

## Tolerance and Religious Freedom: The Struggle in Peru To Tolerate Multiple Cultures in Light of Principles of Religious Freedom

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### I. INTRODUCTION

In his exposition to the emperor Nero, Seneca, that extraordinary Roman sage of Spanish origin, taught of the importance of the virtue of tolerance.<sup>1</sup> He said that tolerance requires “a wise moderation” that is difficult to obtain, but that “no one of all the virtues is more seemly for a man.”<sup>2</sup> As a virtue, tolerance is centered between cruelty and pity.<sup>3</sup> He who limits himself to the practice of abstention in society is not tolerant but rather he who always practices the virtue of kindness—that is, doing good wherever he is and in whatever circumstances he finds himself.<sup>4</sup>

I remember having returned to this idea when, representing the Latin American Consortium of Religious Liberty, I presented the

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1. See 1 LUCIUS ANNAEUS SENECA, *De Clementia*, in SENECA MORAL ESSAYS 357, 434–35 (E. H. Warminton ed., John W. Basore trans., Harvard University Press 1970) (1928). The author interprets the Latin term “clementia,” as used in Seneca’s essays, as a descriptor for the virtue tolerance.

2. *Id.* at 364–65. Although Seneca was discussing tolerance largely in terms of affixing an appropriate punishment, *id.*, the author posits that the principles underlying his view of clemency also apply to tolerating members of society on a broader scale.

3. *Id.* at 436–39.

4. Unfortunately, other scholars have made tolerance an attribute with negative connotations. See, e.g., Guillermo García-Montúfar & Elvira Martínez Coco, *Antecedents, Perspectives, and Projections of a Legal Project About Religious Liberty in Peru*, 1999 BYU L. REV. 503, 509 (“We do not use the term ‘tolerance’ because none of its meanings correctly describe the situation we are mentioning. To ‘tolerate’ implies suffering with patience, disguising something that is not right; without agreement it implies only endurance.”). Active tolerance in dealing with other cultures, as espoused in this paper, means much more than an arms length relationship of allowing others to exist; indeed, “[i]t is neither about suffering another’s thought nor enduring the conviction of another, but of understanding, conceiving, and accepting.” *Id.*

Consortium's views on tolerance to Latin American political and religious authorities in November 2005.<sup>5</sup> On that date, by invitation of the Mexican Government, Mexico City celebrated the International Day of Tolerance in compliance with the corresponding resolution approved by the United Nations General Assembly in 1996.<sup>6</sup>

On that occasion, I expressed that, as Seneca so well defined it, tolerance is an active virtue rather than a passive one.<sup>7</sup> I added that it was not a matter of simple activism, devoid of substance. On the contrary, in today's world that activism is fueled by love—unconditional love of freedom, unconditional love of justice, unconditional love of truth and, above all, by an inexhaustible love of God above all things and an intense love of self as a reciprocal consequence of love for others.

One year later, in celebration of the twenty-fifth anniversary of the United Nations General Assembly's enactment of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief ("1981 Declaration"),<sup>8</sup> I now add that the loving component of tolerance requires various tools in order to bear fruit. It is not enough to love; it must be done well.<sup>9</sup>

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5. For a detailed history of the evolution of religious tolerance, the origin of the 1981 Declaration, and its general impact, see Derek H. Davis, *The Evolution of Religious Freedom as a Universal Human Right: Examining the Role of the 1981 United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, 2002 BYU L. REV. 217.

6. See Follow-Up to the United Nations Year for Tolerance, G.A. Res. 51/95, U.N. Doc. A/RES/51/95 (Dec. 12, 1996).

7. See Press Release, Kofi Annan, Sec'y Gen., United Nations, Tolerance 'An Active and Positive Engagement with Human Diversity' Says Secretary-General on International Day Of Tolerance, U.N. Doc. SG/SM/8492 (Nov. 14, 2002) ("Tolerance is not to be confused with passivity, complacency or indifference. Tolerance is an active and positive engagement with human diversity, and is therefore a key principle of democracy in our multi-ethnic and multicultural societies.").

8. Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, U.N. GAOR, 36th Sess., Supp. No. 51, U.N. Doc. A/36/684 (Nov. 25, 1981) [hereinafter 1981 Declaration].

9. This view of tolerance correlates to the definition espoused by UNESCO in declaring the International Day of Tolerance:

Tolerance is respect, acceptance and appreciation of the rich diversity of our world's cultures, our forms of expression and ways of being human. It is fostered by knowledge, openness, communication, and freedom of thought, conscience and belief. Tolerance is harmony in difference. It is not only a moral duty, it is also a political and legal requirement. Tolerance, the virtue that makes peace possible,

This Article explains how legal authorities can improve their ability to incorporate the tenets of the 1981 Declaration and learn to love well, specifically in dealing with the wide variety of cultures within their population. To this end, Part II addresses the basic philosophies of how to love and tolerate well and why these ideals play an important role in Peru's current legislative approach to religious freedom. Part III analyzes these principles of tolerance with respect to the treatment of indigenous Peruvian cultures. Part IV summarizes the Article's principle recommendations with a brief conclusion.

## II. PRINCIPLES FOR CREATING A REGIME OF TOLERANCE

In order to apply the principles of tolerance, we must first understand what it means to tolerate actively and love well.<sup>10</sup> First, we must come to know the object of our love with clarity.<sup>11</sup> In matters of ecclesiastical law, in order to act legally and with due tolerance in society, we have an obligation to be familiar with those special characteristics of society which will be the object of our tolerance before formulating regulations.<sup>12</sup> Ignorance in this matter is tantamount to aggression.<sup>13</sup>

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contributes to the replacement of the culture of war by a culture of peace. . . . Tolerance is not concession, condescension or indulgence. Tolerance is, above all, an active attitude prompted by recognition of the universal human rights and fundamental freedoms of others. In no circumstance can it be used to justify infringements of these fundamental values. Tolerance is to be exercised by individuals, groups and States.

U.N. Educ., Scientific, & Cultural Org. [UNESCO], *Declaration of Principles on Tolerance*, art. 1, 28 C/Res. 5.61 (Nov. 16, 1995), available at <http://www.unesco.org/cpp/uk/declarations/tolerance.pdf>.

10. See Jordan J. Paust, *Tolerance in the Age of Increased Interdependence*, 56 FLA. L. REV. 987, 992 (2004) (noting that tolerance and love go hand in hand and that tolerance is necessary to love).

11. See UNESCO, *supra* note 9, art. 1 (“[Tolerance] is fostered by knowledge . . .”).

12. See Sol Wachtler, *Judicial Lawmaking*, 65 N.Y.U. L. REV. 1, 16 (1990) (noting that the knowledge needed for lawmaking includes the knowledge of present societal beliefs, understandings, and relationships).

13. Enacting laws without understanding the cultures and religions that will ultimately be affected is a form of aggression because some laws, while not affecting the majority negatively, will impose difficulties on certain groups within the population. See, e.g., Adam Fraser, Comment, *Protected From Their Own Beliefs: Religious Objectors and Paternalistic Laws*, 18 BYU J. PUB. L. 185, 195 (2003) (noting that a legislative lack of understanding of certain cultures, such as the Amish, have caused the creation of laws that impose severe hardship on them because of their religious beliefs). Indeed, as Johann Wolfgang von Goethe noted,

Second, we must imbue our juridical task with humility. In order to do this we must predispose our minds and our praxis to accept a priori that as humans we have weaknesses and limitations, and therefore our juridical reflection and our regulatory plans must begin with the premise that we do not own the truth.<sup>14</sup> We may share the truth with others who see it from a different point of view; however, the state religion which seeks to impose official truths is socially harmful.<sup>15</sup>

Third, it requires the generosity necessary to accept, above all else, the virtues of others. As Secretary General Kofi Annan stated, “Tolerance cannot simply mean passive acceptance of other peoples’ perceived peculiarities.”<sup>16</sup> Generosity as a component of tolerance means that we must not see others’ viewpoints and virtues as temporary inconveniences that we allow until converted into our own; rather, generosity means an acceptance and celebration of another’s right and ability to think and exist.<sup>17</sup> As the UNESCO delegates stated,

Consistent with respect for human rights, the practice of tolerance does not mean toleration of social injustice or the abandonment or weakening of one’s convictions. It means that one is free to adhere to one’s own convictions and accepts that others adhere to theirs. It means accepting the fact that human beings, naturally diverse in their appearance, situation, speech, behaviour and values, have the

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“There is nothing more frightful than ignorance in action.” GEORGE SELDES, *THE GREAT QUOTATIONS* 281 (1993) (quoting Johann Wolfgang von Goethe).

14. “The possibility of error is inherent to the human mind, and, thus, in certain circumstances, we cannot know for sure if we are indeed in the truth. This must make us more tolerant of people who think differently than we do.” Fernando de Trazegnies Granda, *Law in a Multicultural Society: The Peruvian Experience* 12 (Disputes Processing Research Program, Working Paper No. 7:10, 1987).

15. See William P. Marshall, Essay, *The Limits of Secularism: Public Religious Expression in Moments of National Crisis and Tragedy*, 78 NOTRE DAME L. REV. 11, 20 (2002) (stating that state-sponsored religion does not allow tolerance of non-conformity and eliminates the dynamic of competing moral authorities).

16. Press Release, Kofi Annan, Sec’y Gen., United Nations, Secretary-General Calls for Active Effort To Learn About Each Other, In Message To Mark International Day of Tolerance, U.N. Doc. SG/SM/10208 (Nov. 11, 2002).

17. Indeed, “only the acceptance of the beliefs and convictions of others will permit and facilitate the acceptance of our own.” García-Montúfar & Martínez Coco, *supra* note 4, at 509.

right to live in peace and to be as they are. It also means that one's views are not to be imposed on others.<sup>18</sup>

I consider the foregoing reflections important because since the 1948 Universal Declaration of Human Rights issued in Paris by the United Nations General Assembly,<sup>19</sup> human virtues and values, while maintaining their inherent natural value, have acquired the status of compulsory binding standards. In my country of Peru, moral laws have become legal regulations and respect for the idea of the absolute, once the realm of religion, has become the subject of law.<sup>20</sup> It is therefore incumbent upon those of us who devote our work to the fundamental rights of the human being, especially those who focus on the right to religious freedom, not to lose the larger perspective of natural principles in light of the enactment of positive law.<sup>21</sup> Indeed, we must reconcile the individual's social relations and actions from a permanent perspective of eternal truth.

It is not a question of taking a legalistic approach to human values and virtues or of reducing our beliefs regarding our beginning and end to a positivist exercise.<sup>22</sup> That would equate to reducing the human being to a product of his own culture. The German positivist

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18. UNESCO, *supra* note 9, art. 1.

19. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 10, 1948).

20. For example, the Peruvian Constitution incorporates the provisions of the Universal Declaration of Human Rights through reference by stating, "The norms concerning the rights and freedoms that the Constitution recognizes are interpreted in accordance with the Universal Declaration of Human Rights and with the treaties and international agreements concerning corresponding matters ratified by Peru." CONSTITUCIÓN POLÍTICA DEL PERÚ, final and transitory provision 4 (Peter B. Heller trans., 1993). Similarly, "[t]reaties signed by the State and in force are part of national law." *Id.* art. 55.

21. See Davis, *supra* note 5, at 217 ("Although the 1981 Declaration offers broad protections for religious freedom, it takes far more than words on paper to make religious freedom a reality for all peoples of the world.").

22. See García-Montúfar & Martínez Cocco, *supra* note 4, at 505–06 ("It is not enough to consider what is stated in the judicial norms (which tend to be the same for everyone). Similarly, it is not enough to normatively recognize the fundamental rights in international instruments or constitutions. Often, in practice, the realization of freedom is not concretely expressed; it is not developed by creating equal rights in specific arenas; it is not applied by all tribunals; and it is not respected by all administrative state branches."); see also Thomas W. Waelde & James L. Gunderson, *Legislative Reform in Transition Economies: Western Transplants—A Short-Cut to Social Market Economy Status?*, 43 INT'L & COMP. L.Q. 347, 360 (1994) ("It is a delusion to believe that the formulation and enactment of foreign statutes will bring about the transition . . . desired. The fallacy is in thinking that legislation *per se* without (or rather than) . . . policy backed by social and institutional change, can be the lever for change.").

school of Kelsen, which has had a great influence in the Peruvian juridical thinking,<sup>23</sup> has now fallen into obscurity in spite of certain schools of thought that stubbornly perpetuate it.<sup>24</sup> At this moment, I see a new juridical trend in Peru, which rather than reducing the law to rigid grammatical forms, elevates it to the same significance as the human being himself.<sup>25</sup> The emergence of the humanist school of law returns things to their natural state—that is, the law at the service of the individual and not the reverse.

If not so, it would be impossible for the world of law to incorporate into regulations such ideas as kindness, solidarity, truth, tolerance, freedom, belief, and so forth. Even less possible would be to speak with any authority or scientific rigor, in this forum or any other, regarding the fundamental rights of the human being. Lawmakers should establish this task of humanizing the law as a permanent practice, and in their work of legislating, should always bear in mind these three components of tolerance: understanding, humility, and generosity.

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23. See, e.g., Jorge L. Esquirol, *Continuing Fictions of Latin American Law*, 55 FLA. L. REV. 41, 59 (2003) (“The eminent, Austrian jurist Hans Kelsen is often presented as a sufficient and exhaustive description of Latin America’s legal consciousness. Mainstream analyses signal the larger-than-life impact of this European jurist. For many commentators, after citing Kelsen no more need be said. For them, Kelsen is a shorthand for describing a system of positive law formalism, essentially a belief in the hierarchical sources of legal authority—from regulations to statutes to constitutions—and the law as a relatively autonomous system—the pure theory of law. Kelsen, coupled with a Spanish, scholastic past often constitutes the extent of explanation of Latin America’s official legality. Its natural law and deductive logic tradition is simply understood to be updated by reference to Kelsen’s theory of graduated legal sources and the autonomy of law from other spheres of social life.”); Dale B. Furnish, *The Hierarchy of Peruvian Laws: Context for Law and Development*, 19 AM. J. COMP. L. 91, 92 (1971); Josef L. Kunz, *An Introduction to Latin-American Philosophy of Law*, 15 U. TORONTO L.J. 259, 267–68 (1964) (“But the greatest, and overwhelming, influence exercised in Spanish-American contemporary philosophy of law is that of Hans Kelsen . . .”).

24. See Esquirol, *supra* note 23, at 59–60 (finding that commentators cite Kelsen to describe a system of positive legal formalism, essentially a belief in the hierarchical sources of legal authority, arguing, however, that attempting to understand Latin American law solely through one’s view of Kelsen is unsatisfactory and misleading).

25. See García-Montúfar & Martínez Coco, *supra* note 4, at 506 (stating that “[o]ne must be cautious” of merely adopting judicial norms because of the danger that these norms actually conceal human rights violations); see also HENRY P. DE VRIES & JOSÉ RODRIGUEZ-NOVAS, *THE LAW OF THE AMERICAS* 172 (1965) (“[The Latin American] constitutions have often been reduced to aspirational statements rather than a means of controlling governmental action. . . . Thus, though the forms of constitutional government have long been present, the sociological basis for effective implementation of the written words is often lacking.”).

### III. TOLERANCE OF PERUVIAN INDIGENOUS CULTURES

In Peru, many Christian religions, as they proselyte in good faith, impose their culture, often consisting of lifestyles and tendencies foreign to their hearers' traditional way of life.<sup>26</sup> For example, Rafo León, a writer and implacable traveling observer of the vast and complicated land of Peru, recounts,

During a trip through Santa María de Nieva [in the heart of the Amazon jungle] where I was photographing the daily life of an agrarian community, [I saw that] certain evangelical groups in the region are doing away with the traditional practices of these communities as virulently as did the rubber harvesters to a great extent in the Amazon. The ban on singing sweeps away the ancient custom of improvising tunes to accompany hunting, fishing, or even nursing a baby. The veto on alcohol is causing a rapid decline in the production of masato, a nutritious drink with proven medicinal properties. The imposition of western-style dress—in this case also sanctimonious and suffocating—is gradually doing away with cool and beautiful textiles on which symbols and stories are expressed. The fundamentalist and Manichean religious ideology destroys the freedom of thought and action with which the natives have sustained themselves in their own way for centuries.<sup>27</sup>

Is a portion of Peru's culture being destroyed?<sup>28</sup> What form should tolerance take in the face of this reality? Can Peru reconcile tolerance of the foreign with national identity?

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26. See Augustin Motilla, *Religious Pluralism in Spain: Striking the Balance Between Religious Freedom and Constitutional Rights*, 2004 BYU L. REV. 575, 579. Religious hegemony and intolerance can cause significant problems. *Id.* First, a policy of cultural uniformity can work to increase social tension between the dominant religion and the religious minorities. *Id.* Second, cultural uniformity is hypocritical in that diversity is a value which enriches individual freedom and social coexistence. *Id.* Thus, pluralism as a social value promotes respect and intercultural peace, despite the discrepancies and differences in the various values and belief systems. *Id.*

27. Rafo León, *Liberación de la Teología* [*Theology Release*], SOMOS, July 1, 2006, at 66.

28. Peruvian indigenous leaders have increased their efforts to prevent the government from neglecting their legal needs and trampling on their cultural heritage. For example, the Atalaya Declaration, drafted by indigenous leaders in Peru, contains the following:

Indigenous people have been and continue to be historically discriminated against and disfavored with regard to fundamental human rights, respect for our languages, cultures, traditional economies, natural resources and religious practices. In addition, we continue to be victims of forced relocation . . . Faced with the lack of respect for our fundamental rights by the Peruvian State and with the serious impacts already caused by the companies REPSOL and PLUSPETROL on our . . .

Bear in mind that the actions of some religions are perfectly legitimate given that they act within the invulnerable framework of religious freedom protected by current regulations. It is also important to note that those cultures do offer a natural resistance; indeed, due to a societal group's cultural inertia, indigenous populations will, to a large degree, reinforce their fundamental substantive religious traditions in response to any type of "social invasion" and assimilate only that which enriches their culture.<sup>29</sup> However, Peru must recognize that the communication techniques of western Christianity and its dominant culture may generate important and irreparable changes in the worldviews of the indigenous cultures of America. A grave risk, which León noted in fact does happen, is that the irresponsible ardor of fundamentalist preaching may break down that natural resistance, resulting in an irreparable loss of Peru's cultural heritage.<sup>30</sup>

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environment, we resolve . . . [t]o say no to the entrance of the oil [companies] PLUSPETROL and [REPSOL] in our territories, as well as mining, logging and other transnational companies . . . [and] accuse the Peruvian government of noncompliance with the following international treaties: ILO Convention 169 . . .

Atalaya Declaration, Oct. 14 2005, [http://www.earthrights.org/content/view/127/41/1/1/](http://www.earthrights.org/content/view/full/127/41/1/1/) (last visited Feb. 16, 2007).

29. For an example of natural reinforcement and assimilation from Peruvian history, see García-Montúfar & Martínez Coco, *supra* note 4, at 511 (stating that the Spanish conquest of Peru resulted in a "religious dualism," blending Catholicism and paganism into a new indigenous religion). Members of Native American tribes in the United States had similar experiences of retaining old cultural traditions while assimilating Christian beliefs. See, e.g., Kristen A. Carpenter, *Considering Individual Religious Freedoms Under Tribal Constitutional Law*, 14 KAN. J.L. & PUB. POL'Y 561, 583-84 (2005) (recounting the experience of tribal women who adopted Christian beliefs while maintaining elements of their cultural heritage, such as medicine and dance).

30. Granted, many fundamentalist missionaries incorporate traditional cultures and customs into their proselyting activities. See, e.g., *Priest Honored for Preserving Balinese Culture*, NAT'L CATH. REP., Feb. 25, 2005, available at [http://www.findarticles.com/p/articles/mi\\_m1141/is\\_17\\_41/ai\\_n13499360](http://www.findarticles.com/p/articles/mi_m1141/is_17_41/ai_n13499360) (recounting an award presented to a priest for his assistance in compiling a Balinese dictionary and explaining how church leaders adopt the culture by "using Balinese language in liturgy and prayer, wearing traditional dress during religious services and incorporating Balinese symbols in churches"); see also David M. Smolin, *Religion, Education, and the Theoretically Liberal State: Contrasting Evangelical and Secularist Perspectives*, 44 J. CATH. LEGAL STUD. 99, 122 (2005) ("While a secular cynic would likely complain that Christian children are only learning about other cultures so they can destroy them, the perspective of many evangelicals is that Christianity is capable of being incarnated and indigenized within these various cultures in authentic ways."). Certainly, religions that understand and preserve the cultural heritage of the indigenous population should continue to have the opportunity to spread their ideology in a humble manner. However, we do not fulfill our duties of tolerance by ignoring the "products of Christian missionary enterprise of reaching and then transforming cultures." *Id.*

*A. Understanding*

Although the Peruvian Legislature has passed laws regarding the variety of cultures<sup>31</sup> within its country, it fails to implement the concept of tolerance because it lacks the understanding necessary to legislate on behalf of different subsets of the Peruvian people.<sup>32</sup> For example, in some of our Andean countries, out of sheer apathy, legislators often copy laws verbatim from those enacted in other places.<sup>33</sup> Legislators do not go to the trouble of getting to know the reality of the situation in their own country where the law will be enforced.<sup>34</sup> The last congressional session in Peru featured more than a hundred bills to be discussed which had been copied verbatim from the Internet.<sup>35</sup> Let us hope that the new Congress will not repeat this mistake. Legislating in this manner is a form of intolerance.<sup>36</sup>

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31. While the majority of the Peruvian population is a mix of races and cultures, in a very broad sense three main cultures exist in Peru—the Occidental culture, the Indian culture, and the Amazonian culture. The Occidental culture is individualistic, modern, and controls the majority of government and big business in Peru. The Indian culture consists of the poor peasants of the highlands who have only been thinly integrated into national politics and economics. The Amazonian culture consists of the minorities living in the Amazon jungle. This cultural subset has received the worst treatment from the Occidental culture and has lost most of its tribal social life. De Trazegnies Granda, *supra* note 14, at 5–6.

32. One commentator has expressed that Peruvian lawgivers not only have a lack of understanding of different Peruvian subcultures, but also a “deep contempt” for them. “[T]he lawgiver has looked down upon ‘inferior’ cultures which have not yet received the blessings of civilization” as primitive and degraded because anyone who knows the “Occident culture and does not accept it has started a degrading cultural road.” *Id.* at 9.

33. This practice has also occurred in other Latin American countries. *See, e.g.*, Keith S. Rosenn, *The Reform of Legal Education in Brazil*, 21 J. LEGAL EDUC. 251, 254 (1969) (“Brazil, like most Latin American countries, has generally looked toward European sources for the development of its legal system. . . . Consequently, laws were frequently imported from foreign legal systems without consideration of their appropriateness to . . . society, and in a good many areas, laws are so out of touch with social reality that the society is able to function at all only by ignoring the law . . .”).

34. For a discussion on the history and efficacy of “legislative transplants,” see Waelde & Gunderson, *supra* note 22, at 366–72. “The effect of law depends mainly on its context—institutions, social and political forces and legal culture. While it is comparatively easy to copy the text of a foreign law, it is virtually impossible to transfer this context.” *Id.* at 372.

35. *See* Cámara de Comercio de Lima, *Ccl Respalda Proyecto Para Evitar Clonaciones en Nuevas Leyes*, May 2, 2004, available at [http://www.camaralima.org.pe/reporte\\_semanal/wreport\\_171.htm](http://www.camaralima.org.pe/reporte_semanal/wreport_171.htm).

36. Indeed, such conduct flies in the face of UNESCO’s recommendation that “[a]ppropriate scientific studies and networking should be undertaken to co-ordinate the international community’s response to [intolerance], including analysis by the social sciences of root causes and effective countermeasures, as well as research and monitoring in support of policy-making and standard-setting action by Member States.” UNESCO, *supra* note 9, art. 3.

The result of this ignorance is, among other things, the actual nonexistence of the Peruvian State in a great portion of our national territory. It is an absentee state, only appearing in statistics, on maps, in history textbooks, and in social and armed conflicts when such conflicts rate media coverage.

### *B. Humility*

The virtue of humility as a premise of tolerance becomes essential, especially in the missionary work of the various religious faiths. As noted earlier, in Peru religions wanting to fulfill their missionary obligations often try, due to a lack of humility, to impose the culture in which the religious views of their missionaries are immersed. The absence of the government on the one hand and foreign cultural aggression resulting from religious missionary activity on the other hand are creating serious confusion in the identity of the Andean and Amazonian peoples. In order to avoid this, Peru must legally require prior knowledge of socio-cultural reality by those who wish to engage in persuasive missionary activity in a traditional culture. Such a solution would comport with UNESCO's guidance to "promote systematic and rational tolerance teaching methods that will address the cultural, social, economic, political and religious sources of intolerance."<sup>37</sup>

In an excellent, recently published article, Peruvian analyst Richard Webb notes,

Every day we read about endangered biological species, from whales to toads and swallows, but little is said about the greatest extinction we have witnessed as humankind—that of our own creations, those social creations we call cultures. And the whirlwind known as progress continues to sweep away the few vestiges that remain.<sup>38</sup>

This diminishes the richness of our multicultural Peruvian reality. Just as ecologists strive to promote laws that protect endangered natural species, so lawmakers in today's world should endeavor to enact laws to prevent the disappearance of ancient cultures with their great natural richness from which we have much to learn.

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37. *Id.* art. 4.

38. Richard Webb, *¿Qué hacer con Q'ero?* [*What To Do With Q'ero*], EL COMERCIO, Sept. 11, 2006.

*C. Generosity*

Out of all that has been previously said arises the third element assigned to tolerance—that is, the necessary generosity to accept the virtues of another. The juridical practice of tolerance requires acceptance of others without trying to change them. The current state of law in Peru suggests a lack of clarity in whether government authorities truly exercise generosity to indigenous cultures by accepting their attitudes, virtues, and viewpoints as a valid, alternative cultural reality or merely endure their existence as a dying cultural anomaly.<sup>39</sup>

In Peru, Article 149 of the Constitution recognizes the jurisdiction of rural and native communities within their territorial area according to their ancestral regulations and traditions.<sup>40</sup> Section 4 of the Peruvian Civil Code declares these to be a matter of public interest, their lands being inalienable and not subject to prescription or attachment.<sup>41</sup> Thus, both in territorial and community matters, they have their own system of government recognized by the Peruvian State.<sup>42</sup> Since those territories and communities are the main focus of the missionary activity of religious groups, and the most extensive area and the greatest number of people comprising the Peruvian nation,<sup>43</sup> it has always been surprising that none of the proposed constitutional laws for religious freedom presented in the Peruvian Congress make even an indirect reference to this major

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39. Clearly we do not need the latter. De Trazegnies Granda, *supra* note 14, at 9–10 (“We do not need a law that conceives of other cultures as bad situations that we must accept only as a transitional condition until that time that the Occident completes its civilizing mission.”).

40. CONSTITUCIÓN POLÍTICA DEL PERÚ, art. 149 (Peter B. Heller trans., 1993), available at [http://www.humanrightsfirst.org/international\\_justice/icc/implementation/Peru/Constitution\\_Peru\\_English\\_pdf](http://www.humanrightsfirst.org/international_justice/icc/implementation/Peru/Constitution_Peru_English_pdf) (“The authorities of the Peasant and Native Communities, with the support of the Peasant Circles, may exercise judicial functions within their territorial jurisdiction in accordance with customary law as long as they do not violate the fundamental rights of the person.”).

41. PERÚ CODE CIVIL § 4 (1965), available at <http://www.cajpe.org.pe/rij/bases/legisla/peru/codciv.htm>.

42. Unlike the official Peruvian law, which is based on specific rules, these other legal orders are based on customary law. These legal institutions vary significantly from the official law in a wide variety of areas such as family law, property, evidence, legal organization of economic production, and legal procedure. De Trazegnies Granda, *supra* note 14, at 6.

43. The majority of the Peruvian population consists of peasants who live in the Andean Highlands, and the Amazonian jungle occupies the largest portion of Peru’s territory. *Id.* at 3–4.

Peruvian reality.<sup>44</sup> It appears that those bills were copies of the constitutional laws of religious freedom of some European or American country, neither Andean nor Amazonian. Without making reference to, or acknowledging indigenous cultures, Peru appears to be ignoring, not accepting, the rich social tapestry of its native heritage; thus, Peru cannot currently claim that it has acted with generosity or tolerance in dealing with the variety of cultures within its jurisdiction.

*D. Guidance for Enacting Principles of Tolerance—In Humanity and Law*

German positivism sowed in Latin American law the mistaken notion that the law was everything.<sup>45</sup> Enacting a law was considered sufficient to create a tradition, a custom, a lifestyle, and even an idea about things, and the natural value of law was traded for the artificial creation of legal values.<sup>46</sup> Removing ourselves from Kelsenian positivism, the opinion expressed in this Article fits perfectly with the three paragraphs comprising Article 1 of the 1981 Declaration proclaimed by the United Nations General Assembly on November 25, 1981.

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice.

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44. Indeed, it has been said that “no official social regulation based on Andean or Amazonian culture premises” can be found in Peru’s laws. *Id.* at 6.

45. See Kunz, *supra* note 23, at 262 (“At the beginning of the nineteenth century legal positivism banished natural law from philosophy of law, and famous positivist thinkers declared natural law to be dead.”); see also Furnish, *supra* note 23 (discussing Kelsen’s influence on Peruvian legal thinking).

46. See, e.g., Furnish, *supra* note 23, at 92 (“Peruvian lawyers customarily view their legal system in terms of several classes of norms, arranged in a ‘hierarchy’ in accordance with the theories of Hans Kelsen. . . . The hierarchy of laws operates on the principle that whenever a conflict develops between the provisions of one law and those of another, the law which stands higher in the hierarchy prevails.”).

3. Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.<sup>47</sup>

In this same spirit, Peruvian law as a social tool should limit itself to creating adequate legal space so that the human being as an individual may freely choose, manifest, and practice his religion without coercion, but in a limited manner so as to safeguard security, order, health, public morale, and the rights of others. Adoption of these principles has come about in Peru as a result of a lengthy and still unfinished process of separating the official religion from the religion of free personal acceptance.<sup>48</sup> However, a word of caution is in order: the progress celebrated today can result in a terrible surprise if we do not consider carefully the limiting concepts of freedom contained in the 1981 Declaration.<sup>49</sup> With good intentions and enough money or civil authority, that right to choose one's religion without facing discrimination could be replaced by the imposition of religion resulting from the greater pressure that more developed organizations exercise over ancestral cultures lacking modern technology.<sup>50</sup>

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47. 1981 Declaration, *supra* note 8, art. 1, ¶¶ 1–3. We should note that in the mind of at least one scholar, the 1981 Declaration stands as the “most important international document” for defining the religious rights respected in the international community. Davis, *supra* note 5, at 227–28.

48. For a summary of the historical evolution of religious culture in Peru and the modern relationship between the government, the Catholic Church, and non-Catholic denominations, see Carlos Valderrama Adriansén, *Reflections on the Right to Religious Freedom in Peru*, 2003 BYU L. REV. 669; Guillermo Garcia-Montúfar, Moisés Arata Solís & Scott E. Isaacson, *Advances in Religious Liberty in Peru*, 2004 BYU L. REV. 385; Garcia-Montúfar & Martinez Coco, *supra* note 4, at 510–22.

49. The concept of placing restrictions on a dominant economic and technological cultural source in order to protect traditional cultural heritage is not novel in a democratic regime that respects principles of freedom. Indeed, as recently as October 2005, UNESCO adopted the Convention on Cultural Diversity, which has the effect of limiting American motion pictures and promoting local films in order to limit the pervasive influence of Western culture. Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Oct. 20, 2005, available at <http://unesdoc.unesco.org/images/0014/001429/142919e.pdf>; see also Eireann Brooks, *Cultural Imperialism vs. Cultural Protectionism: Hollywood's Response to UNESCO Efforts to Promote Cultural Diversity*, 5 J. INT'L BUS. & L. 112 (2006).

50. The UNESCO delegates noted that “[i]n this respect, particular attention should be paid to vulnerable groups which are socially or economically disadvantaged so as to afford them the protection of the laws and social measures in force, in particular with regard to . . . the authenticity of their culture and values.” UNESCO, *supra* note 9, art. 3.

Resources exist to guide Latin American countries in enacting these principles of tolerance in dealing with and preserving cultures in our modern world. It is important, for example, that a constitutional law of religious freedom for the countries of Latin America include the postulates of the Declaration of San José on Ethno-Development and Ethnocide, adopted by the meeting of experts of UNESCO in San José, Costa Rica on December 11, 1981.<sup>51</sup> For example, the declaration recognized that “[s]ince the European invasion, the Indian peoples of America have seen their history denied or destroyed, despite their great contributions to the progress of mankind, which has led to the negation of their very existence.”<sup>52</sup> In response to this crisis the delegates affirmed

that ethno-development is an inalienable right of Indian groups.

By ethno-development we mean the extension and consolidation of the elements of its own culture, through strengthening the independent decision-making capacity of culturally distinct society to direct its own development and exercise self-determination, at whatever level, which implies an equitable and independent share of power.<sup>53</sup>

In implementing policies for ethno-development, Latin American governments should also recognize that “[r]espect for the forms of autonomy required by the Indian peoples is an essential condition for guaranteeing and implementing these rights.”<sup>54</sup> Recognizing the importance of understanding the cultures that are the object of legislation, the delegates also expressed “the need to provide for due participation by genuine representatives of Indian nations, peoples and ethnic groups in any activity that might affect their future.”<sup>55</sup>

Latin American governments should also consider the recommendations of Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, adopted by the seventy-sixth session of the International Labor Organization in

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51. UNESCO, Meeting of Experts on Ethno-Development and Ethnocide in Latin America, *Declaration of San Jose* (Dec. 1981), available at <http://unesdoc.unesco.org/images/0004/000499/049951co.pdf>.

52. *Id.* at 1–2.

53. *Id.* at 1.

54. *Id.* at 2.

55. *Id.* at 3.

Geneva on June 27, 1989 and in force since September 5, 1991.<sup>56</sup> Convention 169 explicitly recognized that “[g]overnments shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity” and that “[s]pecial measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.”<sup>57</sup> Like the Declaration of San José, the organization recognized that “[i]n applying the provisions of this Convention, governments shall . . . consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly.”<sup>58</sup> Finally, as a corollary to understanding the object of governmental litigation, the convention recognized that “[g]overnments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural, and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities.”<sup>59</sup>

Respect for religious tolerance should be the legal practice in all countries, as a product of prior knowledge of our multiple cultures, with humility and acceptance of the socio-cultural reality of the various cultures without trying to modify or manipulate them, and through laws which limit the veiled imposition of one belief over another in order to maintain order, security, public morale and the ancestral rights of those cultures. There is a grave precedent of promoting laws of religious freedom which basically constitute the imposition of foreign religions.<sup>60</sup> I have not found a single constitutional law of religious freedom in all Latin America, which,

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56. International Labour Organization [ILO], Indigenous and Tribal Peoples Convention, Convention C169 (June 27, 1989), *available at* <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169#Link>.

57. *Id.* arts. 2, 4.

58. *Id.* art. 6.

59. *Id.* art. 7. As noted previously, indigenous tribes have recently accused Peru of violating the tenets of ILO Convention 169. *See supra* note 28.

60. For a discussion on how religious laws in the United States effectively promote assimilation of Native American cultures, see Carpenter, *supra* note 29, at 576–80.

like laws for safeguarding the environment and in the interest of the principle of public order, seeks to safeguard the few remaining vestiges of our multicultural richness. Religious truth is not imposed, but it rather develops in the human conscience on the strength of its own soundness.

#### IV. CONCLUSION

Tolerance consists of more than indifference and apathy towards a group of people; it is an active, loving state, based on the combined principles of understanding, humility, and generosity. Accordingly, tolerance means more than merely directing a positivist creed toward a group of people, it means adopting policies and changing legislation to reflect the humanist values of the object of legislation. In dealing with the myriad native cultures within its population, Peru has failed to actively adopt the policies of tolerance by understanding the subjects of its legislation, by going about its task with humility in recognizing indigenous cultures as an alternative vehicle for truth, and by acting with generosity in accepting these cultures as viable cultural realities. It is my hope that in the future, Peru and other Latin American countries will adopt laws and attitudes in conformity with the Declaration of San José and Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries in truly enacting the principles of tolerance espoused by the United Nations in the 1981 Declaration. Only then can we say that we have truly acted with tolerance in relating to the different cultures within our countries.

Finally, may I quote the old French revolutionary slogan, “O liberty! O liberty! what crimes are committed in thy name!”<sup>61</sup> I would only add: tolerance, tolerance, how few understand your effects.

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61. This quote is attributed to Mme Roland. THE OXFORD DICTIONARY OF QUOTATIONS 407 (3d ed. 1979).