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in co-operation with the

**CONSTITUTIONAL COURT OF ARMENIA**

**5<sup>TH</sup> CONFERENCE OF SECRETARIES GENERAL  
OF CONSTITUTIONAL COURTS  
OR COURTS WITH EQUIVALENT JURISDICTION**

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**REACTIONS TO NEGATIVE CRITICISMS OF DECISIONS OF THE  
CONSTITUTIONAL COURT OF PERU**

**REPORT**

by

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## 1. - Structure and functioning of the Constitutional Court (TC)

The Constitutional Court of Peru is integrated by seven judges elected by the two-thirds majority of the Congress. Their mandate lasts five years and there is no immediate reelection. They enjoy the same limitations and immunities of the members of Congress.

The seven judges of the TC elect a President, Deputy-President and Director of the Constitutional Studies Centre for a period of two years. They may be re-elected once at the end of their term of office. Since 2006, almost all the presidents in office lasted a year or year and a half due to internal dynamics and agreements of the same judges, which make us think of a possible reform of the mandates of President and Vice President so they can last only one year and that way every Judge has the opportunity to lead the TC.

The Court has jurisdiction to resolve:

- a. The constitutional claim process: To assess the compatibility of any regulation with the force of law with the Constitution.
- b. The process of competence: To assess which organ of State has assigned certain competence under the Constitution and its Organic Law.
- c. The process for amparo: The TC acts as ultimately to the denial of the Judiciary in protecting any constitutional right except for personal freedom.
- d. The process of habeas corpus: The TC acts as ultimately to the denial of the Judiciary in protecting the right to freedom and related rights.
- e. The process of habeas data: The TC acts as ultimately to the denial of the Judiciary in protecting the right to informational self-determination and access to public information.
- f. The process of compliance: The TC acts as ultimately to the denial of the Judiciary in order compliance of a law or an administrative act.

The Constitutional Court assesses cases in the judges' meetings as follows:

- a. Plenary meeting of seven Judges.
- b. Two chambers of three Judges each.

Thus, all processes of constitutional claim and competence processes are evaluated by the seven judges. Also the other processes (Amparo, Habeas Corpus, Habeas Data and Compliance) in the case of relevant cases or to set a precedent. For example, the habeas corpus filed by former President Fujimori to annul his conviction was seen by the Plenary. Similarly, the TC Plenary decided the case of the morning-after pill or the emergency oral contraceptive. Also when you challenge decisions of the Supreme Court, the National Election Board and the National Council of Magistracy (the body that appoints and dismisses judges) among others.

Chambers of three Judges know most of amparo proceedings, habeas corpus, habeas data and compliance.

The Constitutional Court of Peru develops public hearings for all cases. During the years 2003 to 2005, the TC developed public hearings in almost all provinces of Peru, in addition to the capital. During the 2006 to 2009 continued the decentralized hearings but with less intensity. In 2010 the Court sits in Lima (capital of the Republic) and Arequipa (site established by the Organic Law) traveling once a month and making audiences of all constitutional claim processes and processes of competence and cases corresponding to the south of Peru.

## **2. - The negative reviews of decisions of the TC in recent years**

Most of the TC Judges took office in September 2007, that's why the criticized decisions include the years 2008 to 2011. It is important to note that the Court's decisions that had been given special negative criticism are very few compared to good judgments and all cases resolved in that period, it should be noted that a single bad decision or not the more correct significantly affects the prestige of the Court.

However, we believe that the balance is in favor of the good decisions that often do not stand out by the media or the public authorities. We hope that in an upcoming meeting of Secretaries General we can highlight our best decisions in order to enrich the debate between the Constitutional Courts in the Venice Commission.

### **2.1. - Case challenged in 2008**

#### - Jalilie Awapara Case

On February 28, 2008 the Constitutional Court issued the judgment in Exp N° 4053-2007-PHC/TC. In this decision the Constitutional Court upheld a presidential pardon granted to former Deputy Minister of Finance of the Fujimori regime, Alfredo Jalilie Awapara, arguing that he had cancer.

The criticism came from the anti-Fujimori political sectors and center left media.

#### - Tudela Case

On June 4, 2008 the TC issued the decision of Exp. N° 1317-2008-PHC, which upheld the writ of habeas corpus filed by brothers Francisco and Juan Felipe Tudela Van Breugel Douglas for his father Felipe Tudela y Barreda against Graciela Losada Marrou for violation and arbitrary deprivation of his liberty.

The case was very mediatic because it was a very rich family and the eldest son had been Minister of Foreign Affairs of Fujimori and UN ambassador. The father who was over ninety years old and marries Mrs. Losada, and then flee to Bolivia on the grounds that his sons wanted to remove his fortune.

The Court found in favor of the sons. Then the facts proved that the decision of the TC was correct because in all likelihood it was a marriage of convenience taking advantage of the senescence of the Father.

The criticism came from the media as the more selling scandal.

#### - Moisés Wolfenson Case

The Wolfenson brothers owned newspapers which during the Fujimori government had been bribed by that Government to attack their opponents. They were in prison but requested that they compute the days of house arrest to parole.

The Court agreed and said they had spent many years without the Congress established the equivalence between days of house arrest and prison sentence.

The judgment was criticized by media and some political.

#### - Case of Military Justice

The Constitutional Court in previous rulings had established that the military judges could not be in military activity. In this judgment of 2008 the TC changes its jurisprudence and says that militaries in active body of law can be judges of Military Courts.

The criticism came from the Human Rights NGOs opposed to the Military Justice System.

### - Bernabe Montoya Case

During the first government of President Alan Garcia was a riot of terrorists in various prisons. One of them occurred in El Fronton island prison. In order to reveal the riot intervened the Navy of Peru and in its attack killed many prisoners convicted and tried for terrorism.

Mr. Bernabe is a marine who participated in the unveiling of the riot. He won a habeas corpus in the Judiciary which guaranteed not to be prosecuted for such acts under the support of the crime had expired.

The Court noted that there was *res judicata* in the habeas corpus and thus gave the reason to Mr. Bernabe.

The strongest criticism came from Human Rights NGOs who seek to judge these facts on the ground that such crimes do not prescribe and are crimes against humanity. Note that the judgment issued during the second government of President Alan Garcia.

## **2.2. – Case challenged in 2009**

### - Case Law on the Use of Force

The Congress passed a law on the use of force by the Armed Forces in the case of restoration of public order in the emergency zones. The Court declared unconstitutional some aspects of the Act

The criticism came from the Congress of the Republic.

### - Case of the "morning-after pill" or "emergency oral contraceptive"

In a process of compliance, in 2006, the TC had said that the State should continue its policy of distributing the morning-after pill in hospitals and medical centers of the State as a contraceptive method.

In 2009, the TC had to solve under a Catholic NGO that challenged the pill on the grounds that it was an abortifacient, and that threatened the life of the unborn. The TC in a majority decision esteemed the claim on the grounds that if there are questions about the abortifacient nature of the pill, life should be protected. Therefore, the State should suspend the distribution of the pill in hospitals and public health centers. There must be said that in private pharmacies the pill can be bought.

The criticism was devastating. They accuse the TC to be a Court of the Middle Age. Almost all media television and radio, were against the ruling. The Minister of Health said they would not recognize the decision. Human Rights NGOs, feminists and an important sector of the public were against the decision. Even today it is recalled that this decision was a difficult time with the public.

### - Chacon Malaga Case

Former Army Commander General Walter Chacon Malaga was being prosecuted for illicit enrichment since 2000. After nine years of no judgment, he requested his exclusion from the process. The Court resolved in his favor and opted him out of the process.

The criticism came from the Judiciary, criminal law academics and opponents of the regime of Fujimori (Political and media). This case law was isolated and then was corrected in a later case (Salazar Monroe) which grants the Criminal Division to judge immediately or otherwise dismiss the cause.

## **2.3. - Case challenged in 2010**

### - Case of the Free Trade Agreement with Chile

In the judgment of Exp N° 00002-2009-PI/TC, the Constitutional Court declared unfounded the constitutional claim against the Free Trade Agreement signed by the Government of the Republic of Peru and the Government of the Republic of Chile.

The Government of President Alan Garcia supported the Treaty but the opposition, which is the actual Government, used nationalist arguments to challenge the treaty.

The criticism came from nationalist groups against the improvement of the relations with Chile.

- Cementos Lima Case

Based on its policy of free trade, the Government established the zero tariff for imported cement. The applicant, *Cementos Lima*, requested the restoration of the tariff to thirteen percent. The TC resolved in favor of the company arguing that domestic industry must be protected and because the reduction was not gradual.

The main critic was the Government. The same President Alan Garcia and his Minister of Finance were very tough in his criticism to the TC.

In 2011 in a second case of another cement company (*Cementos Andinos*), the TC changed his approach and established the case law that the Government was right.

- Administrative Contract Services Case (CAS)

Alan Garcia's government established a form of contract which improved the condition of thousands of public servants who did not have any rights. The TC validated this new approach and said it was constitutional.

The criticism came from the unions who wanted more rights. Today, the actual Government has introduced improvements to the scheme through a second law.

**2.4. - Case challenged in 2011**

- Seat of the Constitutional Court Case

The Organic Law of the Constitutional establishes that its headquarters is in the city of Arequipa, located in southern Peru, one hour by plane from Lima, the capital of Peru. In a case brought by lawyers of Lima this statement was questioned. The TC established that it would have two headquarters, Lima which has the largest caseload and Arequipa as the legal and historical site.

The criticism comes from the Arequipa Region in particular of its authorities who argue that the TC issued a decision to not enforce the law.

- IVESUR Case

In this case the TC intervened and quashed an arbitration award because they find serious questions about the impartiality of an arbitrator.

The Guild of arbitrators questioned that judgment. Then the TC issued a precedent that has pacified his relationship with arbitrators who now praise that decision.

As we have seen the most critical decisions of the TC was concentrated in the years 2008 and 2009. There were very controversial cases specially the "morning-after pill".

During 2010 and 2011 the Judges were aware of the past criticisms and during the last two years there were additional positive impact decisions and criticisms decreased significantly.

**3. - A strategy to reduce the negative criticisms of decisions of the TC**

The TC, based on the experience of the years 2008 and 2009, decides to undertake a communication strategy to respond to criticism with our own communication mechanisms and highlight the positive aspects of the Court's decisions.

This strategy develops the following products:

- Our website through press notes and press releases where we highlight our best decisions.
- The TC produces the TV show "Your Rights": This is done with our resources and with an agreement with the State Channel 7 which reaches the whole country by open signal. It is broadcasted every Saturday at 11:00 am for almost three years and where

through interviews with specialists the judgments of TC are analyzed in a positive way. We also broadcast programs about specific rights.

- Monthly it is published 15,000 copies of a newspaper that is distributed free with the official gazette *El Peruano*. It is published in partnership with the editor of the State.
- Public hearings are broadcasted live via our website.
- The Facebook and Twitter accounts were created.
- We have produced with financial assistance from the World Bank a DVD of four short stories called "The Constitution at the reach of children."
- We have published two editions of a CD with the relevant jurisprudence of the TC, with the support of UNDP.
- This year we hired a company to design us a communicational strategy for the positioning of the TC.
- We plan to develop a radio program with the National Radio of Peru.
- We want to make a video based on the one developed by the Constitutional Court of Korea that seems extraordinary.
- The TC has a Center for Constitutional Studies very active in the task of spreading our case law through courses, seminars and the publishing of books. This year we are planning an amendment to our Organic Law so the Center can have its own resources given the high public demand.

This is the experience that I can share with all of you and it is the result of nearly four years at the General Secretariat. I am available for the exchange of experiences and specially to replicate the good practices that I have the pleasure to appreciate in these two days of sessions.

To all of you thank you very much for your attention.