

FUNDAMENTAL RIGHTS DURING THE CORONAVIRUS PANDEMIC IN PERU

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I. INTRODUCTION

On March 6, 2020, it was publicly announced “patient zero” in Peru’s coronavirus outbreak—a traveler who had recently returned from Europe—had been identified. In response, the president of the republic decreed a health emergency just days before the World Health Organization declared that COVID-19 had officially become a pandemic due to its worldwide spread. The Peruvian government then suspended the recommencement of all grade school, high school, and university classes; prohibited gatherings of more than 300 people; and imposed a mandatory quarantine on travelers coming from countries in Asia and Europe with known hotspots.

Following an exponential increase in the number of patients with symptoms of COVID-19, the government issued Supreme Decree (Decreto Supremo) 044-2020-PCM on March 15, declaring a nationwide fifteen-day state of emergency due to the public health disaster. This decree suspended the right to personal freedom, freedom of movement, inviolability of the home, and the right to assembly, in accordance with Section 137-1 of the Constitution. The decree has since been extended multiple times, with the current, fifth extension lasting through June 30, given that there is still no vaccine and the spread of coronavirus has not been successfully contained.

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As a result of these initial measures, Peru closed all of its borders—by air, land, and sea—on March 19, and halted interprovincial travel, thus making for a quick, although relative, start to social isolation. Two days later, a curfew was imposed, which remains in force to date. Citizens were prohibited from leaving their homes between 8 p.m. and 5 a.m.—although these hours have been adjusted depending on the degree to which different regions have been hit—except for those essential workers who play an important role in containing the spread of COVID-19 or in the production and supply of basic goods such as food and medicine.

Ever since, daily life in the country has been radically transformed: the exercise of our rights—not only personal freedoms, but social rights, too—has been limited and restricted by the authorities’ decisions, as well as the actions of the police and military, as we will see below.

II. RIGHT TO LIBERTY

With the stay-at-home order, the daytime restriction of freedom of movement, and the prohibition of freedom of movement after curfew, law enforcement has begun to issue warnings and order “passersby” to return to their homes. Some offenders have even been ordered to perform community service, while *rondas campesinas* (autonomous peasant patrols) in the north of the country have sometimes taken matters into their own hands and meted out corporal punishment. Police arrested over 51,000 offenders during the first month of quarantine.

This highlighted two issues: First of all, the fact that thousands of citizens refused to comply with the social isolation rules required to break the chain of transmission. They justified this, in most cases, by their need to work in the street because of their involvement in the informal economy as their only means of survival. Secondly, it revealed the ease with which the forces of law and order have stopped people, detained them, and searched their households, sometimes with an arbitrary and/or disproportionate use of force.

While those held until they can be identified and/or detained for twenty-four hours are eventually let go, the government attempted to dissuade citizens from disobeying the emergency orders by imposing monetary fines ranging from 86 to 430 soles (about US\$ 25 to US\$ 130). The public responded dramatically to this curtailment of their freedom of movement, turning grocery shopping into an escape from social isolation and making many of the most popular markets around the country into

potent hotspots for the transmission of coronavirus that are now practically beyond control.

There have also been cases involving the misuse of permits that allow their holders to go to work or drive personal or public transportation vehicles. As a result, workers have congregated in large groups at bus stops, creating hotspots of transmission despite military vehicle patrols and police fines for violations of work and driver's permits, further feeding into the sense of confusion and social chaos.

This situation has been additionally complicated by the 28,000 Peruvians who were stranded in different countries due to the cancellation of their flights following the national emergency decree and the closing of Peru's borders. In response, the government coordinated "state-to-state flights" with the respective foreign affairs offices for the exchange of repatriated citizens. This allowed more than 13,000 Peruvians to return from abroad in exercise of their freedom of movement and residence in our country, although they were placed in quarantine upon their arrival in five-star hotels in Lima, with their stays paid for by the government.

There is also the case of thousands of individuals and families from elsewhere in the country who happened to be in Lima when the state of emergency was declared. After the decree was successively extended, they found themselves without economic resources or the ability to work so that they could pay for their daily living expenses. In response, they started marches to return to their hometowns, gathering in parks and along avenues and highways and creating further transmission hotspots for the pandemic. The executive branch then began working with the regional governments to register over 20,000 people and provide humanitarian transportation for thousands of them, with mandatory coronavirus checks when leaving Lima and upon arrival in their home cities in the country's interior, although they have not always been warmly received there.

III. SOCIAL RIGHTS

The right that has been most directly affected by the pandemic is the fundamental right to health, given that the exponential spread of COVID-19 calls for a public health system that Peru has historically lacked, as made clear by the fact that the government spends just 3.3% of its gross domestic product on health. Despite this, the government has made financial efforts to inject extraordinary funds into the current public budget to improve, expand, and bolster hospitals; buy millions of COVID-19 tests; and hire health personnel to prevent the pandemic's deadly effects from worsening.

This has nevertheless proved insufficient, given the lack of solidarity from private clinics, which charge 10,000 soles per day (over US\$ 3,000) on average for a bed in one of their intensive care units; and the monopoly control held by pharmacy chains and producers of medical oxygen tanks, leading to an exponential rise in the price of medicines and oxygen necessary to alleviate the effects of coronavirus.

While the fundamental rights that have been restricted under the declaration of a state of emergency, with the goal of stopping the spread of coronavirus, are the rights to liberty and security of person, freedom of movement, inviolability of the home, and the right of assembly, in practice these limitations have led to a de facto overlap with the consequent negative impact on the exercise and enjoyment of the social right to health, which must be protected for vulnerable groups, at the very least, when facing crisis situations (Bilchiz, 2017, p. 15).

In terms of indirect effects, the right to work has also been restricted to those supply chain production and service activities that are necessary to prevent the country from grinding to a complete halt, and to keep supplies flowing to the public and ensure people's protection. For all other businesses, however, the government has authorized the "full suspension of the employment relationship," as requested by companies for over 200,000 workers. This has led many employers to commit labor law offenses that need to be investigated and, where applicable, punished by the labor authority. Regulations have also been issued regarding remote work, which larger companies are now permitted to implement using the technological resources and equipment they are providing to their employees so they can work from home.

In the case of workers and self-employed individuals in the informal economy, efforts have been made to keep them from becoming a focal point for the spread of coronavirus, given the fact that their jobs typically require them to move around a great deal while they sell their wares in the street. To this end, the government has approved and disbursed four different subsidies of approximately US\$ 110 each to help citizens cover their expenses during the state of emergency: the "Bono yo me quedo en casa" ("Stay-at-Home Subsidy") for those living below the poverty line; the "Bono independiente" ("Self-Employed Subsidy") for workers in the informal economy; the "Bono rural" ("Rural Subsidy") for peasant farmers; and the "Bono familiar universal" ("Universal Family Subsidy") for anyone who does not qualify for the previous three subsidies. However, because the government does not have a nationwide records system able to register all of these vulnerable populations, and also suffers from inefficient management, only

about 75% of the budgeted amounts have been executed. Meanwhile, the subsidies have proven to be insufficient as an incentive to keep workers from gathering around markets, in the streets, and near hospitals, where street vendors continue to do business.

The right to education has also been suspended with regard to in-person classes for all levels and forms of education. This has made it necessary to begin the implementation of the “Aprendo en Casa” (“Home Learning”) remote education system for grade school and high school students, with the help of public television and radio outlets and the support of private television broadcasters for one hour each day. However, only about a third of school-age children have the computers and internet they need for on-line learning. In response, the government has ordered 840,000 tablets with mobile internet for students, especially those in rural areas.

The pandemic has not prevented private schools from providing educational services online. However, after parents complained that the costs for such services are not the same as those for in-person education, the government announced possible changes to school tuitions in light of the lower costs of online education and/or transport to public schools. Online education options have also been offered to students at public universities, with budgetary help from the government. For their part, private universities are using public credit to continue their operations, while offering discounts and/or payment plans to students during the state of emergency.

While freedoms and their related rights may be legally limited during a state of emergency decreed in response to a public health disaster, these freedoms and rights cannot be rendered null and void, and they certainly cannot be violated. In order for any restriction of freedoms and rights to qualify as constitutional, it must be based on specific legal grounds and serve a legitimate purpose. Such restrictions must also be necessary, meaning that there is no less restrictive option available to achieve the goals being sought, and they must be strictly proportional in their intensity, i.e., the number of human beings who will be affected and the duration of these restrictions.

In the event of any violation of and/or disproportionate effects on citizens’ rights and freedoms during a state of emergency, proceedings for the protection of fundamental rights such as habeas corpus and *amparo* actions are the most appropriate procedural channels for a constitutional court judge to issue a ruling on any detrimental acts, although not on the reasons given for the declaration of the reduction of freedoms and rights, according to Section 200 *in fine* of the Constitution.

There is no question that the members of Congress who were elected on January 26 and took office on March 16 have the democratic power to

perform any acts of political control they deem opportune and necessary. But only the efficient constitutional and democratic handling of the public health crisis and the collective efforts of a people who are aware of their rights will ensure a staggered return, in stages to be approved by the government for progressive implementation over the course of 2020, to a state of constitutional normality for all, so that people can exercise all of the freedoms and rights that are currently restricted. We must remember, after all, that there can be no individual liberty or wellbeing if it is not, at the same time, collective.

Even in spite of the foregoing, it is clear that our rights and freedoms will never fully return to the way they were before the public health emergency. The pandemic has exposed structural failures in the health system that have made it extremely difficult to successfully control the spread of COVID-19 and its deadly consequences for people's lives and health. It is now clear that the return to a "new normal" must be founded on social, economic, and political freedoms and their associated rights.

It no longer seems so utopian to demand the urgent rethinking of structural reforms to the constitutional state in Peru, implemented through constitutional reforms. This would make it possible, in turn, for the constitution to include provisions on health emergencies, along with a new list of social and economic rights, with special protections for our most vulnerable citizens.