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*The Scales of Justice in
Peru: Judicial Reform
and Fundamental Rights*

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The Scales of Justice in Peru: Judicial Reform and Fundamental Rights

César Landa

‘Expenditure on justice is the second priority of a ruler’
Wealth of Nations
Adam Smith

For several years, the Peruvian government has been carrying out an intense campaign in preparation for judicial reform in Peru. The government has received extensive technical and financial support from foreign governments and multilateral loan organisations. However, when the members of the National Council of Justices resigned in the first half of 1998 the World Bank decided to suspend its US\$22.5 million backing and those responsible for the judicial reform subsequently resigned.

It is extraordinary that the Peruvian government, with everything in its favour for the implementation of a judicial reform, should remain at the starting line after years of study and preparation. To what is the lack of confidence of the National Council of Justices in the present judicial policy owed? Do the economic reforms introduced in the country at such a high cost to society not require the creation of an efficient, independent and honest judicial administration? Was the re-election of President Fujimori a factor that hindered the existence of an efficient, independent and honest judicial administration? There is no absolute answer to these questions, but in the process of seeking answers one can find some explanations to the problem which lies at the root of the judicial question: the lack of protection of fundamental rights is directly related to the limits placed upon judicial independence in a nominal state of law. This brings to mind the old adage that a government without a judicial control system plants the seed of its own destruction.¹

In this sense, the tutelage of fundamental rights by the judicial power must be considered in relationship to the judicial reform itself. On the one hand, some key issues such as the better organisation of judicial throughput, the technical selection of judges and their ongoing training, as well as better salaries and discipline, have been broached. On the other, there has been little or no attention to subjects which people find sensitive but which are indispensable to any type of judicial reform: judicial independence in a presidential regime, legal culture, juridical formalism, the judges’ role in the country’s development and judicial honesty. The purpose of these is the defence of fundamental

¹ Karl Loewenstein (1959) *Verfassungslehre* (Tübingen: J.C.B. Mohr), p. 335; Charles Howard McIlwain (1991) *Constitucionalismo antiguo y moderno* (Madrid: CEC), p. 37.

rights, without which any type of judicial reform has no sense or validity.²

The judicial reform process

The judicial branch in Peru has always been criticised for its inability to provide justice and for the poor quality of its jurisdictional function, as a result of its lack of independence from the political power, economic groups and, nowadays, the military power.³ It has also been criticised for the lack of uniform jurisprudential criteria, social insensitivity and, above all, corruption. Inadequate substantive and procedural codes, improvised judicial work systems and the lack of job security for judges along with all of the aforementioned characterise the third power of the state.⁴ Nonetheless, the guardianship of rights is treated as a marginal duty and not a priority of the judiciary.

One of the self-justifications for Fujimori's coup d'état in 1992 was the state of the administration of justice, 'dominated by political sectarianism, venality and irresponsible attitudes ... a scandal which continuously causes democracy and the law to lose prestige',⁵ not the dramatic lack of protection for the people's rights. The government has been carrying out judicial administration reforms based on this perception which is as elemental as it is unfocused. The said reforms can be succinctly surveyed in two parts.

The replacement of judges

The first stage of the judicial reform was initiated after the presidential coup d'état of 1992. This reform started with decrees removing the Supreme Court justices and the judges of the Superior Courts from office. The same was done with regard to the judges of the Tribunal of Constitutional Guarantees, which, along with other democratic

² Germán Bidart Campos (1966) *El derecho constitucional humanitario* (Buenos Aires: Ediar), p. 11; Germán Bidart Campos (1988) 'Constitución y democracia en el nuevo mundo' in Fix Zamudio et al. *Constitución y democracia en el nuevo mundo* (Universidad Externado de Colombia), p. 27.

³ Report by the International Jurists Commission (1994) *Sobre la administración de justicia en el Perú* (Lima: IDL); Javier de Belaúnde et al. (1991) *Poder Judicial y democracia*, (Diego García-Sayán, ed.) (Lima: CAJ-CIJA), pp. 21–58. Juan Monroy (1990) *Poder judicial a 10 años de vigencia de la Constitución de 1979* (Lima); José Martín Pallín (1989) *Perú: la independencia del poder judicial*, report for the CIJA-CIJ (Lima); Luis Pásara (1982) *Jueces, justicia y poder en el Perú* (Lima: CEDYS); and Domingo García Rada (1978) *Memorias de un Juez* (Lima: Andina).

⁴ From the government perspective: José Dellepiani (1996) 'La reforma judicial en el Perú: una propuesta de modernización y reorganización del sistema de administración de justicia', a presentation made in the Seminar-Workshop, 'Reforma Judicial en el Perú: Logros y Retos. En Busca de un Plan de Mediano Plazo', Academia de la Magistratura, Lima, March 12–14; Ministry of Justice (1994) *Foro Nuevas Perspectivas para la Reforma Integral de la Administración de Justicia en el Perú*, backed by the United Nations Development Programme (Lima).

⁵ Alberto Fujimori, 'Manifiesto a la Nación del 5 de Abril de 1992', *La República*, Lima edition, 5 June 1992, p. 5.

institutions, was shut down. At the same time, legislation expressly forbade the initiation of *amparo* (judicial review) proceedings to review the situation of the judges.

The de facto government then proceeded to appoint new Supreme Court justices and Superior Court judges in accordance with the political objectives of national reconstruction and on the grounds of the need to reform the national administration of justice. These political objectives were the implementation of a free market economy and the fight against terrorism, but did not address the problems of corruption and the judiciary's lack of independence and also ignored the basic lack of protection of the people's rights. Yet a government spokesman stated, "The survival of the democratic system as well as the important economic reforms introduced by the present government will not be possible without an efficient administration of justice which answers the needs of modern society..."⁶

In accordance with such modern judicial ideology, the officialist majority⁷ of the Democratic Constitutional Congress included a group of old and new judicial institutions in the 1993 Constitution. The most noteworthy are: 1) judicial principles which consecrate due process and judicial tutelage, judicial control of laws, recognition of common justice and the election of lower court judges and justices of the peace; 2) reorganised institutions such as the Supreme Court, transformed basically into a court of causation; the National Magistrates Council was put in charge of appointing and sanctioning judges; the Ombudsman's Office became an autonomous entity; the Constitutional Court was to be the ruling court for cases concerning basic rights; and the National Electoral College was to be put in charge of administering and holding elections. These constitutional dispositions increasing the independence of the judicial power were favourably received in so far as they separated the judicial power from the hegemonic constitutional institutions resulting from the presidential re-election and the strengthening of the military justice system.⁸

However, the implementation of the new institutions and constitutional organisms was also limited by government development legislation which curbed their constitutional powers. The judicial supervision and control powers of such entities as the Constitutional Court, the Ombudsman's Office and, later, the National Magistrates Council were reduced. Likewise, in March 1993, prior to the implementation of the new Constitution, the government itself created a

⁶ Minister of Justice Ricardo Santa Gadea, 'Introducción', in Ministerio de Justicia, *Foro Nuevas Perspectivas*, p. 9.

⁷ The term 'officialist' is an adaptation of the Spanish term used when the majority members of parliament or congress are members of the president's party.

⁸ Francisco Fernández Segado (1996) 'El nuevo ordenamiento constitucional del Perú. Aproximación a la Constitución de 1993', in *La Constitución de 1993: Análisis y comentarios* (Lima: CAJ), pp. 49-55; and Javier de Belaúnde (1996) 'Elección popular de jueces', pp. 209-17 in the same volume.

Magistrates Court of Honour,⁹ composed of well-known judges, charged with reviewing the cases of the judges who had been dismissed. Nevertheless, within two months of its installation the reorganised Supreme Court transferred its power to administer justice in regard to a paramilitary group to the military justice system, declaring that the kidnapping, assassination and incineration of a professor and nine students from 'La Cantuta' University was a military crime and not an assassination.¹⁰

Along with the abdication of judicial authority in favour of the prevailing political and military powers, it can be said that judicial processes continued to show marked levels of corruption as well as a distinct lack of respect for the rights of due process and the judicial tutelage of the people. Thus, a foreign juridical commission could state without qualification that 'the practical effects of President Fujimori's *reorganisation* of the judicial power and its associate institutions on 5 April 1992 were the cause of a serious limitation on, or the actual elimination of, the institutional independence of the courts'.¹¹

Modernisation and judicial dependence

In 1995, the government began the second stage of the reform. For this purpose, Law No. 26623 created the Judicial Coordination Council and the technical secretariats in the Poder Judicial and the office of the Attorney General, which were provided with exorbitant powers to create courts, the right to propose law projects, responsibility for the budget, the power to appoint provisional judges, etc. President Fujimori appointed José Dellepiane, an ex-marine commander closely connected to his regime, as the head of the judicial reform process. Thus, it was pointed out with some justification that 'the concentration of power in the reorganisation of the judicial power in two people, one of them known for his close ties with the executive power and the armed forces, is a step off the path towards the urgently needed independence of the judicial power in Peru'.¹²

The constitutionality of Law No. 26623 was questioned by the Arequipa Bar Association in the Constitutional Court in 1996, the case being the first to be ruled upon by the court. Despite the fact that five of the seven judges considered the law to be unconstitutional, it was

⁹ See the constitutional laws of 12 March and December 1993 of the Democratic Constitutional Congress and Domingo García Belaúnde and Francisco Fernández Segado, *La Constitución de 1993: Análisis y comentarios*, pp. 238 and 247.

¹⁰ APRODEH (1994) *De la tierra brotó la verdad. Crimen e impunidad en el caso La Cantuta*, (Lima), p. 72.

¹¹ International Jurists Commission (1994) *Informe sobre la administración de justicia en el Perú* (Lima: IDL), pp. 79–86; This report resulted from an agreement between the governments of Peru and the United States for a commission to evaluate the most important characteristics of the Peruvian judicial system and the legal and constitutional reforms introduced.

¹² Human Rights Watch/Americas (1996) *Peru, Presumption of Guilt, Human Rights Violations and the Faceless Courts in Peru* (Washington, DC: Human Rights Watch), p. 15.

pronounced constitutional in accordance with Article 4 of the Constitutional Court Organic Law, which establishes that six votes are needed in order to declare a law unconstitutional. Two magistrates, Acosta and García, both publicly known as being pro-government, did not deem the law to be unconstitutional.¹³ As can be seen, this voting system established by the officialist parliamentary majority permits the minority to hold sway over the majority.¹⁴

The institutionalising of government intervention in the administration of justice, grounded in a project of ostensible modernisation did not reduce the insecurity of the judges' position. According to official figures, only 403 (26 per cent) of the 1,473 judges in 1997 had tenure; the remaining 1,070 were substitutes (59 per cent) or provisional (15 per cent) judges. Moreover, 16 of the 32 justices of the Supreme Court were provisional.¹⁵ Subsequently, these figures have not varied substantially. This means that approximately 75 per cent of Peru's judges are insecure in the exercise of their positions and thus susceptible to political intervention and active or passive jurisdictional dependence. As a rule, this holds true at all levels of the justice administration, from the highest to the lowest courts.

Such judicial instability was exacerbated by the Judicial Power Executive Commission's exercise of its authority to appoint and dismiss provisional judges, taking over the role of a constitutional organism such as the National Council of Magistrates (NCM). The NCM could not appoint the justices to the Supreme Court or judges to any other because the National Magistrates Academy (NMA), responsible for training the judges for their higher appointment, was subordinate to the Executive Commission: 'I can understand that the NCM is uncomfortable about not being able to appoint the judges, but the needs of the judicial reform are others'.¹⁶ It has justifiably been said that 'while on one hand, the Judicial Power Executive Commission has been very strict and resistant about appointing permanent judges, on the other, it has been very lenient and informal about designating substitute and provisional judges in the different jurisdictional courts created as a part of the reform'.¹⁷

In July 1997, the Lima Bar Association declared: 'In the last few months, Peru has witnessed a series of events which, taken together, point to a systematic weakening of the rule of law, the hub and framework of the democratic system ... In this context, the judicial power and the Attorney General's Office serve those who govern us, so that when their arbitrary

¹³ Manuel Aguirre Roca, 'Nacimiento, via crucis y muerte del tribunal constitucional del Perú', *La Constitución de 1993: Análisis y comentarios*, pp. 128.

¹⁴ César Landa (1997) 'Balance del primer año del Tribunal Constitucional del Perú', in *Pensamiento Constitucional*, year IV, no. 4 (Lima: PUCP-MDC, Fondo Editorial), p. 251.

¹⁵ José Dellepiane (1997) *Reforma y modernización del poder judicial* (Lima: Judicial Power), p. 23.

¹⁶ Interview with Francisco Equiguren, director of the National Magistrates Academy, in the daily newspaper *Expreso*, 13 August 1997.

¹⁷ Gorki Gonzáles (1997) *Jurisdicción y poder político en el Perú*, unpublished PhD. thesis, Pontificia Universidad Católica del Perú, Lima, p. 41.

and corrupt actions are questioned through suits for *amparo*, habeas corpus, or other legal accusations, the interested and fearful judges dress up said actions in the guise of legality and innocence, thus lessening the impact of the questions presented by the media and society. Hence it is obvious in the best interest of the ruling party that the majority of the judges be provisional and not permanent in order to better manipulate them ...¹⁸ Likewise, the president of the magistrates' guild declared in August 1997 that the judiciary is undergoing one of the worst experiences in its history. To overcome this, he suggested the disbanding of the Coordination Council and allowing the presidents of the Superior Courts as well as the Supreme Court to appoint the judges.¹⁹

Nevertheless, the Executive Commission of the Judiciary had the support of several directors and in particular that of the president of the Lima Superior Court at that time, Marcos Ibazeta, who promoted the reform while he remained in office. The presidents of the Superior Courts of Justice have made annual declarations concerning the reform of the judicial system. In one such declaration, they stated that, "The reform of the judiciary in Peru is part of the reform of the justice administration system. It is a role model for developing countries and its degree of advancement allows one to foresee the complete achievement of its objectives in terms of juridical security, substantial advance in the fight against corruption, foresightedness and trustworthiness as elements on which peaceful and secure national development should be built."²⁰ This illustrates their deafness to popular opinion and to civil social institutions.

Another important factor in the second stage of the judicial reform is the lack of confidence, both in general and within specialist circles, due to the fact that the judicial players — legal guilds, jurists, universities and litigants — do not take part in the fundamental decisions of the reform process. This fact stems from the lack of democratic consensus in governmental action in general, contributing to the lack of transparency and effectiveness of the judicial reform.²¹ These cases make it evident why the judiciary has, according to public opinion, for some years been among the most inefficient and corrupt Peruvian institutions.²²

In April 1998 the second stage of the judicial reform came to an end as a result of Law No. 26933, which cut back the controlling powers of the National Council of Magistrates over judges and justices. The legislation

¹⁸ Lima Bar Association, 'Comunicado: reforma judicial o qué...', in the daily newspaper *La República*, 27 July 1997.

¹⁹ Statement by José García, president of the National Association of Magistrates, to *La República*, 11 August 1997.

²⁰ Press announcement published in most newspapers on 14 August 1997.

²¹ See the opinions of Roberto MacLean and Domingo García Belaúnde (1993), *Pensamiento Constitucional*, year V, no. 5 (Lima), pp. 185–208.

²² DEBATE Magazine, *Encuesta del Poder*, Apoyo, Lima, July–August 1998, p. 39. Likewise, in *La República*, 11 August 1997, a poll carried out by analysts and consultants showed that 78% of those polled did not have confidence in the judiciary and that only 13% did.

was approved precisely when an investigation had been opened against several Supreme Court justices, in particular César Tineo Cabrera. The justices were accused of prevarication — having altered the vote — in the case of Novotec versus the Central Reserve Bank. These individuals were the same people who, a few months earlier, had ruled that the re-election of President Fujimori in the year 2000 would be constitutional. The measure in favour of the judges approving the presidential re-election together with harassment of the judicial reformers was the primary motive for the resignation of seven of the NCM judges led by Parodi Remón, Roger Rodríguez and Carlos Montoya.

This disgraceful episode resulted in the World Bank suspending and later cancelling a US\$22.5 million loan that had not yet been disbursed.²³ The decision was followed by the renunciation of the ex-marine Dellepiane as the author of the judicial reform. Dellepiane had begun to understand that:

... the interference of the political power added to corruption destroys the concept of the balance of justice. Both are present, and this situation is what makes us immediately conclude that what our country needs is an iron judge ... Justice has been diluted. That is why in order to exercise authentic jurisdictional tutelage we need a justice system ... But first, I believe that Congress must have a serious debate concerning the content of the Constitution and its results. After a year and eight months of administrative reform, it is time to stop talking about a reform of the reform and lead the discussion into another area and decide to change justice in general.²⁴

The second stage of the judicial reform may, then, be characterised as increasing political intervention by the government, through the so-called modernisation promoted by the government and supported financially by the World Bank and the Inter-American Development Bank as well as by technical cooperation from the governments of Japan, the United Kingdom, the United States and multilateral and governmental cooperation agencies such as United Nations Development Programme and the European Union, despite the political leanings of many of them.

Unfortunately, all this international economic support only served to facilitate government political intervention in the judiciary and to make the interests of the judiciary dependent upon the re-election of President Fujimori and the judicial impunity of the armed forces. This has led to the suppression of fundamental rights.

²³ Roberto MacLean, 'La justicia cuesta abajo. A seis años de iniciada la reforma judicial los oficialistas en el Congreso de la República se han convertido en su peor enemigo', in *Caretas*, no. 1534, 17 Sept. 1998. at <http://www.caretas.com.pe/1998/1534/justicia/justicia.htm>.

²⁴ Declarations by José Dellepiane, 'Cambiar la justicia en general', in *La República*, 8 Sept. 1997. Likewise, Roberto MacLean (1997) 'Réquiem para el espíritu del legislador: la cultura de servicio en la administración de justicia', in *El papel del derecho internacional en América. La soberanía nacional en la era de la integración regional* (Mexico: UNAM), pp. 333–57.

The status of the judiciary

Judicial reform is a policy of the state and not just of one government because the protection of the people's rights is a fundamental concept of the rule of law. Any judicial reform should be backed by a social consensus if it is to be capable of reformulating judicial problems regarding the defence of fundamental rights and not deal merely with the limited structural and organisational aspects, as has been the case in Peru.

The politicisation of the justice system

The crisis in the justice system dramatically evident in Peru during the 1990s has been due to a new political phenomenon: the death of political representation.²⁵ In effect, the crisis in party legitimacy has distanced formal political activity from popular expectations for the solution of the country's overarching social conflicts. The solution to social conflicts has moved progressively from the political arena to the courts.²⁶ This has produced the judicialisation of politics, judges finding themselves constitutionally obliged to rule on and act as arbitrators in matters of great political consequence. This is a process for which they are not well prepared, since the Peruvian judiciary has tended to measure matters in terms of legality instead of constitutional law. Because of this one can say that the judges have not judicially domesticated politics but rather, that justice has been politicised as never before.²⁷ The OAS Inter-American Human Rights Commission has stated that the Executive Commissions and the Attorney General's Office directly intervened in and reduced the autonomy of other judicial institutions.²⁸ Likewise, 'although the Constitution calls for an independent judiciary, in practice the judicial system is inefficient, often corrupt and apparently easily manipulated by the executive branch'.²⁹

In February 1994, the Supreme Court convened to decide whether a criminal case against an army paramilitary group accused of killing a teacher and nine students from the La Cantuta University should be tried

²⁵ Domingo García Belaúnde (1995) 'Representación y partidos políticos: el caso del Perú', in *Pensamiento Constitucional*, no. 2, 1995, p. 59.

²⁶ Pedro de Vega (1995) 'Democracia, representación y partidos políticos', in *Pensamiento Constitucional*, no. 2, p. 11; Francisco Rubio Llorente (1988) *El parlamento y la representación política*, in Congreso de los Diputados, *I Jornadas de Derecho Parlamentario*, vol. 1 (Madrid), p. 145.

²⁷ Javier de Belaúnde (1998) 'Reforma de la administración de justicia', in *Pensamiento Constitucional*, year 5, no. 5 (Lima), pp. 200-3; César Landa, 'Independencia y reforma judicial en el Perú', conference given in the programme 'Rechtsstaatlichkeit, Justiz und Verfassungswirklichkeit in Peru', Jugendzentrum, Nürnberg, 26 March 1998, p. 6.

²⁸ 'Intervención en órganos de justicia', *El Comercio*, 23 November 1998; See <http://www.infobanco.com.pe/webcomercio/231198/005212.htm>.

²⁹ This observation reflects a change in the United States Government position. For further details see US State Department, *Peru, Country Report on Human Rights Practice for 1998*, available on the internet at http://www.state.gov/www/global/human_rights/1998_hrp_report/peru.html.

in the civilian courts or in the military courts.³⁰ One day before the Supreme Court ruling — which was expected to be in favour of the civilian courts — the congressional majority unexpectedly and without the least regard for established parliamentary practice passed Law No. 26291, transferring jurisdiction of the La Cantuta case to the military courts. Making a mockery of the civil courts, the Criminal Branch of the Supreme Court endorsed this legislative measure although there were some votes against.³¹

In another case, in June 1995, a lower court judge opened a criminal case against the Colina paramilitary group, which included senior and medium ranking officers, for the death of several residents of the Barrios Altos. But, due to military pressure, Congress passed Law No. 26479 granting amnesty to the members of the armed forces who had committed crimes against human rights.³² Nevertheless, in accordance with Article 138 of the 1993 Constitution, which establishes that a judge should give a constitutional norm precedence over a legal norm when these are incompatible, the judge handling the Barrios Altos case decided to continue processing the members of the armed forces involved in the killings. The decision was based on formal legal arguments, but before the superior courts could rule the congressional majority passed a second amnesty law, Law No. 26492, which established that amnesty laws were not subject to scrutiny by the judiciary. This mandate was dutifully accepted by both the Superior Court judges and Supreme Court justices.³³

In November 1996, the Superior Court decided that Judge Minaya would cease to handle the habeas corpus action on behalf of ex-general Rodolfo Robles since the judge had requested the presence of court officials at the Real Felipe military base to ensure the fulfilment of his release order. Next, in February 1997, the Executive Commission to the Judiciary suddenly deactivated the recently-created Superior Court for drug trafficking cases, just before it was to begin judicial processes for drug trafficking involving high-ranking officers of the armed forces.

These cases are not the exception but rather the norm under the judicial reform in Peru. In June 1997, the government stripped the owner of TV channel 2, Baruch Ivcher, of his Peruvian nationality following televised accusations based on confidential information from the National Intelligence Service. The judiciary subsequently ratified

³⁰ APRODEH (1994) *De la tierra brotó la verdad, Crimen e impunidad en el caso La Cantuta* (Lima), pp. 45–55.

³¹ Criminal Branch of the Supreme Court (1994) *Contienda de Competencia no. 7-94. CSJM-16 J.P. Lima* (Lima), p. 4; State Department (1993) *Country Report on Human Rights Practices for 1992*, p. 475 and (1995) *Country Report on Human Rights Practices for 1994*, p. 482, Joint Committee publications, Washington, DC.

³² APRODEH (1996) *I Foro ético jurídico sobre la impunidad* (Lima), p. 20.

³³ César Landa, 'Límites constitucionales de la ley de amnistía peruana', in *Pensamiento Constitucional*, year 3, no. 3, Lima, 1996, p. 151. Ronald Gamarra and Robert Meza (1995) *Ley de amnistía (impunidad), constitución y derecho humanos*, working paper (Lima), 52 pp.

this move. Immediately afterwards, in August 1997, the Supreme Court laid criminal charges against three independent Superior Court judges who had ruled against the Supreme Council of Military Justice. Between September 1997 and April 1998, Barreto, a former National Intelligence Service agent, was tortured and killed. A second agent, La Rosa, was tortured by military justice. A third agent was harassed for supposedly giving information to the press about the illegal activities of the paramilitary group, 'Colina', responsible for the La Cantuta and Barrios Altos killings, illegal wire-tapping and other crimes. Currently, the survivor and a colleague are outside Peru, one as a United Nations refugee and the other as a political refugee in the United States.

In February 1998, in the *amparo* suit against the parliamentary decision arbitrarily removing three Constitutional Court judges from office after they had declared the presidential re-election law to be inapplicable, the Supreme Court duly ratified the removal of the judges. In May 1998, Delia Revoredo, a dean of the Lima Bar Association — the premier lawyers' guild in Peru — sought asylum with her family in Costa Rica for several months because, as an ex-judge of the Constitutional Court who had been removed by Congress, she had become troublesome for the government. At the same time, the judiciary initiated procedures against her and her husband for supposed tax evasion. All of these cases have been the subject of demands presented to the Inter-American Human Rights System.³⁴ They make it evident that the government does not subscribe to the belief that 'the idea of constitutional justice is the offspring of the "constitutional" culture or what is in fact the same thing, the conception of democracy based on the guarantee of individual liberty and of social and political pluralism. Thus it demands a "limited government" which recognises the constitution as the highest law of the land.'³⁵

Although justice in Peru has never been a value or process isolated from political power,³⁶ the deterioration of the democratic power of the state has led to what we can call a marked informality and narcotism within the justice administration. The jurisdictional function is more unstable and insecure than before because the traditional public powers have begun ceding their authority to the executive, including the military, as well as to private interests led by the media. Thus, the

³⁴ 'Comisión Interamericana expresa preocupación por violación a los DD.HH', *El Comercio*, 9 Oct. 1998, see <http://www.elcomerciopehu.com.pe/fs5n3.htm>.

³⁵ Antonio Baldassarre (1997) 'Parlamento y justicia constitucional en el derecho comparado', in Francesc Pau i Vall (coordinator) *Parlamento y Justicia Constitucional, IV Jornadas de la Asociación Española de Letrados de Parlamentos* (Madrid: Aranzadi), p. 183.

³⁶ Juan López Aguilar (1986) *La justicia y sus problemas en la Constitución* (Madrid: Tecnos), p. 109; Miguel García Herrera (1996) 'Poder judicial y estado social: legalidad y resistencia constitucional', in Perfecto Ibáñez (ed.) *Corrupción y Estado de Derecho. El papel de la jurisdicción* (Madrid: Editorial Trotta), p. 59; Raúl Olivera and Manuel Olivera (1985) *Corrupción en el poder judicial y en el ministerio público* (Lima: Editorial San Marcos), pp. 21 and 57.

informalisation of the rule of law is transferred to the judiciary, thanks to the culture of juridical positivism that subordinates justice to power.³⁷

The culture of legal positivism

The dramatic situation of justice in Peru can be explained by the dialectic of formal justice and political decision-making, which have turned the judges into functionaries of the government rather than of the state.³⁸ In effect, the reasoning behind the judges participation in political cases is characterised by normative and decisive positivism, which has effectively created an autistic jurisprudence. That is to say that the arguments and proofs of its pre-judgement of cases are not valued or are purposefully not considered. This has created a judicial arena outside normal procedure and the media has, in effect, become a de facto judge in Peru. This is in sharp contrast to a communicative jurisprudence based on constitutional principles and juridical interpretation methods at the service of society rather than the state with the aim not only of providing a reasonable amount of juridical security for the people but also the juridical tolerance and pluralism necessary for the construction of democratic societies.³⁹ Communicative justice,⁴⁰ based on non-traditional judicial principles and interpretation, is that which seeks not only juridical security but also reasonableness within the bounds of the established constitutional order which respects the fundamental principles of due process and judicial tutelage.

These practices are rarely encountered in judicial processes and their administration due to the fact that judicial positivism goes hand in hand with the traditional obsequiousness of judges to the law — be this constitutional or not — and with more direct dependence on the political will of those in power. This has produced a vacuum and a failure in the administration of justice, as seen in the haphazard and unrealistic sentencing. Sentences are obscure and elliptical, making it impossible for the interested party to understand and the rights conceded or denied depend more on the judge than the law. Hence, rather than being conservative or liberal, justice is in many political cases detached from established practice, reality and social expectation.

³⁷ Steven Spitzer (1982) 'The Dialectics of Formal and Informal Control', in Richard Abel (ed.), *The Politics of Informal Justice*, vol. 1, *The American Experience* (London: Academic Press), p. 167.

³⁸ Luis María Díez-Picazo (1992) 'Notas de derecho comparado sobre la independencia judicial', in REDC, year 12, no. 34 (Madrid: CEC), p. 32; Roberto MacLean, 'Réquiem para el espíritu del legislador', pp. 335–40.

³⁹ Emilio Betti (1955) *Teoria general della interpretazione*, vol. 1 and 2 (Milan: Giuffrè Editore), p. 292 and 789; Hans-Georg Gadamer (1975) *Wahrheit und Methode* (Tübingen: J.C.B. Mohr), 4th edition, pp. 162 and 185.

⁴⁰ Jürgen Habermas (1997) *Droit et démocratie, entre faits et normes* (Paris: Gallimard), pp. 290; Peter Häberle (1975) 'Die offene Gesellschaft der Verfassungsinterpreten', in *JZ* (Tübingen), pp. 297–305.

In part, this dramatic situation is simply explicable in terms of the lack of judicial independence and the minimal professional training of many judges, who carry out their functions on the one hand by means of the formalist traditions of judicial process and on the other through informal procedures at the service of public and private powers. As a result, public opinion predictably takes the view that the judges apply the law with an iron fist against their enemies and with a velvet glove for their friends.⁴¹

It can, then, be shown that the legal reasoning of the majority of the common judges is tied to a positivist judicial argument which makes it vulnerable to corruption of a different order. Nevertheless, it is necessary to point out that there are several positivist judicial reasoning models: a) the syllogistic model of submission of the case to a pre-established norm; b) the realist model in which the judge first decides and later justifies; c) the judicial discretion model which defends the political power of the judge, and; d) the correct answer model, where the judge does not have the right to discretion and therefore has no political power.⁴²

From this range of possibilities, it can be surmised that Peruvian justice is effectively immersed in a positivist-normative concept. The judges are only the *bouche qui prononce la parole de la loi*, disconnecting the norm from reality. That is to say, they do not incorporate concrete social reality and doctrinal phenomena in the judicial reasoning. The inclusion of the latter would justify the existence of their role of administering justice as a function of the protection of the fundamental rights, which is the best manner of assuring civilian legitimacy and of affirming the constitution.⁴³

It is evident that the judicial reform has not addressed factors such as the legal culture of the judges and the lawyers, the legal training offered in the universities and the legal idiosyncrasies of Peruvian society. Such actors respond to juridical reasoning schemes which, consciously or unconsciously, have a direct impact on any judicial reform.

Although as already noted, justice has never been isolated from political power, its lack of independence is more obvious than ever before due to President Fujimori's re-election, which has compromised the entire structure of the state. The informalisation of the state as well as the dependence of the administration of justice on the political and private powers have grown significantly. The informalisation of the rule of law has not only moved fully into the judicial realm, it has

⁴¹ Raúl Olivera and Manuel Olivera (1985) *Corrupción en el poder judicial y el ministerio público*, p. 44.

⁴² Ronald Dworkin (1997) *Taking Rights Seriously* (Cambridge, MA: Harvard), p. 20; Hans-Peter Schneider (1987) 'Continencia judicial y estructura normativa abierta del derecho constitucional', in Antonio López Pina (ed.) (1987) *División de poderes e interpretación. Hacia una teoría de la praxis constitucional* (Madrid: Tecnos), pp. 73-7.

⁴³ Federico Carpio, Mario Jori, Marco Ramat, Uberto Scarpelli, Agostino Viviani and Vladimiro Zagreblesky (1981) *Garanzie processuali o respoinabilità del giudice* (Rome: Editor Angeli), pp. 25 and 43. Vincenzo Vigoriti (1983) 'Le responsabilità del giudice: orientamenti e prospettive nell'esperanza italiana e comparativa', in *Quaderni Costituzionali*, year 3, no. 1 (Rome), p. 49.

infinitely increased the mechanisms of pressure and control affecting judicial decisions crucial for the government.⁴⁴ The leading representatives of this practice are the judicial power reformers themselves.

In consequence, legal formalism not only operates in the interests of the government and allied private powers, it also leaves the fundamental rights defenceless and does not consider the social consensus on which the application of any norm should be founded.⁴⁵ Thus, in a democracy with relativist governors, without values, a disintegrated party system and an indecisive constitution, which is distinct from an open constitution,⁴⁶ the authorities have been able to secure re-election by using the judiciary as but one instrument of total power.⁴⁷

Conclusion

The judiciary has always been the object of criticism for being at the service of the powerful and the reigning government. That lack of judicial legitimacy has been reinforced by the reform initiated by the Fujimori government with subordination to the political authority having been consolidated by corruption and ineffectiveness. The judicial reform is characterised by the direct intervention of the executive branch in the judiciary in order to secure the re-election of Fujimori in the year 2000.

In order to secure an authentic reform of the administration of justice, the judicial function must be at the service of the people's rights. In other words, the existence of the judiciary is justified by the protection of human rights from excesses by the government and private powers. This means that the judges must vary their position with regard to the law because, although the fundamental rights were once only valid within the limits of the law, now the law is only valid within the limits of the fundamental rights.⁴⁸ This is true in so far as the constitution is the supreme juridical expression of the will of the constitutional power which is based on the democratic principle of the sovereignty of the people and which exists to protect the fundamental rights of the people.

⁴⁴ Helmut Schulze-Fielitz (1984) *Der informale Verfassungsstaat. Aktuelle Beobachtungen des Verfassungslebens der Bundesrepublik Deutschland im Lichte der Verfassungstheorie* (Berlin: Duncker & Humblot), pp. 11-18.

⁴⁵ Roscoe Pound (1906) *The Causes of Popular Dissatisfaction with the Administration of Justice*, in American Bar Association, Report 395, p. 406.

⁴⁶ Peter Häberle, 'Die offene Gesellschaft der Verfassungsinterpreten', pp. 121 and 151. Roland Geitmann (1971) *Bundesverfassungsgericht und 'offene' Normen. Zur Bindung des Gesetzgebers ans Bestimmtheitsfordernisse* (Berlin: Humblot & Humblot), p. 47.

⁴⁷ Pablo Lucas Verdú (1987) *La lucha contra el positivismo jurídico en la República de Weimar, la teoría constitucional de Rudolf Smend* (Madrid: Tecnos), p. 244.

⁴⁸ Herbert Krüger (1950) *Grundgesetz und Kartellgesetzgebung* (Göttingen: Vandenhoeck & Ruprecht in Göttingen), p. 12.