

Peruvian Judicial Reforms, 2020

1. Executive Summary

In 2019 and 2020, the Peruvian government amended its Constitution and passed an organic law to create the Junta Nacional de Justicia (“JNJ”), a new independent body charged with the vetting of new and sitting judges. The JNJ has since begun conducting contests for judgeships and has removed or sanctioned judges at almost every level of the judiciary.¹

Although the reform was born out of outrage for the corruption of an insulated (*i.e.*, not democratically accountable) judiciary, the reforms themselves do not appear to substantively support democracy nor do they undermine judicial independence in favor of executive consolidation. Instead, these reforms create a body very similar to its predecessor, the Consejo Nacional de la Magistratura (“CNM”), with two major differences—transparency and the makeup of the new JNJ itself.

Though it is still too early to say whether the reforms are largely successful, they do seem to be novel in their approach to the vetting of judges and deviate from other vetting bodies created at the same time in the Balkans (notably in Albania and Kosovo). All in all, the JNJ may be an important step for the Peruvian judiciary to root out corruption and create a more independent system, though the potential for abuse remains.

2. Motivations for the Reforms

The 2020 reforms came about most directly as a result of the publication and dissemination of the now infamous “CNM Audios”. In 2017 and 2018, as part of an investigation into the

¹ JUNTA NACIONAL DE JUSTICIA [JNJ], DECISIÓN DE LOS EXPEDIENTES DE PROCEDIMIENTOS DISCIPLINARIOS PERIODO – 2021 [DISCIPLINARY PERIOD 2021 STATISTICS] (2021), <https://www.jnj.gob.pe/files/estadisticas-dpd/2021.pdf>

criminal workings of narcotics cartels in El Callao, Peru, prosecutors and law enforcement recorded a series of conversations between judges, magistrates, prosecutors, and members of the CNM.² In 2018, these tapes were first obtained and disseminated by the web-based news site IDL Reporteros, where the very first released tapes included incriminating conversations involving the president of the highest court in Callao, three then-sitting members of the CNM, and one member of the Supreme Court.³ Since then, a whole slew of tapes were unearthed, detailing conversations amongst the judicial elite, and most prominently, members of the Supreme Court and the CNM, speaking about exchanging favors for judicial placements and case outcomes.⁴ By 2019, the Attorney General's Office issued a report finding that 151 judges, 183 prosecutors, 11 Supreme Court judges, and 5 members of the CNM were all implicated by the tapes and subsequent investigations.⁵

After the dissemination of the CNM Audios and indeed, in the decades before, Peru had already been going through a politically unstable moment. President Pedro Pablo Kuczynski, already facing political backlash, finally stepped down as a result of his apparent involvement in the Brazilian *lava jato* scandal.⁶ President Martin Vizcarra then took over the executive, though

² OjoPúblico Staff, *Enemigo en Casa: Los Jueces y Fiscales Corruptos que Coparon el Sistema de Justicia en Perú* [*Enemy at Home: The Corrupt Judges and Prosecutors that took over the Justice System in Peru*], OJO PÚBLICO (May 6, 2020) <https://ojo-publico.com/1809/el-enemigo-en-casa-magistrados-corruptos-en-el-sistema-de-justicia>.

³ IDL-Reporteros Staff, *Corte y Corrupción* [*Court and Corruption*], IDL-REPORTEROS (July 7, 2018, 10:00 PM), <https://www.idl-reporteros.pe/corte-y-corrupcion/>.

⁴ CONSEJO PARA LA REFORMA DEL SISTEMA DE JUSTICIA, POLÍTICA PÚBLICA DE REFORMA DEL SISTEMA DE JUSTICIA 194, (2021) <https://cdn.www.gob.pe/uploads/document/file/2016540/POLITICA%20PUBLICA%20DE%20REFORMA%20DEL%20SISTEMA%20DE%20JUSTICIA.pdf.pdf>

⁵ PROCURADURÍA PÚBLICA ESPECIALIZADA EN DELITOS DE CORRUPCIÓN [PPEDC], INFORME ESPECIAL: CORRUPCIÓN EN EL SISTEMA DE JUSTICIA: CASO "LOS CUELLOS BLANCOS DEL PUERTO" 34-37, (Ministerio de Justicia y Derechos Humanos [MJDH], 2019) <https://procuraduriaanticorrupcion.minjus.gob.pe/wp-content/uploads/2020/04/INFORME-ESPECIAL-CORRUPCION-EN-EL-SISTEMA-DE-JUSTICIA-1.pdf>.

⁶ Martín Tanaka, *The Drive to Reform Peru's Judicial and Political System: Opportunistic and Incompatible?* CONSTITUTION NET: VOICES FROM THE FIELD (Sept. 28, 2018), <https://constitutionnet.org/news/drive-reform-perus-judicial-and-political-system-opportunistic-and-incompatible>.

the legislature remained out of his reach and within control of the opposition party.⁷ Further politicization led to legislative gridlock in an attempt to stop Vizcarra's attempts to reform the judiciary together with other similar actions, such as his efforts to ban re-elections and tighten campaign finance laws.⁸ The Congress only voted and passed the initial reforms after Vizcarra threatened to dissolve congress in 2018 (a tool he ended up using later in 2020, which ultimately led to his removal).⁹

Political turmoil, therefore, surrounded and engulfed the reforms, as Peru went through some of the most uncertain moments in its political history. As a result, the reforms were created and implemented over the course of three years, with four presidents involved in the process of their implementation.

3. Content of the Reforms

The reforms that ensued are twofold. First, there was a constitutional reform, which created the JNJ and set out the framework for the creation of the Special Commission to conduct the first contest for JNJ members. Second, the legislature passed the Organic Law of the JNJ which specified what the JNJ had to consider in conducting its contests and vetting processes.

a. Constitutional Reforms

⁷ *Id.*

⁸ *Id.*

⁹ Jacqueline Fowks, *Vizcarra Logra el Sí a una de sus Reformas Clave tras Amenazar con Disolver el Congreso Peruano* [Vizcarra Succeeds in Passing One of his Key Reforms after Threatening to Dissolve Congress], EL PAÍS (Sept. 19, 2018, 5:19 AM), https://elpais.com/internacional/2018/09/19/america/1537326777_466427.html; Reuters Staff, *Congreso Peruano Destituye al Presidente Vizcarra en Medio de Acusaciones de Corrupción* [Congress Removes President Vizcarra in the Midst of Accusations of Corruption], REUTERS (Nov. 9, 2020, 4:35 AM), <https://www.reuters.com/article/peru-politica-vizcarra-congreso-idESKBN27Q02A>.

The constitutional reform first removes the CNM as the vetting agency for the judiciary and replaces it with the JNJ.¹⁰ The amendment also creates a merit-based requirement for the selection of all seven members, who are selected for five-year periods with no opportunity for reselection.¹¹ Further, two alternates are chosen through a strict, merit-based system in the event a JNJ member can no longer perform their duties.¹² To be eligible to be a member of the JNJ, the constitution sets out certain requirements, including no prior convictions for intentional or malicious crimes.¹³

The constitutional reform also establishes that the JNJ will have authority to select judges and prosecutors through merit-based contests.¹⁴ Additionally, the JNJ is constitutionally required to vet sitting judges and prosecutors of all levels every three and a half years, as well as ratify these positions every seven years.¹⁵ Also, the JNJ is constitutionally empowered to sanction and remove judges of the Supreme Court and lower courts and provide annual reports to the joint Congress.¹⁶ Finally, each aspect of the JNJ's power, from contests, to removals, to vetting, to final votes to select judges, are required to be justified and public.¹⁷

The amendments to the constitution go on to also establish the Special Commission which will conduct and oversee the selection of JNJ members.¹⁸ The special commission is

¹⁰ Ley de Reforma Constitucional sobre la Conformación y Funciones de la Junta Nacional de Justicia [Constitutional Reform], EL PERUANO, DIARIO OFICIAL [E.P.], 10 Jan. 2019, No. 3090 (Peru)

¹¹ *Id.* at art. 154, sec. 1-4.

¹² *Id.* at art. 155

¹³ *Id.* at art. 156. Other requirements listed in Article 156 are: to be Peruvian by birth, be a practicing citizen, have professional experience as a lawyer for at least 25 years, and others.

¹⁴ *Id.* at art. 155.

¹⁵ *Id.* at art. 154, sec. 2.

¹⁶ *Id.* at art. 154, sec. 3.

¹⁷ *Id.* at art. 154, sec. 1; 2; & 4. The term “justified” here is “motivado” in Spanish and is a legal term of art. The Constitutional Tribunal (the court in Perú which interprets the constitution) has determined that this term requires all decisions that are made must be rationally justified with basis in fact and law. Telephone Interview with Giovanni Priori, professor at the Pontificia Universidad Católica del Perú (Apr. 3, 2022).

¹⁸ *Id.* at art. 155

presided over by the Public Defender, and is made up of six other members: the president of the judiciary, the attorney general, the president of the constitutional tribunal, the comptroller general, one rector to be selected by those public universities that are over 50 years old, and one rector who is voted by those private universities that are over 50 years old.¹⁹

b. Organic law

The Organic Law of the JNJ is divided into eight separate titles, with the first seven dealing with the rules and construction of the JNJ and the final title dealing with those of the Special Commission.²⁰ While the law itself is quite technical, certain aspects should be noted in particular.

First, the preliminary title emphasizes certain principles that are to guide the JNJ in its selection, vetting, and removals.²¹ Although most of the principles enshrined in the law are vague and platitudinal, they do speak to the political moment of the country. Among the most notable principles are equality, merit, transparency, and publicity.²² Particularly with regards to transparency and publicity, the title states that all information, activities, and dispositions are not only to be made public, but are also to be published online in order to maximize accessibility for the general citizenry.²³

Title I more expansively and explicitly goes into the JNJ's powers and rules. Of note, article 8 of chapter II requires the votes and scores of JNJ members in the selection, naming, ratification, performance evaluation, disciplinary proceedings, and other acts be justified and

¹⁹ *Id.* at art. 155

²⁰ Ley Orgánica de la Juna Nacional de Justicia [Organic Law], E.P., 19 Feb. 2019, No. 30916 (Peru).

²¹ Organic Law, Preliminary Title, art. I.

²² Organic Law, Preliminary Title, art. III(a); (c); (f); (g).

²³ Organic Law, Preliminary Title, art. III(f); (g).

public.²⁴ Article 10 of Chapter II reiterates the same requirements for membership in the JNJ as the constitution does,²⁵ while Article 11 explicitly excludes certain people from being members, such as candidates who have been sentenced for crimes of violence against women, former judges who have been removed via JNJ procedures, and certain members of political organizations.²⁶

In Title II, the power of selection, vetting, ratification, evaluation and destitution, sanction, investigation, and other discipline is further detailed.²⁷

In Title III, the act sets out the system for information dissemination. First, the title requires the registry of candidates to each position to be made public, including the results in the Title II processes for each.²⁸ Second, article 47 creates a registry for disciplinary actions to be updated regularly and be made public through the JNJ's webpage.²⁹ Third, article 48 sets out the requirement that the webpage be institutional and public.³⁰

Title IV describes the manner for public participation in these processes. Particularly, the citizenry is empowered to present written challenges during the evaluation of the members of the JNJ as well as during the procedures described in Title II, attend hearings involving the selection, ratification, and election of judges, prosecutors, and members of the JNJ, and sue the members of the JNJ.³¹

²⁴ Organic Law, tit. I, ch. II, art. 8.

²⁵ Organic Law, tit. I, ch. II, art. 10.

²⁶ Organic Law, tit. I, ch. II, art. 11.

²⁷ Organic Law, tit. II. Chapter I in Title II outlines the process for naming/selections, Chapter II outlines ratification, Chapter III outlines partial work evaluations, Chapter IV outlines removal, suspensions, and warning, Chapter V outlines investigations and discipline.

²⁸ Organic Law, tit. III, art. 46.

²⁹ Organic Law, tit. III, art. 47.

³⁰ Organic Law, tit. III, art. 48.

³¹ Organic Law, tit. IV, art. 51.

Title V grants the JNJ resources in the amounts assigned by the congress based on the law of the public sector remunerations.

Title VI grants the members of the JNJ certain rights and obligations as well as setting particular prohibitions.

Finally, Title VII specifies the structure of the Special Commission, the procedures for the installation of the Commission, and the process of the public contest the Special Commission is to take in selecting the members of the JNJ.

Specifically, Title VII sets the six stages of the public contest for the JNJ, which are: (1) the convocation of candidates, (2) evaluation of knowledge, (3) curricular knowledge, (4) tests of trustworthiness, (5) personal interviews, and (6) publication of merits test.³² All stages of the contest are to be public, and even the interviews are required to be live and publicly communicated through the media. The stages are broadly described, granting the Special Commission certain latitude in implementation, with the concrete requirement that the results at each stage be public.

4. Novelty of the Reforms

Judicial vetting is not in itself a new procedure and indeed many countries have created vetting committees that similarly oversee the judiciary, such as Mexico, Albania, Macedonia, and Serbia. The vetting processes in those countries, however, do seem to differ from the JNJ's novel organization and required transparency.

³² Organic Law, tit. IV, ch. IV, art. 86.

One major difference between the processes taking place in the Balkans and in Peru are the direct influence of international actors in the process of either choosing members for the vetting bodies or in the vetting itself.³³ Additionally, these processes have tended not to be very “transparent” in the sense that information regarding the results of the vetting processes are not publicly accessible to the citizenry. This makes the Peruvian vetting body more similar to that in Mexico, though the JNJ enjoys more independence in its decision-making and its decisions remain final. In Mexico, however, the selection of members of the parallel body (the CFJ) is more political, with one member always being the President of the Supreme Court (SCJN), three additional members selected by the entire sitting SCJN, two members selected by the Senate, and one by the President of the Republic.³⁴

The most novel aspect of the reforms, however, appears to be the degree to which transparency is required throughout the vetting processes. Not only are nominations and candidate lists made public, but the scores themselves are as well.³⁵ And this does not only extend to the contests for new positions. For example, in February of 2022 the JNJ publicly announced its reasons for its decision to ratify its previous removal of the Attorney General, Luis Arce Cordova, for his role in aiding Cesar Hinostroza in filling judicial vacancies through

³³ See generally, Marina Matic Boskovic, *Vetting of Judiciary in Transitional Countries – Successful Tool or Entry Point for Political Influence*, Inst. of Criminological and Socio. Rsch. (Mar. 2020), translated in ResearchGate, https://www.researchgate.net/publication/340102070_Vetting_of_judiciary_in_transitional_countries_-_successful_tool_or_entry_point_for_political_influence; HUMA HAIDER, RULE OF LAW CHALLENGES IN THE WESTERN BALKANS (Helpdesk K4D, U.K. Dept. for Int’l Dev., 2018) https://assets.publishing.service.gov.uk/media/5c6c02eacd915d4a39787419/464_Rule_of_Law_in_the_Western_Balkans.pdf).

³⁴ Constitución Política de los Estados Unidos Mexicanos May. 22, 2020, art. 100 (Mex.).

³⁵ See, e.g., Junta Nacional de Justicia [JNJ], Feb. 15, 2022, CONCURSO PÚBLICO PARA LA SELECCIÓN Y NOMBRAMIENTO DE EL/LA JEFE(A) DE LA AUTORIDAD NACIONAL DE CONTROL DEL PODER JUDICIAL [PUBLIC CONTEST FOR THE SELECTION AND NAMING OF THE CHIEF OF THE NATIONAL AUTHORITY OF CONTROL OF THE JUDICIAL POWER], Convocatoria 002-2021-SN/JNJ,

favors.³⁶ This ultra-transparent framework will be a key variable to monitor in future reforms elsewhere, as it may show whether transparency ultimately aids in the fomentation of stronger and more independent judiciaries.

5. Success of the Reforms

Undoubtedly, the main motivation for this reform was to curb the corruption that was discovered in the judiciary. However, evidence shows that the public's perception of corruption in the country has remained the same. In Transparency International's corruption perception index, Peru has a score of 36/100, which was two scores down from the previous year.³⁷ Additionally, the Legatum Institute ranks Peru 164 out of 167 countries in "Confidence in judicial system and courts".³⁸

Despite these pessimistic rankings, there is still no consensus on the effectiveness of the JNJ and its impact on corruption in the judiciary. For instance, FreedomHouse noted in its new ranking for Peru that "the establishment of the JNJ was widely praised by civil society organizations as well as academia."³⁹ Additionally, FreedomHouse is hopeful for the judiciary's role in this unstable moment in Peru's political present: "Peru's seven-member Constitutional Court has maintained sufficient autonomy to serve as a check on the other branches, and the

³⁶ Gestion Staff, *JNJ ratifies the removal of Luis Arce Córdova as Attorney General*, GESTION, (Feb. 7, 2022, 3:44 PM), <https://gestion.pe/peru/politica/jnj-ratifico-la-destitucion-de-luis-arce-cordova-como-fiscal-supremo-rmmn-noticia/?ref=gesr>.

³⁷ Transparency International, "Corruption Perceptions Index 2021," (2022) www.transparency.org/cpi, (last visited Mar. 22, 2022).

³⁸ Carlos Montes, Jaideep Prabhu, Patricio Navia, & Stephen Brein, *Perú at 200: The Need of National Consensus 2* (Legatum Inst., 2021) <https://li.com/reports/peru-at-200-urgent-need-for-political-and-judicial-reforms/>.

³⁹ FreedomHouse, "Freedom in the World 2021 – Peru," (2022) www.freedomhouse.org/country/peru/freedom-world/2021 (last visited Mar. 22, 2022).

constant tension between Congress and the executive heightens the importance of both the Court's composition and its decisions."⁴⁰

Furthermore, the process for choosing members of the Special Committee does appear – in theory – to insulate it from clientelist interests by favoring academics and placing the Public Defender (which is not ultimately affected by the JNJ) at the head of the committee. By further limiting actors who are directly affected by the JNJ to be only two out of a possible seven positions, the Commission may then be protected from these interested parties having additional sway over the committee. Additionally, the statutory requirements that the JNJ must consider for new candidates also appears to create a culture of equality and equity within the judiciary, though this remains to be seen.

Even with all these safeguards, however, two members of the newly chosen JNJ have already been tied to Cesar Hinostroza, resulting in backlash and skepticism over the JNJ's effectiveness.⁴¹ However, the public nature of everything the JNJ does appears to provide a sufficient backstop to these fears. Indeed, the Peruvian project at this point may be a test of whether extreme transparency can effectively curb corruption in the administration of judicial positions.

Professor Giovanni Priori at Peru's preeminent university, Pontificia Universidad Católica del Peru, did note, "I do not believe that people are worried or interested by what the Junta is doing. This is a good thing. In my opinion, the citizenry has seen what the Junta is doing and has seen it as ultimately good."⁴² To illustrate this point, he pointed to the fact that the movement

⁴⁰ *Id.*

⁴¹ Fabiana Sanchez, *Junta Nacional de Justicia ya está completa, pero hay serias críticas [JNJ is already complete, but serious criticisms remain]*, PERÚ21 (Dec. 31, 2019, 11:44 AM), <https://peru21.pe/politica/junta-nacional-de-justicia-ya-esta-completa-pero-hay-serias-criticas-noticia/>.

⁴² Interview with Giovanni Priori, Profesor at Pontificia Universidad Católica del Perú (Mar. 25, 2022).

that lead to these reforms was the first time in Peru’s history that “people went out on the streets to ask for judicial reforms.”⁴³ Given the public nature of what the JNJ does and the fact that no outcry has come about, is therefore perceived as an implicit approval. Conversely, he points to the current discussions taking place regarding the constitutional tribunal in Peru, which is a court where the judges are appointed by congress and not the JNJ.⁴⁴ In contrast to the JNJ’s procedures, this process is not transparent, and decisions are made in backrooms by politicians.⁴⁵ As such, now that some appointments are up to be renewed this year, there have been talks of similarly reforming this court to institute a more transparent and less political procedure.⁴⁶

In all, the judicial reforms offer a lot of promise. The transparency and specific requirements that the JNJ must follow do appear to create a more independent but accountable system. Indeed, although qualifications judiciaries have been criticized in the past as being the least democratic branch, the model that Perú has implemented may be a harbinger of ways to democratize the judiciary without necessarily politicizing it. Though the effects of the reforms are yet to be seen and there is a lot to remain skeptical of, the new Peruvian model should be one to monitor in the coming years.

Motivation: Democracy Promotion | International Crime and Security | Corruption

Scope: Thin | Thick | Both

Mode: Legislative | Executive | Constitutional Amendment | Popular Mobilization and Advocacy

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Press Release: Declarations to the Congress by Constitutional Law Scholar Luciano López, *Proponen que JNJ apoye la elección del TC* (Some propose that the JNJ support in the election of Constitutional Tribunal members) (Aug. 15, 2021) E.P., <https://elperuano.pe/noticia/126866-proponen-que-jnj-apoye-la-eleccion-del-tc>