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# Litigation 2023

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**Peru: Trends & Developments**

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## Trends and Developments

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### Some Key Events Relating to the Peruvian Justice System During 2022

Despite the fact that we are currently facing a complex political situation, Peru has been working, over the last two decades, to boost important sectors such as the economic and financial ones. Therefore, the need to promote the effectiveness and proper functioning of the Peruvian justice system has not been ignored.

This has been a constant objective that has led to important amendments, such as, for instance, the creation of the Constitutional Court with the 1993 Constitution. Also, most recently, it has led to the dismantling of the National Council of Magistrates, whose main function was to select, appoint, ratify and dismiss the judges and prosecutors of the country, and, as its replacement, the installation of the National Board of Justice in 2018, as well as the modification of the procedure for electing magistrates of the Constitutional Court during 2019.

All of these measures, with varying degrees of success, have sought to increase the efficiency, transparency, speed and probity of the Peruvian justice system as the main mechanism to safeguard the social peace. Below we will review three current important developments that have already had – and will continue to have – an important impact on this system.

#### 1. Modifications Made to the Constitutional Procedural Code

On 23 July 2021, Law No 31307 was published, which incorporated a series of amendments to

the Constitutional Procedural Code. A series of procedural rules applicable to processes that seek to protect fundamental rights were modified, as well as the effective validity of the Political Constitution of Peru.

The text of this Law was subject to criticisms that came from the Executive Branch, as well as different sections of civil society; in spite of this, it was approved on the insistence of the Congress of the Republic. Among the most noteworthy amendments are the following:

*“Liminal inadmissibility” has been removed*  
Liminal inadmissibility meant that a judge, when assessing a claim, had the power to reject it after identifying that it had some defects that determined that the request should not be recognised by constitutional justice. This occurred when, for instance, an amparo did not refer to the constitutionally protected content of the right that was allegedly threatened or had been violated.

Amendments made to the Constitutional Procedural Code have removed this power. Although this measure seeks to establish a constitutional justice system with more guarantees, it may, at the same time, lead to a significant challenge in relation to the volume of constitutional proceedings that will be attended by those responsible for this type of controversy, since under this new procedural rule, all claims must be admitted even if they do not comply with the minimum requirements that determine, first, their origin and, then, their admissibility.

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### *The constitutional courts are now competent to be in charge of habeas corpus proceedings*

Before the above-mentioned regulatory amendments, only criminal judges were competent to hear habeas corpus proceedings, that is, those proceedings whose purpose is to protect the right to freedom in its different manifestations.

This has been amended so that constitutional courts are now competent. This measure seeks to confer competence to whoever has been trained and is experienced in constitutional matters; however, it will also increase the number of proceedings that constitutional courts will have to handle.

### *Substantiation is no longer required for filing appeals*

Once again, following a guarantee-based approach, amendments to the Constitutional Procedural Code state that appeals are not required to be substantiated when presented. Thus, the appellant will support their grievances before the superior instance.

This rule could produce harmful effects on the justice system. Although it seeks to guarantee access to the fundamental right to a second instance, its application may lead to the filing of appeals that merely seek to extend proceedings.

In this scenario, the role played by second-instance judges is especially important. They must promptly warn about any misconduct, so that the appeal is resolved within a reasonable period of time that does not jeopardise the effectiveness of the protection granted to the winning party in accordance with the first-instance decision.

### *Amparos against judicial resolutions will no longer be resolved by constitutional judges*

The Constitutional Chamber will hear amparos where a judicial resolution is alleged to be an unconstitutional act or, in case there is none, by the civil one that is competent by territory and turn.

The Constitutional and Social Chamber of the Supreme Court will act as a second-instance body. If the claim's initial rejection is confirmed in the second instance, the aggrieved party may then file a constitutional appeal, taking the dispute before the Constitutional Court.

Although the intention is for the analysis of constitutionality to be carried out by judges with greater experience, this does not seem to be a sufficient reason to justify the amendment. Indeed, if one wished to draw out the logic that is being used to justify the amendment, it could even be claimed that the Supreme Court judges would be even more suitable to hear these cases.

These, as well as the other amendments that were introduced, amounted to a substantial change that, in some cases, was not well received. This is due, among other issues, to the fact that these amendments did not have a *vacatio legis*; rather, the reforms came into force the day after their publication.

Of course, this presented a problem for justice system users, as well as for the judges themselves. Since the procedural rules were immediately applicable, any proceedings that were already in progress had to be subject, immediately, to the new rules incorporated by the legislature.

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This situation has been mitigated somewhat by subsequent jurisprudence. For instance, the 1st Civil Chamber of the Superior Court of Justice of La Libertad, in the case contained in file No 00949-2021-0-1601-JR-CI-06, held: *“The procedural rules provided for by this Constitutional Procedural Code are immediately applicable, even to proceedings in process, as long as the current procedural rule is more favourable to the claimant and maximises his/her right to effective jurisdictional protection; otherwise, they will continue to be governed by the previous rule.”*

We believe that, if amendments that are made to the Constitutional Procedural Code are to have a guaranteeing nature, an interpretation such as the above-mentioned one harmonises the will of the legislature with the rest of our legal system. As it cannot be otherwise in the framework of a process of a constitutional nature, the protection of the fundamental rights involved must be paramount, as well as the correct and effective response of the justice system.

Lastly, on 5 October 2022, Law No 31583 was published, which incorporated changes to the Constitutional Procedural Code. Among them, we identify two that are especially significant:

### *The procedure to be followed by a Constitutional Appeal has been specified*

Following the guarantee-based logic, it is stated that a public case hearing before the Constitutional Court is mandatory and that the lawyers have, under penalty of nullity, the right to present their arguments orally if requested.

Similarly to some of the rules seen above, this last provision aims to promote that whoever has had their claim rejected in two instances presents the considerations that support his or her request. However, in practice, this provision will

extend the proceedings, putting at risk the possibility of a timely and effective response from the Constitutional Court.

### *Some considerations related to amparo jurisdiction have been added*

As stated, an amparo against a judicial resolution is heard, in the first instance, by the Constitutional Chamber or the Civil Chamber of the competent court; and, then, by the Constitutional and Social Chamber of the Supreme Court. Following the amendment, the Superior Court and the Supreme Court will also resolve amparos against: (i) arbitration awards; (ii) public works selection procedures or their execution; and (iii) decisions of the bodies of the Congress, issued within a parliamentary procedure.

This last rule has been the object of a series of criticisms. It has been pointed out that, to the detriment of the effectiveness of arbitral justice, it now allows awards to be questioned via amparo. However, this is incorrect since we are dealing with a provision that only establishes rules of competence but not of the lawsuit admission. Therefore, this analysis must follow the criteria established by the Constitutional Court.

## **2. Legal Actions Before the Prohibition on Labour Outsourcing**

On 23 February 2022, Supreme Decree No 001-2022-TR was published in order to modify the Regulations of Law No 29245 and Legislative Decree No 1038, which regulates labour outsourcing services, prohibiting their use for core business activities.

Through labour outsourcing, a main company (user) can delegate or entrust the execution of a part of its productive process to an outsourcer. This outsourcer will be in charge of developing specialised activities or works, carrying out

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entrusted tasks under its own risk and account. For that purpose, it must have its own financial and technical resources and materials. Furthermore, it must have skilled workers under its own command, also being accountable for the outcomes of such activities.

Outsourcing is a business decision by a company to split its productive process using third parties that will assume one or more segmented phases of that process. It is a manifestation of the right to freedom of enterprise, embodied through the signing of a formal legal act (civil or commercial), exercising the fundamental right to freedom of contract.

In the face of this clear interference with constitutional rights and breach of the scope of Law No 29245 itself, which does not expressly cover the concept of “core business” that has been irregularly incorporated by this reform, companies (private and even public ones) are having to pursue – individually or in groups – up to three parallel legal actions or mechanisms (which is not common in Peru), namely the following:

### *Administrative complaints to be declared as a bureaucratic barrier*

At its administrative headquarters, almost 400 complaints have been filed with the National Institute for the Defence of Competition and Intellectual Property (INDECOPI by its Peruvian acronym) against the Ministry of Labour and Employment Promotion (MTPE by its Peruvian acronym) and against the National Superintendence of Labour Inspection (SUNAFIL by its Peruvian acronym), so that the prohibitive provisions of the regulation in question be declared as an illegal bureaucratic barrier, since they are restrictions irregularly imposed by the public administration that affect the continued existence and development of economic agents in the market,

in this case, workers and companies, outsourcers and customers.

This administrative procedure – regulated by Legislative Decree No 1256 – has two instances: the first one, before the Commission for the Removal of Bureaucratic Barriers, whose judgment can be appealed; and the second, before the Specialised Chamber for the Removal of Bureaucratic Barriers of the Court for the Defence of Competition and Intellectual Property. INDECOPI is empowered to grant precautionary measures in favour of the complainant during this proceeding.

Against the final ruling of the second administrative instance, the losing party may file a Contentious-Administrative lawsuit before the Peruvian Court, in accordance with provisions contained in Article 148 of the Political Constitution, developed by Supreme Decree No 011-2019-JUS, Single Ordered Text of Law No 27584. In such process, precautionary measures can be requested to suspend the administrative decision.

It should be highlighted that recently the second instance of INDECOPI confirmed a decision against the MTPE and SUNAFIL suspending the outsourcing restriction for a mining company, which will surely be a reference for future similar cases. Now, there is a discussion about whether this second-instance ruling has general scope or binds this company only. It should be specified that all companies have been obtaining favourable provisional measures in the first instance, so that if the second-instance resolution does not have general scope, the criterion will obviously be kept.

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### *Amparo*

Two amparo actions have been filed nationwide – against the MTPE and against SUNAFIL, through which the direct violation of the fundamental and constitutional rights to freedom of contract (Article 62 of the Political Constitution), freedom of enterprise (Article 56 of the Political Constitution) and the right to work itself (Articles 22 to 26 of the Political Constitution), are alleged because this prohibition affects both the workers of the outsourcers and the user companies.

This process, set out in number 2, Article 200 of the Political Constitution and developed by Law No 31307, Constitutional Procedural Code, concerns an act or omission, by any authority, official or person, that allegedly violates or threatens fundamental rights other than individual freedom (protected by habeas corpus). It proceeds in up to three instances: the first, before a Judge Specialised in Constitutional Matters, whose ruling can be appealed; the second, before the Constitutional Chamber of the Superior Court of the corresponding judicial district; and only if the second instance ruling is unfavourable to the complainant can the third instance (Constitutional Court) be activated, through a constitutional appeal.

It should be noted that when applying the second paragraph of Article 138 of the Political Constitution, the judges – in interpreting the constitutionality – can suspend the effects and/or scope of a law when there is an incompatibility between it and a constitutional rule.

### *Public interest claim*

Public interest claims have been started, whereby private and public entities have filed proceedings against the MTPE and SUNAFIL, and also including the Presidency of the Republic itself, seeking to remove Supreme Decree No 001-

2022-TR from the legal system because it violates the Political Constitution (Articles 51 and 118, number 8) and Law No 29245, by contravening the normative hierarchy principle through an irregular and illegal regulatory reform.

This process, set out in number 5, Article 200 of the Political Constitution and also developed by Law No 31307, is formulated against the regulations, administrative rules, resolutions and decrees with general nature, before the violation of the Political Constitution and/or the law. It proceeds in two instances: the first one is before the Constitutional Chamber of the Superior Court of the corresponding judicial district, whose ruling can be appealed; and the second one is before the Constitutional and Social Law Chamber of the Supreme Court of the Republic. These processes are not seen by the Constitutional Court.

According to Article 80 of Law No 31307, reasoned judgments within public interest claims may determine the nullity, with retroactive effect, of the contested rules, determining their scope in time. They have general effect and will be published in the official gazette.

### **3. The New Composition of the Peruvian Constitutional Court**

In May 2022, the Congress of the Republic of Peru elected the new magistrates of the Constitutional Court. In accordance with our Constitution, the Congress of the Republic is in charge of the election of the members of the Constitutional Court, which requires the favourable vote of two-thirds of its members. For this reason, the doctrine recognises a crucial political component in this organisation.

In this way, the plenary session of the highest jurisdictional body in the country was renewed,

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after three years in which the mandate of six of its members expired.

These changes are far-reaching, because they will have a direct impact on the functioning of the Peruvian legal system, as well as on the main social and economic issues of our country. As in most jurisdictions, a court of this nature has as its main role to ensure the effective validity of the Constitution.

In the case of Peru, the Constitutional Court is the Political Constitution control body and, therefore, is competent to hear:

- in a single instance, proceedings regarding unconstitutionality, that is, those aimed at determining whether a law should be expelled from the regulatory system or not;
- proceedings regarding decisions that reject claims aimed at protecting fundamental rights (of habeas corpus, amparo, habeas data) and enforcement action (proceedings aimed at ensuring the effectiveness of, and demanding compliance with, legal regulations and administrative acts); and
- proceedings regarding conflicts of jurisdiction or conflicts between powers assigned by the Political Constitution, in accordance with the law.

The Constitutional Court's decisions set the parameters of constitutional validity that guide the pronouncements of all the jurisdictional organisms in our country. Hence, Article VIII of the Constitutional Procedural Code includes the obligation of judges to interpret and apply laws and regulations following the interpretations collected in the jurisprudence of the Constitutional Court.

In addition, in accordance with the importance of this matter, it can issue binding precedents that have mandatory normative force. The legal consequences of this type of pronouncement are so important that, in accordance with Article VI of the Constitutional Procedural Code, in order for a binding precedent to be created, modified, set aside or rendered null and void, a meeting of the Constitutional Court Plenary and the assenting vote of five magistrates are required.

Due to the importance of the conflicts resolved by the Constitutional Court, it is essential that its members be professionals with deep training in the constitutional matters that are repeatedly seen by such body. The new members of the Constitutional Court comply with this requirement, which constitutes a guarantee about the technical correctness of their decisions.

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# PERU TRENDS AND DEVELOPMENTS

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