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Presidential vacancy due to permanent moral incapacity in Peru: constitutional analysis and case study on its political use

La vacancia presidencial por incapacidad moral permanente en el Perú: análisis constitucional y estudio de caso sobre su uso político

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Abstract

The concept of presidential vacancy due to moral incapacity is one of the most controversial mechanisms in Peruvian constitutionalism. The objective of this research is to demonstrate the denaturalization of this cause, highlighting its transformation from a constitutional assumption linked to the mental incapacity of the president to a mechanism of discretionary political control. Methodologically, the study adopts a qualitative and non-experimental approach, based on the case study method. It analyzes the historical and constitutional origins of the grounds, their legal nature and doctrinal development, as well as their application in five emblematic presidential vacancy proceedings, based on an examination of constitutional norms, Constitutional Court jurisprudence, specialized doctrine, and parliamentary procedures. The results show that the grounds have been applied without objective criteria or minimum evidentiary standards, being used to evaluate political conduct or non-judicial allegations. This practice has led to violations of due process, altered the balance between the branches of government, and distorted the presidential model. The conclusion is that the application of vacancy due to moral incapacity is incompatible with the constitutional rule of law and constitutes a factor of democratic instability, making constitutional or legislative reform necessary to objectively define this ground.

Keywords: presidency, incapacity, constitution.

Resumen

La figura de la vacancia presidencial por incapacidad moral constituye uno de los mecanismos más controvertidos del constitucionalismo peruano. El objetivo de esta investigación es demostrar la desnaturalización de esta causal, evidenciando su transformación desde un supuesto constitucional vinculado a la incapacidad mental del presidente hacia un mecanismo de control político discrecional. Metodológicamente, el estudio adopta un enfoque cualitativo y no experimental, basado en el método de estudio de caso. Se analiza el origen histórico-constitucional de la causal, su naturaleza jurídica y su desarrollo doctrinario, así como su aplicación en cinco procesos emblemáticos de vacancia presidencial, a partir del examen de normas constitucionales, jurisprudencia del Tribunal Constitucional, doctrina especializada y procedimientos parlamentarios. Los resultados evidencian que la causal ha sido aplicada sin criterios objetivos ni estándares probatorios mínimos, utilizándose para evaluar conductas políticas o imputaciones no judicializadas. Esta práctica ha generado vulneraciones al debido proceso, ha alterado el equilibrio entre los poderes del Estado y ha desnaturalizado el modelo presidencial. Se concluye que la aplicación de la vacancia por incapacidad moral resulta incompatible con el Estado constitucional de derecho y constituye un factor de inestabilidad democrática, lo que hace necesaria una reforma constitucional o legislativa que delimite objetivamente esta causal.

Palabras clave: presidencia, incapacidad, constitución.

Introduction

Presidential vacancy due to permanent moral incapacity, as provided for in Article 113(2) of Peru's 1993 Constitution, is arguably the most contentious clause in the country's contemporary political system. Although it has appeared in constitutional texts since the nineteenth century, this ground has taken on renewed prominence following the political proceedings initiated against several presidents in recent decades.

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The open-ended nature of the concept of "moral incapacity", characterized as an inexact term not objectively determinable, given the significant axiological weight it may carry, has given rise to divergent interpretations in both constitutional scholarship and parliamentary practice. While some authors contend that moral incapacity refers to the ruler's inability to form rational judgments connected to mental faculties, others conceive of it as a mechanism for ethical oversight of presidential conduct. This article seeks to deepen that debate from a case study perspective, weaving doctrinal analysis together with comparative law, constitutional jurisprudence, and an examination of recent parliamentary proceedings. Its general objective is to critically examine the figure of presidential vacancy due to permanent moral incapacity within the Peruvian constitutional order, in order to demonstrate its historical and legal denaturalization and to show how its political use has affected the balance of powers, due process, and democratic stability. This overall aim is pursued through the following specific objectives: to demonstrate the historical and legal denaturalization of the ground of vacancy due to permanent moral incapacity; to analyze the practical application of presidential vacancy due to moral incapacity in recent emblematic cases; and to evaluate the constitutional and institutional consequences of the political use of this ground.

Methodology

This article adopts a non-experimental case study methodology, well suited to complex legal and political phenomena that require an understanding of their evolution, context, and practical application. For this purpose, the analysis examines current legislation and relevant jurisprudence, including Peruvian constitutions since 1823, comparative legislation, constitutional doctrine, Constitutional Court case law, and the five vacancy cases evaluated in the Peruvian Congress. The research relies on documentary records, variable analysis, comparative tables, and a thorough review of normative and doctrinal sources. Following this approach, the article reconstructs and expands the argumentation from an academic perspective.

To understand the presidential vacancy process due to moral incapacity, one must turn to Peru's presidential model, characterized by a stable five-year term rooted in sovereign election, safeguarded by the prohibition on presidential indictment except for the exceptional cases enumerated in Article 117 of the Constitution:

> The President of the Republic may only be indicted during his term for high treason; for preventing presidential, parliamentary, regional, or municipal elections; for dissolving Congress, except in the cases provided for in Article 134 of the Constitution; and for preventing its meeting or functioning, or that of the National Election Board and other electoral system bodies (Constitution 1993).

Vacancy thus operates as a forced vacancy of power under certain constitutionally prescribed circumstances. Constitutional scholar Enrique Bernales defines vacancy as "that situation whereby a permanent or delegated office lacks an officeholder" (Bernales 2018: 570). Vacancy, therefore, functions as an extreme exception to the principle of fixed tenure. Under this exception and within the framework of the principle of balance among state powers, Congress is constitutionally empowered to declare vacancy "because it is a responsibility conferred upon it by the Constitution under a strict criterion of state power balance" (Bernales 2018: 571). The term "moral," meanwhile, is understood as an aspect of conscience related to cognitive and emotional processes, regulating individual conduct in harmony with the values accepted by the social group to which the individual belongs (Galimberti 2002: 455). In that context, the term "moral," understood literally, points to the "psyche" or set of a person's mental functions. This semantic element reinforces the interpretation of moral incapacity as a form of mental incapacity, a reading further supported by the historical development of constitutionalism. Hence, the president's "moral incapacity" refers to an inability to conduct himself according to the moral rules established by the Constitution for the office in question.

Beyond the provisions of Article 117 of the Constitution, it should be added that appropriate moral conduct is not exclusive to the presidential office but extends to public officials generally. The Code of Ethics for Public Service (2002) demands a high standard of moral rectitude, which some authors (Ledesma Narváez and Ramos Núñez in Docket 2020) interpret as a parameter for evaluating continued tenure in office. Public ethics and the president's civic conduct have accordingly been invoked as justifications for vacancy, and for that purpose, the Constitution itself has established the grounds for vacancy. Article 113 regulates the grounds for vacancy, which are:

"The Presidency of the Republic becomes vacant by […] 1. Death of the President of the Republic; 2. His permanent moral or physical incapacity, declared by Congress; 3. Acceptance of his resignation by Congress; 4. Leaving national territory without congressional permission or failing to return within the established timeframe; 5. Removal, after having been sanctioned for any of the offenses mentioned in Article 117 of the Constitution" (Constitution 1993).

Paragraph 2 of the aforementioned article is the only one referring to moral incapacity as grounds for vacancy. However, the absence of adequate legislative development has allowed for disparate interpretations and discretionary uses. The procedure is governed by Congressional Regulations, whose short deadlines and minimal requirements create an extremely expeditious mechanism for removing the president, one the Constitutional Court has considered risky for democratic stability.

From its initial incorporation into the Peruvian constitutional order through the 1839 Constitution, the presidential vacancy provision was conceived on the premise that permanent moral incapacity referred to the president's inability to properly exercise his faculties of moral discernment, that is, to distinguish right from wrong according to a certain framework of values. In that sense, the ground was originally understood as a case of incapacity of a mental nature that prevented the regular exercise of presidential functions (Cairo 2017: 17).

The concept of "moral incapacity" became a recurring subject in the drafting of Peruvian political constitutions after the term was first introduced in 1839. Table 1 sets out the constitutional evolution of the concept from 1839, where it appears as "perpetual physical or moral impossibility," to its current version in 1993.

Table 1

Constitution	Formula	Article
1839	"perpetual moral impossibility"	81
1856	"by moral incapacity"	83
1860	"by perpetual moral incapacity of the president"	88
1867	"by moral incapacity"	80
1920	"by permanent moral incapacity of the president declared by Congress"	115.1
1933	"by permanent moral incapacity of the president declared by Congress"	144.1
1979	"by moral incapacity […] declared by Congress"	206.1
1993	"by permanent moral incapacity […] declared by Congress"	113.2

Source: Author's own elaboration

Results and discussion

This section examines Peruvian landmark cases over the past two decades in which presidential vacancy proceedings have been promoted or initiated on various grounds, including allegations of inability to govern, corruption charges, or decisions employed as instruments of political control. The examination of these cases aims to show how this ground has been applied as a mechanism of political control, disconnected from its original historical and legal meaning, and used to assess conduct, allegations, or controversies that belong properly to political debate rather than to objectively verifiable mental incapacity. It also evaluates whether the grounds relied upon in each procedure are compatible with the thesis advanced in this investigation and with the constitutional principles governing the exercise of power, particularly due process, the balance among branches, and presidential term stability, in order to determine the coherence of this practice with the framework of fundamental rights recognized by the Constitution.

To that end, a detailed description is provided of the motions for vacancy on grounds of permanent moral incapacity filed in recent decades. These proceedings, arising in contexts of marked political and economic instability, evince a persistent confrontation between the Executive and Legislative branches. Each of the cases analyzed has contributed to a climate of institutional crisis, showing how the presidential vacancy mechanism, as it has been employed, has decisively contributed to the emergence of recurring scenarios of conflict and political instability in the country.

Alberto Fujimori (2000)

Former President Alberto Fujimori's resignation by fax on November 19, 2000, generated profound rejection in Congress, which considered the act unworthy and aggravated by the climate of political instability at the time. This triggered an intense parliamentary debate over the possibility of declaring him vacated on grounds of permanent moral incapacity. Arguments in favor included accusations of having led the country into an economic crisis, having committed illegal and unconstitutional acts, and having lost public trust by deceiving the nation, betraying the population, and misappropriating proceeds from the privatization of state enterprises. For some members of Congress, these actions demonstrated a lack of minimum conditions for governing.

In contrast, other legislators challenged the legitimacy of the vacancy, pointing out that the accusation of moral incapacity had not been raised during Fujimori's two consecutive terms and that no new evidence justified it. They argued that the measure responded more to a political decision than to a genuine constitutional ground, characterizing the process as a maneuver driven by partisan interests seeking to bring down the government (García Chávarri 2013: 391).

The analysis reveals that the motion for moral incapacity was used as a mechanism to assess Alberto Fujimori's ability to govern, interpreting "permanent moral incapacity" not as a mental limitation, which would be legally contradictory given that he had exercised the presidency for years, but as a broad category encompassing alleged crimes, irregularities, or suspicions of corruption. Criteria of after-the-fact political control were even used to justify the vacancy, along with subjective questioning of his qualities for governing.

Such allegations, however, advanced from an essentially political standpoint, are incompatible with a constitutional rule of law. By allowing Congress to decide the president's continued tenure based on vague concepts and without minimum evidentiary standards, the figure of moral incapacity becomes a discretionary instrument that can undermine democratic principles, granting the Legislature the power to annul the popular will expressed at the polls.

Pedro Pablo Kuczynski (2018)

Congress promoted presidential vacancy proceedings on two occasions against then-President Pedro Pablo Kuczynski for alleged permanent moral incapacity, arguing his possible and incompatible business ties with Westfield Capital, First Capital, and businessman Gerardo Sepúlveda, as well as the corruption scheme involving Brazilian company Odebrecht. During the debate, members of Congress such as Rosa Bartra and Daniel Salaverry maintained that Kuczynski should be removed for having concealed information about his relationship with Westfield Capital, which evinced conduct incompatible with the presidential office. This challenge opened the constitutional debate as to whether a contradiction in the president's statements would suffice to consider him morally incapacitated. According to local media reports (Andina 2018), Odebrecht documents showed payments to Westfield while Kuczynski was minister during President Alejandro Toledo's administration (2001–2006), which increased political pressure on him, although he denied having managed those contracts.

A second motion (January 11, 2018) argued that Kuczynski had prioritized personal interests to remain in power, politically negotiating the pardon for Alberto Fujimori and using his constitutional powers in an instrumentalized manner (Convoca 2017). As reported by BBC News Mundo, the pardon generated strong questions about its legitimacy and about the possible existence of a political deal to avoid the first vacancy (BBC 2017). Likewise, journalistic investigations into the Lava Jato case have shown this to be an alleged complex criminal network, whose responsibilities require extended evidentiary proceedings, elements of accusation and defense, and defense guarantees that the summary vacancy procedure does not afford. In that sense, highly complex criminal allegations should not be resolved in a political vacancy proceeding, since Congress lacks the technical capacity and evidentiary standard needed to determine guilt in large-scale criminal matters.

Martín Vizcarra (2020)

The vacancy motion presented on September 10, 2020, sought to declare the permanent moral incapacity of sitting President Martín Vizcarra, motivated by the so-called "Richard Swing case," following the release of audio recordings showing the president and his staff allegedly coordinating responses to investigations into irregular contracting at the Ministry of Culture (Hidalgo 2020). In those contracts, musician Richard Cisneros (also known as Richard Swing) had allegedly been repeatedly hired for various questionable services, such as motivational talks and musical selection, for exorbitant and questionable amounts, and without prior record as a state supplier, sparking accusations of favoritism and improper use of state funds (La República 2020).

The motion document also accused Vizcarra of lying on repeated occasions and obstructing investigations, including alleged instructions to his staff to hinder clarification of the case and a lack of transparency before Congress. Such allegations sought to present a pattern of presidential conduct that violated public morality and justified vacancy, though experts and part of public opinion criticized that an accusation of this nature, complex and linked to possible crimes under criminal investigation, should not be resolved through the moral incapacity ground but rather through judicial proceedings with more exhaustive evidentiary guarantees.

Pedro Castillo (2022)

During Pedro Castillo's term (2021–2022), accusations of alleged acts of corruption and ethical breaches multiplied, generating political instability, to which were added two attempts at vacancy on grounds of permanent moral incapacity, presented by Congress. Although one of the vacancy proceedings did not prosper for lack of votes, the subsequent fiscal investigations attributed to the president possible links to complex crimes such as criminal organization, aggravated influence peddling, and aggravated collusion, especially in public works awards such as the Puente Tarata III case and other contracts related to the Ministry of Transport and Communications. The National Prosecutor's Office expanded the preliminary investigation against Castillo in May 2022 due to "the seriousness and gravity of the allegations," while simultaneously guaranteeing his right to defense, which indicates that the accusations went beyond a mere political challenge and addressed alleged complex crimes with direct penal implications (Ministerio Público 2022).

Additionally, the Attorney General's Office presented a constitutional complaint before Parliament against Castillo and other high-ranking officials, asserting that the former president had allegedly led a criminal organization aimed at obtaining illicit benefits through public contracts and political negotiations, which also motivated investigations in the criminal sphere (including influence peddling and possible collusion). Although Castillo was ultimately removed and later faced charges for rebellion for attempting to dissolve Congress in December 2022, these fiscal inquiries underscore that political criticism of his government was not limited to management disagreements but rather encompassed comprehensive allegations of structural corruption, which the legislative vacancy proceedings attempted to address based on these indications (Reuters 2022).

The comparative analysis of the presidential vacancy cases on grounds of permanent moral incapacity examined (Fujimori, Kuczynski, Vizcarra, and Castillo) allows for the identification of consistent patterns that confirm the investigation's central thesis: the ground has been progressively denaturalized and used as a discretionary instrument of political control, foreign to its original historical-constitutional meaning.

First, the cases show that moral incapacity was not applied as an objective condition linked to permanent mental incapacity, but rather as an open-ended category for evaluating political conduct, alleged ethical infractions, or suspicions of corruption not yet subject to judicial proceedings. In none of the procedures analyzed was a cognitive or psychic impossibility of the president to exercise the office established; on the contrary, the ground was invoked to assess his political suitability or public credibility, functions that exceed the constitutional framework of vacancy.

Second, there is a repeated violation of due process guarantees. The vacancy proceedings were characterized by summary deadlines, absence of clear evidentiary standards, and lack of effective mechanisms for adversarial challenge, which turned Congress into a body that simultaneously accuses, investigates, and sanctions. This dynamic is particularly problematic when the allegations correspond to complex crimes requiring specialized criminal investigation rather than immediate political resolution.

Finally, the case study demonstrates that the recurrent use of vacancy on grounds of moral incapacity has altered the balance among powers and eroded democratic stability. Far from operating as an extreme exception,

vacancy has become functionally akin to a presidential censure motion, incompatible with a presidential regime. Taken together, the findings confirm that the contemporary application of this ground constitutes a structural factor of institutional instability and reinforces the urgency of a reform delimiting its scope or replacing it with constitutionally objective and verifiable grounds.

Conclusions

The analysis of the examined cases reveals the existence of structural problems that lay bare the profound distortions in the application of presidential vacancy due to permanent moral incapacity. First, the ground suffers from marked subjectivity, arising from the absence of objective criteria and clear normative parameters, which renders it incompatible with the principle of reasonableness that should govern the exercise of Congress's constitutional powers. This indeterminacy allows for broad and discretionary interpretations, far removed from a verifiable legal standard.

Likewise, the vacancy proceedings show a recurrent impairment of due process, insofar as summary deadlines and the lack of minimum evidentiary requirements prevent adequate defense and rigorous examination of the facts alleged. This procedural dynamic weakens the protection of the sitting president's fundamental rights and reinforces the eminently political character of the decision.

To this is added a significant imbalance among state powers, since vacancy on grounds of moral incapacity has been used as a mechanism functionally equivalent to a presidential censure motion, a figure foreign to the presidential model enshrined in the Peruvian Constitution. This practice distorts the logic of the system of government and unduly expands Congress's political oversight powers.

Finally, the recurrence of vacancy proceedings over the last two decades, reaching nearly every president of the Republic, reveals a pattern of persistent democratic instability. Far from operating as an exceptional measure, vacancy has become consolidated as an ordinary political tool, confirming that its use responds more to moments of political confrontation than to a strictly juridical application of the Constitution.

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