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Mexican Legislation on Religion and the 1981 Declaration on Intolerance and Discrimination

*Raúl González Schmal**

I. INTRODUCTION

It has been said—and with good reason—that religious freedom is the alpha and omega of human rights. After all, religious freedom concerns people's inner life, the place where they make the major decisions that guide the very meaning of their existence. Since the ratification of Mexico's Constitution in 1917, which afforded few protections for religious freedom,¹ Mexico has made numerous efforts to expand these protections. Nevertheless, there are still some areas of Mexican law that unnecessarily restrict religious freedom. This Article provides a background of the international and Mexican laws that set forth principles of religious freedom and highlights some areas of Mexican law that conflict with these principles.

Part II of this Article gives a brief introduction to the nature and history of international religious freedom. This Part outlines important international documents that provide protection for religious freedom, focusing specifically on the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. Part III then explores some areas of Mexican law that unnecessarily restrict religious freedom in light of international standards and the Mexican Constitution. Part IV offers a brief conclusion.

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1. See *infra* note 61 and accompanying text.

II. RELIGIOUS FREEDOM: AN INTERNATIONAL PERSPECTIVE

A. Internationalization of the Right to Religious Freedom

Religious freedom cannot be dissociated from humans' moral and psychological freedom. "In the affirmation of the right to personal liberty," says Antonio Pérez Luño, "the right to religious freedom had particular relevance. . . . As Jellinek demonstrates in his now classic work, *Die Erklärung der Menschen- und Bürgerrechte*, religious freedom was at the root of the fight for all other fundamental rights of liberty."²

Along the same lines, Natan Lerner notes that international protection of human rights began in areas related to religion.³ At a very early stage in the development of international law, provisions referring to the fundamental rights of minority religious communities were incorporated into various treaties.⁴ This internationalization process began during the nineteenth century. It was during that century that international accords protecting Christian minorities in the Ottoman Empire were established.⁵ Through these accords, the member states comprising the Concert of Europe were able to intercede diplomatically—and at times militarily—on behalf of Christians living in the Ottoman Empire.⁶

2. ANTONIO E. PÉREZ LUÑO, *DERECHOS HUMANOS, ESTADO DE DERECHO Y CONSTITUCIÓN* 117 (4th ed. 1991) ("En la afirmación del derecho de libertad tuvo especial relevancia la defensa de la libertad religiosa. Es sabido cómo para Jellinek, en su ya clásico trabajo *Die Erklärung der Menschen- und Bürgerrechte*, la libertad religiosa representó el germen de la lucha por todos los demás derechos fundamentales de libertad.").

3. NATAN LERNER, *GROUP RIGHTS AND DISCRIMINATION IN INTERNATIONAL LAW* 7 (2d ed. 2003) ("International human rights law actually began, rather timidly, as an attempt to protect discriminated groups, particularly religious minorities . . .").

4. *Id.* ("Since the seventeenth century, several treaties incorporated clauses ensuring certain rights to individuals or groups with a religion different from that of the majority.").

5. See Jonathan E. Hendrix, Comment, *Law Without State: The Collapsed State Challenge to Traditional International Enforcement*, 24 *WIS. INT'L L.J.* 587, 623 (2006) ("[A]greements occurred between European governments and the Ottoman Empire to protect Orthodox Christians in mid nineteenth-century Greece.").

6. See 1 L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 313 (H. Lauterpacht ed., 8th ed. 1955) ("Intervention [by European countries] was often resorted to in order to put a stop to the persecution of Christians in Turkey."); David J. Scheffer, *Toward a Modern Doctrine of Humanitarian Intervention*, 23 *U. TOL. L. REV.* 253, 254 n.4 (1992) ("The major European powers of the Concert of Europe intervened collectively on a number of occasions during the 19th century and early 20th century to protect Christian populations in non-Christian states (typically found in the Turkish/Ottoman Empire)."); Barry M. Benjamin,

The Treaty of Berlin, signed in 1878, is particularly interesting because it grants special legal status to certain religious groups.⁷ The Treaty also served as a model for the system of protection for minorities that was later established within the framework of the League of Nations, an organization that played a very important role in creating an international system for protecting minorities.⁸

In 1941, President Franklin D. Roosevelt eloquently promoted the cause of international human rights, among which he included religious freedom. In his famous "Four Freedoms" speech, he called for "a world founded upon four essential human freedoms."⁹ He labeled these freedoms as follows: "freedom of speech and expression," "freedom of every person to worship God in his own way," "freedom from want," and "freedom from fear."¹⁰ Roosevelt's vision of "moral order,"¹¹ as he characterized it, became a clarion call for the countries that fought against the Axis during World War II and subsequently founded the United Nations.¹²

The foregoing should not be too surprising given that religion exists in all societies, at all times, and in all places. No society, ancient or modern, has existed in which the phenomenon of religion does not occupy a significant place in people's lives.¹³ In *The Ancient*

Note, *Unilateral Humanitarian Intervention: Legalizing the Use of Force To Prevent Human Rights Atrocities*, 16 *FORDHAM INT'L L.J.* 120, 128 (1992) ("[I]n 1829 . . . France, Britain, and Russia militarily enforced the 1827 Treaty of London in order to prevent massive bloodshed in Greece, then under Ottoman occupation. France intervened militarily in Syria in 1860 to protect the Christian population from slaughter at the hands of the Ottoman empire."). For a list of some of the incidents where European countries intervened to protect Christians from Ottoman oppression, see Scheffer, *supra*, at 254 n.4.

7. See James E. Wood, Jr., *The Relationship of Religious Liberty to Civil Liberty and a Democratic State*, 1998 *BYU L. REV.* 479, 496 (stating that the Treaty of Berlin of 1878 had "provisions for the equal rights of religious minorities").

8. See Makau Mutua, *The Iraq Paradox: Minority and Group Rights in a Viable Constitution*, 54 *BUFE. L. REV.* 927, 929 (2006) (stating that the League of Nations "established the first effective set of norms, processes, and institutions for the protection of minorities.").

9. 9 *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT* 672 (Samuel I. Rosenman ed., 1941).

10. *Id.*

11. *Id.*

12. Thomas Buergenthal, *International Human Rights Law and Institutions: Accomplishments and Prospects*, 63 *WASH. L. REV.* 1, 3 (1988).

13. ROY A. RAPPAPORT, *RITUAL AND RELIGION IN THE MAKING OF HUMANITY* 1 (1999) ("No society known to anthropology or history is devoid of what reasonable observers would agree is religion . . .").

City, Numa Denis Fustel de Coulanges states that during ancient times, religion or religious ceremonies constituted the nexus of all societies: “Just as a domestic altar held the members of a family grouped around it, so the city was the collective group of those who had the same protecting deities, and who performed the religious ceremony at the same altar.”¹⁴ Fustel de Coulanges further notes that “[i]t was . . . religion that founded the family and established the first laws.”¹⁵

Distinguished jurist Rudolf von Ihering agrees with this characterization, noting that “the religious element and the *fas* (the religious, sacred, or revealed law) were at the heart of all life in Rome.”¹⁶ He further states that

[b]y virtue of religious consecration, the State and all its organs exist under the protection of religion. In a certain way, the State becomes a kind of temple or divine edifice in which reforms cannot be introduced without the consent of the gods who inhabit it. There is not a single department within the government that is not consecrated to some divinity, and the Romans could not conceive of a political union without religious links. Every *gens*, every curia, and every tribe has its particular form of worship. Furthermore, when Rome wants to form a lasting alliance with other peoples, it enters into religious worship with them. For this reason, Rome adopts the gods of all peoples with whom it forges alliances. At the same time, Rome opens to its allies the cult of Capitoline Jupiter, protector of the Roman State. The gods are gods of the State. Their dominion cannot extend beyond that of the State, but their dominion necessarily extends to the boundaries of the State, growing or diminishing in step with the State’s power.¹⁷

14. NUMA DENIS FUSTEL DE COULANGES, *THE ANCIENT CITY: A STUDY ON THE RELIGION, LAWS, AND INSTITUTIONS OF GREECE AND ROME* 138 (Johns Hopkins Univ. Press 1980) (1864).

15. *Id.* at 112–13.

16. I RUDOLF VON IHERING, *EL ESPÍRITU DEL DERECHO ROMANO* 193 (Oxford Univ. Press 2001) (1865) (“[E]l elemento religioso y el *fas* (es el derecho religioso, santo o revelado) se encarnaban en la vida entera de Roma.”).

17. *Id.* (“[E]l Estado, con todo su organismo por medio de la consagración religiosa está bajo el amparo de la religión y se convierte en cierto modo en un templo o edificio divino, en el que no se pueden introducir reformas sin la voluntad de los dioses que lo habitan. No hay en él ningún departamento que no esté consagrado a alguna divinidad, y los romanos no podían concebir unión política sin vínculos religiosos; no solamente cada *gens*, cada curia y cada tribu tiene su culto particular, sino también, cuando Roma quiere fundar con otros pueblos una alianza durable, debe entrar al mismo tiempo en comunicación religiosa con ellos.”).

B. Religion and Law

In addition to its personal dimension within the individual conscience, religiosity has a social, or communitarian, dimension as well. The relationship between religion and law stems from humans' need to live according to their beliefs and convictions while still living in society. To speak of organized society is to speak of law. A religious society inevitably requires a legal system to maintain order in the religious world. This order is necessary because religions tend to satisfy a series of interests having religious character. Believers require certain social goods to satisfy their religious needs. This situation can create conflict between believers or between believers and non-believers. Laws concerning religion, like all legal systems, establish an order that makes social life possible and that seeks to reconcile potential conflicts that can arise among those seeking the same social goods.

At the same time, religions themselves have brought about distinct organizations and institutions. They establish rights and duties in many areas, including the inner life of the various members of the church or group, the management of economic resources, the establishment of beliefs, the education of members, the functions and jurisdiction of group authorities, and the regulation of religious ceremonies. For these reasons, one must necessarily affirm that *ubi religio ibi ius*.¹⁸

Based upon the foregoing considerations about religious freedom, it is evident—as Joaquín Mantecón has observed—that the topic is especially complex. Furthermore, the concept of religious

Por eso Roma acoge los dioses de todos los pueblos con que se alía, y por su parte les abre el culto de Júpiter Capitolino, protector de todo el Estado romano. Los dioses son dioses del Estado; su dominio no puede extenderse más allá del que al Estado corresponde; pero sí necesariamente tan lejos como el, y crece o restringe en la misma proporción que el poderío del Estado.”).

18. This phrase, loosely translated, means “where there is religion, there is also law.” See Antonio Molina Meliá, *El Hecho Religioso y Su Dimensión Individual y Social*, in *LAS LIBERTADES RELIGIOSAS: DERECHO ECLESIASTICO MEXICANO 44* (Antonio Molina Meliá ed., 1997). Meliá wrote the following regarding the social nature of religion: “Religious sociology confirms that the *homo religiosus* has felt it necessary to reveal his beliefs and live them with people of the same beliefs, to the point of creating numerous religious organizations, associations, or groups with a variety of manifestations.” *Id.* at 41. (“La misma sociología religiosa nos confirma que el *homo religiosus* ha sentido necesidad de exteriorizar sus creencias y vivirlas con sus correligionarios, hasta el punto de crear numerosas organizaciones, asociaciones o grupos religiosos con una gran variedad de manifestaciones.”).

freedom is not easily defined, given that “one can approach it from so many different perspectives, each with multiple and intricate implications of all kinds: psychological, philosophical, ethical and moral, religious, sociological, historical, political, [and] legal”¹⁹

The concept of religious freedom is necessarily connected to that of religion, “but one cannot easily provide a definition of religion that covers every possible aspect the word entails.”²⁰ Religion implies a supernatural dimension, “but it also suggests a multi-faceted human and social reality as well. For this reason, one cannot possibly exhaust the concept with a single definition alone.”²¹ According to Mantecón, some scholars have collected up to 150 different definitions of the word “religion.”²² “In many cases, social scientists’ approach to the concept of religion has been purely phenomenological.”²³ The fact that there are many different religions, which differ in significant ways, also contributes to the difficulty of articulating a single, clear definition.²⁴ Nevertheless, in one form or another, all religions address the fundamental questions of life:

What is man? What is the meaning, the aim of our life? What is moral good, what [is] sin? Whence suffering and what purpose does it serve? Which is the road to true happiness? What are death, judgment and retribution after death? What, finally, is that ultimate inexpressible mystery which encompasses our existence: whence do we come, and where are we going?²⁵

19. Joaquín Mantecón, *La Libertad Religiosa como Derecho Humano*, in *TRATADO DE DERECHO ECLESIASTICO* 85 (Ediciones Universidad de Navarra, S.A., 1994) (“[La libertad religiosa es] un concepto que puede estudiarse desde distintos puntos de vista, y con múltiples e intrincadas implicaciones de todo tipo: psicológicas, filosóficas, ético-morales, religiosas, sociológicas, históricas, políticas, jurídicas . . .”).

20. *Id.* at 87 (“[N]o resulta fácil proporcionar una definición de religión que abarque todos los posibles aspectos que entraña.”).

21. *Id.* (“[L]a religión . . . implica una dimensión sobrenatural . . . pero muestra también una vertiente humana y social con múltiples perfiles, de tal forma que resulta imposible agotar el concepto en una sola definición.”).

22. *Id.* at 87–88.

23. *Id.* at 87 (“En muchos casos la aproximación al concepto de religión por parte de las ciencias sociales es puramente fenomenológica.”).

24. *Id.* at 88 (“Otra razón que justifica la dificultad de definirla puede estribar en el hecho de que no existe una única religión, sino muchas, que además pueden resultar—y de hecho resultan—muy diferentes entre sí.”).

25. Second Vatican Council, *Nostra Aetate: Declaration on the Relation of the Church to Non-Christian Religions* § 1 (Oct. 28, 1965), available at <http://www.vatican.va/archive/>

The societal dimension of religion, mentioned previously, requires that “the State enact laws to regulate certain aspects of the social dimension of the citizenry’s religious life.”²⁶ “State religi[ous] law concerns the solutions or approaches that different states have applied to religion.”²⁷

Today, most people think of religious freedom as both a right that guarantees the ability to practice one’s religion freely, whether individually or in association with others, and a restriction on religion-based discrimination by the State.²⁸ Religious freedom is a human right with unique characteristics. Human rights are rights inherent in human nature; they have their foundation in the dignity of every person. All humans have rights and duties that flow directly from their humanity itself. For that reason, these rights and duties are universal and inviolable; they cannot be renounced or waived in any way.²⁹

C. Dimensions of the Law of Religious Freedom

Today, the human right of religious freedom—the “fruit and guarantee of all other civil rights”³⁰—is principally considered a type of immunity against coercion. In other words, individuals cannot be prevented from living according to the dictates of their conscience, nor be forced to live against the dictates of their conscience.

Although the right to religious freedom is an individual and personal right, it appears in multiple forms.³¹ All of these forms can

hist_councils/ii_vatican_council/documents/vat-ii_decl_19651028_nostra-aetate_en.html.

26. Mantecón, *supra* note 19, at 90 (quoting Pedro Lombardía, *El Derecho Eclesiástico*, in *DERECHO ECLESIASTICO DEL ESTADO ESPAÑOL* 28 (2d ed. 1983)) (“[L]a dimensión social del fenómeno religioso lleva consigo la necesidad de que el Estado discipline, por medio de su derecho, determinados aspectos de la dimensión social de la vida religiosa de los ciudadanos.”).

27. *Id.* at 91 (“Las soluciones o tratamiento jurídico que los diferentes Estados han dado al fenómeno religioso constituye el objeto del Derecho eclesiástico.”).

28. *Id.* at 91–92.

29. See Universal Declaration of Human Rights, pmbl., G.A. Res. 217A (III), at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter 1948 Declaration] (“Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”).

30. *Decreto de Reconocimiento Oficial*, LAS NOTICIAS MÉXICO, July 9, 2001, <http://www.lasnoticiasmexico.com/zz2032.html> (quoting Pope John Paul II) (“El Pontífice señaló que ‘en un Estado de Derecho, el reconocimiento pleno de la libertad religiosa es, a la vez, fruto y garantía de las demás libertades civiles . . .’”).

31. IVÁN C. IBÁN & LUIS PRIETO SANCHÍS, LECCIONES DE DERECHO ECLESIASTICO

be characterized as generating negative rights, which prevent others from interfering with one's religious pursuits.³² Thus, the right to religious freedom represents a "legally guaranteed realm of immunity for practicing religious faith and fulfilling all duties that such practice requires to make worship complete and coherent."³³

The right to religious freedom includes the following elements: freedom of conscience; freedom to worship; freedom to spread one's religious beliefs, ideas, and opinions; the right to train members of one's faith; freedom to teach and the right to provide religious education; the right to meet together and manifest belief; the right of association; and, finally, the right to conscientious objection.³⁴

D. Three Precursors to the 1981 Declaration

After World War II, general declarations of human rights treated religious discrimination in the same way as other forms of discrimination.³⁵ Nevertheless, progress in the area of religious freedom was extremely slow, particularly when compared to the progress made in combating racial discrimination.³⁶ This section briefly describes three United Nations documents that address religious freedoms.

In 1948, the United Nations issued the Universal Declaration of Human Rights ("1948 Declaration"), which refers to freedom of belief in its preamble.³⁷ This Declaration prohibits any kind of discriminatory distinction,³⁸ and proclaims that every person enjoys "the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and the freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."³⁹ Finally, the 1948 Declaration establishes that

95 (1985).

32. *Id.*

33. *Id.* ("Las facultades que comprende el derecho de libertad religiosa suponen la garantía jurídica de un ámbito de inmunidad para practicar el acto de fe y cumplir con todos los deberes que ese acto lleve aparejado para ser completo y coherente.")

34. *See id.* at 95-112.

35. LERNER, *supra* note 3, at 84.

36. *Id.*

37. 1948 Declaration, *supra* note 29, pmbl.

38. *Id.* art. 2.

39. *Id.* art. 18.

“[p]arents have a prior right to choose the kind of education that shall be given to their children,”⁴⁰ which purportedly includes religious education.

In 1966, the United Nations issued the International Covenant on Civil and Political Rights (ICCPR).⁴¹ Like the 1948 Declaration, the ICCPR states that “[e]veryone shall have the right to freedom of thought, conscience and religion,”⁴² but further adds that no person shall “be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.”⁴³ Additionally, the ICCPR states that the “[f]reedom to manifest one’s religion or beliefs 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.”⁴⁴ The ICCPR also addresses religious education for children and parents’ rights concerning the same.⁴⁵ All of these religious freedoms are given added protection under the ICCPR, which specifically prohibits their derogation under any circumstances.⁴⁶

In 1966, the United Nations also issued the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁴⁷ The ICESCR, reiterating the language of the 1948 Declaration, states that education should “promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups.”⁴⁸ Additionally, the ICESCR further establishes that parents have the right “to ensure the religious and moral education of their children in conformity with their own convictions.”⁴⁹

These three international documents were the precursors to the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (“1981

40. *Id.* art. 26(3).

41. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

42. *Id.* art. 18(1); *see also* 1948 Declaration, *supra* note 29, art. 18.

43. ICCPR, *supra* note 41, art. 18(2).

44. *Id.* art. 18(3).

45. *Id.* art. 18(4).

46. *Id.* art. 4(2).

47. International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1996, 993 U.N.T.S. 3 [hereinafter ICESCR].

48. *Id.* art. 13(1).

49. *Id.* art. 13(3).

Declaration”),⁵⁰ which is currently the international document reflecting the highest degree of development and maturity of the right to religious freedom.

E. The 1981 Declaration on Religious Intolerance and Discrimination

The 1981 Declaration was approved by the United Nations General Assembly on November 25, 1981.⁵¹ The drafters included the word “belief” in the Declaration’s title “to meet the objections of those who felt the need to stress the protection of the rights of non-believers, such as rationalists, free-thinkers, atheists and agnostics.”⁵² The term may have been inspired by the doctrine of John Courtney Murray, who believed that the right to religious freedom was a part of a larger concept—the freedom to express one’s fundamental beliefs.⁵³

The right to religious freedom—or the right to express fundamental beliefs—grants recognition and legal guarantees to religious beliefs as well as to atheistic and agnostic opinions. For both believers and non-believers, this equal treatment has particular importance in maintaining and creating a platform of positive consensus concerning human values.

Notwithstanding the foregoing, scholars such as Pedro-Juan Viladrich and Javier Ferrer Ortiz affirm that

[w]hat agnosticism and atheism enjoy in terms of free exercise or worship is a value recognized by the right of religious freedom. What they enjoy in terms of ideological and ethical systems—free manifestation; living in harmony with one’s beliefs; teaching and spreading beliefs individually, mutually, or institutionally; and engaging in these activities in private and in public—flows from rights such as freedom of thought and freedom of conscience.⁵⁴

50. Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, at 171, U.N. GAOR, 36th Sess., Supp. No. 51, U.N. Doc. A/36/684 (1981) [hereinafter 1981 Declaration].

51. *Id.*

52. LERNER, *supra* note 3, at 89.

53. See John Courtney Murray, *The Declaration on Religious Freedom*, in WAR, POVERTY, FREEDOM: THE CHRISTIAN RESPONSE 5-19 (1966).

54. See Pedro-Juan Viladrich & Javier Ferrer Ortiz, *Los Principios Informadores del Derecho Eclesiástico*, in DERECHO ECLESIASTICO DEL ESTADO ESPAÑOL 215 (3d ed. 1993) (“Lo que el agnosticismo y el ateísmo tiene de ejercicio libre y propio del acto de fe es un bien o valor reconocido por el derecho de libertad religiosa. Lo que contiene de sistema ideológico

According to Viladrich and Ferrer,

[a]theism as shared by a group of atheists, that is to say, an atheist society, is not the same as an organized religious body. The differences are not merely historical—religious bodies have a social presence and an institutional, and sometimes multi-secular, dimension—but conceptual: a religious body is a *religion-specific community*, and for that reason, they are afforded religious freedom and the freedom of worship. An atheist group, by definition, is not a religious group, but an *ideological or ethical community*, or both things simultaneously. Therefore, atheists' legal position receives the protection that the freedoms of thought and conscience grant to atheism's various forms, or even the general system for regulating associations and foundations.⁵⁵

Although the 1981 Declaration provides for various religious freedoms and protections, it is non-obligatory:

[I]t is no more than . . . a non-binding instrument which carries with it only the moral weight of a UN solemn statement, expressing the more or less agreed upon trends prevailing in the international community on a given subject at a specific time. As with other UN declarations, it does have certain legal effects and exerts a high degree of expectation of obedience by members of the international community to the extent that it may eventually be considered as stating rules of customary international law.⁵⁶

Regardless of one's perspective, there can be no doubt that the adoption of the 1981 Declaration marked an important step in religious groups' struggle to obtain some of the protections afforded racial and ethnic groups under the then-current scheme of human rights law.

y ético—su libre manifestación, el vivir en consonancia con esas opciones, enseñarlas, difundirlas, individual, asociada o institucionalmente, en público y en privado, etc.—es materia de los derechos de libertad de pensamiento y de libertad de conciencia.”).

55. *Id.* at 215 n.70 (“El ateísmo compartido por varios sujetos asociados, esto es, una sociedad atea no es lo mismo que una confesión religiosa. Las diferencias no sólo son de orden histórico—hay un arraigo social y una dimensión institucional en las confesiones, a veces multiseccular—, sino conceptual: una confesión es el *colectivo específico de lo religioso* y por ello sujeto de la libertad religiosa y de culto; un grupo ateo, por definición, no es un grupo religioso, sino un *colectivo ideológico o ético* o las dos cosas al mismo tiempo. De ahí que su lugar jurídico sea la protección que el derecho de libertad de pensamiento y de conciencia da a sus formas asociadas o, incluso, el régimen común de las asociaciones y fundaciones.”).

56. LERNER, *supra* note 3, at 96.

F. Religious Freedom in the 1981 Declaration

Article 6 of the 1981 Declaration states that “the right to freedom of thought, conscience, religion [and] belief” includes the following freedoms:

- (a) To worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes;
- (b) To establish and maintain appropriate charitable or humanitarian institutions;
- (c) To make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief;
- (d) To write, issue and disseminate relevant publications in these areas;
- (e) To teach a religion or belief in places suitable for these purposes;
- (f) To solicit and receive voluntary financial and other contributions from individuals and institutions;
- (g) To train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief;
- (h) To observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one’s religion or belief;
- (i) To establish and maintain communications with individuals and communities in matters of religion and belief at the national and international levels.⁵⁷

Given how the right to religious freedom is delineated in Article 6, it is clearly a unique freedom. In other words, the right to religious freedom is not simply another kind of ideological freedom or freedom of thought; rather, it is a distinctive right. What appears to shape the right to religious freedom as unique and distinct from other rights is its communitarian aspect. Religious freedom entails a cultic freedom, not simply a cultural freedom. Thus, religious freedom necessarily includes the right to establish social groups specifically for religious purposes.

Other international documents implicitly recognize that religious life has collective dimensions that deserve respect and protection; nevertheless, these documents provide few concrete details about the

57. 1981 Declaration, *supra* note 50, art. 6.

legal status of religious groups as such. As previously mentioned, the United Nations' 1981 Declaration represents its most important pronouncement since the 1948 Declaration, in which it first sought to end religious persecution and discrimination. One of the 1981 Declaration's principal advances is that it addresses not only the individual or personal dimension of the right to religious freedom, but the communitarian dimension as well.⁵⁸ Article 6 recognizes the rights of religious groups as such, which the State should guarantee and protect. Thus, Article 6 constitutes the modern model for what religious freedom means.

The principal focus of Article 6 lies in its attempt to establish the foundations for a standard of freedom for religious groups. This attempt is made with the understanding that, as Article 7 makes clear, the rights and freedoms set forth in the 1981 Declaration are intended to be recognized in "national legislations in such a manner that everyone shall be able to avail himself of such rights and freedoms in practice."⁵⁹ This statement indicates that the United Nations conceives the rights and freedoms set forth in the 1981 Declaration as the minimum protection that state law should guarantee to any religious group, independent of how particular legal systems regulate relations between the State and religious groups.

As a final point, it is significant that many years ago, the United Nations Commission on Human Rights began a project to create a draft convention dealing with religious intolerance and discrimination; this effort appears to have remained in suspense. For this reason, it is absolutely necessary to use all possible measures to ensure that states adopt the principles of the 1981 Declaration into their domestic legislation.

58. Compare 1948 Declaration, *supra* note 29, arts. 2, 16, 18, 26 (guaranteeing individuals the rights to religious freedom of conscience, religious practice, and freedom from discrimination with regard to religion more generally, but without specific guarantees regarding religious communities), with 1981 Declaration, *supra* note 50, art. 6 (providing specific guarantees regarding the formation of religious communities and institutions, and communication with them).

59. 1981 Declaration, *supra* note 50, art. 7.

III. MEXICAN LEGISLATION ON RELIGION

The current Mexican Constitution was established in 1917 and has experienced hundreds of changes throughout its existence.⁶⁰ The Constitution originally represented one of the most restrictive constitutions in the world with regard to religious freedom.⁶¹ Between 1926 and 1929, this situation provoked the Cristero Rebellion, a bloody war fought in defense of religious freedom.⁶² By the early 1940s, however, the Constitution's anti-religious provisions had ceased to be vigorously applied, even though they had not been officially derogated.⁶³

In 1992, substantial amendments were made to the five constitutional articles concerning matters of religion: Articles 3, 5, 24, 27 (sections II and III), and 130.⁶⁴ The Ley de Asociaciones Religiosas y Culto Público (LARCP) was passed in that same year.⁶⁵ Eleven years later, the regulations implementing the LARCP were approved.⁶⁶

The new legal framework marked a never-before-seen stage in relations between the political and religious spheres in Mexico. This stage concerned not only the Catholic Church—although the Catholic Church certainly received the most attention—but also many other religious faiths, all of which color Mexican society with different hues and make it a society of religious pluralism.⁶⁷

60. Stephen Zamora & José Ramón Cossío, *Mexican Constitutionalism After Presidencialismo*, 14 INT'L J. CONST. L. 411, 412 (2006).

61. See MICHAEL C. MEYER & WILLIAM L. SHERMAN, *THE COURSE OF MEXICAN HISTORY* 543-44 (5th ed. 1995) (discussing the limitations on religious freedom that were contained in the original 1917 Constitution).

62. *Id.* at 587-89 (giving a historical account of the Cristero Rebellion).

63. See *id.* at 627-28 (discussing the election of President Manuel Avila Camacho in 1940, which led to the end of anticlericalism and enforcement of anti-religious constitutional provisions).

64. Constitución Política de los Estados Unidos Mexicanos, *as amended*, art. 130(a), (c)-(e), Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.) [hereinafter Mexican Constitution].

65. Ley de Asociaciones Religiosas y Culto Público [Law of Religious Associations and Public Worship], *as amended*, arts. 3, 5, 24, 27, 130, D.O., 15 de Julio de 1992 (Mex.) [hereinafter LARCP].

66. Reglamento de la Ley de Asociaciones Religiosas y Culto Público [Regulations of the Law of Religious Associations and Public Worship], D.O., 6 de Noviembre de 2003 (Mex.) [hereinafter RLARCP].

67. Today, the vast majority of Mexican citizens declare themselves to be Catholic, but other religious denominations are making a gradual advance. According to the most recent

Although the constitutional amendments mentioned above represented a positive direction in favor of religious freedom, they did not go far enough. Specifically, they left in place various restrictions on religious freedom that are in conflict with some of the principles set out in the international documents on religious freedom described above.

This Part discusses the principal restrictions on the right of religious freedom within Mexico's current legal framework using the four international documents on religious freedom discussed in Part II—particularly the 1981 Declaration—as a paradigm. The following sections outline these restrictions, which include restrictions affecting ministers of religion, conscientious objectors, religious freedom in education, media of mass communication, and spiritual assistance for members of the military.

A. Ministers of Religion

Article 130 of the Constitution, as amended, refers to “ministers of religion” in multiple sections; however, the Constitution does not specify the meaning of this term.⁶⁸ Nevertheless, the LARCP states that “ministers of religion include all persons having the age of majority upon whom the religious associations to which they belong confer that character.”⁶⁹

Article 130 and the LARCP create an exception for ministers of religion in terms of their status as citizens.⁷⁰ Specifically, ministers have no right to a passive vote,⁷¹ nor can they hold high public

Mexican census, conducted in 2000, 87.99% of citizens claimed Catholic affiliation, 5.2% claimed Protestant affiliation (including historical religions; Pentecostals and Neo-Pentecostals; the Church of the Living God, the Pillar and Ground of the Truth; the Light of the World; and other evangelical groups), 2.07% claimed Biblical but non-evangelical affiliation (including Seventh-Day Adventists, Jehovah's Witnesses, and the Church of Jesus Christ of Latter-day Saints, also known as the “Mormons”), 0.05% claimed Jewish affiliation, 0.31% claimed other religions, and 3.52% claimed no religion. See XII Censo General de Población y Vivienda 2000, available at http://www.inegi.gob.mx/prod_serv/contenidos/espanol/bvinegi/productos/censos/poblacion/2000/definitivos/Nal/tabulados/00re01.pdf. Naturally, these percentages could have changed slightly during the seven years that have elapsed since the census took place.

68. Mexican Constitution, *supra* note 64, art. 130(c)–(e).

69. LARCP, *supra* note 65, art. 12 (“[S]e consideran ministros de culto a todas aquellas personas mayores de edad a quienes las asociaciones religiosas a que pertenezcan confieran ese carácter.”).

70. Mexican Constitution, *supra* note 64, art. 130(d); LARCP, *supra* note 65, art. 14.

71. A “passive vote” is the right to be voted into office, whereas an “active vote” is the

office, unless they definitively abandon their ministry for a specific period of time beforehand.⁷² To have the right to a passive vote, the period is five years before the relevant election; to hold high public office, the time period is three years before acceptance of the public office.⁷³ This restriction against ministers is discriminatory: it limits their citizenship rights for no other reason than their position as ministers.

It should be emphasized that the status of a citizen represents a truly essential key in a democratic state that is founded upon the equal participation of every citizen in popular sovereignty. As Viladrich and Ortiz write,

At this level there is not not can there be any difference in status or capacity; the violation of this common and radical condition—or the existence of diverse categories of citizens in a democratic state, which qualifies as the same thing—represents not only the violation of a subjective right, but the negation of what democracy means.⁷⁴

A democratic state cannot, without compromising its own legitimacy, use its legal system to deprive the political rights, or a part thereof, of its citizens out of fear that they might illicitly influence electoral processes. A democratic state assumes the risk of liberty. It affords all potential candidates or representatives the freedom to assume their own moral responsibility—to govern themselves with their own conscience—with the caveat, of course, that their behavior not be criminal. Most importantly, a democratic state grants to the people themselves the responsibility to decide for whom they will vote, even though they might “err” in doing so. A democratic state has genuine confidence in the capacity of the people, even the simple and the illiterate, to know what they desire. In contrast, the authoritarian and paternalistic state begins with the premise—whether acknowledged or not—that the people lack the discernment to rationally choose their leaders. This premise

right to vote. See Jorge A. Vargas, *Freedom of Religion and Public Worship in Mexico: A Legal Commentary on the 1992 Federal Act on Religious Matters*, 1998 BYU L. REV. 421, 447.

72. Mexican Constitution, *supra* note 64, art. 130(d); LARCP, *supra* note 65, art. 14.

73. LARCP, *supra* note 65, art. 14.

74. Viladrich & Ortiz, *supra* note 54, at 202 n.55 (“En ese plano ni hay—ni puede haber—diferencias de calidad o posesión del título, porque la violación de esa común y radical condición o, lo que es lo mismo, la existencia de diversas categorías de ciudadanos en un Estado democrático, no sólo representa la conculcación de un derecho subjetivo sino también la negación de su esencia democrática.”).

essentially relegates the people to the permanent status of under-aged minors. For that reason, the authoritarian state must shield its citizens from the pernicious influences that could affect the people's political will, especially when those influences do not coincide with the will of the governing class.

Ministers of religion should enjoy the same rights and have the same obligations as anyone else; they should not be given special privileges nor be subject to special discrimination. Thus, a democratic state should not deprive ministers of religion from exercising their human rights in the political arena. True democracies cannot accept the argument that spiritual functions are incompatible with political activity and that the people must therefore be protected against the danger of being politically influenced by those having spiritual and moral authority over them.

It is one thing for a church to impose a duty of political abstention upon its ministers and for those ministers to freely accept that duty, just as they may renounce marriage and business pursuits. It is quite another thing for the legal system to deprive such rights from citizens who happen to be ministers. Such deprivation is a blatant case of religion-based discrimination, which the international law of human rights specifically prohibits. Simultaneously, this deprivation limits the political rights of all citizens to the degree that it limits their opportunity to elect ministers of religion—who have been unduly excluded from the right to a passive vote—to represent them in public office.

Article 130 of the Constitution also prohibits ministers of religion from “insult[ing] patriotic symbols in any way.”⁷⁵ Furthermore, the implementing legislation for this article adds that ministers cannot “in any manner induce others to reject” patriotic symbols.⁷⁶ These provisions assume that ministers, simply because they are ministers, are more likely to betray national symbols than the rest of the population. This assumption is both offensive and discriminatory. Additionally, it is unwarranted from a legislative perspective because the illicit behaviors addressed in Article 130 are

75. Mexican Constitution, *supra* note 64, art. 130(e) (“Los ministros no podrán . . . agraviar, de cualquier forma, los símbolos patrios.”).

76. LARCP, *supra* note 65, art. 29(II) (“[Los ministros no podrán] [a]graviar a los símbolos patrios o de cualquier modo inducir a su rechazo . . .”).

already prohibited in the Federal Criminal Code and in the Law on the State Seal, the State Flag, and the National Anthem.⁷⁷

Article 130 contains another serious restriction that infringes not only upon political freedoms of ministers of religion, but also their freedoms to express belief, to write, and to publish.⁷⁸ The Constitution specifically grants these freedoms to all citizens in Articles 6 and 7.⁷⁹ Article 130, however, prohibits ministers from exercising these freedoms: “[I]n public meetings, in acts of the religious group, in religious propaganda, or in religious literature, [ministers may not] oppose the laws of the country or its institutions”⁸⁰ The LARCP, which is the legislation implementing Article 130, includes the prohibition that ministers may not “oppose the laws of the country or its institutions in public meetings.”⁸¹ The penalties for violating this prohibition include a “fine of up to twenty-thousand days of the current minimum daily wage in the Federal District.”⁸²

Besides restricting the ability of ministers of religion to exercise rights granted to all other Mexican citizens, the limitations in Article 130 violate the 1981 Declaration,⁸³ the ICCPR,⁸⁴ and the American Convention on Human Rights (ACHR).⁸⁵ These international documents recognize human rights concerning freedoms of conscience, thought, oral and written expression, information, and opinion on any subject whatsoever. Furthermore, these documents

77. Código Penal Federal [C.P.F.] [Federal Criminal Code], *as amended*, art. 191, D.O., 14 de Agosto de 1931 (Mex.); Ley Sobre el Escudo, la Bandera y el Himno Nacionales [Law on the State Seal, the State Flag, and the National Anthem], *as amended*, art. 56, D.O., 8 de Febrero de 1984 (Mex.). All of these prohibitions concern matters related to conscientious objection, a right that Mexican legislation does not recognize in any form. See *infra* Part III.B.

78. Mexican Constitution, *supra* note 64, art. 130.

79. *Id.* arts. 6, 7.

80. *Id.* art. 130(e) (“Tampoco [los ministros] podrán en reunión pública, en actos del culto o de propaganda religiosa, ni en publicaciones de carácter religioso, oponerse a las leyes del país o a sus instituciones . . .”).

81. LARCP, *supra* note 65, art. 29(X) (“[Los ministros no podrán] [o]ponerse a las Leyes del País o a sus instituciones en reuniones públicas . . .”).

82. *Id.* art. 32(II) (“A los infractores de la presente ley se les podrá imponer . . . [m]ulta de hasta veinte mil días de salario mínimo general vigente en el Distrito Federal.”).

83. See 1981 Declaration, *supra* note 50, arts. 2(1), 7, 18, 19, 30.

84. See ICCPR, *supra* note 41, arts. 2(1), 3, 5, 18, 19(2), 26.

85. See American Convention on Human Rights, arts. 1, 2, 12, 13(2), 24, Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter ACHR].

obligate the signatory states to respect and guarantee these rights to all individuals without regard to race, color, sex, language, religion, or opinion (political or otherwise) and to avoid restricting or limiting these fundamental human rights—regardless of any justification proffered by law, convention, regulation, or custom.

Mexico accepted, ratified, and promulgated these international documents without publishing any kind of interpretative declaration or reservation excluding ministers of religion from the freedoms of thought, expression, and publication contained in the international documents.⁸⁶ According to Article 133 of the Constitution, these documents form part of Mexico's legal and constitutional framework.⁸⁷ Consequently, Mexico not only unjustifiably violated its international obligations but violated its own constitutional law when it restricted ministers from exercising those rights.

Some may contend that the foregoing prohibitions do not represent restrictions on ministers' human rights since the law prohibits only "opposition" to the country's laws and institutions, not "criticism." Specifically, they might assert that opposition means either refusing to obey the law or not permitting government institutions to function, while criticism simply means disagreeing with laws and institutions. For several reasons, this interpretation is incorrect. First, a prohibition against disregarding one's legal obligations for religious reasons already exists in the LARCP.⁸⁸ Second, in the political context, the word "opposition" generally has a broader meaning than obstructing institutions or disobeying the law; it often connotes criticism or simple disagreement. Third, if "opposition" goes beyond the bounds established by the legal system, such conduct must include illicit behavior for which any citizen—not ministers alone—could be punished. The most troublesome aspect of all is that the Department of the Interior, in its sole discretion, holds the power to judge whether a particular

86. Mexico's *Diario Oficial de la Federación*, which is similar to the United States' *Federal Register*, published notices of the adoption of these documents. Decreto de Promulgación del Pacto Internacional de Derechos Civiles y Políticos, D.O., 20 de Mayo de 1981 (Mex.) (adoption of the ICCPR); Decreto de Promulgación de la Convención Americana Sobre Derechos Humanos, D.O., 7 de Mayo de 1981 (Mex.) (adoption of the ACHR).

87. Mexican Constitution, *supra* note 64, art. 133.

88. LARCP, *supra* note 65, art. 1.

minister's activity constitutes "opposition" and to determine and apply any penalty that might result.⁸⁹

B. Conscientious Objection

As previously noted, religious freedom represents immunity against government coercion, as well as coercion from other people and social groups, which either prohibits individuals from acting according to their conscience or forces them to act against their conscience.⁹⁰ For this reason, when a law or a public authority's requirement—such requirement, when legitimate, being presumed to have the force of law—openly offends an individual's conscience, that individual has the right, and at times the inexcusable obligation, to disobey the law or requirement. This area of law concerns what is known as conscientious objection.

In general, the term "conscientious objection" describes the decision, in order to remain faithful to one's own convictions, to refuse to obey a given requirement or command. The forms of conscientious objection are as numerous as the crimes of those who abuse their authority. Indeed, one could write a history that would constitute a magnificent testimony honoring those who were brave enough to choose fidelity to conscience over the immediate and fleeting advantages of conformity.

Constitutional provisions do not usually refer directly to conscientious objection as a subjective right that is *erga omnes* in its many different forms. In most cases, constitutions name only certain forms, such as conscientious objection to military service, leaving other forms unmentioned. Nevertheless, conscientious objection is indisputably a part of the fundamental right of religious freedom.

In effect, conscientious objection is an inherent element of religious freedom. This element translates into an individual's right to refuse to obey a legal obligation in order to remain faithful to personal convictions. This right does not concern a simple psychological difficulty that creates a false crisis of conscience; rather, it concerns a legal obligation that, if obeyed, would produce serious injury to one's own conscience or professed beliefs. Conscientious

89. *Id.* arts. 30, 32.

90. *See supra* Part II.C.

objection therefore entails fidelities which, as Emmanuel Mounier affirms, “[are] value[d] more than life itself.”⁹¹

Conscientious objection, based upon the dignity and freedom of each person, is a fundamental and inalienable right that the State’s legal system should recognize and protect. If the legal system fails to do so, the State denies its citizens personal dignity. Consequently, the State becomes the original source and unquestioned arbiter of personal rights and responsibilities.

Although the Mexican Constitution contains certain restrictions, it basically guarantees the right of religious freedom, which right implicitly includes conscientious objection as one of its dimensions. Nevertheless, the LARCP emphatically denies the possibility of recognizing conscientious objection: “In no case can religious convictions exempt a person from obeying the laws of the country. No one can cite religious reasons to avoid the responsibilities and obligations prescribed by law.”⁹²

Notwithstanding this provision, there are possible arguments through which conscientious objection may receive constitutional protection. Specifically, one could argue that the Constitution’s right of religious freedom implicitly includes the right of conscientious objection, which constitutional right therefore enjoys supremacy over the implementing of legislation. Indeed, the ombudsman for the National Commission on Human Rights used this argument to recognize the right of Jehovah’s Witnesses to refuse to honor patriotic symbols in schools.⁹³ This decision effectively recognized Jehovah’s Witnesses as conscientious objectors in such cases.

Mexico’s state legislatures are beginning to make significant advances in this area. For example, in 2005, Jalisco’s state legislature amended the State Law on Health by adding Article 18.⁹⁴

91. EMMANUEL MOUNIER, *PERSONALISM* 49 (Philip Mairet trans., Grove Press 1952) (1950).

92. LARCP, *supra* note 65, art. 1 (“Las convicciones religiosas no eximen en ningún caso del cumplimiento de las leyes del país. Nadie podrá alegar motivos religiosos para evadir las responsabilidades y obligaciones prescritas en las leyes.”).

93. COMISIÓN NACIONAL DE DERECHOS HUMANOS, RECOMENDACIÓN GENERAL NO. 5 (May 14, 2003), *available at* <http://www.cndh.org.mx/recomen/general/005.htm>.

94. *Ley Estatal de Salud del Estado de Jalisco* [State Health Law of the State of Jalisco], *as amended*, art. 18(3), 30 de Diciembre de 1986 (Mex.), *available at* <http://info4.juridicas.unam.mx/adprojus/leg/15/351/default.htm?s=>.

The professionals, technicians, aides, and social-service providers who form part of the State Health System can use conscientious objection to excuse themselves from participating in any program, activity, practice, treatment, method, or research that violates their freedom of conscience as it relates to their values, ethical principles, or religious beliefs.

When the conscientious objector's refusal puts a patient's life or health at risk and the patient cannot be transferred to other health-system employees who can provide the necessary care, the objector cannot exercise his or her right and must take the necessary medical measures; if the objector does not do so, he or she will face a charge of violating professional responsibility.

The Secretary of Health will publish the rules and guidelines that must be followed in order for individuals to manifest the conscientious objection described in this Article, with the caveat that such rules cannot limit individuals' exercise of this right nor prejudice the employment of those who might exercise it.⁹⁵

This article takes a truly advanced position with respect to human rights and the exercise of authentic federalism and introduces an explicit right to conscientious objection for the first time in Mexican legislative history. This recognition of conscientious objection appears in the health care arena, one of the most sensitive areas, and an area in which one's conscience is likely to be aggrieved. Such aggravation occurs when individuals are obligated—by force of law or by a contract of employment—to participate in any kind of program, research, medical treatment, or practice that violates their values, ethical principles, or religious beliefs. These situations include, for example, matters related to abortion or stem cell research. The state legislators who drafted this amendment have

95. *Id.* ("Los profesionales, técnicos, auxiliares y prestadores de servicio social que forma parte del Sistema Estatal de Salud, podrán hacer valer la objeción de conciencia y excusarse de participar en todos aquellos programas, actividades, prácticas, tratamientos, métodos o investigaciones que contravengan su libertad de conciencia con base en sus valores, principios éticos o creencias religiosas. Cuando la negativa del objetor de conciencia implique poner en riesgo la salud o vida del paciente, sin que éste pueda ser derivado a otros integrantes del sistema de salud que lo atiendan debidamente, el objetor no podrá hacer valer su derecho, y deberá aplicar las medidas médicas necesarias; en caso de no hacerlo, incurrirá en causal de responsabilidad profesional. La Secretaría de Salud emitirá las disposiciones y lineamientos para manifestar la objeción a que se refiere este artículo, sin que estas disposiciones puedan limitar el ejercicio de este derecho o generar discriminación en el empleo hacia quien lo haga valer.").

opened a legislative path to protecting people's freedom of conscience, which deserves the greatest recognition and respect.

C. Religious Freedom in Education

While not specifically directed at religious faiths or specifically concerned with religious freedom, certain laws nevertheless affect both. One example is education legislation, which has a considerable effect on religious freedom because it concerns not only the manifestations of religiousness or irreligiousness but also the very origin of those manifestations. After all, education provides the most influential means by which religious convictions take shape and are reinforced. Thus, citizens' religious options depend in great part upon education laws.⁹⁶

The constitutional amendments of 1992 eliminated section 4 of Article 3.⁹⁷ That section contained the following prohibition:

Religious corporations, ministers of religion, companies which exclusively or predominantly engage in educational activities, and associations or companies devoted to propagation of any religious creed shall not in any way participate in institutions giving elementary, secondary, and normal education and education for laborers or field workers.⁹⁸

By eliminating this section, Mexico effectively removed a prohibition against establishing religious schools and providing religious education in private schools. What is not prohibited is permitted; therefore, the fact that the Constitution no longer prohibits religious education in private schools means that such education is implicitly authorized. Mexico would have done better to create an explicit constitutional right of religious freedom in educational matters, which right would include the ability of all individuals and organizations to create and maintain education

96. See JOSÉ MARÍA GONZÁLEZ DEL VALLE, *DERECHO ECLESIASTICO ESPAÑOL* 51 (1989).

97. See JORGE GONZÁLEZ CHÁVEZ, *ARTÍCULO 3 CONSTITUCIONAL: GRATUIDAD DE LA EDUCACIÓN SUPERIOR: UN ENFOQUE JURÍDICO 9-14* (1999) (listing the constitutional amendments affecting Article 3).

98. *Id.* at 11 (quoting Article 3(IV) as of 1946) ("Las corporaciones religiosas, los ministros de los cultos, las sociedades por acciones que, exclusiva o predominantemente, realicen actividades educativas y las asociaciones o sociedades ligadas con la propaganda de cualquier credo religioso no intervendrán en forma alguna en planteles en que se imparta educación primaria, secundaria y normal y la destinada a obreros o a campesinos . . .").

centers. Rather than appearing in the Constitution, this right was relegated—with some restrictions—to the LARCP.⁹⁹ Additionally, Mexico has failed to recognize another important educational right in its Constitution: the right of parents to determine the type of education their children receive in conformity with their own convictions.

Although Mexico now implicitly allows religious education in private schools, it continues to prohibit religious education in public schools. As noted in the Constitution, “[public] education is secular and will therefore be completely free of any religious doctrine.”¹⁰⁰ This restriction infringes on parents’ right to choose the type of education, whether public or private, that their children will receive, which right expressly appears in the 1948 Declaration,¹⁰¹ a declaration to which Mexico is a party. The European Convention on Human Rights (ECHR) also addresses the relationship between public education and religious convictions. Protocol 1 to the ECHR states that “[i]n the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”¹⁰² Additionally, the 1981 Declaration establishes that “[e]very child shall enjoy the right to have access to education in the matter of religion or belief in accordance with the wishes of his parents . . . and shall not be compelled to receive teaching on religion or belief against the wishes of his parents”¹⁰³

Similarly, the ICCPR provides that parties to the Covenant “undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own

99. LARCP, *supra* note 65, art. 9(V).

100. Mexican Constitution, *supra* note 64, art. 3(I) (“[La educación que imparta el Estado] será laica y, por tanto, se mantendrá por completo ajena a cualquier doctrina religiosa.”).

101. 1948 Declaration, *supra* note 29, art. 26(3) (“Parents have a prior right to choose the kind of education that shall be given to their children.”).

102. European Convention for the Protection of Human Rights and Fundamental Freedoms, protocol 1, art. 2, Nov. 4, 1950, 213 U.N.T.S. 221. Although Mexico is not a member of the Council of Europe, it attained observer status in 1999. *See* Council of Europe, *The Council of Europe’s Member States*, http://www.coe.int/T/E/Com/About_Coc/Member_states/default.asp.

103. 1981 Declaration, *supra* note 50, art. 5(2).

convictions."¹⁰⁴ This provision is repeated with similar language in the ACHR, also known as the San Jose Pact.¹⁰⁵ Mexico subscribed to, ratified, and ultimately promulgated both the ICCPR and the ACHR.¹⁰⁶ In light of Article 133 of the Constitution, Mexico's adoption of these covenants carries with it certain consequences.¹⁰⁷ First, all human rights described in the covenants that have not been the object of reservations or declarative interpretations—which Mexico has never promulgated—necessarily form part of Mexico's constitutional order. Second, Mexico has assumed an unavoidable legal obligation to protect these rights. Third, Mexico ought to amend its Constitution to conform to the content of the covenants.

Consequently, with regard to religious freedom and education, Mexico should have already amended the Constitution to accomplish the following: (1) eliminate the prohibition against teaching religion in schools; such teaching naturally being extracurricular and non-obligatory; and (2) recognize the human right of parents to ensure that their children's education conforms to their convictions. It should not have been optional for Mexican legislators to decide whether or not to amend the Constitution in this way. Rather, they had a legal responsibility to do so. Both covenants clearly establish this responsibility.

Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.¹⁰⁸

It is important to note that the possibility of receiving religious education in accord with parents' convictions is the educational area in which religious freedom is most directly realized. For that very reason, as demonstrated above, this right appears in the principal international documents on human rights, as well as in most

104. ICCPR, *supra* note 41, art. 18(4).

105. ACHR, *supra* note 85, art. 12(4) ("Parents or guardians, as the case may be, have the right to provide for the religious and moral education of their children or wards that is in accord with their own convictions.").

106. *See supra* note 86.

107. Article 133 provides that such covenants shall be the supreme law of the nation. Mexican Constitution, *supra* note 64, art. 133.

108. ICCPR, *supra* note 41, art. 2(2); *see also* ACHR, *supra* note 85, art. 2.

constitutions of the western world.¹⁰⁹ Professor Gary Doxey notes that countries have adopted many different interpretations of parents' fundamental right to educate their children according to their own beliefs¹¹⁰—a right granted in international instruments. Furthermore, Doxey points out that countries have not always found concrete ways to recognize that right.¹¹¹

Mexican law, which recognizes the right to religious freedom in education only for private schools, creates serious discrimination against parents who lack the financial resources to send their children to such schools. In Mexico, of every one hundred children attending elementary school, more than ninety attend public schools;¹¹² thus, the inference that can be drawn is that over ninety percent of parents lack sufficient resources to send their children to private school. This situation presents a case of religious discrimination based upon economic position and social status. Such religious discrimination conflicts with the 1981 Declaration,¹¹³ the ICCPR,¹¹⁴ the ACHR,¹¹⁵ and the 1948 Declaration.¹¹⁶

Religious freedom must include, among other manifestations, the right to instruct, educate, or indoctrinate according to a particular religious or ideological belief system. Recognizing this imperative, international human rights law grants all individuals and organizations the right to establish, direct, and administer educational centers.¹¹⁷

109. Professor Gary B. Doxey notes that the majority of Latin American countries currently permit religious teachings in public schools, with the exception of Mexico, El Salvador, Nicaragua, Ecuador, Uruguay, Cuba, and Puerto Rico. Gary Doxey, *La Educación Pública Frente a la Libertad Religiosa*, V COLOQUIO DEL CONSORCIO LATINOAMERICANO DE LIBERTAD RELIGIOSA 27-28 (2005). In the European Union, religion is taught in public schools, with the exception of France, where social ethics is taught in place of religion. *Id.* at 29. In Spain, there is debate concerning a law that proposes to eliminate religious education in the name of secularism. *Id.* In the United States, religion is not taught in public schools; nor is religion taught in the public schools of Canada, although the State continues to contribute monetary resources to some religious schools for historical reasons. *Id.* at 28.

110. *See id.* at 27-28.

111. *Id.* at 24.

112. Ernesto Zedillo, President of Mexico, Address at Ecatepec, Mexico (June 27, 2000), <http://zedillo.presidencia.gob.mx/pages/disc/jun00/27jun00.html> (stating that ninety-one percent of Mexican children attend public schools).

113. *See* 1981 Declaration, *supra* note 50, art. 2(1).

114. *See* ICCPR, *supra* note 41, art. 2(1).

115. *See* ACHR, *supra* note 85, art. 1(1).

116. *See* 1948 Declaration, *supra* note 29, art. 2.

117. *See, e.g.*, ICESCR, *supra* note 47, art. 13 ("No part of this article [regarding

Because international law has afforded religious organizations the right to establish schools, it follows that schools are conceived as more than centers for transmitting knowledge. Rather than simply transmitting knowledge, schools should be seen as centers for establishing values and attitudes in accordance with a particular religious creed or ideology.

As shown in this section, prohibiting the teaching of religion in public schools violates human rights; however imposing the teachings of a particular religion is equally violative of those same human rights. Therefore, an important caveat applies when the state recognizes parents' right that religious education will be provided for their children in public schools: this right must be scrupulously guaranteed to parents of all religious backgrounds, as well as to those who do not want their children to receive any religious instruction at all. Parents from all religious backgrounds—whether Catholic, Jewish, Protestant, or any other—have the right to ensure that their children receive an education that conforms to their own religious beliefs; similarly, agnostic and atheistic parents enjoy the right to ensure that their children receive no religious education of any kind.

D. Media of Mass Communication

In a grave inconsistency, the LARCP states that “[r]eligious associations and ministers of religion may not own or manage, whether directly or through a third party, licenses for operating radio stations, television stations, or any kind of telecommunications.”¹¹⁸ Likewise, religious associations and ministers cannot “acquire, own, or manage any kind of media of mass communication.”¹¹⁹ Printed publications are excluded from this prohibition.¹²⁰

This prohibition conflicts with Articles 6 and 7 of the Constitution, which grant freedoms to express ideas and to publish writings.¹²¹ The means necessary to exercise these constitutional

education] shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions . . .”).

118. LARCP, *supra* note 65, art. 16 (“Las asociaciones religiosas y los ministros de culto no podrán poseer o administrar, por sí o por interpósita persona, concesiones para la explotación de estaciones de radio, televisión o cualquier tipo de telecomunicación . . .”).

119. *Id.* (“Las asociaciones religiosas y los ministros de culto no podrán . . . adquirir, poseer o administrar cualquiera de los medios de comunicación masiva.”).

120. *Id.*

121. Mexican Constitution, *supra* note 64, arts. 6, 7.

freedoms are the very means that the LARCP denies to religion: radio, television, other telecommunications media, and media of mass communication.

Not only does this LARCP prohibition violate constitutional freedoms of expression, it is also unconstitutional to the degree that it goes beyond the framework established in Article 27 of the Constitution. Section II of Article 27 makes no reference to any limit on religious associations' ability to acquire, own, or manage media of mass communication.¹²² The LARCP prohibition therefore qualifies as *praeter legem*¹²³ and lacks legal force. As a result, if any government authority seeks to apply that prohibition to a religious association in some future case, the association may be able to defend itself by seeking a suit of *amparo*¹²⁴ before a district judge. Such a defense would follow the provisions of the Law of Amparo.¹²⁵

Aside from constitutional problems, this LARCP prohibition violates established standards of international public law. Mexico has an obligation to recognize these standards in its legal system, given that it has subscribed to and ratified international accords codifying them. Such accords include the ICCPR, which states that everyone is entitled to "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."¹²⁶ Furthermore, the ICCPR provides the following:

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of [these] rights . . . carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

122. *See id.* art. 27(II).

123. Outside or beyond the law.

124. A suit of *amparo* is a legal proceeding, the purpose of which is to protect all persons whose constitutional rights have been violated by governmental actions.

125. *See Ley de Amparo* [Law of Amparo], *as amended*, art. 114(1), D.O., 10 de Enero de 1936 (Mex.).

126. ICCPR, *supra* note 41, art. 18(1).

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (*ordre public*), or of public health or morals.¹²⁷

Additionally, the LARCP prohibition also conflicts with Articles 12 and 13 the ACHR, which grants rights of expression to religious associations.¹²⁸ The prohibition also constitutes a patent case of the kind of discrimination prohibited in the 1981 Declaration.¹²⁹

E. *Spiritual Assistance for Members of the Military*

The LARCP also fails to recognize an explicit right to spiritual assistance in detention centers and prisons, health centers, immigration centers, and the military as a right inherent within the right of religious freedom. Nevertheless, the regulations implementing the LARCP partially—and properly—correct this error by providing a right to spiritual assistance in health centers and social-welfare institutions, both public and private, as well as in social rehabilitation centers and immigration centers.¹³⁰ This right to spiritual assistance in detention centers and prisons unquestionably inheres in the right to religious freedom. The regulations, therefore, merit praise for recognizing elements implicit in the LARCP and for establishing them clearly and precisely. Thus, these regulations coherently apply the interpretive rule of *favor libertatis*,¹³¹ a rule that should always be considered when interpreting legislation on religious matters.

127. *Id.* art. 19(2), (3).

128. ACHR, *supra* note 85, arts. 12, 13.

129. 1981 Declaration, *supra* note 50, arts. 1, 2.

130. RLARCP, *supra* note 66, art. 6. With respect to social rehabilitation centers, the right to spiritual assistance was already provided for in the Regulations of the Federal Centers of Social Rehabilitation, as set forth in Articles 8, 33, and 42. Reglamento de los Centros Federales de Readaptación Social [Regulations of Federal Centers of Social Rehabilitation], arts. 8, 33, 42, D.O., 30 de Agosto de 1991 (Mex.). Article 42 provides that “[a]ccredited ministers of religious groups may visit Federal Centers of Social Rehabilitation upon written authorization from the General Director of Social Prevention and Rehabilitation of the Department of the Interior, or from whomever the Director designates [to provide such authorization].” *Id.* art. 42 (“Los ministros acreditados de cultos religiosos, podrán visitar los Centros Federales de Readaptación Social, previa autorización por escrito del Director General de Prevención y Readaptación Social de la Secretaría de Gobernación, o de quien él designe.”).

131. The rule of *favor libertatis* provides that in cases of uncertainty, the interpretation most favorable to expanding freedoms should be adopted.

Notwithstanding the progress that the foregoing represents in widening the scope of religious freedom, an important omission deserves attention. This omission concerns the right to spiritual assistance in military establishments, and may possibly reflect historical prejudice. Such prejudice, however, cannot be justified today and should therefore be corrected. The right to spiritual assistance needs to apply when the requirements of military service eliminate the possibility for service members to receive religious assistance of their own faith in any other way.

IV. CONCLUSION

In light of the principles set forth in the Mexican Constitution and the international documents discussed in this Article, it is evident that changes must be made to Mexico's current legal framework in order to provide greater religious freedom for all Mexican citizens. Mexico's legislature will ultimately need to take the necessary steps to ensure the protection of these religious freedoms. Only then will Mexican citizens truly enjoy the religious freedom they deserve.