

# Unconstitutional State of Affairs, Prison, and Disability from a Critical and Human Rights Perspective\*

Estado de cosas inconstitucional, cárcel y discapacidad en perspectiva crítica y de derechos humanos

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## Abstract:

This article seeks to evaluate the extent and present condition of the unconstitutional state of affairs established by the Constitutional Court of Peru in Ruling No. 05436-2014-PHC/TC. It aims to examine the unlawful state of circumstances as a pivotal mechanism in judicial activism and as an instrument for the safeguarding and advancement of human rights. The paper examines the circumstances of incarcerated individuals with disabilities, who represent one of the most vulnerable and oppressed populations impacted by this constitutional ruling. The employed methodology is qualitative, utilizing a socio-legal documentary framework. The findings indicate that, despite the proclamation of an unconstitutional state of affairs, substantial shortcomings persist in the realization of the rights of these individuals. The study concludes that, although advancements have occurred in various domains, the judgment has not been comprehensively and successfully executed, especially concerning the inclusion, protection, and particular requirements of individuals with disabilities within the correctional system.

**Keywords:** Constitutional State of Affairs, Fundamental Rights, Persons Deprived of their Liberty, Disability, Inclusion.

## Resumen:

Este artículo busca evaluar la magnitud y la condición actual del estado de cosas inconstitucional establecido por el Tribunal Constitucional del Perú en la sentencia n.º 05436-2014-PHC/TC. Tiene como objetivo examinar el estado de cosas inconstitucional como un mecanismo fundamental en el activismo judicial y como un instrumento para la salvaguarda y el avance de los derechos humanos. El artículo examina las circunstancias de las personas en situación penitenciaria con discapacidad, quienes representan una de las poblaciones más vulnerables y oprimidas afectadas por esta sentencia constitucional. La metodología empleada es cualitativa, y utiliza un marco documental socio-jurídico. Los hallazgos indican que, a pesar de la publicación de un estado de cosas inconstitucional, persisten deficiencias sustanciales en la realización de los derechos de estas personas. El estudio concluye que, aunque se han producido avances en varios ámbitos, la sentencia no se ha ejecutado de manera integral y exitosa, especialmente en lo que respecta a la inclusión, la protección y las necesidades particulares de las personas con discapacidad dentro del sistema penitenciario.

**Palabras clave:** estado de cosas inconstitucional, derechos fundamentales, personas privadas de libertad, discapacidad, inclusión.

## Introduction

The ongoing problem of prison overpopulation in Latin America profoundly affects essential human rights. This phenomenon diminishes the quality of life for jailed individuals and cultivates an atmosphere marked by violence, insecurity, and insufficient rehabilitation, thereby obstructing the social reintegration of inmates. Peru ranks among the most densely populated countries in the region, resulting in dire conditions including instability, inadequate infrastructure, and restricted access to key services. This issue is intensified when the most vulnerable individuals, such as incarcerated persons with disabilities, are disproportionately impacted.

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Proposing effective remedies to this issue has been difficult, as numerous institutional endeavors have not resulted in enduring change. In response to these challenges, the Peruvian Constitutional Court, as the supreme interpreter of the Constitution and guardian of fundamental rights, has undertaken the essential responsibility of compelling state authorities to enact public penitentiary policies through the legal mechanism of declaring an unconstitutional state of affairs. The constitutionality of this legal suitability is indisputable, however, its effectiveness in resolving the systemic problem of jail overpopulation is still contentious.

This article seeks to accomplish two primary objectives: first, to assess the extent and present condition of the unconstitutional state of affairs as articulated by the Peruvian Constitutional Court in its Ruling on Case No. 05436-2014-PHC/TC; and, second, to investigate the unconstitutional state of affairs as a pivotal legal instrument associated with judicial activism, also serving as a means for promoting human rights. This term emphasizes the attention given to vulnerable communities by constitutional courts, especially in the prevention of human rights violations.

## Methodology

This research used a qualitative methodology to examine the social, legal, and jurisprudential aspects of the unconstitutional condition of affairs with penal issues and disability.<sup>1</sup> A socio-legal documentary research method is utilized, integrating legal study with many social disciplines to offer a holistic perspective.<sup>2</sup> The data-gathering method involves documentary analysis, concentrating on scientific literature and jurisprudence released in recent years pertaining to the subject areas. Instruments such as Zotero software for document management, analytical guides, and digital repositories are employed.<sup>3</sup>

## Theoretical Framework of the Unconstitutional State of Affairs in Peru

The unconstitutional state of affairs is a judicial mechanism employed *ex officio* by constitutional courts to rectify circumstances that systematically and extensively violate the fundamental rights of vulnerable or marginalized populations.<sup>4</sup> It requires that governmental authorities promptly execute inter-institutional public policy initiatives to address these infractions. This technique enables constitutional courts to advocate for the protection of fundamental rights in both their subjective aspect, by addressing individual claims, and their objective aspect, by confronting underlying structural challenges necessitating active involvement from state institutions.<sup>5</sup>

The unconstitutional situation signifies a shift from subjective to objective legal actions, guaranteeing systemic equality for all impacted parties, not solely the individual plaintiffs.<sup>6</sup> It is an intellectual and strategic tool employed to resolve conflicts by obligating the state to uphold its constitutional obligation to safeguard human dignity. Its consequences transcend jurisdictional boundaries, impacting political discourse on social justice and the advancement of human rights.

Some contend that the unconstitutional situation compromises the separation of powers by obligating the executive branch to enforce particular public policies; however, this perspective neglects the function of constitutional courts as the paramount interpreters of democratic constitutions, responsible for safeguarding civil, political, social, economic, and cultural rights.<sup>7</sup> Cáceres Cáceres asserts that the structural deficiencies inside public administration, rather than external influences, frequently result in the infringement of fundamental rights, hence rendering interventions by constitutional courts both lawful and essential.<sup>8</sup>

The notion of the unconstitutional state of affairs derives from U.S. jurisprudence, particularly the 1954 *Brown v. Board of Education* ruling, which aimed to abolish racial segregation in public schools. The method subsequently reached Latin America, with Colombia being the inaugural nation to institutionalize it in 1997 via the SU-559/97 and T-153/98 decisions by its Constitutional Court. Peru implemented it for the inaugural time in 2004 in Case No. 2579-2003-HD/TC. Other nations, including Brazil, have emulated this approach, as the Supreme Federal Court of Brazil deemed the overcrowding in its prison system illegal in 2015.<sup>9</sup>

The inaugural declaration of an illegal state of affairs in Peru transpired during a habeas data process intended to safeguard access to public information. Subsequently, the Peruvian Constitutional Court has employed a similar technique in other issues concerning education, indigenous populations, and those deprived of liberty. The impact of the legal cases is comparable to instances where the execution of an act or omission has resulted in a widespread infringement of rights.<sup>10</sup>

The extension of the sentence's effects on the personal interests of the parties should not be contentious, as the Constitutional Court, an independent entity tasked with safeguarding constitutional supremacy, may issue decisions that affect the actions of other bodies, which is both appropriate and legitimate. The authority of the Constitutional Court originates from the principles of the Social and Democratic State that necessitate explicit articulation.<sup>11</sup> The 14th ground of the Ruling of Case No. 3149-2004-AC/TC likewise articulates this, marking the second instance of the ICS declaration inside Peruvian constitutional jurisprudence.

In the Ruling of Case No. 0853-2015-PA/TC of 2017, the Peruvian Constitutional Court declared an unconstitutional state of affairs in the education sector due to significant deficiencies in the availability and accessibility of education for individuals living in extreme poverty in rural areas. Education is acknowledged as a fundamental right, the progressive attainment of which is the responsibility of state authorities.<sup>12</sup> The Court mandated the Ministry of Education to execute a plan of action to guarantee the education of children and adolescents from very impoverished rural communities.

Likewise, the unlawful state of affairs has been invoked in cases concerning indigenous peoples, mainly to rectify the deprivation of the right to communicate in native languages, especially in areas where indigenous populations are prevalent. This infraction was specified in Article 48 of the Constitution, as confirmed by the Constitutional Court in its Ruling of Case No. 00889-2017-AA of 2018. Siles observes that the Peruvian Constitutional Court has employed the unconstitutional state of affairs doctrine in three significant judgments within penal law.

The initial ruling in Case No. 03426-2008-PHC/TC (2010) examined inadequacies in the care and rehabilitation of inmates suffering from mental health disorders. Nine years later, in the Ruling of Case No. 04007-2015-PHC/TC (2015), the Court reaffirmed the unconstitutional state of affairs due to persistent issues concerning the mental health care of incarcerated individuals. In the Judgment of Case No. 05436-2014-PHC/TC (2017), the Court, one year later, proclaimed the unconstitutional condition of affairs due to the severe and persistent overcrowding in Peruvian penal facilities, exacerbated by insufficient health, infrastructure, and security services. As a result of this declaration, the Ministry of Justice and Human Rights, in collaboration with the Ministry of Economy and Finance and other governmental entities, developed the National Prison Policy 2030.

## Unconstitutional State of Affairs and Prison Overcrowding

Peru's penitentiary system is currently facing its most severe structural crisis, a situation that has worsened over the years. According to the National Penitentiary Institute, overcrowding began in 1997 when the prison population was 24,297. By 2015, this number had skyrocketed to 73,255, and by May 2023, it reached a staggering 92,351 inmates.<sup>13</sup>

Peru currently manages 69 correctional facilities intended for 41,556 inmates. As of June 2024, these jails accommodate 97,235 prisoners, yielding an overcrowding rate of 134 %, with many facilities above 100 % overcrowding levels.<sup>14</sup> This situation has led to a massive and systemic violation of fundamental rights. According to both the Ombudsman's Office and the Peruvian Constitutional Court, the solution is not the construction of new prisons but the proper application of pretrial detention, opting for alternative measures where appropriate. Moreover, emphasis must be placed on guaranteeing the availability and accessibility of vital services, especially in healthcare and education, while also offering specific provisions for marginalized groups, including individuals with disabilities, Indigenous populations, and the elderly.<sup>15</sup>

The National Penitentiary Policy for 2030, established after the declaration of an unconstitutional state of affairs in Case No. 05436-2014-PHC/TC, ostensibly addresses these concerns. It is vital to evaluate its existing condition and advancements to comprehend the difficulties in adequately tackling these systemic issues.

## Context

The unconstitutional state of affairs declared by the Peruvian Constitutional Court in the Ruling of Case No. 03426-2008-PHC/TC of 2010, that although it generated a public policy, it did not meet its objectives and ultimately failed. Next, we present the Ruling of Case No. 05436-2014-PHC/TC issued on May 26, 2020, which has driven the implementation of a new institutional plan, which is the National Penitentiary Policy to 2030 whose supervision by the Peruvian Constitutional Court, in theory, is in force. It all originated from the filing of a habeas corpus lawsuit in court by an inmate of the Tacna (Pocolay) penitentiary establishment, alleging that his rights to reasonableness and proportionality in terms of the manner and conditions of serving his sentence and personal integrity were being violated in that prison.

As is well known, both the first and second instances of the Judiciary have rejected the claim of the appellant, leaving no other way but to resort to constitutional justice, a justice that unfortunately has taken six years (2014-2020) to issue a ruling. Apart from the above, the context that the Peruvian Constitutional Court has evaluated to pronounce is the Peruvian penitentiary reality in 2020. Its foundations have been based on postulates of international human rights law, in soft law and hard law instruments ratified by Peru, which integrate the block of constitutionality regulated by Article 55 of the Constitution. According to statistics provided by the National Penitentiary Institute, the Peruvian Constitutional Court has found that the housing capacity in the eight regional offices (68 penitentiary establishments) amounted to 40,137, but the prison population in February 2020 reached 96,870 inmates, detecting an overpopulation of up to 141 % and an overcrowding of 20 %.

The Peruvian Constitutional Court detected the presence of critical and permanent overcrowding. Of the 68 penitentiary establishments, 49 are in overcrowded conditions. In addition to this problem, severe deficiencies have been found regarding the infrastructure of prisons and the quality of sanitary and security facilities. Another issue of concern was the predominance of vulnerable populations such as people with disabilities, indigenous peoples, the elderly, etc., for whom no differentiated services and spaces were identified, but rather the same as those of other inmates. Faced with these situations, and as already announced, the Peruvian Constitutional Court decided to apply the unconstitutional state of affairs technique, since, in addition to the deprivation of personal or ambulatory liberty, a legitimate affectation, fundamental rights, such as health and integrity, were massively violated, putting life itself at risk.

The declaration of the unconstitutional state of affairs made visible the scarcity of penitentiary establishments in terms of quantity and good conditions, which caused not only overcrowding but also, independently of it, an increase in vulnerability. Consequently, the Peruvian Constitutional Court urged the Ministry of Justice and Human Rights to urgently, within no more than 3 months, prepare a penitentiary

policy valid until 2025, subject to supervision and follow-up (every six months, through public hearings) by said court. With this initiative, the state of emergency of the Peruvian Penitentiary System would have to be overcome; otherwise, the establishments with the greatest overcrowding at the time of the deadline would be closed. At the time the sentence was issued, there were six prisons with the highest overcrowding: Chanchamayo (553 %), Jaen (522 %), Callao (471 %), Camana (453 %), Abancay (398 %) and Miguel Castro Castro (375 %).<sup>16</sup>

In the operative part of the sentence, the Peruvian Constitutional Court, in addition to declaring the plaintiff's claim partially founded and declaring the unconstitutional state of affairs, has urged the Judiciary to adequately apply preventive detention, replacing it with other equally suitable alternatives. It is considered that prisons should guard, above all, those under investigation and perpetrators of serious crimes, who represent an imminent danger to society.<sup>17</sup> It should be noted that the Peruvian Constitutional Court, through its ruling, has sustained a frontal criticism of the actions of Peruvian political authorities and public officials who have allowed the prison system to fall into a systematic crisis.<sup>18</sup> Incarceration is already too much because it imposes on people a lifestyle limited by criteria that are not legally established. The State arbitrarily determines in which part of the prison they will live, under what conditions and with whom, what belongings they may keep, and what goods they may acquire, among others.<sup>19</sup>

## **Progress and Current Status**

The Unconstitutional state of affairs declared by the Peruvian Constitutional Court in the previously studied sentence promoted the implementation of the National Penitentiary Policy to 2030, approved by Supreme Decree No. 011-2020-JUS promulgated on September 25, 2020. The objective was to rectify the unconstitutional conditions characterized by chronic overcrowding and inadequate infrastructure and sanitation services in jails. To assess the status, progress, and challenges of the specified public policy, three evaluations are conducted: the initial evaluation involves examining the institutional reports published by the National Penitentiary Institute for the years 2021, 2022, 2023, and 2024 to ascertain the fluctuations in overcrowding since the declaration of the Unconstitutional state of affairs. The second review examines the data supplied by the Peruvian Ministry of Justice and Human Rights concerning the advancements and obstacles of the penitentiary strategy assessed between 2023 and 2024. The third evaluation relies on information from the Peruvian Constitutional Court concerning the public supervisory hearings conducted biannually (Table 1).

TABLE 1.

First evaluation. Years after the Peruvian Constitutional Court issued Ruling No. 05436-2014-PHC/TC (May 26, 2020), the prison reality presents the following nuances

Month and year	Penitentiary establishments	Shelter capacity	Prison population	Overpopulation	Overpopulation (%)	Overcrowding (%)
May 2021	68	40,899	86,812	45,913	112 %	92 %
May 2022	68	41,018	89,091	48,073	117 %	97 %
May 2023	68	41,019	91,940	50,921	124 %	104 %
May 2024	69	41,556	97,235	55,679	134 %	114 %

Source: Prepared by the authors based on reports issued by the National Penitentiary Institute (2021), (2022), (2023), and (2024).

Once the table 1 is noted, the prison situation between 2021 and 2024 reveals a progressive worsening of overcrowding and overcrowding in Peruvian prisons. Despite a slight increase in housing capacity and the number of prisons, the prison population inside the walls has grown at a very fast pace. In 2020, overcrowding reached 92 %, while in 2024 it rose to 114 %, with an overpopulation that in 4 years went from 45,913 to 55,679 people. These figures confirm the growing crisis in the penitentiary system, with more people incarcerated in increasingly precarious and unjust conditions.

Second evaluation. This part reviews two documents issued by the Peruvian Ministry of Justice in response to requests for access to public information: Report N°116-2023-JUS/DGAC-DPC of September 7, 2023, and Letter N°02-2024-JUS/DGAC-DPC of August 8, 2024. Both documents reflect the progress and challenges involved in the implementation and execution of the National Penitentiary Policy to 2030, by its six priority objectives: 1) Significantly reduce overcrowding in the prison system, 2) improve dignified living conditions for persons deprived of liberty, 3) ensure conditions of security and coexistence of the prison population, 4) strengthen skills for the reintegration of persons deprived of their liberty serving sentences in closed and free environments, 5) strengthen knowledge management, interoperability and transparency of the prison system, 6) improve capacities for reintegration in persons who have served their sentences.

On September 7, 2023, the Peruvian Ministry of Justice conducted the initial assessment of the penitentiary policy's advancements and obstacles. The ministry reported that the National Penitentiary Policy to 2030 has made strides in the implementation of educational, labor, and health programs, as well as electronic shackles, with an emphasis on enhancing prison living conditions and mitigating overcrowding.<sup>20</sup> To enhance the administration of the prison system, an interoperability project is being developed, and security operations have been conducted in collaboration with the Peruvian National Police. Nonetheless, considerable obstacles persist, including the necessity to amend legislation to abolish prisons, broaden the scope of reintegration services, and ensure adequate resources for effective and sustained execution. Conversely, there is a necessity for concerted inter-institutional collaboration and for judicial authorities to implement procedures that facilitate prison deaccessioning. Ultimately, it lacks adequate financial and logistical resources.<sup>21</sup>

The second review took place on August 8, 2024. This time the Peruvian Ministry of Justice as the governing body in the matter, made the following statement: As part of the progress made, in 2024, the Multisectoral Strategic Plan (PEM) of the National Penitentiary Policy to 2030 was approved by the Supreme Decree N°003-2024-JUS. During 2023, alternative measures to imprisonment, basic services for persons

deprived of liberty, and comprehensive care for the children of incarcerated women were implemented.<sup>22</sup> In addition, the maintenance of penitentiary establishments and the implementation of specialized treatment programs increased. Regarding the challenges detected, the Peruvian Ministry of Justice stated that it is necessary to achieve an articulation of the services with the strategic actions and operational activities of the entities involved in the studied policy. It is also necessary to optimize the financial, operational, and logistical capacity of the National Penitentiary System to improve the quality and coverage of the services provided.

Although the 2023 review shows progress in reducing overcrowding and improving living conditions in prisons through electronic shackles, and educational and health programs, according to the National Penitentiary Institute reports of 2022 and 2023, overcrowding has not decreased; on the contrary, it has increased. In the second review, regarding the request for access to public information of August 2024, the Peruvian Ministry of Justice has practically omitted to pronounce the reduction of overcrowding and the possible improvements to prison infrastructure and basic services that would essentially be promoted through such state policy.

Third evaluation. In August 2024, the Peruvian Constitutional Court was approached through a request for access to public information, to consult on the progress of the implementation and execution of the National Penitentiary Policy to 2030, as stated in the last paragraph of the operative part of the Ruling in Case No. 05436-2014-PHC/TC: “The Constitutional Court will hold public hearings of supervision every 6 months, counted from the date of publication of this ruling.” The Peruvian Constitutional Court has offered some documents, which reflect the actions that the Ministry of Justice and Human Rights has taken regarding the situation of overcrowding in prisons during the period (2020-2022). However, the information on what the Peruvian Constitutional Court has concluded and recommended in the hearings in the supposed public supervisory hearings has been omitted.

Furthermore, an account is provided of a sentence compliance supervision hearing that took place on May 5, 2021. It is reported that, through Administrative Resolution No. 179-2022-P/TC, dated November 14, 2022, the Constitutional Court’s System for Supervision of Sentence Compliance was rendered ineffective. This system was initially established by Administrative Resolution No. 065-2020-P/TC on June 1, 2020. As a result, from 2022 to 2024, no hearings have been held to supervise compliance with the sentence issued by the Constitutional Court. The situation has grown more concerning, as the only autonomous constitutional body responsible for overseeing inter-institutional coordination—and, most importantly, the efforts of the Peruvian Ministry of Justice to reduce overcrowding—has abandoned the optimistic determinations it had previously expressed in its ruling.

## **Prison and Disability**

The institution of prison, which serves as the situational platform upon which constitutional judges focus when deploying the unconstitutional state of affairs technique, is the subject of the subsequent analysis. This setting also analyzes disability, emphasizing two categories that frequently do not align in safeguarding fundamental rights. The terms “prison” and “disability” conjure a hostile atmosphere in which individuals deprived of liberty and those with disabilities encounter formidable obstacles. These individuals possess restricted alternatives, and a constrained ability to advocate for their rights, and are frequently relegated to mere resistance or survival. Life in prison becomes a condition to be endured, as there are no viable ways to surmount it. The prisoner must cultivate resilience by acclimating to suffering.<sup>23</sup>

Prison is a space where the voice of the strongest prevails, akin to Hobbes’ “state of nature,” which disregards the law. The experience of incarceration is a profound mark upon the individual, a stigma that separates them from the broader community and from which it is nearly impossible to escape.<sup>24</sup> In prison, the individual finds no genuine prospects for growth. Life stagnates in a void, and efforts to overcome adversity often

lose their meaning.<sup>25</sup> Everything becomes uniform in this environment, which is structured as a state-implemented and state-controlled institution that strips away the individual's humanity, reducing them to the status of an object—useless and entirely dispensable.

The harshness of prison life is further exacerbated when it intersects with disability, a concept that is still evolving. Seminario-Hurtado & Ponce assert that the term “person with a disability” refers to an individual or group recognized as a subject of full equality in rights, opportunities, and freedoms, who, despite having sensory, motor, intellectual, or mental impairments, continue to enjoy their fundamental rights without discrimination.<sup>26</sup> Any person with a sensory, physical, intellectual, or mental impairment—whether congenital or acquired—who faces barriers, gaps, and structural inequalities in society, is identified as a person with disabilities, without compromising their inherent dignity.<sup>27</sup>

Disability, on the other hand, is understood as a term that refers to the barriers of discrimination, exclusion, and inequality that individuals with disabilities encounter daily. These barriers, which are perpetuated by society, result in the denial of fundamental human rights, autonomy, and equal opportunities, thereby preventing full and meaningful participation in society.<sup>28</sup> This understanding derives from the Convention on the Rights of Persons with Disabilities (CRPD) and its Optional Protocol. From this perspective, the human rights-based model of disability care is incorporated, which recognizes persons with disabilities as subjects of full equality in rights and opportunities. It emphasizes the importance of addressing and preventing any action or omission by the State that hinders the enjoyment of their human rights.<sup>29</sup>

The intersection of prison and disability, at least from a theoretical perspective, reveals that these two constructs form distinct yet interwoven universes, each influenced by ideologically driven narratives. Within the jail context, an individual's existence is marked by desolation, deterioration, and lack of purpose. The formation of disability in society reflects an analogous imposition, wherein those with disabilities are subjected to a life lacking legal recognition and equal rights—characterized by inequality and segregation, as it does not conform to cultural standards of “normality”.

In order to offer a tangible perspective on the intersection of prison and disability, we refer to the objective data on the concentration of disability within the Peruvian prison system. The Census by the National Institute of Statistics and Informatics estimates that 3,209,261 individuals in Peru have some sort of handicap, representing 10 % of the population.<sup>30</sup> The census further reveals that of the total population with disabilities, 57 % are women (1,820,304 individuals) and 43.3 % are men (1,388,957 individuals). The data is illustrated in figure 1.

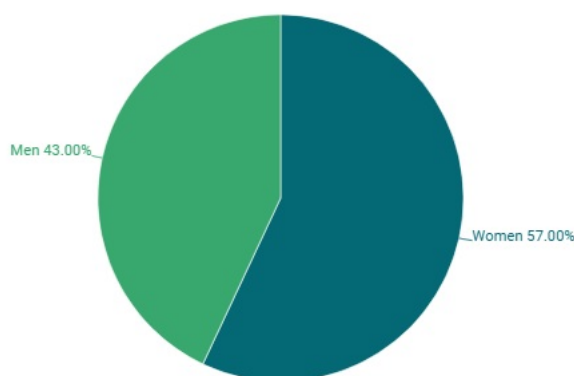


FIGURE 1.  
Population with disabilities by sex  
Source: Own elaboration.



Regarding the geographic distribution of disability, it has been identified that Metropolitan Lima is home to 1,002,368 persons with disabilities, representing 31.2 % of the total. This is followed by the department of Piura, with a total of 173,477 (5.4 %), and the departments of La Libertad and Puno, with 167,632 (5.2 %) and 160,082 (5.0 %), respectively. Finally, Arequipa reports a total of 158,987 persons with disabilities (5.0 %) (Figure 2).<sup>31</sup>

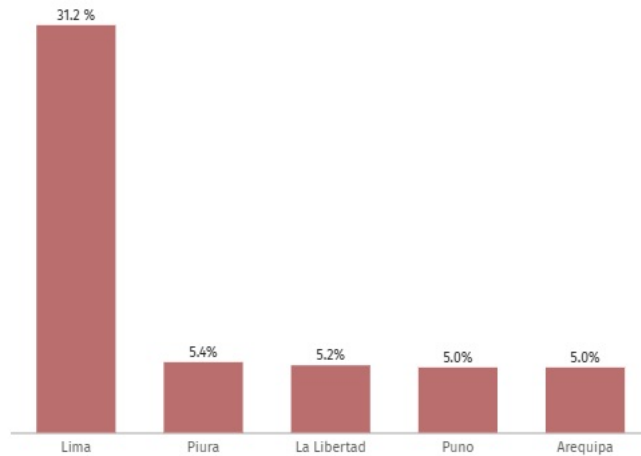


FIGURE 2.  
Population with disabilities by geographic situation  
Source: Own elaboration.

Regarding the types of disability, the results revealed that 43.4 % possess physical disability, followed by 29.71 % with intellectual disability, on the other hand, 21.64 % possess sensory disability, lastly, 5.21 % mental disability (Figure 3).<sup>32</sup>

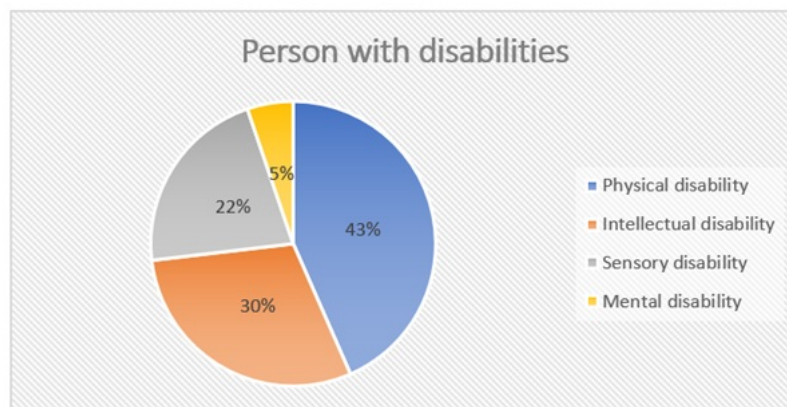


FIGURE 3.  
Population with disabilities by type  
Source: Own elaboration .

Regarding the types of disability, the results indicate that 43.4 % of individuals have a physical disability, followed by 29.71 % with an intellectual disability. Additionally, 21.64 % have a sensory disability, and 5.21 % have a mental disability.<sup>33</sup>

The 'First National Penitentiary Census' was published in 2016 by the National Institute of Statistics and Informatics in collaboration with the Ministry of Justice and Human Rights and the National Penitentiary Institute, with respect to the treatment of persons with disabilities in prisons. This analysis delineated the

primary sociodemographic attributes of the population confined in 66 correctional facilities nationwide, encompassing those with disabilities.<sup>34</sup>

The census revealed that a segment of the prison population has disabilities. Specifically, 15.9 % (12,071) reported having vision problems, even when using glasses, which impede or hinder their ability to perform daily activities. Following this, 9.7 % (7,402) reported difficulties in movement, walking, or using their arms and legs.<sup>35</sup> About this data, a recent study by Seminario-Hurtado & Avellaneda-Vásquez examined the legal situation of persons with disabilities in penitentiary centers, in alignment with updated public access information from the National Penitentiary Institute. The findings indicated that 793 inmates with probable disabilities were identified, of which only 39 possess a disability certificate. Notably, 66 % of these individuals are from the Lima region, as evaluations for inmates in other departments are still in progress.<sup>36</sup>

The lack of current data on the sociodemographic profile of inmates with disabilities is underscored by this predicament. Consequently, the overall count of individuals with disabilities, along with their specific disability classifications and gender, remains indeterminate, thereby hindering the evaluation of their human rights status. Additionally, the National Council for the Integration of Persons with Disabilities has indicated that the Committee on the Rights of Persons with Disabilities, at the outset of 2023, observed the deficiency of information regarding incarcerated individuals with disabilities and the problem of prison overcrowding. The Committee advised that the pertinent authorities formulate policies to mitigate congestion and provide sufficient infrastructure; yet, these measures are still outstanding.

## **The Unconstitutional State of Affairs and Judicial Activism in the Defense of Human Rights**

The unconstitutional state of affairs, as encapsulated by the conflict between judicial activism and human rights, raises constitutional concerns. The Peruvian Constitutional Court has delineated the application of this doctrine in penal issues through the ruling in Case No. 05436-2014-PHC/TC, emphasizing its principal limitations. The penitentiary strategy enacted by the Peruvian Constitutional Court via the proclamation of an unconstitutional state of affairs has failed to meet its aims. Prison congestion has intensified, and there is less evidence of enhancements in sanitary and infrastructural conditions. Moreover, there is insufficient control over the Peruvian Constitutional Court's compliance with its verdict. This setting offers a succinct elucidation of the concepts of 'jail' and 'disability' as elements of hypervulnerability, which the unconstitutional state of affairs handles, but not without criticism.

## **Judicial Activism and the Unconstitutional State of Affairs**

First and foremost, judicial activism, a concept that is highly debated in legal theory, critical legal studies, and legal philosophy, is a judicial approach in which judges interpret and substantiate legal cases in a manner that occasionally deviates from strict legal norms. Aguiló Regla defines an activist judge as one who diverges from legality to coincide with constitutionality, dedicated to the actualization of constitutional values.<sup>37</sup> We would argue, however, that the beliefs of judges about the fairest way to resolve a case can be shaped by ideological biases, potentially leading to conflicts with the letter of the law.<sup>38</sup>

Judicial activism, along with its opposing concept of judicial formalism, is often perceived as a deviation from the judicial norm or a pejorative paradigm that discredits it.<sup>39</sup> Nevertheless, not all aspects of judicial activism are subject to criticism. Certain components, notwithstanding their constraints, may substantially enhance modern legal theory. Judicial activism can provide a transformational view of vulnerability, particularly regarding structural issues within nations.<sup>40</sup> This interpretation is only feasible if relevant

authorities amend the jurisdictional rules that define judicial powers or limit their actions; otherwise, the rule of law may be compromised.<sup>41</sup>

Constitutional judges may implement a more effective type of judicial activism by prioritizing the protection of marginalized groups and guaranteeing the realization of their constitutional rights. Feoli Villalobos identifies two key indicators of activist rulings: The acknowledgment of new rights and the formulation and advocacy of public policy. This is exemplified by the Peruvian Constitutional Court's determination of an illegitimate state of affairs in Case No. 05436-2014-PHC/TC, a determination that surpassed the specifics of the case. The ruling relied on binding doctrine instead of statute law, illustrating a robust activist position that compels the judiciary to emphasize the relevant constitutional principles and rights, particularly on pretrial detention. For judicial activism to be efficacious, it must involve the modification of jurisdictional regulations governing court proceedings. This should be based on the concept of "small justice," free from ideological biases or stereotypical views. Judges may fail to protect fundamental rights or individuals whose ideas differ from their viewpoints.

The Peruvian Constitutional Court's engagement in prison overcrowding demonstrates its activist stance through advocacy for vulnerable populations and the promotion of public policy to tackle this issue, thereby urging action from all three branches of government.

The Court's approach signifies a divergence from the positivist legal tradition, while uncertainties persist about its capacity to ensure fundamental rights. The verdict of the Peruvian Constitutional Court in Case No. 05436-2014-PHC/TC has resulted in ineffective public policy and inadequate advancement in addressing the issue. The Court's quiet on the subject after its verdict creates apprehensions; particularly as political figures have publicly highlighted the matter in the aftermath of the ruling.

## **The Unconstitutional State of Affairs in Defense of the Human Rights of Incarcerated Individuals with Disabilities**

The safeguarding of human rights predominantly relies on the political resolve of governmental entities, as politics is crucial in the effective execution of human rights-oriented policies. Political obstacles frequently impede the complete actualization of these rights, highlighting the necessity for intervention by the jurisdictional or constitutional framework via legal-political procedures, such as the unconstitutional state of affairs. This process has become an essential instrument for safeguarding human rights, as the Peruvian Constitutional Court has integrated International Human Rights Law into its decisions, notably in Case No. 05436-2014-PHC/TC.

An activist judgment declares a state of affairs to be unconstitutional in the presence of a structural issue that results in severe violations of fundamental rights. In these instances, judges employ a human rights-based framework, considering intersectionality and the principle of progressivity. This approach represents a responsibility to progressively fulfill human rights obligations, ensuring their preservation over time. Consequently, it is imperative to develop clear indicators to evaluate the progress of human rights. The Peruvian Constitutional Court might greatly benefit from these indicators in its supervision of judicial procedures related to unconstitutional circumstances, particularly with incarceration and disabilities.

On March 30, 2008, Peru ratified the Convention on the Rights of Persons with Disabilities (CRPD), which acknowledges the rights of individuals with disabilities and mandates states to provide reasonable accommodations in both public and private sectors. These concessions are essential for evaluating the advancement of human rights for this vulnerable population.<sup>42</sup> The Vienna World Conference on Human Rights determined that assessing the advancement of human rights necessitates the utilization of indicators to gauge this achievement. These indicators facilitate the evaluation of progress achieved while also identifying the structural drivers and the social, cultural, and political resistances that create detrimental settings and

result in human rights violations.<sup>43</sup> By connecting these ideas, the text now flows more smoothly, maintaining logical coherence and reinforcing the central theme of the importance of judicial intervention and the use of indicators to measure the progress of human rights, particularly for vulnerable groups such as persons with disabilities.

For this reason, Peru submitted its IV National Report to the United Nations Human Rights Council during the Fourth Cycle of the Universal Periodic Review. Resolutions 5/1 and 16/2 delineated advancements in correctional issues, including the ratification of the National Correctional Policy through 2030, which seeks to enhance living circumstances with dignity. The authorities revised the Directive on Comprehensive Care and Specialized Penitentiary Treatment for Individuals Deprived of Liberty and the Special Protected Criminal Population Outside of Prisons, integrating a gender-sensitive and intersectional framework. The Penitentiary Function Manual was ultimately issued in accordance with the effective implementation of the Bangkok Rules and the Nelson Mandela Rules.<sup>44</sup>

Despite these advancements, the Peruvian Constitutional Court has declared that persons with disabilities in prison face an unconstitutional situation due to the violations of their right to health (Article 25 of the CRPD), equality and non-discrimination (Articles 5 and 14 of the CRPD), an adequate standard of living and social protection (Article 28 of the CRPD), and accessibility (Article 9 of the CRPD), as indicated in its rulings.

Furthermore, the Court acknowledged the importance of protecting the rights of people with disabilities who are incarcerated in Case No. 04580-2011-PHC/TC. It emphasized that, due to limited resources and inadequate infrastructural improvements, their rights to health, dignity, and protection from torture were being violated. In Case No. 05729-2017-PHC/TC, the Court emphasized the imperative of ensuring adequate living conditions for jailed individuals with disabilities, highlighting the adequacy of prison facilities and the need to address their specific needs.

## Conclusions

In 2020, through Ruling No. 05436-2014-PHC/TC, the Peruvian Constitutional Court invoked the unconstitutional state of circumstances in criminal matters for the third time. The ruling garnered significant praise, marking the first occasion in which the Supreme Court comprehensively evaluated the state of the nation's prison system. Despite the commendable articulation of the declaration, its execution has been markedly inadequate, raising considerable concerns. The implemented penitentiary policy has been ineffective in reducing prison overcrowding, thereby hindering inmates' access to vital services. Moreover, research indicates that the Peruvian Constitutional Court has failed to oversee the implementation of its ruling. This demonstrates that the proactive actions of constitutional judges, together with their acknowledgment of the obligation to protect human rights, are ineffectual without necessary political will and execution. Should the Court neglect to ensure the proper execution of its decisions, the effectiveness of its judicial activism is significantly diminished.

The Peruvian Constitutional Court has acknowledged the unconstitutional state of affairs as a mechanism to protect, uphold, and ensure the human rights of individuals deprived of their liberty, particularly focusing on those with disabilities, who represent one of the most vulnerable populations. The United Nations (UN) has observed the absence of a contemporary population census of jailed individuals with disabilities, thereby rendering public policies and associated procedures ineffective. The UN emphasizes that incarcerated individuals with disabilities face violations of fundamental rights, including health, equality, non-discrimination, accessibility, and an adequate standard of living with social protection, attributable to insufficient resources, inadequate infrastructure, and restricted accessibility. This indicates that Peru fails to meet its international human rights duties that protect individual dignity, particularly for this

vulnerable group that has the dual disadvantage of being both disabled and incarcerated, so exacerbating their vulnerability.

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## Notes

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