

## THE SOCIAL ISSUE IN PERUVIAN CONSTITUTIONALISM OF THE 20<sup>TH</sup> CENTURY AND IN THE CASE LAW OF THE CONSTITUTIONAL COURT: INFLUENCE OF SOCIALIST CONSTITUTIONALISM?

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*The socialist ideas of Russian Revolution were well-known in Peru, according with the struggles of working-class and student movements and the birth of socialist and communist parties. But the Peruvian Constitutions of 1920 and 1993 only opened someone social rights, not only for the workers, but also for the indigenous people to protect their community territories. Only with the Constitution of 1979 the leftwing constituents were almost one third of the constituents. In this way the Constitution included social ideas in the type of State as social and democratic Rule of Law, the equal rights between all persons, particularly between men and women, the employment was protect by the State, the public education cost-free, the property had a social function, the natural resources were of the Nation, and the indigenous and Amazonian communities were protected, etc. But, with the neoliberal Constitution of 1993 the economic model was liberalized in favor of the market and the international investors, reducing the social rights, and the national power was centralized in the Executive Power. But, since 2000, after the fall-down of Fujimori's regimen, the Constitutional Court played a role of balanced the impact of this new model, according with the international treaties of human rights and social rights. In this sense, the Constitutional Court was able to give the Constitution of 1993 a social content.*

*Keywords: social ideas; socialist constitutionalism; Peruvian social doctrine; model of State; material equality; property; land problem; indigenous problem; work; social rights, Constitutional Court.*



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## Introduction

Socialists and their ideas were present in the constituent debates of twentieth-century Peru starting with the Congreso Constituyente (Constituent Congress) of 1932, in which four representatives of the Partido Socialista (Socialist Party) took part in the debates on the Constitution of 1933.<sup>1</sup> A more organic participation, however,

<sup>1</sup> Rocío Chirinos Montalbetti, *La Constitución peruana de 1933* 76 (1991).



took place in the Asamblea Constituyente (Constituent Assembly) of 1978-1979, when the left-wing parties – Frente Obrero y Campesino del Perú (Workers' and Peasants' Front of Peru), Partido Comunista Peruano (Peruvian Communist Party), the Partido Socialista Revolucionario (Revolutionary Socialist Party), Acción Popular Socialista (Socialist People's Action), and Unidad Democrática Popular (People's Democratic Unity) – made up more than 30% of the Assembly that debated the Peruvian Political Constitution of 1979, along with the Partido Aprista Peruano (Peruvian Aprista Party) and the Partido Popular Cristiano (Christian People's Party).

It was in this constituent assembly that the social and economic values and principles in favor of the majority were most thoroughly expressed, in both the preamble and certain chapters of the resulting Constitution. Most noteworthy among these were the sections on the formula of the social state, planning in a social market economy model, entrepreneurial pluralism, the social function of property, labor, health, education, peasant and native communities, among others. Thus, the Constitution of 1979 has been referred to as the product of the ideas of social democracy, social Christianity, and democratic socialism.<sup>2</sup>

However, the Constitution of 1979 was repealed by the then-president Alberto Fujimori's self-coup in 1992, and was promptly replaced by the Constitution of 1993 – issued by a Congreso Constituyente Democrático (Democratic Constituent Congress) – from which any social ideas were practically banned in favor of the economically liberal and politically conservative model on which the Fujimorista regime was based. The congress that drafted this Constitution barely included ten leftwing constituents. Despite this, some of them played an outstanding role in the debates, much like they had in the constituent assembly of 1932.

On the other hand, the Constitutional Court was also created based on the Constitution of 1993. Since 2002, this Constitutional Court has developed a body of jurisprudence that has made use of certain ideas on social equality and economic, social, and cultural rights in the court's rulings on cases brought before it, in an attempt to give the Constitution of 1993 a social content, inspired mainly by the comparative social constitutionalism of Spain, Italy and Germany. This being the case, can we truly speak of any significant influence of socialist ideas in the Peruvian Constitutions of the twentieth century?

A heated debate of ideas began in Peru in the early 20<sup>th</sup> Century, regarding the social issue. This occurred against the backdrop of three historical events that marked the social climate in the Continent, either because of their influence or due to the reactions that these events unleashed among the local population: the Mexican Revolution of 1910 and its Querétaro Constitution of 1917;<sup>3</sup> the fall of the German Empire and the

<sup>2</sup> Henry Pease, *La Constituyente de 1979 en el proceso político peruano* in *Constitución y Sociedad Política* 13, 35–38 (Marcial Rubio & Enrique Bernal eds., 1981). See also, Alberto Ruiz-Eldrege, *La Constitución Comentada 1979* 16 (1980).

<sup>3</sup> Cf. Catherine Andrews, *Un siglo de constitucionalismo en América Latina (1917–2017)* (2017).



establishment of the Weimar Republic, with its social Constitution of 1919; and the Russian Revolution of 1917 – more so than its Constitution of 1918 – which, according to Boaventura de Sousa Santos, “shook the world and set the living conditions of almost a third of the world’s population over the following decades.”<sup>4</sup>

### 1. The Debate of Social Ideas in Early Twentieth-Century Peru

In the first few decades of the twentieth century, a debate on political ideas was held in Peru in the context of popular demands, marking a before and after in terms of the handling of the social issue in the country. We refer to the debate between Víctor Raúl Haya de la Torre and José Carlos Mariátegui.

Originally, these two thinkers had several points in common. Indeed, both of them initially challenged the capitalist system and shared a vision of Peru’s society at the time as semi-feudal and semi-colonial.<sup>5</sup>

Insofar as the country’s core economic difficulties could not be tackled without addressing “the economic problem of the indigenous peasantry,”<sup>6</sup> the question of land became the country’s primary social problem.<sup>7</sup> In 1928, however, the two thinkers began to distance themselves from one another after Haya de la Torre claimed that capitalism was an inevitable stage for Peru’s social development.<sup>8</sup>

For his part, Mariátegui argued for Peru’s “own, distinct kind of Marxism”<sup>9</sup> in which the struggle of classes in the Andes was to be led by the Peasant.<sup>10</sup> As noted by Flores Galindo:

José Carlos Mariátegui thought it was possible to found a socialist project in Peru in view that Peruvian history had followed a different course from Europe’s evolution. Here, socialism – product of the modern, industrial world, of cities and of the working class – could converge with the country’s own historical trajectory. Hence, it was critical for Mariátegui to demonstrate that a peculiar case of Inca society had given rise to a State without private property and with the persistence of collectivistic traits. The so-called “primitive

<sup>4</sup> Boaventura de Sousa Santos, *A cien años de la Revolución Rusa: El problema del pasado es que no pasa*, Rebelión, 10 February 2017 (Feb. 14, 2021), available at <https://www.rebelion.org/noticia.php?id=222772>.

<sup>5</sup> Mariano Valderrama, *Haya de la Torre y el APRA de los años veinte*, 5 Revista de la Universidad Católica 128 (1979).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 129.

<sup>8</sup> *Id.* at 130.

<sup>9</sup> Enrique Dussel, *El marxismo de Mariátegui como ‘filosofía de la revolución’* in *El marxismo de José Carlos Mariátegui*. Vº Congreso Nacional de Filosofía 27, 33 (David Sobrevilla Alcázar ed., 1995).

<sup>10</sup> *Id.*



communism," as it was termed in the *Communist Manifesto*, was reproduced through what he called Inca agrarian communism ... that persisted to this day in peasant communities, where it was possible to find the equivalent of present-day socialism in the form of the collective appropriation of pastures, land, and the labor of the peasantry, still in practice.<sup>11</sup>

According to the foregoing, it may be observed that the root of these ideas was institutionalized in Peruvian society through the parties that followed Mariátegui and his ideology. Many years later, this would allow the expression of such interests in the public sphere by Marxist and/or Leninist parties, as well as the workers' union movements that shared their ideological orientation, through legitimate and legally established channels of popular representation.

As we will see, in terms of the social issue, the Peruvian Political Constitution of 1979 – drafted by the people's representatives elected to the Constituent Assembly of 1978 (primarily from the Partido Aprista Peruano, the Partido Popular Cristiano, and the left wing parties, both Marxist and non-Marxist) – manifestly exceeded its predecessors (the Constitution of 1920 and the Constitution 1933), along with the subsequent Peruvian Constitution of 1993, which does not imply that its social principles, rules, and values were actually materialized during the time it remained in force.

## **2. The Position of Peruvian Legal Doctrine and Stakeholders Regarding Social Ideas in the Early Twentieth Century**

Particularly noteworthy are two major twentieth-century Peruvian jurists: Juan Bautista de Lavalle and José León Barandiarán.

While the former vehemently rejected the idea of the proletarian revolution and its enforcement in Peru, the latter had a much more receptive view of the social issue in legal-constitutional terms.

### **2.1. Jurists**

#### **2.1.1. Juan Bautista de Lavalle**

As a lead professor of the Universidad Nacional Mayor de San Marcos, in 1923, Juan Bautista de Lavalle gave a speech in memory of the great jurist Luis Felipe Villarán (1845–1920), which was later published as a book entitled "Luis Felipe Villarán. El Maestro, el Jurista, el Magistrado." In this speech, Lavalle rejected the ideas and actions of the Russian Revolution of 1917, querying any influence it might have in Peru based on his belief that it would be politically, socially, and economically disastrous.

Lavalle believed that Luis Felipe Villarán would also have rejected these socialist ideas, stating that "for this noble professor of liberalism, the mystical or political

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<sup>11</sup> Alberto Flores Galindo, *Para situar a Mariátegui in Pensamiento político peruano* 205 (1987).



absolutism of an ancient tyrant would have been equally as unjustifiable as the new dictatorships organized in the name of the Marxist economic revolution.<sup>12</sup> To this end, he argued that:

In view of the oversimplification of its materialistic concept of history and the class struggle, which have been discredited by legal and economic philosophers; its disregard for moral forces and factors of irreplaceable value to human existence; its proposed solutions that are irreconcilable with the fundamentals of a democratic government; in defense of the thousand year old civilization now being threatened it imperative that we pass the harshest of judgments on the Marxist ideology so recklessly being wielded by all those who seek to take advantage of the force that has represented, and continues to be represented on this earth by the effortless exploitation of human ignorance, naivety, and discontent.<sup>13</sup>

On the other hand, what Lavalley's writings make clear is that he conceived social reform based not on the actions of the masses, but on the will for individual change rooted in moral renewal.<sup>14</sup>

In short, Lavalley adopts an opposite position against the collective action and political organization of the working class based on social demands, a position which was typical among the legally established oligarchy who rejected the Russian Revolution from an individualistic, liberal, and sometimes even conservative, standpoint.

### 2.1.2. José León Barandiarán

On the other hand, the renowned Peruvian jurist José León Barandiarán (1899–1987), published a paper in 1930<sup>15</sup> in which he analyzes the German Constitution of 1919 and explains the upheaval experienced in Germany after its defeat in World War I, which in turn led to the outburst of revolutionary movements in the country led by both socialists (Bolsheviks) and social democrats.

Barandiarán, who is also considered to have been the first to introduce Jhering's philosophy in Peru<sup>16</sup>, viewed the Weimar Constitution as being clearly social in nature, referring that:

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<sup>12</sup> Juan Bautista de Lavalley, *Luis Felipe Villarán. El Maestro, el Jurista, el Magistrado* 19 (1923).

<sup>13</sup> *Id.* at 26.

<sup>14</sup> *Id.* at 27–28.

<sup>15</sup> José León Barandiarán, *La Constitución Alemana de 1919* (1930); see also, Manuel Vicente Villarán, *El Gobierno de Alemania. El Imperio. La República. La Dictadura* 33–58 (1936).

<sup>16</sup> Luis Lloredo Alix, *La recepción de Rudolf Von Jhering en Asia y Latinoamérica*, 31 *Anuario de Filosofía Jurídica y Social* 5, 35 (2016).



Without a doubt, the German ideological context was not suitable for the implementation of a Russian-style of socialism. Ideas possess absolute value in terms of their content, and not in terms of how they are implemented. The how is circumstantial, and depends on the idiosyncrasies of each population. The absolute value of the socialist idea lies in the fact that it reflects an inevitable future organization. From this standpoint, the Weimar Constitution, which represents progress, even if only relative, in the evolution toward socialism, has undisputed merit. Its study offers many valuable suggestions with regard to today's political and social problems.<sup>17</sup>

León Barandiarán admired the fact that German social democracy had chosen this particular model over that offered by the Bolshevik option of the Soviets and promoted by German socialists. A choice that allowed the expression of social law in the Constitution of 1919.

## **2.2. Stakeholders**

Also worth highlighting are certain social actors and thinkers who played a key role in events of undeniable legal and political importance, which, in the case of Peru, included the establishment of the eight-hour workday in 1919, along with the introduction of socialism in Peru.

### *2.2.1. Manuel Caracciolo Lévano and Delfín Lévano*

Manuel Caracciolo Lévano and Delfín Lévano, father and son respectively, were two major leaders, whose participation in the worker's movement to obtain an eight-hour workday was decisive, in terms of the organization of their workers' unions and their dissemination and broadcasting in the media, such as the weekly paper "La Protesta."<sup>18</sup> Thus, for example, in a ceremony that took place on 1 May 1905, Manuel Caracciolo Lévano mentioned the struggles of the slaves in Tsarist Russia, proclaiming, "May what the slaves do today in Russia be done tomorrow by the slaves in Peru!" in a speech following that given by Manuel González Prada, a reputed intellectual anarchist of the time who served as an intellectual model and source of inspiration for the workers' movement.<sup>19</sup>

After several years of different initiatives (such as the union of bread bakers known as the Federación de Obreros Panaderos "Estrella del Perú"), demonstrations, strikes, and forceful measures, the eight-hour workday was finally decreed during José Pardo's second term in office in 1919, thereby putting an end to a process that began in the nineteenth century after the events in Chicago (1886).

<sup>17</sup> León Barandiarán 1930, at 11.

<sup>18</sup> Cf. Semanario "Hildebrandt en sus trece," Año 9, No. 428, 29 March 2019, at 19 & 38. See also César Lévano, *Las ocho horas. Historia real de una victoria exclusivamente obrera* (2019).

<sup>19</sup> Semanario "Hildebrandt en sus trece," *supra* note 18, at 38.



In any case, although the Political Constitution of 1920 contained no express recognition of the eight-hour workday, Article 47 did mention that the law would establish “maximum working conditions and minimum salaries based on age, sex, the nature of the tasks, and the conditions and needs of the country’s different regions.”

### 2.2.2. *José Carlos Mariátegui*

Appearing in the midst of this workers’ struggle was José Carlos Mariátegui, known by the nickname “El Amauta,” an “unmatched and unsurpassed” ideologist of socialism in Peru who sought to erect socialism as a “heroic creation.” With this goal in mind, he founded the Peruvian communist party in 1928, which despite being named Partido Socialista (Socialist Party) – formed part of the Communist International.

Mariátegui was indeed the ideologist who introduced socialism in Peru, although with certain nuances that reflected Peru’s reality. His discourse, however, was political more than legal, since the law at that time was solely valued as a subsequent expression of policy, and never the other way around.

For Mariátegui, the October Russian Revolution was the highest expression of the peoples’ struggle throughout the twentieth century because it marked the beginning of a new stage of history that would work to reverse oppression, injustice, and poverty. Hence, in November 1921, Mariátegui would state that, “The Russian Revolution has marked the start of the Social Revolution.”<sup>20</sup>

Mariátegui also spearheaded the creation of a unified union organization for the defense of workers’ rights, which is now known as the Confederación General de Trabajadores del Perú (CGTP).

## 3. Reception of Socialist Constitutionalism in the Peruvian Constitutions of the Twentieth Century?

Having provided the foregoing background, we will now proceed to evaluate whether socialist constitutionalism – understood as a new political and legal order at the service of the working class,<sup>21</sup> expressed in Russia in the Declaration of Rights of Working and Exploited People and in its Constitution (1918) – had any direct or indirect influence on the Peruvian Constitutions of the twentieth century. To this effect, the following guidelines have been selected: i) the kind of state; ii) material equality; iii) the land problem; iv) protection against exploitation and other forms of slavery (the “Native Peruvian problem”).

<sup>20</sup> Gustavo Espinoza, *José Carlos Mariátegui y la Revolución Rusa*, *Rebelión*, 13 November 2007 (Feb. 14, 2021), available at <http://www.rebelion.org/noticia.php?id=58936>.

<sup>21</sup> Cf. Comisión del Centenario de la Revolución Socialista de Octubre, *Constitucionalismo soviético (I). Fundamentos ideológicos*, Comisión Octubre, 7 February 2017 (Feb. 14, 2021), available at <https://octubre1917.net/2017/02/07/constitucionalismo-1/>.





### **3.1. Type of State**

In the case of Peru, during the twentieth century, starting with the Political Constitution of 1933, it was established that the State's power stems from the people and is exercised by State officials with the limitations set forth in the Constitution and the law (Art. 1). Similar provisions can be found in the Peruvian Constitutions of 1979 (Art. 81) and 1993 (Art. 45).

None of these Peruvian Constitutions established a labor-based socialist republic, opting instead for the formula of a Social and Democratic State governed by the rule of law, established in the Political Constitution of 1979 (Art. 4). To date, this classification is still used to identify the Peruvian State, in accordance with Articles 3 and 43 of the Peruvian Constitution of 1993 and the terms set forth in the case law of the Peruvian Constitutional Court. Regardless of the adopted nominal State model, the development of the Peruvian Constitution's contents have granted it a social identity of its own through the concepts of equality, property, land, the Peruvian Native, and labor.

### **3.2. Material Equality**

In principle, the Peruvian Constitutions of 1920 and 1933 contain no provisions regarding the explicit recognition of material equality; particularly if we bear in mind that in such Constitutions, rights were conceived as guarantees, which validity was based on the law.

However, there are provisions related to the acknowledgement of equality, in both general and specific terms, such as the following:

- Article 17 of the Constitution of 1920: "Special laws may be established as required by the nature of things, but not based on differences among persons."
- Article 23 of the Constitution of 1933: "Special laws may be enacted when so required by the nature of things, but not based on differences among persons."

The entry into force of the Peruvian Constitution of 1979, acknowledged that fundamental rights are both prior to and greater than the State, due to the predominance of the human being and his dignity. This evaluative framework not only included a recognition of formal equality (Art. 187), but also a large number of provisions directly related to material equality:

- Article 2, Section 2 on the right to equality: "Men and women shall have equal opportunities and responsibilities. The law grants men and women equal rights."
- Article 24 on the right to education: "The State is responsible for establishing plans and programs and for directing and supervising education to ensure its quality and efficiency in accordance with regional characteristics; and for granting equal opportunities to all."
- Article 42 on the right to work: "Employment, in its different forms, is protected by the State without discrimination, under a system of equal treatment."

Conversely, the Peruvian Constitution of 1993 included only some of the preceding provisions. Thus, for example, while recognizing formal equality (Art. 103) it



overlooked the provision on equal opportunities and responsibility between men and women, which at present has been established by law (Law 28983); and their inclusion among the purposes of the right to education. On the other hand, the following provisions were now included:

- Article 26 on the principles regulating employment: “In the employment relationship, the following principles shall be respected: 1. Equal opportunities, without discrimination.”

- Article 59 on the economic role of the State: “The state shall provide opportunities for development to those sectors suffering from any type of inequality.”

As observed, the Constitution of 1993 reduced the scope of the explicit constitutional recognition of material equality. However, this drawback has been overcome by the Constitutional Court’s interpretations in its rulings on legal-constitutional disputes, as analyzed hereinafter.

### **3.3. Property**

Property, in the Peruvian Constitutions of 1920 and 1933, was established as a social and/or national guarantee.

In the Peruvian Constitution of 1920, we find provisions that basically regulate private property, along with property owned by the state, public institutions, and – recognized for the very first time – indigenous communities. These property rights are not statute barred and can only be transferred by public deed, in the cases and in the form and manner established by law (Art. 41).

In any event, expropriation is allowed on the grounds of a legally proven public interest, with the prior payment of a fair-price (Art. 38). According to this Constitution, “public goods whose use belongs to all, such as rivers and public roadways, cannot be held as private property” (Art. 38); “mining property, fully belongs to the State”; and “possession or use may only be granted in the form and under the conditions set forth by law” (Art. 42).

As in the Constitution of 1920, the Peruvian Constitution of 1933 also established that public goods cannot be held as private property, including rivers, lakes, and public roadways (Art. 33), and that “no one can be deprived of what is rightfully his except on the grounds of a legally proven public interest, with the prior payment of fair-price compensation” (Art. 29). This Constitution also established the following:

- Article 34: “Property must be used in keeping with the public interest. The law shall establish the limits and forms of the right to property.”

- Article 35: “The law may, for reasons of national interest, establish special restrictions and prohibitions on the acquisition and transfer of certain types of property, whether based on their nature, condition, or location in Peruvian territory.”

- Article 37: “Mines, land, forests, water, and, in general, all natural sources of wealth belong to the state, except for legally acquired rights. The law shall establish the conditions for the use of these goods by the State, or their concession, whether in ownership or in use, to private parties.”



- Article 38: "The State may, by virtue of a law, take possession of or nationalize overland, maritime, river, lake, and air transportation or other privately-owned public services, prior payment of compensation and in accordance with the laws in force."

- Article 209: "Community property is indefeasible and imprescriptible, except in the case of expropriation on the grounds of public interest, with the prior payment of compensation. Likewise, such property cannot be attached."

It was not until the enactment of the Constitution of 1979 that property was recognized as a fundamental right (Art. 2, Sec. 14), as follows:

- Article 124: "Ownership binds the owner of a property to use such goods in keeping with public interest. The State shall promote access to property in all of its modalities. The law shall establish the forms, obligations, limitations, and guarantees of the right to property."

- Article 125: "No one may be deprived of what is rightfully his except on the grounds of public necessity and utility or social interest, declared in accordance with the law, with the prior payment of compensation, that must be necessarily paid in cash and in advance."

- Article 126: "The law may, for reasons of national interest, establish special restrictions and prohibitions on the acquisition, possession, exploitation, and transfer of certain goods based on their nature, condition, or location."

- Article 128: "Public goods, whose use belongs to all, are not subject to private rights."

Subsequently, the Constitution of 1993 recognized the fundamental right to property (Art. 2, Sec. 16), amending the grounds for expropriation set forth in the previous Constitution. Now, instead of public necessity and utility or social interest, in the Constitution currently in force the grounds for expropriation, are national security or public interest, as follows:

- Article 70: "No one may be deprived of his property, except exclusively for reasons of national security or public interest, declared by law, with the prior cash payment of fair-price compensation that includes consideration for contingent damages. Action may be filed before the Judiciary to challenge the value of the property established by the State during the expropriation process."

Exceptional temporary restrictions on property were also introduced for reasons of national security:

- Article 72: "The law may, exclusively for reasons of national security, temporarily establish specific restrictions and prohibitions on the acquisition, possession, exploitation, and transfer of certain goods."

With regard to goods of public domain and use, the Constitution of 1993 establishes the following:

- Article 73: "Goods of Public Domain and Use: Goods of the public domain are indefeasible and imprescriptible. Goods for public use may be granted to private parties, in accordance with law, for economic exploitation."



Additionally, the connection between property and the economic model in force was established as follows:

- Article 60: “The national economy is based on the coexistence of different forms of property and enterprise.”

Thus, unlike the Constitution of 1979, the Constitution of 1993 did not explicitly enforce the balance between the right to property and the public interest. Despite this, the social function of property has frequently been developed in the case law of the Peruvian Constitutional Court.

### **3.4. The Land Problem**

The land problem in Peru has historically been one of those issues that has had the greatest impact on coexistence in Peruvian society, generation after generation.

During the twentieth century, although a number of political and electoral proposals were made for the implementation of an agrarian reform process in the country, this did not effectively occur until the Revolutionary Government of the Armed Forces, which began in 1969 with the issue of Decree Law (Decreto Ley) 17716.

The Constitution of 1920 does not expressly mention the land problem, albeit it does contain a provision stating that those goods owned by indigenous communities are imprescriptible, and can only be transferred by public deed, in the cases and in the form and manner established by law (Art. 41).

Later, the Constitution of 1933 explicitly established a provision in favor of land ownership by indigenous communities, as follows:

- Article 211: “The State shall, with preference, award land to those indigenous communities that do not have enough to meet the needs of their population, and shall expropriate privately owned land for such purpose.”

For its part, the Constitution of 1979 included an entire chapter on the agrarian regime (Title III, Chapter VII), most notably containing the following provisions:

- Article 157: “The State guarantees the right to private ownership of land by individuals, cooperatives, communities, self-managed groups, or any other form of association directly controlled by its proprietors, in keeping with the public interest and in accordance with the regulations and limitations established by law [...] Abandoned land shall fall under the domain of the State, to be awarded to landless peasants.”

- Article 158: “The State, through public sector agricultural institutions and farmer associations and entities, shall establish and implement a policy that guarantees the development of agrarian activity, in harmony with other sectors of the economy.”

Special note should be made of Article 159 of the Constitution of 1979, which established the agrarian reform as follows:

- It was an instrument for the transformation of the rural framework and the comprehensive promotion of persons who made their living from the land.

- It aimed to implement a fair system for the ownership, tenure and working of the land, with a view to the economic and social development of the nation.



- It prohibited landlordism and aimed to gradually eliminate small-scale farming through plans for the concentration of land plots.
- It sought to disseminate, consolidate, and protect small- and medium-scale private rural property, within the limits established by law.
- It sought to promote the development of cooperative enterprises and other freely established forms of association for the production, processing, trade, and distribution of agricultural products.

Upon its entry into force, the Constitution of 1993 maintained a chapter on the agrarian system and peasant communities (Title III, Chapter VI). However, this new Constitution established a clearly reduced scope in comparison to its predecessor. Article 88 of this Constitution established the following:

- The State shall give preferential support to agrarian development.
- Guaranteed right to the ownership of land, whether by private individuals or communities or any other form of association.
- The law may establish the boundaries and area of land holdings based on the peculiarities of each zone.
- Abandoned land shall, by law, fall under the domain of the State, for ongoing sale.

As observed, the Constitution of 1993 largely withdrew the State's support for agricultural development, by maintaining just one reference to the agrarian regime, for which the State must at least provide preferential support. For its part, the agrarian reform is not mentioned at all, given the neoliberal economic model on which the Constitution of 1993 is based.

### ***3.5. The Indigenous Problem***

In an Andean country such as Peru – deeply rooted in the culture of the Inca Empire that was invaded by the Spanish Crown, and its subsequent independence as a republic in 1821 – the indigenous problem was one of the key issues to be addressed in the different Constitutions enacted during the twentieth century.

First of all, attention should be drawn to Article 58 of the Constitution of 1920, according to which,

The State shall protect the indigenous race and enact special laws for its development and culture in keeping with its needs. The nation recognizes the legal existence of the indigenous communities and the law shall vest these communities with the corresponding rights.

Later, the Constitution of 1933 included a title dedicated to indigenous communities (Title XI). In addition to the creation of the Ministry of Labor and Indigenous Affairs (Art. 181), which was finally materialized in 1949, this Constitution also established the following provisions:

- Article 207: "Indigenous communities shall enjoy legal existence and legal status."
- Article 208: "The State shall guarantee the integrity of the communities' property ..."



- Article 210: “Neither municipal councils nor corporations nor any other authority shall intervene in the collection and management of the revenues and goods of the communities.”

- Article 212: “The State shall enact the civil, criminal, economic, educational, and administrative laws required by the particular conditions of the indigenous peoples.”

The Constitution of 1979 included a chapter on indigenous communities (Title III, Chapter VIII), consisting essentially of the following provisions:

- Article 161: “Peasant and Native Communities shall enjoy legal existence and status. They are autonomous in their organization, communal work, and use of the land, as well as in all economic and administrative matters within the framework established by law. The State shall respect and protect the traditions of the Peasant and Native Communities, and foster the cultural development of their members.”

- Article 162: “The State shall promote the comprehensive development of Peasant and Native Communities, and encourage communal and cooperative enterprises.”

In terms of the ownership of land by these communities, the referred Constitution explicitly stated that such land could not be attached, was indefeasible and imprescriptible, except by virtue of a law based on the interest of the community and requested by majority of two-thirds of eligible community members, or in the case of expropriation on the grounds of public necessity and utility, subject to prior payment (Art. 163). The Constitution also prohibited land-grabbing practices within the communities (Art. 163).

However, in the Constitution of 1993, the rights and duties of the peasant and native communities (Title III, Chapter VI) were reduced in Article 89, according to which:

Peasant and Native Communities shall enjoy legal existence and status. They are autonomous in their organization, their communal work, and the use and free disposal of their lands, as well as all economic and administrative matters, within the framework established by law. Ownership of their lands is imprescriptible, except in the case of abandonment provided for in the preceding section. The State shall respect the cultural identity of all Peasant and Native Communities.

If we compare the scope of protection provided to peasant and native communities by the Constitution of 1979 with that of 1993, it becomes quite clear that the former provides a much more explicit and robust protection than the current Constitution. As in previous cases, the case law of the Peruvian Constitutional Court has played a key role in setting the scope and limits of this protection within the framework of the constitutional principles, rules, and values.

### **3.6. Work**

Concerning employment, the Peruvian Constitution of 1920 established provisions on the subject both in the section on individual guarantees and that on social guarantees.



Specifically, Article 22 established that,

There are no, nor can there be slaves in the Republic. No one can be forced to render personal labor without his free consent, and without due compensation. The law does not recognize any covenant or imposition whatsoever that deprives any person of his individual liberty.

As for those provisions on employment established as social guarantees, Article 47 establishes that “The State shall pass legislation on the general organization and safety of industrial work, and on the guarantee of life, health, and hygiene therein.” Likewise, “the law shall establish the maximum working conditions and minimum salaries in relation to age, sex, the nature of the tasks, and the conditions and needs of the country’s different regions,” as well as that “the compensation of occupational accidents shall be mandatory and rendered effective in the form and manner established by the law.”

For its part, the Peruvian Constitution of 1933 also included provisions on employment among its national, social, and individual guarantees. National guarantees included the following:

- Article 42: “The State guarantees the right to work. All professions, industries, or trades that are not contrary to public decency, health, or safety may be freely exercised.”
- Article 43: “The state shall pass laws on collective bargaining.”
- Article 44: “Employment contracts shall be prohibited from including any provision restricting the exercise of civil, political, and social rights.”
- Article 45: “The State shall promote a profit sharing system in favor of employees and workers, and shall pass laws on all other aspects of the relations between the two parties, as well as on the defense of employees and workers in general.”
- Article 46: “The State shall pass laws on the general organization and safety of industrial work, and on the guarantees of life, health, and hygiene therein.
- The law shall fix the maximum working conditions, severance pay and compensation for accidents, as well as minimum salaries, based on age, sex, the nature of the work, and the conditions and needs of the country’s different regions.”

In terms of individual guarantees, Article 55 states that,

No one may be forced to render his personal services without his free consent, or without due compensation.

As previously mentioned, these Constitutions did not establish labor rights, but rather legal guarantees. However, this situation radically changed, at least in formal terms, with the entry into effect of the Peruvian Constitution of 1979, which addressed the issue of the fundamental right to work in its Title I, Chapter V: “On the Fundamental Rights and Duties of the Individual.”



Over the course of sixteen articles, it established a strong constitutional framework for the protection of employment as a value, principle, and fundamental right, as highlighted in the following provisions:

- The State's recognition of employment as the main source of wealth, as a right, and social duty (Art. 42).
- The State's duty to promote the economic and social conditions required to eliminate poverty and ensure equal opportunities for useful occupation, to all inhabitants of the country that will protect them against unemployment or underemployment in any of its forms (Art. 42).
- The prohibition of any condition that may prevent the workers from exercising their constitutional rights, or that disregard or diminish their dignity (Art. 42).
- The State is responsible for prohibiting discrimination in the different forms of employment and the protection of equal treatment (Art. 42).
- The worker's right to fair pay, to ensure the necessary material wellbeing and spiritual development for him and his family (Art. 43).
- The right of all workers, whether male or female, to equal pay for equal work rendered in identical conditions for the same employer (Art. 43).
- The State's periodic adjustment of the minimum wage (Art. 43).
- The system of family allowances paid to workers with large families, in accordance with the law (Art. 43).
- The establishment of ordinary working hours, of eight hours per day and forty eight hours per week (Art. 44).
- Establishment, by law, of the working conditions for minors and women (Art. 44).
- Workers' rights to paid weekly resting days, paid annual vacation leave, and severance pay, the right to regular legal bonuses and other special bonuses, and all other benefits dictated by law or the respective collective bargaining agreement (Art. 44).
- Overtime pay (Art. 44).
- The establishment of standards for nighttime work, as well as for work in unsanitary or hazardous conditions, as defined by law (Art. 44).
- Protective measures for working mothers, as defined by law (Art. 45).
- The right to stable employment, such that workers may only be dismissed for a duly proven just cause, as set forth by law (Art. 48).
- In all cases, the payment of remunerations and social benefits to workers shall take precedence over all the other obligations of the employers (Art. 49).
- The right to form workers' unions without prior authorization (Art. 51).
- The right to engage in collective bargaining (Art. 54).
- The legal force of collective bargaining agreements (Art. 54).
- Workers' right to strike, which is exercised in accordance with law (Art. 55).
- The inalienable nature of workers' recognized rights (Art. 57).
- The principle of *in dubio pro operario* (Art. 57).





However, in the Political Constitution of 1993, protection of the fundamental right to work was reduced by eight sections in Chapter II: "On Social and Economic Rights," found in Title I: "On the Person and Society." These regulations provide less protection compared to the previous Constitution, due to the neoliberal economic model in which the new Constitution is rooted.

While there is some overlap in terms of the recognition of rights and labor principles, there are also obvious absences, such as the following:

- Work is no longer the main source of creation of wealth.
- The elimination of poverty and the provision of protection against underemployment.
- The substitution of the acknowledgement of fair pay for an equitable and sufficient pay.
- The elimination of the express prohibition against discrimination in all forms of employment and the explicit protection of equal treatment for which the State had previously been responsible.
- The elimination of the State's periodic adjustment of the minimum wage.
- The elimination of the family allowance system in favor of workers with large families, in accordance with law.
- The elimination of any mention of overtime pay (Art. 44).
- The elimination of any mention of establishing standards for nighttime work or work performed in unsanitary or hazardous conditions, as defined by law (Art. 44).
- The provision that the law shall grant workers adequate protection against arbitrary dismissal instead of the right to stable employment.

All of the foregoing provisions evidence the introduced changes and setbacks in terms of labor rights, in comparison to the Constitution of 1979; changes that have been gradually and partially offset by the interpretation work of the Constitutional Court in the judgment of cases. Even so, this court has not been immune to fluctuations in its case law due to the different stages it has experienced since the return of democracy in Peru, in the year 2000.

#### **4. Peruvian Constitutional Court Rulings on Economic, Social, and Cultural Rights**

Following the reinstatement of democracy after the fall of the authoritarian administration headed by former president Alberto Fujimori, the Constitutional Court has gone through more than one stage in the development of its case law to date, according to its different judges and certain external pressures by those in power at any given time.

Obviously, the referred fluctuations have reflected on the quality and relevance of its judgments, upon settling specific or abstract cases, which have repercussions on the pacification or not of society's conflicts of the highest social, political, economic, environmental, and cultural importance, as analyzed below.



#### **4.1. *The State and its Form***

In Constitutional Court Judgment (STC) 0008-2003-AI/TC, issued during Peru's consolidation as a democracy, the Constitutional Court weighed the constitutionality of Article 4 of Emergency Decree (Decreto de Urgencia) 140-2001, which allowed the State to fix minimum rates for the provision of domestic and international passenger and cargo land transportation services, by an Executive Order.

In this judgment, the Constitutional Court argued that the Peruvian State, as defined by the Constitution of 1993, exhibits the basic characteristics of a social and democratic state under the rule of law (STC 0008-2003-AI/TC, p. 10).

In terms of the State's basic political ideologies, the court maintained that while this type of State acknowledges the basic principles and rights of a State governed by the rule of law, such as the right to liberty, "materializing this liberty is impossible if its establishment and formal guarantees are not accompanied by certain minimum conditions of existence that enable them to be effectively exercised" (STC 0008-2003-AI/TC, p. 11).

With regard to the teleological aspects of the social and democratic State governed by the rule of law – which the court qualified as a "political alternative in response to the liberal State" (STC 0008-2003-AI/TC, p. 12) that "assumes its basic precepts and grants it social duties at the same time" (STC 0008-2003-AI/TC, FJ 12) – it maintained:

The configuration of the social and democratic State under the rule of law requires two basic aspects: on the one hand, the existence of material conditions to achieve its goals, which requires a direct relationship with the State's real and objective possibilities, along with active participation of the citizenry in State activity; and, on the other, the State's identification with its social objectives, so that it may reasonably assess not only those contexts that justify its action, but also those that require its abstention, thereby preventing it from becoming an obstacle for social development. [p. 12]

The requirements of the social and democratic State under the rule of law include the social requirements, in the understanding that this type of State "is a state of social integration, which seeks to reconcile the interests of society and banish the classist antagonisms of the industrial system" (STC 0008-2003-AI/TC, p. 13).

In subsequent judgments, such as STC 0048-2004-AI/TC, in which the court evaluated the constitutionality of the Mining Royalties Act – Law 28258, it added that:

[...] in this type of state, the rights of the individual are not exclusive of the interests of society, given that one cannot occur without the other. It is, as such, a type of State that seeks to achieve social integration and reconcile the legitimate interests of society with those of the individual, given that it is the



supreme goal of society and the State to defend the individual and respect his dignity (Article 10 of the Constitution). [STC 0048-2004-AI/TC, p. 4]

In terms of the “social” content of this type of State, the same judgment refers that “the constitutional mandate which holds the State responsible for safeguarding the common good means that it must intervene to correct social inequities, so that all, and not just a few, may share the benefits of progress and economic development” (STC 0048-2004-AI/TC, p. 12). Finally, on said occasion, the court added that

the State’s role involves the defense of the common good and the public interest; the rational and sustainable exploitation and use of natural resources, which, as such, belong to the nation; and the implementation of actions aimed at fostering social equity. [STC 0048-2004-AI/TC, p. 12]

Hence, although the Constitutional Court has not linked Peru’s type of State with a classical socialist model, it has made reference to the “social” content of the Peruvian State, whereby minimum material conditions must exist for all so that the State is able to achieve its goals.

#### **4.2. Material Equality**

With regard to material equality, the aforementioned judgment STC 0008-2003-AI/TC explicitly stated that the legislator’s bond with the fundamental rights is not only negative but positive as well, as outlined below:

[...] public authorities are able to revert conditions of inequality, or to put it another way, to reinstate the conditions of equality that may be arising in the country’s social reality, even if they are contrary to the Constitution and its aspirations.

This criterion, of course, is also applicable in the economic sphere, in which according to the Constitution, the State has the obligation to adopt measures aimed at providing opportunities for development to those sectors suffering from any form of inequality (Article 59). [p. 15]

On this occasion, the Constitutional Court also noted that the promotion of material equality, along with the principle of liberty, must prevail in a social market economy “within a democratic order guaranteed by the state” (STC 0008-2003-AI/TC, p. 16).

Similarly, the Constitutional Court referred that the State is the promoter of equality among individuals (STC 01/03-2003-PI/TC, p. 12), that the State has the obligation to take measures in favor of those who have been neglected in order to restore the conditions of equal opportunities to which the Constitution aspires (STC



0016-2002-PI/TC, p. 11). The court also stated that the notion of equality must be perceived in two convergent planes. In the first, equality acts as a guiding principle for the organization and actions of the democratic state under the rule of law; while in the second, it is a fundamental individual right (STC 261-2003-PA/TC, p. 3.1).

In STC 1417-2005-PA/TC, upon developing the content and jurisdictional protection of social rights – such as the fundamental right to receive a pension – the Constitutional Court maintained that the effort to ensure its specific content required a systematic analysis of the constitutional provision which recognizes this right together with the principles and values such as material equality and the right to dignity and solidarity (p. 36).

In recent years, the Court ruled on a case (in STC 0853-2015-AA/TC) in which two sisters from a rural area in Peru were requesting to continue their high school studies on a regular basis, in a basic education center near to their home, since there was no other educational center specific to their age group (over eighteen years old) nearby. The court granted their petition, based on the principle of material equality, in view of the lack of education coverage (p. 58).

Thus, it is clear that as far as material equality is concerned, the Peruvian Constitutional Court has failed to promote socialist constitutionalism. However, this has not prevented it from defending the Peruvian State's role in taking measures to provide equal opportunities for social development to those suffering from inequality or discrimination.

#### **4.3. Property**

In a wide range of case law, the Constitutional Court has highlighted the social function of private property, despite the fact that this function is not expressly included in the Constitution of 1993.

Thus, for example, in the aforementioned STC 0008-2003-AI/TC, the Constitutional Court explicitly stated that “reference to the common good contained in Article 70 of the Constitution allows us to recognize the social function which the law grants to the property” (p. 26). Indeed, property is established not only as a subjective right, but also as an institutional guarantee, which entails the recognition of its social function (p. 26).

The same ruling also stated that this social function “applies to capital goods and goods for public utilities, but not to consumer goods or private goods, in which only a strictly personal use is recognizable, in which case refraining from using such property to the detriment of the community shall suffice” (STC 0008-2003-AI/TC, p. 26). As a result, the exercise of the right to property, which is not an absolute right, means that all legal limitations are aimed at equating:

- The right to personal property with the exercise thereof by all other individuals.



- The right to personal property with the exercise of all other individual liberties.
- The right to personal property with the public order and the common good. [STC 0008-2003-AI/TC, p. 26]

In any case, the social function of private property has played a key role in the determination of its constitutionally protected content as a fundamental right. Thus, in STC 03258-2010-PA/TC, the court maintained that the right to property “vests its owner with the power to use, enjoy, exploit, and dispose of the property, provided that its use fulfills its inherent social function” (p. 3).

In consequence, it is clear that, through its interpretation of the Constitution, the Constitutional Court has recognized that private property has a social function, even though invoking the influence of socialist constitutionalism was not necessary to that effect.

#### **4.4. The Land Problem and the Indigenous Problem**

On certain occasions, the Constitutional Court has equated the land problem with the indigenous problem. For example, in STC 0022-2009-PI/TC, it referred that:

ILO Convention 169 aims to eradicate the development models that previously sought the assimilation of indigenous peoples to the dominant culture. This is not an attempt to situate the indigenous peoples in a position of superiority over the rest of the population, but rather to make sure that the indigenous peoples can effectively exercise the fundamental rights claimed in favor of society as a whole.

While it is true that the indigenous peoples have existed since long before the creation of the Peruvian State, their presence has not implied their visibility or effective inclusion in the State’s development policies. Thus, the historical marginalization that these peoples have suffered must be borne in mind so that we can understand not only the indigenous peoples per se, but the laws drafted with the goal of protecting their particular sociological, cultural, political, and economic reality as well. As such, the protection granted by the convention focuses on those elements that are necessary and indispensable to preserve and guarantee the existence of indigenous peoples, without prejudice to their development and voluntary participation in the global economy. One example of this can be seen in the regulation of their land, the recognition of and respect for their identity, and the provision of higher levels of education, health, and quality of life. [p. 14]

This ruling establishes the primary aspects of the right of be informed of the indigenous peoples “when, in *application of the provisions* of the convention,



legislative and administrative measures are proposed *that may directly affect them*" (STC 0022-2009-PI/TC, p. 19).

While specifying that indigenous peoples do not hold the right of veto, the Constitutional Court explicitly established the main characteristics of the right to consultation:

a) good faith; b) flexibility; c) the goal of reaching an agreement; d) transparency; and e) prior implementation of the consultation process. These characteristics are also guiding principles. So, whenever legal loopholes are identified, these principles must be followed to ensure that they are fully enforced. Likewise, the absence of these elements related to the right to consultation must be construed as arbitrary and therefore unconstitutional. [STC 0022-2009-PI/TC, p. 26]

The Court also highlighted the following powers as the constitutionally protected content of this right: i) access to consultation; ii) respect for the essential characteristics of the consultation process; and iii) the guarantee of compliance with the agreements reached in the consultation process, specifying that "the content of this right does not include veto power over the legislative or administrative measure, or the right of the indigenous peoples to refuse to engage in the consultation" (STC 0022-2009-PI/TC, p. 37).

In addition, the Constitutional Court also referred to the State's obligation to delimit indigenous territories and to the issue of the abandonment of indigenous lands. Lastly, in the event of the expropriation of indigenous land – to the extent that not only the right to property is at stake but the right to the very existence of the indigenous peoples, the Court stated that:

[...] the State's obligation must not be limited to the payment of fair compensation, but must go the extra mile, to secure a shared benefit. Granting them new land of an equal size and quality is not enough, since the indigenous peoples must benefit from the exploitation of their original ancestral territories from which they have been separated, thereby guaranteeing not only the continuity of their existence, but the improvement of their quality of life. It is only in this way that the expropriation of indigenous lands can be construed as justified, otherwise the members of such peoples may resort to the relevant legal channels to protect their rights. Likewise, this shall be taken into account when the compensation is the result of interventions in the property of indigenous peoples, as in the case of easements. [STC 0022-2009-PI/TC, p. 52]

Later the same year after issuing the foregoing judgment, the Constitutional Court passed judgment STC 0024-2009-PI/TC, in which it analyzed the constitutionality of



Legislative Decree (Decreto Legislativo) 994, that promoted private investment in irrigation projects for the expansion of agricultural lands.

In this case, the Court dealt with the land and indigenous problems jointly, by referring:

The Court wishes to stress that the communal property of indigenous peoples cannot be based on the classical approach to “property” on which civil law is based. For indigenous peoples, the land is not a mere commodity, but a fundamental element with components of a spiritual, cultural, and social nature, among others. On their land, indigenous peoples develop their knowledge, subsistence practices, beliefs, and traditional forms of life that are passed on from generation to generation. The Court recognizes the value of the special relationship that indigenous people have with their land, and wishes to highlight the highly articulated nature of the right to communal property and other rights, such as the right to life, integrity, cultural identity, and freedom of religion. [STC 0024-2009-PI/TC, p. 18]

The court also explicitly stated that

in keeping with Article 13 of ILO Convention 169, upon applying the provisions of said convention, the State shall respect the particular importance that these peoples give to their relationship with their land or territory. [STC 0024-2009-PI/TC, p. 19]

Once again, the arguments made by the Peruvian Constitutional Court contain no express mention of any influence of socialist constitutionalism. Nevertheless, it could be said that by granting legal-constitutional protection to indigenous peoples, addressing the problem related to the recognition of and respect for their territories, cultures, etc., the Court’s actions meet the demands for the rights advocated by proponents of socialism in Peru to a certain extent.

#### **4.5. Work**

The Constitutional Court has had its successes and failures when it comes to protecting the fundamental right to work.<sup>22</sup>

Soon after Peru’s return to democracy, in the arguments set forth in judgment STC 1124-2001-AA/TC (Case of the Telefónica Workers’ Union and FETRATEL), and especially in judgment STC 0976-2001-AA/TC (Case of Eusebio Llanos Huasco), the Constitutional Court established the mechanism to reinstate the workers to their

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<sup>22</sup> This idea is explored in greater depth in Rosa Isabel Sánchez Benites, *La jurisprudencia más destacada del Constitutional Court del Perú respecto al derecho a la protección adecuada contra el despido arbitrario* (2018, unpublished).



jobs, through *amparo* proceedings filed against cases of dismissal in violation of constitutional rights.<sup>23</sup>

In the first of these two judgments, the Court held that Article 34 of the Consolidated Text (TUO) of Legislative Decree (Decreto Legislativo) 728 – Labor Productivity and Competitiveness Act, passed by Executive Order (Decreto Supremo) 003-97-TR, violated the Constitution by establishing compensation as the “sole remedy” applicable in the event of an arbitrary dismissal (p. 12). According to this ruling, it was unconstitutional to limit obligations exclusively to compensatory protection. The Court added that “compensation shall be a complementary or substitute form of restitution where freely determined by the worker, but shall not be considered a remedy for an act that is invalid *ab initio* by virtue of its unconstitutionality” (p. 12).<sup>24</sup>

Later, in judgment STC 0976-2001-AA/TC (Case of Eusebio Llanos Huasco), the Court referred that Article 27 of the Constitution “does not establish the right to absolute job stability, that is, the right ‘not to be dismissed arbitrarily.’ It only recognizes the worker’s right to ‘adequate protection’ against arbitrary dismissal” (p. 11). For this reason, the judgment defined this right as legal, in the understanding that an adequate protection against arbitrary dismissal “requires that, whatever the options adopted in legislative terms, they must satisfy a minimum criterion of proportionality, or, as expressly established in the text of the Constitution, guarantee ‘adequate’ measures” (p. 11).<sup>25</sup>

Based on the foregoing, the Constitutional Court concluded that restitution resulting from arbitrary dismissals or the violation of certain fundamental rights recognized in the Constitution or human rights treaties are: a) null and void dismissal; b) dismissal without cause; and c) wrongful dismissal.<sup>26</sup>

In particular, this judgment states that null and void dismissal occurs in the following cases:

- The worker is dismissed solely for being the member of a union, or for his or her participation in union activities.
- The worker is dismissed solely for being a representative or candidate of other workers (or for acting in such capacity).
- The worker is dismissed for reasons of discrimination based on his or her sex, race, religion, political views, etc.
- The worker is dismissed for being pregnant (provided the dismissal occurs during her pregnancy or within 90 days after giving birth).
- The worker is dismissed because he or she has AIDS (cf. Law 26626).
- The worker is dismissed because he or she has a disability (cf. Law 27050). (p. 15)

Aside from the foregoing judgments, the Constitutional Court has also acted to provide protection in labor matters in other cases, although it has also experienced

<sup>23</sup> Sanchez Benites 2018, at 2.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 3.

<sup>26</sup> *Id.* at 5.





setbacks, which are particularly visible in judgment STC 05057-2013-PA/TC (known as the Huatuco Case). According to this ruling, having verified the distortion of a civil or fixed-term employment contract, the government employee shall only be reinstated if he or she was hired by virtue of a public contest for a budgeted, vacant position for an indefinite term. In practice, this requirement has been rendered ineffective for all those not seeking reinstatement to a position that forms part of the civil service and administrative career.<sup>27</sup>

Hence, it is clear that the Constitutional Court has guaranteed a relative degree of occupational peace between employees and employers, although there have been stages during which it has given the constitutional framework on the fundamental right to work a strong social content.

### Conclusion

In the history of twentieth-century Peru, a socialist type of State has not been established at a Constitutional level, but this has not prevented the social issue from being addressed, especially in the Peruvian Constitution of 1979.

The paradox here is that this commitment to social issues through a social and democratic State under the rule of law began in the country in the early 80's, when the referred type of government was undergoing a global crisis, particularly evident in the Soviet Union's so-called "Perestroika" and "Glasnost" reform policies and their corresponding impact on the socialist block. A crisis that led to the "fall of the Berlin Wall" in 1989 and the establishment of the "Washington Consensus," forging a universal constitutional political model based on a free market economy, democracy, and human rights.<sup>28</sup>

The arrival of the 90's decade in Peru not only implied the illegitimate repeal of the Constitution of 1979 and its social constitutionalism but the enactment of the new Constitution of 1993, which is based on an economically neoliberal and politically conservative model. Despite this, the rights that regulate the social issue in Peru have remained in place.

Following the country's return to democracy in 2001, the Peruvian Constitutional Court was able to give the Constitution of 1993 a social content, although the Court faced obstacles and setbacks along the way, especially in the form of pressure from different government administrations, as well as other, *de facto* powers starting in 2008.

Accordingly, the Constitutional Court has gone through a number of stages, some more democratic than others. Its most outstanding rulings were issued during Peru's stage of democratic consolidation (2002–2008), during which the Court clearly showed a commitment towards reaffirming the goals of a social and democratic state

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<sup>27</sup> Sanchez Benites 2018, at 15.

<sup>28</sup> César Landa, *Apuntes para una Teoría Democrática Moderna en América Latina* 56 (1994).



under the rule of law, in the form of material equality, the social function of property, the protection of peasant and indigenous communities and their territories, and the protection of the fundamental right to work, among other economic, social, and cultural rights, focusing on the very same matters at stake in political debates on the social issue and the propagation of socialist ideas in Peru during the first few decades of the twentieth century.

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