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REMARKS ON CASE 06111-2009- PA/TC: AN OPPORTUNITY TO INQUIRE ABOUT THE PERUVIAN CHURCH AND STATE SYSTEM

Susana Mosquera

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Instituto de Derecho Humanos

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Abstract

Last 7th March the Peruvian Constitutional Court made Case 06111-2009-PA/TC public, a very significant judgment that affects the essential content of religious freedom. This paper will deal with the main topics used by the Court: religious freedom, equal treatment, secularism, and collaboration with religious entities. It will also try to offer a wider approach to the Peruvian legal system of Church and State relationship, considering the new law on religious freedom, and some other Constitutional decisions, because it is not completely sure that focus is directed to the correct place.

Key Words

Religious freedom, secularism, Church and State relationship, equal treatment.

1. General overview: historical and legal approach

In 1915¹ the Peruvian Constitution included the first tolerant formulation of church and state relationship, since in this date private cult was accepted. Freedom of conscience will only arrive in 1933² even though Peru still is a Catholic confessional state. Great change would be made when the 1979 Constitution come into force because it appropriately recognized freedom of conscience and religion to every human being³. That was a very good Constitution, which recognized a large catalogue of human rights and also created procedural tools to protect them⁴. Nevertheless not one case concerning religious freedom arrived to the Guarantees

¹ By means of a constitutional reform on Article 4 of the 1860 Peruvian Constitution that, as all the previous Constitutions, had recognized Roman Catholicism as the State religion.

² Article 59 mentioned freedom of conscience and religion.

³ Article 2 established: "Every individual has the right (...) to freedom of conscience and religion, individually or as a member of a group. No one may be persecuted for his ideas or beliefs. Public expression is free, provided that it does not offend moral or disturbs peace".

⁴ National and international as far as during this period Peru signed and confirmed most of the International instruments on Human Rights.



Constitutional Court⁵. Relationships with the Catholic Church were ruled by the 1980 Agreement⁶, and it seems that throughout this period other religious communities were taking shape into the internal laws⁷.

The 1993 Constitution opened a new period in recent history, and although it was so discredited because of the political context where it was born⁸, the truth is that a great job had been done to read it in a more democratic way, solving some of the basic problems it had⁹. So even if some voices have demanded its revision, there are not reformation projects in the near future. During this new constitutional period¹⁰ several claims¹¹ concerning religious freedom had arrived to the Constitutional Court so we can say that important progress has been made in this topic.

There are three essential articles of the Constitution for the Civil ecclesiastical law: Article 2. 3¹², that recognized freedom of conscience and religion¹³, article 2. 2 that forbid discrimination on the grounds of religion and article 50 that establish basics lines of the church and state model¹⁴. A model that can be describes as positive or cooperative in regards to the religious entities¹⁵.

⁵ Created in 1980 and dissolved by ex president Fujimori on 5th April 1992. Unfortunately the living period of the 1979 Constitution (1979-1993) happened to be remembered as the beginning of the terrorist activities in the country.

⁶ It was in fact prepared under the 1933 Constitution, but came into force just a few days after the 1979 Constitution. The coincidence between them is evident, especially if we read the formula of "independence and autonomy" included in article 1 of the 1980 Agreement and Article 86 of the 1979 Constitution.

⁷ According to information prepared by CONEP they had a relevant increase of membership during the 1980-2007 period because of some reasons: visa permissions, donations, and legitimacy of the missionary work. <http://www.concilionacionalevangélico.org> [last accessed 27th September 2011].

⁸ Fujimori self-coup of 5th April 1992. That day Congress was dissolved to prepare a new Constitutional text.

⁹ We have to make special recognition to the Constitutional Court that since it's reopening in 1996 has protected the Constitutional concept of democracy and human rights.

¹⁰ First case about religious freedom was known by the Constitutional Court on 1997.

¹¹ Eighteen, from 1997 till 2011.

¹² Article 2, 3: "Every person has the right (...) to freedom of conscience and religion, in an individual or collective manner. No person shall be persecuted on a basis of his ideas or beliefs. There is no crime of opinion. Public exercise of any faith is free, in so far as it does not constitute an offense against morals or a disturbance of the public peace."

¹³ As the American Convention on Human Rights, the Peruvian Constitution opted to split in two the international triad "freedom of thought, conscience and religion", placing thought with freedom of expression. Nevertheless, we consider that technique just as a practical method to protect freedom of thought not as an essential change into the nature of the freedom of religion as a right nucleated around these three freedoms.

¹⁴ Article 50: "Within an independent and autonomous system, the State recognizes the Catholic Church as an important element in the historical, cultural, and moral formation of Peru and lends it its cooperation. The State respects other denominations and may establish forms of collaboration with them."

¹⁵ Collaboration that becomes more explicit now, than in the former Constitution.

Despite the fact that Peruvian legislator has taken a long time to rule about the right of freedom of religion¹⁶ some early movements were made to prepare the subject: Legislative changes to exclude discrimination against non-Catholic entities or to include swear or promise formula. But the most important ones will arrive after 2001. That year new office at the structure of the Legal Affairs Bureau was created to deal with the non-Catholic religious entities issues. The main topic was the problem of their legal recognition and personality. To solve it, a Registry was shaped in 2003 to inscribe the non-Catholic religious entities. During their living period 142 “religions” were included in this data base. The path was ready to walk over it on direction to the subject matter of collaboration recognized in article 50 of the Constitution. To guide this journey we have the new Freedom of Religion Act approved last December 2010¹⁷ and its rules of development¹⁸. Even if this is an act to protect and promote Freedom of Religion as an individual human right, the importance played by collective rights is quite evident. In fact, one of the main and direct consequences of the coming into force of the 29635 Act was the opening of a new mechanism of legal recognition for the non-Catholic religious entities¹⁹.

2. *Case 06111-2009-PA/TC of 7th March 2011*

It is a fact that this case arrived at a crucial moment for the Civil Ecclesiastical Law, inside and outside the country. Only a few months before the new Freedom of Religion Act was approved and almost at the very same moment with the Grand Chamber Judgment on Lautsi v. Italy, and more importantly, with the same basic topic “the display of religious symbols in public places”.

a. *The facts and circumstances of the case*

Action behind Case 06111-2009 started on November 2008 when a Civil Tribunal in Northern Lima denied the claim presented by Mr. Linares against the President of the Supreme Court of the Republic, as head of the Judicial Power. Denial was based on the lack of constitutional content of the request. Mr. Linares had two demands: first, removal of religious symbols –particularly crucifixes and Bibles- in all the offices and courts because their presence creates a conflict with the secularism of the State and represents discrimination against non-Catholic citizens; second, leaving out the question –made during any declaration ahead the Judicial Power- about the faith professed by the person making the statement.

With a first rejection to his demand, Mr. Linares appealed in July 2009. The Civil Superior Court of Northern Lima confirmed the verdict, remarking that there was not constitutional content on the case. So when the “appeal of grievance”

¹⁶ Although Law Projects on this topic can be found in the Congress since 2006, social demands on this field were activated earlier.

¹⁷ *Religious Freedom Act, # 29635, 16th December 2010.*

¹⁸ Decreto Supremo N° 010-2011-JUS.

¹⁹ Former Registry was closed on December 2010.



arrived to the Constitutional Court there was a strong and serious ticking off to the previous judicial answers²⁰ because it was “easy to see the link between petitions and the constitutional content of freedom of religion”²¹. The appeal of grievance is accepted and studied by the Constitutional Court even if procedural rules normally recommended send the case back to the first court.

b. Petitions and Court Answer

No doubt this is a suitable case to understand how freedom of religion interacts with a system of Church and State relationships. So even if the Constitutional Court did not analyze all the arguments with the same strength, we will try to open the focal point a bit more.

Personal and subjective effects of the violations of right to freedom of religion had an important role in the claim presented by Mr. Linares. As a ground to his first petition he said that, “on this mind he associates crucifixes and Bibles at the offices and courts of the Judicial Power, with the Inquisition and with his personal legal experience during the Fujimori dictatorial period. He also considered that the State has the right “to prefer” a religion instead of others, however cannot induce Catholicism to public entities. Religious symbols will always be partial; they do not represent all Peruvians”²². For the second petition he argued that the question about the faith professed by the person making any statement before the Judicial Power can only have historical and cultural reasons, without legal support. And, it could be an open door to court inequality, if the judge would have another faith.

With the purpose of preparing its answer, the Constitutional Court decided to offer us a brief approach to the basic principles where Civil Ecclesiastical Law is rooted²³. However this is objectively a great idea, the approach used by the Court seems to be incomplete as far as they forgot to include the very recent regulation of the 29635 Act on Religious Freedom, to give content of this fundamental right²⁴. In its place, the Constitutional Court used some of its own sentences related to religious freedom, non discrimination on grounds of religion, “secularism” and collaboration. And we have to say that this is not a one hundred per cent right decision, basically for three reasons. One, because by doing that, the Constitutional Court had lost the chance to make a completed and closed definition of religious freedom as a fundamental right. It used dissimilar sentences with unrelated issues, and did not clarify the spheres we can find inside this fundamental right: forum internum, external manifestations and the collective aspects of religious freedom.

²⁰ Especially if we consider the fact that Peru has a diffuse control of constitutionality. The Constitutional Court should only received exceptional cases.

²¹ EXP. 06111-2009-PA/TC, par. 3.

²² Free extracts from the records of the case.

²³ At least, according to well-known Spanish scholars. Vid. Viladrich, P.J. “Los principios informadores del Derecho español”, (pp. 211-316) en A.V. *Derecho eclesiástico del estado español*. Pamplona. 1980.

²⁴ The most terrible thing is that the Constitutional Court mentioned –because it well knew it- but did not use the 29635 Act –to give content to religious freedom-.

Second, he did not connect religious freedom and non-discrimination on grounds of religion in the answer of this action. Three, it mistook the description of the Peruvian model of Church and State relationship.

We will come back to some of these points, but to organize the ideas included in this case we are going to split the court answer into two basic topics: public declaration of State faith and individual declaration of faith.

b.1. Public declaration of State faith

We take in here the question –first petition made by Mr. Linares- if the display of Catholic symbols in public spaces –judicial courts and offices- represents or not a declaration of State faith. Of course, the final inquiry we have to answer is whether or not religious freedom had been injured by this fact.

The Constitutional Court concluded in this point that the display of Catholic symbols in public spaces is not unconstitutional²⁵, and even if we could agree with such a final conclusion, we have to say that the Constitutional Court made a mistake developing its argumentation. Not any public space has the same impact in freedom of religion. Or if we want to read it in a different way, the display of religious symbols in public spaces can open a debate about religious freedom as a fundamental right only when they are spaces under state –public- administration. If not, we are just talking about the public manifestations of religious freedom, which are a basic content of this right.

So when the Constitutional Court validates the display of Catholic religious symbols in the Peruvian Judicial Power offices and courts, because removing them, will also imply the removal of any other religious symbol we could find “outside” – in public spaces-, it is making a wrong understanding of the concept “public space”²⁶. External religious symbols, such as churches and chapels, processions, collective manifestations of cult, or even the big and obvious cross in the Saint Cristobal hill in Lima are not affecting the content of religious freedom, because they are in fact, collective manifestations of external content of this right. It was not the State who promoted these manifestations but the Catholic people themselves. The State should only be aware of public manifestations of faith in spaces under its administration. That is, spaces which are “state spaces”, because they represent any sphere of public administrative power of the State²⁷.

Considering this approach, judicial power is obviously one of the State powers. Catholic religious symbols in offices and courts mean something completely different from churches, processions or even men and women with

²⁵ EXP. N° 06111-2009-PA/TC, para. 56.

²⁶ “(...) habría igualmente que prohibir la exposición de símbolos religiosos en las calles, como las cruces en las cimas de los templos, ya que su presencia podría resultar emocionalmente perturbadora para los no creyentes”. EXP. N° 06111-2009-PA/TC, para. 50.

²⁷ Education, legislative power, judicial power, are common places for these kinds of conflicts.



notorious religious symbols in the streets or in their jobs. Then Constitutional Court has to answer the question of whether or not, the display of Catholic symbols is affecting Mr. Linares' constitutional right of religious freedom. In this point we can see that, because of a deficient description of religious freedom constitutional content, the Court has to support its answer on merely two arguments. First, the purely historical and cultural meaning of these religious symbols²⁸; and for such a traditional existence they have not ability to affect the fundamental religious freedom of the applicant or the "secularism" of the State. Second, because religious symbols are quiet and passive symbols, with little proselytism influence, so they force no one's religious freedom²⁹.

Could the Constitutional Court have said something else? We think so. If, as we have suggested, the Constitutional Court had elaborated a more complete approach to religious freedom as a fundamental right and had explored its relationships with non discrimination on grounds of religion, we could have a better answer to this conflict.

We propose to understand the right to religious freedom as a cell with three basic elements: freedom of thought, freedom of conscience, and freedom of religion. Freedom of thought will be the deepest nucleus of this cell, protected basically with non interference and non coercions. Freedom of thought will be connected with the other parts of the cell by using freedom of speech³⁰. Freedom of conscience will be the external, -although not always public- and practical manifestation of my freedom of thought. While freedom of thought is a general freedom; conscience is a particular one, because it represents the final destination reached by my thought. It is here, in the freedom of conscience where you can place the "conflicts of conscience". The final stratum of this cell will be freedom of religion or belief, always external and normally collective.

All this entire content should always be protected in any model of State: neutral, confessional, or associative. Differences will appear later, once we reach the external contents and we focus on the fact that the State could have also some obligations to promote and encourage the situation to get accurate conditions to practice religious freedom to everybody³¹. Because such a conception receives a deepest impulse in associative models of Church and State relationship, while a

²⁸ "La influencia de la Iglesia católica en la formación histórica, cultural y moral del Perú se manifiesta en elementos presentes históricamente en diversos ámbitos públicos, pudiendo afirmarse que, más allá de carácter religioso de su origen, dichos elementos revisten actualmente un carácter histórico y cultural". EXP. N°. 06111-2009-PA/TC, para. 37.

²⁹ "La sola presencia de un crucifijo o una Biblia en un despacho o tribunal del Poder Judicial no fuerza a nadie a actuar en contra de sus convicciones". EXP. N°. 06111-2009-PA/TC, para. 45.

³⁰ That could be the reason why the American Convention on Human Rights and other documents on human rights placed freedom of thought with freedom of speech.

³¹ Such a cooperation or promotion model makes also the difference between freedom of religion and freedom of conscience. It seems to be easier to the State to collaborate with religious entities.

neutral or separatist State will try to reduce this concept to a minimum, we will find different and asymmetrical answers to similar freedom of religion controversies in different countries³².

At this point we should be able to conclude that the reason why the display of Catholic religious symbols in the offices and courts of the Peruvian Judicial Power is not unconstitutional because it does not affect the fundamental content of religious freedom of Mr. Linares. Neither his freedom of thought, because no one forced him to have or to express a different vision of religion³³. Neither his freedom of conscience, because as the Constitutional Court said, the crucifix does not force you to act against your convictions. And not his freedom of believe, because the crucifix is a quite symbol, without proselytism.

What about the external and maybe accessorial dimension where the State assumes certain obligations to promote and encourage equal conditions to practice everybody's religious freedom? That is to get rid of non discrimination on grounds of religion. Probably at this level Mr. Linares had received a non respectful answer by the Judicial Power. It will be much more equal and coherent with the principle of collaboration³⁴, to promote a multicultural state. Maybe removing all religious symbols, maybe including minority religious symbols. Many accommodation solutions could be possible, but such a decision should arrive after a serious and suitable reading of the Peruvian system of Church and State³⁵.

We should remember that religious freedom uses other fundamental rights and liberties to develop a more extensive protection: freedom of association, non discrimination, freedom of speech, right to marry, right to education, and so on. If we want to find the deepest meaning of religious freedom we should be able to make a complete interpretation. The New Peruvian Act of Religious Freedom will give us new tools to do that kind of work. As we have already mentioned, the Constitutional Court decided not to use it in this case. And we think that a great chance has gone. It is true that they have included the four doctrinal principles of the Civil Ecclesiastical Law into the answer to case 06111-2009 but the way they applied them was quite controversial. They did not offer a complete description of

³² The European Court of Human Rights has answered almost all its cases concerning religious freedom developing the doctrine of "margin of appreciation", which enables the European Court to vary the intensity of its scrutiny of national measures and policy decisions. Vid. HUTCHINSON, M.R. "The Margin of Appreciation Doctrine in the European Court of Human Rights", (pp. 638-650) in, *The International and Comparative Law Quarterly*. Volume 48. Issue 3. 1999.

³³ And it is pacific the concept

³⁴ Included in article 50 of the Peruvian Constitution.

³⁵ As the Court suggested in fact. "Por supuesto, a juicio de este Colegiado, que el Poder Judicial no deba quitar los crucifijos o Biblias de los despachos y tribunales porque alguien así lo reclame, no impide que el órgano correspondiente de dicho Poder del Estado pueda decidir que se retiren, pero no precisamente porque sea inconstitucional mantenerlos". EXP. N°. 06111-2009- PA/TC, para. 55.



religious freedom as a fundamental right; they did not establish a good link between religious freedom and non discrimination on grounds of religion³⁶; and most important, they misunderstood the role played by collaboration and secularism in this model. We will come back to this point later.

b.2. Individual declaration of faith

Mr. Linares' second petition –leaving out the formal question about his religion made to the accused or person making a statement during the process- was positively considered by the Tribunal as a real damage to freedom of religion, unable to coexist with the Constitution.

We think the Tribunal made a wrong interpretation in two basic points. First, religious freedom does not forbid the question about religion, but protects against any discrimination consequences received because of the answer or the silence to this question³⁷. Second, the Court completely forgets the purpose of this question³⁸: to know if the accused or any person making a statement will swear or promise.

The Constitutional Court mistakes this point, affirming that there exists no legal and only customary support for such a question. The truth is the question was in the Penal Procedural Code of 1939 and it has been maintained in the New Penal Procedural Code approved on 2004³⁹. The question is made in two moments, first time to know if the person will use swear or promise formula (and will need the Bible⁴⁰ or not), and second during the basic identification. Does religious freedom forbid these questions? No. At first when the question is made, conflict of conscience will be solved because alternative options are already included into the question: swear or promise. Second, the right to remain silent will solve the problem. The only thing we have to guarantee is a fair trial, a fair judgment. The judge should not be prejudiced with the answer he received, because in doing that he will be perverting the course of justice.

The Constitutional Court did not see it in this way, and accepted Mr. Linares' second petition. Things could have stopped here. But the Court decided to expand verdict effects, not only by forbidding this question in the legal rooms, but also forbidding that any other authority or public official will make this sort of

³⁶ Case 05680-2009-PA/TC, 28th October 2010 (published on April 2011) comes back on this topic. The verdict in this case considers unconstitutional the internal policy approved by the General Attorney in the Judicial District of Amazonas establishing the obligation to place a nativity in Christmas and forcing an annual adoration.

³⁷ Protected, -as the Court mentioned in the case- by article 2.18 that allows: "to keep in private his political, philosophical, religious or any other type of convictions, as well as to keep professional secret".

³⁸ At least when it is made for the first time during the process.

³⁹ "Antes de comenzar la declaración, el testigo será instruido acerca de sus obligaciones y de la responsabilidad por su incumplimiento, y prestará juramento o promesa de honor de decir la verdad, por sus creencias; (...) Acto seguido se preguntará al testigo su nombre, apellido, nacionalidad, edad, religión si la tuviera, profesión u ocupación, estado civil (...)". Art. 170, Decreto Legislativo N° 957, 22nd July 2004.

⁴⁰ In fact, this is the reason why we can see a Bible on the offices of the Judicial Power.

question⁴¹. The second point has the potential to create controversies if we consider the fact that sometimes, to improve a more accurate protection of freedom of religion, it will be necessary to receive that kind of personal information⁴².

3. *Peruvian Church and State Model*

If we made an inclusive reading of articles 2.3, 2.2, and 50 of the 1993 Constitution with the Religious Freedom Act and all the other regulations concerning religious issues, we will have to recognize that we are facing a model that considers religion positively. For such a reason the system decided to create a collaboration formula between the State and religious entities⁴³.

At this point we have to reject both sides' affirmations. Mr. Linares saying that there exists a lawful State preference for the Catholic Church⁴⁴, and the Constitutional Court saying that Peru is already a secular state. The first one will be refused because it is false. The second one will be refused because of it is wrong. There is no single article in the Constitution saying that Peru is a secular state model⁴⁵, there are no previous Constitutional Court judgments saying that Peru was a secular state model⁴⁶, there is no prove in society⁴⁷, and there is not prove in the laws⁴⁸. So, why has the Constitutional Court decided to include this concept in the game? Probably because it was too fashionable to avoid it. But secularism -and its French *laïcité* version- is too dangerous a concept to include it so simply in the Peruvian legal framework⁴⁹.

The Peruvian model of Church and State has a confessional background –still visible in society-, but decided to move towards a cultural pluralism⁵⁰, promoting and protecting human rights. And this is what should be done. To recognize and protect the fundamental right of religious freedom⁵¹. Secularism and *laïcité* are just

⁴¹ Article 4 of Decreto Supremo N° 010-2011-JUS 27th July- Religious Freedom Act new Rules - seems to be a consequence of this verdict: “Las entidades públicas no podrán exigir en sus formularios o en los modelos de currículos que las personas expresen su convicción religiosa”.

⁴² For instance, to implement equal standards on religious education in public schools. There is no other way to be exonerated from Catholic religious classes than declaring another faith.

⁴³ It is true that nowadays there exists one only Agreement with the Catholic Church, but the agreement's purpose is obvious and notorious - with religious minorities- into the new Religious Freedom Act.

⁴⁴ We have already mentioned that Peru is not a confessional State since 1979.

⁴⁵ We have article 50 speaking about “collaboration” with independence and autonomy between religious and civil powers.

⁴⁶ The relevant case, EXP. N°. 3283-2003-AA/TC, 15th June 2004, used the expression “aconfessional”.

⁴⁷ Really we could find ways to prove the opposite, as the Constitutional Court had done mentioning the public presence of many Catholic symbols. Is a fact that the Peruvian society is mainly Catholic.

⁴⁸ The New Religious Freedom Act makes no single mention to the concept of secularism.

⁴⁹ With a philosophical, legal, sociological and cultural debate about secularism still open, the Peruvian Constitutional Court should have been more prudent.

⁵⁰ Not only in religious affairs, also protection other cultural identities.

⁵¹ As Judge Bonello said: “In Europe, secularism is optional, freedom of religion is not”. Concurring opinion of Judge Bonello, Grand Chamber. Case of Lautsi v. Italy, 18th March 2011, para. 2.5.



the fancy envelopes we use to send the letter with the important message: freedom of religion to every human being. That will place the spotlight in a different scenario, not political but legal. The important thing will be to develop the capacity to give a correct answer when a non convenient restriction on religious freedom has happened.

4. Conclusions

Just to conclude we would like to remark two ideas included in this paper.

First, we have to recognize the important step achieved with case 06111-2009, including the famous four principles of the civil ecclesiastical law. But we should not forget that, these are just instrumental interpretative means to shape the constitutional and conventional human rights.

Second, the main role played by the freedom of religion as a fundamental right that has to be perfectly described –legal and not moral description- to become a useful tool in solving conflicts of law. Such kinds of conflicts will be more and more frequent considering the global and multicultural nature of our societies.

We have to be ready and well prepared to offer a suitable legal answer.