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A Threat from the Inside: The Appointment of Judges of the Peruvian Constitutional Court

Marco Antonio Toche Zevallos
Ruhr-Universität Bochum, Germany

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In 2019, a questionable appointment of judges of the Constitutional Court in the Congress is shut down by a manoeuvre of Martin Vizcarra, then President of Peru. The incident ends with the dissolution of the Congress. Later in 2020, with a new congress installed, another controversial designation process starts. A lawyer requests an ordinary judge to order the halt the election; a preventive measure is issued, and the process is cut off on an early stage. Recently, on 11th May 2022, a newly elected congress gives it another try and, after a suspicious balloting without debate, six new magistrates are appointed¹ to replace the ones with expired tenure. In this essay I will argue that the recent appointment is a threat to the Peruvian democracy and, more importantly, that its source is the Peruvian legal system itself, whose deficiencies render any designation process of the Constitutional Court's judges vulnerable to democratic illegitimacy.

Interpreting the constitution consists of more than simply clarifying the meaning of its text, drafted in general clauses. The essence of interpretation is its normative nature: the interpreter pours convictions and values on the text and weaves them into a reading that accords with a political conception of the best constitutional practice for a state. This normative dimension of constitutional interpretation can be recognized at least in two respects when, for instance, out of a single constitutional text a court can interpret the ban of abortion, in opposition to the former court that understood its permissibility. On the one hand, to modify an interpretation is to arrogate to oneself the correctness of an understanding of the constitutional norm under analysis. On the other hand, and more importantly, a renewed interpretation of a provision imprints a political conception on the constitutional practice.

Although the text may not vary in a single comma, with two opposing interpretations on controversial issues like the one of abortion one can speak, in a broad sense, of two different constitutions put in practice. Therefore, in reality, constitutional interpretation may have a foundational character comparable to constitutional amendment: it can go beyond the text. It is an active review and reconfiguration of the bases of a political community. Constitutional interpretation is in this sense a task of deliberation of essential political matters. Of course, with this representation I do not intend to uphold that the interpreter acts as a constituent power, whose only limit is its own will. It is undeniable that constitutional interpretation cannot tend to distort the text or water it down with capricious readings, but it can expand it considerably, for better or for worse.

In Peru, the constitution can be interpreted by virtually all governmental bodies and, of course, by the citizens themselves. By way of example, the mere parliamentary discussion about the constitutional adequacy of a bill, or the enactment of a so-called law of constitutional development² are in themselves interpretative exercises. Likewise, the claim of unconstitutionality that citizens can file against laws³ presupposes interpretation. However, the last word on the meaning and scope of constitutional norms is held by the Constitutional Court⁴. This attribution, without constituting an impediment to critical judgment and deliberation, represents a delegation, and thus a restriction, of the power to carry out and enforce

¹ The Congress gave no justification for the decision. See Centro de Noticias del Congreso. (2022).

² A law that specifies a constitutional provision.

³ Constitutional Assembly (1992); Political Constitution of Peru (1993) *Article 202*.

⁴ *Ibid.*

normative judgments of the highest relevance in political life. Somehow, to delegate the power of constitutional interpretation amounts to a partial up giving of public reason about fundamental issues.

Clearly, in a democracy such an entrustment must be consistent with the value of public justification. That implies, among other things, that the appointment of the judges ought to comply with high technical and ethical conditions, and that the process must enable the greatest transparency and controllability possible. It is worth noting that the decisions of a constitutional court, apart from being of the highest hierarchy within a state, are not constantly checked by the citizens. In reality, decisions encompass so high a degree of technicality that they must be generally assumed to meet the standards of public justification. Actually, that a decision by a constitutional court must be revisited would be a bad symptom. What is required, then, is that the delegate of public reason be justified in his holding the position.

The Peruvian Constitution has two normative provisions directly related to the public justification of the appointment the Constitutional Court judges. First, the eligibility criteria for a constitutional magistrate are the same as those that apply to aspiring supreme judges⁵, ensuring a minimum of expertise to conduct legal trials and make relevant decisions. Second, magistrates are appointed by an absolute majority vote by the Congress⁶. While criticism can be posed regarding the suitability of such a political and partisan body as the congress to carry out the designation, the idea behind the rule is that the congress, being elected by direct vote and composed of several political parties, exercises the legitimate representation of the people, and can imprint its legitimacy on the court. As that rationale is of undoubted democratic spirit, it is in principle possible to attain public justification of the appointment process.

However, a realistic account of parliamentary politics must note that partisan interests, lobbies, and mere ineptitude can result in designations with low or null public justifiability. It may well occur that parliamentarians vote in favour of the election of a magistrate claiming that she has merits, but in reality, they be moved by surreptitious interests. Of course, pointing out such duplicity in a parliamentarian's reasons is difficult, but there must be the possibility of evaluating them as exhaustively as possible. In this regard, the Peruvian legal system is not fully unregulated. The appointment process begins with a call for candidatures, is followed by a relatively controllable evaluation conducted by a special parliamentary commission and concludes with the vote of in the plenary⁷. There are also rules that avoid partisanship. For instance, eligibility prerequisites resigning partisan militance⁸. Furthermore, the selection process is part of a regulated public competition, with technical criteria for scoring, and so forth⁹. In addition, the list of applicants is published and there is a period for objecting candidatures practicable by virtually all citizens.

Beyond the objections that could be raised against the efficacy of the control mechanisms of the evaluation phase, there is a fundamental juridical flaw regarding the final and truly decisive stage: the vote. Before presenting the argument, two preliminary clarifications are in

⁵ Constitutional Assembly (1992); Political Constitution of Peru (1993) *Article 202*.

⁶ *Ibid*.

⁷ Congress of the Republic of Peru (2021) *Legislative ordinance N° 001-2021-2022-CR*.

⁸ Congress of the Republic of Peru (2004) *Law N° 28301, article 12*.

⁹ Congress of the Republic of Peru (2021) *Legislative ordinance N° 001-2021-2022-CR*.

order. It is worth noting, first, that the transparency requirement is not met if the reasons for the appointment are not permanently accessible. Reasons are truly accessible if there is at least the possibility of hearing them from the parliamentarians themselves. Secondly, there must be an independent mediator who transmits the parliamentarians' reasons in such a way that citizens can assess and evaluate them beyond technicism; this is, a free press. Only from a dishonest view on the knowledge of the average, lay citizen could it be said that it suffices to publish the technical guiding criteria for the evaluation and then proceed to vote. All the more considering that technical criteria are only requirements for eligibility that display with independence of each congressman's reasons for electing them. After all, each may have good political reasons to refuse a high-scoring candidate. Individual reasons are thus owed to the public.

That said, the Peruvian legal system lacks a provision for forcing congressmen to carry out a public and transparent vote. In consequence, true accessibility and, in turn, public justification of the appointment of constitutional magistrates, cannot be warranted. Quite the contrary, it can be agreed that the vote is secret and even worse, that it takes place without a proper open debate¹⁰. Moreover, according to the Constitution itself, parliamentary vote cannot be questioned or turned into a reason to hold congressmen accountable¹¹. The congressional vote is almost sacred within the Peruvian constitutional framework. Consequently, there is no way to question the agreement of parliamentarians (by their vote) to vote on the election of judges of the constitutional court without prior debate. The Congress can decide to go against the spirit of any parliament: discussion. But even more dangerous, it can deprive the public of reasons.

Without a pre-voting debate, citizens cannot apprehend which reasons were considered for appointing tribunes. Forgoing the debate on such a relevant issue is an unacceptable secrecy for a democracy. It is not enough that, after a review of the profiles of each elected magistrate, it can be concluded that there could be agreeable reasons in favour of the appointment. It is necessary to know if the actual reasons of those who make the choice are agreeable. If a man scratches his finger because he thinks that another finger will pop out, his act is not rational just because the observer believes that he scratches to relieve his itching. Therefore, only the actual reasons for choosing a judge are those that count when evaluating the acceptability of the designation. It need not be said that without debate there is no mediator to talk about. Secrecy violates also press liberty.

To make matters worse, once the voting process is concluded and the constitutional judges are appointed, there is no legal means to question or overrule the decision. The judges of the court cannot be removed from office except for incurring some cause of vacancy or for being constitutionally accused¹². Moreover, the court's decisions and actions, including the taking of the oath of newly appointed magistrates, are not subject to any kind of judicial control or to the order of any other governmental authority¹³. That is, the appointment of the six judges

¹⁰ Congress of the Republic of Peru (2021) *Legislative ordinance N° 007-2021-2022-CR*, article 57.

¹¹ Constitutional Assembly (1992); Political Constitution of Peru (1993) *Article 93*.

¹² Congress of the Republic of Peru (2004) *Law N° 28301*, article 16.

¹³ Constitutional Assembly (1992); Political Constitution of Peru (1993) *Article 93*, concordant with article 14 of the *Law N° 28301*, Congress of the Republic of Peru (2004).

that took place on 11th May 2022 in Peru is not only inadmissibly secret but also irreversible. Virtually, the only possibility for turning over the appointment within the boundaries of the Peruvian Constitution would be a decision by the Constitutional Court itself in an unprecedented constitutional interpretation. hilariously improbable.

In conclusion, there are deficiencies in the Peruvian legal system that hinders the public justification of the appointment process of the Constitutional Court's judges, because it makes the accessibility of the reasons for appointing them inadmissibly dependent on the will of the parliamentarians. The fact that constitutional interpretation, a partial delegation of the exercise of public reason, is unjustifiably held by judges renders its normative character illegitimate and hurts a democracy. Peruvian democracy is threatened from the inside.

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- Political Constitution of Peru** (1993) *Article 93 and article 202.*