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# The Future of Religious Liberty in Argentina: Will a New Constitutional Mandate and Would Newly Proposed Laws Enhance Religious Liberty?

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# The Future of Religious Liberty in Argentina: Will a New Constitutional Mandate and Would Newly Proposed Laws Enhance Religious Liberty?<sup>1</sup>

All inhabitants of the Nation enjoy the following right[], in accordance with the laws that regulate [its] exercise, namely . . . of freely professing their religion.<sup>2</sup>

## I. INTRODUCTION

The right to freely exercise the religion of one's choice has a peculiar character in the Argentine Republic: although the national constitution requires that the federal government sustain the Roman Catholic Church,<sup>3</sup> each Argentine or foreigner has the right to practice his or her religion.<sup>4</sup> This church-state relationship is a result of the historical background of the Argentine Constitution, the state power it creates,<sup>5</sup> and the remnants of the powers of the "patronato."<sup>6</sup>

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1. The authors would like to thank several people for their insight, suggestions, and assistance in gathering pertinent information from which this Comment was written: Dr. José Camilo Cardoso, General Director, National Registry of Churches, Ministry of Foreign Relations, International Commerce, and Worship; W. Cole Durham, Jr.; Gustavo Javier Berasaluce; and Rubén Vicente Alliaud. The authors take sole responsibility for the opinions herein.

2. CONSTITUCIÓN ARGENTINA [CONST. ARG.] art. 14; *see also id.* art. 20 ("Foreigners enjoy in the territory of the Nation all of the civil rights of a citizen; they may . . . freely practice their religion . . .").

3. *Id.* art. 2. At times this article may refer to the Roman Catholic Church (in Spanish, "la Iglesia Católica Apostólica Romana") as "the Church."

4. *Id.* arts. 14, 20.

5. The state regulates all churches within the nation and takes its powers from both the national constitution and statutory law. *See* 3 RAFAEL BIELSA, DERECHO ADMINISTRATIVO 422 (6th ed. 1964).

6. The national patronato has its origins in the Spanish Patronato Real created during the crusades and continued into the Inquisition. The patronato deals only with the Roman Catholic Church directly, but because the Catholic Church plays a central role in Argentine religious culture it affects all other religious activities. The national patronato gains its powers from the Argentine Constitution

Newly enacted constitutional reforms and recent pending legislation in Argentine law may weaken the traditions of Catholic dominance created by the patronal powers and introduce a more liberal position toward non-Catholic religions.<sup>7</sup> These changes reflect the changing religious beliefs and emerging religious pluralism of the Argentine people.

The Roman Catholic Church has had enormous influence on the power structure of the state.<sup>8</sup> The Church's influence is derived from the national constitution and the federal civil code. Although the Catholic Church is not considered the state church, the Argentine Constitution declares that "[t]he Federal Government supports the Roman Catholic Apostolic Faith."<sup>9</sup> This support is largely economic;<sup>10</sup> the Catholic Church is not considered the state church. The Argentine Civil Code further provides that the Church must be considered a legal entity of necessary existence and public right.<sup>11</sup> Although recently changed, the constitution has historically made an explicit call for buttressing Church membership (and thus Church influence).<sup>12</sup>

Government statistics put Roman Catholics at ninety percent of the Argentine population,<sup>13</sup> although only

and concordats between the Argentine government and the Vatican. See 3 *id.* at 420-22; see also discussion *infra* part II.

7. See discussion *infra* part IV.

8. See *Sources of Power*, Political Risk Services, Nov. 1, 1994, available in LEXIS, Nsamer Library, Argen File.

9. CONST. ARG. art. 2.

10. See Jesús Méndez, *Church-State Relations in Argentina in the Twentieth Century: A Case Study of the Thirty-second International Eucharistic Congress*, 27 J. CHURCH & ST. 223, 225-26 (1985). In 1988, the federal government's expenditures were roughly 8.9 billion dollars, of which 0.9%—roughly 80 million dollars—were expended for recreation, culture, and religion. *Argentina, General Information*, Kaleidoscope, Jan. 20, 1995, available in LEXIS, Nsamer Library, Argen File. More specifically, the Catholic Church receives approximately 10 million dollars annually in state funds. Interview with Dr. José Camilo Cardoso, General Director, National Registry of Churches, Ministry of Foreign Relations, International Commerce, and Worship, in Provo, Utah (Apr. 3, 1995).

11. GUILLERMO A. BORDA, *MANUAL DE DERECHO CIVIL* 317 (8th ed. 1976) ("[S]ólo la Iglesia católica debe ser considerada como una persona jurídica de existencia necesaria y de derecho público."). CÓDIGO CIVIL [CÓD. CIV.] art. 33.

12. Before the 1994 constitutional reform, the constitution granted congressional power to convert the native Indian population to the Church. Congress had power "[t]o provide for the security of the frontiers; to maintain peaceful relations with the Indians, and to promote their conversion to Catholicism." CONST. ARG. art. 67, § 15 (1853) (repealed 1994).

13. *Argentina*, 1994 U.S. Central Intelligence Agency, *The World Factbook*, Feb. 16, 1994, available in LEXIS, Nsamer Library, Profil File. The same statistics

approximately twenty percent of those consider themselves practicing Catholics.<sup>14</sup> As the Church finds itself less authoritative in the lives of Latin Americans, its political role is questioned.<sup>15</sup> However, Argentina and Latin America continue to influence the Catholic Church.<sup>16</sup> The next pope might realistically be Latin American since, among other things, half the Catholics in the world live in Latin America.<sup>17</sup>

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put Protestants at 2%, Jews at 2%, and all other religions at 6%. *Id.*; see also *Argentina, General Information*, Kaleidoscope, Jan. 20, 1995, available in LEXIS, Nsamer Library, Argen File; *Argentina: Argentina Troubled By Inflation, Military Unrest*, Reuter Textline, Reuter News Service—Central and South America, Dec. 3, 1990, available in LEXIS, Nsamer Library, Argen File (Argentina is “[h]ome to Latin America’s largest Jewish community, around 350,000.”).

14. *Argentina*, 1994 U.S. Central Intelligence Agency, The World Factbook, Feb. 16, 1994, available in LEXIS, Nsamer Library, Profil File.

15. Cf. ALBERTO ESPADA-MATTA, CHURCH AND STATE IN THE SOCIAL CONTEXT OF LATIN AMERICA 40 (1985) (noting that the Church lacks harmony with Latin America and is perceived as an obstacle to constructing a “more just society”). Roughly 1,600 religious institutions flourish in Argentina. National Registry of Churches Act, No. 21.745 (1978) (Arg.).

16. Spain and several Latin American countries have traditionally evidenced a close relationship between their governments and the Catholic Church; other authors have analyzed this relationship between the Church and countries such as Chile, Mexico, Guatemala, and Spain itself. See generally Roberto J. Blancarte, *Recent Changes in Church-State Relations in Mexico: An Historical Approach*, 35 J. CHURCH & ST. 781 (1993) (examining recent legislation affecting the Catholic Church and other religions in Mexico); Carl E. Meacham, *The Role of the Chilean Catholic Church in the New Chilean Democracy*, 36 J. CHURCH & ST. 277 (1994) (noting the Chilean Catholic Church’s function is less crucial today than it was in past years); Gloria Moran, *The Legal Status of Religious Minorities in Spain*, 36 J. CHURCH & ST. 577 (1994) (surveying various attempts to enhance religious liberty while noting persistent patterns of religious discrimination); Blake D. Pattridge, *The Catholic Church in Revolutionary Guatemala, 1944-54: A House Divided*, 36 J. CHURCH & ST. 527 (1994) (exploring internal affairs of the Church and relations with society at large in Guatemala). For a further look at political, social, and church-state relations of the Church in Latin America, see generally Cornelia Butler Flora & Rosario Bello, *The Impact of the Catholic Church on National Level Change in Latin America*, 31 J. CHURCH & ST. 527 (1989) (considering the economic effect of the Church in Latin America); Jeffrey Klaiber, S.J., *The Catholic Church’s Role as Mediator: Bolivia, 1968-1989*, 35 J. CHURCH & ST. 351 (1993) (examining the Catholic Church’s effective role in mediating national disputes between government and labor); Clara A. Pope, *Human Rights and the Catholic Church in Brazil, 1970-1983: The Pontifical Justice and Peace Commission of the São Paulo Archdiocese*, 27 J. CHURCH & ST. 429 (1985) (addressing the development of the human rights campaign fronted by the Brazilian Catholic Church).

17. *El próximo Papa podría surgir de América latina*, LA NACIÓN, Nov. 1, 1994, at A2. “América latina alberga ya a casi la mitad de los católicos del mundo, . . . [y] un pontífice latinoamericano contribuiría en modo notable no sólo a la nueva evangelización del continente sino también, más en general, del ‘sur’ del mundo.” *Id.*

More specifically, speculation holds that the pope who succeeds John Paul II will be an Argentine.<sup>18</sup> Thus, changes in Argentina's political and religious structure may have a profound effect on the Church both within and without the country's borders.

This Comment makes a comparative analysis of Argentina's constitutional, statutory, and cultural religious framework in light of recently proposed reforms. It examines Argentina's current church-state regime, comparing and contrasting it with past Argentine regimes and with the United States. This Comment compares Argentina to the United States because the authors are familiar with their own country's system of church-state relations. The authors do not mean to suggest that the United States' system is necessarily better than Argentina's, but rather offer it as an alternative paradigm. The most appropriate comparison this Comment makes is between the religious freedom of Argentina's past and that of the present.

Part II examines the historical context of Argentine church-state relations, including an analysis of the impact of the Spanish Patronato Real on Argentina's unique church-state system. Part III shows the role the state power of the Argentine government plays in developing and administering church-state relations and the influence of the patronato on the state's exercise of its police power. Part IV analyzes a recent constitutional reform and newly proposed laws that would directly affect religious freedom in Argentina.

This Comment concludes that, while some positive changes are occurring, the historical underpinnings of the religious status quo prevent significant change from occurring in the church-state arena. The constitutional reforms have created a favorable environment for further change in the future, but the newly proposed law, while making great strides toward greater religious freedoms, does not fully accommodate the emerging diversity of Argentine religious beliefs.

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18. Graciela Iglesias, *Sostuvo que el próximo Papa será argentino: Interrogantes abiertos sobre lo dicho por Jean Guilton*, LA NACIÓN, Nov. 3, 1994, at A2 (summarizing the speculation of 93-year-old French philosopher Jean Guilton, prolific author of more than thirty philosophical works on Catholicism and the first layperson authorized to direct part of the Vatican Council).

## II. THE HISTORICAL FOUNDATION OF CHURCH-STATE RELATIONS IN ARGENTINA

The historical foundations of Argentine church-state relations lie in the outgrowth of a symbiotic relationship between the Catholic Church and Spain, known as the Spanish Patronato Real. "A *patron* is a person who endows a place of divine worship and who is in turn endowed with particular rights."<sup>19</sup> The patronato, or patronage, is the right or power that the patron or King gains over a church, which power is gained by granting lands, building churches, and supplying an endowment to sustain the clergy in the land.<sup>20</sup> "[B]y reason of the patronage,"<sup>21</sup> the patron has the right to "name to the ecclesiastical authorities a suitable cleric."<sup>22</sup> This "enables the patron to advance into the [position] the person whom he considers most fit to bring about desirable spiritual, economic, social, and political effects of the position."<sup>23</sup> Great power was attained by the Argentine state through the patronato.<sup>24</sup>

The patronato ensured the preaching of Catholic doctrines and maintenance of the Church's structure in a time when its administration was limited due to communication and travel barriers.<sup>25</sup> Because of the intertwined Spanish and Catholic relationship, the growth of the Spanish empire resulted in a parallel growth of the Catholic Church and its influence on the political and religious climate of the New World.<sup>26</sup>

The patronal system of church-state relations was the medium through which the Catholic Church and Spain gained their respective new world ecclesiastical and political powers.<sup>27</sup> The system fostered a missionary effort which would never be surpassed,<sup>28</sup> and which had far-reaching effects on

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19. W. EUGENE SHIELS, *KING AND CHURCH: THE RISE AND FALL OF THE PATRONATO REAL* 21 (1961).

20. *Id.* at 21-23.

21. *Id.* at 22 (citation omitted).

22. *Id.*

23. *Id.*

24. *See id.* at 21.

25. "We make this grant for those persons presented [the Spanish monarchy] according to the requirements of the canons to us and our successors as Roman pontiffs, in view of the great expanse of ocean that separates those lands from us." SHIELS, *supra* note 19, at 112 (citation omitted).

26. ESPADA-MATTA, *supra* note 15, at 5.

27. *Id.*

28. SHIELS, *supra* note 19, at 2.

church-state relations in Latin America.<sup>29</sup> The Patronal powers consisted of Spain's recognition of the Catholic Church as the official church of the Americas and the Catholic Church's recognition of Spain as the supreme sovereign of the land.<sup>30</sup> This created a cartel of power between the two sovereigns, which for centuries maintained itself as the supreme power of the Americas. The relationship endured both because the Church was dependent upon the Spanish Crown as the only informational source of the geography of the Americas and because the Church granted Spain a remuneration of money and structural benefits.<sup>31</sup>

The Patronal powers were first conveyed during the Spanish holy wars against the Moors.<sup>32</sup> Beginning in 1064, when Alexander II sanctified the wars as holy crusades—marking a significant step in relations between the Vatican and the Spanish Royalty<sup>33</sup>—donations of properties and patronage became a regular part of the crusades.<sup>34</sup> A substantial portion of lands were donated to religious establishments after lands were received from the Moors.<sup>35</sup> During the 1400s, in the Bull of Granada, the Vatican granted the Spanish Monarchy the power both to nominate all major prelacies and to hold in trust all tithes and endowments.<sup>36</sup> This bull contained the essential elements of the Patronato Real de las Indias: "the right to choose the officers of the church, to hold and distribute the funds necessary for their

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29. *See id.* at 6.

30. *Cf. id.* at 80.

31. *See id.* at 6-7. Spain took advantage of church monies to erect hospitals, buildings, and churches which gave the new colonies much needed structure. *See id.* at 123.

32. *Id.* at 4.

33. *Id.* at 4-5.

34. *Id.* at 5.

35. *Id.*

36. *Id.* at 5-6. The Church committed this power to the Spanish monarchy in the Bull of Granada which states:

Our chief concern and commission from heaven is the propagation of the orthodox faith, the increase of the Christian religion, the salvation of barbarian nations, and the repression of infidels and their conversion to the faith. Hence it is the Catholic kings [namely King Ferdinand and Queen Isabella] and princes, athletes of Christ and tireless warriors battling in that cause, never fail to find in us their deserved assistance and favor.

*Id.* at 66.

material support, to convert the people of the conquered land, and to maintain these converts in their Christianity."<sup>37</sup>

Spain gained control over religious teachings under the sponsorship of the Church in a papal grant of authority to name ecclesiastical leaders,<sup>38</sup> and received compensation for its efforts in the form of tithes which the pope conceded to the Catholic monarchs.<sup>39</sup> Although the impact of this hierarchical structure on Argentina became moot with Argentina's independence, the Patronato Real de las Indias strongly influenced the formation of Argentina's national patronato under the constitution.

#### A. *The Patronato Real de las Indias*

The Spaniards had a two-fold mission in coming to the Americas: they came as conquerors, seeking gold and riches, and as evangelists, bringing "Christianity to the natives."<sup>40</sup> One year after Columbus' discovery of the Americas, upon perceiving in the powers of the Bull of Granada a means of fostering Spanish Catholic beliefs and customs in America, the Spanish Monarchy asked for and received the *Inter caetera divinae*.<sup>41</sup> This document provided that Pope Alexander VI would entrust the Spanish Monarchy with the power to convert the natives in the Indies because he had "no missionary organization capable of entering a distant and primitive area and of supporting itself by its own resources."<sup>42</sup> As part of this patronal agreement, Spain received exclusive papal recognition that it was the supreme sovereign of the land.<sup>43</sup> By letting the

37. *Id.* at 18.

38. *Id.* at 112 (citation omitted). Julius II stated: "We grant the right of patronage and the right to present suitable persons . . . . This right extends to all other ecclesiastical benefices and pious places that are vacant . . . to cathedral and metropolitan churches and even to churches belonging to religious orders which by law should be subject to consistorial action." *Id.*

39. *Id.* at 110.

40. Maria Clara Luchetti Bingemer, *Popular Religion and the Church: Hopes and Challenges at the Dawn of the Fifth Centenary*, in *NEW FACE OF THE CHURCH IN LATIN AMERICA* 157 (Guillermo Cook ed., 1994).

41. See SHIELS, *supra* note 19, at 76-77.

42. *Id.* at 77.

43. *Id.* As stated in the *Inter caetera divinae*:

We therefore commend in the Lord your sacred and laudable intentions . . . to bring [the natives] to receive the holy rite of baptism as the apostolic command obliges. . . .

We expressly exclude [from the newly discovered lands] all persons of whatever rank, even imperial and royal, or status, grade, order, or condi-



Spanish Monarchy act as the patron of the Church, Pope Alexander VI opened the gates for Pope Julius II's recognition of the full Patronato Real de las Indias, which was memorialized in 1508 in the *Universalis ecclesiae regimini*.<sup>44</sup>

Although the Church maintained itself as a sovereign, Church administration in America was achieved in a hierarchical manner.<sup>45</sup> The lowest tier in the patronato included bishops and the secular clergy; the King of Spain was the supreme patron.<sup>46</sup> Spain relied on the Church's social and spiritual programs to exert control over the native Americans, thus establishing a pattern of control.<sup>47</sup>

### B. The Argentine National Patronato

The 1853 constitution established a national patronato that drew on the history between the Catholic Church and Spain.<sup>48</sup> The "Code" of the Argentine National Patronato consisted of executive powers granted by the National Constitution,<sup>49</sup> the opinions of the Supreme Court, statements from the executive department, and resolutions of distinct and diverse doctrinal conflicts between the government, the Church, and civil sectors.<sup>50</sup>

The national patronato was repealed in 1966 by means of a concordat, which unraveled the patronato's formal structure of church-state interdependence.<sup>51</sup> Recent constitutional reforms

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tion, under pain of automatic excommunication.

*Id.* at 79-81.

44. *See id.* at 77, 110-12 (giving full grant of patronage and presentation in the Indies).

45. *See id.* at 195.

46. *Id.*

47. *See* ESPADA-MATTA, *supra* note 15, at 6.

48. For an insightful glimpse into Argentina's preparations for the transition to a National Constitution, and from a democratic constitution to military rule and beyond, see SANTOS P. AMADEO, ARGENTINE CONSTITUTIONAL LAW 4-6, 8, 11-23, 35, 95 (Edwin W. Patterson ed., 1943); ENRIQUE DUSSEL, A HISTORY OF THE CHURCH IN LATIN AMERICA 75 (Alan Neely trans., 1981); ARTHUR P. WHITAKER, ARGENTINA 21, 36-40, 43, 44, 49-53, 56-58, 71-72, 81, 85, 88, 103 (1964); Arthur F. Liebscher, *Toward a Pious Republic: Argentine Social Catholicism in Córdoba, 1895-1930*, 30 J. CHURCH & ST. 549, 550 (1988); *Argentina, General Information*, Kaleidoscope, Jan. 20, 1995, available in LEXIS, Nsamer Library, Argen File (After a short stint of power by Isabel Perón, the democratic form of government was re-established in Argentina in 1976.).

49. *See* CONST. ARG. art. 86, § 9 (repealed 1994).

50. 3 BIELSA, *supra* note 5, at 427.

51. *See* Law no. 17.032 (1966).

and proposed statutory reforms may weaken the remaining powers of the national patronato.<sup>52</sup> These proposed statutory reforms, however, were not the first attempt at revising church-state relations in Argentina. But despite these efforts, the strong influences of the patronal system continue to re-emerge in Argentine church-state relations.

### C. *Historical Attempts to Change Church-State Relations*

#### 1. *From revolution to the 1930s*

Many of the clergy were directly involved in the revolutionary movement of the early 19th century.<sup>53</sup> However, the new government began to undermine the fragile religious structure by expelling clerics and interfering with the lives of those living in convents.<sup>54</sup> In the Assembly of 1813, the government assumed all rights typified by the patronato. As a result, religious hospitals were expropriated, the administration of tithes was regulated, ecclesiastics were declared independent from any foreign sovereignty, and the bishop was declared the only ecclesiastical authority.<sup>55</sup> Thus, even before the formal recognition of the national patronato in the 1853 Constitution, the Argentine forefathers followed the model of the Patronato Real de las Indias by assuming control over many religious institutions and delegating many civic functions to the Church.

The ecclesiastical reform of 1822 made the patronato free from all legal context,<sup>56</sup> and "[t]he ecclesiastical reform of [1826] . . . almost resulted in the disappearance of the religious orders."<sup>57</sup> In 1834, a congress of canonists met to resolve the

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52. See discussion *infra* part IV.

53. The participation of the clergy was integral to the success of the revolutionary cause. Friar Ignacio Grela was one of the first to protest Viceroy Cisneros as president of the newly formed Junta in 1810. Seventeen priests signed the petition presented to the assembly that had requested the naming of the new Junta. Father Funes, the Dean of the Cathedral in Córdoba, helped quash a counterrevolution. The Chaplain of the Army of San Martín, Friar Luís Beltrán directed the construction of the canons used to liberate Chile. Sixteen of the twenty-nine representatives approved by the provinces to sign the Act of Independence on July 9, 1816 were Roman Catholic Priests. Despite intense clerical participation, it was also a time of liberal policies toward the Church. See DUSSEL, *supra* note 48, at 90.

54. *Id.* at 92.

55. *Id.* at 92-93. For further explanation about separation from foreign authorities, see 3 BIELSA, *supra* note 5, at 426-27.

56. 3 BIELSA, *supra* note 5, at 427.

57. DUSSEL, *supra* note 48, at 99.

problem of the separation of the Argentine Church from the Holy See.<sup>58</sup> The congress definitively consecrated the right of the patronato to be an irrevocable and indestructible authority.<sup>59</sup> At the same time, it established the basis for national recognition of the Church.<sup>60</sup>

Following Argentine independence, Argentina operated under a dual government. The Church controlled population records, *capellanías* (chapelaincies), social welfare, marriage, education,<sup>61</sup> and legislation regarding Indians.<sup>62</sup> Civil officers retained control over erecting chapels and hospitals, authorized the establishment of religious orders, expelled priests, collected tithes, disposed of the bishop's collections, and selected saints as intermediaries between God and man.<sup>63</sup>

The government has vacillated in its relations with the Church. After receiving the Church's formal recognition, Church clergy did at times participate in the political process.<sup>64</sup> Since the adoption of the constitution, the government has occasionally attempted to pass anticlerical legislation of various kinds.<sup>65</sup> However, during the early 1930s, the Church came to an agreement with the Argentine state, and a period of mutual church-state trust ensued.<sup>66</sup> Nevertheless, that trust between the government and the Church did not continue to flourish.

## 2. *The Peronist Regime*

With the ascendancy of Colonel Juan Perón and his Neo-Fascist regime in the 1940s and 50s, relations between the state and the Catholic Church changed dramatically.<sup>67</sup> Following its assumption of power in 1943, the Peronist regime made the armed forces a strong power within the state, hoping to establish them as the final arbiter of public policy.<sup>68</sup> To con-

58. 3 BIELSA, *supra* note 5, at 427.

59. 3 *id.*

60. 3 *id.*

61. Eduardo R. Saguier, *Church and State in Buenos Aires in the Seventeenth Century*, 26 J. CHURCH & ST. 491, 494 (1984).

62. *Id.* at 495.

63. *Id.* at 496.

64. 3 BIELSA, *supra* note 5, at 427.

65. WHITAKER, *supra* note 48, at 43.

66. Méndez, *supra* note 10, at 224.

67. See WHITAKER, *supra* note 48, at 13.

68. *Id.* at 107-08.

solidate its political power, the new military government solicited the power of right wing Catholic nationalist groups.<sup>69</sup> The relationship between the two powers began to deteriorate as Perón sought to gain control over every aspect of Argentine life.<sup>70</sup>

Eventually the Peronist regime initiated a movement to control the Church as well,<sup>71</sup> depriving it of powers it had long enjoyed. For example, the Church was no longer allowed to direct school curriculum, Catholic radio broadcasts were prohibited, and Catholic newspapers and publishing firms were closed.<sup>72</sup> Despite the manifest hostility of the government toward the Catholic Church, other religious denominations were not affected because they did not pose serious threats to Perón's divide-and-rule policy.<sup>73</sup> However, Perón underestimated the power of the right-wing Catholics, which ultimately led to the erosion of his political power.<sup>74</sup> Perón's decline was marked by a mass protest attended by Catholics and non-Catholics in defiance of police orders.<sup>75</sup> Perón expelled two Catholic prelates to Rome as a result of the uprising, whereupon the Vatican issued a decree of excommunication upon all who had participated in the expulsion. During the shock of the excommunication, the military revolted and Perón retreated into exile.<sup>76</sup> Perón later returned from exile to continue his political agenda, but he never regained his former power over the Church.<sup>77</sup>

Thus, the national patronato survived these attempts to undermine its power. The involvement of Catholic prelates in the political arena was typical of the Argentine church-state experience. With the return of democratic rule, the constitutional provisions were re-adopted.<sup>78</sup> Under these provisions

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69. *Id.* at 109.

70. *Id.* at 140. Following the death of Eva Perón, the working class demanded that Eva be canonized, a demand that was promptly rejected by the Catholic Church. *Id.* at 141.

71. *See id.*

72. *Id.* at 143.

73. *Id.*

74. *Id.* at 144.

75. *See id.* at 146.

76. *Id.* at 146-50.

77. *See* ENRIQUE DUSSEL, *LOS ÚLTIMOS 50 AÑOS (1930-1985) EN LA HISTORIA DE LA IGLESIA EN AMÉRICA LATINA* 71 (1986) (discussing the attacks on Catholic priests after Perón's death).

78. *Argentina, General Information*, Kaleidoscope, Jan. 20, 1995, available in LEXIS, Nsamer Library, Argen File.

the system of territorial ecclesiastical divisions was reinstated, establishing geographical jurisdictions administered as dioceses or archdioceses. The reinstated system also assured the independence of archbishops, bishops, and priests from any other power, and granted monies to provide for the costs of the churches.<sup>79</sup>

Although the patronato no longer exists, its influence continues to be felt in the administration of federal and provincial governments as prescribed in the National Constitution and other laws.<sup>80</sup> Despite its inadequacies, the system withstood dictators and military rulers who tried to uproot the patronal system in the exercise of state power.

### III. CHURCH-STATE RELATIONS IN PRACTICE TODAY

#### A. *Introduction to the State Power*

Relations between the Catholic Church and the Argentine State are controlled today by principles governing the exercise of religion within the state powers, and powers born from the right of patronage.<sup>81</sup> From these principles are derived the major rights and duties of the federal government relating to religion, and especially the governmental association with the Catholic Church: the state's right to exercise supreme authority,<sup>82</sup> the state's endorsement of the Catholic Church,<sup>83</sup> and governmental duties of sustaining the Catholic Church and protecting the free exercise of any religion.<sup>84</sup> The power of the state is the nation's supreme power,<sup>85</sup> and the laws recognize no other jurisdiction or ecclesiastical dominion.<sup>86</sup>

#### B. *Concordats*

The Catholic Church receives much of its power through state-approved concordats.<sup>87</sup> These are agreements between the state and the Holy See,<sup>88</sup> which address public rights

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79. 3 BIELSA, *supra* note 5, at 430.

80. See CONST. ARG. art. 67, § 19, amended by CONST. ARG. art. 75, § 22.

81. 4 BIELSA, *supra* note 5, at 175.

82. 4 *id.*

83. 4 *id.*

84. See CONST. ARG. arts. 14 and 20.

85. 4 BIELSA, *supra* note 5, at 176.

86. 4 *id.*

87. See 4 *id.* at 177; CONST. ARG. art. 75, § 22.

88. 4 BIELSA, *supra* note 5, at 177; see THE AMERICAN HERITAGE DICTIONARY

within the state.<sup>89</sup> The Church's interest in religious free exercise and the national interest in public order combine in the concordats.<sup>90</sup> In Argentina, a concordat is both ecclesiastical law and civil law;<sup>91</sup> it can reach secular as well as religious matters and requires cooperation between the Church and state powers.<sup>92</sup> An example of the influence of concordats is the disestablishment of the patronato.<sup>93</sup>

### *C. Benefits and Burdens to the Catholic Church of the Church-State Relationship*

The Argentine Constitution guarantees the regular financial support of the Church,<sup>94</sup> placing the federal government in the role of comptroller of Church funds and justifying some governmental intervention in the Church's internal administrative rules.<sup>95</sup> Some commentators have even suggested that this power extends to the right to appoint and discipline ecclesiastical authorities who function administratively.<sup>96</sup> However, the rights of the Church and the state are distinct, and the state only intervenes when the Church interferes with state powers.<sup>97</sup>

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(2d. ed. 1982) (defining a concordat as "an agreement between the pope and a government for the regulation of church affairs.").

89. 4 BIELSA, *supra* note 5, at 177.

90. 4 *id.* (noting HENRY J.F.X. BONFILS, *MANUEL DE DROIT INTERNATIONAL PUBLIC* 897, 899 (1908)).

91. 4 *id.* at 178.

92. 4 *id.*

93. Cód. Civ. 17.032.

94. *See* CONST. ARG. art. 2.

95. 3 BIELSA, *supra* note 5, at 422-23.

96. 3 *id.* at 423. There is, however, a convincing counterargument that since the creation of the National Registry of Religion and Worship (an administrative agency), the Church's civil power has subsided as the administrative duties of the Catholic priests have been drastically reduced. Still, another author believes that those administrators that are paid out of government funds for administrative services should be subject to the control of the government. These administrators, by the continuity and generality of their positions, can only be seen as officials within the formal structure of the government. 3 *id.*

97. The justification for the relationship between the state and the Catholic Church has been couched in terms of public service. The Church is considered by many to be a public service, not in the sense of a charitable organization serving the public but, rather, as public employees with directions to provide government service and fulfill a basic public need. 3 *id.*

Additionally, the preeminence of the Catholic Church has a certain official character. Until very recently, the Argentine President and Vice-President had to be Roman Catholics in order to hold office. CONST. ARG. art. 76 (amended 1994); *see also* *Argentina: Less power, more time*, *Business Latin America*, Sept. 5, 1994,

Until passage of the 1994 constitutional reforms, the autonomy of the Church was compromised because the constitution allowed the state to appoint Church leadership in Argentina in exchange for the government's financial support.<sup>98</sup> With the new reforms enacted to further the separation of the Catholic Church and the state, an incongruity emerged because the executive power to appoint ecclesiastical leaders was repealed. Now the Catholic Church enjoys state financial support but the state does not appointment ecclesiastical leaders.

*D. Government Requirements Regarding the Catholic Church Versus Other Religions*

The relationships between the Argentine state and the various religions of Argentina also betray a certain amount of discrimination in favor of the Catholic Church. For example, the Catholic Church is treated as a legal entity in civil actions.<sup>99</sup> In addition, the Church is required to register only the name, nationality, and the diocese of the clergy. However, all other religions must make a more complete registration with the federal government<sup>100</sup> in order to receive the liberties afforded to religious associations. This registration requirement can be potentially problematic because some religious organizations may not meet the registration criteria.<sup>101</sup> In theory,

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available in LEXIS, Nsamer Library, Argen File; *Menem Wins His Bid For a Second Term; No Election Date Yet*, Latin American Information Services—Lagniappe Letter, Aug. 5, 1994, available in LEXIS, Nsamer Library, Argen File; discussion *infra* part IV.A. In practice, the formalities of the Constitution regarding the Catholic Church have been recognized in official ceremonies. 3 BIELSA, *supra* note 5, at 424.

Others have argued that the Church is not a public service agency because not all members of the public belong to the Church and consequently do not receive its services. Proponents of the present system argue that religious services provided by the Church are comparable to the free educational advantages the state offers, of which many people also do not take advantage. 3 *id.*

98. See CONST. ARG. art. 86, §§ 8, 9 (repealed 1994) (declaring the executive power to appoint Catholic leaders and to approve decrees).

99. BORDA, *supra* note 11, at 317 (noting that recognition of the Church as a legal entity is codified in Civil Code article 33).

100. Non-Catholic religions must set forth (a) the establishment date of the religious organization; (b) the name, nationality, and identity of each of its ministers and other authorities; (c) the location of each temple, meetinghouse, chapel, synagogue, or mosque, conferences and the church's related institutions; (d) the name and nationality of its responsible directors; and, (e) all changes in leadership and location. 4 BIELSA, *supra* note 5, at 180 n.243.

101. For example, community churches such as the Baptist church do not have a hierarchical structure; instead, each community pastor is the leader of his con-

such problems should not occur because the Minister of Exterior Relations and Worship is responsible for attending to the suggestions and petitions that each new religious organization formulates.<sup>102</sup>

*E. The Argentine Constitution's Guarantee of Freedom of Conscience*

Legal constraints on the exercise of religious rights should be mainly concerned with external manifestations<sup>103</sup> because the right to freedom of internal belief is prerequisite to any degree of religious freedom.<sup>104</sup> Because freedom of religion may be constrained by the same general limits that apply to all constitutional guarantees—the preservation of public order or morality<sup>105</sup>—religions and religious practices can be regulated by national and provincial laws.<sup>106</sup> External manifestations of religious belief such as religious ceremonies, emblems, and other religious sentiment demonstrated in public are subject to the state power and, thus, can be regulated by the state.<sup>107</sup>

A recently proposed law considered by the Argentine Congress would change the statutory laws associated with the state power, however.<sup>108</sup> Some of the provisions would allow greater religious freedoms for non-Catholic religions, although the Catholic Church would retain its inherent powers of the nation-

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gregation without direction from a higher authority. See 4 *id.* at 181 (supporting the idea that the freedom of opinion and wholesome preaching can be restricted by such a policy).

102. 4 *id.*

103. See W. Cole Durham, Jr., A Comparative Framework for Analyzing Religious Liberty 17 (1993) (unpublished manuscript, on file with the *Brigham Young University Law Review*). Versions of Professor Durham's paper have been presented at the following conferences: Constitutional Law Session, Inter-American Bar Association Meeting, Santiago, Chile, Apr. 20, 1993; Conference on First Amendment Freedoms and Constitution Writing in Poland, University of Warsaw, May 24-25, 1993; Project on the State of Religious Human Rights in the World: A Comparative Legal and Religious Study, Emory University School of Law, Law and Religion Program, April 24-27, 1993. See also Dr. José Camilo Cardoso, Remarks at the Symposium of the International Academy for Freedom of Religion and Belief, the J. Reuben Clark Law School and the David M. Kennedy Center for International Studies 4 (Apr. 3, 1995) (transcript available from the *Brigham Young University Law Review*).

104. See Durham, *supra* note 103, at 15.

105. CONST. ARG. art. 19.

106. *Id.* art. 104 (reserving power in the provinces).

107. 4 BIELSA, *supra* note 5, at 189-90 (stating that religious processions are subject to state powers).

108. See discussion *infra* part IV.



al patronato and would maintain its preferred status as a constitutionally recognized religion.

#### IV. A LOOK TOWARD GREATER RELIGIOUS FREEDOMS: A NEW CONSTITUTIONAL MANDATE AND NEWLY PROPOSED LAWS

The following three changes have either been proposed and/or adopted in the interest of greater religious freedom in Argentina: (i) constitutional reform affecting the presidency, (ii) an allowance for conscientious objectors in military service, and (iii) a general law affecting religious liberties. The purport of these changes may be illustrated by comparisons with religious liberties as construed in the United States; however, it should be kept in mind that comparisons with the United States serve only to illustrate Argentina's proposed reforms in a way that is comprehensible for the North American reader. The focus of this paper is to understand Argentina in its past and its present religious paradigms.

##### A. *A New Constitutional Mandate Affecting Religion: Toward a Non-Catholic President*

On April 10, 1994, President Menem "emerged as the clear winner in elections to select delegates" for a constitutional assembly to consider reforms.<sup>109</sup> The delegates adjourned the ninety-day Constitutional Reform Assembly on August 24, 1994, after making significant constitutional revisions.<sup>110</sup>

109. *Chronology of Events*, Political Risk Services, Nov. 1, 1994, available in LEXIS, Nsamer Library, Argen File.

110. See *id.*; *Political Outlook: Political Forces at a Glance*, Economist Intelligence Unit, Country Forecast, June 6, 1994, available in LEXIS, Nsamer Library, Argen File.

President Menem is considered "Argentina's strongest leader since Perón." *Sources of Power*, Political Risk Services, Nov. 1, 1994, available in LEXIS, Nsamer Library, Argen File. His six years in office have seen remarkable changes and he wishes to continue leading Argentina in its economic, social, and political recovery. *Id.* To overcome the constitutional mandate that the Argentine president may only serve one term, Menem sought to diminish the six-year term to one of only four years but allowing for re-election to a second term; in this manner, Menem hoped to be able to continue to strongly maneuver Argentina like his confrontational "caudillo" (leader) predecessors. See CONST. ARG. art. 77, amended by CONST. ARG. art. 90 (former article 77 mandating a presidential and vice-presidential term of six years in office but new article 90 shortening the term to four years and allowing for re-election); *Argentina: Menem the Megalomaniac*, Reuter Textline, Independent, Apr. 12, 1994, available in LEXIS, Nsamer Library, Argen File; *UK: Profile—Argentinian President Carlos Menem*, Reuter Textline, Guardian, September 9, 1991, available in LEXIS, Nsamer Library, Argen File. For an insightful glimpse

However, "Congress still has to pass some [twenty] new bills in the coming months to give the changes the force of law."<sup>111</sup>

Under the former constitution, Article 76 required the "President or Vice President of the Nation . . . [to] belong to the Roman Catholic Apostolic Church."<sup>112</sup> This requirement has been dropped under the current reforms,<sup>113</sup> paving the way

into the provincial world in which Menem grew up—far from the sophistication of metropolitan Buenos Aires—see JOSÉ HERNÁNDEZ, MARTÍN FIERRO (1982 ed.) (written in the 1870s and demonstrating the unrelenting will of the early Argentine "gauchos" (cowboys)).

Several general (non-religious) changes were made by the Constitutional Committee, the most significant of which modifies the presidential term of office from six to four years but allows the president to seek re-election for a second consecutive term. Under the new change, President Menem will seek re-election in May of 1995. See *Argentina: Less Power, More Time*, Economist Intelligence Unit, Business Latin America, Sept. 5, 1994, available in LEXIS, Nsamer Library, Argen File.

The constitution grants the president considerable power and the reforms to the Argentine Constitution promulgated in 1994

do little to alter this basic power structure, as they were primarily introduced in order to allow Menem to run for re-election in 1995. In addition, a semi-parliamentary form of government will be introduced, some of the powers of Congress will be increased, and the judiciary will gain somewhat greater independence. Menem overcame the opposition of the Radical Civic Union (UCR) to his bid for re-election by promising these concessions in return.

*Sources of Power*, Political Risk Services, Nov. 1, 1994, available in LEXIS, Nsamer Library, Argen File. Thus, despite the reforms, Menem's aggressive iron-fisted approach as President will likely continue as, under the new constitution, an accumulation of power will continue in the President's hands. Menem's style "of ruling by decree often isolates legislation from the political realm. As a result, the Congress and judiciary are still dominated by the all-powerful president, and the new constitution does very little to allay these concerns." *Id.* The constitutional reforms and Menem's re-election would both perpetuate a heavy presidential hand and may not be good for Argentina: "It is not clear that [Menem's] re-election will help strengthen democracy, as his heavy use of rule by presidential decree helps perpetuate the tradition of strong, authoritarian leaders." *Five-Year Political and Economic Forecasts—Most Likely Regime*, Political Risk Services, Nov. 1, 1994, available in LEXIS, Nsamer Library, Argen File.

Several other changes were made in the recent constitutional reforms, including changes to the Argentine legislature. For a general listing of the constitutional reforms made by the Constituent Assembly (Constitutional Reform Assembly), see *infra* Appendix B.

111. *Argentina: Less Power, More Time*, Economist Intelligence Unit, Business Latin America, Sept. 5, 1994, available in LEXIS, Nsamer Library, Argen File.

112. CONST. ARG. art. 76 (amended 1994).

113. CONST. ARG. art. 76, amended by CONST. ARG. art. 89 ("To be elected president or vice[-]president of the Nation, it is required to have been born in the Argentine territory, or to be a child of a native citizen, having been born in a foreign country; and the other qualities required to be elected senator."); *Argentina: Less Power, More Time*, Economist Intelligence Unit, Business Latin America, Sept. 5, 1994, available in LEXIS, Nsamer Library, Argen File; see also *Menem Wins His*

for non-Catholic political hopefuls to assume the Argentine presidency. One reason, certainly, for this change is the patent inconsistency in establishing a general constitutionally-protected freedom of religion while permitting only Catholics to run for the presidency.<sup>114</sup> In past years the constitution provided the president with broad powers which affected the Church and the president appointed the Catholic Church hierarchy in Argentina.<sup>115</sup> The president no longer has this power, evidenc-

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*Bid For a Second Term; No Election Date Yet*, Latin American Information Services—Lagniappe Letter, Aug. 5, 1994, available in LEXIS, Nsamer Library, Argen File.

114. Before the Constitutional Reform Assembly, Menem argued that "[i]t is a contradictory constitution because there is an article that establishes freedom of religion and another that bans 15 [percent] of the population, demanding that the president of the republic be of the Roman and Apostolic Catholic religion." *Argentina: Menem Discusses Constitutional Amendment and Re-election*, Reuter Textline, BBC Monitoring Service: Latin America, Oct. 7, 1993, available in LEXIS, Nsamer Library, Argen File. Compare CONST. ARG. art. 2 (mandating federal governmental support of Catholicism) with CONST. ARG. art. 76 (requiring Catholicism as prerequisite of presidential or vice-presidential office) (amended 1994).

President Menem in earlier years conformed his religious behavior in order to achieve his dream of realizing the Argentine presidency. Menem was born of Syrian immigrants in the Argentine province of La Rioja. While governor of that province, he was imprisoned for two years by the Argentine military that overthrew Isabelita Perón in the coup of 1976. "He told anyone who would listen that he would be president one day and converted in prison from his native Islamic faith to Catholicism, a necessary pre-requisite for the top job." *Argentina: Menem the Megalomaniac*, Reuter Textline, Independent, Apr. 12, 1994, available in LEXIS, Nsamer Library, Argen File; cf. *UK: Profile - Argentinian President Carlos Menem*, Reuter Textline, Guardian, September 9, 1991, available in LEXIS, Nsamer Library, Argen File ("[Menem] also nurtured a curiously hybrid image of religiosity. His Muslim mother, he said, had seen visions of the Virgin Mary at his birth; hence his upbringing as a Catholic. She also traced her lineage directly back to Mohammed."). Menem's motives for religious "conversion" evidence the paradox existing in the constitution prior to the reforms.

Speculation also exists that Menem sought for the constitutional reform in an effort to safeguard his presidency. His relations in recent years with his wife Zulema Yoma had soured, and in March, 1991, Zulema filed for divorce. *Id.* Separated from his wife, Menem might not be considered a practicing Catholic if divorced, and this might have jeopardized his future tenure as president. Interview with Gustavo J. Berasaluze, Argentine attorney, in Provo, Utah (Mar. 18, 1995). Such speculation has been dispelled by others closer to Menem who argue that he is sincere in his efforts to augment religious freedom without regard to his personal political career. Interview with Dr. José Camilo Cardoso, General Director, National Registry of Churches, Ministry of Foreign Relations, International Commerce, and Worship, in Provo, Utah (Apr. 3, 1995).

115. Specifically, under the Argentine Constitution the president formerly appointed bishops for the cathedrals from a list of three names submitted by the Senate. CONST. ARG. art. 86, § 8 (repealed 1994).

Part of the reason for the Church's strong opposition to Menem's re-election is probably because of his earlier non-Catholic background and general antagonism

ing the growing religious plurality in Argentina. The government has taken a greater church-state separationist position, now leaving ecclesiastical appointments to the jurisdiction of the Catholic Church. Had this not occurred, the Church could have been confronted with the irony of a non-Catholic president who appointed the Catholic Church hierarchy.<sup>116</sup>

### *B. Legislation Allowing for Conscientious Objection*

On December 15, 1994, the Argentine Senate passed a draft bill that would establish voluntary military service<sup>117</sup> and allow for conscientious objection. The provision requires that "[c]itizens who at the time of the call consider themselves unable to go through the military service out of deep religious, philosophical or moral convictions, and who are opposed to the use of weapons, must serve in the Substitute Social Service."<sup>118</sup> Conscientious objectors would as part of their service engage in useful public activities: civil defense; environmental protection; and social, sanitary, or educational services.<sup>119</sup> The bill follows the pattern of countries that have a liberal tolerance for freedom of religious convictions, including opposition to military service.<sup>120</sup>

### *C. Newly Proposed Law Affecting Non-Catholic Religions: Trámite Parlamentario, Cámara de Diputados de la Nación No. 37*

Other reforms proposed in recent months may be the ini-

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toward the Church. Cf. *Five-Year Political and Economic Forecasts—Most Likely Regime*, Political Risk Services, Nov. 1, 1994, available in LEXIS, Nsamer Library, Argen File.

116. The government, composed largely of Catholics, likely feels that a non-Catholic is unlikely to ever win the presidency and that the eventuality of a non-Catholic wielding any power over the Church would never come to pass. Interview with Gustavo J. Berasaluze, Argentine attorney, in Provo, Utah (Mar. 13, 1995).

117. *Argentina: Senate Approves Voluntary Military Service Bill*, Reuter Textline, BBC Monitoring Service: Latin America, Dec. 17, 1994, available in LEXIS, Nsamer Library, Argen File.

118. *Id.*; see *infra* text accompanying note 145.

119. *Argentina: Senate Approves Voluntary Military Service Bill*, Reuter Textline, BBC Monitoring Service: Latin America, Dec. 17, 1994, available in LEXIS, Nsamer Library, Argen File.

120. For example, the United States has upheld this right. See, e.g., U.S. CONST. amend. I (the First Amendment's Free Exercise Clause); *United States v. Seeger*, 380 U.S. 163 (1965) (holding that a sincere and meaningful religious belief in a Supreme Being adequately constitutes a conscientious objection to combatant military service).

tial steps to augmenting religious freedom in Argentina. Currently pending legislation<sup>121</sup> would significantly affect religious organizations in Argentina that presently do not enjoy the same status and privileges as the Catholic Church.<sup>122</sup> A discussion and analysis of the bill follows, addressed in order of

121. Trámite Parlamentario, Cámara de Diputados de la Nación [TPCD] No. 37 (1993). For a near-complete translated version of the text of the pending legislation (called by Argentine legislators a "Trámite Parlamentario" or Parliamentary Treatment (or Parliamentary Proceeding)), see *infra* APPENDIX A.

122. President Menem has spoken of his reforms as part of a project "basically of a cultural nature [with] . . . freedom of expression as an unswerving and irrevocable pillar of the change that we have made." *Argentina: President Menem Opens Congress[ional] Session, Stresses Need to Change Institutions*, Reuter Textline, BBC Monitoring Service: Latin America, May 5, 1994, available in LEXIS, Nsamer Library, Argen File.

The Secretary of Worship recently requested a written opinion from roughly twenty to forty religious organizations on the pending legislation. The Argentine Senate passed the bill with only a few minor changes early in the legislative session of 1994. Interview with Gustavo J. Berasaluze, Argentine attorney, in Provo, Utah (Jan. 26, 1995). Nevertheless, because of the extensive constitutional reforms and subsequent legislative activity occurring in 1994, the House of Deputies found its time consumed, and it took no action on the proposed bill, which then expired under applicable congressional rules. The General Director of the National Registry of Churches intends to resubmit the bill with small changes suggested by the recent constitutional reforms. However, neither the legislature nor the executive has taken further action with respect to this legislative proposal. Interview with Dr. José Camilo Cardoso, General Director, National Registry of Churches, Ministry of Foreign Relations, International Commerce, and Worship, in Provo, Utah (Apr. 3, 1995).

This legislative hiatus may last until after the election in May 1995. Though the House of Deputies failed to pass the bill, it is very likely to resurface soon, even if in altered form; its likelihood for success is best evidenced by the Senate's previous passage of the bill.

Speculation exists that nothing will happen with the legislation until after the May 1995 election in which Argentine President Carlos Menem is seeking re-election. Letter from Rubén V. Alliaud, Argentine attorney in Buenos Aires, to Scott S. Thomas (Feb. 13, 1995) (on file with author) ("[N]adie está muy interesado en tratar el tema ahora, antes de las elecciones de Mayo."). Menem likely sees it as in his best political interest not to disturb the present calm of continued legislative inaction. Interview with Gustavo J. Berasaluze, Argentine attorney, in Provo, Utah (Jan. 26, 1995). If Menem does not disturb the status quo—voters' current minds—he stands a good chance to win his re-election bid: "[a]lthough Menem's popularity has certainly declined during 1994, and the Perónists have suffered some electoral disappointments, they still dominate the political scene." *Sources of Power*, Political Risk Services, Nov. 1, 1994, available in LEXIS, Nsamer Library, Argen File.

Nonetheless, Argentina wants economic stability without unlimited presidential power, and political forecasts give Menem only a 50 percent probability of winning re-election. *Five-Year Political and Economic Forecasts—Most Likely Regime*, Political Risk Services, Nov. 1, 1994, available in LEXIS, Nsamer Library, Argen File. Thus, the newly proposed law, if revived and considered again in the House of Deputies, would only muddy the near-pristine waters of Menem's re-election bid.

its chapters with the following topics: fundamental principles; relations with the Roman Catholic Church; the Registry of Churches and Religious Denominations; The Advisory Council on Religious Matters; protection of religious freedom; and temporary dispositions.

### 1. Chapter 1: Fundamental Principles

The first chapter of the proposed law sets out one of the fundamental principles which reaffirms that the freedoms of conscience and of religion, guaranteed by the National Constitution, are to be enjoyed by every person.<sup>123</sup> The proposal then affirms an axiom: "Religious beliefs can never constitute a motive for inequality or discrimination before the law."<sup>124</sup> The law would specifically assure that a person's particular religious beliefs could not be a justification for prohibiting his or her "entry into public institutions."<sup>125</sup> If this phrase is construed to include the right to seek election to the presidency (or vice-presidency), this assurance has been recently secured in the Argentine Constitution.<sup>126</sup>

The proposed legislative enactment also delineates several rights<sup>127</sup> pertaining to religious freedom: one has the right to profess a particular belief, to manifest it freely, to change or abandon that belief, or not to profess a belief at all.<sup>128</sup> Religious persons would, individually or collectively, worship ac-

123. TPCD No. 37, ch. 1, art. 1; see CONST. ARG. art. 14 ("All inhabitants of the Nation enjoy the . . . right[] . . . of freely professing their religion.")

124. TPCD No. 37, ch. 1, art. 1. Nevertheless, as discussed earlier, this legislation continues to buttress the preferred status of the Catholic Church, thus perpetuating existent inequality and discrimination. Though statistics reflect widespread membership in the Catholic Church as roughly 90% of Argentines, that participation is nominal; the same statistics reveal that, of those 90% who are Catholics, "less than 20 [% are] practicing." *Argentina*, 1994 U.S. Central Intelligence Agency, The World Factbook, Feb. 16, 1994, available in LEXIS, Nsamer Library, Profil File. Thus, the Church, though not having as strong a following as one might otherwise think, nevertheless enjoys tremendous domination through constitutional and civil protections. Such favoritism epitomizes inequality and discrimination. See *supra* text accompanying notes 9-15.

125. TPCD No. 37, ch. 1, art. 1.

126. See discussion *supra* part IV.A.

127. This enumeration is not exclusive, and other rights may also exist. TPCD No. 37, ch. 1, art. 2.

128. *Id.* art. 2(a). Justice Stewart spoke of this right when he recognized the freedom "to believe or disbelieve, to worship or not worship, to pray or keep silent, according to [one's] own conscience, uncoerced and unrestrained by government." *School Dist. of Abington Township, Pa. v. Schempp*, 374 U.S. 203, 320 (1963) (Stewart, J., dissenting).

according to their particular religion in public or in private, and, more importantly, they could not be obligated to worship contrary to their personal religious convictions.<sup>129</sup> This right to freely worship is inherently fraught with difficulty—though religious free exercise in theory is unbounded, it does have its limits in practice.<sup>130</sup>

Another provision would secure the right “[t]o receive and impart religious teachings and information through whatever legitimate means, in public or in private.”<sup>131</sup> This right would clearly safeguard the practice of proselytizing so important to several churches and is concomitant with the previously enumerated right to maintain or change one’s religious beliefs.<sup>132</sup> The proposal would also prohibit the obligation of swearing an oath if violative of one’s religious convictions;<sup>133</sup> Argentina legitimately seeks to codify such an important right.<sup>134</sup> Addi-

129. TPCD No. 37, ch. 1, art. 2(b). *But see* discussion *infra* part IV.D (considering the bill’s deleted language that would have prohibited requiring taxes or contributions of an individual that would go to fund a church different from that individual’s faith).

130. The United States Supreme Court’s Free Exercise jurisprudence coupled with recent statutory modifications—The Religious Freedom Restoration Act, 42 U.S.C. § 2000bb—establishes a balancing test that ensures that necessary limits on one’s free exercise will be enforced by the least restrictive means and only when a compelling government interest exists. Such a balancing test may likely arise in Argentine courts if this particular clause in the legislative proposal gives rise to adjudication.

A plethora of scholarly criticism has ensued since Justice Scalia’s majority opinion in *Employment Div., Dep’t of Human Resources v. Smith*, 494 U.S. 872 (1990) (eliminating the compelling government interest requirement). For a reading of recent developments in the United States’ Free Exercise Clause jurisprudence, see, e.g., Ashby D. Boyle II, *Fear and Trembling at the Court: Dimensions of Understanding in the Supreme Court’s Religion Jurisprudence*, 3 SETON HALL CONST. L.J. 55 (1993) (examining the “endless struggle” in the Supreme Court’s jurisprudence of the Religion Clauses); Rex E. Lee, *The Religious Freedom Restoration Act: Legislative Choice and Judicial Review*, 1993 B.Y.U. L. REV. 73 (considering the effect of the Religious Freedom Restoration Act upon the Supreme Court’s Free Exercise jurisprudence—where a generally applicable law can adversely affect religious activity even where the state has not shown a compelling interest).

131. TPCD No. 37, ch. 1, art. 2(e).

132. *See supra* text accompanying note 128.

133. TPCD No. 37, ch. 1, art. 2(f).

134. For example, in the United States, this right was judicially upheld when members of the Jehovah’s Witnesses refused to recite the pledge of allegiance. The Supreme Court found the refusal to be a valid exercise of religion under the First Amendment. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). The Jehovah’s Witnesses cite Jesus’ affirmation, “My kingdom is not of this world,” *John* 18:36 (King James), as part of the basis for their refusal to obey the less-than-divine laws of a temporal government. Their religious conviction in not wishing to salute the flag is that such a gesture is tantamount to worshipping a grav-

tionally, the newly proposed law would allow for observance by individual worshippers of "the day that according to their doctrine is dedicated to religious celebration,"<sup>135</sup> a right important for those who do not wish to work on their particular day of religious observance.<sup>136</sup>

The proposed law, in addition to setting out religious freedoms that inhere in the individual, also provides rights or liberties of churches, denominations, or religious communities.<sup>137</sup> These liberties would include the right to establish religious facilities of worship;<sup>138</sup> to establish and maintain schools or places of education, as well as other services and places for church benefit;<sup>139</sup> to maintain unrestricted communication with members and non-members of their faith, both within the country or abroad;<sup>140</sup> and to support the ministers of their faith.<sup>141</sup> Moreover, the rights afforded a collective religious body would not disparage the rights given to its individual members.<sup>142</sup>

The declaration of fundamental principles contains the following caveat: "The exercise of the rights derived from religious freedom and of conscience has, as its only limit, the rights of others in the exercise of their own liberties, and those that impose public order, health and public morality."<sup>143</sup> In addition, the proposed laws would not allow a person to invoke personal religious convictions in an attempt to "abstain from fulfilling public responsibilities" imposed by law or by the Con-

en image. *Barnette*, 319 U.S. at 629; see *Exodus* 20:4-5 (King James).

135. TPCD No. 37, ch. 1, art. 2(i).

136. The United States has recognized this right. See, e.g., *Sherbert v. Verner*, 374 U.S. 398 (1963) (construing the Free Exercise Clause and holding state unemployment benefits could not be denied a Seventh-Day Adventist for her refusal to work on Saturday because of her religious beliefs); see also *Exodus* 20:8-11 (King James) ("Remember the sabbath day, to keep it holy. Six days shalt thou labour, and do all thy work: But on the seventh day shalt thou rest . . ."); *Deuteronomy* 5:14 (King James) ("But the seventh day is the sabbath of the Lord thy God: in it thou shalt not do any work . . .").

137. The proposed law makes reference to three distinct types of religious organizations: "churches, religious communities or denominations," see *infra* APPENDIX A, but a reference in this paper which, for example, refers only to denominations, is intended also to refer to the other types of religious organizations—churches and religious communities.

138. TPCD No. 37, ch. 1, art. 3(a).

139. *Id.* art. 3(b).

140. *Id.* art. 3(c).

141. *Id.* art. 3(d).

142. *Id.* art. 3; see *supra* notes 123-129 and 131-136 and accompanying text.

143. TPCD No. 37, ch. 1, art. 4.



stitution.<sup>144</sup> This general rule would have as an exception the right of conscientious objection to military service, a right guaranteed by the voluntary military service bill recently passed by the Argentine Senate.<sup>145</sup> The proposal would not exempt those espousing quasi-religious reasons for avoiding public duties, including those who claim that their consciences are dictated by ideas of astrophysical, psychic or parapsychological phenomena, or philosophical, humanistic or spiritualistic values.<sup>146</sup> This restrictive measure would assure the protected status of what are traditionally considered sincere religious beliefs and worship while not safeguarding what some may consider non-pious endeavors.

## 2. *Chapter II: Relations with the Roman Catholic Church*

Chapter 2 is rather succinct, assuring the preferred status of the Catholic Church: "Relations between the National State and the Roman Apostolic Catholic Church, whose preexisting public legal status has been recognized by the National Constitution, will continue, as they have to the present, under the principles of autonomy and cooperation . . ."<sup>147</sup> This section would perpetuate the government's inequitable treatment of Catholic and non-Catholic faiths. The problems associated with the non-separationist aspects of Argentine church-state relations would continue to beset non-Catholic faiths.

## 3. *Chapter III: The Registry of Churches and Religious Denominations*

The third chapter sets out the principles and rules involved in the Registry of Churches and Religious Denominations. This chapter provides that the Ministry of Foreign Relations, International Commerce, and Worship would oversee the voluntary registration of churches, religious communities, and denominations within the Registry of Churches and Religious Denomi-

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144. *Id.* For example, religious individuals could not refuse to pay taxes, seeking justification based solely on religious grounds.

145. *Id.* (TPCD No. 37 provides that "A special law will regulate the right of conscientious objection."); see discussion *supra* part IV.B.

146. TPCD No. 37, ch. 1, art. 5.

147. *Id.* ch. 2, art. 6; see CONST. ARG. art. 2 (declaring the federal government's support for the Roman Catholic Apostolic Faith). For further discussion of this aspect of Argentine church-state relations, see discussion *infra* part IV.D.

nations.<sup>148</sup> Organizations and their members that chose not to register would nonetheless enjoy the benefits afforded them as organizations and individuals. Similarly, the state would still reserve the right to exercise its power over those denominations.<sup>149</sup> This is an important concession for members of faiths such as the Jehovah's Witnesses who strive to keep their interaction with the government as minimal or non-existent as practicable.<sup>150</sup> To register, a religious organization would have to meet at least one of the following requirements: (i) it must prove its presence in at least three Argentine provinces,<sup>151</sup> (ii) it must be established as an official church or religious organization of a foreign state which maintains diplomatic relations with Argentina;<sup>152</sup> (iii) it must give evidence to demonstrate its presence in the country for at least one hundred years;<sup>153</sup> or (iv) it must prove to have a membership equal to at least five percent of the provincial population where the denomination practices.<sup>154</sup> Satisfaction of at least one of these requirements may prove to be difficult only for the smallest of denominations; yet religious minorities especially need legal protection, and full protection would not be given to all religions under the proposed law.<sup>155</sup>

Registration would afford the participating denominations several rights, including recognition of the religious entity's ministers,<sup>156</sup> the right of exemption from military conscription for that organization's ministers or seminary enrollees,<sup>157</sup> the

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148. TPCD No. 37, ch. 3, art. 7.

149. *Id.*

150. See *supra* note 134 and accompanying text. In the United States, other religions such as the Amish have had their rights to distance themselves from government and community vindicated. Because the Amish in the United States strive to avoid worldly ideals such as competition and the pursuit of material wealth—more their children may witness in public schools—the U.S. Supreme Court has recognized the right of Amish parents to closely govern their children's education. *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (upholding the right of Amish parents to keep their children from attending public schools beyond the eighth grade).

151. TPCD No. 37, ch. 3, art. 8(a)(1).

152. *Id.* art. 8(a)(2).

153. *Id.* art. 8(a)(3).

154. *Id.* art. 8(a)(4).

155. Full protection could only be afforded if an organization did not have to meet any age, provincial presence, official foreign church, or minimal membership requirements in order to be registered as a denomination.

156. TPCD No. 37, ch. 3, art. 9(a).

157. *Id.* art. 9(b). This particular right is much narrower than the broad right of conscientious objection by any religious individual (which has also been recently

right to receive benefits or exemptions provided by law,<sup>158</sup> and freedom to worship in places outside governmental interference.<sup>159</sup> Further, the organizations would also have access to public media<sup>160</sup> and possess rights similar to those given to public welfare entities.<sup>161</sup> Moreover, this chapter also provides that, under the proposed law, religious entities would be considered autonomous and would be allowed to freely organize their internal structure.<sup>162</sup>

Two proposed rights included in a prior draft were discarded by the Senate before its passage of the bill: the right to impart religious teaching in public schools, and the right to participate on the Advisory Council on Religious Matters.<sup>163</sup> Though the point is arguable, the state probably did not seriously abrogate religious freedoms by not recognizing the former right.<sup>164</sup> Conversely, granting the right to impart religious instruction might prove to be discriminatory; allowing religious instruction in public schools in Argentina could easily be dominated by the curriculum of one church, such as the Catholic Church. Were this the case, the right of religious instruction would bring non-Catholics no closer to their ideal of religious pluralism in teaching. Similarly, the proposal extending the right to representation on the Advisory Council to every denomination was likely viewed as too cumbersome: the sheer

passed by the Argentine Senate). See discussion *supra* part IV.B.

158. TPCD No. 37, ch. 3, art. 9(c).

159. *Id.* art. 9(d). This right is given provided the religious organization retains title of ownership to the place of worship. *Id.*

160. *Id.* art. 9(f).

161. *Id.* art. 9(e).

162. TPCD No. 37, ch. 3, art. 10.

163. See Telefacsimile from William H. Wingo, Partner, Kirton & McConkie, to W. Cole Durham, Jr., Professor of Law, J. Reuben Clark Law School, Brigham Young University (Mar. 30, 1993) (on file with authors) (including translated language of proposed draft legislation months prior to the Senate's revision discussing the deletion of the two rights mentioned and subsequent passage of the bill); see also discussion *infra* part IV.C.4.

164. This is evidenced in the United States where the debate concerning whether to allow religion in the public schools has given rise to decades of heated controversy; the United States Supreme Court has severely limited religious teaching in public schools. See, e.g., *Edwards v. Aguillard*, 482 U.S. 578 (1987) (invalidating Louisiana legislation that mandated teaching "creation-science" along with "evolution-science" as violative of the Establishment Clause); *Stone v. Graham*, 449 U.S. 39 (1980) (invalidating a Kentucky Statute that required posting of the Ten Commandments on public classroom walls); *School Dist. of Abington Township, Pa. v. Schempp*, 374 U.S. 203 (1963) (holding unconstitutional school programs involving use of the "Lord's Prayer" or voluntary Bible reading); *Engel v. Vitale*, 370 U.S. 421 (1962) (invalidating government-written nondenominational prayer).

number of council participants would probably have been unmanageable.<sup>165</sup>

#### 4. Chapter IV: The Advisory Council on Religious Matters

The proposed law's fourth chapter would provide for an Advisory Council on Religious Matters, which would fall within the jurisdiction of the Ministry of Foreign Relations, International Commerce, and Worship,<sup>166</sup> and which is presided over by the Sub-Secretary of Worship.<sup>167</sup> The Advisory Council would be composed of a maximum of twelve<sup>168</sup> members representing a cross section of religions.<sup>169</sup> The council members would each serve for a three-year period<sup>170</sup> and would be chosen by the Ministry of Foreign Relations, International Commerce, and Worship on the basis of their competence and recognized experience in religious matters.<sup>171</sup> During their period of service, the council members could not officially represent their respective religious denominations.<sup>172</sup> Before passage of the bill, the Senate deleted the requirement that Advisory Council members come only from churches of widespread acceptance.<sup>173</sup> Under the new bill, council members are to represent the "spectrum" of religious denominations,<sup>174</sup> a healthy change that gives minority religions a voice in council deliberations, allowing for decisionmaking more in harmony with the needs of minority religions.

Council members would provide advice on religious subjects to public authorities on the national or provincial level.<sup>175</sup> They would also advise the executive branch about

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165. See discussion *infra* part IV.C.4.

166. TPCD No. 37, ch. 4, art. 12.

167. *Id.*

168. *Id.* art. 14.

169. *Id.* art. 12. As mentioned previously, rather than including a member from each denomination inscribed in the Registry, the number of council members was likely limited for convenience and workability. See discussion *supra* part IV.C.3.

170. TPCD No. 37, ch. 4, art. 14.

171. *Id.*

172. *Id.*

173. See Telefacsimile from William H. Wingo, Partner, Kirton & McConkie, to W. Cole Durham, Jr., Professor of Law, J. Reuben Clark Law School, Brigham Young University (Mar. 30, 1993) (on file with authors) (including translated language of proposed draft legislation months prior to the Senate's revision, and the deletion of language in ch. 4, art. 12 before subsequent passage of the bill).

174. TPCD No. 37, ch. 4, art. 12.

175. *Id.* art. 13(a).

agreements of cooperation between religious denominations and the government.<sup>176</sup> Additionally, the Council would have the power to intervene in the legislative process whenever the law's<sup>177</sup> regulatory norms are elaborated upon or modified.<sup>178</sup> These functions of the Advisory Council would be an effective part of the legislative process; without them, Argentine lawmakers might be less sensitive to the diverse religious needs of the country.

### 5. *Chapter V: Protection of Religious Freedom*

The proposed law's fifth chapter delineates enforcement mechanisms to protect the rights afforded religious denominations and individuals. The chapter provides:

Every person, church or religious community, can bring an action for relief against whatever act or omission of a public authority or of a private person or entity, that in a real and imminent way harms, restricts, alters or arbitrarily threatens any of the rights mentioned in the present law.<sup>179</sup>

This provision safeguards religious freedom against both governmental and private encroachments. Furthermore, an action may be brought in the Argentine courts to enforce these religious rights.<sup>180</sup> Similarly, a religious organization may judicially appeal an administrative decision which denies inclusion in the Registry.<sup>181</sup> These judicially enforced preventive measures serve as checks and balances on the executive functions and as limits upon private interference with religious liberty.

Nonetheless, the law also affirms that religious denominations would be able to exact from their members and employees conduct that conforms with the denomination's religious or moral principles.<sup>182</sup> This right may be considered important because a church as a private organization must be able to govern the conduct of those desiring membership in it.<sup>183</sup> If

176. *Id.* art. 13(b); *see id.* art. 11.

177. "Law" here refers to TPCD No. 37.

178. TPCD No. 37, ch. 4, art. 14(c).

179. *Id.* ch. 5, art. 15.

180. *Id.*

181. *Id.* art. 16.

182. *Id.* art. 15.

183. The United States Supreme Court has upheld this right under a variety of circumstances, thus accommodating the idiosyncratic practices or beliefs of various religious denominations. For example, the Court has held that fundamentalist

the proposed law were enacted, Argentina would protect the self-governance of the religious entities existing in the country.

#### 6. Chapter VI: Temporary Dispositions

The sixth chapter of the proposed law provides that registrations formerly granted under prior law no. 21.745—the law currently governing the registration of churches—would retain their validity for two years.<sup>184</sup> During that time, religious denominations would seek their inclusion in the new Registry.<sup>185</sup> In addition, churches, religious communities, and denominations, which were previously afforded only the rights of civil associations, would now be given greater legal status. This would permit a church to transfer all its reportable property to the church's name,<sup>186</sup> and under this preferred legal status, churches would enjoy benefits such as tax exemptions given to (non-profit) religious organizations.<sup>187</sup>

The new law would explicitly repeal law no. 21.745, the National Registry of Churches Act.<sup>188</sup> The rights afforded in and the overall tenor of the proposal are to some degree epitomized by the modification of language in other articles of the Civil Code: the term "dissident churches," previously used in the code, would be replaced with "churches or religious commu-

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Christians whose religion holds that a woman should remain home to nurture her preschool children have the right to deny a pregnant, married woman a position as teacher at their parochial school. *Ohio Civil Rights Comm'n v. Dayton Christian Sch.*, 477 U.S. 619 (1986). The Court has also upheld the right of The Church of Jesus Christ of Latter-day Saints to deny employment to someone who does not subscribe to important beliefs particular to the church's faith. *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987). For an exposition of religious group rights in light of *Amos* and *Dayton Christian Schools*, see Frederick M. Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99.

184. TPCD No. 37, ch. 6, art. 17.

185. *Id.*

186. *Id.* art. 18.

187. *Id.*; Dr. José Camilo Cardoso, Remarks at the Symposium of the International Academy for Freedom of Religion and Belief, the J. Reuben Clark Law School and the David M. Kennedy Center for International Studies 6, 8 (Apr. 3, 1995) (transcript available from the *Brigham Young University Law Review*) (arguing that the proposed law would establish the fundamental right of a church to enjoy the benefits of legal entity status).

188. TPCD No. 37, ch. 6, art. 20; see also National Registry of Churches Act, No. 21.745 (1978) (Arg.).

nities or denominations,"<sup>189</sup> and what was formerly termed "Protestant" would now be termed "religious."<sup>190</sup>

*D. Government Funding for the Catholic Church and its Adverse Effect on Non-Catholic Religions*

Although the proposed law makes important strides toward recognition of the non-Catholic religions, it does not provide a true separation of church and state.

The close relationship between the Church and the Argentine state would continue under the proposed law; however, an enormous revision was proposed that would significantly distance the Catholic Church from state support. A draft prior to the Senate's passage of the bill included the following significant provision: each individual would have the right not to pay taxes or to be forced to make contributions to support a religion that was not his or her own.<sup>191</sup> This change would have been a momentous one since it would have effectively eliminated the government's monetary support of the Catholic Church, but the Senate deleted it before the bill passed.<sup>192</sup>

One commentator has summarized the confluence of the Church and the Argentine state as follows:

The Constitution of Argentina has adopted an intermediate position with respect to the Church-State relationship issue; it neither contains an "establishment clause" as the Constitution of the United States provides nor establishes an official religion.

Article 2 of the Argentine Constitution provides that the State will support the Roman Catholic Church. The Supreme Court has interpreted the constitutional clause only as an obligation of the State to subsidize the expenses of Roman Catholic worship. Therefore, the Roman Catholic belief is not an official religion. It enjoys, however, a preferential treatment not granted to other religions.

In summary, . . . under the Argentine Constitution there is freedom of religion but not equality of religion.<sup>193</sup>

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189. TPCD No. 37, ch. 6, art. 21(a) (modifying Cód. Civ. 2346).

190. *Id.* art. 21(b) (modifying Cód. Civ. 3740).

191. Telefacsimile from William H. Wingo, Partner, Kirton & McConkie, to W. Cole Durham, Jr., Professor of Law, J. Reuben Clark Law School, Brigham Young University (Mar. 30, 1993) (on file with authors) (including translated language of proposed draft legislation months prior to the Senate's revision and discussing deletion of language in ch. 1, art. 2(h) before subsequent passage of the bill).

192. See TPCD No. 37, ch. 1, art. 2.

193. 10 KENNETH R. REDDEN & LINDA L. SCHLUETER, MODERN LEGAL SYSTEMS

Without a strict church-state separation in Argentina, the government has provided support for the Church through taxation.<sup>194</sup>

This symbiotic relationship has been a standard fixture in Argentine culture. Because of the governmental influence on the administration of the Church in Argentina, the Church has become a powerful institution to effect social change desired by the government. The impact on Argentine culture would be great if the state were to end its direct support of the Church. However, as long as direct support continues, non-Catholic

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CYCLOPEDIA 10.20.46, § 1.5(C) & n.143 (rev. ed. 1991) (noting G. BIDART CAMPOS, MANUAL DE DERECHO CONSTITUCIONAL ARGENTINO 169 (1985)).

194. The Catholic Church enjoys unusual benefits: it does not pay utilities, general taxes, or property taxes; part of its budget comes from the government; its priests are supported by the state; it receives governmental subsidies for parochial schools; and its subsidies come from a general fund derived from taxation, exacting money from all taxpayers, religious (Catholic or non-Catholic) or non-religious alike. Interview with Gustavo J. Berasaluce, Argentine attorney, in Provo, Utah (Feb. 7, 1995).

By way of comparison, the United States through its Establishment Clause, U.S. CONST. amend. I, affords a more distinct separation of church and state—that is, the United States does not have an established state church nor does it subsidize any church or churches with government funding. The (United States') Founding Fathers sought to guard against the publicly-aided institution of one or more religions. They guaranteed religious freedom through the Constitution, mandating that "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I. With this safeguard, American citizens would be free from compulsion to join a particular religion or to pay taxes in support of a religious entity in which they neither participated nor believed. An examination of originalist understanding shows the First Amendment aimed against such coercion.

A primary drafter and supporter of the First Amendment, James Madison clarified the wording of the First Amendment in the First Congress' debates; he "apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." 1 ANNALS OF CONG. 730 (J. Gales ed. 1934) (Aug. 15, 1789), noted in Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 936-37 (1986). Arguing that the proposed amendment was not intended to inhibit religion, Madison stated that he "believed that the people feared one sect might obtain a preeminence, or two combine together, and establish a religion to which they would compel others to conform." 1 ANNALS OF CONG. 731 (J. Gales ed. 1934) (Aug. 15, 1789), noted in McConnell, *supra*, at 937. Madison, in his well-known *Memorial and Remonstrance Against Religious Assessments*, states that "religion 'can be directed only by reason and conviction, not by force or violence,'" and that "compulsive support" of religion is "unnecessary and unwarrantable." McConnell, *supra*, at 937-38 (citing JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS ¶¶ 1, 3 (circa June 29, 1785)). For a look at a recent decision of the New York Court of Appeals (which was subsequently affirmed by the United States Supreme Court) construing modern Establishment jurisprudence, see generally Scott S. Thomas, Note, *Beyond a Sour Lemon: A Look at Grumet v. Board of Education of the Kiryas Joel Village School District*, 8 B.Y.U. J. PUB. L. 531 (1994).



churches are disadvantaged and inhibited by the Catholic Church's annual receipt of millions of dollars from the government.<sup>195</sup>

Even if the proposed law were passed, the provisions in the Argentine Constitution that provide funding for the Church would continue without alteration.<sup>196</sup>

## V. CONCLUSION

The constitutional reforms<sup>197</sup> and proposed legislative changes<sup>198</sup> demonstrate the increasing acceptance of non-Catholic religions in Argentina. A greater need and widening support to sever the close relationship between the Catholic Church and the Argentine government arise as the country continues to undergo dramatic changes and becomes more pluralistic. Although the newly proposed law did not pass Argentina's House of Deputies, the proposal demonstrates that the Argentine religious paradigm is shifting and should result in greater religious freedoms for everyone in Argentina. However, as long as the state financial and political support of the Catholic Church continues, true religious freedom will be inhibited.

Juan Bautista Alberdi, a prominent Argentine considered to be the father of the Argentine Constitution, declared that Argentina would either be exclusively Catholic and uninhabited, or it would be inhabited and prosperous if tolerant in religious subjects.<sup>199</sup> Perhaps further constitutional reform, augmenting religious liberty and removing the Catholic Church from its preferred status, will occur only when a non-Catholic is elected president.

*David E. Doxey*  
*Scott Stephens Thomas*

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195. See *supra* note 10 and accompanying text.

196. See TPCD No. 37, ch. 2, art. 6 (preserving the preferred status of the Catholic Church); see also discussion *supra* part IV.C.2.

197. See discussion *supra* part IV.A.

198. See discussion *supra* parts IV.A, B.

199. Dr. José Camilo Cardoso, Remarks at the Symposium of The International Academy for Freedom of Religion and Belief, The J. Reuben Clark Law School and The David M. Kennedy Center for International Studies 4 (Apr. 3, 1995) (transcript available from the *Brigham Young University Law Review*) (noting Alberdi's comment regarding church-state relations in Argentina). See generally JUAN B. ALBERDI, BASES Y COMENTARIOS DE LA CONSTITUCIÓN ARGENTINA (1920).

APPENDIX A<sup>200</sup>THE NATIONAL HOUSE OF DEPUTIES  
PARLIAMENTARY SECRETARY  
PARLIAMENTARY TREATMENT  
1993 Period

No. 37

Monday, June 21, 1993

[Ministry of Foreign Relations, International Commerce, and  
Worship]

CHAPTER 1  
FUNDAMENTAL PRINCIPLES

Article 1.—In the Argentine Republic, every person enjoys the fundamental right to the freedom of conscience and of religion guaranteed by the National Constitution.

Religious beliefs can never constitute a motive for inequality or discrimination before the law; nor can they be justification for prohibiting anyone from the carrying out of their functions or public responsibilities or their entry into public institutions, under pain of nullification of the norm that decrees otherwise.

Art. 2.—Religious freedom includes, in particular, the following rights:

- (a) To profess the religious beliefs that are freely chosen, or not to profess any; to change them or to abandon those that one has; and to manifest them freely or to abstain from doing so;
- (b) To practice, individually or collectively, the acts of worship corresponding to their particular religion, in public or in private; and not to be obligated to practice acts of worship contrary to one's personal convictions;

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200. The newly proposed law, TPCD No. 37, was translated by Mr. Thomas with help from Gustavo J. Berasaluze.

- (c) To receive assistance from the ministers of one's particular religious persuasion, in particular in hospitals, jails or barracks; and to receive worthy burial according to one's particular convictions without any of this being the cause of discrimination;
  - (d) To associate together for the common development and practice of religious activities and to meet together or conduct public manifestations for religious purposes.
  - (e) To receive and impart religious teachings and information through whatever legitimate means, in public or in private; and to select for oneself, or for minors or those who are incapacitated whose guardianship is exercised legally, religious and moral education, in accordance with one's own convictions;
  - (f) Not to be obligated to swear an oath according to terms that violates one's personal religious convictions;
  - (g) Not to be obligated to reveal one's personal religion, except in cases of a census or general polls ordered by law;
  - (h) To participate individually or collectively in social life through acts or undertakings motivated by religious beliefs;
  - (i) To commemorate their religious festivities, observe the day that according to their doctrine is dedicated to religious celebration and celebrate their marriage rituals with due protection to the public order.
- The preceding clause is not restrictive.

Art. 3.—Churches, denominations or religious communities, without prejudice to the rights of their members, have the right:

- (a) To establish temples or religious facilities for worship and personal cemeteries;
- (b) To establish and maintain schools or places of education, homes, hospitals, publishing houses, or necessary service organizations for the publication of their doctrine;
- (c) To maintain free communication with their members and with other churches or religious communities within this country or abroad;
- (d) To designate, prepare, and support the ministers of their faith.

Art. 4.—The exercise of the rights derived from religious freedom and of conscience has, as its only limit, the rights of others in the exercise of their own liberties, and those that impose public order, health and public morality.

Religious convictions cannot be invoked to abstain from fulfilling public responsibilities imposed by the National Constitution or by law.

A special law will regulate the right of conscientious objection.

Art. 5.—Not to be considered sheltered by this law are the activities and entities related to the study of or experimentation related to astrophysical, psychic or parapsychological phenomena, or the dissemination of philosophical, humanistic or spiritualistic values with purposes foreign to religious ones.

Not sheltered either is the public use of denominations, symbols or exterior forms notoriously utilized or identified with a church or religious denomination in a different way than that in which it is intended to employ them, except with express permission by the entity affected.

## CHAPTER II

### RELATIONS WITH THE ROMAN CATHOLIC CHURCH

Art. 6.—Relations between the National State and the Roman Apostolic Catholic Church, whose preexisting public legal status has been recognized by the National Constitution, will continue, as they have to the present, under the principles of autonomy and cooperation established in the agreement approved by law no. 17.032.

## CHAPTER III

### THE REGISTRY OF CHURCHES AND RELIGIOUS DENOMINATIONS

Art. 7.—Churches and religious communities and denominations will enjoy legal status with the status as such, once they have been inscribed in the respective Registry, which will be maintained in the Ministry of Foreign Relations, International Commerce, and Worship.

Inscription in such registry will be voluntary.

Failure to be registered will not impede the actuation of the entity with respect to the freedom of association, nor in the exercise on the part of its members of the rights that are recog-

nized in the present law; nor in the exercise of police power on behalf of the State.

Art. 8.—The Executive Branch will dictate the regulatory norms of the Registry mentioned in the previous article, subject to the following norms:

(a) that the church or religious community which solicits registration comply with at least one of the following requirements:

(1) To prove its effective presence in not less than three provinces or jurisdictions in the national territory.

In the case of churches or organizations that do not recognize a central authority and are comprised of autonomous communities, the joint presentation of churches or communities that share the same doctrine and as a whole fulfill the requirement expressed in the first paragraph will be sufficient.

(2) To be official churches or religious organizations of States that maintain diplomatic relations with the Argentine Republic or of foreign-based Patriarchal delegations in the country.

(3) To prove to have a presence of one hundred years in the country.

(4) To prove a minimal number of members equal to five percent of the total population of the provinces in which they practice;

(b) They must prove the date of their initial presence in the Republic, their name and other identifying data, system of operation and internal representative bodies, declaring their characteristics and requirements for their valid designation;

(c) They must explicitly define their religious principles, identify sacred books or the most important other sources of their doctrine and internal organization; their worldwide structure and approximate number of members or faithful in the country and in the world;

(d) The request for registration will include a succinct but complete explanation of their principal rites or cultural celebrations, of the ministerial structure and the means of entering the ministry, and of the form of incorporation of the church or religious community;

- (e) The registration of federations, conventions or confederations that combine the requirements established in the law and its regulation will be allowed;
- (f) There will not be inscribed in the Registry associations or entities which are not strictly religious, nor cultural or educational entities, nor those of service or assistance, even when these are organized in conjunction with a religious affinity of its members or for the publication or dissemination of religious ideas; without prejudice of the right of the registered churches or religious organizations to organize, possess, or direct them;
- (g) The cancellation of an inscription in the Registry can only be accomplished at the request of the Church or religious community itself, by judicial decree or by administrative resolution, founded on transgression proven by law and with a prior summary in which the right of defense is guaranteed. The authority of application may impose warning sanctions or suspension of the registration if the seriousness of the wrong does not justify cancellation.

The regulation of this law will envisage the means to maintain up-to-date the information in the Registry.

Art. 9.—Inscription in the Registry will carry with it, for the churches and the religious communities or denominations inscribed therein, the following rights:

- (a) The right of recognition of its religious ministers in their character as such, and the granting to them of the necessary faculties for the exercise of their ministry;
- (b) The right to obtain exemption from military conscription for its ministers or seminary enrollees, according to the provisions of law no. 17.531;
- (c) The right to obtain the exemptions or benefits that the laws in effect provide for churches or religious communities;
- (d) Protection against embargo or execution of the temples or places of worship, and of the sacred objects or those destined exclusively for worship, so long as the title of ownership corresponds to the church or religious community or denomination and does not deal with tax

debts or those derived from their construction or acquisition;

- (e) The right to receive the treatment granted to entities of public welfare, without the necessity of additional registration whatsoever;
- (f) To utilize the public media of broadcasting according to the specified regulations;

Art. 10.—Registered churches and religious communities or denominations will enjoy full autonomy and can freely establish their internal structure and organizational norms.

Art. 11.—The Executive Branch can make agreements of cooperation with those registered churches and religious communities or denominations that because of their universal presence, historical traditions in the country, stable structure of their creed and number of members, offer guarantees of permanence in the country.

Such agreements ought to be submitted for legislative approval to the extent that they exceed the powers of the Executive Branch.

#### CHAPTER IV

##### THE ADVISORY COUNCIL ON RELIGIOUS MATTERS

Art. 12.—Within the jurisdiction of the Ministry of Foreign Relations, International Commerce, and Worship and presided over by the sub-Secretary of Worship, an Advisory Council of Religious Matters will function, of honorary character, whose members represent in the best manner possible the religious spectrum of the country.

Art. 13.—The exclusive functions of the Council will be the following:

- (a) To provide advice to the public authorities on the national or provincial level, insofar as they require, in matters linked to religious subjects;
- (b) To advise the Executive Branch in the elaboration of the agreements of cooperation mentioned in Article 11;
- (c) To intervene in the elaboration or modification of the regulatory norms of the present law.

Art. 14.—The council members will be designated by the Ministry of Foreign Relations, International Commerce, and Worship for a period of three years, with previous consultation from the principal religious denomination and always where the religious denomination to whom the chosen persons pertain does not object. They must be persons of recognized experience and competence on the subject and will not exercise the official representation of the religious denomination to which they pertain. The regulation will foresee the number of council members to a maximum of twelve (12) and their staggered renewal.

#### CHAPTER V PROTECTION OF RELIGIOUS FREEDOM

Art. 15.—Every person, church or religious community, can bring an action for relief against whatever act or omission of a public authority or of a private person or entity, that in a real and imminent way harms, restricts, alters or arbitrarily threatens any of the rights mentioned in the present law.

It will not be considered injurious of religious liberty the fact that the institutions or denominational entities demand from their members or employees that they conform their conduct and their doctrine to the religious or moral principals of the institution, or that they make reasonable use of their right of admission.

The action will have as its objective the immediate cessation of the effects of the act or omission or the dictation of pertinent precautionary measures, without prejudice to the reparations that may be forthcoming and which must be sought through ordinary channels.

The judgment will be substantiated before federal judges and, in the city of Buenos Aires, before the national judges in Civil and Federal Commercial cases. In the latter case, the highest jurisdiction that is provided for by the Civil and Commercial Procedural Code of the Nation will apply.

Art. 16.—There will be a recourse of appeal before the National Chamber of Appeals in Federal Civil and Commercial cases in the city of Buenos Aires, against the definitive administrative decisions which reject an inscription in the Registry created by Chapter III of this law.



CHAPTER VI  
TEMPORARY DISPOSITIONS

Art. 17.—The registrations granted to the present by the National Registry of Churches created by law no. 21.745, will retain their validity for two years from the effective date of the present law.

Once this period has passed, such registrations will expire as a matter of law.

Art. 18.—Churches and religious communities and denominations that, on the date on which this law becomes effective, enjoy legal status under the category of civil associations or another category that does not conform to its particular religious structure, and obtain the registration referred to in chapter III of this law, can transfer their reportable property to the name of the church or religious community or denomination, with exemption from all taxes or fees that are assessed for the transfer of property or such documentation and actions thus originated, provided that:

- (a) the organs of the association or legal representative presently functioning with capacity to dispose of its properties provide express conformity; and,
- (b) the transfer is finalized within a period of one year from the date this present law goes into effect, a period which can be extended for an equal period and only one time by the Executive Branch.

When an entity has opted for the procedure provided for in this article, the church or religious community or denomination which receives the property will be solely responsible, with the transferring association or legal representative, for the existing debts of the same on the date of the transfer.

Art. 19.—The Executive Branch will dictate the regulatory norms of the present law within ninety (90) days of its effective date.

Art. 20.—Law no. 21.745 is hereby repealed.

Art. 21.—The following articles of the Civil Code are hereby modified:

- (a) In article 2346, the term "dissident churches" will be replaced with the term "churches or religious communities or denominations."
- (b) In article 3740, the word "Protestant" will be replaced by the word, "religious."

Art. 22.—[According to form.]

## APPENDIX B

SIGNIFICANT CONSTITUTIONAL CHANGES BY THE  
CONSTITUENT ASSEMBLY<sup>201</sup>

The new national constitution that the Constituent Assembly approved today has 129 articles and 17 temporary provisions.

The reforms introduced into the constitution added 19 new articles to the 1853 text, amended 40 items in existing articles and added a new chapter on New Rights and Guarantees.

The outstanding points of the new constitution, which will become effective at 0000 (local time) on 23 August, are the following:

The president and the vice-president are elected in direct elections. The term lasts four years and they can be re-elected once.

*[T]he requirement that the president be Roman Catholic was dropped.*<sup>202</sup>

Presidential and vice-presidential candidates will compete in a runoff election when neither obtains 45% of the votes, or 40% with a 10% advantage over the candidate in second place.

The post of Chief of Cabinet is created.

As of 1995, each province will have a third senator elected by local legislatures to represent the minority.

The city of Buenos Aires will have an autonomous government and the mayor will be elected in direct elections.

The existence of political parties and the state's contribution to maintain them is recognized.

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201. Unless otherwise noted, the material in this appendix is taken (verbatim) from *Argentina: Constituent Assembly Approves New Constitution*, Reuter Textline, BBC Monitoring Service: Latin America, Aug. 24, 1994, available in LEXIS, Nsamer Library, Argen File (summarizing report by Noticias Argentinas news agency).

202. *Argentina: Less Power, More Time*, Economist Intelligence Unit, Business Latin America, Sept. 5, 1994, available in LEXIS, Nsamer Library, Argen File (emphasis added).

Ordinary congressional sessions are extended to nine months.

Congress must approve required and urgent decrees and delegated legislation.

Initiatives and questions to the people are introduced as mechanisms of semi-direct participation.

Laws can be introduced by both chambers of Congress, and individual citizens also now have the right to submit bills to the Chamber of Deputies, which must take them up within 12 months.<sup>203</sup>

The National General Auditor's Office is created. It will be headed by a representative of the largest opposition group.

The Attorney-General's Office is established as an independent entity.

The position of an independent and fully autonomous ombudsman is created.

The Council of Magistrates is created.

As of 1999, judges will retire when they reach 75.

Supreme Court justices will be designated by the president and confirmed by the Senate with the votes of two-thirds of its members.

A new system of federal revenue sharing will be approved before 31st December 1996.

Provinces may establish regions for their economic development.

Free and equal schooling principles are guaranteed in the public school system. Autonomy and self-sufficiency for national universities are also guaranteed.

Nine international treaties on human rights, such as the San Jose de Costa Rica Pact and the Declaration on Children's Rights, are incorporated.

Petitions of amparo (protection), habeas corpus and habeas data are incorporated.

User and consumer rights are promoted.

The prior ethnic existence of indigenous people and their rights, as well as the common ownership of lands they traditionally occupy, are recognized.

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203. *Id.*

The protection of children from pregnancy until  
the end of their elementary education is established.