

Limits to the Fundamental Rights of the Military in Peru

Analysis of the 13 March 1999 Subordination Act

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“My freedom ends where yours begins.”

Martin Luther King

In Peru, as in other countries, military personnel's exercise and enjoyment of fundamental rights is restricted due to the inherent military subordination required. However, the last authoritarian government in Peru forced Peru's military, under the guise of obedience and discipline, into an abusive subordination environment to justify an even greater restriction of their rights.

From 28 July 1990 to 22 November 2000, Peruvian President Alberto Fujimori forced the Armed Forces to assume a role of blind obedience to himself, under the legal argument that the President of the Republic is the Supreme Commander in Chief of the Armed Forces and the National Police, and thus, the Armed Forces were to accept his orders without question.

Fujimori became president when Peru's Political Constitution of 1979 was in effect, Article 2 of which established the population's rights; a list that was open to include other rights of similar nature, rights based on the dignity of men or on the principles of the sovereignty of the people, of the rule of law and of the republican form of government. Additionally, several principles, typical of military organizations, were outlined as constitutionally relevant values, such as unity, discipline, hierarchy, the principle of political and trade union neutrality, and reserve.

In military life, by virtue of its inherent hierarchical structure and duty to obey lawful orders, the subordinate owes respect and obedience to his or her superior. However, all military orders given by a superior to a subordinate, either by commission or omission of a specific action, must be legal. Thus, if a subordinate knowingly obeys an illegal order, then it will not be considered exculpatory nor extenuating. Yet, during the Fujimori government period, the military high command gave orders that they and their subordinates knew were in legal disagreement with the laws they swore to uphold and defend.

According to Spain's Constitutional Court, discipline becomes an “essential value for guaranteeing the cohesion of the Armed Forces,”¹ essential for military institutions to comply within a nation's constitutional framework. Thus, discipline

is an essential condition for the existence of any military institution and is based on command and obedience.

Peru's Political Constitution of 1979 established several prohibitions for military personnel, such as exercising the right of petition, running for elected office, participating in political activities or demonstrations, and carrying out proselytizing activities (until post retirement). Peru's armed institutions then, in turn, established internal rules accordingly.

These prohibitions, according to the Constitutional Court of Peru, "seek to safeguard the non-political character of the Armed Forces and the Peruvian National Police (PNP) in order to protect the professional military from the fickleness of a national political life and avoid their institutional politization. That is, allow them to serve objectively in compliance with the goals assigned to them by the Constitution, aside from certain interests of current governments or their own, either corporate or private."²

Three years after assuming power, Fujimori enacted the Constitution of 1993, effective on that day, but not enacted officially until 9 November 2007, when disciplinary standards were consolidated under Law No. 29131, Disciplinary Regime of the Armed Forces Act. Both the Constitution of 1979 and 1993 restricted the exercise of the following fundamental rights of military personnel:

Recognized Rights Curtailed	Political Constitution of Peru of 1979	Political Constitution of Peru of 1993
Freedom of information, opinion, speech and dissemination of ideas regarding national security issues, without previous authorization nor censorship nor any impediment	Article 2 item 4	Article 2 item 4
Freedom to choose place of residence, to travel throughout the national territory and abroad, except limitations for reasons of health or by judicial order or application of the immigration law	Article 2 item 9	Article 2 item 11
Freedom of assembly, for demonstration purposes, in public squares and roads	Article 2 item 10	Article 2 item 12
To participate individually or in association in the political life of the country.	Article 2 item 16	Article 2 item 17 and Article 35
To formulate petitions	Article 2 item 18	Article 2 item 20
To peace, tranquility, enjoyment of free time and rest, as well as to enjoy a balanced and adequate environment for the normal course of life	Article 2 item 15	Article 2 item 22
To a legitimate defense	It was not regulated	Article 2 item 23

Recognized Rights Curtailed	Political Constitution of Peru of 1979	Political Constitution of Peru of 1993
To work freely subject to the law	Article 2 item 13	Article 2 item 15
To an eight-hour (8) workday or forty-eight-hour (48) workweek as a maximum. In case of cumulative or non-typical workday, the average of hours worked in the same periods cannot be greater than said maximum	Article 44	Article 25
To the right of unionization, collective bargaining and strike	Article 61	Articles 28 and 42
The members of the Armed Forces and the National Police have the right to vote and to citizenship participation, regulated by law. They can neither run for elected office, participate in political activities or demonstrations nor conduct acts of proselytizing, until they have reached retirement, according to the law	The right to vote was not regulated Article 67	Article 34
The Armed Forces and the National Police are not deliberative. They are subject to the constitutional power	Article 278	Article 169

Table. Rights recognized in the Peru's Political Constitution of 1979 and 1993 with restrictions for the Armed Forces

Source: Author

The legal condition of an active military person puts him or her in a “special subordination relationship”³ that according to Iñaki Lasagabaster Herrarte is defined as “a reduction of the rights of citizens, or of the institutionally planned systems for their guarantee, as a result of a qualified relationship with public powers, derived from constitutional mandate or legislation, that can be, in some cases voluntarily assumed, and that, in turn can be accompanied by the recognition of certain specific rights in favor of the citizen affected by such condition.”⁴

That special subordination relationship is invoked to automatically justify the limitations of fundamental rights and many times extends its effects to the activities of military personnel both in and out of service, affecting personnel’s personal or private lives, and clashing with other rights and principles that seem not to have a judicial relevance at first sight, but that do entail the principle of legality and judicial guarantees.

After two years of constitutional government, Alberto Fujimori conducted his own coup on 5 April 1992, and established his “Government of National Emergency and Reconstruction,” as a response to the terrorist groups Shining Path (Sendero Luminoso) and the Revolutionary Movement Túpac Amaru (MRTA), which were engaged in an insurrectionist war against the government. The

decision for the self-coup, which openly violated Article 278 of the Constitution of 1979, was unanimously backed by the Armed Forces, the PNP and the National Intelligence Service (SIN, by its acronym in Spanish), who justified their support, at the time, by stating: “*The Armed Forces and the Police Force are not deliberative. They are subject to Constitutional Power.*” This was made possible as, since before the self-coup, an institutional collapse had taken place inside all the state's entities, including the Armed Forces, the latter having been seriously discredited and deteriorated, since the 1980s, by the continuous countersubversive fights against Shining Path and MRTA. Under these circumstances Fujimori laid the groundwork for the Armed Forces be able to effectively confront terrorism through extra-legal, non-democratic channels; starting with the manipulation of military institutions and their institutional subordination to civilian power, specifically himself and his presidential advisor Vladimiro Montesinos Torres.

Part of that groundwork included conferring on the Armed Forces complete oversight of pacification actions and placing the PNP under its command, with full authorization to intervene by all means necessary in the fight against terrorism. The Armed Forces were granted absolute power in both emergency and non-emergency declared areas, full entry into prisons, university premises, and in any other areas deemed necessary. Thus, the Armed Forces had *carte blanche*, without any restrictions, to act under the guise of their countersubversive strategy without any congressional oversight, and later placed these powers in the hands of the president himself.

The president's advisor, Montesinos, had served as an intelligence officer in the Army (although ousted in 1977 when he was accused of selling state secrets to the CIA).⁵ Thus, Montesinos understood the intricacies of the Armed Forces' inner workings and its inner conflicts of power. His background uniquely allowed him to take advantage of the military forces' weak institutionalized structures and reorganize the SIN with Fujimori's consent, allowing him to control activities not only against civilian opponents but the military institutions themselves. He took advantage of direct control to not only warn him of any possible coup d'état, but to facilitate Fujimori's own self-coup later.

Since the self-coup of April 1992, and until March 1999, Fujimori and Montesinos were able to reign with only a few civilians and a small segment of the press voicing any opposition, due to the fear inherent from the absolute power they had established.

On 13 March 1999, the president of the Joint Armed Forces Command (CCF-FAA, by its acronym in Spanish) called a meeting with 400 officers of the Armed Forces and the PNP at the “José Ruiz” Auditorium, in Las Palmas Air Base. That was not the first time that the military were called to a meeting of this kind; in

fact, after the self-coup of 1992, the military high command was constantly called in to receive Montesinos' illegal orders, which they later communicated to their respective military institutions. These types of calls were already customary, but this time the difference was the purpose and composition of the meeting: not only were high command leadership invited, but also intermediate level officers as well.

As customary, all military meetings organized by the Joint Command were authorized by Montesinos and had an apparent purpose and a real purpose, and this meeting was no exception. On the one hand, the apparent purpose of the meeting was to sign a document to state the support of the Armed Forces for the self-coup of 5 April 1992 and defend the amnesty laws that protected the military and police forces from being held individually liable for human rights violations between 1980 and 1995. The document was called, by the press and the political media, as the "Subordination Act." It consisted of nine agreements and, in the third and fourth agreements, it alluded to a secret commitment of honor that all officers most uphold, further delineated in clause nine of the same act. However, the real purpose for this act was for Montesinos, who was already controlling the Armed Forces and the PNP via the SIN, to have official control via the commitment in writing of the high and intermediate commands of the Armed Forces, and thus deter any possible military action that could be contrary to the plans in place for the reelection of Fujimori.

In this meeting, attended by Montesinos, then General of the Peruvian Army, César Saucedo Sánchez, President of the Joint Command of the Armed Forces, declared that this document constituted an historical act that did not signify that the Armed Forces were becoming politicized; even in light of its clear violation of the Armed Forces' requirement for political neutrality, which had already been violated by the military's support of Fujimori's self-coup of 1992. This act was one more proof of the formalization of "blind obedience" of the Armed Forces and the PNP to Fujimori and Montesinos.

Iván Degregori calls the Fujimori government period as the "black phase;" he defines it as a dark period of the history of peruvian institutions, although some politicians argue that this was made possible by individuals within the Armed Forces' institutions, and not the institutions themselves. Nonetheless, the increased subordination and deterioration of Peru's military institutions became an illegal and delegitimized instrument in support of Fujimori and Montesinos. However, the context in which the Armed Forces coexisted at the moment of signing the Subordination Act should be taken into account, as they had little institutional cohesion and internal discipline, and lacked true military leadership capable of confronting Montesinos, while those military members that stood up to this abuse of power were demoted and sidelined.

The Subordination Act was not widely known until April 2001, when the Congress of the Republic made it public. It surprised Peruvian society to see that the military and police high command had signed a document in which they pledged to defend, protect, and support their members against any responsibility or reprisal for violations of human rights. It became clearly apparent that it was a way to shield Alberto Fujimori, military members under the command of Montesinos, and Montesinos himself from the avalanche of trials for killing, kidnapping, or torturing that they knew would follow if Fujimori was not reelected in 2000, which was the case.

The signing of the act by a great majority of the military not only meant their adhesion to its stipulations, but also acceptance of its implied coercion, as anyone not signing the agreement would either receive a letter of invitation to retire, or worse, be subject to retaliatory action. One example is the case of Major General of the Peruvian Army, Rodolfo Robles Espinoza, who denounced that he was victimized because he revealed to the public the existence of a death squad, called Grupo Colina, organized by the SIN. As a reprisal, he and his family received death threats and he was criminally prosecuted via Court Martial, concluding in his forced retirement, without benefits, after almost 30 years of service in the Peruvian Army.

Without any doubt, the signing of the Subordination Act in 1999 demonstrated the weakness of the military and the ambition of those puppet upper echelons in the Armed Forces that took advantage of opportunities for their own benefit. Thus, the SIN built by Montesinos with the help of the military was able to get into all levels of military institutions in such a way that nobody was safe from being spied upon, which made it possible to infringe on military members' right to freedom of speech, freedom of movement and transit, enjoyment of free time and rest. Additionally, many were the career plans of military members that were harmed, along with the principles of hierarchy, obedience, and discipline.

Limitation of the right to freedom of speech, opinion, and dissemination of ideas

During the Fujimori government, no military member wanted to be recorded stating anything that could seem to oppose the regime, since there were no guarantees for the exercise of the freedom of speech, opinion and dissemination of ideas, and above all, against the fear of reprisals. They were completely silenced with deep military secrecy; their silence due to their signed commitment to Montesinos via the Subordination Act, which truly exemplified George Washington's

warning that “if freedom of speech is taken away, then dumb and silent we may be led, like sheep to the slaughter.”

Limitation to the right of the freedom of movement or freedom of transit, right to enjoyment of free time and rest, and the right to work freely

The limitation of the right to freedom of movement or freedom of transit seriously affected the military; as Montesinos directed the scheduling of a military member from the moment they got up in the morning until they went to bed, with no room to exercise their own discretion on many occasions. Some military personnel even had to move to the Peru’s Military Command Circle to provide personal protection to Fujimori and his family. When Fujimori moved to the SIN’s headquarters, they also had to move with him (at the time Montesinos made Fujimori believe that an attack was being prepared against his life, and thus was able to move him to a military facility which denied access to civilians). The Truth and National Reconciliation Commission reported that the Lima magazine “Caretas” made it known that the Security Special Units, assigned to the security of Montesinos and Fujimori, were made up of more than 300 selected members of the National Police and the Peruvian Army who did not have a private life but were at the sole service of Fujimori, reporting only to Montesinos.⁶

The SIN’s listening group spied on civilians and military personnel 24 hours a day, and extended its power to 13,500 service agents of the Armed Forces and the PNP, and tightly controlled the movement of the military personnel assigned to protect the security of Montesinos and Fujimori. They controlled everything from housing, bathroom schedule, breakfast, relief schedule, bedtime, outings and returns, permits, trips outside their assigned offices, use of clothing during the outings, use of vehicles, among other issues that affected the private life of the silenced military members. If any military member needed to schedule even the smallest social event, to include any marital status change, they had to inform their superior. All of this constituted a clear infringement of their privacy and enjoyment of free time and rest.

In 1992, seven years before the signing of the Subordination Act, there was an attempt to depose Fujimori of the presidency. This attempt was attributed to a group of retired and active military officers. The active eavesdropping of the SIN and the spies placed by Montesinos helped to identify them. The officers were detained without a warrant, imprisoned and forbidden from any type of communication; they were later tried without due process, and sentenced to prison. It was obvious that after this attempted insurgency, Montesinos intensified all efforts to know, in detail, all movements and conversations of high command, and

exercised control over military discipline and jurisdiction over those not in agreement with the regime.

Fujimori and Montesinos were always interested, even more after the Subordination Act, in diminishing the public's respect of the military, necessary to undermine the public's perception of the military's ethical values and mystique from top to bottom. This further served to subordinate the military and harmed the public's perception of military service as a calling.

Harm to the right of a career

The fourth final and transitory stipulation of the political Constitution of Peru establishes the standards related to the rights and freedoms recognized by the Constitution, interpreted in conformity with the Universal Declaration of Human Rights, and the international treaties and agreements ratified by Peru. In other words, Peru's constitution established rights to match other international interpretations on the subject of human rights.

The right to a career is not a right expressly regulated in the Peruvian constitution, but was recognized by the Interamerican Court of Human Rights, the supranational entity to which Peru laws are subjected, and accepted by the Peruvian Judiciary. It is defined as part of the objective of freedom and its lessening seriously and irreparably alters the life of a person, and impedes that person from reaching his personal, family and professional goals.

The careers of many members of the military were harmed during the Fujimori Government, as the law controlling promotions was modified to allow arbitrary and corrupt decision-making. They were also harmed by the capricious permanent change of stations of military members, against established legal and traditional norms. Montesinos ensnared military command in inefficiency and mediocrity to ensure an easily controlled, servile, and less efficient military high command structure, consisting of only his close colleagues. They, in turn, were in charge to do the same with intermediate officers, as Rospigliosi Capurro clearly states: "Corrupt officers were ideal for their plans since that way they were easily blackmailed."⁷ All this with the intent to prevent any honest initiatives, opinions, and ethical objections, offenses that could remain in personnel's official records.

The clear process of de-professionalization of the Armed Forces during the Fujimori government directly impacted military discipline. The rampant corruption in promotions destroyed a profession that consisted of selfless sacrifices and total dedication. This transformed the military member, if they had any expectation of promotion or improvement in their career, into having a selling price, and resigned to march to the rhythm of the drum as ordered by the high command, so

they could be in good graces with Montesinos. This reality dominated the military environment until the fall of the Fujimori regime.

One example is the case of General Nicolás de Bari Hermoza Ríos, who for six years was Joint Command Chief of the Armed Forces (from 1992 to 1998). To make him unremovable, Fujimori offered retirement to the generals that could succeed him, since the real role of this general in the Fujimori government was revealed when he was tried, convicted, and sentenced to eight years for corruption in 2005, and to 25 years for the commission of aggravated homicide, kidnapping, forced disappearances and conspiracy in 2010.⁸

There was no doubt that the military's right to freedom, in its different forms, was most limited during the Fujimori government. Something forgotten during this period was that military members' limitations of freedom are not exempt to the principle of legality, as military code is also part of a state's framework of overarching rights under its laws.⁹

Twenty-three years have elapsed since the signing of the Subordination Act and yet, Peru's Armed Forces are still experiencing its long lasting effects. This has hampered the Armed Forces' ability to create a lasting future vision; as its military institutions still suffer from the effects of de-institutionalizing and de-professionalizing that took place under that period, in which recovery of military prestige has become a task of enormous proportions. It remains clear that the high command during the Fujimori government sowed in their officers a "cracked discipline;" with those intermediate officers being indoctrinated with a marked indifference towards the interests of the nation as opposed to their own interests. Changing this mindset must be the most important essential task of today's service members, since the future integrity of the Armed Forces will depend on it. □

Notes

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