

Peru: Captive Courts

I. IN SHORT . . . WHAT WE FOUND

A. Opportunities

1. CONSTITUTIONAL AND LEGAL GUARANTORS

The broad bill of rights in the 1993 constitution and the laws furthering constitutional protections for reproductive health constitute the main advantages of the Peruvian legal system.

2. MECHANISMS AND INSTITUTIONS FOR THE PROTECTION OF RIGHTS

The Peruvian legal system also has the advantage of having multiple flexible and speedy mechanisms for the protection of rights. Additionally, the fact that all decisions denying protection of rights must be reviewed by the Constitutional Court opens the door for the active intervention of the court in the construction of a public discourse on human rights.

The ombudsman's office (Defensoría del Pueblo) has been the government body most active in promoting, reporting and following up on women's rights.

3. VICTORIES

The Peruvian high courts have defended the need to **evaluate physical and psychological violence** in accordance with criteria that are **not limited by cultural and class differences**.

B. Limitations

1. SILENCING JUDGES

The largest obstacle to the protection of rights in the last decade has been the **silencing of the judicial branch** by the **closing of the Court of Constitutional Guarantees** and the delay in the creation of the Constitutional Court as

mandated by the 1993 constitution. Furthermore, the **creation of executive committees** replaced the highest judicial institutions with temporary bodies completely dependent in function on the executive branch.

2. REACTIONARY INTERPRETATIONS

In spite of the important advances in the establishment of constitutional and legal rights, the paucity of decisions by the high courts reveals a **significant backwardness in the judicial discourse in comparison with the legal texts**. For example, it is outrageous that the Supreme Court has maintained a position of lenience toward the defendant in cases of sexual violence, contrary to the constitution, which guarantees personal, moral and psychological integrity.

3. LOSSES

The bleakness in the jurisprudence begs for a strong collaborative effort with the judicial branch. The courts' position regarding **sex crimes** is to not make findings against the defendant unless there is evidence beyond what should normally be sufficient. This reveals a **lack of interest in protecting** the sexual integrity of women and minors, who are the main victims of these types of crimes. In cases of **physical violence**, the court has required that in order for the violence to be grounds for allowing a divorce, the aggression must produce an injury that would result in at least four days absence from work. The courts' position reveals a **lack of interest in protecting the victims** of these crimes, **in spite** of the **legislative** intent, which was to provide them the maximum protection. Likewise, their reluctance to grant **divorce** when the fault can be attributed to the man, by not finding "intent of abandonment" in spite of his prolonged absences, and their willingness when it is allegedly the woman's fault, reflects a patriarchal understanding of marriage that does not consider women as equal to men.

The **lack of decisions** related to **sexual and reproductive autonomy**, women's **equality** in the **workplace**, and **sexual and reproductive rights** is evident.

II. TENDENCIES IN JUDICIAL INTERPRETATION

A. The Judicial System

1. THE JUDICIAL BRANCH

The highest body in the **judicial branch** is the **Supreme Court of Justice**,³⁶⁶ which hears cassation proceedings and procedures initiated against a superior court on final appeal, or against the Supreme Court itself.³⁶⁷ Supreme Court judges are elected by the **National Council of the Judiciary**.³⁶⁸ The **Constitutional Court** protects the constitution.³⁶⁹ Its seven members are elected for terms of five years by a vote of two-thirds of the members of the congress.³⁷⁰ The authorities of rural and indigenous communities, “with the support of the *Rondas Campesinas*,” may administer justice in their territorial jurisdictions.³⁷¹

The **political crisis** of the 1990s, during which the present constitution entered into effect, profoundly affected the **independence of the judicial branch**.³⁷² One of the most serious results of the crisis was the reduction in power of the Constitutional Court³⁷³ to an “ordinary court for the review of general regulations denying habeas corpus, *amparo*, habeas data, and actions for compliance, resolving these matters with only four judges, who cannot abstain, but must vote each time, according to Provisionary Law 26801 and later revoked by Law 26954.”³⁷⁴ This situation seriously affected the exercise of the Constitutional Court’s powers of review of laws infringing on the constitution in form or fact. However, the first measure of the constitutionally designated president of the interim government was to return the powers of the Constitutional Court and of the three members previously dismissed, as of December 2000.³⁷⁵

2. SOURCES OF LAW

The legal system recognizes the **primacy of the constitution**³⁷⁶ and **legislation** as its main source of law.³⁷⁷ In case of an absence or defect of law, general principles of law, doctrine and jurisprudence are applicable.³⁷⁸

International treaties that are in force³⁷⁹ are a part of the legal system³⁸⁰ and have the **same effect** as laws.³⁸¹

In general, **judicial decisions** are only binding on the parties to the case. However, Supreme Court decisions in cassation proceedings (final decisions of the Supreme Court),³⁸² and *habeas corpus* and *amparo* decisions that establish principles of general effect³⁸³ made by an absolute majority of *vocales asistentes* (attending voting members) in open court are binding on judges. Decisions declaring the unconstitutionality of a law also have general effects.³⁸⁴

3. CONSTITUTIONAL REVIEW

The constitution's supremacy is guaranteed through the constitutional review exercised by the Constitutional Court³⁸⁵ and the Supreme Court of Justice³⁸⁶ through special petitions as well as the general review granted all judges in the republic.³⁸⁷

The Constitutional Court hears **petitions for unconstitutionality** and, at the highest judicial level, **decisions denying *habeas corpus*, *amparo*, *habeas data*, and *acción de cumplimiento*** (petition for compliance).³⁸⁸ Petitions for unconstitutionality can only be submitted by the president, the attorney general, the ombudsman's office, 25% of the members of congress, 5,000 citizens, regional presidents, and professional colleges in their own areas of specialty.³⁸⁹

The Supreme Court of Justice's branch of constitutional and social law hears popular petitions at the highest judicial level. Popular petitions originate from "infringements of the law and the constitution, against regulations, administrative provisions and resolutions, and general decrees, from whatever source."³⁹⁰

4. MECHANISMS FOR THE PROTECTION OF RIGHTS

The constitution establishes four additional mechanisms for the protection of rights. Actions for *habeas corpus* involve the protection of an individual's right to freedom and related rights.³⁹¹ They can be submitted by the person affected or by someone else in his or her name,³⁹² in spoken or in written

form,³⁹³ before the specialized judge for public law or the specialized penal judge, where the violation occurred.³⁹⁴ The action should be resolved within 24 hours. Actions for *habeas data* involve the protection of the right to informational privacy as defined by the constitution in article two, paragraphs five and six.³⁹⁵ Actions for *amparo* involve the protection of all other rights recognized in the constitution that are violated or threatened by a public authority or civil servant.³⁹⁶ They can be submitted by the victim or by his or her representative³⁹⁷ before a lower civil court or labor judge where the violation occurred or where the petitioner resides.³⁹⁸ They should be resolved within six days.³⁹⁹ *Amparo* proceedings can only begin once all other remedies have been exhausted, unless the latter are not regulated, to prevent irreparable harm, or when the prior remedy was not resolved in the given time frame.⁴⁰⁰ **Petitions for compliance** can be submitted against any public authority or civil servant who fails to comply with a written law or administrative act.⁴⁰¹

B. Decisions on Sexual and Reproductive Rights

1. THE RIGHT TO HEALTH AND TO REPRODUCTIVE HEALTH

Constitution: “Art. 7. Everyone has the right to the protection of health, the family environment and the community, as well as the obligation to contribute to its promotion and defense. Any person incapable of caring for him/herself for reason of physical or mental impairment has the right to respect for his/her dignity and to a system of legal protection, care, readjustment, and security.”

See also: Law 26842, General Health Law; Law 26626 (on HIV/AIDS).

The **Constitutional Court** has allowed petitions of *habeas corpus* for the protection of the right to life and health of prisoners.⁴⁰²

The Supreme Court has found that the social security administration's responsibility, in cases of medical responsibility, substitutes for and therefore is concurrent with and not exclusive of that of the doctor involved.⁴⁰³

2. THE RIGHT TO PHYSICAL INTEGRITY AND TO BE FREE FROM VIOLENCE

Constitution: "Art. 2. Everyone has the right to: 1. life, identity, moral, psychological, and physical integrity, and to free development and well-being. [...] 24. To freedom and personal security [...] h. No one should be subject to moral, psychological, or physical violence, nor torture, or inhumane or humiliating treatment. Anyone can immediately request a medical examination of an injured person, or of a person unable to go him/herself to the authorities. Oaths made under duress are not valid. Anyone administering them under duress will be held accountable.

See also: Penal Code, arts. 121, 122, 170-176; Legislative Decree 896 of 1998; Law 26,941 of 1998; Law 26260 (on domestic violence).

Sexual Violence

The **Supreme Court** in plenary found that if the alleged victim of a sex crime shows signs of anal sex, the credibility of her testimony is weakened in favor of the accused;⁴⁰⁴ that the **victim's statement is insufficient** to establish guilt when it is not clearly supported by a medical opinion;⁴⁰⁵ that when a victim's death is as a result of rape, the **rape subsumes the homicide**;⁴⁰⁶ that testimony given before police by the defendant is not sufficient to establish guilt for the crime of rape;⁴⁰⁷ that **without proof of the age of the victim**, the case should be decided in favor of the defendant and therefore he should not be submitted to the highest scrutiny as demanded in cases involving the rape of a minor;⁴⁰⁸ and that the **defendant's statement** of the facts is sufficient evidence when corroborated by the expert's report.⁴⁰⁹

For the courts, the victim's sexual past is relevant so that her honor is measured in inverse proportion to her sexual experience. In this way,

the court stated that the medical certificate... appears to show that the victim had previously engaged in anal sex,⁴¹⁰ which, doctrinally speaking, evidences reprehensible behavior.

Domestic Violence

The **Constitutional Court** found that a requirement to evaluate **extreme or excessive cruelty as grounds for divorce according to “the education, customs and behavior of both spouses” violates the rights** to equality and life, to moral, psychological and physical integrity, and to honor and peace.⁴¹¹

The **Supreme Court** found that **extreme or excessive cruelty** as grounds for divorce can be understood as “negative, permanent acts that reveal brutal tendencies enacted for the purpose of causing suffering in the other spouse, and that exceed the limits of mutual respect.”⁴¹² However, according to the employer, injuries resulting in **four days absence** from work do not constitute extreme or excessive cruelty.⁴¹³ On the other hand, the Supreme Court has also maintained that **it is not necessary to prove various acts of aggression.**⁴¹⁴ The **Supreme Court** has likewise found that domestic violence victims can become so mentally disturbed by the violence that they are not responsible for their actions.⁴¹⁵

3. THE RIGHT TO EQUALITY AND TO BE FREE FROM DISCRIMINATION

Constitution: “Art. 2. All people have the right: [...] 2. to equality before the law. No one should be discriminated against on the basis of national origin, race, sex, language, religion, beliefs, economic basis, or any other basis.”

See also: Civil Code, art. 4777.

The Constitutional Court has found that **denying women** on the maintenance staff for the police **their status as part of the police force** constitutes sex **discrimination**.⁴¹⁶

4. THE RIGHT TO CONSENT TO MARRIAGE AND TO FORM A FAMILY

Constitution: “Art. 4. The community and the state [...] protect the family and promote matrimony. They are recognized as natural institutions that form the basis of society. Marriage, and the grounds for separation and dissolution, are regulated by law.”

“Art. 5. The stable union of a man and a woman, who form a home, free of matrimonial impediments, creates a situation of community property subject to the laws governing community property, when applicable.”

See also: Legislative Decree No. 346, modified by law 26530, National Population Law.

The **Supreme Court** has found that in order to grant divorce on the grounds of abandonment of the marital home, an intent to abandon the home in addition to an absence of two years must be proven.⁴¹⁷ If abandonment of the home cannot be proven, the number of years since one of the spouses left the home can be used as grounds for adultery and dishonest conduct without prejudice. This doctrine has not benefited women in any cases.⁴¹⁸

5. THE RIGHT TO DECIDE THE NUMBER AND SPACING OF CHILDREN

Constitution: “Art. 6. The objective of the national population policy is to promote and propagate responsible fatherhood and motherhood. It recognizes the right of families and individuals to decide. To this effect, the state assures adequate education and information programs and access to methods that do not affect life or health.”

See also: Penal Code, arts. 114 and 120; Law 26482, General Health Law; Legislative Decree No. 346, modified by law 26530, National Population Policy Law.

The **Constitutional Court** has found that **eliminating the prohibition** against **surgical sterilization** does not violate the constitution. With this reform, the court seeks to emphasize the absolute ban on abortion and prohibit sterilizations for any reason. The court interpreted the law as not including sterilization as a method of family planning, reasoning that all forms of family planning should be reversible. However, sterilizations can be performed when recommended by a doctor.⁴¹⁹

If the idea of family planning is to be understood in accordance with the law that regulates it [...] it must be understood as a family program, freely agreed on by the couple, that has as its objective “the free determination of the number of children” [...] Understanding family planning in this way, those methods which, like surgical sterilization, prevent the planning and spacing of births by making them impossible, cannot be understood as under the rubric of “family planning.” [...] Looked at in this way, what the modification made by law 26530 achieves by eliminating the prohibition against sterilization, is to emphasize the complete ban on abortion, leaving it to the couple’s preference to decide, with complete freedom, regarding the use of all other methods of contraception.

The **Supreme Court** has ruled that **abortion is not a crime against the state but rather a crime against human life**. Therefore, a punitive decision placing the state as a legally protected interest is null and void.⁴²⁰

Unfortunately, in cases involving abortion and access to contraception, the courts have not incorporated any consideration of the reproductive rights of women.

6. THE RIGHT TO WORK AND TO SOCIAL SECURITY ⁴²¹

Constitution: “Art. 23. Work, in its various forms, is a priority of the state, which particularly protects working mothers, minors, and handicapped persons.”

“Art. 26. The following principles are respected in the work environment: 1. Equality of opportunities without discrimination. 2. Fundamental character of rights recognized by the constitution and the law. 3. In cases where the meaning of a law is in doubt, interpretation favorable to the worker is preferred.”

See also: Law 27185, modifying article 29 of Legislative Decree No. 728, Labor Production and Competitiveness Law; Law 26790, Modernization of Social Security; Law 27056, Creation of Social Security for Health Law.

7. THE RIGHT TO BE FREE FROM SEXUAL EXPLOITATION

Constitution: “Art. 2. All people have the right: [...] 24. To freedom and personal security. Consequently: [...] b. Restrictions on personal freedom are not allowed except as permitted by the law. Slavery, servitude and trafficking in persons are prohibited in all forms.”

See also: Penal Code, arts. 179 -182.

No decisions on the right to be free from sexual exploitation were found during the time period examined by the researchers.

8. THE RIGHT TO EDUCATION

Constitution: “Art. 13. The purpose of education is the full development of a human being. The state recognizes and guarantees the

freedom of education [...]”

See also: Constitution, arts. 14 -17.

There have been no rulings by the courts on the right to sex education or on discrimination against pregnant students.

9. THE RIGHT TO PRIVACY

Constitution: “Art. 2. All people have the right: [...] 7. To honor and a good reputation, personal and familial privacy, as well as to one’s own voice and image.”

See also: Penal Code, arts. 151 -157; General Health Law.

The Supreme Court found that an individual registered as male cannot change his name to a female name, even if he has undergone a sex change operation, if this surgery has not been registered with a proper medical history.⁴²²

