

Democratization through Decentralization. Why Electoral Laws Matter

By Maria Bertel ¹

Abstract: Although Alberto Fujimori, the father of neo-populism stepped down almost 20 years ago, Peru is still struggling with his legacy: *Fujimorismo* is still dividing society and the Constitution of 1993 although amended various times since Fujimori resigned, is still in force.

One of the means to overcome the dysfunctional democracy during the Fujimori presidency was decentralization. Introduced in 2002 it was hoped to bring the government closer to the people through dividing power between the national and the regional level. Almost two decades later, the hopes linked with decentralization seem to have only been partly realized. For one, the decentralization process never really worked out as intended. For another, decentralization has only partially brought the government closer to the people – in fact, due to its shortcomings, it has brought corruption, one of the country’s major problems, to the regional level.

It is against this background, this contribution will analyze the main problems of decentralization itself and external problems (clientelism, corruption and populism). I will show how the decentralization process was influenced by the reforms undertaken by Congress, which focused on the design of the electoral laws and what to expect of the most recent electoral law reforms.

One of the problems of decentralization is that, in a way, decentralization reform is used by Congress as a tool to prove its ability to govern. Congress is often adopting solutions that are popular amongst voters with a low risk of adversely affecting themselves instead of really tackling the crucial problems. This fosters corruption and clientelism, which in turn make the population more open to populist leaders on the national and the regional level.

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A. Introduction

Latin American constitutionalism seems to be more interesting than ever, as the latest literature on the topic shows.² However, neither questions regarding the territorial division nor the actual situation of Peru are a big topic in academia.³ In the following, I want to show the problems Peru is facing almost 20 years after the authoritarian president Alberto Fujimori stepped down and how this is linked to democracy and the Peruvian model of decentralization.

In 1978, Peruvian sociologist Julio Cotler published his book “Clases, Estado y Nación en el Perú”.⁴ Without wanting to write a comprehensive history of Peruvian society, he carved out the cornerstones of some of its problems at the time. Some of his findings have not lost their relevance and, in the middle of what can be seen as a constitutional crisis⁵, form an important basis for investigating the constitutional and legal configuration of the Peruvian state. Some of Cotler’s observations in particular merit a mention since they are closely linked to the topic of decentralization and its challenges: the fact that Peru was a centralized country, its lack of an encompassing national identity,⁶ and the general failure of the ruling parties to organize society in a way that made it possible to establish a functioning state.⁷ Neither the military rule of Peru (1968–1980) nor the democratic governments following, led by presidents Fernando Belaúnde Terry (1980–1985) and Alan García (1985–1990) managed to overcome the problems mentioned by Cotler. Economic problems and the rise of the Maoist Shining Path movement (Sendero Luminoso)⁸ and of the Revolutionary Movement Túpac Amaru (Movimiento Revolucionario Túpac Amaru)⁹ accompanied the presidential elections in 1990 and led to the victory of the relatively unknown candidate Alberto Fujimori. President Fujimori changed the way politics worked and shaped what is now known as “neoliberal populism”¹⁰: With the self-coup on 5th of April 1992 he

2 See the handbooks *Armin von Bogdandy/Eduardo Ferrer Mac-Gregor/Mariela Morales Antoniazzi/Flávia Piovesan/Ximena Soley* (eds), *Transformative Constitutionalism in Latin America: The Emergence of a New Jus Commune*, Oxford 2017, *Rosalind Dixon/Tom Ginsburg* (eds), *Comparative Constitutional Law in Latin America*, Cheltenham and Northampton 2017.

3 The two handbooks mentioned in note 1, e.g., do not address the topics.

4 *Julio Cotler*, *Clases, Estado y Nación en el Perú*, Lima, 1978.

5 The Guardian 19.9.2018, Peru’s president in high-stakes gamble to push through anti-corruption reforms, <https://www.theguardian.com/world/2018/sep/18/martin-vizcarra-peru-anti-corruption-measure-reform> (last accessed on October 31, 2018).

6 Cotler, note 4, p. 48 f.

7 Cotler, note 4, p. 338.

8 On the history of the Shining Path, see, *Jerónimo Ríos/Marté Sánchez*, *Breve historia de Sendero Luminoso*, Madrid 2008.

9 On the history of the Revolutionary Movement Tupac Amaru, see *El País* 19.12.1996, *Resurge una guerrilla en el ocazo*, https://elpais.com/diario/1996/12/19/internacional/850950003_850215.html (last accessed on October 31, 2018).

10 *Carlos de la Torre*, *Populism in Latin America*, in: *Cristóbal Rovira Kaltwasser/Paul Taggart/Paulina Ochoa Espejo/Pierre Ostiguy*, *The Oxford Handbook of Populism*, Oxford 2012, p. 198.

dissolved Congress and suspended the Constitution. In 1993, after being pressured by the OAS, a new Constitution, designed for the needs of the newly elected president, was enacted. Fujimori should stay in power until 2000, despite of presidential term limits laid down in the 1993 constitution. A so-called authentic interpretation of the Constitution through a law of Congress, which was clearly an abuse of powers of the Congress, allowed Fujimori to stand for elections a third time.¹¹ This is just one example for the shift in style, Fujimori brought into politics. He didn't have to rely on a strong military, but with the help of Congress shaped the law to his advantage. Therefore, he could also claim to uphold democracy, as regular elections were taking place. However, a reliable secret service complemented the picture of a dysfunctional democracy.¹²

Fujimori's presidency was dominated by economic reforms (of neoliberal style¹³) and his successful fight against the Shining Path movement. However, his success against the Shining Path movement came at a high price: Already from 1983 on, the Peruvian army became involved in the fight against the Maoist Shining Path,¹⁴ which eventually escalated into a very violent conflict which engulfed almost the entire country, caused the deaths of around 69,000 people¹⁵ and also led to a strong rural exodus.¹⁶

The high degree of centralization of the country and its political instability were one of the main reasons for the rise of the Shining Path movement: the absence of the state in regions suffering from inequalities and poverty, cut off from modern amenities and progress.¹⁷ This was also emphasized by the Commission on Reconciliation and Truth¹⁸, which was set up to make peace with the past.

Decentralization, which was introduced through an amendment to the Peruvian Constitution in 2002, was meant to tackle the problems of a government geographically far from many people and can therefore be seen as an attempt to achieve a better presence of the state in remote areas. The idea was, that through sharing power between the central and the regional level and through elected governments on the regional level with political, economic and administrative autonomy, democracy could be strengthened and public services for

11 Rainer Grote, *The Republic of Peru: Introductory Note*, in: Max Planck Institute (ed), *OCW CM 292 (PE)*, Jurisdiction:Peru [pe], 2005.

12 NZZ 23.12.2003, Montesinos und seine verbrecherische Hydra, <https://www.nzz.ch/article98JL0-1.348079> (last accessed on October 31, 2018).

13 See, e.g. Philip Mauceri, *State Reform, Coalitions, and the Neoliberal Autogolpe in Peru*, *Latin American Research Review* 30 (1995), p. 7 ff.

14 CVR, *Informe Final* (2003), *Primera Parte, Sección primera, Capítulo 1*, 56.

15 New York Times 26.5.2012, *Peru Forced to Confront Deep Scars of Civil War*, <https://www.nytimes.com/2012/05/27/world/americas/peru-confronts-wounds-of-civil-war.html> and CVR, <http://www.cverdad.org.pe/pagina01.php> (both last accessed on October 31, 2018).

16 See the numbers of the Peruvian Statistics Institute, https://www.inei.gob.pe/media/MenuRecursivo/publicaciones_digitales/Est/Lib0018/capi2006.htm (last accessed on October 31, 2018).

17 CVR, *Informe Final*, 5, 53.

18 CVR, <http://www.cverdad.org.pe/> (last accessed on October 31, 2018).

the population would be improved. Moreover, it was hoped it would help overcoming the identity problem.¹⁹

Against this background, I will show the main problems of decentralization itself and external problems. I will moreover show how the decentralization process was influenced by the design of the electoral laws and what to expect of the most recent electoral law reforms,²⁰ as the legislator focused on electoral law reforms and neglected other structural reforms of decentralization.

This has consequences for politics on the regional as well as the national level, as the system promotes clientelist and sometimes even populist behavior of politicians. In this context, I rely mainly on the findings of Carlos de la Torre (on populism in Latin America)²¹, Rickard Lalander (concerning the link between decentralization and populism in Latin America)²², David Landau (concerning abusive constitutionalism in general)²³, Martin Tanaka (on the weak party structure of Peru on the national level)²⁴ Carlos Meléndez (both on the problems the weak institutionalization of Peruvian parties lets arise)²⁵ and Paula Muñoz (on clientelist practices in the Peruvian context)²⁶.

Based on the descriptive analysis, I will demonstrate how these different theoretical approaches work together in a combined way. I will argue that even supposedly less relevant developments can have a relatively large impact on the design of the democratic state.

- 19 This is reflected in Art 190 which was foreseeing the creation of bigger regions. Interestingly, the new regional governments are trying to develop regional identities through e.g. choosing their own hymn, see on that topic, *Maria Bertel*, Surgimiento de identidades regionales en la normatividad regional del Perú. Un análisis legal, in: Boletín del Instituto Riva-Agüero No. 37 (2014), p. 207.
- 20 I will start with the constitutional reform of 2015 and include the subsequent selected electoral reforms.
- 21 *Carlos de la Torre*, note 10.
- 22 *Rickard Lalander*, Descentralización y populismo. Desafíos teóricos y metodológicos en la investigación sobre las democracias representativas en América Latina, in: *Provincia* 33 (2010), p. 33.
- 23 *David Landau*, Abusive Constitutionalism, in: 47 *UC Davis Law Review* (2013), p. 189.
- 24 *Martin Tanaka*, Personalismo e institucionalización. La reforma de los partidos políticos en el Perú, Lima 2017.
- 25 *Carlos Meléndez Guerrero*, Perú. Partidos y outsiders. El proceso electoral peruano de 2006, in: *Desafíos* 14 (2006), pp. 40–68 and with regard to the migration of Venezuelan people to Peru and the rising xenophobia *Carlos Meléndez*, El Comercio 11.8.2018, Partido Xenófobo Peruano, <https://elcomercio.pe/opinion/rincon-del-autor/partido-xenofobo-peruano-carlos-melendez-noticia-545584> (last accessed on October 31, 2018).
- 26 *Paula Muñoz Chirinos*, Campaign clientelism in Peru: an informational theory, Dissertation, Austin 2013 and *Paula Muñoz Chirinos*, An Informational Theory of Campaign Clientelism: The Case of Peru, in: *Comparative Politics* 47, no. 1 (2014), pp. 79–98.

B. The decentralization process and its status quo

I. Background

Peru is no outlier when it comes to decentralization: Throughout the South American continent, decentralization processes²⁷ were set in motion beginning in the 1980s in close relation with democratization.²⁸ Decentralizing power should allow for the decision making not only on the national level, but also on the regional level through elected bodies.²⁹ The expectation was that this would not only lead to a better economic situation of the regions, but would also bring democracy closer to the people.³⁰

Decentralization, however, was not initiated until the early 2000s. Although the Constitution of 1993 already included a chapter on decentralization, it never became relevant; on the contrary: Fujimori slowly centralized the country into a “hyper centralistic” state.³¹ A genuine decentralization process only started with the changes made to the Constitution in 2002. More than 15 years later, the hopes linked with decentralization have not come true, as I will further explain in the following.

II. The decentralized and unitary state and the implications for power-sharing

Art 43 of the Peruvian Constitution states that the government of Peru is “unitary, representative and decentralized”. Art 188 ff of the Peruvian Constitution further lay down what Peru being a decentralized state entails.³² Art 188 states that “decentralization is a form of democratic organization and a mandatory, continued policy of the State, whose essential purpose is the comprehensive development of the country”, thus setting the context for decentralization: It is considered to foster development and is seen as inherently democratic. Decentralization is therefore a feature of the Constitution.

Since decentralization was not considered to be achievable all at once, when the Constitution was amended in 2002, decentralization was moreover characterized as a process

27 For a definition of decentralization see *Markus Böckenförde, A Practical Guide to Constitution Building: Decentralized Forms of Government*, IDEA, Stockholm 2011, p. 1.

28 *Jean Bossuyt*, Overview of the decentralization process in Latin America: Main achievements, trends and future challenges, European Centre for Development Policy Management, Discussion Paper 148, Maastricht 2013.

29 *Eduardo Ernesto Vega Luna et al*, El círculo de la corrupción en los gobiernos regionales, Lima 2018, 8.

30 *César Landa Arroyo*, Descentralización y jurisprudencia constitucional, in: *Revista Peruana de Derecho Constitucional* 7 (2014), p. 41 ff and *Eduardo Ernesto Vega Luna et al*, El círculo de la corrupción en los gobiernos regionales, Lima 2018, 8.

31 *Domingo García Belaunde*, La descentralización en el Perú actual, in: *Anuario Iberoamericano de Justicia Constitucional* 9 (2005), p. 745.

32 This entails the question of the territorial basis of the regional governments (Art 189 and 190), the organization of the regional governments (Art 191), their competencies (Art 192) and provisions on finances (Art 193).

which should be “carried out in stages, in a progressive and orderly manner, following criteria that permit the proper distribution of jurisdictions and transfer of resources from the national government to local and regional governments” (Art 188).

Characterizing decentralization as a feature and a process inevitably leads to a tension: How can the state be decentralized and continue decentralization, without turning into a genuine federal state at some point? This tension is reflected in the Constitutional Court’s distinction between a “unitary decentralized” and a “unitary *and* decentralized” state, which the Court introduced in 2005. The difference between the two concepts is, according to the Court, “not a simple word game”³³. It is about “profound differences in the horizontal distribution of power”³⁴. The unitary decentralized state is a state where regions do not enjoy real autonomy, but play an executive role (“*verdadera autonomía, pues si bien tienen importantes potestades reglamentarias y ejecutivas, éstas, finalmente, reducen su cometido a la ejecución de las leyes estatales*”³⁵). Unitary decentralization therefore means no real autonomy, but still some regulatory powers in the framework of the execution of laws.

Unitary *and* decentralized, however, goes beyond the mere execution of laws, as the Court explains. Peruvian regional governments have what the Court calls political autonomy. This translates into the possibility for citizens to elect the respective regional organs and into the capacity of regions to issue norms with legal rank.³⁶ However, the Court avoids the use of words which would clearly point at regional legislative powers, but rather uses terms such as “normative power”.³⁷ Yet whether this means that the regions have the power to legislate is contested and remains an unsolved problem.³⁸

The unclear situation on the legislative powers of regions is reflected in the distribution of competencies. In order to further determine regional autonomy Art 191 points at the respective competencies of the regions. Those competencies are laid down in Art 192 of the Peruvian Constitution. Art 192 introduces a list of the competencies of the regions with a general description of the aims of said regions. Regional governments should further “encourage the development and the regional economy, provide incentives for investments, ac-

33 Constitutional Court 0020–2005, n 34.

34 Constitutional Court 0020–2005, n 34.

35 Constitutional Court 0020–2005, n 34.

36 Constitutional Court 0020–2005, n 34.

37 In its decision Constitutional Court 00047–2004-AI/TC, n119, the Court argued that “[...] in regard to the national government it has to be remarked that it is not completely free to regulate any subject matter, but rather has to follow the distribution of competencies as it is laid down in the Constitution and the laws. Therefore, the distribution of competence is a material and competential limit to the exercise of the legislative function [of the national government]”.

38 The Constitutional Court is very cautious in that regard, see, case 00047–2004-AI/TC, n 119 where it laid down: “[...] in regard to the national government it has to be remarked that it is not completely free to regulate any subject matter, but rather has to follow the distribution of competencies as it is laid down in the Constitution and the laws. Therefore, the distribution of competence is a material and competential limit to the exercise of the legislative function [of the national government]”.

tivities and public services they are responsible for, in harmony with national politics and plans and local plans of development.”³⁹ This is followed by a list of specific competencies⁴⁰ which are a mixture of organizational matters and subject matters, the latter of which are almost completely confined to only one para (para 7). However, the competencies are not applicable directly but require further elaboration, especially para 7, where the subject matters are listed. Art 192 para 7 needs further elaboration because it explicitly states that regional governments can exercise their competences in different areas such as “agriculture, fishing, industry, agro-industry, trade, tourism, energy, mining, roads, communications, education, health, and the environment, according to law”⁴¹. In practice, most competencies exercised by the regional governments are transferred competencies in line with Art 192 para 7.

It is therefore not only left in the dark whether regions have the power to legislate, but even if this would be true if regions can rely on exclusive constitutionally guaranteed competencies, where they can act without a further law allowing them to exercise the competence.

This unclear situation is a first internal problem of decentralization with regard to power sharing and the vertical division of powers: Is legislative power really shared between the national and the regional level? And are regions at all competent to legislate?

III. Territorial implications

Even before 2002, when the decentralization process was initiated, Peru consisted of 24 departments (“departamentos”), one constitutional province (Callao) which counts as a department, and the capital city of Lima. The language used by the Constitution in its revised form suggests that the newly introduced governments were considered regional governments. One would therefore expect the regions to be the territorial basis for the regional governments. Although the regional governments were set up on the existing departments (Art 189), the plan was to create bigger regions, connecting two or more departments. This

39 Art 192 own translation.

40 The official English translation available on SPIJ (the platform for laws of the Ministry of Justice,) refers to “duties”. In my opinion (and with regard to the dictionary of the Real Academia Española, where the term “competencia” is explained as “Ámbito legal de atribuciones que corresponden a una entidad pública o a una autoridad judicial o administrativa”), the translation of “son competentes” as “duties” is not correct. See, <http://dle.rae.es/?id=A0gTnnL> (last accessed on October 31, 2018). This is further strengthened by a systematic approach: Art 192 para 9 states that regional governments can “present legislative initiatives in matters of their competence”. Here the Spanish text uses the term “competencia”; the English translation uses “jurisdiction”, which is not the same as competence. “Jurisdicción” means “Poder o autoridad que tiene alguien para gobernar” (<http://dle.rae.es/?id=MeIWIBy> (last accessed on October 31, 2018).

41 Official translation, [http://spij.minjus.gob.pe/CLP/contenidos.dii/CLPlegcargen/coleccion00000.htm/tomo00243.htm/sumilla00245.htm?f=templates\\$fn=document-frame.htm\\$3.0#JD_Consti93-ingls](http://spij.minjus.gob.pe/CLP/contenidos.dii/CLPlegcargen/coleccion00000.htm/tomo00243.htm/sumilla00245.htm?f=templates$fn=document-frame.htm$3.0#JD_Consti93-ingls) (last accessed on October 31, 2018).

plan, however, failed, because the result of the mandatory referendum was negative.⁴² Therefore, up until today, Peru counts 25 regional governments (including the Constitutional Province of Callao),⁴³ based on the departments.

This can be seen as a second problem of the decentralization process, as one of its basic ideas, the creation of new territorial units has failed.

IV. Organizational structure and the influence of electoral laws on decentralization

The norms on the organizational structure of the regional governments are laid down in the Constitution itself (mainly Art 191) and further elaborated in the organic law on the regions. The organizational structure of the regions is – beside electoral reform – one example where reforms have actually taken place (mainly in 2015).⁴⁴ The regional governments consist of a regional council, which acts as the normative and controlling organ, the regional governor⁴⁵, who is the executive organ, and a council of regional coordination, consisting of members of civil society and the mayors of the provincial municipalities. The latter council has advisory powers and coordinative functions according to the law. The regional council has between seven and 25 members, taking into account that each province counts at least one member and taking into account the electoral population. The regional governor and a vice-governor are elected directly for four years, immediate reelection is prohibited.⁴⁶ Members of the regional council are also elected directly for a period of four years.

Since the 2015 reform, regional governors can be cited to Congress when Congress requires it and according to a law that stipulates the prerequisites. This law still needs to be enacted by Congress.

This constitutional picture is complemented by the organic laws and laws elaborating the organizational part of decentralization.⁴⁷

The organizational structure of the regions is closely connected to electoral rules. The Constitution is silent on this topic. More concrete rules result from the respective laws, applicable to elections in general and to elections on the regional level specifically.

On the regional level, the initial design of the elections of the regional governor fore-saw that the candidate to obtain the most votes would be elected.⁴⁸ This resulted in the election of regional governors which did not have a substantive support of population. There-

42 <https://elcomercio.pe/peru/descentralizacion-regiones-jose-carlos-requena-260253> (last accessed on October 31, 2018).

43 See, Art 190 Constitution and the twelfth final and transitory provisions and http://www.peru.gob.pe/directorio/pep_directorio_poderes.asp?cod_poder=7 (last accessed on October 31, 2018).

44 Law N° 30305.

45 Initially the regional governors were regional presidents. This changed in 2015, when Congress decided on a reform (Artículo Único de la Ley N° 30305, publicada el 10 marzo 2015).

46 Initially reelection was possible.

47 Organic Law on the Regions (N° 27867), Basic Law on Decentralization (N° 27783).

48 Art 5 Law on Regional Elections (not amended).

fore, the provision was changed with an amendment in 2009.⁴⁹ Since then, a minimum of 30% of the votes is necessary to be elected, and a second round was introduced in case no candidate achieves 30% at once, where the candidate obtaining more votes gets elected. Together with the fact that the election of the members of the regional councils and the regional governors are not connected to each other, this can lead to unstable regional governments, as the regional governor might not be able to rely on a majority in the regional council.

At this point the crucial role of electoral rules for a successful decentralization process becomes clear. It is uncontested in the literature that the design of the electoral rules is one of Peru's biggest problems on the national as well as on the regional⁵⁰ and municipal level, as it has resulted in a weak party system.⁵¹ Parties can help to channel societal needs and wishes to the political sphere, as well as coordinate different societal needs and wishes in the political class as a whole. The absence of parties lead to the absence of this function and has had an impact on the coherence of the decentralization process and also influenced the national level.⁵² As Paula Muñoz has shown, the absence of parties can lead to political clientelism⁵³ and has furthered a national divide where the Popular Force of Keiko Fujimori, the daughter of former president Alberto Fujimori acts against the "official political class"⁵⁴, and the others oppose what is called *Fujimorismo*.⁵⁵

V. Fiscal aspects

Fiscal decentralization means to design redistribution.⁵⁶ The fiscal aspect in the decentralization process of Peru has gained quite some weight in literature, but in practice, there is

49 Art 2 de la Ley N° 29470.

50 See Art 17 Law on Political Organizations as amended in 2005 (Artículo 2 de la Ley N° 28581, publicada el 20 Julio 2005).

51 *Tanaka*, note 23.

52 *Christopher Sabatini*, Latin America's Lost Illusions: Decentralization and Political Parties, *Journal of Democracy* 2003, p. 138 ff.

53 *Muñoz*, note 26, p. 5 and 6.

54 *Diario Correo* 4.12.2014, Keiko Fujimori: "El pueblo está harto de mentiras", <https://diariocorreo.pe/politica/keiko-fujimori-el-pueblo-esta-harto-de-mentiras-548929/> and *El País* 30.11.2017, El fujimorismo en ofensiva contra las instituciones, https://elpais.com/internacional/2017/11/30/america/1512005358_100325.html (both last accessed on October 31, 2018).

55 *Público* 25.4.2016, Perú: la batalla contra el fujimorismo, <https://www.publico.es/internacional/peru-batalla-fujimorismo.html> (last accessed on October 31, 2018).

56 *José Laríos/Betty Alvarado/Elena Conterno*, *Descentralización Fiscal*, Trimestre Fiscal N 84 (without year), p. 619 f, available at https://www.mef.gob.pe/contenidos/pol_econ/documentos/Prodes_descentralizacion_larios_alvarado.pdf (last accessed on October 31, 2018).

hardly any decentralization of financial resources.⁵⁷ Art 193, which is the basis for fiscal decentralization, does not foresee the right of regions to institute taxes of their own design.⁵⁸ The regions rely therefore on governmental transfers.⁵⁹ Art 193 does not guarantee regions a certain amount of funding or a mandatory percentage of the national budget. This puts regions in a very weak position when it comes to spending. The only own income regions can rely on are resources from mining rights.⁶⁰ This leads to a need for compensating measures, as not all the departments have natural resources and can benefit from extraction.⁶¹ For this purpose, an equalization fund was installed through the basic law on decentralization.⁶²

It does not come as a surprise that one of the main claims of regions is a new design of fiscal decentralization, also securing a certain percentage of the national budget.⁶³

C. Main problems of the decentralization process

I. Inherent problems

The overview on the decentralization process above has revealed the most pressing problems of the Peruvian decentralization process: First, it is unclear whether regions have the power to legislate at all and if so, if legislative power is shared between the national and the regional level. Even if the answer to these questions lies in the negative and regions can only exercise secondary legislation, the distribution of competencies is ambiguous. Second, the organizational structure of the regions and the electoral rules lead to unstable regional governments. Third, regions almost completely rely on transfers from the national level. Therefore, they have to rely on the national level in exercising their competencies. The problem, that the process of installing bigger regions has failed has to be seen as the least one in that regard.

57 *Jorge Martínez Vazquez*, Fiscal Decentralization in Peru: A Perspective on Recent Developments and Future Challenges, International Center for Public Policy Working Paper 13–24, Atlanta November 2013, p. 27 ff.

58 *Andrés F. Muñoz/Emilio Pineda/Axel Radics* (eds), *Descentralización fiscal y disparidades regionales en América Latina: el potencial de las transferencias de igualación* (2017) 200.

59 *Francisco J. Ruiz de Castilla Ponce de León*, Potestad Tributaria de los Gobiernos Regionales y Locales, in: *Derecho & Sociedad* 33 (2009), p. 52.

60 *Ruiz de Castilla Ponce de León*, note 59.

61 Congreso de la República, Unidad Técnica “Observatorio de la Descentralización”, *Transferencias de tipo de canon, regalías, participaciones y otro* (2017), p. 23.

62 MEF, <https://www.mef.gob.pe/es/transferencia-y-gasto-social/transferencia-a-gobiernos-regionales> (last accessed on October 31, 2018).

63 Interview with Edwin Licona (president of the assembly of regional governments), El Comercio 21.6.2016, ANGR: “No nos den otro ministerio, sino las competencias”, <https://elcomercio.pe/lima/angr-den-ministerio-competencias-224494> (last accessed on October 31, 2018).

To the problems mentioned above adds the weak Constitutional Court, who could – at least in theory – act as a stabilizing factor. Especially shortly after the reform of the Constitution in 2002, the Constitutional Court had to decide several cases dealing with the decentralization process. Here, the institutional weaknesses of the Court and its politicization came into play.⁶⁴ On the basis of an already incoherent legislation, which could perhaps be saved by clear interpretations, the Court has failed to provide useful guidance. For one, the Court has not always managed to make decisions that not only resolve the case in question but moreover shed light on future developments. In general, the Court is very cautious if not outright timid to use clear language, and unfortunately its role in the further interpretation of the decentralization process was not always helping in disentangling the norms ruling the decentralization process. On the contrary: the Courts' jurisprudence is sometimes clearly furthering the interests of the central level, without taking into account the constitutional configuration of the decentralization process.⁶⁵

The problem can be illustrated, e.g., with the so-called Conga case.⁶⁶ In this case, the Court had to decide whether a regional ordinance declaring a certain region with water resources as a protected region (where mining projects were not allowed) was in line with the constitutional and legal delimitation of competencies. In fact, the Court did not really examine the constitutionality of the regional ordinance, but only referred to the national laws and their primacy.⁶⁷ Yet, the Court did not address the underlying question whether or not the protection of a certain area with hybrid resources was falling into the competence of the region. The methodological approach of the Court did not only not help to resolve the legal dimension of the problem, but couldn't solve the social side of the problem either.⁶⁸

Another big problem of the decentralization process has been its management. Although the initial situation did not look too bad, the institution responsible for overlooking the decentralization process, the National Council on Decentralization (*Consejo Nacional de Descentralización*), was all too soon (2007) dissolved in a legally problematic way. It was installed by law, but dissolved by a decree.⁶⁹ Whether this was in line with constitutional requirements was debated in Congress, but Congress finally did not revoke the decree.⁷⁰ The dissolution of this independent⁷¹ body where representatives of all three levels of government – the local, the regional and the national level – should have a seat can be

64 See, e.g. the 2013 crisis El País 19.7.2013, Crisis política en Perú por la designación de los miembros del Constitucional, https://elpais.com/internacional/2013/07/19/actualidad/1374270061_600378.html (last accessed on October 31, 2018).

65 Landa Arroyo, note 30, p. 44 and detailed for the Conga case p. 45 ff.

66 Corte Constitucional 0001–2012-PI/TC.

67 Landa Arroyo, note 30, p. 45 ff.

68 Landa Arroyo, note 30, p. 45 ff.

69 Decreto Supremo N° 007–2007-PCM.

70 See, <http://www2.congreso.gob.pe/Sicr/Prensa/heraldo.nsf/CNtitulares2/281BA5D22451421D0525727D0077EADF/?OpenDocument>

71 Not autonomous; for the difference see, *USAID*, Informe 22.

seen as an early sign of the growing fear of strong regions harbored by the central executive level and as a sign, that the political style had not profoundly changed since the restoration of democracy in 2002. Since its dissolution, the decentralization process is guided by the Secretary of Decentralization⁷², which is part of the Presidency of the Council of Ministers.⁷³

II. External problems – Corruption and Clientelism

1. General remarks

The problems faced by Peruvian democracy and others are reflected in the high level of corruption on practically all levels of the government. This also affects decentralization, as corruption seriously affects electoral campaigns through⁷⁴ and therefore the results of democracy. Reversely as Paula Muñoz has shown, the instable party structure in Peru furthers clientelist practices.⁷⁵ Again, clientelist practices are a strategy of populist forces in Latin America to communicate with the people, as Carlos de la Torre points out.⁷⁶

Corruption is not the exception but the rule in Peru, not only on the regional but also on the national and the municipal level of government. The Ombudsman of Peru issued a report on the topic in March 2017, using the term “megacorrupción”⁷⁷ to describe the current status quo. This is reflected by the ongoing investigations of the four former presidents (Alejandro Toledo, Alan García, Ollanta Humala, Pedro Pablo Kuczynski) in connection with the Odebrecht corruption scandal⁷⁸ that affected the whole continent.⁷⁹ The Odebrecht scandal perfectly illustrates the degree that corruption has reached and that it is not an isolated problem, as it involves not only Peru, but also Brazil, Venezuela, Colombia, the Dominican Republic, Panama, Angola, Argentina, Ecuador, Guatemala, Mexico and Mozam-

72 <http://www.descentralizacion.gob.pe/>.

73 Decreto Supremo N° 007–2007-PCM.

74 Susan C. Stokes, Political Clientelism, in: Robert E. Goodin (ed.), *The Oxford Handbook of Political Science*, Oxford 2011, Online Publication Date: Sep 2013, DOI: 10.1093/oxfordhb/9780199604456.013.0031 in Footnote 1.

75 Muñoz, note 26.

76 De la Torre, note 10, p. 195.

77 *Defensoría del Pueblo*, Informe Defensorial N 176, Planes sectoriales anticorrupción: recomendaciones para mejorar su formulación, Lima 2017, p. 3.

78 Odebrecht is a Brazilian construction company which bribed politicians all over the continent and even developed a whole system for that, see Business Insider 30.5.2017, One company has thrown politics in the Western Hemisphere completely off-kilter <https://www.businessinsider.com/what-is-the-odebrecht-corruption-scandal-2017-5> (last accessed on October 31, 2018).

79 El País 12.6.2018, La Fiscalía de Perú abre una investigación a tres expresidentes por el ‘caso Odebrecht’, https://elpais.com/internacional/2018/06/11/america/1528709622_391364.html?rel=st_r_articulo#1537293671878 (last accessed on October 31, 2018).

bique, as well as other countries still being investigated.⁸⁰ Bribery payments by the Odebrecht company were also used for electoral campaigns, with the prospect for Odebrecht to be contracted after the elections.⁸¹ Corruption itself is not a new phenomenon, but at the beginning of democratization in Peru and other places, the fight against it was simply not a priority.⁸²

2. Corruption, clientelism and the regional governments

Decentralization in its current design has led to the decentralization of clientelism and corruption.⁸³ At the end of 2016, more than 3000 cases of corruption were linked to regional governments.⁸⁴ In April 2017, the journal *El País* reported that out of 25 regional governors, 14 were somehow connected to corruption cases.⁸⁵ By then, six former regional governors had already been convicted because of corruption.⁸⁶ Corruption in regional governments is, therefore, a serious problem which not only harms public finances but also influences the electoral process. In many cases, the campaigns of candidates for the regional governor's office and their political movements are financed by regional businessmen. In return, public contracts are given to those companies. Regional corruption in Peru not only has this horizontal aspect (confined the regional level itself), but also a vertical one which links it to the national level. This vertical corruption aims at maintaining favorable relations with certain ministries in order to obtain good evaluation results of work done.⁸⁷ When

80 BBC 15.12.2017, Odebrecht case: Politicians worldwide suspected in bribery scandal <https://www.bbc.com/news/world-latin-america-41109132> (last accessed on October 31, 2018).

81 BBC, note 80 and Washington Post 23.1.2018, The corruption scandal started in Brazil. Now it's wreaking havoc in Peru., https://www.washingtonpost.com/world/the_americas/the-corruption-scandal-started-in-brazil-now-its-wreaking-havoc-in-peru/2018/01/23/0f9bc4ca-fad2-11e7-9b5d-bbf0da31214d_story.html?utm_term=.7d1cb8ea102b (last accessed on October 31, 2018)

82 *Carlos Sabino*, Democracia y corrupción en América Latina, <https://www.clublibertaddigital.com/ilustracion-liberal/5/democracia-y-corrupcion-en-america-latina-carlos-sabino.html> (last accessed on October 31, 2018).

83 See below.

84 *Diario Correo* 21.5.2017, Más de 3 mil casos de corrupción vinculados a gobiernos regionales, <https://diariocorreo.pe/politica/mas-de-3-mil-casos-de-corrupcion-vinculados-a-gobiernos-regionales-750999/> (last accessed on October 31, 2018).

85 *El País* 13.4.2017, 14 de los 25 gobernadores peruanos están condenados o tiene casos abiertos por corrupción, https://elpais.com/internacional/2017/04/12/actualidad/1492027007_887871.html (last accessed on October 31, 2018).

86 *El País*, note 85.

87 *José Carlos Rojas*, *El Peruano* 10.9.2018, El círculo de la corrupción en las regiones, <https://elperuano.pe/noticia-el-circulo-de-corrupcion-las-regiones-70937.aspx> (last accessed on October 31, 2018)

paired with the weak forms of institutional control, the picture that emerges is rather bleak.⁸⁸

3. Clientelism and Populism

Since Alberto Fujimori was elected president, (neo liberal) populism and clientelism has been a seemingly fixed part of the political landscape. Since structured parties are practically non-existent, elections for all levels of government tend to be “in the hands of actors who are characterized by de-ideologization, personalism, improvisation and weak leadership, short-time thinking in their rationality and excessive pragmatism.”⁸⁹ With regard to the regions it is the Congress who would have to decide on rules providing the basis for more stability regarding the political process.

As I will show in the following, reforms in the field of decentralization are not necessarily guided by the optimal solution, but rather serve as a political tool for Congress to show ability to govern without changing much (because of a lack of political will). The result are dysfunctional regional governments which do not serve the further democratization of the country. Following David Landau we could even talk about “abusive legalism”, and – adapting his definition of abusive constitutionalism – talk about “mechanisms of [... legal] change [...] to undermine democracy.”⁹⁰ This is also illustrated by Carlos Meléndez, who provides an in-depth analysis of Peru's problems with its unstable party structure.⁹¹

D. Solutions: Electoral reforms

I. General remarks

Against the problems of decentralization described above it does not come as a surprise that calls for reforms are constantly present. Whereas these reforms could be addressing all the topics mentioned with regard to decentralization, the legislator has focused on the electoral realm. Certainly, the problem of the vague distribution of competencies and linked to it legislative powers of the regions would have been the perfect topics for reform as well. How-

88 *Rojas*, note 87. Rojas says that “estamos ante un panorama desalentador de la viabilidad de la descentralización y la democracia en el Perú.”

89 *Martin Tanaka*, El sistema de partidos “realmente existente” en el Perú, los desafíos de la construcción de una representación política nacional, y cómo enrumbar la reforma política, Instituto Estudios Peruanos, Informe final, Lima 2007, 7. Own translation (original text “en manos de actores marcado por la desideologización, el personalismo, la improvisación y precariedad de los liderazgos, el cortoplacismo de su racionalidad, su excesivo pragmatismo.”) and *Muñoz*, note 26, p. 5 and 6.

90 *Landau*, note 23, p. 191.

91 Already early and relating to the regional level, *Carlos Meléndez Guerrero*, ¿Una descentralización sin partidos? El primer año de gestión del APRA en el gobierno regional de San Martín, IEP, Documento de trabajo N 138, p. 52 ff.

ever, one can assume that as this would probably entail further limitations on the power of the national level, it is more attractive to concentrate on other reforms.

Electoral reform has been one of the most pressing topics of the past several years, not only with regard to decentralization, one of its main aims being to strengthen the party system.⁹² But up until now, the reforms which have been realized do not seem to have much to offer with regard to stabilization. The examples analyzed show the crux, leading to abusive practices of the law: Often reforms start with good intentions, but they get changed in the law-making process in order to fit the needs of the ruling parties and turn into ineffective projects in the best case or are harmful or even discriminating in the worst case. In the following, I will analyze selected reforms, starting with the constitutional reform of 2015.

II. Constitutional reform of 2015

In 2015, Art 191 of the Constitution was amended⁹³ to change the denomination of regional presidents to regional governors, although this was only a minor part. The amendment made immediate reelection for regional governors impossible and included the possibility for Congress to cite regional governors to Congress. Moreover, Art 203 of the Constitution was amended in order to allow regional governors to file a claim about the unconstitutionality of a law regarding the regions with the Constitutional Court.⁹⁴ Whereas the latter has to be seen positive from the point of view of regions, especially the introduction of term limits is worth a closer look.

The driving force of the reform, especially of the introduction of term limits, was the fight against corruption and – according to the congressmen introducing the bill to parliament – the strengthening of democratic practices within parties.

The underlying problem was the misuse of public finances regarding the costs of reelections, as regional governors standing as candidates for reelection would often fund their campaigns with public money. Since other oversight institutions such as the General Audit Institutions and instructions by the National Council on Elections had failed to solve the problem, the prohibition of reelection was a renewed attempt to get rid of the problem.⁹⁵⁹⁶

It was assumed that the possibility of reelection had a bad influence on the political system and regional administration in general, as it furthered authoritarian political leaders and

92 See, e.g., El Comercio 28.1.2018, Letona sobre reforma electoral: “Los partidos son la base”, <https://elcomercio.pe/politica/ursula-letona-reforma-electoral-partidos-son-base-noticia-492646> (last accessed on October 31, 2018).

93 Artículo Único de la Ley N° 30305, publicada el 10 marzo 2015

94 Regional ordinances could be brought to the Constitutional Court before, see Art 200 para 4 Peruvian Constitution.

95 Dictamen recaído en los Proyectos de Ley N° 292/2011-CR, 1426/2012-CR 2566/2014, 3318/2013/CR y 3404–2013-CR, que proponen reformar la Constitución prohibiendo la reelección inmediata de Presidentes y Vice Presidentes Regionales así como de Alcaldes.

96 Note 95, p. 10.

*caudillismo*⁹⁷, which weakened internal democratic practices in parties. Term limits, however, would lead to consolidated institutions, democratic parties and responsible leaders.⁹⁸ It remains in the dark how these aims should be achieved by term limits. Given the lack of consolidated parties overall, e.g., the development of democratic practices within parties is clearly impossible.⁹⁹

Moreover, literature reveals, that there is no consensus on whether term limits can truly reduce corruption.¹⁰⁰

Keeping in mind the rather low percentage of reelection of governors, it is dubitable that the prohibition of immediate reelection will do much to resolve the problem.¹⁰¹ Additionally, neither the reduction of oligarchic structures nor a better planning of the tasks regional governors want to see realized can be automatically expected as the result of the reform. Corruption will find its way in, especially when oversight is weak.¹⁰² Even the Mexican example where reelection for almost any office was prohibited since 1933, shows that term limits are not a cure for all. According to the constitutional reform of 2014, reelection is allowed in Mexico from 2018 on.¹⁰³ The ratio behind the Mexican reform was to strengthen representation.¹⁰⁴

The question therefore arises why Congress opted to implement a measure which is likely to fail to overcome the problem in the long run. There is a very easy answer: The prohibition of reelection is popular among voters.¹⁰⁵ Therefore, it is a means of Congress (and especially of the majority party) to demonstrate its ability to govern. Another factor is

97 For an explanation of the “caudillo”, see *Rogelio Pérez Perdomo*, Notes for a Social History of Latin American Law: The Relationship Between Legal practices and Principles, 52 Rev. Colegio de Abogados P.R. 1 (1991), in Angel R. Oquendo (ed.), *Latin American Law 2006*, p. 73 and *Tony Wood*, Caudillo Trouble, *NACLA Report on the Americas*, 49:2 (2017), p. 187) for a critical approach to the concept.

98 Dictamen, note 95, p. 11.

99 *Tanaka*, note 24, p.16.

100 *Nathan Sandals*, A Step in the Wrong Direction: How Term Limits Could Increase Corruption, <https://globalanticorruptionblog.com/2016/01/11/a-step-in-the-wrong-direction-how-term-limits-could-increase-corruption/> (last accessed on October 31, 2018).

101 Perú21 6.10.2017, ¿Desde cuándo rige la norma que prohíbe la reelección inmediata de alcaldes y gobernadores regionales?, <https://peru21.pe/politica/rige-norma-prohibe-reeleccion-inmediata-a-alcaldes-gobernadores-regionales-379059> (last accessed on October 31, 2018).

102 See, *Rojas*, note 87.

103 Decreto por el que se reforman, adicionan y derogan diversas disposiciones de la Constitución Política de los Estados Unidos Mexicanos, en materia política-electoral, Diario Oficial, 10.2.2014.

104 *Héctor Zamitiz Gamboa*, La reforma político-electoral 2014–2015: ¿híbrido institucional o avance gradual del Sistema democrático en México?, in: *Estudios Políticos* 40 (2017), p. 31.

105 Recently this regards the discussion on the possibility of the reelection of congress members, RPP Noticias 23.8.2018, Ipsos Perú. El 76% de peruanos apoya la no reelección de congresistas, <https://rpp.pe/politica/congreso/ipsos-peru-el-76-de-peruanos-apoya-la-no-reeleccion-de-congresistas-noticia-1145232>, see also the discussion in the US some time ago, *Time* 23.2.2010, Term

that the prohibition of reelection on the regional level does not negatively affect Congress members – unlike the current discussion on a prohibition of the reelection of members of Congress¹⁰⁶ – which made it even easier to pass the law.

Additionally, the fact that some regional governors were gaining popularity because they opposed national plans might have played a role.¹⁰⁷ The reform came at a time when regional governments were organizing and actively promoting their aims.¹⁰⁸ Therefore, one can assume that the side effect of less stability on the regional level was not unwelcome.

III. Electoral reforms – infra-constitutional level

The electoral reforms of the past several years were of course not limited to the Constitution, but extended to ordinary laws as well. In the following, I will analyze the most recent reforms.

1. Reform to strengthen regional (departmental) political organizations

As mentioned above, populism and clientelism are furthered by unstable political organizations. The possibility of forming genuine regional parties was not part of the Peruvian legal landscape. Only so-called movements (set up for a specific election) were recognized on the regional level. This led to the situation that either national parties had regional branches or that for each electoral process movements emerged (and eventually disappeared). The aim of Law no 30688, which changed the existing law on political organizations, was the strengthening of the party system by allowing political parties without a national, but only a regional basis. In combination with Art 1 of the Law on Political Organizations, this means that the law now recognizes regional political parties. It remains to be seen whether this reform can really strengthen the regional level.

Limits: No Magic Pill for Washington's Woes, <http://content.time.com/time/politics/article/0,8599,1967192,00.html>, as a barometer how unsatisfied people are with the work of Congress members (all last accessed on October 31, 2018).

106 See Art 2, question no. 3 of the referendum (foreseen to take place on December 9, 2018) Decreto Supremo N 101–2018-PCM.

107 See the case of Gregorio Santos, the regional governor of Cajamarca, who opposed a huge mining project (Servindi, Perú: Gregorio Santos y la verdad del caso Conga, <https://www.servindi.org/actualidad/56877> [last accessed on October 31, 2018]), and led the then candidate for presidency Ollanta Humala proclaim “Agua si, oro no”, about which he forgot after the elections Gestión 30.12.2013, Los vaivenes y las contradicciones de Ollanta Humala sobre Conga durante tres años, <https://gestion.pe/peru/politica/vaivenes-contradicciones-ollanta-humala-conga-tres-anos-56102> (last accessed on October 31, 2018). Gregorio Santos, although in prison, was re-elected regional governor in 2014 El Comercio 26.7.2016, Gregorio Santos: ¿asumirá la presidencia regional de Cajamarca?, <https://elcomercio.pe/peru/cajamarca/gregorio-santos-asumira-presidencia-regional-cajamarca-240880> (last accessed on October 31, 2018).

108 See ANGR, <http://angr.org.pe/> (last accessed on October 31, 2018) and their activities and publications in between 2013 and 2016.

2. Reform to strengthen the connection between the representatives and their region

With Law no 30692, new prerequisites for electoral candidates were introduced. Candidates must now either have been born in the electoral district in which they are running for office or have been residing there for the last two years (instead of three years). The fact that the connection to a district via birth was abolished in the past seems odd, as it allows persons who have no actual connection to a certain circumscription to stand in elections.¹⁰⁹

There is, however, the danger that this extension of the possibility to people who do not reside in the electoral district leads to an economization of politics¹¹⁰, as was pointed out in the debates of the bill. It was argued that parties could try to attract candidates with a strong financial background who were born in a certain district, but did not have any other connection to that district.

In light of the rampant clientelism and corruption, this is indeed a valid argument. Expanding the right to run for office not only on the regional, but also on the local level might also result in more possibilities for people linked to (illicit) business to expand their network.¹¹¹ Therefore, broadening the requirements for possible candidates is unlikely to curb these pre-existing problems. However, one has to admit, that with money certain interests might always find their way into politics, independent of the design of the rules. History shows, that e.g. clans involved in drug trafficking had no problems to introduce candidates supporting the clans' interests.¹¹²

Therefore, the main point of criticism is addressed to the labelling of the law: It is more than questionable, whether the rule serves the aim of strengthening the connection between the representatives and their region. Again this is rather a mean of congress to achieve fast results in electoral reform and decentralization without major changes.

- 109 Ley que modifica la Ley 27683, Ley de Elecciones regionales y la Ley 26864, Ley de Elecciones municipales para regular el vínculo entre el candidato y la circunscripción por la cual postula, Ley 30692, Dictamen de la Comisión de Constitución y Reglamento, p 13.
- 110 Also mentioned in the debate in Congress, see Dictamen de la Comisión de Constitución y Reglamento recaído en el Proyecto de Ley 1840/2017-CR, que propone modificar el artículo 13 de la Ley 27683, Ley de Elecciones Regionales, para permitir que las personas nacidas en su respectivo departamento o región, postulen a los cargos de gobernador, vicegobernador o consejero regional, p. 7.
- 111 In the past problems were reported linked to narcocandidatos Exitosa 6.9.2018, Alertan de 'narcocandidatos' en filas de APP y fujimorismo, <https://exitosanoticias.pe/alertan-de-narcocandidato-s-en-filas-de-app-y-fujimorismo/> (last accessed on November 3, 2018).
- 112 Perú21 6.4.2014, Jaime Antezana: 'Narcotráfico tiene alianza con la cúspide', <https://peru21.pe/politica/jaime-antezana-narcotrafico-alianza-cuspide-152352> (last accessed on November 3, 2018), Utero.Pe 7.10.2014, El próximo presidente regional de Ucayali es un excocalero investigado por lavado de activos (y más casos de narcopolítica), <http://utero.pe/2014/10/07/el-proximo-presidente-e-regional-de-ucayali-es-un-excocalero-investigado-por-lavado-de-activos-y-mas-casos-de-narcopolitica/> (last accessed on November 3, 2018).

3. Changes to the rules of party and campaign financing

Up until now financing of parties and campaigns is not transparent: In the elections of October 2018 e.g. several candidates have to be considered so-called “narcocandidates” and it is an open secret that in different regions candidates get financed by clans involved in drug trafficking.¹¹³

To overcome the problems of dubious private party financing, law no 30689 set up a new system, where anonymous donations are forbidden and limits of private financing are introduced.

With regard to campaign funding, as a part of the promised constitutional reforms of President Vizcarra, the executive proposed a bill to Congress. Whereas the reform proposed by the executive would have been far reaching, the Legislative cut the reform down.

According to the proposal of the executive, Art 35 would have been rewritten in the following way:

“Political organizations are obliged to provide an account of their funding and their spending in the ordinary periods and during electoral campaigns. Contributions must be received through the system foreseen by law. Contributions that are not declared by the political organizations are presumed to come from a prohibited source. In addition to private contributions within the limits and modalities foreseen by law, only public contributions resulting from direct or indirect public funding are allowed. Political organizations cannot receive, directly or indirectly, anonymous contributions, contributions of illicit origin or from natural persons convicted of crimes against public administration, drug trafficking, illegal mining, illegal logging, human trafficking, asset laundering, terrorism or organized crime, according to the law.”¹¹⁴

The final proposal of the legislative (which will be submitted to referendum in December 2018)¹¹⁵ reformulated and changed the reform in the following way: “Financing of political organizations can be public or private. It is governed by law according to the criteria of transparency and accountability. Public financing promotes participation and the strengthening of political organizations under criteria of equality and proportionality. Private financing is realized through the financing system with the corresponding exceptions limits and restrictions. Illegal financing leads to the respective administrative, civil or penal sanctions. Electoral advertisements in radio and television media are only permitted when financed indirectly by the public.”¹¹⁶

113 <https://exitosanoticias.pe/alertan-de-narcocandidatos-en-filas-de-app-y-fujimorismo/> (last accessed on November 3, 2018).

114 Expediente del Proyecto de Ley 03186/2018-PE, Ley de Reforma Constitucional que regula el Financiamiento de Organizaciones Políticas, 9.8.2018.

115 See above.

116 Expediente del Proyecto de Ley 03186/2018-PE, Autógrafa de ley remitida al poder ejecutivo, 4.10.2018.

If we compare the two reform proposals two points are striking. First, the executive's proposal did not say anything on advertising in times of electoral campaigns, whereas the legislative proposal restricted the electoral adverts to media which are at least indirectly financed through the public.

The second striking point is, that the legislative abolished the rules on transparency during campaigns.¹¹⁷

The argumentation of the Committee on Constitutional Affairs on the second point relied on the fact, that the further constitutionalizing of such detailed rules was not desirable. This did not inhibit the legislative to add rules on advertisements in media and television, pointing at the problem that campaigns were getting more and more expensive and this rule was necessary for the equality of chances.¹¹⁸ This is a weak argumentation; there are other ways of limiting the costs of campaigns. The problem of adverts in media financed through the public is that they do not reach all people in the whole country.¹¹⁹ Therefore, the reform will strengthen those parties which have the possibility to reach the population not covered by public media in other ways (e.g. through visits of candidates or regional branches of the party).¹²⁰ Moreover, this could also affect private media.¹²¹ The question is also whether all parties have the same access to media financed through the public.

It can again only be pointed out, that the original idea seems to be positive; the final outcome, however, is dangerous. Constantly proposing lukewarm reforms, which will hardly help to improve democracy, will lead to ever more frustrated voters, which eventually turn away from democracy.

- 117 Gestión 27.9.2018, Transparencia lamenta que no se hayan incluido reportes de campaña en reforma, <https://gestion.pe/peru/politica/transparencia-lamenta-hayan-incluido-reportes-campana-reforma-nddc-245506> (last accessed on October 31, 2018).
- 118 Dictamen de la Comisión de Constitución y Reglamento, Ley que modifica el artículo 35 de la Constitución Política del Perú para regular el financiamiento de Organizaciones Políticas, 26.9.2018, p. 8 f.
- 119 Gestión 20.6.2018, Reflexiones alrededor de la “Ley Mulder”, <https://gestion.pe/blog/publirama-de-medios/2018/06/reflexiones-alrededor-de-la-ley-mulder.html> (last accessed October 31, 2018).
- 120 Before the regional and municipal elections of October 2018, the party Popular Force could have benefited from this change, but by losing its regional and municipal basis (see El Comercio 7.10.2018, Fuerza Popular: la derrota del fujimorismo en Lima y regiones, <https://elcomercio.pe/politica/fuerza-popular-derrota-fujimorismo-lima-regiones-elecciones-2018-noticia-565433> [last accessed October 31, 2018]) it is questionable who will benefit from this rule.
- 121 See already the arguments against the so-called Ley Mulder, which prohibited publicity of the state in private media. The Constitutional Court however, declared the law unconstitutional (Constitutional Court 00013–2018-AI).

4. Impeding persons from running in elections

The latest reform dates back to 9 January 2018 and is explicitly intended to permanently impede certain groups of persons from running in elections.¹²² This includes those convicted of terrorism (even if they were later rehabilitated¹²³), drug trafficking, rape and corruption. In the Peruvian concept, “terrorists” refers to the former members of the Maoist Shining Path Movement and the Revolutionary Movement Túpac Amaru.

The reasoning for the reform was the following: It was expected that many former members of the Shining Path movement would be released just in time for the October 2018 elections, with the prospect of some of them running for election looming large. The reform was presented as a tool of militant democracy.¹²⁴

However, the amendment is not only a tool of militant democracy. It might be a coincidence, that an accompanying bill that would have clarified that persons wrongly convicted of terrorism are able to run for office, was not supported by the Popular Force of Keiko Fujimori. Therefore, the congressional bill to clarify this is still pending,¹²⁵ but in the meantime, the wrongly convicted are excluded. The exclusion of certain candidates may not be unwelcome from the point of view of the Popular Force.

This legal limbo affected e.g. the former prime minister Yehude Simon¹²⁶, who wanted to run for the regional elections in October 2018 in the region of Lambayeque, but whose list was declared inadmissible. Yehude Simon was convicted of terrorism in the 90ies, but

122 See on that problem with more details, *Oswaldo Ruiz-Chiriboga*, *The Unconstitutionality of Ecuador’s 2018 Constitutional Referendum, Presidential Term Limits and the Almighty Transitory Council For Citizen Participation and Social Control* (forthcoming), p. 15.

123 Law N° 30717 (<http://spij.minjus.gob.pe/content/noticia/pdf/LEY-30717.pdf>, 1.10.2017): “el impedimento resulta aplicable aun cuando hubieran sido rehabilitadas”.

124 See the bill (Proyecto de Ley N° 2076/2017-CR, p. 4): “La democracia no puede quedarse de manos cruzadas y debe actuar en correspondencia con los mismos mecanismos democraticos para defenderse, especialmente frente a aquellos que actuaron de forma violenta y atentaron contra las libertades de toda una generacion. De la misma forma resulta indispensable frente a la corrupcion que ha penetrado en los diversos etsamentos del Estado, poner coto a la presencia de personas a los que la justicia ha condenado.”

125 Perú21 18.1.2018, Elecciones ediles y regionales 2018: ¿Quiénes están impedidos de postular?, <https://peru21.pe/politica/elecciones-ediles-regionales-2018-quienes-impedidos-postular-392417>; (last accessed on October 31, 2018). Individual cases are in the meantime resolved on a case by case basis by the National Electoral Jury, La República 24.8.2018, Yehude Simon sigue en carrera y JEECh analiza otros 24 pedidos de exclusion, <https://larepublica.pe/sociedad/1304007-yehude-simon-sigue-carrera-jeech-analiza-24-pedidos-exclusion> (last accessed on October 31, 2018).

126 See the case of Yehude Simon, La República 3.8.2018, Lambayeque: admiten postulación de Yehude Simon al gobierno regional, <https://larepublica.pe/sociedad/1291050-lambayeque-admite-n-postulacion-yehude-simon-gobierno-regional> (last accessed on October 31, 2018), who finally got the permission to stand as a candidate.

later rehabilitated by the so-called Lanssier Commission.¹²⁷ In the end Yehude managed to obtain the permission to run for office through an *amparo* claim.¹²⁸

Considering the recent history of Peru, it is understandable that there is a certain fear of the return of members of the Shining Path as mayors or regional governors. However, it is questionable whether a life-long prohibition of running for office is the right way to deal with this fear. Moreover, the reform shows how a missing exception (i.e. that of wrongly convicted, rehabilitated persons) can turn a reform which is technically a step into the right direction into an ambiguous project ripe for potential abuse with the alarming possibility of accusations of terrorism being used to suppress inconvenient candidates.¹²⁹ Terrorism moreover currently seems to be a mean to defame the political opponent, as the example of a public prosecutor who requested the detention of Keiko Fujimori shows. He was accused of having advocated terrorism and cited to Congress on the basis of Art 316A of the Penal Code, which makes advocating terrorism a crime.¹³⁰ It might again be a coincidence, but this provision was aggravated in July 2017¹³¹ when already Popular Forces had the majority in Congress.

E. Why the weaknesses of decentralization matter

I. ... on the regional level

There is no doubt that the failed creation of regions bigger than the existing ones, which are based on the former departments, is problematic. Yet, I do not consider this to be a major

- 127 La República 14.10.2008, Hubo rigurosa investigación para indultar a Yehude Simon <https://larepublica.pe/politica/374012-hubo-rigurosa-investigacion-para-indultar-a-yehude-simon> (last accessed on October 31, 2018).
- 128 La República 29.6.2018, Jurado Nacional pone en carrera a Yehude Simon a GR de Lambayeque, <https://larepublica.pe/politica/1269138-jurado-nacional-pone-carrera-yehude-simon-gr-lambayeque> (last accessed on October 31, 2018).
- 129 See also the latest developments on the national level where two prosecutors investigating on Keiko Fujimori are cited to congress because they allegedly played down the terrorism of the Shining path while attending an event in Mexico, Diario Correo 16.10.2018, Congreso pide explicaciones al fiscal José Pérez por presunta apología al terrorismo, <https://diariocorreo.pe/politica/congreso-pide-explicaciones-fiscal-jose-perez-presunta-apologia-terrorismo-848044/> (last accessed on October 31, 2018).
- 130 There are serious problems with the freedom of expression, laid down by Lex, Apuntes sobre las modificaciones realizadas al delito de “apología del terrorismo” tras la emisión de la Ley 30610, <https://legis.pe/apuntes-las-modificaciones-realizadas-al-delito-apologia-del-terrorismo-tras-la-emision-la-ley-30610/> (last accessed on October 31, 2018).
- 131 For the history of the delict see e.g. *David Panta*, Pautas interpretativas del delito de apología al terrorismo, <https://legis.pe/pautas-interpretativas-delito-apologia-terrorismo/> (last accessed on October 31, 2018); see also Constitutional Court 010–2002-AI/TC. For the problems of the modified rule see *Segundo Rolando Márquez Cisneros*, Apología al terrorismo. A propósito del reportaje sobre Maritza Garrido Lecca en la revista Somos, <https://legis.pe/apologia-terrorismo-maritza-garrido-lecca-somos/> (last accessed on October 31, 2018).

issue, especially given that some regional governments successfully take advantage of the possibilities offered by the Ley N° 29768, Ley de Mancomunidad Regional¹³², to build so-called “mancomunidades regionales” (regional networks). This enables regions to work together for specific purposes.

What is more problematic is the configuration of the distribution of competencies, as this has led to many uncertainties in the past.¹³³ The configuration of the distribution of competencies results in practical problems: When competencies are unclear and the coordination between the levels of government is hampered or lacking, the state cannot work efficiently. Until the Constitutional Court decides on the question, time and money are lost and important (mainly infrastructural) projects can only be realized with a delay.¹³⁴ As showed, decentralization is not tackled as a comprehensive project by the national level, as neither the problem of the distribution of competencies nor the financial resources of the regions were addressed.

The answer of the national level, electoral reform, has failed with regard to the stabilization of parties.

The instability of the (regional) political elites and problems of the decentralization process continue to further clientelist practices and corruption, not least because the unclear distribution of competencies leads to a lack of transparency when the different levels of government exercise their respective competencies.¹³⁵ A lack of transparency helps to create a climate all too favorable for corruption.

These issues result in a loss of the voters’ confidence in democracy and helps candidates who come to power through questionable methods (“caudillo style”) and arguments. This is liable to lead voters to favor candidates who propose to act with a “firm hand” or who promote populist ideals. Most recently, this could be observed in the electoral campaign of Ricardo Belmont, who was running for the office of mayor in Lima in 2018. He openly opposed electoral debates (even the one officially organized by the National Council

132 For a list of the *mancomunidades* inscribed in the register up until now and their purpose, see Secretaría de Descentralización 5.1.2018, <http://www.descentralizacion.gob.pe/index.php/2018/01/05/mancomunidades-regionales-y-municipales/> (last accessed on October 31, 2018).

133 See e.g. Constitutional Court case 0001–2012-PI/TC, the so-called Conga Case, named after the mining project (regional ordinance declaring a special area an “environmentally protected area” and therefore rendering a previously approved project illegal).

134 With relation to Lima, see *José Alonzo Jiménez Alemán*, Análisis de la distribución de competencias en materia de jerarquización y gestión de infraestructura vial: caso de Lima Metropolitana, in: *Revista de Derecho Administrativo* 14 (2014), p. 236.

135 *El Comercio* 4.7.2018, Vizcarra dice que desorden en descentralización genera corrupción, <https://elcomercio.pe/politica/martin-vizcarra-dice-desorden-descentralizacion-genera-corrupcion-noticia-532985> (last accessed on October 31, 2018).

of Elections), claiming that they would not inform people, but were being used to lie to them¹³⁶, and used xenophobic arguments to drive his campaign.¹³⁷

II. ... on the national level

The problems of the regional level are tied to the national level. First, it is the national level that is responsible for changing the legislation concerning the regional governments. It seems that Congress gives priority to less pressing problems with easier solutions and prefers to suggest solutions which are likely to “sell” and serve the purposes of the national level. In addition, regulating the regional governments can be used to demonstrate the national level’s ability to govern, which further leads to the adoption of popular rather than practical, efficient solutions. Moreover, it can seem doubtful at times whether there even is the political will to change the situation. For instance, although the financing of electoral campaigns was further restricted through the constitutional reform proposal of 26th of September 2018, Congress abolished the executive’s proposal according to which the campaign financing would have to be laid open already during the electoral campaign. Congress subsequently touted the reform as an effective measure in the fight against corruption, though in reality, the result is unsatisfactory.

As long as the legislator does not seriously tackle the issue of regional legislation, it will be very difficult to see the regions’ performance improve. This includes not only the electoral side but also structural reforms of the regions, such as the clarification of the distribution of competences and the financial decentralization.¹³⁸

The problems of decentralization are, in a way, a tool for Congress and the executive to protect themselves by adopting solutions that are popular amongst voters with a low risk of adversely affecting themselves.

Moreover, the call for strong leaders and the rise of populism are present not just on the regional, but also on the national level. This can at least partly explain the success of Keiko Fujimori and her party Fuerza Popular (Popular Force) in the last elections. Although Fuerza Popular (Popular Force) compromised itself to follow the rule of law and human

136 Canal N 21.9.2018, Ricardo Belmont: “Debates electorales han servido para mentir a la gente”, <https://canal.n.pe/actualidad/ricardo-belmont-debates-electorales-han-servido-mentir-gente-n339771> (last accessed on October 31, 2018).

137 La República 22.8.2018, Ricardo Belmont: “Los venezolanos están casi como dueños de casa” <https://larepublica.pe/politica/1302942-ricardo-belmont-inmigracion-venezolana-duenos-casa> and Alfredo Torres, El Comercio 26.8.2018, Mala entraña, por Alfredo Torres, <https://elcomercio.pe/opinion/columnistas/belmont-ricardo-xenofobia-venezuela-mala-entranas-alfredo-torres-noticia-550687> (both last accessed on October 31, 2018).

138 Secretaría de Descentralización 5.1.2017, La descentralización en Perú, un reto por cumplir, <http://www.descentralizacion.gob.pe/index.php/2017/01/05/ocde-la-descentralizacion-en-peru-es-un-proceso-incompleto/> (last accessed on October 31, 2018) with regard to fiscal decentralization.

rights,¹³⁹ it is nevertheless taking advantage of its strong position in Congress in a number of ways.¹⁴⁰

F. Theoretical implications

The Peruvian case illustrates how difficult it is to draw the line between good intent and progress on the one hand and misuse and backlash on the other hand. Decentralization was introduced into the Constitution with the hope of further democratization. Departing from the theory of abusive constitutionalism of David Landau¹⁴¹ we can see, that sometimes constitutional silence or vagueness can have a harmful effect because that silence allows for the abusive use of ordinary laws. The opening of new political spaces through decentralization, as explained by Rickard Lalander,¹⁴² worked in the Peruvian case only to some extent. Without clear guidance from the Constitution regarding these new spaces, those spaces can be deformed. If one of the players, like in Peru the parties¹⁴³, are systematically weakened through laws¹⁴⁴, then those spaces cannot be effectively used. In Peru, this adds to the problems of the electoral system.¹⁴⁵ As Paula Muñoz has shown, this has led to the development of clientelist politics in Peru.¹⁴⁶

Studying a case like Peru moreover shows, that the theories presented, can each only explain parts of the reality. Especially when trying to find the reasons for the dysfunction of a concept like decentralization, it is important to not only have a look at the constitutional level, but also at the organic and ordinary laws as well as to Courts or other institutions for the resolution of conflicts. Further investigations, not only on Peru and decentralization, but on other concepts related to democracy, should therefore not only take into account the constitutional, but also the infra-constitutional level. It is the infra-constitutional level which can unveil the weaknesses of the constitution.

139 BBC Mundo 7.4.2016, ¿Por qué el fujimorismo sigue teniendo fuerza en algunos sectores de Perú?, https://www.bbc.com/mundo/noticias/2016/04/160318_peru_elecciones_fujimorismo_ep (last accessed on October 31, 2018).

140 Fujimori changed most of the security personal in Congress: La República 7.6.2018, Militantes y aportantes de Fuerza Popular son contratados como seguridad, <https://larepublica.pe/politica/1258864-militantes-aportantes-fuerza-popular-son-contratados-seguridad> (last accessed on October 31, 2018).

141 Landau, note 23.

142 Lalander, note 22 p. 41.

143 For the role of parties as actors on the decentralized level, see Lalander, note 22 46 f.

144 Tanaka, note 24 and Meléndez, note 25.

145 See above.

146 Muñoz, note 26.

G. Outlook

Making any definitive statements regarding the future of democracy would amount to fortune telling in a country undergoing such turbulent changes. However, what is clear is that democracy in Peru continues to stand on shaky ground and that decentralization has not achieved its aims of making Peruvian democracy more robust. The vulnerability of democracy was expressed in the pre-election surveys for October 2018: 48.4 % of Peruvians planned to cast a blank vote.

The literature is unanimous in the assessment that Peruvian democracy suffers from a very weak party system which is responsible for its constant imperilment.¹⁴⁷ Furthermore, functioning parties, in which Peru is severely lacking, are crucial for the success of other reforms, such as decentralization. Therefore, clear rules on electoral laws would go a long way towards safeguarding democracy.

Given the current situation, the outlook is not too bright. As long as fundamental reforms are not undertaken, those who ignore democratic forms but are seasoned in clientelist practices will continue to take advantage wherever they can.¹⁴⁸

147 *Martín Tanaka/Sofía Vera Rojas*, La dinámica “neodualista” de una democracia sin sistema de partidos: La situación de la democracia en el Perú, in: 30 *Revista de Ciencia Política* (2010), p. 89 ff; *Julia María Rubio*, El Sistema de Partidos de Perú (1980–2015), in: Freidenberg, Flavia (ed), *Los sistemas de partidos en América Latina 1978–2015*. Tomo 2. Cono Sur y Países Andinos (2016), p. 449 ff.; La República 21.6.2018, Más de 360 candidatos en carrera por gobiernos regionales, <https://larepublica.pe/politica/1264614-360-candidatos-carrera-gobiernos-regionales> (last accessed on October 31, 2018).

148 *Julio Cotler*, La democracia y el Estado en Perú, *Estudios de política exterior, Latinoamérica Análisis*, 29.6.2015, <http://www.politicaexterior.com/latinoamerica-analisis/la-democracia-y-el-estado-en-peru/> (last accessed on October 31, 2018).