religion can be found in the Capitulation of the Turkish Sultan Suliman (also known as the “Sublime Door” or “The Magnificent”). The Capitulation contained an agreement with the King of France, Francisco I, guaranteeing (1) the freedom of worship and (2) the personal inviolability of Christians in Ottoman territories, together with the acknowledgment of certain privileges to Catholic communities.¹⁷

In modern days, these rights have been recognized in national documents such as the United States Declaration of Independence and in international juridical instruments such as the Declaration of the Rights of Man and the Citizen. These

16. Petzold Pernia, *supra* note 12.

17. See VICTOR GARCÍA TOMA, 1 ANÁLISIS SISTEMÁTICO DE LA CONSTITUCIÓN PERUANA DE 1993 [SYSTEMATIC ANALYSIS OF THE PERUVIAN CONSTITUTION OF 1993] 77 (Universidad de Lima ed., 1998).

rights constitute the “unavoidable existence of the dignity of each man,” and are the “angular rock of human rights.”¹⁸

The Universal Declaration of Human Rights effectuated by the United Nations in 1948 signaled in its Preamble that liberty, justice, and world peace are founded upon the recognition of the intrinsic dignity and the equal and inalienable rights of mankind. Therefore, the enjoyment of the freedom of belief marks the advent of a world in which man should aspire to live. For this reason, the Declaration’s eighteenth article provides that every person has the right to freedom of thought, conscience, and religion. These rights include the freedom to change religion or belief, as well as the freedom to manifest one’s religion or belief, be it individually, collectively, publicly, or privately, by teaching, practice, worship, and observance.¹⁹

The right of every person to freely profess a religious belief and to publicly or privately manifest and practice it has also been recognized in the American Declaration of Rights and Duties of Man (Article three)²⁰ and the International Covenant on Civil and Political Rights.²¹ Article eighteen of the American Declaration states that no one can be the object of coercive means that may impair one’s liberty to adopt or retain their choice of religion or beliefs. This liberty is only limited by the law as necessary to protect the safety, order, health, public morality, or the fundamental rights and liberties of others. The United States committed to respect the liberty of parents and, if applicable, legal guardians, to guarantee that their children receive a religious and moral education in accordance with the convictions of the parents.²² The American Convention of Human Rights of San José of Costa Rica contains similar provisions in Articles twelve and twenty-seven.²³ Through these

18. José Camilo Cardozo, *Libertad Religiosa y Pluralismo en la Construcción de la Paz* [Religious Liberty and Pluralism in the Construction of Peace], Address Before the 4th World Congress of Religious Freedom (June 23, 1997).

19. See Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, art. 18 (1948).

20. See American Declaration of Rights and Duties of Man, May 2, 1948, OAS Off. Rec. OE A/SER. L/V/II.23/Doc. 21/Rev. 6 (1948).

21. The Covenant became effective on March 23, 1976.

22. See generally International Pact on Civil and Political Rights.

23. See American Convention of Human Rights, *opened for signature* Nov. 22, 1969, arts. 12, 27, 1144 U.N.T.S. 123, *reprinted in* 9 I.L.M. 673.

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international texts, we can appreciate that the concepts of religious liberty and freedom of conscience are inextricably related "to the extreme that the second cannot be conceived without the existence of the first, since it implies its verification through the acts of worship."²⁴

We can surely affirm that "in general, all those rights that refer in one way or another to the possibility of projecting and realizing human life according to the free will of the subject within the reach of judicial order, ethics and social interest"²⁵ are emitted from the ontological right of freedom. For this reason, the ontological right is alluded to as a plexus of liberties, a multitude of manifestations of the same. One should not only consider the rights expressly recognized by the norms, but also all those that permit the full realization of the life of man in liberty.

The liberties of conscience and religion are specific, concrete manifestations of the right to freedom. In turn, they are the base and the sustenance of permanent peace, which can only be developed and shaped in democratic and free regimes. According to Professor Cole Durham, religious liberty is a component of freedom in general, and "most free societies have recognized the special role that religion plays in the lives of individuals, groups, and society."²⁶

A. *The Freedom of Conscience*

The freedom of conscience is the right of all persons to maintain personal convictions about all aspects of life. Conscience is the ability to perceive oneself in the adherence to an idea, concept, or belief of any type. It consists of thinking as it seems pertinent at the time. It is understood as the "faculty of believing internally according to the faithful knowledge and understanding of each person."²⁷ Finally, it is the right to

24. Cardozo, *supra* note 18, at 77.

25. CARLOS FERNÁNDEZ SESSAREGO, 4 EXPOSICIÓN DE MOTIVOS Y COMENTARIOS AL LIBRO PRIMERO DEL CÓDIGO CIVIL PERUANO: DERECHO DE LAS PERSONAS [EXPOSITION OF MOTIVES AND COMMENTARIES TO THE FIRST BOOK OF CIVIL PERUVIAN CODE] 63 (Delia Revoredo de Debakey ed., 1985).

26. W. Cole Durham, Jr., *Perspectives on Religious Liberty: A Comparative Framework*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVES: LEGAL PERSPECTIVES 31 (Johan D. van der Vyver & John Witte, Jr. eds., 1996).

27. GARCÍA TOMA, *supra* note 17.

believe what one wishes about any subject and manifest it externally. Therefore, the freedom of conscience implies a spiritual option rooted in the sentiment, conviction, faith, or belief of every person.

This right should not be confused with the freedom of action. It must be kept in mind that the freedom of action is exercised in "accordance with the regulations of social life," which implies that we may need to restrain our conduct based on our relations with others. Conscience is revealed to us in some form tainted with the color of the absolute. However, we must clarify that "conscience does not create truth, neither does it determine whether an action was right or wrong; in this way the freedom of conscience has as a limit, truth."²⁸

B. Religious Freedom

If religion is founded on the socially sanctioned concept of the character and nature of divinity or divinities, on institutionalized systems and norms of conduct, and on historically conformed doctrine, then religious freedom must be understood as the right held by all persons to profess the religious faith which they consider to be true. Additionally, all must be able to sustain their faith in their surrounding environment.²⁹ For this reason, it implies in some manner "the external manifestation of the freedom of conscience."³⁰

All religious faiths should incorporate and effectively develop this right for all nations, as there is no single church that is dominant in every country. In addition, as pointed out by Professor Durham, the discrimination that affects one religious group in a particular country echos in religious groups in other countries because a minority group in one country is the dominant faith in another. We are therefore convinced that only the acceptance of the beliefs and convictions of others will permit and facilitate the acceptance of our own. Only religious pluralism guarantees adequate and harmonious social interaction. We do not use the term "tolerance" because none of its meanings correctly describe the situation we are

28. MARIA PÍA CHIRINOS MONTALBETTI, CONSTITUCIÓN DE 1993: LECTURA Y COMENTARIO [CONSTITUTION OF 1993: LECTURE AND COMMENTARY] 24 (1996).

29. See Silva Santisteban, *supra* note 3.

30. GARCÍA TOMA, *supra* note 17.

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mentioning. To “tolerate” implies suffering with patience, disguising something that is not right; without agreement it implies only endurance. It is neither about suffering another’s thought nor enduring the conviction of another, but of understanding, conceiving, and accepting. For this reason, we share Cardozo’s criticism of the term, “no individual, group or determined community has the prerogative to tolerate another, such as it cannot be asserted that someone should be tolerated. Tolerance implies distance, difficulty on dialogue and inequalities from the time one subject actively tolerates and another passively is tolerated.”³¹

As a final note, if the advancement of religious liberty has been a fundamental victory of international groups and organizations dedicated to this issue, it is in large part because this vision has received support from the Catholic Church in the Declaration “*Dignitatis Humanae*” by the Ecumenic Council of Vatican II.

IV. THE ANTECEDENTS OF RELIGIOUS FREEDOM IN PERU

A. *Theocracy*

Theocracy occurs when the state and the church become one entity. There becomes a narrow union of a political body, a religious doctrine, and manifestations in interpersonal relations. In this manner, the church becomes the foundation and sustenance of the juridical and political order, since all is considered a manifestation of divinity.

Such was the scheme of the socio-political order in Peru under the Incas. The religious system of the Incas was a syncretism. Local political authority was comprised of the chieftans of conquered peoples subject to the central Incan power structure. In the religious order, the Incas incorporated certain gods into their worship which were not Incan, on the condition that they remain subordinate to the Sun God.

The Andean religious system was centered on two axes, the Cuzco and Pachacamac. Although the first dominated politically, and despite having opposing divinities, they complemented each other religiously. Pachacamac represented chaos, the hidden and obscure, while the Sun God signified

31. Camilo Cardozo, *supra* note 18.

order, knowledge, or light. The Inca, in the middle, assured the cult of both gods, who were in some ways manifestations of the same divine principle, though the Sun God had a position of privilege. The Cuzco ordered its entire religion around the Sun God, considering the Inca as his son and mediator, a synthesis of the divine and human. The Inca was responsible, along with his father the Sun, for preserving the order of the world, who was known as Kay Pacha o Kay Tawantinsuyo.

From this, one can observe the profound intricacy between religion and the Incan state. The governing person, the Inca, was the son of the Sun God, and as such, was also considered divinity.³² “[A]n entire divine kindred, an intricate net of exemplary adventures, epiphanies, and rituals” was woven from these two essential divinities, the Sun and the Inca.³³ A popular religion existed along with this official religion of the Incas, based on the Earth and the peasants’ relation to her. In this popular religion one can find the religious tradition born in the Andean communities, whose existence dates several centuries prior to the formation of the Incan Empire. The importance of this popular religion was correctly addressed by Valcárcel: “[in the] Andean case . . . [t]he most persistent trait, what has the most duration and what has arrived to our days surviving four centuries of Catholic oppression, has been popular religion.”³⁴

The gods of the Incan Empire fell along with its government. A formal obedience and respect to the Christian God replaced devotion to the Inca gods. However, in local cults, the popular religion continued to play the same role it had for

32. This divine origin of the Incas has been narrated by the Incan Garcilaso, in his *Comentarios Reales de los Incas* (*Commentaries on the Incas*), when he relates it in their own terms:

Our father, the Sun, seeing men as I have told you, felt pity and compassion, and he sent from heaven to the earth a son and a daughter of his own so they could teach men the doctrine and knowledge of our father the sun, so they could adore and worship him as their god, and so that they could give men the precepts and laws so they could live as men of reason and urbanity

Comentarios Reales de los Incas [*Commentaries on the Incas*].

33. Alejandro Ortiz Rescaniere, *El Dualismo Religioso en el Antiguo Perú* [*Religious Dualism in Ancient Peru*], in *HISTORIA DEL PERU*, *supra* note 3.

34. Luis E Valcárcel, *La Religión Incaica* [*Incan Religion*], in *HISTORIA DEL PERU*, *supra* note 3.

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hundreds of years. Millones explains, “the deities that were known under the names of A.U., Huamaní, etc., not only survived under the local government and Empire, but also endured the siege of the Catholic religion during the Colony, to reach our days in the form that has been dictated by the ethnographers.”³⁵ In hindsight, the Spaniards’ conquest of Peru gave rise to a religious dualism which “created a mutual understanding between the invader and the Andean. It gave origin to a Catholicism and a persistent paganism which covered and supported each other.”³⁶ In this manner emerged an indigenous religion, “established” and “revitalized.”

During this era the Catholic Church established the “Patronage.” The Code of Canonic Law set forth the sum of privileges, along with some duties, which were conceded by the Catholic Church to the Catholic founders of a church, chapel, or benefaction, and to those that had a common cause with them. The most notable and long-lasting historic application of this right was the “Regio Patronato Indiano,” which dictated the relations between the state and the church for various centuries, even after Independence. In Peru, Pope Pío IX granted it through means of his papal seal “preclara inter beneficia,” and the President of the Republic, Don Nicolás de Piérola, retroactively incorporated it into Peruvian legislation through the decree of January 27, 1880.

In Spain, the infamous Tribunal of the Inquisition, which began to function in the thirteenth century, sustained the perceived danger posed to monarchs by Jews and converted Moors. Thirty people were condemned to burn at the stake from 1570 to 1820. Beginning with the eighteenth century, the activity of the “inquisidores” began to decline until, by the Royal Order of the ninth of March of 1820, the Tribunal was totally suppressed.

The Constitutions of the republican era also initially opted for theocracy. The Constitution of 1823 established the religion of the Republic—the Apostolic and Roman Catholic Church—to the exclusion of any other.³⁷ For this reason, it was a duty of the

35. Luis Millones, *Religión Indígena Colonial [Indigenous Colonial Religion]*, in *HISTORIA DEL PERU*, *supra* note 3.

36. Ortiz Rescaniere, *supra* note 33.

37. *See* PERU CONST. of 1823, art. 8.

nation to protect it through all means conforming with the spirit of the gospel; all the inhabitants of the state were obligated to inviolably respect it.³⁸

The Constitution of 1826 continued the sanction of the Catholic Church as the religion of Peru, however, it did not allude to the duty of the nation to protect it or of the inhabitants to respect it.³⁹ The obligation of the nation to protect the Catholic religion by all means was reestablished in the Constitution of 1828, which served as a sharp reminder that the state would not permit the emergence of any other religion.⁴⁰ Similar provisions were contained in the Constitutions of 1834,⁴¹ 1839,⁴² 1856,⁴³ 1860,⁴⁴ and 1867.⁴⁵

The fact that Peruvian Constitutions prohibited the public exercise of all religion which was not Catholic signified a "cut back of the rights of North Americans and English non-Catholic residents of Peru, who were forced to meet in modest places or diplomatic legations."⁴⁶ At the end of the nineteenth century, the Protestant churches began the great challenge of preaching their beliefs in Peru. The first evangelical groups to initiate this effort were from the Methodist church, whose proselyting was limited by the constitutional provisions, mentioned previously, which prohibited the freedom of worship. Therefore their labors were confined to the propagation of biblical scriptures.

The first evangelic school was opened in Peru in 1891. The adverse mentality toward freedom of worship dominated the Peruvian legislation of the nineteenth century. It was not until 1897 that civil marriage was authorized for non-Catholics. Finally, after heated parliamentary and media debates, 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

38. *See id.* art. 9.

39. *See* PERU CONST. of 1826, art. 6.

40. *See* PERU CONST. of 1828, art. 3.

41. *See* PERU CONST. of 1834, art. 2.

42. *See* PERU CONST. of 1839, art. 3.

43. *See* PERU CONST. of 1856, art. 4.

44. *See* PERU CONST. of 1860, art. 4.

45. *See* PERU CONST. of 1867, art. 3.

46. Ortiz Rescaniere, *supra* note 33.

state and which prohibited any other religion) was abolished. The long road from theocracy to secularism came to an end.

B. Secularism

Secularism has surged with the modern state and presents itself when the state favors one religion (in Peru the Catholic religion) without limiting the emergence of others. This means that the freedom of worship is respected without imposing religious unity. As García Toma has expressed, the state preoccupies itself residually of protecting those minimum

spiritual contents that affect the temporal common good. These minimum contents can vinctuate themselves with the religion adopted by the majority of the population, or with themes that may be common to all religious confessions while always respecting religious plurality.⁴⁷ It is therefore understood, as process of secularization, that by which “a social, sacred and closed structure becomes an open, accessible and not sacred.”⁴⁸

In this order of ideas, the Constitution of 1920 protected the freedom of conscience as an individual guarantee by signaling in Article 23 that no one can be persecuted by reason of his or her ideas or beliefs.⁴⁹ The constitutional text of 1933 covered not only the protection of freedom of conscience, but also of freedom of belief, by signaling in Article 59 that both were inviolable and that no one could be persecuted for their beliefs.⁵⁰ Additionally, it was established in Article 232 that all religions enjoyed the liberty to exercise their respective cults. However, the Catholic Church still enjoyed some privileges due to the fact that the majority of the people in the country professed, and continue to profess, Catholicism. In Article 234 of that Constitution, it was established that the relations between the state and the Catholic Church should be governed by agreements of the Executive Power and approved by Congress.⁵¹ Also, the Constitution of 1979 stated in the third parenthetic sentence of Article 2 that all persons had the right

47. See GARCÍA TOMA, *supra* note 17.

48. Silva Santisteban, *supra* note 3.

49. See PERU CONST. of 1920, art. 23.

50. See PERU CONST. of 1933, art. 59.

51. See PERU CONST. of 1933, art. 234.

to freedom of conscience and religion, in individual or group form; that no persecution should exist due to ideas or beliefs; and that the public exercise of all confessions are free, as long as they do not offend the public morality or alter the public order.⁵²

Article 86 of the Constitution recognized for the first time the possibility that the state could collaborate with non-Catholic confessions. This was a constitutional novelty, which originated with a proposal from the Peruvian Episcopal.⁵³ In effect, the hierarchy of the Catholic Church presented to the Constituent Assembly of 1979 a document which stated, *inter alia*, that the church not only wanted a general acknowledgment of religious liberty, but it also wanted the guarantee of individual and social rights. This was an important declaration, which originated out of respect for human dignity and in the right of each person to freely choose any religion he or she chose to profess.

Despite all this, the Constitution of 1979 was not completely secular, as it favored Catholic religious education in all educational processes; however, it stated that it should be imparted without violating freedom of conscience.⁵⁴ In the same manner, the state recognized the Catholic Church as an important element in the historic, cultural, and moral foundation of Peru.

V. THE CURRENT SITUATION

A. *The Current Standard*

The starting point is the constitutional declaration of equality of all persons, without discrimination for reason of "race, gender, language, religion, [or] opinion."⁵⁵ The Political Constitution of Peru of 1993 guarantees (1) the right of all persons to liberty, conscience, and religion, in individual or associated form; (2) that persecution shall not exist for reason of ideas or beliefs; (3) that there is no crime in opinion; and (4)

52. See PERU CONST. of 1979, art. 2.

53. See Enrique Chirinos Soto, CONSTITUCIÓN DE 1993: LECTURA Y COMENTARIO [CONSTITUTION OF 1993: LECTURE AND COMMENTARY] 93 (Piedul S.R.L. ed., 1996).

54. See PERU CONST. of 1979, art. 22.

55. CONSTITUCIÓN POLÍTICA DEL PERÚ 1993, art. 2(2).

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that the public exercise of all religions is free, as long as it does not offend public morality or alter the public order.⁵⁶

As Enrique Bernales has expressed, these passages reflect an ancient liberty, consubstantial to the independence of

thought and the spiritual nature of man, which is assumed in the tradition of the Western culture. In this sense, the norm is a reaffirmation of traditional principles which should be valued and saved not only as antecedents, but in their projection and historic permanence.⁵⁷

García Toma correctly points out that, as a consequence, “no person finds himself subject to coercive action that deteriorates his right to have or adopt a conviction—whether philosophical, political or religious—of his choosing. . . . Therefore, an act of harassing, worrying, or disturbing of political or judicial character, etc., constitute an attempt against a human being.”⁵⁸

In response to these concerns, Articles 13 and 14 of the Constitution state that religious education shall be imparted without violating the liberty of conscience,⁵⁹ and parents must choose the educational centers in which they enroll their children.⁶⁰ The second paragraph of Article 50 of the Constitution is also consecrated to the respect of the state to other confessions, signaling that covenants of collaboration may be established between them.⁶¹

According to the Organic Law of the Department of Justice (Law 28,167), the Minister of Justice is responsible to coordinate the collaboration of the Executive Power with the Catholic Church, as well as with other confessions, when the state establishes forms of collaboration with them, in accordance with what has been established by the Constitution and the law. The Office of Ecclesiastical Matters administers these coordinations.

56. *Id.* art. 2(3).

57. ENRIQUE BERNALES BALLESTEROS, LA CONSTITUCIÓN DE 1993: ANÁLISIS COMPARADO [THE CONSTITUTION OF 1993: COMPARATIVE ANALYSIS] 96 (ICS ed., 1996).

58. GARCÍA TOMA, *supra* note 17.

59. *See* CONSTITUCIÓN POLÍTICA DEL PERÚ 1993, art. 14.

60. *See id.* art. 13.

61. *See id.* art. 50.

B. Religious Reality

Though true that the majority of the population of Peru belongs to the Catholic religion, a great percentage of this is a result of tradition and not conviction. As Silva Santisteban states, “for the majority of Peruvians, religion, more than a doctrine with respective prescriptions, dogmas and commandments, is a collective sentiment that is projected with differing intensity among all aspects of the world and life.”⁶²

Our country finds itself in an intense process of undeniable secularization, due not only to the changes produced on a constitutional level, but also to a series of events that slowly began to shape the institutional life forms of the dominion of the Church. For example, recent years have witnessed the secularization of education, the suppression of the ecclesiastic privilege, the establishment of the Civil Registry, and other evidences of secularization. However, despite some moves toward a more secular regime, we believe that the religious liberty recognized in the Constitution is not translated, as will be shown later, into equal treatment for all religions.

The Catholic Church undoubtedly continues to have a place of privilege that is reflected in a norm with greater benefits. Currently, the Catholic populace constitutes the majority in the country, even though the number of Catholics in comparison to demographic growth shows a constant decline: in 1940 Catholics represented 98.15% of the population; in 1972 they declined to 96.12%; in 1977 it was estimated around 92%; while the last census of 1993 stated that the Catholic population had dropped to 88.9%.

C. The Catholic Church and the Peruvian State

The institutional relations between the Catholic Church and the Peruvian state are based on the International Agreement between the Holy See and the Republic of Peru on July 19, 1980, ratified by Pope John Paul II on July 22, 1980, and approved by Decree 23,211 of July 24, 1980. The collaboration between the Peruvian state and the Catholic Church is reflected in several aspects, including the following:

62. Silva Santisteban, *supra* note 3.

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1. Independence and autonomy

The Catholic Church is granted total independence and autonomy and enjoys the state's collaboration in order to better realize its service to the national community. Independence and autonomy are political faculties. The first consists of the absence of hierarchical subjection to the church of the state, and the second of the church's faculty of internal self-determination.

Independence also implies "the liberty to act to meet its ends, in conformity with the legal frame established in the Constitution and the laws."⁶³ Autonomy, on the other hand, signifies that the Catholic Church is free to make decisions necessary to meet its ends in administrative, economic, and disciplinary matters.

2. Judicial personnel of public internal rights

The Catholic Church is granted rights as a judicially recognized legal entity. These rights apply to the Catholic Church in general, as well as to the Episcopal Peruvian Conference, and all Archbishops, Bishops, Prelacies, Apostolic Vicarships, Ecclesiastic Chapters, Diocesan Seminaries, and parishes and missions dependent on them. This legal status allows the Church to acquire and dispose of goods, as well as receive exterior help.

3. Personal assignations

Some Catholic Church officials, including Bishops, receive state-funded personal allowances.⁶⁴

4. Exonerations and beneficial tributaries

The Catholic Church receives exclusive tax exemptions. For example, the Catholic Church is exempt from paying the Tax on Rents (Legislative Decree 774), the General Tax to the Sales and Selective Consumption for the importation of donated goods (Legislative Decree 775 and 821), the Ancient Excise Tax

63. GARCÍA TOMA, *supra* note 17.

64. The system originated in the last century when, upon abolishing the civil laws about the charge of ecclesiastic tithes, the state assumed the responsibility of assigning a salary to Bishops and their immediate collaborators.

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(Legislative Decree 776), and the Predial Tax (Legislative Decree 776). The Diocesan Seminaries and the Centers of the Formation of Religious Communities, recognized by the Episcopal Peruvian Conference, also enjoy the exemption from taxes and also of tax deductions on donations in their favor given to universities.⁶⁵ Additionally, Catholics receive tax deductions for charitable contributions made to the Church.

5. *Creation of educational centers at any level*

The Catholic Church has complete liberty to establish educational centers of all levels, in conformity with national legislation, in the area of private education. In the public educational centers, Catholic religious education is imparted as an ordinary subject. The professor of this subject is appointed by the Bishop of the zone and maintains his position as long as he is in favor with the Bishop. Ecclesiastical officials that serve in the sector of public education are protected by Article 65 of Decree 22,875, gaining the same rights as other teachers but without the nationality requirement.

6. *The military vicarship*

The state guarantees religious assistance to members of the armed forces, the police forces, and civil workers of the Catholic faith. The Catholic Church is also authorized to install chaplaincies in all state-run medical centers and penitentiaries.

7. *Religious marriage*

The Catholic Church is authorized to perform religious marriages which, in exceptional circumstances, carry civil validity. Such a marriage may occur in situations of imminent danger of death, as established by Article 268 of the Civil Code,⁶⁶ or in accordance with the second paragraph of Article

65. See Law of Universities, Law 23,733, art. 98.

66. Article 268 reads:

If one of the contracting parties is in imminent danger of death, the marriage can be celebrated/take place without observing the formalities that are due. This marriage is performed before the parish priest or any other priest and does not produce civil effects whatsoever if one of the parties is incompetent/incapable. The registry only requires the presentation of the certified copy of the parochial certificate. Such registry whether the party

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260 of the Civil Code, where proper authority has been delegated to a parish priest by a civil authority, such as a mayor or a judge.

8. *Establishment of private cemeteries*

The Church has authority to establish private cemeteries.

9. *Migratory benefits*

Migratory benefits are received by the pastoral agents of the Catholic Church. In return, the Catholic Church agrees that the dioceses established in Peru will not be dependent on a foreign ecclesiastic authority, and the posts of residential archbishops and bishops fall on prelates of Peruvian nationality. Additionally, the Church is bound to inform the state of the creation or suspension of a diocese or ecclesiastical jurisdiction, as well as the nomination of principal ecclesiastic authorities.

D. Other Religious Confessions and the Peruvian State

The forms of collaboration which are mentioned in Article 50 of the Peruvian Constitution have not been translated in any agreement between the Peruvian state and another non-Catholic religious confession.⁶⁷ Currently, the non-Catholic religions are constituted as associations. It must also be understood that Article 81 of the Civil Code provides that when an association is religious, its internal regimen is determined by the status granted by its ecclesiastic authority. This norm directs, for all religious confessions, the recognition of the internal regimen of each organization, in addition to the norms generally established in the Civil Code for associations.

Non-Catholic confessions currently have some rights. First, non-Catholic confessions enjoy some tax exemptions; in some cases this is done through legal texts, and in others, through the equation of the spirit of these texts to religious liberty. These religious confessions are currently exempt from the Rent Tax, the General Tax on Sales and Selective Consumption by

in danger of death survives or not, should be effectuated within the following year of the marriage, under the sanction of annulment.

CIVIL CODE art. 268.

67. See CONSTITUCIÓN POLÍTICA DEL PERÚ 1993, art. 50.

the Importation of Donated Goods, the Tax of Ancient Excise, and the Tax of Vehicular Patrimony. Although these exemptions are similar to those granted to the Catholic Church, the law as applied creates additional hurdles for non-Catholic confessions.

Regarding the exemption from the Predial Tax, the term "temple" has been applied to the churches of all religious confessions. However, a grave interpretation problem has arisen due to the fact that the terms "convents and monasteries," which have been understood in a restrictive manner as "canonic," unduly exclude the property used to house the ministers of any confession, as well as property used for administrative offices. Additionally, some municipalities in Peru demand non-Catholic confessions to follow an administrative process so that each "temple" or "religious site" built requires express exemption to be given. This application was not the spirit of the legislation and it is not found in the text of Legislative Decree 776. The exemption is granted for a determined time and must be renewed; however, this is illegal, since the expiration of the exemption is permanent and automatic. Recently, some municipalities have denied the exemption to some non-Catholic confessions using the illegal grounds that the confessions have not been officially recognized by the Peruvian state.

These applications of the law are outrageous. Tax exemptions should be extended to all religious confessions so that these confessions need not divert their material resources to burdensome fiscal obligations. In addition, there is no reason why the followers of any confession should not receive equal tax deductions for the contributions offered to their churches. Any natural person should be allowed to deduct such contributions from his or her taxes.

Second, by mandate of Article 14 of the Constitution, and out of respect for the freedom of conscience, religious education may be imparted by any confession. No impediment exists for any religious confession to create educational centers at any level, inspired by their own principles and values. Furthermore, the General Law on Education requires confessions to

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coordinate their educational actions with the Minister of Education.⁶⁸

Third, under the judicial principle of “that which is not prohibited is permitted,” the various confessions may establish medical centers in which they can give service to the general community. The assistance of ministers to the Hospitable Centers of the State Hospices is permitted, as is the establishment of private cemeteries. Also, under the principle that one cannot distinguish where the law does not distinguish, nothing in Peru keeps any confession from establishing cemeteries in conformity with their proper rites and practices, or from burying their followers in them.

Fourth, with regards to marriage, in Peru a total separation is granted in civil religious marriages. The ministers of all religious confessions can perform marriages for their congregation, according to their rites, norms, and proper practices.

In the Peruvian civil ordinance, as previously indicated, marriage is allowed before the parish priest or any other priest when one of the contracting parties is in imminent danger of death; thereafter establishing civil effects by registration through the presentation of the certified copy of the parochial registry. We find no reason why this capacity should not be extended to the ministers of other religious confessions. Similarly, the authority Mayors can delegate to allow civil marriages to be performed before the parish priest or an ordinary priest should also be extended to non-Catholic ministers.

The enumeration of the actual rights the Catholic Church enjoys, and of those enjoyed by other religious confessions, demonstrates that, in fact, equality does not exist in the normative treatment of all religions. This has given rise to projects designed to concretely establish acts containing the constitutional declaration of equality.

E. The Attempts to Draft a Religious Liberty Law

The first legal project concerning religious liberty and the collaboration of the state with religious confessions germinated

68. See General Law on Education, Law 23,384, art. 16.

in the interior of the Ministry of Justice in 1997. It merited contrary opinions from the Director of Ecclesiastic Affairs, who reasoned that many of its points were already being applied by law or recognized practice, and that it could “originate false expectations and suspicions among the interested parties, along with political repercussion and possible controversies.”

The project advocated the following for all confessions:

- the individual or associated right of religious liberty with limitations regarding public morality, public order, and the rights of others;
- the right to have a free relationship with the ministers of one’s own faith;
- the ability to establish associations to facilitate the realization of religious activities;
- the adherence to a religious confession or the absence of one, could not originate discriminations before the law, neither to the access to education or employment;
- the classification as an association and registry in the Public Registry should be sufficient to exercise all rights granted under the law; and
- the exemption from all rental taxes.

A second project was drafted by the authors of this article. A draft was discussed with some members of the International Academy for Religious Liberty and Belief. On the foundation of this project and the contributions of the latter, we have elaborated a new proposal, whose central ideas are discussed in section VI below.

VI. OUR LEGAL PROJECT ON RELIGIOUS LIBERTY⁶⁹

A. *The Broad Content of Liberty of Religion and Conscience*

The proposal contains, as its starting point, the acknowledgment and protection, as a fundamental right of all persons, of the liberty of conscience and religion (in all its forms of expression or exercise comprising all other liberties and fundamental rights related to them). In this context, the state should ensure that all persons, individually or collectively, are able to freely develop their religious beliefs, whether in public or private. For this reason, Article 3 of the project prohibits all

69. A translation of this proposal appears as an appendix to this article.

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actions or omissions that directly or indirectly discriminate against a person due to his or her religious beliefs; this cannot be invoked to restrict or affect the legal equality which is guaranteed by the Political Constitution of Peru of 1933. Professor Durham has re-vindicated the national judicial frame-work of religious liberty as “a genuinely international right.”⁷⁰

B. The Attainments of the Liberty of Conscience and Religion

If this project has any virtue, it would be that, in Article 9, the faculties that comprehend the exercise of liberty of conscience and religion are simply illustrative. Therefore, we are not faced with a closed number of clauses; instead, the rights are merely illustrative or referential of all that may be had, with the only limitations being the exercise of third-party right and the norms of public order and good customs. Several rights are expressly recognized as part of the exercise of the liberty of conscience and religion.

First, and most importantly, each person must be able to freely profess his or her chosen religious belief. This implies being able to manifest, change, or abandon religious beliefs at any moment. The different religious confessions have, by constitutional mandate, plenary rights to exercise all the vital forms of religious liberty, which are: (1) adherence to a faith; (2) maintenance of its beliefs; (3) broadcasting of its message and precepts; (4) association with others; and (5) practicing the corresponding acts of prayer or worship. These forms can be realized in an individual or a collective manner, privately or publicly, in such a way as to freely commemorate its holy days and practice its rites.

The focus of this proposal is extensive recognition of the liberty of worship beyond the private sphere of each individual. As Professor Durham expressed, “[t]o the extent that the ideal of religious freedom is viewed as a mere emanation of enlightenment secularism, it will grow increasingly suspect within traditional cultures bent on maintaining their own hegemony.”⁷¹ For this reason there is a need for “a notion of

70. Durham, *supra* note 26, at 1-2.

71. *Id.* at 7.

religious freedom that can be shown to be grounded as a shared value within both religious and secular traditions.”⁷²

This project expressly recognizes other rights, including:

- receiving burial according to one’s religious beliefs, in any cemetery;
- receiving assistance from the ecclesiastic representatives of one’s own confession, in any place;
- associating for the development and communal practice of religious activities and meeting or manifesting publicly religious ends;
- receiving, informing, and imparting religious teachings through any means, in public or in private, and being able to elect for one’s self or for minors or incompetents under their parental authority, guardianship, the religious, moral, and ethical education that they deem proper;
- preaching or disseminating of their religious beliefs, manifesting in public form their dogmas or doctrines without censure;
- taking oaths according to their own religious convictions; and
- participating either individually or collectively in social life, through acts appropriate to their religious beliefs.

These rights are a “parameter of the other fundamental rights and it must respect the precinct reserved for intimacy and autonomy of the person without appropriating itself of the right to impose or impede the profession or public practice of one’s own religion or of the community.”⁷³

C. The Limitations on the Exercise of the Established Rights

In Article 4 of the project, it is asserted that the rights derived from the liberty of conscience and religion are limited by the exercise of third party rights, the norms of public order, and good customs. The first limit is the exercise of third-party rights; i.e., it is a juridical principle, universally accepted, that our right ends where the right of another begins.

72. *Id.*

73. Camilo Cardozo, *supra* note 18.

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The second limit concerns public order. Defining "public order" is truly difficult. Technically, we may affirm that the norms dealing with the public order are those destined to maintain the determined, prevailing socio-political system. This allows us to describe without difficulty the public order of Roman slavery, the communist public order of Stalin, or the liberal English public order of the Victorian era, without making value judgments about them. The norms of public order may be manifested to us with the negative characteristics of:

- verticality, because they are dictated by those who manifest power with total independence in the manner in which they have come to obtain it; and
- standardization, because we find them in norms that prohibit or permit determined conduct, and agreement with the prevailing system because they are destined to maintain it.

Therefore, when we affirm that religious manifestations should not disturb or perturb the tranquility of a community, or when we point out that they should not be against the public order, we are not saying that the manifestations (understood as revelation of the human sentiment) should not occur, rather that they cannot be produced through acts of violence that place the system at risk. Of course, public order, as a limit on the rights of liberty of conscience and religion, only makes sense in systems that have opted for secularism. When government is a theocracy, however, the norms that deal with the public order then become the instruments of the repressor, castrating the aspirations of plurality and the diversity of belief.⁷⁴

Good customs, on the other hand, are those acts that have been internalized by members of a community as correct. They are characterized (1) by their horizontality, because they are born and developed in the sentiment of all members of the community; (2) by their variability, because they change according to function in time as well as space;⁷⁵ and (3) by the

74. Let us remember that the principle "such king, such religion" was imposed harshly since the Reform, to Catholics as well as Protestants, which caused in Germany such cruel migrations of populations from one confession to another. As an example of this, it is enough to cite the religious wars in France, the repressions which occurred due to the Spanish Inquisition, and the persecutions of Catholics and non-Catholics in England and Scotland.

75. Let us keep in mind that what our grandparents understood to be correct,

fact that they are scattered, because we cannot find them codified and must analyze them under the light of every particular context in which the conduct is performed. “[I]f liberty of conscience pushes to challenge with actions the norms of social convenience, then liberty of conscience can be maintained, but not act legally according to it.”⁷⁶ These are the limits that should be encountered in exercising the right derived from the liberty of conscience and religion.

D. Religious Entities and Their Rights

The project delineates the following rights to religious entities:

- to freely exercise their ministry, practice their worship, celebrate meetings and to establish places for these ends (This right is directly attached to the autonomy and free determination of religious entities.);
- to establish their internal ecclesiastic organizations and hierarchies (In the expression of their necessary autonomy, religious entities should act without any type of coercion and according to proper norms.);
- to freely choose the form of organization for external activities, as well as the persons who should participate and collaborate in them;
- to disseminate their creeds by any means of communication;
- to establish and maintain educational and cultural centers, in which formal or informal education at any level or of any type can be imparted, always respecting current legislation;
- to establish and maintain institutions of benefit, homes, hospitals, editorials, or any type of service entity articulated in their doctrine;
- to create, participate, sponsor, and form associations and foundations, to realize their ends; and
- to solicit and receive all types of voluntary contributions to establish private cemeteries, meeting all legal requisites about the matter.

improper, or old fashioned several years ago, may not seem as such to us today.

76. BERNALES BALLESTEROS, *supra* note 57.

E. The Administrative Acknowledgment of Religious Entities and Their Effects

In order to administer these rights, it is necessary to create a Registry of Religious Entities. In Peru, no Administrative Registry of religious confessions has existed because the state prohibited the legal existence of non-Catholic religions. With that prohibition eliminated, non-Catholic confessions were classified as civil associations in the Public Registry of Associations. When the INABIF (The National Institute of Family Welfare), belonged to the Sector of the Ministry of Justice, a Registry of Institutions existed to provide benefits and assistance, with coordination between the Registry and the Direction of the Minor and the Family under the Direction of General Justice. The Registry inscribed many religious confessions for the social role they played. Also inscribed were Catholic institutions that performed social services, as well as the orders, religious congregations, and secular institutes. This Registry was open to any lay or secular organization that met such ends.

Currently, there exists a unique Registry in the Ministry of the Presidency in which private Catholic entities and non-Catholic and lay or secular entities are inscribed with the end of receiving outside donations with the benefits of Decree 21,942 and its complementary norms. The non-Catholic religious confessions conduct the approval of their donations, free of rights and taxes, in the corresponding sector. However, only the jurisdictions of the Catholic Church meet that approval through the Judicial Sector because of Catholic personnel in the Public Justice.

The project proposes to place the Ministry of Justice in charge of the Registry of Religious Entities. The religious entities should comply with minimum requirements to become inscribed, which would have to be developed according to the legal regulation. One of these requirements would have to be to explicitly state their religious principles, sacred books, and important sources of doctrine, as well as the principal characteristics of their internal organization. We believe that in no way should the administrative entity make value judgments regarding internal matters of religious confessions. Further, the administrative entity should not opine in relation to their

doctrine and morality because this would violate the plenary liberty that the Constitution already grants to religious confessions. Regarding legislative requirements, such as having a determined number of followers, years of presence, roots in the national community, etc., these should not be understood as a limitation on the right of liberty.

In effect, if “confession” is understood to be the “religious creed and group of persons that profess it,”⁷⁷ this only signifies the existence of a “human group which professes a union of ideas as truths of faith. This means that it has a certain structure and transcendental spiritual foundation.”⁷⁸ We should keep in mind that, in institutionalizing religious beliefs, the collective creates a means of life of the same by adhering to them and practicing common rituals. In other words,

a philosophy is consolidated into a form of seeing and understanding the world, the church appearing as the union of individual identities through the same established dogmatic beliefs, at the same time as a visible organization, that through its rites and ethical prescriptions, seeks to keep its members in the necessary conviction of the religion and its promises.⁷⁹

F. The Obligation of Conscience

Modern democratic states recognize the value of the objection of conscience. We believe that such conscientious objection should be allowed without any type of distinction, whether for Catholics or non-Catholics. As an alternative to obligatory military duty, the realization of administrative duties in the Armed Services or the participation in development works that they have under their charge should be substituted. Also, the right of doctors and related professionals not to participate in interventions contrary to their religious beliefs should be retained in public and private medical centers.

77. REAL ACADEMIA DICCIONARIO DE LA LENGUA ESPAÑOLA [THE ROYAL ACADEMY DICTIONARY OF THE SPANISH LANGUAGE] 340-41 (19th ed. 1970).

78. BERNALES BALLESTEROS, *supra* note 57.

79. Silva Santisteban, *supra* note 3.

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VII. CONCLUSION

A law protecting religious liberty in Peru would affirm the fundamental right of the individual and groups, which already has constitutional roots. Our nation, as we have previously mentioned, is multicultural and multilingual. Therefore, a law of this nature has to be preceded by ample discussion, whose principal protagonists should be the Catholic Church, together with the representative entity of the Evangelical confessions, (the second largest religious community⁸⁰), and the representatives of the other religious confessions, which also have just and legitimate interests in the matter. We believe the only law of religious liberty that would be sustained in social peace would be one which places foremost the total amplitude of the right of religious liberty, and second, the socio-historical-religious reality of the nation.

The law should be the fruit of consensus, participation, plurality, and of the community of ideas, because, as Russo expressed, "we must learn the fundamental secret that truth can be one and at the same time many, and that we may have different visions of the same truth from various points of view. Therefore, instead of antagonism toward none, we will have an infinite sympathy for all."⁸¹

80.

Today the Catholic religion is extremely widespread in the country, yet it must be noted that Evangelist groups are very active. Whereas in the dawning age of the Republic, the technical means to verify such an assertion did not exist, such means exist today. . . .

. . . Evangelist groups are indeed very active, especially in marginal zones (zones of extreme poverty) and periphery zones of the territory.

Quispe Correa, *supra* note 2, at 363, 366.

81. JOSÉ ANTONIO RUSSO DELGADO, DE FILOSOFÍA, PAZ Y RELIGIÓN [OF PHILOSOPHY, PEACE AND RELIGION] 15 (José Luis López ed., 1985).