

# LATIN AMERICAN DEMOCRACY: FLOURISHING OR FLOUNDERING?

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## I. INTRODUCTION

While the world watched transfixed as Eastern Europe transformed into independent democratic nations, an equally brilliant metamorphosis was occurring in Latin America. Latin America has long endured a volatile, and sometimes violent, political environment; many of these countries have histories replete with governmental destabilization and military coups. Peru has undergone over one hundred revolts, including forty-five military coups.<sup>1</sup> Forty-five of that country's seventy-three leaders have been military leaders.<sup>2</sup> Twelve different constitutions and twelve magna cartas governed the country before civilian rule was finally reinstated in 1979.<sup>3</sup>

Both Argentina and Paraguay suffered through harsh military dictatorships. Beginning in 1976, a military dictatorship took over the Argentine government and left up to thirty thousand people dead before losing power.<sup>4</sup> In 1954, Paraguay's military began its thirty-five-year control over the country. Several hundred people lost their lives, and thousands were imprisoned.<sup>5</sup>

While avoiding bloodshed, Brazil, Uruguay, and Bolivia also had military takeovers. During Brazil's military regime, in power between 1964-1985, only two hundred deaths were reported; however, many Brazilians fled the country seeking refuge abroad.<sup>6</sup> During Uruguay's dictatorship of 1973-1985, torture

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<sup>1</sup> In fact, Peru has been able to sustain formal democratic rule only twice — between 1895-1914 and between 1980-1992. Civilian rulers have been in power only around thirty-four percent of the time since Peru became an independent country. This is one of the worst records in Latin America. See David Scott Palmer, *Democracy in Peru?*, in *ASSESSING DEMOCRACY IN LATIN AMERICA* 243 (Philip Kelly ed., 1998).

<sup>2</sup> See *Diario de los Debates* (visited Dec. 16, 1999) <<http://www.congreso.gob.pe/index.htm>>, search (Buscar) for *Diario de los Debates*; result page '*Diario de los Debates 27/08/98 Sesión Nro 5 Sesión del Pleno*'.

<sup>3</sup> See Philip Mauceri, *The Transition to "Democracy" and the Failures of Institution Building*, in *THE PERUVIAN LABYRINTH: POLITY, SOCIETY, ECONOMY* 13, 29-30 (Maxwell A. Cameron & Philip Mauceri eds., 1997).

<sup>4</sup> See *The Challenge of the Past*, *ECONOMIST*, Oct. 24, 1998, at 34.

<sup>5</sup> See *id.*

<sup>6</sup> See *id.*

was widespread. In Bolivia, during a four-year period, seven military governments and two powerless civilian governments ruled the country.<sup>7</sup>

The 1980s, however, introduced a time of widespread democratization in Latin America.<sup>8</sup> During this decade, all of these countries (as well as Chile) replaced military rule with democratically elected leaders.<sup>9</sup> Although democracy finally appears to be taking root and blossoming, doubts linger over the permanence of democracy in this region of the world.<sup>10</sup> Ironically, the actions of a democratically elected leaders of Latin America cast the greatest doubt on the stability of their democracies.<sup>11</sup> This paper will analyze the stability of democracy in Latin America by examining the following four areas: the stability of the democratically elected civilian government, the stability of constitutional rule, the stability of free elections, and the stability of the judiciary.<sup>12</sup> This paper seeks to explore these four areas while taking into account the current social and political situation in Latin America. This paper will give special attention to Peru, as that country poignantly evinces the regional conflict between democracy and authoritarianism.

## II. THE STABILITY OF DEMOCRATICALLY ELECTED GOVERNMENTS

The increased political disturbance in the 1990s undermines the democratic stability achieved in the previous decade. In the 1990s, escalating coup attempts disrupted democratically elected governments throughout Latin

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<sup>7</sup> See Eduardo A. Gamarra, *Facing the Twenty-First Century*, in DEEPENING DEMOCRACY IN LATIN AMERICA 71, 72 (Kurt von Mettenheim & James Malloy eds., 1998). These governments were in power between the years 1978 and 1982. See *id.*

<sup>8</sup> See Deborah L. Norden, *Democracy and Military Control in Venezuela: From Subordination to Insurrection*, LATIN AM. RES. REV., Jan. 1, 1998, at 143. Cuba, of course, presents a notable exception to the general trend of democratization. However, some believe that eventually Cuba will also have a democratic government. See Damian J. Fernandez, *Passion and Democracy in Cuba*, in ASSESSING DEMOCRACY IN LATIN AMERICA, *supra* note 1, at 158.

<sup>9</sup> See *The Challenge of the Past*, *supra* note 4, at 34.

<sup>10</sup> See Kurt von Mettenheim & James Malloy, DEEPENING DEMOCRACY IN LATIN AMERICA, *supra* note 7, at 1.

<sup>11</sup> See *The Challenge of the Past*, *supra* note 4, at 34.

<sup>12</sup> Political science professor Russell Fitzgibbons of UCLA identified these factors as important in measuring democratic growth in Latin America. See Phillip Kelly, *Measuring Democracy in Latin America: The Fitzgibbon Index*, in ASSESSING DEMOCRACY IN LATIN AMERICA, *supra* note 1, at 3.

America. The first coup attempt occurred in Haiti on September 30, 1991.<sup>13</sup> Only seven months after Haiti's first-ever freely held elections, the military deposed President Jean-Bertrand Aristide. Although the international community immediately leveled economic sanctions against Haiti's new military government, it took three years of economic pressure, along with United States' military intervention, to finally restore Aristide to power.<sup>14</sup>

Several months after the Haitian coup, on February 4, 1992, a military coup directed by junior military leaders threatened Venezuela's government.<sup>15</sup> The worsening economic and social conditions as well as rampant corruption in the president's administration angered the military.<sup>16</sup> The revolting officers claimed to support democracy, contending that they would strengthen democracy by removing the corrupt president and his cabinet.<sup>17</sup> Although the government quickly quashed the coup attempt, widespread demonstrations in support of the coup leaders evidenced the general discontent with the democratic regime. While favoring democracy, many Venezuelans expressed anger at government corruption and expressed their belief that the military could reform the corrupt democratic government.<sup>18</sup>

Almost two months later, another coup disrupted the region's stability. Peru's democratically elected president, Alberto Fujimori, announced an *autogolpe* or self-coup, making himself the sole leader of the country.<sup>19</sup> Fujimori dissolved Congress, put some members under house arrest, suspended the 1979 Constitution, and limited freedom of the press.<sup>20</sup> While Fujimori promised periodical referendums on important issues, he refrained from announcing any plans to hold free elections.<sup>21</sup>

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<sup>13</sup> See Arturo Valenzuela, *The Crisis of Presidentialism in Latin America*, in POLITICS, SOCIETY, AND DEMOCRACY: LATIN AMERICA 121, 131 (Scott Mainwaring & Arturo Valenzuela eds., 1998).

<sup>14</sup> See *id.* at 132.

<sup>15</sup> See Norden, *supra* note 8, at 153.

<sup>16</sup> See *id.* at 155.

<sup>17</sup> See *id.*

<sup>18</sup> See *id.*

<sup>19</sup> Political writers give many reasons for this coup including the need for emergency powers to combat the deadly terrorist group Shining Path and to fight against the "institutional gridlock" resulting from the numerous political parties. This analysis, however, exceeds the scope of this paper. See Maxwell A. Cameron, *Political and Economic Origins of Regime Change in Peru: The Eighteenth Brumaire of Alberto Fujimori*, in THE PERUVIAN LABYRINTH: POLITY, SOCIETY, ECONOMY, *supra* note 3, at 35, 52, 54.

<sup>20</sup> See Carol Graham, *Introduction: Democracy in Crisis and the International Response*, in PERU IN CRISIS: DICTATORSHIP OR DEMOCRACY? 1, 5 (Joseph S. Tulchin & Gary Bland eds., 1994).

<sup>21</sup> See *id.* at 9.

Fujimori's coup met with overwhelming approval from Peruvians and overwhelming disapproval from the international community. Polls conducted in Peru soon after the coup reflected that upwards of eighty percent of the population approved of the coup.<sup>22</sup> Business leaders, as well as the population as a whole, agreed that strong measures were necessary to effectively control the crime, terrorism, and corruption enveloping the country.<sup>23</sup>

The international community, including many of Peru's Latin American neighbors, viewed the situation as an attack on democracy not only in Peru but also in the region as a whole. President Menem of Argentina shared his concerns about the coup in a lengthy conversation with then President Bush, while the Uruguayan foreign minister immediately scheduled a fact finding mission to Peru.<sup>24</sup> The Organization of American States (OAS) called for Fujimori to establish a timetable for democratic elections. The OAS while condemning the coup did not call for economic sanctions.<sup>25</sup>

Probably more persuasive than the rhetoric of foreign ministers and OAS officials, the threat of economic sanctions caused Fujimori to reconsider his position. The United States and Japan cut off all but humanitarian aid.<sup>26</sup> A recovery package including 1.4 billion dollars in loans from developed countries threatened to fall apart, and over two hundred million dollars were withdrawn from Peruvian banks after the April 5th coup.<sup>27</sup> While the international community did register strong disapproval of Fujimori's acts, some powerful countries hinted that Fujimori simply needed to restore democracy without necessarily restoring the status quo before the coup.<sup>28</sup> One senior State Department official from the United States noted that Peru just needed to "get that democratic feeling back."<sup>29</sup>

In a May meeting before the OAS, Fujimori grudgingly agreed to hold elections.<sup>30</sup> However, elections could not magically restore democracy in Peru. In fact, these elections strengthened rather than weakened Fujimori's grip on power. The elections were held without any assurances of impartiality

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<sup>22</sup> See MAXWELL A. CAMERON, *DEMOCRACY AND AUTHORITARIANISM IN PERU: POLITICAL COALITIONS AND SOCIAL CHANGE* 145 (1994).

<sup>23</sup> See *id.*

<sup>24</sup> See *id.* at 154.

<sup>25</sup> See *id.* at 155.

<sup>26</sup> See Graham, *supra* note 20, at 7-8.

<sup>27</sup> See Bending, *Maybe: Peru*, *ECONOMIST*, May 23, 1992, at 44.

<sup>28</sup> See CAMERON, *supra* note 22, at 155.

<sup>29</sup> *Id.*

<sup>30</sup> See Bending, *Maybe: Peru*, *supra* note 27, at 44.

by the government.<sup>31</sup> Peruvians' disapproval of both Congress and the many political parties led to voter apathy and the highest levels of absenteeism (voting is compulsory in Peru) and blank votes in thirty years.<sup>32</sup> Minority parties split between participating in the elections and boycotting the elections in protest over Fujimori's autocratic acts. The two largest opposition parties, APRA and Acción Popular, refused to endorse any candidates, claiming this was an illegal election for an illegal Congress.<sup>33</sup> As a result of the disarray in the opposition's ranks, Fujimori's supporters won a majority in the new Congress.<sup>34</sup>

Although the opposition could not prove mass electoral fraud, these elections manifested a "gross imbalance" in media access and coverage.<sup>35</sup> Candidates backed by Fujimori were given practically free access to prime time television coverage while opposition members were denied coverage.<sup>36</sup> Rather than investigate the allegations of unfairness and fraud, the international community simply endorsed the elections and proclaimed democracy restored in Peru.<sup>37</sup> The OAS supervision of the elections gave legitimacy to the process and to the belief that Fujimori supported democracy. In the end, Fujimori accomplished his goal—his supporters gained an absolute majority in the new eighty-member Congress.<sup>38</sup>

Following Fujimori's successful coup, the military in five other Latin American countries attempted takeovers. After the years of relative governmental stability in the region, the four successive coup attempts occurring quickly after Fujimori's coup suggest the influence of Fujimori on other leaders in Latin America.

A scarce six months later, on November 27, 1992, the Venezuelan military attempted another coup.<sup>39</sup> While the leaders of the last coup consisted mostly of junior officers, high ranking navy and air force officials carried out this

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<sup>31</sup> See Fernando Rospigliosi, *Democracy's Bleak Prospect*, in PERU IN CRISIS: DICTATORSHIP OR DEMOCRACY?, *supra* note 20, at 35, 46.

<sup>32</sup> See *id.* at 47.

<sup>33</sup> *Peru Gives Its Verdict*, ECONOMIST, Nov. 28, 1992, at 43.

<sup>34</sup> See Rospigliosi, *supra* note 31, at 47.

<sup>35</sup> Francisco Sagasti & Max Hernandez, *The Crisis of Governance*, in PERU IN CRISIS: DICTATORSHIP OR DEMOCRACY?, *supra* note 20, at 23, 27.

<sup>36</sup> See *id.*

<sup>37</sup> See Rospigliosi, *supra* note 31, at 49.

<sup>38</sup> See *Peru Gives Its Verdict*, *supra* note 33, at 33. This new Congress replaced a two hundred forty member Congress. *Id.*

<sup>39</sup> See *Weary and Wary*, ECONOMIST, Dec. 12, 1992, at 54.

latest attempt. Loyal government troops quickly contained the coup attempt, albeit after violent confrontations.<sup>40</sup>

The coup attempt in Guatemala on May 25, 1993, held uncanny similarities to Fujimori's *autogolpe*. Like Fujimori, the president of Guatemala dissolved Congress, shut down the Supreme Court, invoked emergency powers to run the country, and called for the election of a new Congress to rewrite the constitution.<sup>41</sup> However, unlike Fujimori, President Serrano faced a defiant Congress and Supreme Court that refused to be relieved from their power. Further, the international community responded more harshly. The United States cut off all aid, and the OAS began working on a plan to implement economic sanctions, a step not taken by the OAS against Peru.<sup>42</sup> The Guatemalan military quickly withdrew its support for the ill-fated coup. By week's end the *autogolpe* had failed, and the president was deposed.<sup>43</sup>

In Brazil, an *autogolpe* was suggested although never attempted. The military encouraged President Franco to consider an *autogolpe* modeled after Fujimori's.<sup>44</sup> Although Brazil confronted many of the same problems as Peru (notably "institutional gridlock"), Brazil's president, a firm believer in democracy and, perhaps more importantly, lacking adequate political support, declined to take this measure to help reform the government.<sup>45</sup>

In April of 1996, Paraguay was threatened by a coup attempt. Then President Wasmosy relieved army commander General Lino Oviedo of his post.<sup>46</sup> However, General Oviedo had no intention of gracefully leaving the army but instead threatened to topple the government. The deposed general, along with five thousand troops, set up in barracks on the outskirts of the capital city, Asunción, and demanded a position in the defense ministry. Although President Wasmosy had the support of Congress, the Paraguayan people, Brazil, Argentina, Uruguay, and the United States, he initially gave into Oviedo's demands and offered him the coveted job.<sup>47</sup> However, this capitulation was soon followed by a withdrawal of the president's offer, and Oviedo backed down from his attempts to destabilize the government.<sup>48</sup>

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<sup>40</sup> See Norden, *supra* note 8, at 143.

<sup>41</sup> See Cameron, *supra* note 22, at 169.

<sup>42</sup> See *id.*

<sup>43</sup> See *id.*

<sup>44</sup> See *id.* at 171.

<sup>45</sup> See *id.* at 172-74.

<sup>46</sup> See *Paraguay: Backward March*, ECONOMIST, Apr. 27, 1996, at 47.

<sup>47</sup> See *id.*

<sup>48</sup> See *The General Loses*, ECONOMIST, May 4, 1996, at 40.

Most recently, in January 2000, Ecuador's democratically elected president, Mr. Mahuad, was deposed by a coup, which included members of the armed forces as well as indigenous farmers.<sup>49</sup> The army and the farmers were disgruntled with the continuing economic crisis and the devaluation of the currency.<sup>50</sup> After only a few hours, however, the army pulled its support for the coup, probably in part due to pressure exerted on it by the United States.<sup>51</sup> Although Mr. Mahuad was not restored to power, his vice-president took control and restored civilian rule.<sup>52</sup>

These many coup attempts seem to offer a discouraging outlook on the continuing vitality of democracy in Latin America. However, while countries enjoying long histories of democratic and stable rule tend to view coups as "traumatic event[s] for the nation," many Latin American societies view coups as legitimate ways of replacing the ineffective incumbent regime.<sup>53</sup> Some writers have suggested that viewing coups as great national tragedies is imposing the "Anglo-Saxon, democratic views onto other societies" and that in reality coups are "not quite the body blow to society that an observer from America or Western Europe might assume [them] to be."<sup>54</sup> Rather, the coup is viewed simply as an alternative to elections—elections many times tinged with political unrest and corruption.<sup>55</sup> As noted above, while governments around the world condemned the coups in Peru and Venezuela, the people of those countries supported the coups as ways to rid the countries of corrupt and ineffective leadership.

Further, many of the coups were immediate or eventual failures, and the democratically elected leaders retained power or were later restored to power. Only Peruvian President Fujimori conducted a successful coup, and today many of the safeguards of democracy, such as free elections and a freely elected Congress, have been restored in Peru. Although the situation appears grim at first glance, the many coup attempts in the last few years do not necessarily indicate that democracy cannot survive in Latin America.

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<sup>49</sup> See *A Warning From Ecuador*, *ECONOMIST*, Jan. 29, 2000, at 23.

<sup>50</sup> *See id.*

<sup>51</sup> *See id.*

<sup>52</sup> *See id.*

<sup>53</sup> BRUCE W. FARCAU, *THE COUP: TACTICS IN THE SEIZURE OF POWER* 6 (1994).

<sup>54</sup> *Id.* at 6-7.

<sup>55</sup> *See id.* at 6.

## III. THE STABILITY OF CONSTITUTIONAL RULE

While the impact of military coups may be hard to determine, the continued disregard for constitutional rule by democratically elected leaders does threaten some fundamental democratic freedoms because political stability is many times closely linked to the actions of the elected leaders. "Electoral fraud, official corruption [and] the unconstitutional extension of a president's term" may all serve the immediate purposes of the government and may even serve to temporarily prolong a democratic government.<sup>56</sup> However, the democratic government then loses its moral authority, and it "deprives the regime of the moral right to denounce the military when it, in turn, acts outside of the law, ostensibly in defense of higher national interests."<sup>57</sup> For this reason, it is essential to the stability of a country to identify the actions of leaders that deprive the people of constitutional rights and that, in turn, can lead to unrest in military ranks.

Since returning to democratic rule, many Latin American countries, wary of one-man dictatorships,<sup>58</sup> have adopted new constitutions that include restrictions on reelection.<sup>59</sup> Some leaders, though, aspiring to more years in office, have attempted to change their country's constitution to allow consecutive reelections.

*A. Panamanian and Brazilian Presidents Attempt to Change the Constitution*

In Panama, President Ernesto Perez Balladeras proposed a constitutional amendment that would allow him to run for another term in 1999 and serve five more years.<sup>60</sup> Panamanians had to approve the amendment in a nationwide referendum. President Balladeras spared no expense as he campaigned in favor of the amendment and touted the common line that another term in office was necessary to implement his reform package.<sup>61</sup> Much to the

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<sup>56</sup> *Id.* at 35.

<sup>57</sup> *Id.*

<sup>58</sup> *See Two Terms and You're Out: All Latin American Countries Ban or Limit the Re-election of Incumbents*, *ECONOMIST*, Aug. 22, 1998, at 16.

<sup>59</sup> The countries of Costa Rica, Colombia, Dominican Republic, Mexico, Guatemala, and Honduras do not allow reelection. Venezuela and Panama allow reelection after ten year intervals. Bolivia, Chile, Ecuador, El Salvador, Nicaragua, and Uruguay allow reelection after one term of being out of office. Argentina, Brazil, and Peru allow for one successive term. *See Re-election Bid Is Now Formally on: Opinion Polls Still Show a Large Majority Opposed*, *LATIN AM. WKLY. REP.*, Nov. 11, 1997.

<sup>60</sup> *See Panama: No Second Term*, *ECONOMIST*, Sept. 5, 1998, at 32.

<sup>61</sup> *See id.*



president's dismay, Panamanian voters overwhelmingly opposed the constitutional amendment.<sup>62</sup>

Unlike the Panamanian president, Brazilian President Fernando Henrique Cardoso was able to convince the Brazilian Congress to amend the constitution. The Brazilian Constitution requires sixty percent of congressional support before any constitutional change can be made.<sup>63</sup> Although pro-Cardoso members of Congress easily had the votes necessary to secure this change, many of these members were reluctant to hand over any more power to the executive branch.<sup>64</sup> Ultimately, President Cardoso was able to persuade the members of Congress to support his proposition for reelection.<sup>65</sup>

The actions of these two presidents did not undermine stability in their respective countries because they used legitimate means to change the constitution. Further, the Panamanian president accepted the outcome of the referendum without question. Leaders in other Latin American countries, however, were not as concerned with using legitimate means to achieve their goals.

### *B. Argentina's President Attempts to Reinterpret the Constitution*

Argentina's President Carlos Menem also hoped for another term in office even in the face of a constitutional provision prohibiting a third-straight term. Menem had already authored one constitutional change allowing him to run for a second term. However, Menem argued that a third term was constitutional because he had served only one term under the present constitution and therefore was eligible to run for one additional term.<sup>66</sup> Unabashed by criticism, Menem promised to use "all judicial and political means necessary" to ensure a bid for reelection.<sup>67</sup> Ultimately, the Supreme Court of Argentina would have ruled on the constitutionality of Menem's bid for reelection. Menem had packed the court with his supporters, and the opposition party members threatened to impeach the judges of the Supreme Court if they

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<sup>62</sup> See *id.* (noting that sixty-four percent of Panamanians voted against the amendment).

<sup>63</sup> See *Brazil's Re-election Carnival*, *ECONOMIST*, Feb. 1, 1997, at 41.

<sup>64</sup> See *id.*

<sup>65</sup> See *id.* Pro-Cardoso Congress members controlled almost four hundred seats, while only 306 votes were needed to approve the constitutional amendment. Ultimately, 336 members voted for the change while seventeen members voted against the proposal. In separate votes, both houses of Congress approved the amendment. See *id.*

<sup>66</sup> See *Menem Forswears a Third Term, for 1999 Anyway*, *ECONOMIST*, July 25, 1998, at 34.

<sup>67</sup> *Id.*

allowed Menem to run for another term.<sup>68</sup> Faced with severe opposition from Eduardo Duhalde, the mayor of Buenos Aires and a prominent member of his own party, Menem announced that he would forswear a third term.<sup>69</sup> Nevertheless, Menem continues to explore the possibility of a third term and has even proposed a national referendum on the issue that would be legally binding on the government.<sup>70</sup> Menem conveniently ignored the fact that a referendum can neither change the constitution nor bind Congress. Although Menem continues to enjoy strong support from parts of the population, it is unlikely that he could garner the support needed to win a national referendum allowing his reelection.<sup>71</sup>

Although theoretically working within the framework of the law, Menem's actions actually undermine the rule of law in Argentina. His willingness to pack the Supreme Court of Argentina with his supporters and his willingness to propose a referendum and pronounce it binding are steps that exceed the scope of the constitution. Although these actions do not appear to be egregious, they can have devastating consequences on a fragile democracy with a discontent military.

### *C. Peru's President Ignores the Constitution*

The greatest controversy in Latin American politics surrounds President Fujimori's plans to run for a third term. Even though the Supreme Court of Peru and the Peruvian Congress ultimately approved Fujimori's bid for reelection, almost every step of the reelection controversy has been challenged on constitutional grounds. Fujimori's political opposition denounced as unconstitutional the reelection law passed by Congress allowing him to run for reelection. Further, the methods used by Fujimori to pass the reelection law and push his reelection agenda have also been questioned on constitutional grounds. Lastly, many politicians, community groups, prestigious schools, and scholars argued that the denial of a referendum allowing the people to decide whether Fujimori should run for reelection also raises serious constitutional issues.

*1. The Reelection Question.* The reelection controversy first emerged in 1994 as Fujimori prepared for the 1995 elections, the first presidential elections since the adoption of the 1993 Political Constitution. Unlike the

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<sup>68</sup> *See id.*

<sup>69</sup> *See id.*

<sup>70</sup> *See Meanwhile, in the Provinces*, *ECONOMIST*, Mar. 20, 1999, at 40.

<sup>71</sup> *See id.*

previous constitution, the 1993 Constitution allowed presidential reelection for one consecutive term.<sup>72</sup> A Peruvian citizen brought a complaint against Fujimori arguing that the president was barred from seeking reelection because he had been elected in 1990 under the 1979 Constitution which prohibited reelection.<sup>73</sup> This complaint came before the Jurado Nacional de Elecciones (“Election Board”), the body in charge of judging the eligibility of political candidates.<sup>74</sup> According to the constitution, the decisions of the Election Board are final, definitive, and cannot be revised.<sup>75</sup> As the parties debated Fujimori’s eligibility to run for office in 1995, both the president’s advocate as well as the Election Board asserted that the 1995-2000 term would be Fujimori’s second term in office.<sup>76</sup> The Election Board concluded that Fujimori could run for reelection in 1995.<sup>77</sup>

With the question of reelection resolved in his favor, Fujimori devoted himself to his presidential campaign. In an overwhelming show of approval, sixty-five percent of Peruvians voted for Fujimori, and his supporters won a majority in Congress.<sup>78</sup> The majority of the population seemed to agree that Fujimori’s economic success and his success in curbing the violence of the Shining Path overshadowed his attacks on democracy.<sup>79</sup>

2. *Another Reelection Question.* Soon after Fujimori’s reelection, the current constitutional crisis emerged. Although the reelection question had seemingly been resolved, the president opened the debate once again by suggesting the possibility of another bid for reelection. A third term would put him in office until the year 2005.<sup>80</sup> Article 112 of the new constitution clearly promulgated a restriction of two consecutive presidential terms. During the constitutional debates surrounding the adoption of article 112, Carlos Torres y Torres Lara, then president of the Congress, attempted to quell the doubts of opposition members with the following explanation:

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<sup>72</sup> CONSTITUCION POLITICA DEL PERU art. 112.

<sup>73</sup> See Delia Revoredo de Mur, *Nadie Puede Obstaculizar Ni Limitar Derecho del Pueblo al Referéndum* (visited Sept. 3, 1998) <<http://www3.larepublica.com.pe/1998/SETIEMBRE/pdf3/politica.htm>>. Delia Revoredo de Mur is the Dean of the School of Lawyers in Lima, Peru.

<sup>74</sup> See CONSTITUCION POLITICA DEL PERU art. 178(1).

<sup>75</sup> See *id.* art. 181.

<sup>76</sup> See Revoredo de Mur, *supra* note 73.

<sup>77</sup> See *id.*

<sup>78</sup> See *Fujimori Takes All*, *ECONOMIST*, Apr. 15, 1995, at 40.

<sup>79</sup> See *id.*

<sup>80</sup> See Christopher Chazin, *Peru’s Fujimori Fights For 3rd Term Amid Hostage Crisis*, *DOW JONES NEWS SERVICE*, Jan. 28, 1997, available in LEXIS, LATNEWS Library, DJNS File.

I ask for the floor to reiterate that the proposal to be approved only gives the president the possibility of two consecutive terms. Do you want me to be more direct? I will. If President Fujimori becomes part of another electoral process he will only be able to be president one more time because the present term would count as one. I do not believe that I can be any clearer.<sup>81</sup>

In addition, during the previous reelection debate, all parties referred to the 1995-2000 term as Fujimori's second term in office.<sup>82</sup>

Disregarding the clear language of article 112, as well as the clear language of the constitutional debates, Congress adopted its own interpretation of article 112 in August of 1996. After ten hours of debate and a massive walkout by opposition members, the pro-Fujimori congressional majority passed Law No. 26657, more commonly known as the Law of Authentic Interpretation. This law consists of one article and states:

Be it interpreted in an authentic way, that the reelection referred to in Article 112 of the Constitution, refers to and is conditional to the presidential terms begun after the date of promulgation of the referred constitutional text. In consequence, let it be authentically interpreted that in the computation, those presidential terms initiated before the validity of the Constitution are not given account retroactively.<sup>83</sup>

In essence, Congress sought an end to the reelection controversy by legalizing Fujimori's run for a third term.

The opposition and media vigorously denounced this attempt to manipulate the constitution. A leading Peruvian newspaper condemned the law as a "legal coup d'état."<sup>84</sup> To resolve this new reelection controversy, the Lima Lawyer's Association challenged the Law of Authentic Interpretation before the Tribunal Constitucional ("Constitutional Tribunal").<sup>85</sup>

<sup>81</sup> *Diario de los Debates*, *supra* note 2.

<sup>82</sup> See Revoredo de Mur, *supra* note 73.

<sup>83</sup> Law No. 26657, *Congreso de la República* (visited Sept. 21, 1998) <<http://www.congreso.gob.pe/ccd/leyes/cronos/1996/ley26657.htm>>.

<sup>84</sup> *Politics: Way Cleared for Third Fujimori Term*, WKL.Y. REP., Sept. 5, 1996, available in Westlaw, PARERSLAT database.

<sup>85</sup> See *id.*

The Peruvian Supreme Court of Justice retains the final word on constitutional law matters.<sup>86</sup> The Peruvian judicial system also establishes a Constitutional Court, a specialized body independent of, but that assists, the judicial system.<sup>87</sup> The Constitutional Court purports to be a completely independent body "subject only to the Constitution and its Organic Law."<sup>88</sup> The court's primary responsibilities consist of "dealing with actions of unconstitutionality in a single instance, guaranteeing the supremacy of the Constitution and declaring whether the diverse norms are constitutional or not."<sup>89</sup> After considering the Law of Authentic Interpretation, three of the seven justices voted that Fujimori was ineligible to run for office in the 2000 presidential elections. The remaining four justices abstained from voting.<sup>90</sup> Those voting against the law based their conclusion in large part on the ruling made by the Election Board in 1994. The Election Board referred to the 1995-2000 term as Fujimori's second term, and the constitution prohibited a third consecutive term.<sup>91</sup> The president of the Constitutional Tribunal approved the decision of the three voting justices and denied Fujimori the right to run for another consecutive term.<sup>92</sup>

Although Fujimori and his supporters in Congress tinkered with the constitution in passing the Law of Authentic Interpretation, the ruling of the Constitutional Tribunal demonstrated that the checks and balances necessary for a democratic country still existed.

Subsequent events, however, cast profound doubt on the strength and independence of the judiciary. The 1993 Constitution guaranteed judges specific rights. Judges were guaranteed complete independence and were bound only by the constitution and the law. Further, judges were guaranteed permanent tenure as long as they conducted themselves properly on the job.<sup>93</sup> Ignoring this constitutional provision, in May of 1997, Congress removed the three justices that had voted against the Law of Authentic Interpretation. Congress claimed that these justices violated judicial procedure by ruling on

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<sup>86</sup> See *Legal System of Peru*, 40 ST. LOUIS U. L.J. 1403, 1404 n.4 (1996).

<sup>87</sup> See *id.* at 1405-06.

<sup>88</sup> *Id.* at 1406.

<sup>89</sup> *Id.*

<sup>90</sup> See Revoredo de Mur, *supra* note 73.

<sup>91</sup> See *id.*

<sup>92</sup> See Calvin Sims, *Peru's Congress Is Assailed Over its Removal of Judges*, N.Y. TIMES, May 31, 1997, § 1, at 4.

<sup>93</sup> See CONSTITUCION POLITICA DEL PERU art. 146.

behalf of the Constitutional Tribunal without having the appropriate quorum.<sup>94</sup> The three justices angrily denounced their removal as political punishment for having voted against Fujimori's law. As a result, the president of the Constitutional Tribunal resigned, agreeing that "the decision adopted by Congress was based on politics and not on judicial or legal issues."<sup>95</sup>

Angry international reaction soon followed the removal of the three justices. The United States Ambassador to Peru, Dennis Jett, saw this "as a step backward" that would "weaken the whole democratic system."<sup>96</sup> Human rights groups denounced the removal of the judges as the worst attack on democracy since Fujimori's *autogolpe* in 1992. A deputy director for Human Rights Watch/Americas asserted that "[t]here [were] no longer any checks on Fujimori's power. He so thoroughly controls the Congress that he can get them to do whatever he wants."<sup>97</sup>

Fujimori, however, evinced no remorse over his refusal to heed the Constitutional Tribunal and instead staunchly continued his quest for a third presidential campaign. The Law of Authentic Interpretation came before the Supreme Court in early 1998.<sup>98</sup> The Supreme Court reversed the decision of the Constitutional Tribunal and ruled that the Law of Authentic Interpretation was valid. Shocked, opposition leaders decried this ruling as an "unconstitutional manipulation of the judiciary."<sup>99</sup> Critics pointed out that Congress packed the Supreme Court with pro-Fujimori judges and that this ruling was simply another authoritarian act by the president.<sup>100</sup>

In response to Fujimori's abuse of power, opposition groups followed the lead of many of Peru's neighbors and called for a referendum, a right only recently given to Peruvians under the 1993 Constitution.<sup>101</sup>

<sup>94</sup> See Jonathan Friedland, *Peruvians Recoil from Fujimori, Despite Peace, Prosperity He Won*, WALL ST. J., July 8, 1997, at A11.

<sup>95</sup> *Id.*

<sup>96</sup> Sims, *supra* note 92, § 1, at 4.

<sup>97</sup> *Id.*

<sup>98</sup> See *Peru Court: Fujimori Can Seek 3rd Term*, CHIC. TRIB., Feb. 11, 1998, § 1, at 13.

<sup>99</sup> *Id.*

<sup>100</sup> See *id.*

<sup>101</sup> Unlike Peru, other countries in the region have used the referendum process many times over the years in attempts to preserve democracy and remove dictators. In 1917, Uruguay was the first South American country to incorporate the referendum as a constitutional right. Since that time, Uruguay has held eight referendums, the most important in 1982. The 1982 Referendum played an important role in restoring democracy in Uruguay. The military dictatorship allowed a referendum concerning the adoption of a new constitution. The people overwhelmingly voted against the new constitution showing instead their support for the 1966 Constitution adopted by the people. Because of the clear demand for the return to democratic rule, the military allowed presidential and municipal elections. Following this example, the

The opposition movement Foro Democrático (the Forum) hoped to use its new right to call a referendum as a way of halting what it considered Fujimori's anti-democratic bid for more power through a third presidential candidacy. Article 31 of the 1993 Constitution states that "the citizens have the right to participate in political affairs through the means of a referendum."<sup>102</sup> Article 32 specifies four categories of issues that can be submitted to the referendum process:

1. The total or partial reform of the Constitution
2. The approval of norms that have the status of law
3. Municipal ordinances
4. Materials relevant to the process of decentralization.<sup>103</sup>

The Forum intended to call a referendum to afford the Peruvian people the opportunity to approve or reject the Law of Authentic Interpretation. The Forum collected the 1.4 million signatures needed to call a referendum and presented these signatures to the National Office of Electoral Processes ("ONPE").<sup>104</sup> In this case, the ONPE took the 1.4 million signatures gathered for the express purpose of calling for a referendum and used them instead to fulfill the three-tenths of one percent required to support a legislative initiative.<sup>105</sup> All this was done without the consent of the Forum.

The Forum's rights continued to be disregarded by Congress. Article 14 of Law 26300 states that "those that present the [legislative] initiative may name two representatives to sustain and defend the initiative in the congressional commissions and in the process of reconsideration."<sup>106</sup> The initiative was slated to appear before the Constitutional Commission. Representatives of the Forum, citing their rights under article 14 of Law 26300, requested an audience before the Commission to explain the purpose of the signatures and the usurpation of the will of the people.<sup>107</sup> Instead, ONPE sent the measure

Chilean people held a referendum where they rejected the rule of their dictator, General Pinochet. The only countries in Latin America not guaranteeing a constitutional right to hold a referendum are Mexico, Bolivia, Honduras, and El Salvador. See Francisco Miró Quesada Rada, *El Referéndum en el Mundo*, EL COMERCIO (published Sept. 13, 1998) <<http://www.elcomerciope.com.pe/webcomercio/1998/9/15/fs5n7.htm>>.

<sup>102</sup> CONSTITUCION POLITICA DEL PERU art. 31.

<sup>103</sup> *Id.* art. 32.

<sup>104</sup> See *Diario de los Debates*, *supra* note 2.

<sup>105</sup> See *id.*

<sup>106</sup> Ley No. 26300, *Congreso de la Republica de Peru* (visited Sept. 21, 1998) <<http://www.congreso.gob.pe/ccd/leyes/cronos/1994/ley26300.htm>>, art. 14.

<sup>107</sup> See *Diario de los Debates*, *supra* note 2.

directly to Congress allowing Congress to either approve or reject the referendum.<sup>108</sup>

3. *Say What You Mean and Mean What You Say*. On August 28, 1998, a historic congressional debate took place. On one side, Fujimori's supporters opposed invalidation of the Law of Authentic Interpretation and opposed, as well, any calls for a referendum. On the other side, the opposition argued that the Law of Authentic Interpretation should be found unconstitutional and, further, that the Peruvian people should be allowed to exercise their constitutional right to call for a referendum. The majority party, although making some valid arguments, undermined its position by consistently reinterpreting laws in glaring contradiction to their apparent meanings. In the end, in part because of the majority's skill in manipulating words and legal arguments, the people lost constitutionally guaranteed freedoms.

Tensions ran high as Congress began deliberating on the referendum issue. Approximately one thousand protesters, many of them university students, gathered outside Congress shouting their support for the referendum.<sup>109</sup> Some of the students evaded the police and made their way inside Congress where they shouted their support for the opposition throughout the debate.<sup>110</sup> Among the members of Congress, tempers raged, culminating in one member slugging another after being insulted.<sup>111</sup> The president of Congress attempted to stress the importance of the debate and the necessity to keep calm and allow the arguments to proceed.<sup>112</sup>

This debate centered around two issues. First, Congress discussed the validity of the referendum issue coming before Congress. The opposition argued that Congress had no legal authority to rule on the referendum but rather that the debate was an usurpation of the power given to the people by the 1993 Constitution to call a referendum. Second, Congress discussed the fundamental concern—should the people, through a referendum, decide whether Fujimori could run for a third presidential term. The opposition argued that a refusal to allow a referendum violated the constitution and exposed Fujimori's authoritarian beliefs.

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<sup>108</sup> *See id.*

<sup>109</sup> *See Peru Leader Eligible for Election in 2000*, NEWSDAY, Aug. 29, 1998, at A12, available in 1998 WL 2683209.

<sup>110</sup> *See El Insulto Como Instrumento de Defensa*, EL COMERCIO (published Aug. 29, 1998) <<http://www.elcomerciope.com.pe/webcomercio/1998/9/1/fs5n86.htm>>.

<sup>111</sup> *See id.*

<sup>112</sup> *See Diario de los Debates*, *supra* note 2. Much of the following information about the debate comes from the transcript of the congressional debate.



The opposition first asserted that because proper civil procedure had not been followed, Congress lacked the power to debate this issue.<sup>113</sup> The ONPE, the organization presenting the legislative initiative, had taken signatures gathered in support of a referendum and had used them, without consulting with the Forum, to support this legislative initiative. Only a member of Congress or the signatures of three-tenths of one percent of the electorate could bring a bill in front of Congress.<sup>114</sup>

The majority party countered that in this case, it was best to dispense with the proceeding before the Constitutional Commission and instead debate the issue before the whole Congress because the issue was of great national importance and would eventually come before Congress anyway.<sup>115</sup> The majority easily won the vote to continue the debate and to proceed to the principle issue of whether the government should allow a referendum. The majority party's disregard for procedure is troublesome, especially as the procedural rights guaranteed the very important substantive right of allowing the proposal to be defended before the appropriate committee. Fujimori's party did not spend time arguing that the presentation of this bill was valid. Instead, it simply justified the act because of the importance of the subject matter.

The central debate concerned both the legal and moral justifications for and against the referendum. The legal debate concerned the modification of Law 26300 leading to restrictions on the constitutionally guaranteed right to call for a referendum. Putting legality aside, the opposition also questioned the morality of refusing the Peruvian people the opportunity to decide whether Fujimori should be allowed to run for a third term.

Article 31 of the 1993 Constitution gave Peruvians the right to call for a referendum. Further, article 31 stated that any act that prohibited or limited the rights of the citizenry in this area was null and punishable.<sup>116</sup> However, in September of 1996, Congress recognized that Law 26300 abrogated the rights guaranteed under articles 31 and 32 of the constitution.<sup>117</sup> Article 39 of Law 26300 established four areas that could be subject to a referendum:

1. The total or partial reform of the Constitution in accordance with article 206 of the same.

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<sup>113</sup> See *id.*

<sup>114</sup> See Ley No. 26300, *supra* note 106.

<sup>115</sup> See *Diario de los Debates*, *supra* note 2.

<sup>116</sup> CONSTITUCION POLITICA DEL PERU art. 31.

<sup>117</sup> See *Diario de los Debates*, *supra* note 2.

2. To approve a law, regional law of general character and municipal ordinances.
3. To disapprove of laws, legislative decrees, and urgent decrees, as well as the laws referred to in the previous category.
4. In the materials referred to in article 190 of the Constitution according to special law.<sup>118</sup>

Under Law 26300, a referendum would still be appropriate in this case as the Forum's petition fell under the third category of disapproval of laws. The interpretation of this article came under scrutiny and finally the Jurado Electoral ("the Jurado"), the governmental body determining election and referendum issues, further clarified the prerequisites for calling a referendum. The Jurado determined that for categories one, two, and four, a referendum could not be called until the initiative was presented and rejected by Congress.<sup>119</sup> Category three was not included and therefore did not require a rejected legislative initiative. Thus, it was proper for the Forum to collect the signatures in disapproval of the Law of Authentic Interpretation even before the issue was debated and rejected by Congress.

In April of 1997, though, the right to a referendum was further restricted by Law 26592. This law states:

Every referendum requires a legislative initiative rejected by Congress, the same which can be submitted to a referendum in conformance with this law, only if it counts with the favorable vote of no less than 2/5 of the votes of the legal number of the members of Congress.<sup>120</sup>

Opposition leaders scathingly rejected this legal maneuver used to trump their call for a referendum. First, the constitution guaranteed the right to hold a referendum, then through the passage of Law 26300 Congress restricted this right, and finally after passing Law 26592, Congress gave itself the right to completely reject the people's call for a referendum. Senator Avendano Valdez contended that Law 26592 was invalid because the Jurado had already declared that referendums disapproving laws did not need a rejected legislative

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<sup>118</sup> Ley No. 26300, *supra* note 106, art. 39.

<sup>119</sup> See *Diario de los Debates*, *supra* note 2.

<sup>120</sup> Ley No. 26592, *Congreso de la República* (visited Sept. 21, 1998), <<http://www.congreso.gob.pe/ccd/leyes/cronos/1996/ley26592.htm>>.

initiative.<sup>121</sup> According to the constitution, the decisions of the Jurado are final and cannot be changed.<sup>122</sup> Therefore, Congress did not have the power to pass Law 26592 requiring a rejected legislative initiative. Further, the opposition contended that Congress did not have the power to require a two-fifths vote of approval by Congress before allowing a referendum to proceed. Article 31 of the constitution guaranteed the right to a referendum and also stated that any limitation of this right was null and subject to punishment.<sup>123</sup> Senator Valdez noted that the right to call a referendum was an “unrestricted right, and in consequence the famous law that establishes Congress as a filter, is a law that violates the constitution.”<sup>124</sup> The senator emphasized the strong language used in this article—limitations were null and subject to punishment.<sup>125</sup> He commented that few times in the constitution were such clear and strong words used.<sup>126</sup>

The majority party countered with its own legal arguments. First, it noted that the constitution did not forbid modifications of the rights concerning referendums. Second, Fujimori’s party accused the Forum of committing fraud in the collection and presentation of the 1.4 million signatures needed to call for a referendum.

Senator Delgado Paricio, a member of the Change Ninety-New Majority party (C90-NM), responded to the criticisms of the changes made to the referendum guarantee of article 31 of the constitution. In full this article states:

The citizens have the right to participate in public affairs through the referendum; legislative initiative; removal or renewal of the authorities and the demand of an accounting of affairs. They also have the right to be elected and to freely elect their representatives, in accordance with the conditions and procedures determined by the organic law.<sup>127</sup>

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<sup>121</sup> See *Diario de los Debates*, *supra* note 2.

<sup>122</sup> CONSTITUCION POLITICA DEL PERU art. 181.

<sup>123</sup> *Id.* art. 31.

<sup>124</sup> *Diario de los Debates*, *supra* note 2.

<sup>125</sup> See CONSTITUCION POLITICA DEL PERU art. 31.

<sup>126</sup> See *Diario de los Debates*, *supra* note 2. Supporting Senator Valdez, Senator Reto Neyra affirmed that judicial instability, including the reinterpretation of the Constitution and the passing, abrogating, and modifying of laws, could lead to democratic instability as well. *Id.* “From the point of view of the judiciary,” he continued, “Article 31 of the Constitution” is clear in guaranteeing the right to a referendum. *Id.*

<sup>127</sup> CONSTITUCION POLITICA DEL PERU art. 31.

The majority party picked out the last phrase—"according to the conditions and procedures determined by the organic law"—and argued that the right to a referendum was conditioned by the organic law.<sup>128</sup> This would give Congress the power to pass laws, such as Law 26300 and 26592, changing the guarantees given in the constitution.

There are two problems with this argument, however. First, the beginning sentence of article 31 guaranteeing the right to a referendum does not subordinate this right to any other law. Only the right to elect and be elected is conditioned by the organic laws of the country. Second, as the opposition argued later in the debate, even if the phrase does apply to the right to call a referendum, there is a difference between limiting a law and having to meet the conditions and procedures established by other laws.<sup>129</sup> One senator explained, "Conditions, there can be; procedures, there can be: how it [the referendum] is asked for, who asks for it . . . But the right cannot be limited."<sup>130</sup>

Senator Torres y Torres Lara, distinguished Peruvian constitutional scholar, continued the legal debate for the majority party. Lara began his discussion distinguishing the situation in Peru and the situation with President Menem in Argentina.<sup>131</sup> As noted earlier,<sup>132</sup> Argentina had a similar constitutional provision forbidding reelection, and Menem tried the same argument advanced by Fujimori, claiming that only presidential terms commenced after the new constitution counted for reelection purposes. Unlike the Peruvian Constitution, however, the Argentine Constitution included a statement explaining that Menem's term at the time of adoption of the new constitution should be considered his first term.<sup>133</sup> While an interesting distinction, this argument does not prove that Fujimori should be able to run for another term. It only proves that Menem was even bolder in his attempt at reelection.

Lara next dealt with the role of Congress in interpreting the constitution. He gave numerous examples of congressional interpretation of the constitution.<sup>134</sup> He concluded that "the history of interpretation is absolutely long in our history, not only under former constitutions, but also under this constitution."<sup>135</sup> Throughout the debate, though, the opposition members were

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<sup>128</sup> *Diario de los Debates*, *supra* note 2.

<sup>129</sup> *See id.*

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

<sup>131</sup> *See id.*

<sup>132</sup> *See supra* Part II.B.

<sup>133</sup> *See Diario de los Debates*, *supra* note 2.

<sup>134</sup> *See id.*

<sup>135</sup> *Id.*

not challenging the right of Congress to interpret the constitution, but rather they were challenging the correctness of their interpretation. Senator Torres y Torres Lara seemed to gloss over this fact.

Finally, Lara argued that it was necessary to have a representative democracy as opposed to a direct democracy. All agreed, he noted, that a direct democracy posed great dangers and that the new constitution established a combination of direct and representative democracy.<sup>136</sup> Moreover, he contended that requiring the rejection of a legislative initiative and a two-fifths vote by Congress before approving a referendum would establish the proper balance and keep the masses from controlling the government by always calling for a referendum.<sup>137</sup> He stated that Law 26300 clarified this position, and after the Jurado misinterpreted this law, it was necessary to pass Law 26592.<sup>138</sup>

Senator Torres y Torres Lara failed, however, to address some important issues. The majority party wrote the constitution. If direct democracy were so dangerous, why did the constitution guarantee the right to call a referendum without the need for congressional approval. He also failed to address the constitutional provision that all changes to the right to call a referendum would be null and subject to punishment.

While the opposition's constitutional argument appears stronger, the majority did advance some important concerns surrounding the validity of the signatures presented by the Forum. The Forum presented the list of names and election numbers (similar to American social security numbers) in the form of three compact discs. Almost immediately, irregularities were noticed as names appeared multiple times with falsified signatures.<sup>139</sup> One television correspondent interviewed a man, asking him if he had signed a referendum petition. The man denied adding his signature to the campaign. The correspondent proceeded to show the man that his name and election number appeared twelve times on the lists.<sup>140</sup> The man confirmed that although his name and election number were used, the signature was not his. The reporter cited numerous cases throughout the records of duplicated names and numbers.<sup>141</sup> The majority concluded that the Forum deliberately committed fraud in the collection of the signatures. One senator concluded that up to

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<sup>136</sup> *See id.*

<sup>137</sup> *See id.*

<sup>138</sup> *See id.*

<sup>139</sup> *See id.*

<sup>140</sup> *See id.*

<sup>141</sup> *See id.*

forty percent of the signatures could be omitted due to irregularities.<sup>142</sup> The opposition responded that any error was due to the transmission of the names, signatures, and election numbers from paper sources to the electronic source. Senator Chavez Cossio de Ocamp (C90-NM) aptly responded that "if this is a digital error, it sure is an intelligent one."<sup>143</sup>

Throughout the debate, the congressional opposition parties never adequately responded to the charges of fraud. Ironically, however, at the time of the debate, ONPE, the body in charge of verifying the signatures for authenticity, had not examined any of the signatures. In a newspaper article dated September 11, 1998, the head of the ONPE stated that not one of the more than 1.4 million signatures had been tested for authenticity.<sup>144</sup> For this reason, neither side has a particularly credible argument concerning the validity of the signatures.

Although both sides argued the legal side of the controversy, the opposition also passionately asserted the need to protect democracy from an authoritarian government. While the government could manipulate the laws to restrict the referendum, the will of the people could not be ignored without diminishing and eventually destroying democracy.

Senator Flores Nano began the impassioned plea for the preservation of the referendum. She noted that polls indicated that over sixty percent of the electorate favored the referendum.<sup>145</sup> The real issue, therefore, was not the exact number of valid signatures collected but rather whether Congress would listen to the voice of millions of Peruvians calling for the referendum.<sup>146</sup> Following her, numerous opposition members continued to plead that democracy be respected by allowing the referendum to go forward as guaranteed in the constitution.<sup>147</sup>

The majority party ignored the arguments based on the need for the preservation of democracy and focused mainly on the legal arguments. One senator stated that the majority party was not against the referendum; it simply

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<sup>142</sup> See *id.*

<sup>143</sup> *Id.*

<sup>144</sup> See *Jefe de ONPE Se Reúne Con Fiscal Ad Hoc que Investiga Denuncia de Fraude Electrónico*, EL COMERCIO (published Sept. 11, 1998) <<http://www.elcomercioperu.com.pe/webcomercio/1998/9/15/fs5n230.htm>>.

<sup>145</sup> See *Diario de los Debates*, *supra* note 2.

<sup>146</sup> See *id.* Although this senator stated that sixty percent of the populace backed the referendum, most sources put the number at or above seventy-five percent. See *Foro Democrático Anuncia Paro Cívico Para el 30 de Setiembre* (visited Sept. 14, 1998) <<http://www.gestion.com.pe/archivo/ago/1998/28/SPOLI.htm>>.

<sup>147</sup> See *Diario de los Debates*, *supra* note 2.

wanted the opposition to garner the votes necessary to approve the referendum.<sup>148</sup> This argument is far from convincing, however, because all of the majority members denounced the referendum and asserted their support for Fujimori's bid for a third term.

After thirteen hours of debate, Congress finally voted on the referendum.<sup>149</sup> For all the fiery rhetoric and passionate pleas, the opposition failed to muster the votes necessary to approve the referendum. Forty-five members voted for the referendum, six senators were absent, one abstained, and sixty-seven voted against the referendum.<sup>150</sup> Upon hearing the results of the vote, clashes broke out between demonstrators waiting outside of Congress and the police. The demonstrators held up signs proclaiming, "Referendum is Democracy" and "No to Reelection."<sup>151</sup>

4. *Effects of the Vote.* Both politicians and citizens considered the Peruvian congressional debate to have serious ramifications. The country and the world wait expectantly to see the effects of this vote on democracy in Peru and in the region. While the results cannot be predicted with certainty, there are some areas of concern. First, the rise of protest against the government and the ensuing violence could jeopardize the stability of the government. Second, there is concern that after winning this victory, Fujimori will be emboldened to commit fraud in order to win a third term.

Almost as soon as the vote result was made known, organizers around the country began mounting protests. Ten thousand protesters marched through Cuzco, an important mountain city.<sup>152</sup> The marchers asserted that the vote against the referendum was a vote against democracy. Signs read: "Stop the Dictatorship!" and "Stop the Constant Running Over Democratic Institutions!"<sup>153</sup> Around the country, in Cajamarca, Jaen, Comas, Pisco, Ica, Piura, Huaraz, and Chimbote protesters demanded the return to democracy. The mayor of Lima stated that Fujimori had a "fatal obsession for staying in power indefinitely," and, in consequence, Peruvians were confronting an "authoritarian government — a dictatorship disguised as a democracy."<sup>154</sup> The

<sup>148</sup> See *id.*

<sup>149</sup> See *El Insulto Como Instrumento de Defensa*, *supra* note 110.

<sup>150</sup> See *Mayoría Oficialista Acabó Ayer Con el Referéndum* (visited Sept. 14, 1998) <<http://www.gestion.com.pe/archivo/1998/ago/28\1POLI.htm>>.

<sup>151</sup> *Id.*

<sup>152</sup> See *Cusqueños Dijeron; ¡No! a la Dictadura* (published Sept. 2, 1998) <<http://www3.larepublica.com.pe/1998/SETIEMBRE/pdf3/politica.htm>>.

<sup>153</sup> *Id.*

<sup>154</sup> *Alcalde de Lima Afirma que Presidente Fujimori Tiene Obsesión Por El Poder* (visited Sept. 14, 1998) <<http://www.gestion.com.pe/archivo/1998/ago/28\10POLI.htm>>.

Forum, the group responsible for collecting the signatures, announced almost immediately that it would wage a "campaign of democratic resistance confronting authoritarianism and fraud."<sup>155</sup> The Forum proceeded to call a general strike for September 30, 1998.<sup>156</sup>

Although this was to be a peaceful strike, the people's dissatisfaction with the government soon resulted in violence. Workers, union supporters, students, and various other spectators gathered around the chained iron gates of the Presidential Palace.<sup>157</sup> Soldiers guarding the Palace retreated after someone in the crowd threw a smoke bomb. Heartened by this, the protesters, sticks and metal rods in hand, banged on the outer gates until they finally gave way, allowing the protesters to march into the patio of the Palace. The marchers first threw rocks at the windows of the Palace.<sup>158</sup> The protesters then began beating at the door of the Presidential Palace. They were able to open one door that led to the quarters of the Palace's color guard. The marchers grabbed the guards' instruments and began playing their protest marches. Others grabbed the colorful uniforms and began throwing them in the air.<sup>159</sup> On-lookers applauded the actions of the marchers until the police forces finally entered the building, pushing the protesters out of the area.<sup>160</sup>

The use of violence, coupled with the lack of respect shown by the marchers toward the Presidential Palace, the symbol of government and of the presidency, is troublesome. Perhaps a connection exists between Fujimori's perceived lack of respect for laws and the willingness of the people to disregard laws. Luis Guerrero, president of the Association of Municipalities of Peru, stated that the rule of law no longer existed in Peru.<sup>161</sup> "The constitution and the laws have been violated," he said in an interview with a

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<sup>155</sup> *Foro Democrático Anuncia el Inicio de "Campaña de Resistencia Democrática,"* EL COMERCIO (published Aug. 30, 1998) <<http://www.elcomercioperu.com.pe/varios/referendum/fs5n100.htm>>.

<sup>156</sup> *See Foro Democrático Anuncia Paro Cívico para el 30 de Setiembre* (visited Sept. 14, 1998) <<http://www.gestion.com.pe/archivo/1998/ago/28\5POLI.htm>>.

<sup>157</sup> *See La Violencia y Las Balas Estremecieron Ambientes de Palacio de Gobierno,* EL COMERCIO (published Oct. 1, 1998) <<http://www.elcomercioperu.com.pe/webcomercio/1998/10/1/fs3nl.htm>>.

<sup>158</sup> *See id.*

<sup>159</sup> *See id.*

<sup>160</sup> *See id.*

<sup>161</sup> *See No Existen Garantías Para Elecciones Limpias y Transparentes en el 2000* (visited Sept. 14, 1998) <<http://www.gestion.com.pe/archivo/1998/ago/31\4POLI.htm>>.



Peruvian newspaper.<sup>162</sup> "The chief, the power of the State, in violating [the norms] is opening the doors for everyone to violate all [laws]."<sup>163</sup>

Equally troublesome is the lackluster job of the military police in protecting the Palace and the president. When protest marches take place, police usually block off the area in front of the Palace. In this case, the area was unguarded, and when the police saw the protesters attempt to break down the gate, they retreated rather than confront the crowd.<sup>164</sup> Only women guarded the Palace, and they were quickly moved to one side by the protesters.<sup>165</sup> Later in the evening, some protesters returned, climbed up on a Palace balcony and painted anti-government slogans on the wall. Not a single police officer remained in the area.<sup>166</sup> Fujimori remained inside the Palace while all of these events took place.<sup>167</sup>

Perhaps the actions of the police were simply an attempt to avoid bloodshed, yet the duty to protect the president, especially since he was in the Palace, should have been of utmost importance to them. The failure to establish order and enforce the rule of law runs counter to a democratic society, which functions because of the respect given to the law.

Protests against Fujimori continue, most recently after the December 31, 1999, ruling by the Election Board that Fujimori is eligible to run for a third term in office.<sup>168</sup> On December 27, Fujimori announced that he would run for a third term in the April 9, 2000, elections.<sup>169</sup> This announcement was quickly followed by the Election Board's vote of approval. On January 6, around 4,000 protesters took to the streets to demonstrate against the Election Board's decision.<sup>170</sup> Although riot police were on hand, the demonstrations were relatively peaceful. It remains to be seen, however, whether the protests will continue to be peaceful as the April 9th election approaches.

While constitutional changes certainly do not offend democratic principles, attempts to simply reinterpret or ignore constitutional limitations do under-

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<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *See Jefe de Estado Permaneció en su Despacho Durante Graves Incidentes*, EL COMERCIO (published Oct. 1, 1998) <<http://www.elcomercioperu.com.pe/webcomercio/1998/10/1/fs3n6.htm>>.

<sup>165</sup> *See id.*

<sup>166</sup> *See id.*

<sup>167</sup> *See id.*

<sup>168</sup> *See Thousands Protest Peruvian President's Re-election Bid* (visited Jan. 30, 2000) <<http://www.cnn.com/2000/WORLD/americas/01/06/peru.protests.ap/index.html>>.

<sup>169</sup> *See id.*

<sup>170</sup> *See id.*

mine the rule of constitutional law. Fujimori's attempt simply to reinterpret the constitution to his liking manifests a great disrespect for constitutional rule.

#### IV. THE STABILITY OF DEMOCRATIC ELECTIONS

Recent democratic elections offer both hope that democracy continues to grow in Latin America as well as some concern that military leaders continue to exert great power over Latin American countries. Peru and Brazil stand as evidence that free and open elections remain intact. In Venezuela and Paraguay, however, the rising popularity of former coup leaders in election campaigns has raised doubt as to the people's commitment to democracy.

Peru held municipal elections in October of 1998, just two months after the referendum debate. Many opposition members voiced concern over the integrity of the voting process and the continuation of free and fair elections.<sup>171</sup> Luis Guerrero, head of the Association of Municipalities of Peru, stated that Fujimori's actions left grave doubts that fair and transparent elections would be guaranteed in the year 2000. While these concerns were valid, the October elections shed hope that the next presidential elections would be free and fair. Some irregularities did occur, however, and the Election Board annulled results in four districts of the department of Ayacucho.<sup>172</sup> Further, the mayor of Miraflores, a large district in the capital city Lima, denounced the Election Board for not investigating alleged irregularities in his district. Despite this, on the whole, the elections appeared to be a fair demonstration of the will of the people.<sup>173</sup> For example, a fiery opponent of President Fujimori was

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<sup>171</sup> See *No Existen Garantías Para Elecciones Limpias y Transparentes en el 2000* (visited Sept. 14, 1998) <<http://www.gestion.com.pe/archivo/1998/ago/31\4POLI.htm>>.

<sup>172</sup> See *Declaran Nulas las Elecciones en Cuatro Distritos en el Departamento de Ayacucho*, EL COMERCIO (published Dec. 18, 1998) <<http://www.elcomerciooperu.com.pe/webcomercio/1998/12/18/fs26n87.htm>>.

<sup>173</sup> In spite of Fujimori's authoritarian acts, it is utterly remarkable to note the difference between the 1990 elections (when Fujimori first came to power) and the most recent 1998 elections. In 1990, the Peruvian terrorist group Shining Path terrorized both general and municipal elections. In the months leading up to the municipal elections, over sixty mayors and mayoral candidates were killed. Over five hundred candidates withdrew out of fear for their lives. This fear extended to the voters. Close to sixty percent of registered voters either invalidated their vote or refused to vote even though voting is required and failure to vote carries a stiff fine. In one mountain city, virtually controlled by terrorists, eighty-five percent of the population failed to vote. The general elections suffered a similar fate. Shining Path carried out a campaign of bombings and general strikes. The hillsides surrounding Lima were aglow with torches shaped as the hammer and sickle. On the other hand, the 1998 municipal elections had little if any violence, and voters were free to cast their ballots for their candidate of choice. See Simon Strong, *Shining Path: A Case Study in Ideological Terrorism*, in *LATIN AMERICA AND*

reelected as mayor of Lima. Also, in many regions, independent candidates rather than those affiliated with the president were elected.<sup>174</sup> As in Peru, Brazil's October elections proceeded without problems and returned President Cardoso to power.<sup>175</sup>

By contrast, in both Venezuela and Paraguay, former coup leaders chose to run for office. In Venezuela, voter participation consistently declined in the last decade reaching an all time low in the 1993 general elections.<sup>176</sup> The absenteeism rate rose to 41.7 percent, doubling the previous record.<sup>177</sup> In 1998, however, increased excitement surrounded the presidential elections and the candidacy of Hugo Chavez, who only six years before had led a failed coup attempt against the government.<sup>178</sup> On December 6, 1998, Hugo Chavez became the new president of Venezuela.<sup>179</sup> During his victory speech, Chavez emphasized his commitment to democracy and free market reform. Critics, however, troubled about Chavez's anti-democratic past, worried about his campaign promise to establish a special constituent assembly. This body would be composed of a cross-section of the population and would have the power to bypass the opposition dominated Congress.<sup>180</sup> To appease the opposition, Chavez intimated that rather than replace Congress, this special assembly would simply complement the work of Congress. The new assembly could discuss such issues as ending the ban on presidential reelection while Congress would address more technical reform topics.<sup>181</sup>

On July 25, 1999, Venezuelans went to the polls to elect the members of the new constituent assembly.<sup>182</sup> In an overwhelming victory, Chavez's followers won 121 of the 128 seats in the new assembly.<sup>183</sup> Almost immediately the new assembly began reviewing corruption charges against judges and began preparing to remove those judges found guilty of corruption.<sup>184</sup> When Congress decided to return from its recess to address this new development,

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THE CARIBBEAN: PROSPECTS FOR DEMOCRACY 207, 216-17 (William Gutteridge ed., 1997).

<sup>174</sup> See *Peru: Possible Presidents*, ECONOMIST, Oct. 17, 1998, at 38.

<sup>175</sup> See *Brazil's Steady Nerve: Thank President Henrique Cardoso and the Voters Who Have Just Re-elected Him*, ECONOMIST, Oct. 10, 1998, at 16.

<sup>176</sup> See Enrique A. Baloyra, *Deepening Democracy with Dominant Parties and Presidentialism*, in DEEPENING DEMOCRACY IN LATIN AMERICA, *supra* note 7, at 38.

<sup>177</sup> See *id.*

<sup>178</sup> See *The Colonel Rides On*, ECONOMIST, Nov. 4, 1998, at 35.

<sup>179</sup> See *A Message From the People*, ECONOMIST, Dec. 12, 1998, at 35.

<sup>180</sup> See *id.*

<sup>181</sup> See *id.*

<sup>182</sup> See *Chavez Cleans the Slate*, ECONOMIST, July 31, 1999, at 29.

<sup>183</sup> See *Chavez's Power Grab*, ECONOMIST, Aug. 28, 1999, at 27.

<sup>184</sup> See *id.*

the new assembly passed laws that stripped Congress of most of its power.<sup>185</sup> Finally, on September 10, 1999, an agreement was reached, allowing Congress to reconvene in October and giving the new assembly the duty of rewriting the constitution.<sup>186</sup> While critics are quick to doubt Chavez's commitment to democracy, Chavez has declared that his "intention is to rebuild institutions, to strengthen democracy."<sup>187</sup> Only time will tell whether these intentions are genuine.

In Paraguay, the presidential elections sparked a constitutional debate that threatened to undermine democratic rule. Lino Oviedo, the leader of the 1996 coup attempt, won the presidential nomination of his party.<sup>188</sup> Afterwards, however, the Supreme Court of Paraguay upheld the ten-year prison term imposed on Oviedo by a military tribunal, and he was forced to abandon the presidential race.<sup>189</sup> Still demonstrating their support for Oviedo, the Paraguayan people elected his running mate, Raul Cubas, as the new president. After winning the presidency, one of President Cubas's first acts in office was to free his friend and mentor, Oviedo.<sup>190</sup> Following this pardon, President Cubas arranged a second military tribunal, composed mostly of Oviedo's friends, that dismissed all charges against him.<sup>191</sup> The vice-president of Paraguay admitted that Cubas's decision to pardon Oviedo was founded on "a slightly exotic interpretation" of Paraguayan law.<sup>192</sup> Paraguay's Supreme Court declared Cubas's acts unconstitutional and ruled that Oviedo must go back to jail.<sup>193</sup> While at first lacking the two-thirds majority necessary to impeach President Cubas, the Paraguayan Congress did possess the simple majority needed to block all legislation.<sup>194</sup> The controversy between Congress and the president continued to rage with the vice-president speaking out

<sup>185</sup> See *id.*

<sup>186</sup> See Mike Williams, *Chavez Shakes Up Venezuela-and the Hemisphere*, ATLANTA J. CONST., Sept. 19, 1999, at B1. Following the lead of other Latin American presidents, Chavez proposes to change the constitution to allow the president to serve two consecutive six-year terms. Under the current constitution, the president may only serve one, five-year term. See *Caribbean Jacobinism*, ECONOMIST, Aug. 14, 1999, at 29-30.

<sup>187</sup> Williams, *supra* note 186.

<sup>188</sup> See *Paraguay's General Makes His Come-back*, ECONOMIST, May 16, 1998, at 33.

<sup>189</sup> See *Deadlock*, ECONOMIST, Dec. 12, 1998, at 36.

<sup>190</sup> See *id.*

<sup>191</sup> See *id.*

<sup>192</sup> *New Paraguayan President Frees Former General Jailed in '96 Incident* (visited Jan. 23, 1998) <<http://cnn.com/WORLD/americas/9808/19/paraguay.general/index.html>>.

<sup>193</sup> See *Deadlock*, *supra* note 189, at 36.

<sup>194</sup> See *id.*

defiantly against the acts of President Cubas.<sup>195</sup> In a bloody turn of events, Vice-President Argana was murdered on March 23, 1999.<sup>196</sup> Witnesses claim that the murderers were dressed in army fatigues. The murder of Argana finally convinced two-thirds of Congress that President Cubas should be impeached.<sup>197</sup> Rather than face a trial, Cubas resigned and sought asylum in Brazil.<sup>198</sup> Lino Oviedo also fled the country and was given asylum in Argentina.<sup>199</sup>

These tumultuous events have lessened the optimism surrounding Paraguay's democratic and peaceful presidential election. The new president, although a supporter of the slain vice-president, still has many ties to the previous military regime.<sup>200</sup> Further, Lino Oviedo may still have plans to regain control not only of his party but also of the country. For now, though, the country's fragile democracy appears to have been preserved.

## V. THE STABILITY OF THE JUDICIARY

Finally, in determining the strength of democracy, the state of the judiciary warrants consideration. A strong judiciary bringing about "an enforceable, compulsory, and foreseeable rule of law" is an essential foundation for a strong democracy.<sup>201</sup> Historically, though, many of the judicial systems in Latin America have been strongly controlled both by overly political factions and by the other branches of government.<sup>202</sup> This has led not only to a weak and ineffective judiciary but also to a weaker democracy. President Fujimori cited the extreme power of the judiciary as a justification for his coup.<sup>203</sup> The military officers behind the coup in Venezuela noted the corruption of the judiciary as one reason for their coup attempt.<sup>204</sup>

Several obstacles, including political instability, corruption in the judicial system, and powerful groups with private interests in maintaining the status

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<sup>195</sup> See *Fratricide*, ECONOMIST, Mar. 27, 1999, at 38.

<sup>196</sup> See *id.*

<sup>197</sup> See *id.*

<sup>198</sup> See *Paraguay*, ECONOMIST, Oct. 9, 1999, at 36.

<sup>199</sup> See *id.*

<sup>200</sup> See *The Woes of Three Uncertain Mini-democracies*, ECONOMIST, Apr. 3, 1999, at 29.

<sup>201</sup> Edgardo Buscaglia, *Obstacles to Judicial Reform in Latin America*, in JUSTICE DELAYED: JUDICIAL REFORM IN LATIN AMERICA 15, 15 (Edmundo Jarquin & Fernando Carrillo eds., 1998).

<sup>202</sup> See *id.*

<sup>203</sup> See Jorge Correa Sutil, *Modernization, Democratization and Judicial Systems*, in JUSTICE DELAYED: JUDICIAL REFORM IN LATIN AMERICA, *supra* note 201, at 97, 97.

<sup>204</sup> See *id.*

quo, have hindered judicial reform over the years.<sup>205</sup> As a consequence, the public has little trust in the judiciary.<sup>206</sup> Further, this distrust has been heightened by the slow workings of the judiciary and by the limited access to the judiciary.<sup>207</sup> Although these obstacles are serious, many Latin American countries, along with constitutional reform, have also begun much needed judicial reform.

In Colombia, the 1991 Constitution reaffirmed the independence of the judiciary and set up controls allowing it to work free of interference from the other branches.<sup>208</sup> Colombia's 1886 Constitution established the independence of the judiciary, but a strong executive power slowly eroded this independence.<sup>209</sup> The executive branch gained power over the judiciary by expanding the role of the military courts. The constitution provided that military courts would have jurisdiction over "crimes committed by members of the military while on active duty and relating to military service."<sup>210</sup> This provision was interpreted broadly and soon included jurisdiction over common crimes committed by members of the military and civilians in the employment of the military.<sup>211</sup> The government's establishment of the Courts of Public Order furthered weakened the judiciary by giving these special courts jurisdiction over terrorist crimes or activities linked with terrorism. Also, the executive branch restricted the right to habeas corpus.<sup>212</sup>

On July 4, 1991, Colombia adopted its new constitution and incorporated substantial reforms into the structure and operation of the judicial system.<sup>213</sup> The new constitution created new judicial bodies and significantly altered the functions of the older bodies. The Office of Public Prosecution (Fiscalia General) was created to prosecute crimes. Through this system, the Colombian judiciary moved toward an accusatory system of justice rather than the traditional inquisitorial style, where the judge had the sole power to investigate and prosecute crimes.<sup>214</sup>

<sup>205</sup> See Buscaglia, *supra* note 201, at 21-29.

<sup>206</sup> See Néstor Humberto Martínez, *Rule of Law and Economic Efficiency, in* JUSTICE DELAYED: JUDICIAL REFORM IN LATIN AMERICA, *supra* note 201, at 3, 3.

<sup>207</sup> See *id.* at 7-8.

<sup>208</sup> See Donald T. Fox & Anne Stetson, *The 1991 Constitutional Reform: Prospects for Democracy and the Rule of Law in Colombia*, 24 CASE W. RES. J. INT'L L. 139, 150 (1992).

<sup>209</sup> See *id.*

<sup>210</sup> *Id.* at 150-51.

<sup>211</sup> See *id.* at 151.

<sup>212</sup> See *id.* at 152.

<sup>213</sup> See LINN A. HAMMERGREN, *THE POLITICS OF JUSTICE AND JUSTICE REFORM IN LATIN AMERICA: THE PERUVIAN CASE IN COMPARATIVE PERSPECTIVE* 241-44 (1998).

<sup>214</sup> See *id.* at 244.

The right of habeas corpus also was strengthened, especially in regards to the military courts.<sup>215</sup> Petitions for habeas corpus were required to be answered within thirty-six hours. Further, citizens could seek an immediate injunction for any act or omission by a public official that violated any constitutional right.<sup>216</sup> Within ten days, a court was required to either grant or deny the injunction and any appeal would proceed before the Constitutional Court.<sup>217</sup>

While these reforms are an encouraging start toward an effective and democratic judiciary, two areas pose special concern. First, the military continues to exert considerable power in the judicial sector. Military courts have "exclusive and final jurisdiction over crimes committed by officials during the course of active duty or during counterinsurgency operations."<sup>218</sup> Further, these courts also exert jurisdiction over the police. A second area of concern involves the special courts used to try terrorism and drug trafficking.<sup>219</sup> Although reforms have been made to these courts, including affirming the prisoner's right to habeas corpus, the controversy remains over the courts' existence in the first place.<sup>220</sup>

As with any reform, the changes have been criticized because of their poor implementation and also because of the political ramifications of the changes.<sup>221</sup> However, the reformers' work should not be disparaged.<sup>222</sup> While the future remains uncertain, there is hope that these same forces that rose up to demand judicial reform will also work together to make the judicial reforms effective.

Chile's return to democracy after the rule of Pinochet led to many proposals for judicial reform as well. As in Colombia, the Chilean military courts had extensive jurisdiction.<sup>223</sup> One study suggested that during Pinochet's rule around ninety-five percent of all people prosecuted by military courts were civilians that had committed non-military crimes.<sup>224</sup> Because of

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<sup>215</sup> See *id.* at 244-45.

<sup>216</sup> See *id.* at 245.

<sup>217</sup> See *id.*

<sup>218</sup> *Id.*

<sup>219</sup> See *id.*

<sup>220</sup> See *id.* Especially objectionable is the use of "faceless judges." *Id.*

<sup>221</sup> See *id.* at 246-47.

<sup>222</sup> See *id.* at 248.

<sup>223</sup> See Robert G. Vaughn, *Proposals for Judicial Reform in Chile*, 16 FORDHAM INT'L L.J. 577, 591 (1992/1993).

<sup>224</sup> See *id.*

laws giving military courts criminal jurisdiction over civilians, the military courts actually handled more cases than the civilian courts.<sup>225</sup>

In some areas legislation has been passed restricting military jurisdiction, and proposals have been made to further restrict the jurisdiction of military courts.<sup>226</sup> One proposal includes supervision of military courts by civilian courts.

While these countries offer an encouraging picture, Peru's judicial branch offers a somewhat bleaker view. During 1992, President Fujimori began setting up military tribunals in an attempt to bring quick and effective justice upon accused terrorists.<sup>227</sup> In order to protect the judges and prosecutors from retaliation from terrorists, these courts were made up of "faceless" military judges.<sup>228</sup> Critics argued that these military trials proceeded too quickly for the judges to have actually considered the evidence<sup>229</sup> and that defendant's lawyers were denied adequate preparation time.

Although the terrorist insurrection has now been contained, the Peruvian government continues to rely on the military to restore order. On May 23, 1998, the government of Peru issued the first of a series of decrees changing the criminal law of Peru in order to confront the rapidly rising crime rate.<sup>230</sup> These changes included the expansion of military tribunals and the restriction, and sometimes abrogation, of the right of habeas corpus.

Article 173 of the 1993 Constitution states that civilians will not be subject to military tribunals except in the case of terrorist activity as determined by the law.<sup>231</sup> President Fujimori, however, gave these military tribunals jurisdiction over civilians accused of non-terrorist crimes. He circumscribed the constitution's clear prohibition of this act by redefining the word *terrorist*.

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<sup>225</sup> See *id.*

<sup>226</sup> See *id.* at 592.

<sup>227</sup> It is always important to keep in mind that for most of the 1980s and into the 1990s, the Peruvian government was attempting to contain a very powerful and deadly terrorist force, the Shining Path. Terrorist activity accounted for at least twenty-three thousand reported deaths as well as ten billion dollars in damages to the country's infrastructure. Palmer, *supra* note 1, at 250. To put those numbers in perspective, the damage done by terrorists equaled eighty percent of Peru's external debt and "six times more than its annual, legal exports." Strong, *supra* note 173, at 217.

<sup>228</sup> See HAMMERGREN, *supra* note 213, at 90. Along with faceless judges, these tribunals also use anonymous witnesses. *Id.* at 120.

<sup>229</sup> See *id.* at 120.

<sup>230</sup> *Ley de Terrorismo Agravado No Garantiza Debido Proceso*, EL COMERCIO (published May 24, 1998) <<http://www.elcomercioperu.com.pe/webcomercio/4/1998/5/25/terrogra.txt.html>>.

<sup>231</sup> CONSTITUCION POLITICA DEL PERU art. 173.



The new laws defined *aggravated terrorism* as “illicit acts against the body, life and health, against liberty, against property and the public safety committed through criminal organization.”<sup>232</sup> The redefining of the word *terrorism* and the increased jurisdiction of military tribunals received criticism from various sectors. One commentator noted that terrorism is an act against the state with the intent of creating unrest throughout the country.<sup>233</sup> Enrique Chirinos Soto, president of the Constitutional Commission, noted that these measures were unconstitutional because they did not conform to the parameters set out in the 1993 Constitution.<sup>234</sup> Another member of Congress sharply disagreed with the policies of the government that allowed civilians, even delinquents, to be tried by military tribunals. “In military courts,” he said, “civilians have fewer guarantees, the sentence cannot be reviewed by the Supreme Court and all of the timetables are shorter.”<sup>235</sup> Ultimately, these acts lead away from a democratic nation and toward a militarized country. Constitutionalist Raul Ferrero Cost voiced his concerns that the government was on the road to the militarization of the country. No matter how horrible the crime wave, he noted, the acts are within the jurisdiction of civilian courts and should be dealt with by these courts.<sup>236</sup>

Another area of concern is the right guaranteed by article 2(24)(f) of the 1993 Constitution. This article states:

Every person has the right to: liberty and personal safety. In consequence: No one can be detained except through written order from a judge or from the police authorities in cases of flagrant acts. The detained should be put at the disposition of the corresponding judiciary in a twenty-four hour time span. . . This timetable does not apply to cases of terrorism, spying and illicit drug trafficking.<sup>237</sup>

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<sup>232</sup> *Necesarias Correcciones*, EL COMERCIO (published June 8, 1998) <<http://www.elcomercioperu.com.pe/webcomercio/6/1998/6/8/edito.txt.html>>.

<sup>233</sup> *See id.*

<sup>234</sup> *See Preocupación Compartieron Representantes del Congreso*, EL COMERCIO (published May 22, 1998) <<http://www.elcomercioperu.com.pe/webcomercio/4/1998/5/22/8leyes.txt.html>>.

<sup>235</sup> *Id.*

<sup>236</sup> *See Figura de Terrorismo Agravado Conduce a Militarización del País*, EL COMERCIO (published May 22, 1998) <<http://www.elcomercioperu.com.pe/webcomercio/4/1998/5/22/3leyes.txt.html>>.

<sup>237</sup> CONSTITUCION POLITICA DEL PERU art. 2(24)(f).

The new laws allow those suspected of *aggravated terrorism* to be held for fifteen days without the right to a lawyer.<sup>238</sup> Under the 1993 Constitution, this would be a violation of a person's liberties. The government once again avoided conflict by simply redefining the word *terrorism*, thereby making the law technically legitimate.

Interestingly, in studying the Peruvian judicial reform, recurring issues surface, such as the stability of constitutional reform as well as the leaders' commitment to democracy. Illegitimate reform, even though for a good cause, eventually weakens democracy.

## VI. CONCLUSION

Stability in these four areas—constitutional reform, democratically elected leaders, democratic elections, and judicial reform—are by no means exclusive. However, they do shed important light on the state of democracy in Latin America. In comparing the different countries, the struggle between democracy and authoritarianism becomes clearer. And while some countries are advancing more quickly toward democracy, all Latin American countries evince the possibility of completely embracing and flourishing under a democratic government. After reporting on the recent coup in Ecuador, one writer aptly summed up the situation: “[O]nly the naive ever thought democracy would effortlessly flourish in countries that are still mostly poor and unequal. The good news is that it is not about to wither.”<sup>239</sup>

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<sup>238</sup> *Necesarias Correcciones*, *supra* note 232.

<sup>239</sup> *A Warning From Ecuador*, *supra* note 49, at 24.