A Short History of Peruvian Criminal Procedure and Institutions

By H. H. A. COOPER

The history of Peru's criminal procedure and institutions may be considered most conveniently by reference to four distinct periods, the Pre-Hispanic; the years of Spanish domination; the Declaration of the Republic, 1821, until the close of the century; and the beginning of the present century to date. These divisions, though arbitrary as is ever the case when the continuous unfolding of the historic process is artificially adapted to some scheme of narration, have been made partly on account of the general events of Peru's history, but more particularly by reference to the characteristics of the institutions and procedures themselves. Each period has its own special interest for the historian and jurist and each is sufficiently distinct to stand upon its own for the purposes of study. Each has a useful contribution to make to a general understanding of the evolution of law and order.

The Pre-Hispanic Period

Of the laws and institutions of those peoples who anciently inhabited the territory comprised in the modern state of Peru, the materials at our disposal allow us to write little of value relating to the period prior to the beginning of the fifteenth century. (1) That considerable empires, such as that of the Chimu, existed we know from the archaelogical remains. That there existed, too, a well organised society and considerable order is implicit in the extent and nature of such ruins as Chan Chan in northern Peru. There is nothing, however, upon which may be based more than the flimsiest conjectures as to the way in

(1) SEE, "Historia del Derecho Peruano", Jorge BASADRE, Editorial Antena, Lima, 1937, at pages 71/72. Compare, "Derecho Procesal Penal; parte general", Luis del VALLE RANDICH, Lima, 1968, at page 29.

which order was anciently maintained in the pre-columbian political agrupations. (2) The interest of this period of study lies in what can be deduced, from the scant materials at our disposal, with respect to the century prior to the arrival of the Spanish Conquerors in 1532.

Reference to any general history of the Incaic period reveals at once the difficulties which face the historian. (3) The Incas, to whom writing appears to have been unknown, (4) have left us no reliable account of their origins and much of their history, despite the patient and dedicated efforts of specialist researchers, remains a mystery. Yet slender though the evidence is, there is much of importance in the history of this great people whose domain once extended from modern Quito to where the great forests of southern Chile begin. On the established facts a number of useful observations can be made pertinent to the present theme.

The conquest of the Incas was rapid and effective. (5) It follows that two problems were of importance from the point

---

(2) Referring to the representational Moche (pre-Inca) pottery, Dr. MASON writes: "Strict authority is also shown by effigies of persons who have evidently undergone punishment, such as mutilation, or scenes depicting execution or stoning". The Ancient Civilisations of Peru, J. ALDEN MASON, Penguin, London, 1961 at page 74. Perhaps the most that may be safely ventured as to the period prior to the general Inca domination is that private vengeance had been superseded and that trial and punishment had become a public function. See Handbook of South American Indians, Vol. II, Rafael LARCO HOYLE, p. 168.

(3) The problem for the more specialised historian is neatly put by Dr. Sally FALK MOORE: "Ultimately, all knowledge of the Inca empire derives from a rather ambiguous lot of 16th and 17th century manuscripts. As a consequence of inconsistency, plagiarism and incompleteness in these documents, many liberties can be taken in describing the Inca culture. Evidence can be found to support precisely opposite theories. It is a case in which the scholar can be all too much the master of his material". Power and Property in Inca Peru, Columbia University Press, New York, 1958, at page 6. The only safe course is to make an individual appreciation of each of the relevant primary materials by reference to the particular purpose in mind, being appropriately guided by the works of those who have made a main study of the general validity of these old authorities and in particular of the Chronicles of the discovery and conquest. Two points are worthy of note, namely that the oldest authorities are not necessarily the best and that those which may tell their story with considerable accuracy in connection with some matters are of little value in connection with others. For the purposes of this study much reliance has been placed upon the Relación of Fernando de SANTILLAN. A lawyer concerned with process and institutions who reads this account cannot fail to be impressed with the fact that this Chronicler was not merely a shrewd and knowledgeable lawyer, but that he knew precisely what he was seeking in this field.

(4) The question whether the Incas ever attained anything approaching a permanent expression of the spoken word is very controversial. An excellent summary of the various points of view is to be found at p. 103/135, "Fuentes Históricas Peruanas", Raúl PORRAS BARRENECHEA, MEJIA BACA y VILLANUEVA, Lima, 1954.

(5) The period of Inca expansion lasted a little over a hundred years. SEE "Handbook of South American Indians", Vol. II, pages 204/208. All the early Chronicles testify to the orderly government existing throughout the Empire at the time of the arrival of the Spaniards.

of view of good government; the rapid reduction of the conquered peoples and their subordination to the Inca's will; and the subsequent maintenance of law and order by means of the enforcement of some sort of criminal law. The Incas have this in common with the Norman invaders of England: that they were primarily administrators rather than law givers; that the separation of powers and functions was unknown to them; that government was conceived of as generated by and radiating from a strong central source; that local organisation was permitted to subsist provided it could be adapted to the needs and aims of the central government; that control was exercised by means of travelling officials armed with the Royal authority; that law and order and the system of tribute were closely linked. Perhaps the most important feature of the Inca system from the present point of view is its despotic nature. (6) With this central fact in mind, a number of definite assertions can be made concerning penal procedure and institutions.

(1) There existed no regular hierarchy of courts, either central or local. (7) Insofar as any functioning jurisdiction had existed among the subjugated peoples this seems simply to have been taken over, subject to the over-riding powers of the central authority, exercised through its travelling inspectors. (8) In carefully allotted measure, certain officials wielded the jurisdic-

(6) This is a general and widely held verdict. "The Inca government was an unqualified despotism deriving its power in theory from the supernatural beings that watched over the Emperor and in fact from the military force which he controlled". John HOWLAND ROWE, "Handbook of South American Indians", Vol. II, at page 273. "The government of Peru was a despotism, mild in its character, but in its form a pure and unmitigated despotism", History of the Conquest of Peru" William H. PRESCOTT, BURT & Co., New York, Vol. I, at p. 41. See also BASADRE, op. cit. supra at note 1, page 187.

(7) See MOORE, op. cit., supra at note 3, p. 117. The rather fanciful judicial framework postulated by Dr. Horacio URTEAGA cannot be supported on the authorities cited. SEE, "La organización judicial en el Imperio de los Incas y en la Colonia", Librería Gil, Lima, 1938. It is also noteworthy that there were no regularly held sessions: MOORE, p. 121.

(8) This official was the **Tucuyricuc**, which the early Spanish writers correctly designated by reference to their own practices, Veedor or one having a general oversight of matters. The functions ascribed to this official are, however, somewhat difficult to disentangle from the early accounts due to a linguistic confusion with the title used to describe a provincial governor. See MOORE, op. cit., supra, note 3, p. 115 and Handbook of South American Indians, Vol. II, p. 264, note 19. The doubts as to the exact functions of the **Tucuyricuc** on the part of the early Spanish jurists are precisely expressed by Licenciado Francisco FALCON: "También habían otros jueces que llamaban Tucuiricoc que quiere decir todo lo mira o veedores y eran de fuera de la provincia; entendían en los negocios de la justicia, unas veces juntamente con los **hunos** y curacas y otras veces sin ellos; no se puede entender en que casos había estas dos diferencias, ni si era con orden o acaso. Los cuales eran como jueces de comisión o pesquisadores o más propiamente visitadores . . .". "Daños que se hacen a los Indios", Los Pequeños Grandes libros de Historia Americana, Tomo X, Serie I, Lima, 1946, pages 135/6.

tion, civil and criminal, appropriate to their rank. There were accordingly no regular judicial sessions, but rather the ad hoc excercise of this jurisdiction as the need for it arose.

(2) All power flowed from the Inca and his word was law. (9) All judges held their appointments at the Inca's pleasure and the offices were not hereditary. Given the absolute nature of this power and the caprices of the ruler, standardized procedure as such was non-existent. (10) Ritual and formalism are in evidence in legal proceedings, but fixed ceremonial rites for the trial of causes are not in evidence (11) and it seems possible to advance the view that the judge of causes was not bound in any way save that his actions must not have been such as to displease the Inca. Trial and judgment constituted the most naked acts of unfettered authority, within the limits which had been accorded the official concerned.

(3) There is no evidence whatsoever of even an emergent legal profession. (12) The modern Quechua language, as well

---

(9) The theory upon which the Inca delictual structure rested was not so much that the doing of a particular forbidden act brought punishment in its train as that the breaking of the Inca's command not to do that particular thing carried with it the inevitability of punishment. See "Derecho Penal Angentino", Sebastián SOLER, Tipográfica Editora Argentina, Buenos Aires, 1951, Vol. I, at p. 96 citing Garcilaso de la VEGA.

(10) See "Relación del origen, descendencia, política y gobierno de los Incas" Licenciado Fernando de SANTILLAN, "Tres Relaciones de Antiguedades Peruana", Ed. Marcos JIMENEZ DE ESPADA, Editorial Guarania, Paraguay, 1950, p. 51, para 12.

(11) The notable absence of formalism in criminal proceedings is revealing of not merely the factors of social and cultural development, but more importantly the objectives of criminal investigation and disposal. Trial was designed to elicit, as expeditiously as possible, the facts of the matter. At times it was convenient to appeal to superstitious usages, but only in so far as these assisted in revealing the facts. Superstition and ritual were never an end in themselves and the flexible nature of the proceedings reveals their true nature.

(12) This is stated with varying degrees of emphasis by a number of writers, who have studied the Inca legal system. See for example, MOORE, op. cit., supra at note 3, p. 120; Historia del Derecho Procesal en el Perú", Percy MACLEAN ESTENOS, Revista de Derecho Procesal, Buenos Aires, 1945, Nº 2 at p. 24; URTEAGA, op. cit. supra at note 7, p. 29, citando Pedro de CORDOVA y MEXIA. Certainly the Chronicles are silent as to the existence of anything in the nature of a lawyerly class and its existence would not have escaped the notice of Fernando de SANTILLAN, who especially comments in favourable terms on the absence of "letrados" and "procuradores". Furthermore those authors whose writings contain an abundance of Quechua do not supply a term even remotely suggestive of a counsellor in legal proceedings. Nevertheless, it is noteworthy that the earliest Quechua vocabulary, that of Fray Domingo de SANTO TOMAS, (who, incidentally, instructed Cieza de LEON in the language), contains a number of indigenous words for lawyer and lawyerly functions. These are not contained in the later work of Diego GONZALEZ HOLGUIN, but one **Villapuc**, is to be found in the near contemporary compilation of Diego de Torres Rubio. Fray DOMINGO gives a verb, **Villani**, meaning in Spanish, **informar**. (In reality the verb is not an infinitive form, but a first person singular). There does not seem, however, to have been any functionary who, on the Chronicle accounts, would have fulfilled the duties comprehended by the term. An even more curious term is **Llacta chapac**, which Fray DOMINGO translates as "abogado del pueblo". The notion of

as the ancient glossaries, preserves a number of words which give some indication of those offices and professions then existing. The notion of argument in the face of accusation and trial is unknown (13) and the pleader or learned counsel is notably absent.

(4) Absent, too, is any notion of appeal to higher authority. (14). This is perfectly consistent with the authoritarian nature of the regime, the according of a particular function to those officials who wielded criminal jurisdiction and the general nature of the Inca system of government. The Inca requirement of submission left little room for doubts and the requirement of obedience, that became ingrained to the point where it left an indelible mark upon future generations, (15) would have been inconsistent with the delays inherent in the review of causes or a challenge to duly appointed Royal officials. (16)

(5) All criminal proceedings were necessarily oral and seem to have been in public. (17) Torture was a regular pre-

doing something for or on behalf of a collective entity is implicit in this term, but again it is difficult to divine what this office might have been in the absence of descriptive evidence from other sources. These terms would, however, seem to have a direct, unadulterated reference to Incaic institutions and it is worth recalling the comment of Raúl Porras Barrenechea on Fray DOMINGO'S work: "En él hay todavía muy pocos aportes de origen español u occidental'.

(13) Given the absolutist nature of the Inca rule this is hardly surprising as it would have admitted of a wholly unacceptable challenge to the cardinal principle of authority. What is perhaps more worthy of remarking is that the Chronicles and even the folk traditions are silent as to anything in the nature of intercession even on a family basis.

(14) The suggestion to the contrary of Dr. Horacio URTEAGA cannot be accepted: "El Imperio Incaico", Librería Gil, Lima, 1931, at pages 208/209. The correct position seems to be that stated by Garcilaso de la VEGA: Comentarios Reales, Vol. I, p. 93, Emecé Editores, Buenos Aires, 1945. The distinction must be drawn between appeal and what amounted to regular administrative review. The person tried had neither right nor privilege to look elsewhere for alteration of his sentence, but an onus lay upon the judge not to exceed the bounds of his authority upon pain of himself suffering the Inca's displeasure. There were high officials whose duty it was to see that such irregularities did not occur or to punish those which did. See note 19. See, also the Second Part of the Chronicles of Peru, Pedro de CIEZA DE LEON, trans. Clements R. MARKHAM, Haklyut Society, London 1883 at page 55: "Certain Orejones were sent as judges, but only with powers to inspect the provinces and give notice to the inhabitants that if any felt aggrieved he was to state his complaints in order that the officer who had done him injury might be punished".

(15) No more striking testimony of this habit of obedience can be offered than the faithful compliance with the orders of Atahualpa, notwithstanding his incarceration by the Spaniards. Despite his circumstances he was faithfully attended by his retinue and received the fearful homage of even the highest of his captains. See, for example, "Relación del descubrimiento y conquista de los reinos del Perú", Pedro Pizarro, Editorial Futuro, Buenos Aires, 1944 at p. 61. The awe inspiring, well-known journey of Hernando Pizarro was accomplished less by military prowess than in reliance upon this unquestioning obedience to the Inca's word.

(16) See GARCILASO DE LA VEGA, op. cit., supra at note 14, Vol. I, p. 92.

(17) This ought not to be taken as having any modern doctrinal significance such

trial proceeding and something in the nature of the ordeal may have existed, though it is likely that the latter was for the purpose of extracting concealed information rather than as a means of proof. (18)

(6) No record of the nature and content of criminal proceedings seems to have been maintained. In important cases, the functionary concerned with the administration of justice would no doubt give an oral account of his proceedings to the Inca or his Council. (19) The Quipus with their mathematical, significance can have had little direct relation to penal proceedings (20) or to have sufficed for controlling their development by way of a system of precedent. (21)

(7) A definite body of substantive law existed with appropriate penalties attaching to certain offences. (22) The officials

as that which colours the traditional pride in the open nature of criminal proceedings, as a general matter, under the Common Law. Proceedings were held in public because, consistent with the objectives of Inca rule, justice was more effectively dispensed in that way and its manifestations had an educative effect upon a people whose laws, being exclusively judge-made, had no other means of communication other than example. There seems to have been no rule that proceedings had to be held at any particular time of day or in any particular place and the Inca seems to have held audience as he pleased. Cieza de LEON, op. cit., supra at note 14, p. 183.

(18) COMPARE, "El derecho penal de los Incas". Victor MODESTO VILLAVICENCIO, Revista de Derecho Penal, Buenos Aires, No. 1, 1946 at page 41. This is based substantially on Huamán POMA DE AYALA. This latter author does suggest something in the nature of the aceptance of the miraculous by way of proof and the circumstances of the retailing of this curiosity make it unlikely that it is either invention or the product of alien learning. However, the general expedition of Inca justice would seem to tell against such practices save in the most exceptional of cases. See, also, CIEZA DE LEON, op. cit., supra, at note 14, p. 74: "If any one denied the accusation, it was said those serpents would do him no harm, but that if he lied they would kill him; and this they held and kept for certain".

(19) Or to the Incas special visitors. SEE: "Relación del origen y gobierno que los Incas tuvieron" (1608). Colección de libros y documentos referentes a la Historia del Perú, Segunda Serie, Tomo III at page 68. "Enviaba el Inga cada año sus visitadores, para saber si los defectos eran castigados, para ver como lo hacían sus cocricocs y gobernadores y estos visitadores lo hacían muy bien y con mucha fidelidad y sin sobornos, porque el que recibía algo y el que lo daba, era muy castigado del Inga".

(20) The use of the Quipu as a mnemonic device has been extensively canvassed. The earlier Chroniclers were witness to some prodigious feats of memory in which the Quipu camayocs demonstrated their ability to recall not merely relations of mathematical significance, but others quite unrelated to any numerical factor. These essays, however, depended upon the personal memory of the manager of this instrument of recollection rather than anything intrinsic to the quipus themselves. See Raúl PORRAS BARRENECHEA, op. cit., supra at note 4, p. 117/135. In one important respect, however, the Quipu records played an important and known part in the criminal process. The annual census, which recorded the deaths throughout the land that the tax tribute might be adjusted accordingly would necessarily show those who had been executed by judicial order. See also, "La Vida Cotidiana en el tiempo de los últimos Incas", Louis Baudin, Librería Hatchette, Buenos Aires, 1955 at pages 122/123.

(21) Although it is sometimes suggested that quipu records of laws and decided cases were maintained in some form of central archive at Cuzco, it is unlikely that such a circumstance would have escaped the eagle eye of Fernando de SANTILAN.

(22) On these, see generally, the graphic work of Huamán POMA DE AYALA, "Nue-

administering justice must have known of these and their notoriety, even into following times, suggests not only their customary nature, but the uniformity of their application throughout the Inca's dominions. (23)

(8) There is an entire absence of any popular element either in the creation of law or in its administration. Moreover, and this is clearly borne out by that period for which we have the strongest evidence namely that immediately before the Spanish conquest, there is neither devolution of jurisdiction to popular organs nor that specialization of functions which one finds in developing societies. The habit of obedience was not merely ingrained by the time of the Spanish arrival; it had become institutionalized to the point of serving as a necessary adjunct to the nation's trial procedures. Although there existed the most intricate organisation for tax, military and other socio-economic purposes based upon a decimal system, there is nothing comparable to the English frankpledge or the criminal responsibility of the Hundred. (24) It can only be assumed that it was not necessary or inconsistent with Inca penal policy. The Inca design for the keeping of the peace rested upon a unique policing of the officials themselves, to whom the responsibility was allotted in carefully apportioned degree, for the maintenance of law and order.

(9) The Incaic administration of criminal justice was frankly discriminatory as to persons. Persons were tried according

---

va Corónica y Buen Gobierno", Institut D'Ethnologie, Paris, 1936, at pages 301/314. See also, the supposed Blas Valera, an account upon which Garcilaso de la VEGA placed much reliance, "Relación de las costumbres antiguas de los naturales del Perú" en Tres Relaciones Peruanas, pages 183/185. With a jurist's touch, Licenciado Fernando de SANTILLAN probably reaches the truth when he states: "Las penas de los que iban contra estas cosas que el Inga tenía ordenadas y puestos para su gobierno, y también la de los que cometían cualquier delito, parece que eran todas arbitrarias", op. cit., supra note 10, p. 51, para. 13.

(23) While there are firm traditions concerning the creation of economic institutions and forms of government by named individuals, there do not appear to be reported traditions relating to the creation of particular types of penalty. Their variety and the great discretion accorded the higher judges suggests that they were created ad hoc according to the particular circumstances, which their application seemed to dictate. The constant supervision of the travelling judges would have tended towards uniformity by much the same process as that which gave rise to the English Common Law. See "Relación de Antiguedades deste reyno del Pirú", Joan de SANTACRUZ PACHACUTI YAMQUI, "Tres Relaciones de Antiguedades Peruanas", Editorial Guarania, Paraguay, 1950, page 253.

(24) Compare Prescott, op. cit. supra at note 4, Vol. I, p. 53, note 6. Prescott comments upon the numerical analogy with the Anglo-Saxon division, but correctly focuses upon the distinction, namely that, for police purposes, the responsibility under the Inca system fell upon the official who had been entrusted with the limited power of maintaining the peace.

to the concept of their rank and function in society and this determined not merely the Court, which was charged with the matter, but also the relative scale by reference to which punishment was awarded. (25)

(10) The system of punishments was characterised not merely by its Draconian severity, but also by the extraordinary diversity of execution of penalties, especially the death penalty. There seems to have been an incipient notion of making the punishment fit the crime. (26) The penalties were fundamentally of an intimidatory character and the inevitability of their application had much to do with the cultivation of the habit of obedience. (27) There also existed a strong notion of social hygiene, which certainly stemmed from the earlier pattern of Incaic activity, namely the reduction of conquered territories to a law-abiding state. (28)

(11) Inca penal proceedings and institutions are of a strikingly secular nature. The law was non-mystic in the sense

(25) See, Huamán POMA DE AYALA, at page 312. Compare, "Reseña Histórica de la Evolución del derecho penal", Julio ALTMANN SMYTHE, Lima, 1944, pages 173/174. The unequal application of the law again reveals much of the ad hoc nature of Incaic institutions and criminal proceedings. Clearly the Inca scheme of law and order would be more likely to be threatened by rebellious members of the Orejón or noble classes and the deterrents would have to be designed in proportion to the possibilities. See also the case of the Yanaconas, a whole class of people being reduced, in perpetuity, to inferior status on account of the errors of the forbears, CIEZA DE LEON, op. cit., supra at note 14, page 55.

(26) This must be understood in a strictly intimidatory rather than expiatory sense. There does not seem to be any religious or sacrificial element in the execution of penalties and certainly no objective of propitiating some deity; sacrificial vicims on the contrary were honoured. So far as the noted tendency is observable, it seems to have been dictated purely by a deterrent policy designed to exemplify the wrong-doing by fixing before society the horror of the crime through the horribleness of the penalty. See, "Tratado de Derecho Penal", Luis JIMENEZ DE ASUA, Editorial Losada, Buenos Aires, 1950, Vol. I, at pages 717/718. See particularly the penalty attaching to habitual drunkenness See, also, "El delito en las altas culturas de América", Hermann TRIMBORN, UNMSM., Lima, Perú, 1968, at page 96.

(27) See CIEZA DE LEON, op. cit. supra at note 14, p. 37. "So great was the veneration that the people felt for their princes, throughout this vast region, that every district was as well regulated and governed as if the lord was actually present to chastise those who acted contrary to his rules. This fear arose from the known valour of the lords and their strict justice. It was felt to be certain that those who did evil would receive punishment without fail, and that neither prayers nor bribes would avert it".

(28) The Inca system of pacification simply did not admit of any general tolerance of deviant behaviour. Those who did not submit to the Inca's blandishments and resign themselves to this mild yoke of benevolent paternalism were ruthlessly exterminated. See CIEZA DE LEON, op. cit. supra at note 14, p. 193. Much the same considerations motivated the structuring of the criminal law. There was simply no place for the criminal in the Inca pattern of society; by the nature of his activity he had placed himself irrevocably outside that society. This policy is evidenced by the scant attention paid to subjective factors and the slight provision for recidivism.

that it was not the province of a priestly class, nor was the breaking of law in any way connected with a notion of sin as this is thought of in modern society. Crime was simply a flouting of authority, which the system could not tolerate. (29)

(12) While it is notable that the Incas had no concept of the judicial function as something apart from the other branches of governmental activity, even more significant perhaps is the lack of doctrinal distinction between criminal and civil law. In so far as the latter existed at all it was adjunct to, or subordinate to the criminal process and civil rights were accordingly the product of and received their recognition and protection from the administration of criminal law. (30)

(13) The administration of justice was extremely expeditious. Proceedings were necessarily oral and taken in the immediate presence of the appropriate judicial officer. The accused gave evidence or was interrogated as to the matter in hand by direct confrontation. (31) Witness evidence was given in the same way and there is some authority for according this a discriminatory scale of values in that it is said that women and poor persons might not testify. (32) Evidence was taken upon oath, generally without the intervention of any magical processes of proof and the whole proceeding seems to have been designed to elicit the truth as expeditiously as possible.

(14) Vicarious proceedings do not seem to have been general, though it is said by one authority that a father might be punished for the wrongdoing of an errant child. (33) A system of hostages was used in the maintenance of law and order (34) and the transportation of whole peoples and the colonization of others had a similar objective. (35)

---

(29) Compare BASADRE, op. cit., supra at note 1, page 78.

(30) See, for example, the Inca law of succesion, Fernando de SANTILLAN, op. cit. supra, at note 10, pages 54/55. It is interesting to note the similarity between the ordinary Inca testament and the English secret trust.

(31) Fernando de SANTILLAN, op. cit. supra, at note 10, page 57, para. 25. This much cited passage seems to have been based on an earlier and authoritative enquiry into the matter and is found in "Relación del origen e gobierno" (see note 19, supra) at page 74 under the heading "La forma que tenía en juzgar". The wording is nearly identical. It has been said, though it is not clear on what primary authority, that proceedings could only last for a maximum of five days. This can hardly have applied to criminal proceedings at all. See PRESCOTT, Vol. I, p. 54.

(32) See VILLAVICENCIO, op. cit. supra at note 13, page 43.

(33) Garcilaso de la VEGA, op. cit. supra, at note 14, Vol. I, page 91.

(34) Garcilaso de la VEGA, op. cit. supra, at note 14, Vol. I, page 247.

(35) See "Historia de los Incas", Pedro SARMIENTO DE GAMBOA, Emece Editores, Buenos Aires, 1943, at pages 110/111.

(15) So far as can be judged from the evidence that has come down to us, the general language of the Incas was not rich in juristic terminology. The necessary additions forced upon the indigenous population by the advent of the Spaniards and the Spanish ways in the matter of law and administration are to be seen from a comparison of the earlier vocabularies. (36) Even allowing for the imperfect collection of the relevant terms, it may be said that the terminology was oriented towards procedural aspects. (37)

In summary, it may be said that the main characteristic of the Incaic criminal process was its emphasis upon the principle of submission. (38) There is entirely absent the notion of those human rights asserted so vociferously by modern man and it is principally on this account that the system encountered such criticism from the nineteenth century liberal school. (39) There is a refreshing absence, too, of legalism, (40) doubtless due to

(36) See, "Lexicon o vocabulario de la lengua general del Perú", Fray Domingo de SANTO TOMAS, Edición del Instituto de Historia, U.N.M.S.M., Lima, 1951. 'Vocabulario de la lengua general de todo el Perú llamada lengua Qquichua o del Inca", Diego González Holguín, Edición del Instituto de Historia, U.N.M.S.M., Lima, 1952. "Arte y vocabulario de la lengua quechua general de los Indios de el Perú", Diego de TORRES RUBIO, edn. of. 1754.

(37) There is one very interesting term which recurs in different forms. The word used for investigation or taking accounts has an identical root to that used for the action of judging. Fray DOMINGO at page 153 gives "juzgar" — **tarapayani.** Judge (Juzgado o Juez) is **tarapayac,** at page 363 is **taripani** — "averiguar o tomar cuentas". **Taripayasca** — "arbitrariedad", Diego Gonzales Holguín, page 551 gives "Juez de crimen" (clearly a Spanish influence) — **Hucha taripak apu.** Diego de TORRES RUBIO, page 130 gives "Juez criminal" — **Taripac apu.** The "Relación del origen e gobierno", page 69 gives: "Iba también juez de comisión, y este se llamaba taripaoc, que quiere decir aclarador; hacía su información por sus quipus con claridad". Fernando de SANTILLAN, op. cit. supra at note 10. page 52: "Otros inviaba a castigar algunos casos particulares; a este llamaban taripasac, que quiere decir declarador y este hacía información de todo lo que le era denunciado con grandes mañas y ardides para saber la verdad". The Incaic legal vocabulary seems to have been constructed by reference to function and particularly by reference to the functions of judicial officers. As, for example, "Relación del origen e gobierno", page 68, "Por el nombre que daban al visitador se sabía a lo que iba; si iba a castigar algún delito se llamaba **hochaycacamayoc,** que quiere decir "a quien incumbe castigar los delitos".

(38) This principle was expressed symbolically in the later Empire by the rule that those who came before the Inca in audience, whatever their rank, should carry upon their shoulders a light burden. See Pedro PIZARRO, op. cit. supra at note 15, pages 61/62. It is of no small significance that, touching this question of authority, Atahualpa should have received his first Spanish visitors without insistence upon this formality.

(39) See Raúl PORRAS BARRENECHEA, op. cit. supra at note 4, pages 166/167. The Inca state represented the very antithesis of that which is conceived of as embraced by the contemporary expression "The Rule of Law". Yet a very ordered and orderly society existed, under which rights were guaranteed. What is absent is that legalistic harnessing of the unrestricted power of the supreme ruler, which permits in the modern democratic state, through a process of dilution, a modicum of participation by the governed in the choosing of their own destiny. The price of law is often the loss of at least some order.

(40) The term legalism is used here precisely in the sense in which it is defined by Dr. Judith SHKLAR in her perceptive work under that title, Harvard University Press,

procedural reasons and the fact that no legal profession as such existed. There is, nevertheless, strong evidence of a deeply-rooted sense of what was just (41) and the inculcation and development of this must have played a large part in the Incaic administration of criminal justice. The effective maintenance of law and order over so vast an area at a time when communications were of the most primitive represents an extraordinary triumph of a most unusual administrative and managerial ability. The originality of the Inca system lies in its creation of a hierarchy of authority rather than function, through the delegation of carefully limited powers to officials who could be trusted on their own account or by reason of the Inca retaining some sufficient hold over them.

The Spanish Domination

The Spanish conquest of Peru brought about the abrupt and near total destruction of the elaborate socio-juridical apparatus, which the Incas had designed and perfected for the administration of justice throughout their vast domains. The nature of the Incaic system and the violent and dramatic seizure of the Inca himself, the fountain head of all power, made for a more rapid disintegration than might have been the case in a less totalitarian state. Unlike those earlier conquests of the Incas, which had sought to integrate the newly acquired populations through a process of gradual assimilation and, wherever possible, through the subtle adaptation of local usages and autho-

1964. Perhaps the most revealing evidence in relation to the Inca attitude towards things legal is to be deduced from the attitude of Atahualpa to his trial and execution. This was flagrantly irregular on the evidence of the best eye-witness to the events, Pedro PIZARRO, who writes, "Cierto pocas leyes habian leido estos señores ni entendido, pues al infiel sin haber sido predicado le daban sentencia", op. cit. supra at note 15, page 60. The Inca made no challenge to PIZARRO'S legal right to put him to death and it would have been alien to his understanding to have done so. Although he knew of the existence of the King of Spain in comprehensible terms, he made no move to appeal to him. Thus one condemned by a Toquricoq would have submitted without appeal to the Inca. Atahualpa could only take comfort in the belief that, were Pizarro acting in excess of his authority, he might later be punished by his superior, as he, being Inca, might have punished an errant official. A comparison on the ground of a legalistic versus non-legalistic approach to such a question might be made with the trial of Charles I of England. This underlying philosophy is very instructive of the basis of the Inca system.

(41) This is particularly evident in the exaction of tribute and the support of soldiery. When one thinks of the Inca system in terms of social justice, it is well to reflect that the terms of the English Petition of Right, 1628, so far as they represented the grievances of the people, could have had no counterpart under the Incas. Taxation was, even on the most prejudiced view, moderate and reasonable; there was no billeting of soldiery as an added imposition. Spanish reflections on Inca justice are worthy of note; see SANTILLAN, op. cit. supra at note 10, pages 69, 74/75.

rities, the Spanish conquest had the immediate and necessary objective of imposing a wholly alien, juridical culture upon a henceforth subject people. It was not easy for the early Spanish officials to understand the operation of the Inca system; it was very soon apparent that it would be impossible to recreate it, were such a course even desirable. (42) Furthermore, religious reasons dictated the most complete extirpation of all institutions, which might have been even slightly tainted with idolatry and the combination of this motive with that of political convenience brought about the rapid substitution of Spanish laws and Spanish institutions.

In effecting this change, the Spaniards were undoubtedly aided by the strength of their own legal traditions and the superiority of written law over the oral tradition, given the collapse of the authority which would have made possible the enforcement of the latter. While the introduction of the horse did much to ensure the triumph of Spanish arms, the introduction of the lawyer, for good or ill, did even more to secure for Spain the fruits of her conquest. From a juridical point of view, the change is of such magnitude that a study of particular, isolated facets scarcely does justice to its historical significance. Without trespassing too far beyond the bounds of the present theme, it may be said that the advent of the Spanish represents, in procedural and institutional terms, the substitution of a system of laws together with the apparatus for their modification and enforcement, for a system of bare administrative authority. Basically, the change was organic; that which had undergone alteration was the institutional structure through which the real, effective power of the state made itself felt. The cultural conflict, which might under other circumstances have interrupted this transmission and transmutation of authority, was to a large extent mitigated through that principle of submission that had for so long been nurtured by the Incas.

The Spanish conquest of Peru was in its inception a private venture licensed by the Crown. (43) Even the wildest

(42) A considerable part of the work of Fernando de SANTILLAN, several times referred to, is devoted to an exposition of the Inca system and the conclusions to be drawn from it in relation to the problems confronting the then government. SANTILLAN concludes that good government can only be established on Spanish lines. See in particular op. cit. supra at note 10, pages 112/113, para. 105.

(43) See BASADRE, op. cit. supra at note 1, page 237. On the legal basis of these ventures see, "Las Instituciones jurídicas en la conquista de América", Silvio A. Zavala, Madrid, 1935 at pags 123/129.

dreams of the *Conquistadores* can hardly have embraced but the smallest part of the material successes which their venture was to attain. The social, political and cultural implications of their relatively easy conquest cannot have been forseen at all. Pizarro's intrepid seekers after fortune arrived as mere adventurers; almost overnight they found themselves kings. Small wonder, then, that those who had arrived without even the anticipation of assuming responsibility for government, should of necessity have passed from the stage of history leaving this to others more adequately prepared for the task. The destruction of the Inca governmental framework left a vacuum, which it was the place of Spain's able administrators and lawyers rather than her soldiers to fill. The problem from the point of view of the criminal law was twofold: firstly, law and order had to be established which meant, effectively the substitution of the Rule of Law for the Rule of Arms; secondly, permanent institutions had to be established so that the precepts of Spanish law might be rapidly translated to the newly acquired territories for their proper governance and reduction to a permanent state of peace. In the realization of the first aim, the exalted state of the Spanish conquerors themselves and their internecine struggles was of greater preoccupation than the condition of the conquered peoples. (44) The early endeavours of the King of Spain's representatives to transform what had been a private enterprise of some lawlessness into a state undertaking based firmly on a legal footing is of comparatively slight interest from the point of view of the present theme. What is worthy of note in passing is the role of the Spanish lawyer and jurist, of whom that extraordinary man, *Pedro de la Gasca* is the archtype. (45) The writings of the post-conquest period are much concerned to establish the legality of Spain's title. (46) In this secondary stage of consolidation, the predominance of the lawyer is as marked

(44) See, "Guerras Civiles de Perú", Pedro CIEZA DE LEON, Vols. I and II, Madrid.

(45) The role of Pedro de la GASCA in effecting the pacification of Peru has been well described and much praised by historians. His role as an administrator, in the establishment of an effective system of Courts and the personnel with which to staff them has received less attention. His correspondence is full of allusions of great interest to this aspect of his activities and reveals both his grasp of the realities of the situation, with which he was contending and his ability to design appropriate solutions. One of many striking examples is his letter to the Consejo de Indias in which he advocates doubling the salaries of the Oidores of Lima and gives his reasons therefor: "Gobernantes del Perú", Roberto LEVILLIER, Madrid, 1921, Vol. I. at pages 214/215.

(46) See, ZAVALA, op. cit. supra at note 43 for an excellent treatment of the various theories which enjoyed currency.

as that of the soldier in the primary reduction of the indigenous people to the Spanish rule. The absence of legislation under the Incas has been noted; its all pervading presence under the Spaniards is soon to become overpowering.

The law, whch was to prevail in those territories over which Spain had acquired jurisdiction was of Spanish creation and those who were to administer it had received their legal education in Spain. Very soon after the pacification of Peru by *Pedro de la Gasca,* the University of San Marcos, or as it was known in its earliest days, the University of Lima, was founded. It is of no small significance to the present theme that the first lay Rector, Don *Pedro Fernandez de Valenzuela,* was at the time of holding this office also *Alcalde de Corte of* the *Real Audiencia de Lima.* (47) His even more distinguished son, *Fiscal de Crimen* and first *Protector General de los Naturales,* was also of the University of San Marcos. (48) Thus early began the formation of lawyers produced by this, the oldest University of the Three Americas, and their active association with the creation and administration of law in Peru, a factor of more than passing importance in any consideration of the development and direction, which that law was eventually to take.

While the notion of codification was as yet alien to Spanish law, that which was brought to the new territories represented an advanced and sophisticated stage of unification. (49) The responsibilties assumed by Spain in regard to the pacification and incorporation of these lands within the framework of her

(47) See, "Alma Mater: origenes de la Universidad de San Marcos", Luis Antonio EGUIGUREN, Lima, 1939, at page 214. It is noteworthy that by Royal Cédula of 24th February, 1603, Alcaldes de Corte and Oidores were disqualified from election to the office of Rector. The great jurist Juan de SOLORZANO PEREYRA, then Oidor of the Real Audiencia of Lima was shortly after offered the Catedra of Prima de Leyes and wrote: "con muy crecido salario y honrosas partidas y que acomodarían la hora en que se huviese de leer, de forma que no se encontrasse con las de la Audiencia, y aunque hize de este ofrecimiento la estimación debida, no me atrevi a acetarle por no contrariar las leyes". Cited "Introducción a la historia del Derecho Patrio", Ricardo LEVENE, Aniceto LOPEZ, Buenos Aires, 1942 at page 15.

(48) See EGUIGUREN, "Alma Mater, ibid. For an appreciation of the work of those connected with San Marcos in relation to Indian affairs in these early, difficult times, see "Diccionario Histórico Cronológico de la Real y Pontificia Universidad de San Marcos y sus Colegios', Luis Antonio EGUIGUREN, Lima, 1940, Vol. I, at pages 725/743.

(49) See, "Un práctico castellano del siglo XVI" (Antonio de la PEÑA) Madrid, 1935 and the excellent introduction of Dr. Manuel LOPEZ REY Y ARROJO at page 6: "El error está, a nuestro parecer, en hablar en dichas épocas de Código o de codificación. Nadie pensaba entonces en codificar. Lo más que se puede hablar en los siglos XIV al XVII en España es de unificación.....". Nevertheless, the essential uniformity of the work is remarkable. See the observations of a most weighty authority in this field, Dr. Niceto ALCALA-ZAMORA in "Nuevas Reflexiones sobre las leyes de Indias", Editorial Guillermo RAFT, Buenos Aires, 1944 at pages 97/98.

own existing legal system had a profound, modificatory effect upon that system itself. (50) The law, substantive and adjectival, that came into being as a result of this alchemy is to be found in the formidable work entitled *Recopilación de leyes de los Reynos de las Indias*. (51) It is principally to Books II and V of this collection of laws, ordinances and other instruments that one looks for instruction as to the institutions and procedures that were thus established by the Spaniards and which constituted the structure and functioning of Peruvian criminal justice during the greater part of the Colonial period, leaving traces which persist even until the present day. A noteworthy feature is the intimate vinculation of the administration of justice with the objective of christianizing the indigenous inhabitants of the new territories, which reflects the preoccupation of the Spanish crown with that evangelising aspect of its conquests upon which its juridical title in the eyes of some was thought to be founded. (52) This gives rise in the early period to tensions between religious and secular authorities, which reflect in the administration of criminal justice. (53) Equally worthy of note is the dualism in the system consequent upon the existence of a hierarchy of officials which derived its powers from the Crown itself and an inferior or local level of administration constituted by election or subappointment to which was entrusted a correspondingly lower order of jurisdiction in criminal matters.

The cornerstone of the colonial administration of justice was the *Real Audiencia*. (54) That which was created in Lima in 1543 was considered the most prestigious court in the lands, recently conquered by Spain, (55) and its appelate jurisdictio-

(50) See BASADRE, op. cit. supra at note 1, page 235.

(51) This work was completed and published in 1680. The text herein cited is the 4th Edition, Madrid, 1791. On the Recopilación see BASADRE, op. cit. supra at note 1, pages 246/252.

(52) See the Recopilación Ind. Libro I, Título XVIII and XX. See also, Libro V, Título II, Ley XXIX "Que los Gobernadores reconozcan la policía que los Indios tuvieron, y guarden sus usos en lo que no fueren contrarios a nuestra Sagrada Religión".

(53) See "Gobernantes del Perú", Vol. II, p. 70, Carta de Licenciado CASTRO. "Lo tercero que estando el corregidor entre ellos tenia cuydado de castigar los delitos que cometieron y quitara que los frayles y sacerdotes no se hagan juezes seglares en castigar estos en delitos como se haze . . .". See, also, "Política Indiana", Juan de SOLORZANO Y PEREYRA, Campañía Ibero-Americana de Publicaciones, Madrid, Vol. IV, at p. 27. para 11.

(54) On this institution generally in the Indias see "La Magistratura Indiana", Enrique RUIZ GUIÑAZU, Universidad de Buenos Aires, 1916. "Las audiencias se destinaron siempre a las ciudades supuestas de mayor porvenir y fueron, como queda comprobada, la base sustancial y positiva del sistema político español", op. cit. at page 38.

(55) Towards the end of the XVIII century, 13 Audiencias were functioning in Spain's overseas territories and it is important to distinguish the various categories as certain Audiencias like that of Lima exercised a jurisdiction over inferior Audiencias, in

nal limits originally approximated to those of the old Inca empire. The *Audiencia* as an instrument of government comprehended the widest of functions without seeking to distinguish them as legislative, judicial or administrative. Nevertheless as a tribunal of justice certain safeguards ensured a high degree of independence of function and an effective separation of powers in practice. (56) The *Real Audiencia* of Lima constituted the highest court of appeal in Peru; from there lay appeal only in the most serious of causes to the *Consejo Real y Supremo de las Indias*. (57) The criminal jurisdiction of the court was vested in the four *Alcalde del Crimen*. These judges were selected, at least in the earliest times, from among those lawyers who had extensive experience in matters appertaining to the Criminal law. The *Alcaldes* were appointed by the Crown and held office at the Crown's pleasure. (58) They were enjoined to hear causes in a regular manner, sitting for three hours each morning in ordinary session for the exclusive purpose of hearing pleas. (59) In addition to its appelate functions, the *Sala de Crimen* of the *Alcaldes* was the court of first instance in criminal matters for the city

---

the case of Peru over those of Quito, Charcas and Chile. See "La Magistratura Indiana", p. 43/44.

(56) The Audiencia has much in common with the English Curia Regis in its earliest stages before specialization of function gave birth to the various courts of Common Law. It does not seem that the Virrey was ever intended to take an active part in the day to day administration of justice though his authority was necessary in certain matters. His interference was resented by the professional judges and he gradually fades more and more into the background leaving these a high degree of functional autonomy. See, "La Magistratura Indiana", p. 29. See, also "Memorias que escribieron los Virreyes del Perú". Ed. Ricardo BELTRAN Y ROZPIDE, Madrid, 1921. Relación de MONTES CLAROS (1607-1615),Vol. I at page 198. "La audiencia por Audiencia ha de escribir a Su Majestad juntamente con el Virrey: Los Alcades del crimen escriben aparte y manda Su Majestad que no les obliguemos a mostrar las cartas". Recopilación Ind. Libra II, Título XVII, Ley XXXV.

(57) On this great body, which brooded over all aspects relative to good government in the Indias, see, "El Consejo Real y Supremo de las Indias", Ernesto Schafer, Universidad de Sevilla, 1935, Vols. I and II. On appeals in criminal causes see "Política Indiana" Vol. IV at page 276. The Virrey had a general power to pardon in criminal matters. Recopilación Ind. Libro III, Título III, Ley xxxvij.

(58) The jurists considered that criminal causes took precedence over civil matters and for their determination the appointment of "good and well chosen judges" was necessary. "Política Indiana" at page 78. The question whether it was a good or bad thing to leave these judges a long time in one place was also one which exercised the mind of the same jurist. "Política Indiana" at page 71. "Como aún también les suela causar embarazo para la libre y desinteresada administración de justicia el haver estado muchos años en el servicio de una misma audiencia, por las amistades y compadrazgos, o por los enojos o diferencias, que es forzoso se contraygan en tanto tiempo con los más vecinos de las Ciudades en que residen".

(59) Recopilación Ind. Libro II, Título XVII, Ley vj. See also the regimen for hearing of causes. Recopilación Ind. Libro II, Título XV, Ley xxj. Ordinary causes were normally heard in the order in which they arose. Recopilación Ind. Libro II, Título XV, Ley lxxxij.

of Lima and an area of five leagues around. (60) The novel feature of this court is its sitting *en banc*. The court normally comprised three judges,who gave their sentence by vote and the law, so far as it referred to Lima, prescribed specifically that in cases involving the death penalty, mutilation or corporal punishment, three votes in favour of such sentence were necessary for its execution. (61)

The organisation of the criminal jurisdiction of this court set the future institutional pattern for Peru at this superior level of administration. The trial of causes was an exercise undertaken according to carefully prescribed procedures, in which five principal components played their respective roles. Each gave to the system something of its own special characteristics and each is to be found, albeit with the modifications that time and a changing society have produced, in the present day system. These elements are the professional, legally qualified judge; (62) the *Relator* (63) of the court; the *Fiscal;* (64) the *Escribano;* (65) and the *abogado*. (66) The procedure of the court was of an inquisitorial nature and the whole of the proceedings, from the first informative stage, through the examination or deliberative stage to the passing of judgment itself was carefully reduced to writing, and moreover, writing of a technical character that permitted of the determination of the matter in proper, legalistic fashion. (67) These requirements gave the court's func-

(60) See "Política Indiana", Vol. IV, at page 78.

(61) Recopilación Ind. Libro II, Título XVII, Ley viij.

(62) On the qualities and qualifications sought in those appointed judges of the Audiencias, see "Política Indiana", Vol. IV, at page 63.

(63) Legal terms, the names of particular institutions and officers of the various tribunals often have no useful equivalent in another language and accordingly have been left here in Spanish with the appropriate explanations. Some attempt is occasionally made to anglicize the vocabulary, i.e. Intendant for Intendente, but this is meaningless and serves no useful purpose. There is no equivalent of the Relator to be found in the Common Law. He is rather more than a Clerk of the Court and rather less than a High Court Master. The Relator was appointed by the Audiencia. On the duties of his office see Recopilación Ind. Libro II, Título XXII.

(64) On the duties of the Fiscal generally see, Recopilación Ind. Libro II, Título XVIII.

(65) On the duties of the Escribano de Cámara, see Recopilación Ind. Libro II, Título XXIII.

(66) The term Abogado as used here means a legally qualified person who has been duly licensed to practise before the courts. After receiving the degree of Bachiller, the intending lawyer had to study law for a further four years before being admitted to practise before the Courts. See "Novísima Recopilación" París, 1846, Título XII, Ley ii. The importance of the abogado in the administration of justice may be seen from Recopilación Ind. Libro II, Título XV, Ley xxxxiij, which provided in the event of an unresolved discord among the judges that "se nombran abogados, como está proveído para que los vean y determinen juntamente con los jueces".

(67) A proper appreciation of those characteristics can only be made from a study

tioning its distinctive character in both its original and appelate proceedings. The *Relator* while himself having no judicial responsibilities (68) nevertheless plays a vital part in that development of the judicial process leading to the emission of sentence by the judge. The written process is vast and unwieldy and in public hearing does not lend itself to open, public examination by the judge. It is the duty of the *Relator* to make intelligible that process by reading resumés of its content as instructed by the court, placing in order the documents comprised in the case that the Court might treat of them as necessary and redacting the court's deliberations. What the *Relator* does during the actual judicial hearing corresponds in certain fashion to that which the *Escribano* has already done in that preliminary stage leading up to the hearing itself. The importance of the *Escribano*, institutionally speaking, cannot be overstated; (69) it is this official in particular who has given to Peruvian criminal proceedings that character which is distinctive. It is the *Escribano* who prepares the *expediente* or case papers, taking the testimony of the witnesses, (70) and in so doing he sets the stage, by his selection and exposition of this material, for the way in which the judge will later set about his task of deciding the issue according to law. The *Alcaldes* were enjoined to make personal examination of the witnesses upon their testimony, (71) but they could do this effectvely only on the basis of those prior declarations taken before the *Escriba-*

of the proceedings of the period. One such document of considerable interest has been studied by the author and is to be published by the University of San Marcos. This document is entitled "Actos criminales que sigue Don Juan de VIDAL contra María Antonia, negra esclava de Doña Nicolasa FERNANDEZ, sobre injurias". The document dated 1742 is Legajo No. 11, Archivo Nacional del Perú (sección histórica). It is a proceeding in the Real Sala del Crimen at first instance and will herein be cited as Procedimiento penal Juan de VIDAL. The page references are those of the transcribed copy.

(68) The true nature of the Relator's position is seen from the modern Ley Orgánica del Poder Judicial of Peru, wherein they are placed first in the relation of "Auxiliares de Justicia".

(69) There is a parallel between the Escribano and the Clerks in Chancery in the early formative stage of the common law. The continuing and indeed growing importance of the Escribano lies in the written nature of the proceedings and the fact that they remained substantially under his care and control throughout the entire period of litigation. At the present day, this influence wielded by the Escribano is quite remarkable to one accustomed to the presentation of oral evidence in open court under a common law jurisdiction.

(70) See the Procedimiento penal Juan de VIDAL. Note the "Reconocimiento" of Philipe XIMENES, the Escribano at pages 9 and 10, wherein this official certifies having himself inspected the personal injuries of which the aggrieved party complains and this testimony is incorporated by him into the proceedings. This intervention by an officer of the court is characteristic of the inquisitory nature of the proceedings.

(71) Recopilación Ind. Libro II, Título XVII, Ley v.

nos. A substantial part of the content as well as the procedural forms of presentation depended much upon the techniques evolved by the *Escribanos* in the course of their duties. Perhaps none of the components has so changed its nature and functions as the *Fiscal*. Originally, this officer occupied a high and important place in the administration of justice for the express purpose of supervising the proceedings in the Crown's interest. (72) His duty was to ensure the regular compliance of all concerned with the dispositions of the law and particularly to see that the Royal financial interest in these proceedings was properly respected. Gradually, by reason of these responsibilities, the *Fiscal* has come to be not merely a passive watch-dog, but rather an active participant in the formulation of the considerations upon which the very judgment itself is based. (73) The *Abogado* or pleader in the cause was early viewed with mixed feelings and the traditional distrust felt almost universally by those concerned with the administration of justice on an autocratic basis. (74) The lawyer, as ever, was regarded as a brake upon the resolution of causes, but these criticisms applied more specifically to civil than criminal matters. (75) The *abogado* consequently played an important role as defender before the *Audiencias*, moderating the excesses which would have been the product of the otherwise unsupervised examination of witnesses by the *Escribanos* and generally presenting cases in conformity with the tortuous mass of written law applicable even to the simplest of matters. (76) The lawyers, who practised before the *Audien-*

(72) A good example of his duties and the way in which these were carried out is to be seen in the proceedings against the Licenciado Vaca de CASTRO, ex-Virrey of Peru. See "Gobernantes del Perú", Vol. II, pages 301/315.

(73) The quasi-judicial character of the office of Fiscal is seen in Ley xxx, Libro II, Título XV, Recopilación Ind. excluding from the Acuerdo de Sentencias all other officials of the court with the exception of the Fiscal, who may be present with the judges.

(74) See, "La Magistratura Indiana", pages 332/333.

(75) See "Memorias que escribieron los Virreyes del Perú", Memorial of Francisco de TOLEDO, Vol. I, at page 90: "Tienen tanta naturaleza y afición estos naturales a pleitos y a papeles y érales esto tan perjudicial para las vidas y haciendas, como muy largo escribí a V. M. desde aquel reino, que fue una de los cosas que más fuerza ha sido menester para quitarsele, porque en seguimiento de cualquier pleiticillo iban y venían del repartimiento a las audiencias en cuyo distrito caían hormigueros de ellos y gastaban sus haciendas en procuradores, letrados y secretarios, y dejaban muchos de ellos las vidas e iban tan contento con un papel aunque fuesen condenados, como si saliesen con el pleito".

(76) In the Procedimiento penal Juan de VIDAL the hand of the lawyer is plainly discernible in many places. See for example, where the question of release on bail is being argued at page 27: "...y quando esta resulta no se puede ni debe relaxar al reo bajo de fianza como en propios terminos asientan todos los AA criminalistas es de justicia que no siendo la dicha rea capas de pena pecuniaria...".

cias were examined and licensed by those courts and a strict control was exercised over their activities. (77) The very technicality of the proceedings and their written nature made the employment of a lawyer as necessary to the smooth working of the legal system as for the protection of the interests of the person standing accused. (78)

At a lower level of jurisdiction, Peru was divided into *Corregimientos,* a large administrative area governed by the *Corregidor,* an official appointed by the crown for a term of years and in whom all governmental powers were vested. (79) The civil and criminal jurisdiction of this officer was in practice delegated to a *Teniente Letrado* or legally qualified assistant and was further delegated by him to a number of minor judges, who exercised their functions throughout the area in question in the name of the *Corregidor.* The limits of the criminal jurisdiction are not well defined and appeal lay from the *Corregidor* to the *Audiencia.* Spain's difficulties with her colonial administration must be atributed in great part to the corruption and inefficiency which eventually overtook this system of *corregimientos.* (80) The ill-defined jurisdiction and the undifferentiated powers of government, which lay in a single officer gave rise to injustice and a growing sense of oppression on the part of those subject to the abuses. The *Audiencias* had the power to correct and remedy the situations giving rise to these grievances, but the sheer volume of work, the delays inherent in the review of the written process and the physical size of the country preclu-

(77) Recopilación Ind. Libro II, Título XXIIII, Ley j.

(78) The interposition of the lawyer in criminal proceedings was admitted by the Spaniards with much greater freedom and at an earlier stage of procedural development than was the case with the Common Law See "Un práctico castellano del siglo XVI", Capítulo Décimo, "Cómo y cuando puede intervenir, procurador en la causa criminal", pages 101/102. The Novisima Recopilación, Libro V, Título XXII, Ley i, states: "Porque el oficio de los Abogados es muy necesario en la prosecución de las causas y pleytos, y quando bien lo hacer es gran provecho de las partes".

(79) See Recopilación Ind. Libro V, Título II, Ley j under heading Perú. See also, "El protector de Indios", Constantino BAYLE, Sevilla, 1945, at pages 125/152. See also the revealing "ordenanza" of Francisco de TOLEDO relating to the functioning of the Corregimiento of Cuzco in criminal causes, Gobernantes del Perú, Vol. VII, at pages 40/41.

(80) Of the failings of the Corregidores, Dr. RUIZ GUIÑAZU writes, "Empero, el mal como es notorio, estaba en los hombres elegidos para aplicarla (la legislación indiana)". La Magistratura Indiana, page 293. Nevertheless this must be reckoned one of those cases where the failing lay in the nature of the institution itself and the strains to which it was subjected in Peru in particular, rather than blame be placed exclusively upon the human element. An interesting insight into the problems from the point of view of the indigenous population is gained through the work of Huamán POMA. His commentator writes harshly but with justification: "En verdad, ninguna autoridad como el Corregidor, desprestigió tanto al hombre y al Estado español". El Derecho Indiano, José VARALLANOS, Suma Editorial, Lima, 1946 at page 139.

ded its effective employment. Administration of criminal justice before the *Corregidores* and their delegates may not unfairly be characterized as uncertain, uneven and long drawn out. Its components and procedures approximated to those of the *Audiencia* itself, sessions being conducted in regularly appointed places throughout the jurisdictional area in its principal seats of government. (81) The most important cases would proceed for determination to the *Corregidor* himself before passing on appeal to the *Audiencia.*

Towards the end of the XVIIIth century, Spain's colonial administration underwent a fundamental change, which resulted in a noteworthy alteration of certain aspects of the administration of criminal justice. At different times, throughout Spain's vast overseas territories, the *Corregimientos* were abolished and these jurisdictions consolidated into larger and differently organised units called *Intendencias.* (82) In 1784 the system was extended to Peru and, as finally established, the country was divided into eight *Intendencias* in place of the numerous *Corregimientos* which had hitherto existed. (83) This aggregation of considerable power in one set of hands represents a centralisation and systematization of government. (84) Essentially the jurisdiction of the *Intendentes* in criminal matters was but a consolidation of that which had been enjoyed by their more numerous precursors, being a first instance jurisdiction throughout their provinces, exercised in much the same way, through a *Teniente Letrado* (85) and *subdelegados,* the latter sometimes called, confusingly, *corregidores.* Appeals from the *Intendente* and his legally qualified assistants passed as before to the *Audiencia.* While in many respects, the *Intendencia* is of great importance

(81) On all aspects relating to the jurisdiction and functioning of the Corregidores in criminal matters see, "Política para corregidores y señores de vasallos", CASTILLO DE BOVADILLA, Madrid, 1775, Volumes I and II. BOVADILLA is at times fanciful when he strays from his theme, but he can be relied upon in matters relating to procedure.

(82) On the background to the setting up of the Intendencia system see "Intendencias en Indias", Luis NAVARRO GARCIA, Sevilla, 1959. Occasionally the term "Intendentes corregidores" is to be found. See "Novísima Recopilación", paris, 1846, Libro VII, Título XI, Ley xxiv.

(83) See "El Corregidor de Indios en el Perú bajo los Austurias", Guillermo LOHMANN VILLENA, Ediciones Cultura Hispánica, Madrid, 1957, Apéndice VIII for a full list. 51 corregimientos were dependencies of the Audiencia of Lima.

(84) See "Intendencia en Indias", at page 98.

(85) On the appointment and qualifications of this officer, in effect the professional judge at this level, see "Intendencias en Indias", page 84, note 16. Something like a system of checks and balances seems to have been intended. The security of tenure given to this judicial officer is an interesting innovation and a useful buttress against outside pressures, which might have influenced the proper administration of justice.

as a stage of administrative development, in the matter of criminal procedure the very short period of its operation in Peru reduces its significance. It is probable that the disappearance of some of the graver abuses associated with the *Corregimientos* improved the quality of the justice dispensed and reduced thereby the sense of grievance that had been at least partly responsible for the serious disorders suffered by Peru in 1780. (86) The real problem lay, however, in the unwieldy procedures themselves, the delays in the dispensing of justice and the institutional problems to which the very size of the country and communication difficulties gave rise. Contemporary with the adoption of the Intendencia system was the establishment of the *Real Audiencia* of Cuzco. It is probable that this latter was at least as important in effecting an improved administration of justice and the psychological effect was doubtless even greater. (87).

At the lowest level of all, stood a purely local government, that of the *Alcaldes ordinarios* and their counsellors or *Regidores* in the *Cabildos*. (88) These were authorities normally elected by the townships themselves and not appointed by the Crown or through Crown agency although the central government exercised considerable control over such elections. (89) Minor criminal jurisdiction was vested in these *Alcaldes ordinarios* and in effect they constituted the peace-keeping authority at first instance in all cases in those areas where this level of jurisdiction was not directly exercised by the superior courts. (90) It would seem that originally the *Alcaldes* were to have been the judges at first instance in all criminal causes which did not fall to be heard by the *Audiencias* in virtue of their original jurisdiction. (91) The influence of the *Corregidor,* however, made itself felt in this sphere, as in all other aspects of the governmental activity of the *Cabildo,* so that original jurisdiction remained effecti-

(86) See, "La Magistratura Indiana", pages 134/137. See also the important dictamen of Miguel FEYJO DE SOSA printed in the crónica de Melchor de PAZ, Volume II, Lima, 1952, Guerra Separatista, pages 333/355.

(87) See "La Real Audiencia del Cuzco", Alcides F. ESTRADA, Revista Jurídica del Perú, 1954, at pages 166/177, especially page 168.

(88) On the Cabildos generally see, "Los Cabildos seculares en la América española", Constantino BAYLE, Sapienta, Madrid, 1952.

(89) See BAYLE, op. cit. supra at note 88, pages 111/153.

(90) It is worthy of note that the word Alcalde which has come to have a modern meaning somewhat distinct from that which it originally bore, is derived from the Arabic "Cadi", a judge. See also, "Política Indiana", Vol.IV, page 12.

(91) See BAYLE, op. cit. supra at note 88, page 159.

vely exercised by the *Alcalde ordinario* in criminal matters only where this had not been assumed directly by the *Corregidor* or his delegates. (90) Where the *Alcalde ordinario* actively exercised his jurisdiction appeal lay from him direct to the *Audiencia,* which court exercised a supervisory attention over his activities in various cases. The *Alcaldes ordinarios* were advised by legally qualified *assesores* elected by the *Cabildo.* (93) The *Escribano* was an important adjunct to the administration of justice at this level and his presence and services were normally necessary to give effect to the proceedings. (94) There is some evidence of a revival of the *Cabildos* under the Intendencia system (95) with the result that the jurisdiction of the *Alcaldes ordinarios* became more sharply defined, their being allocated specific matters in the field of criminal law by the regulations drawn up by the *Intendentes.* Under the general supervision of this official, the *Alcalde ordinario* came, where these had been appointed or elected, to exercise a general or first instance jurisdiction in much the same way as the *subdelegados* in other areas of the province.

Under the Spaniards, the administration of criminal justice in Peru became institutionalised. In many ways this period might be considered A Golden Age of procedure. After their own fashion, the Spanish laws and proceedings were at least as discriminatory as to persons and classes as had been those of the Inca. (96) Penalties remained harsh and inequitable, but lost the

(92) See BAYLE, op. cit. supra at note 88, pages 162/163 "Dije arriba que la creación de los corregidores anuló prácticamente a los alcaldes que se suprimieron por innecesarios en muchos sitios... Los corregidores recortaron la jurisdicción, que a los alcaldes sólo quedó en la ciudad y en cinco leguas a la redonda, aunque los términos municipales se alargaran más". See, also, at page 156 "(Corregidores) Propiamente no forman parte del Cabildo son injertos en él por la fuerza; injertos que secaron la guía natural de la institución, desplegando a los Alcaldes y mermando los poderes de los consejos. Aún donde los Alcaldes sobrevivían, sus atribuciones eran de pura honra o muy mermadas, aún las judiciales". See, also "Política Indiana", Vol. IV at pages 15/16. The conflict of jurisdiction is seen in an acute form in the case of the city of Lima. See "El corregidor de Lima", Guillermo LOHMANN, Revista Histórica, Lima, Perú, Vol. XX, 1953, pages 153/180. The problem was only solved by the appointment of the Alcaldes de Crimen, see page 170.

(93) See BAYLE op. cit. supra at note 88, page 161. The post of asesor was valued and much sought after, particularly in Lima. See "Libros de Cabildos de Lima", Book XXIII at pages 403/404.

(94) Se BAYLE op. cit. supra at note 88, page 256, note 13.

(95) See "Intendencias en Indias", page 108. See "Administración Colonial Española" 1782/1810 John LYNCH. Editorial Universitaria de Buenos Aires, 1962, at pages 208/209.

(96) The notion of equality before the law is quite alien to this period of Spanish domination. See "La Magistratura Indiana", page 264. "En la época colonial existían castas sociales. Los indígenas constituían la inferior, para ella había leyes peculiares, excepciones y privilegios. Los negros formaban otra casta y no gozaban de derechos civiles

qualities displayed by the punishments which had shocked even the *Conquistadores*. (97) Torture remained, however, as a procedure for extracting evidence in criminal proceedings. The changing pattern of society brought about the economic sanction as a reality and the concept of costs in criminal causes. (98) A proliferation of officials brought extension after extension of process, adding to delays and the technicalities of an already complex process. There are signs of a separation of the hearing of criminal causes into an investigation stage before one official and a determination or judgment stage before another. (99) In the place of the old, direct confrontation, evidence was now taken in a manner which, while suited to the system, lent itself to prolixity and procrastination by all parties. Prosecution was initiated by the individual aggrieved, unless the State was directly interested by reason of the transgression, in which case the Fiscal intervened for the purpose of pursuing the criminal proceedings. The individual could therefore in certain circumstan-

---

ni privilegios. Los mestizos o descendientes de padres españoles y madres indígenas constituían una clase intermedia entre los indios y los blancos de raza noble y sangre pura, quienes ocupaban el primer lugar en la jerarquía social de la colonia". In his usual robust and uninhibited style Francisco de TOLEDO wrote "La Justicia Real como muchas veces escribí a V. M. hallé poco terminada y respetada y con falta de ejecución, porque al rico y poderoso le parecía que para él no debía haberla, ni al pobre si se topaba con alguno de estos que podía alcanzarla, y a todos en general y aún a los mismos ministros de ella les parecía que si se apretaba en la ejecución, que era aventurar a que se levantase la tierra que estaba acostumbrada a libertad y exenciones". Memorias, Vol. I at p. 77. The difficulties in administration were accentuated by the large numbers of persons enjoying privileges which exempted them from the criminal jurisdiction of the ordinary courts at all levels, for example those who were subject only to the Fuero Militar. See Novísima Recopilación, Libro VI, Título IV. An increasing number of civilians incorporated in the Militia towards the end of the XVIII century enjoyed these privileges. Towards the end of the XVIII century the practice seems to have been growing for certain persons to receive from the Virreyes a general exoneration for themselves and their families from the ordinary criminal jurisdiction, such exoneration being granted by the Inhibitoria through the exercise of the dispensing power inherent in the Virrey. I am indebted to Mr. John Fisher of the University of Liverpool, who has made a special study of the Intendencias in Peru for directing my attention to this matter of exemptions from ordinary jurisdiction in this period.

(97) Save in periods of uprising or open warfare, the repressive quality of Spanish law in Peru was economic rather than a manifestation of physical cruelty. It is this fact which accounts for the surprise, almost shock quality of the apparent desire of Tupac AMARU to reimpose as an adjunct to his own projected regime a return to the draconian penalties of Inca times. See "Tupac Amaru y el Derecho virreynal", Juan José VEGA, Revista de Derecho y Ciencias Políticas, U.N.M.S.M., XXXI iii at pages 563/572.

(98) One of the features of the administration of Inca criminal justice upon which Fernando de SANTILLAN commented favourably was the absence of cost to the parties, due of course to its administrative simplicity. The Recopilación, on the other hand deals minutely with the cost of each stage and each item of process and costs in criminal causes assumed a position of some importance.

(99) See Procedimiento penal Juan de VIDAL, pages 10/13, being the confession or examination of the accused taken before one of the Alcaldes de Crimen.

ces abandon the proceedings with leave of the court. (100) There is no presumption of innocence and the accused was ordinarily incarcerated pending investigation in serious cases or where his social standing did not constitute an obstacle. He might be released on bail in appropriate circumstances. (101) Above all the administration of justice over this period was never able by its very nature to rid itself of the taint and vices of colonialism. This brought exploitation and privilege in its train and a host of dissatisfactions from which the procedures and institutions born on Spanish soil and exported to her new territories could never escape. While the indigenous population remained quiescent and the colonists had not yet acquired identification with the lands in which they lived and died, these defects remained minimal. Towards the end of the Spanish domination there are signs that only a complete change of attitude to these probems might have sufficed to make possible the adaptation of existing institutions to the needs of the new and emergent America.

The Birth the Republic to the close of the nineteenth century

With the coming of Peruvian independence, a perceptible wind of change made itself felt in this as in other branches of the law. The birth of the new nation gave rise to urgent jurisdictional and institutional problems for which immediate and provisional solutions had to be found. The change in political and authoritarian terms wrought by the great liberation is profound. Perhaps even more remarkable than the tangible changes, which are only to be expected after a radical alteration of power structures such as that produced by the overthrow of an imperialist regime, is the psychological climate, which the new possibilities of independent nationhood engendered. Peru did not throw aside overnight in the matter of her administration of criminal justice and the structure and functioning of her institutions, that which had been produced by nearly three hundred years of Spanish colonial rule. Nevertheless the change is dra-

(100) See the auto at page 29, Procedimiento Juan de VIDAL. The judges assented to the termination of these proceedings following what was in essence a settlement by the parties of their basic differences and humble submission to the aggrieved for the harm that had been done to him. The similarity with a civil suit is striking.

(101) Procedimiento penal Juan de Vidal at page 23.

matic and that which impresses is the opening out of new thought, a forward-looking attitude absent during the period of dependence upon Spain, which was to permit of Peru's own jurists and politicians to seek beyond the narrow confines which Spain herself had imposed for the regulation of her subjects' destinies. Thus Peru approached the modern age in a true spirit of enquiry, eager to adapt the best of modern learning to her own uses regardless of the regions or cultures from which such instruction might derive. Peru entered the era of Codification in an internationalist spirit, which was of itself a liberating force from the imprisoning, narrow, Hispanic traditions of the past. (102)

Although these new, liberal and exciting ideas influenced greatly those entrusted with shaping the destiny of this emergent nation, the rupture with Spain, her institutions and procedures, which are the subject of this study, was neither sudden nor complete. Rather was there a period of adjustment or withdrawal while Peru sought, from the best materials to hand, to fashion for herself her own distinctive institutions and criminal procedures. Inevitably the break with the past and the spiritual rebirth of Peru as an independent state brought a period of teething troubles, which reflected the general, unsettled conditions in which the young nation found herself upon gaining liberty to direct her own affairs. From independence until the dawn of the new century Peru had sixteen constitutions or instruments of government, many of which were of a provisional character or which, though having legal effect, were of no practical consequence in fact, the period of their validity and the circumstances of their existence being such as to preclude their affecting the nation's life and structures. (103) Both internally and externally throughout the XIXth century, Peru was subjected to pressures and beset with problems, which made extremely difficult the progressive development of the country's legal system in accord with the needs of its peoples. That it was able to overcome these to the extent of producing

(102) See, "Sinopsis histórica de la legislación penal en el Perú", Carlos ZAVALA LOAYZA, Revista de Derecho y Ciencias Políticas, U.N.M.S.M., 1941, Año V, Núm. 1, pages 3/78 at pages 7/21. This publication merits the greatest respect being written by one who was the author of Peru's current Code of Criminal Procedure and one whose learning in the subject has stood the test of the severest and most impartial of criticism.

(103) See "Constituciones Políticas del Perú 1821-1919", Cámara de Diputados, Lima, Perú, 1922 pages xii-xv.

by 1860, scarcely forty years after attaining independence, a Constitution, which was to endure for practical purposes without serious formal alteration for the next sixty years and shortly thereafter a Code of criminal procedure, which lasted for approximately the same length of time, is evidence of the maturity attained in so short a time by Peru's jurists and the thoroughness with which they set about their tasks.

The dual problem, which faced the liberators, was how to replace the existing Spanish colonial system of courts with a new Peruvian hierarchy of tribunals as well as how to maintain law and order by reference to some reasonably complete body of norms, for it was practically impossible to create in so short a time entirely new laws necessary to ensure the continuity of the country's juridical life. To this end, as a purely provisional measure the instrument of government issued, 12th February 1821, by General *José San Martín* provided for the continuance of those laws which had been in force in Peru under the Spaniards, subject to a modification in the structure of those authorities which were to administer them. (104) The *Intendentes* and *Sub-delegados* were divested of their powers in this respect and these were transferred to the Departamental Presidents and Governors of *Partidos*. (105) A Court of Appeal was established in Trujillo comprising a President, two *Vocales* and a *Fiscal*. (106) This Tribunal in effect replaced the jurisdiction exercised up to that time by the *Audiencias*. A further provisional instrument issued 8th October 1821 made important modifications in the structure of those organs to which the administration of justice was to be entrusted. (107) In 1823 the new Republic promulgated the first of its many Constitutions, which devoted twenty seven of its sections to the administration of justice by the judicial branch of government. The Constitution created a Supreme Court, in which was vested important appelate functions as well as some original jurisdiction in special causes. (108) The Constitution provided for the creation in Lima, Trujillo, Cuzco and Arequipa of Superior Courts of Justice which were to exercise provisionally the original jurisdiction in criminal matters in their respective provinces. Two things pre-

(104) Ibid. at page 8.
(105) Ibid. at page 8.
(106) Ibid. at page 8.
(107) Ibid. pages 18/20.
(108) Ibid. pages 54/58.

sumed by this Constitution gave it a distinctive orientation in the matter of the administration of criminal justice. Firstly, that a code of criminal procedure would be in existence was presupposed (109) while secondly, the Constitution assumed that a system of jury trial would soon be introduced. (110) These two contentious features coloured Peruvian juristic thought patterns for the rest of the XIXth century and the debate to which they gave rise persisted, particularly in the case of the jury, during the first twenty years of the present century. The history of Peru's criminal procedure and institutions during this period is largely an account of the country's attempts to create a code, the provisions of which would meet its peculiar social, geographic and political exigencies, together with a satisfactory hierarchy of tribunals whose personnel would give effect to the normative structure thus established. By the second half of the XIXth century, amid upheaval and unrest, both objectives had, after a period of trial and error, been substantially attained. Throughout the XIXth century Peru's jurists groped their way forward uncertainly, empirically and not very scientifically towards the desired end. Their efforts made possible the work undertaken on a more solid basis by their successors in the century that was to follow. Each Constitution, however shortlived or practically ineffective, added some slight, distinctive feature to the edifice that was being constructed. Thus the Constitution of 1823 had raised expectations of a jury system in criminal causes and that of 1839, the longest lived of all fundamental, political charters to date provided:

"Art. 132. Se establece el juicio por Jurados para las causas criminales del fuero común. La ley arreglará sus procedimientos y designará los lugares donde han de formarse".

The Constitution Vitalicia of Bolívar of 1826 provided:

"Art. 112. Habrá Jueces de Paz en cada pueblo para las conciliaciones; no debiéndose admitir demanda alguna civil, o criminal de injurias, sin este previo requisito".

(109) See Article 106. "Los códigos civil y criminal prefijarán las formas judiciales. Ninguna autoridad podrá abreviarlas, ni suspenderlas en caso alguno". See also, "Mensajes de los Presidentes del Perú", Pedro Ugarteche y Evaristo San Cristóbal, Librería e Imprenta Gil, Lima, Perú, 1943, Vol. I, 1821/1867 at page 132.

(110) See Articles 102 and 108. The latter provided "El nombramiento de Jurados, su clase, atribuciones, y modo de proceder, se designará por un reglamento particular. Entre tanto, continuarán los juicios criminales en el orden prevenido por las leyes".

Thus constituted, this institution of "Justices of the Peace" found its place in the Constitution of 1839:

"Art. 124. Habrá Jueces de Paz para el desempeño de las atribuciones que les designe la ley".

These two instances alone serve as indication of the direction in which Peruvian juristic thought was moving and how new and distinctive had become the ideas and vocabulary of those whose concepts derived less from their Spanish legal heritage than a broad vision of what was thought, in international terms, to be the best in modern practice.

The task of codification was commenced relatively early in the life of the new Republic, but for various reasons the labours of those engaged in reducing the country's laws to form and order did not bear fruit until the second half of the XIXth century. (111) For a brief period, during the Confederación Perú-Boliviana, the *Código Santa Cruz* constituted the law which governed criminal proceedings in the Peruvian courts. (112) With the Restoration and the inevitable revival of the spirit of nationalism, this legislation was abrogated, leaving Peru once more without a code of criminal procedure. The chaotic situation to which this gave rise was further bedevilled by Peru's internal politics and not uncharacteristic wrangling among her codifiers and legislators on points of principle, which tended to infect not merely the controversial aspects under discussion, but also the more general question of codification itself. (113) Wearied, almost as it were by the duration and futility of the argument as well as imbued by the sheer necessity of organizing her law relating to criminal procedure, Peru at last promulgated, in some haste, in 1863, the Code which governed these matters until 1920. Prior to this, Peru had promulgated two further Constitutions, namely those of 1856 and 1860. That of 1856 was the first in which that element of popular justice, the Jury, was to find no place (114) and its exclusion received confirmation in the charter of 1860, which with

(111) See "Historia del Perú", Jose de la RIVA-AGÜERO, Librería Studium, Lima, 1953, vol. II, at pages 340/344.

(112) See "Código Santa Cruz de procedimientos judiciales del Estado Sud-Peruano", Eusebio ARANDA (Edición Oficial), Lima, 1836. See also "Historia de la República del Perú", Jorge BASADRE, Ediciones Historia, Lima, Perú, 1961, Vol. II, at pages 837/838.

(113) See RIVA-AGÜERO, op. cit. supra a note 111, page 343.

(114) Se BASADRE, op. cit. supra at note 112, Vol. I, at page 353. See also, "Reseña Histórica de la evolución del derecho penal", Julio ALTMANN SMYTHE, Lima, 1944 at pages 238/239.

minor interruption, was to carry Peru well into the next century. One law of vital importance, promulgated in 1857 must also be mentioned. This created the post of *Fiscal de la Nación,* a quasi-judicial figure with almost Ombudsman-like powers, whose principal function was to act as a watchdog over the judiciary in general. This is a real point of departure in the history of this officer of the court, who was destined to play an increasingly important role in the administration of criminal justice.

The *Código de Enjuiciamientos en Materia Penal,* effective from January 1863 had been intended to resolve doubts, secure a uniform application of the adjectival law and generally facilitate the determination of criminal causes by reference to a scientifically oriented technique. (115) Its very complexity militated against the realization of these objectives and it may be said with some justification that it was the product of learned minds singularly unattuned to the realities of the situation for which they were legislating. (116) A great deal of thought had gone into the preparation of this Code and the complexities of the problems, with which it sought to wrestle, had not been underrated. Where it set out to clarify, however, it succeeded only in confusing. In its failure lies a basic lesson relative to the whole process of codification in so far as this art has been practised in Peru. The codifier manifested in 1863 his fundamental lack of confidence in the judge and set out to resolve for him adjectivally almost every difficulty he might be likely to encounter. This anti-judiciary orientation colours the very structure of the Code and is the main factor which gives it its complexity. That this lack of confidence, and the thereby assumed superiority of the codifier, may well have been justified, taking the body of the judiciary as a whole, (117) does not add anything of value to the solution propounded. The justified fears merely translated themselves into procedures, which far from serving to improve the quality of the judicial determination of the matter, could only serve to aggravate the very uncertainties, which the codifier was seeking to eliminate. By the 1850s

(115) See ZAVALA LOAYZA, op. cit. supra at note 102,pages 37/40 citing the document under which the draft Code was remitted to Congress for approval.

(116) See ZAVALA LOAYZA, op. cit. supra at note 102, pages 42/43 "¡Cuanta complejidad, cuantos requisitos, cuantos problemas para obtener la prueba plena!... La ilusión o la esperanza en la eficacia de la obra codificadora se desvanece ante la realidad que moldea y deforma los más claros y los más fuertes principios".

(117) See "Mensajes de los Presidentes del Perú", Vol. I, 1821/1867, Mensaje of Ramón Castilla at pages 183, 184 and 256.

the earlier reaction against Spain had spent its force and the eyes of at least some Peruvian jurists were turning with interest to not merely the Spanish heritage, but also the more immediate products of Spain's own legislators. Accordingly, the Code of 1863 owes much to the Spanish *Reglamento Provisional* of 26th September 1835 and its most striking innovations derive from that enactment. (118) While it would be wrong to attribute too much of the ill to this fact, its narrowness and restrictive view of the judicial function clearly owe a considerable debt to the influence of Hispanic jus-philosophy in adjectival matters. It is undeniable, nevertheless, that the earlier flirtation with emergent English liberalism and the essential spirit of revolutionary France had given way before the more austere principles of Spanish authoritarianism The ill assorted marriage of elements deriving from these distinct spheres of influence produced a code of criminal procedure that lacked a purposeful connection with the realities of Peruvian life. While Peru's jurists at this time show a high degree of intellectual attainment, their works are divorced from reality in such a way as to highlight the artificialities of Peruvian society at this time.

The Code of 1863 contains many features of the greatest importance inasmuch as they reveal the development of Peruvian adjectival law as well as for their enduring nature. The first part of the Code deals with matters of jurisdiction and venue. (119) It firmly establishes the jurisdiction of the *Jueces de Paz* in minor offences (120) and a triple instance jurisdiction, (121) with a High Court and Supreme Court hearing appeals. (122) It provided that, as a basic rule, crimes be tried by the judge of the place in which they were committed. Elaborate rules were laid down for challenging judges on grounds of interest, bias or unacceptable association. (123) The second

(118) See ZAVALA LOAYZA, op. cit. supra at note 102, page 40.

(119) See, Código de Enjuiciamiento en Materia Penal, Edición Oficial, Lima, Perú, 1862. Articles 1-12. The question of venue has always been difficult for Peru due to the vast extent of its natural territory and the tremendous communication difficulties. See, for example, "Mensajes de los Presidentes" at page 279: "Hay, sin embargo, algunos inconvenientes para que ésta (la justicia) sea prontamente administrada en todas partes, y nacen de la demarcación judicial. Mas accesible es la justicia para el pobre que vive en el mismo lugar que el Juez que para el que habita a gran distancia".

(120) Ibid. Articl 4 (1).

(121) Ibid. Article 4 (2-5).

(122) Ibid. Article 4.

(123) Ibid. Article 13. A comparison of the Peruvian judicial view of disqualification for bias with that deriving from English case law is interesting and instructive. See, "Anales Judiciales del Perú", Imprenta del Estado, 1906, Vol. 2, 1873/75 at page 223. "No es causal de recusación a los magistrados judiciales el hecho de que estos sean accionis-

part deals with the bringing of criminal proceedings and vests the right of initiating these primarily in the aggrieved party. (124) The role of the *Fiscal* as public prosecutor becomes clearly defined. (125) Generally, the initiation of criminal proceedings is an inelegant blend of private action and obligatory state intervention which at times overrides or supersedes it. A healthy feature is the prohibiton of secret or anonymous complaints. (126) The third part, dealing with the form of criminal proceedings, introduced a notion of considerable complexity. The process was divided into two stages, the *"Sumario"* and the *"Plenario"*. (127) The former was intended to substantiate the existence of the crime itself, both as to matters of law and fact, while the latter was to concern itself with the trial of the accused in respect of the matters thus judicially established. The practical and philosophical difficulties arising out of this procedural division never seem to have been appreciated by the authors of the Code, but in later times the weight of criticism directed against it was almost invariably supported by appeal to the impracticality of this feature. No concept in the whole of the Code is perhaps so difficult to understand as that entitled *"el cuerpo del delito"*. The definition of this concept is in itself exceedingly difficult, (128) for the most learned of commentators are in a state of considerable disagreement on the point. What can be usefully said, however, is that those who originally engineered the concept were concerned to produce an adjectival tool which would permit of the judicial proof of the twin elements of the criminal figure, namely the intellectual element and the non-intellectual element. (129) The *"Cuerpo del delito"* is not thus a definition of the elements of the cri-

---

tas de sociedades anónimas en que también lo son los interesados en el juicio", Compare Dimes v. Grand Junction Canal Co. 3 H.L. Cas. 794.

(124) Ibid. Article 16.

(125) Ibid. Article 18.

(126) Ibid. Article 28.

(127) Ibid. Article 29.

(128) There is a very considerable literature on the subject. See "Derecho Procesal Penal: La Prueba", Luis del VALLE RANDICH, Lima, 1964, pages 58/62. See also, "El Cuerpo del delito en la legislación procesal argentina', Clemente A. DIAZ, Abelado-Perrot, Buenos Aires, 1965 at pages 34/35. "La noción de cuerpo del delito es un concepto complejo, en cuanto se compone de elementos de diferente intensidad y calidad que difícilmente son susceptibles de ser compendiados o extractados en una frase la adecuadamente amplia como para comprenderlos a todos; de ahí que la definición de cuerpo del delito tendría que comenzar por definir sus elementos". For a judicial exposition of the dificulties see, "Anales judiciales del Perú", Vol. II, 1873/75 at page 368.

(129) See DIAZ, op. cit. supra at note 128, page 35. See also "Anales Judiciales", Vol. V, 1888/1893 at pages 656/657.

me itself nor a definition of some part of those elements, but rather a juridical concept that permits of the judicial recognition of certain of the elements of the crime that the process may proceed to the judging of the responsibility for its commission by the person accused. The probative problem will readily be appreciated by anyone familiar with the Anglo-American law of criminal responsibility with its awkward conceptual structure composed of *actus reus* and *mens rea.* The results in practice of this procedural focussing upon the most thorny aspects of the delictual concept were far from favourable. The preliminary stage of the proceedings reduced itself to a mere mathematical collection and arrangement of items of proof, by judges who were far from understanding the philosophical nature of the concept that had been designed by the learned jurists to relieve them of almost all necessity to think for themselves. (130) The accused arrived at the second stage of the proceedings after frightful delays with the cards already stacked very much against him (131) simply because the mechanism so devised performed the most imperfect surgery upon the criminal concept itself and the proof of the *"Cuerpo del delito"* tended all too often to be taken as virtual proof of the responsibility of the accused for the commission of all those elements, which went to make up the criminal figure itself.

Having thus designed an elaborate system for trying the cause, the Code devoted considerable attention to matters of evidence. In the matter of witness evidence, a strict requirement of two credible witnesses was laid down (132) and an awkward distinction drawn between full and partial proof. (133) Once again mathematical notions of sufficiency were established to regulate the activities of the judge. The *"Cuerpo del delito"* itself formed an indispensable part of the evidence of that stage of the process designated the *"Plenario"*. (134) The Code of 1863 placed a heavy responsibility in fact upon the judge in the evaluation of the different classes of evidence that it sought to enumerate, but it tended to hide this behind the ela-

(130) See ZAVALA LOAYZA, op. cit. supra at page 102, page 43. See also, "Código de Procedimientos en Materia Criminal", Legislación Peruana, Lima, 1920, Exposición de Motivos, Mariano H. Cornejo at page x. "El trabajo de los jueces se reduce a contar los monosílabos que determinan la condena".

(131) See, Mariano H. CORNEJO, op. cit. supra at note 130, pages viii, ix.

(132) Código de Enjuiciamiento en Materia Penal, Article 101.

(133) Ibid. Article 99.

(134) Ibid. Article 101. See "Anales Judiciales", Vol. IV, 1880/87, pages 35/48.

borate instructions prepared for his guidance. The result was that the judge was neither an effective seeker after truth nor an independent arbiter of the circumstances of the case; he was in short a prisoner of the process. The Code could only serve to increase the uncertainties of the judges at first instance, while doing nothing to boost their self-confidence. The tendency to look for consolation in the strongest form of proof which could only be the fullest and most complete confession on the part of the accused was almost irresistible. (135) Although the Code expressly forbade the use of torture, the lack of the presumption of innocence coupled with the prospect of languishing for years in the most unsatisfactory conditions of incarceration had very much the same effect. The Code provided limited facilities for release on bail, (136) but in general its provisions were structured to the premise that, once apprehended, the suspected author of a crime ought to remain in the physical power of the authorities until such time as he might be positively absolved of its commission.

The appeal procedure instituted by the Code was a review of the written process not a retrial, although the reception of fresh evidence could be admitted. (137) The importance of the *Fiscal* is notable in appeal proceedings. The Code further provided that the proceedings might be quashed as a nullity by the Supreme Court in the case of an infringement of the law relative to the application of the appropriate penalty or in the case of some fundamental omission in the proceedings themselves which vitiated their legal effectiveness. (138) This power of review by the Supreme Court was of considerable importance in establishing a regular and uniform administration of the criminal law. The last part of the Code contains a section devoted to the summary procedure in minor offences to be followed by the *Jueces de Paz*. (139) The comparative simplicity of the procedure elaborated is striking.

A code, once adopted, tends to leave an indelible mark upon the legal system of which it forms a part. Thus the Code of 1863, however fundamentally it might be altered in the future, tended to set the basic pattern for the hearing of criminal causes

(135) Mariano H. CORNEJO, op. cit. supra at note 130, at pag viii.
(136) Código de Enjuiciamiento en Materia Penal, Article 77/82.
(137) Ibid. Article 151.
(138) Ibid. Article 156/159.
(139) Ibid. Articles 167/175.

in Peru. However radically the future reformers might operate, they could never alter or wholly eradicate those features which, forming part of Peru's Hispanic heritage, were expressly or by implication incorporated into her legal system by the Code of 1863. Thus the system preferred was inquisitorial and that element of popular justice the jury, was excluded. Curiously, the earlier trend towards Anglo-French thinking had left Peru, inconveniently, with the jury in the special and difficult case of criminal causes concerning the Press and publication. (140) The nature of the judicial function in criminal matters was conceived of in Hispanic rather than Common Law terms. Most important of all, perhaps, was the attitude towards the nature of criminality itself, as evinced by the concept of the "*Cuerpo del delito*" and the judicial proof of its elements and of the guilt of the person standing trial. The written process rather than the oral was adopted, with all that this signified in terms of labour and the hierarchy of officials necessary to ensure the functioning of the system. Within the Code is enshrined, albeit tentatively, the notion of the *Fiscal* as protector of the public interest and as an adjunct to the judicial function itself. (141) These features were to represent the raw materials with which later generations of Peruvian jurists would work to improve the administration of criminal justice.

Two other aspects relevant to the subject deserve mention. In the second half of the XIXth century there is clear evidence of the growing importance of the Supreme Court of the Republic as a formative influence in the creation and adaptation of adjectival law The court had begun to assume an authoritative position, which gave its interpretations a most important place in the normative hierarchy of Peru. When in the early years of the following century systematic publication of the Court's decisions from 1871 onwards was undertaken, the true role of its judges and that of the *Fiscal* began to emerge. It is clear that this publication was originally intended to form the basis of a case law system upon which lawyers and the inferior courts might rely for guidance. (142) While never achieving the eminence of the judicial decision as a source of law in a Common Law country, these precedents and the *memoria* and

(140) Mariano H. CORNEJO, op. cit. supra at note 130 at page vii.
(141) See Articles 16/28, Código de Enjuiciamientos en Materia Penal
(142) See "Anales Judiciales", Vol. I, 1871/72, Prólogo at page ii.

reports of the Presidents and Commissions of this Court had a profound effect upon the criminal law and its institutions. It would be true to say that no important development took place without the Court's sanction and its resistance was often crucial in deciding the fate of a projected reform. The intimate and continuing link of its members with academic life and their readiness to serve upon codifying committees lent a stability to the legal system which buttressed it against the general shakiness and frailties caused by Peru's inherent political and social schisms. The second feature, the history of which has already been related elsewhere, (143) is the introduction of the remedy of Habeas Corpus into the Peruvian legal system. This marks in a way the rebirth of liberal thought and an expansionist attitude on the part of Peru's jurists that is to culminate in the reforms of the XXth century. It serves also to underline the continuing preoccupation of those concerned with the administration of criminal justice with the sad fact that paper perfection in the matter of law-giving was not adequately matched in the execution of or obedience to these scientifically structured enactments. The plaint of *Francisco de Toledo* (144) might well have had its echo in the late XIXth century, but in a more disguised form and for different reasons. Basically however, the hard facts of Peruvian society remained the same and these militated against equal application of the law despite lip-service paid by modern protagonists of the principle.

The Twentieth Century

The history of Peru's criminal procedure and institutions from the turn of the century until the present time must be predominantly an account of the two great codifying exercises of 1920 and 1940. While other changes, both institutional and procedural, have their importance, the significance of the two Codes is such as to overshadow all else in the historical perspective. The period in which they are set was a turbulent one for Peru, both politically and juridically. Each is a product of its own age, bearing always in mind that legislation tends in any system to reflect not the immediate moment of its promul-

(143) See "Habeas Corpus in the Peruvian Legal system", H. H. A. COOPER, Revista de Derecho y Ciencias Politicas, U.N.M.S.M., Año XXXI, No. II, pages 297/335.
(144) See note 96 supra.

gation but rather the earlier, preparatory period, over which the ideas embodied in its dispositions were coalescing. A relatively short time separates the two Codes, but in certain respects their differences are striking. It might be said that the Code of 1920 embodies much of the legal philosophy of the first years of the present century and the delay in transmuting them into acceptable normative form made them, if not at once obsolete, at least ripe for a very early revision. The Code of 1940 is thus perhaps less of a new endeavour than a ripening or maturing of some of the adjectival law tentatively projected by its predecessor. The Code of 1920 may be said to represent the birth of a distinctively Peruvian criminal procedure after a somewhat extended period of gestation. On this analogy, the Code of 1940 is truly in the nature of a coming-of-age.

The preparation and promulgation of the two codes of criminal procedure must also be studied in the light of Peru's constitutional experience, if their significance is to be properly appreciated. The second half of the XIXth century, which had early produced Peru's first native code of criminal procedure witnessed, too, the promulgation of Peru's longest-lived Constitution to date. (145) Yet this latter part of the century, which had brought Peru to independent nationhood, was one of violent political change internally and war and crisis in her external relations. Basically, the tenets to be found in the Constitution of 1860 were sound, but the pace of social change and instability of political factors were against their satisfying the country's needs in the matter of law and order. These needs were never far, however, from the minds of Peru's legislators and the patent dissatisfactions, which found expression from time to time, were the product of Peru's peculiar environment, the elements of which worked against enforcement and execution, rather than a concerted attack upon specific norms or institutions and the ideas upon which they were based. As society grew and power became more diffused throughout it, discontent with the bases of the Constitution and the administration of the criminal law took on a general character which reflected the

(145) The Constitution of 1860 was promulgated 10th November 1860. From 29th August 1867 to 6th January 1868 another Constitution was legally in force and the Constitution of 1860 was restored on that latter date and was legally effective until 27th December 1879 when its validity was interrupted by the Estatuto Provisorio of Nicolás de Piérola until 18th January 1881 when it was restored de facto. Restoration de jure of the 1860 Constitution took place on 23rd October 1883 and it endured until the promulgation of the new Constitution on 18th January 1920.

anxieties of the age. It is of some note that the great Constitutional debate, leading to the promulgation of the Constitution of 1920, (which finally superseded that of 1860), proceeded parallel to and often entangled with the more technical debate, which heralded the promulgation, in the same legislative assembly, of the Code of Criminal Procedure of 1920. The effectiveness of the Constitution of 1920 as a legal instrument had little opportunity for proof, for its promulgation was rapidly followed by a period of dictatorship which practically paralyzed its operation. In many ways, the Code of Criminal Procedure of 1920 is a more able work than the Constitution of the same year (146) and as a measure of reform it far more radical and satisfying.

Codes and Constitutions, particularly in Latin American countries tend to bear the indelible stamp of those primarily responsible for their elaboration, so that we can usually identify a code and its ideas with its author. The Code of Criminal Procedure of 1920 (147) is largely the work of a most remarkable jurist, *Mariano H. Cornejo,* who brought to the task of reforming Peru's creaking, adjectival criminal law the long, practical experience of an astute legislator and politician, nicely blended with the qualities of an advanced, distinguished thinker in the realms of sociology and law. (148) Perhaps a less radical or controversial figure might have aroused less opposition among the nation's conservative elements so that the Code, as contemplated by its author, might have passed into law. It is certain that one of lesser ability could not have produced the reforms so necessary to Peru's juristic health after a fashion that would have been acceptable to those then in charge of her destinies. The Code itself is a remarkable work, but what is of special value is the exposition with which Dr. *Mariano H. Cornejo* prefaced his draft Code and his careful annotation of each of its articles. (149) An examination of these observations enables one to understand the motivation of each proposition and the sources upon

(146) The Constitution of 1920 was essentially a political compromise designed to give expression to a number of ideas that had not as yet achieved a concrete formulation. The Code of Criminal Procedure was the product of a careful study from the 11th February 1915.

(147) El Código de Procedimientos en Materia Criminal of the 2nd January 1920.

(148) For an appreciation of this extraordinarily versatile man see, "Mariano H. CORNEJO; el hombre y su obra", Dr. Hugo Denegri Cornejo, Colegio de Abogados de Lima, 1966.

(149) See Mariano H. CORNEJO, op. cit. supra at note 130.

which the author had drawn for inspiration. One is necessarily left, the heat and controversy of the moment of its introduction having long since passed, with a profound admiration for the author, its moving spirit against often the most serious of obstacles, and the breadth of his vision and culture. In a historical sense, its novelties represent a real triumph of the forces of progress over the sloth and indifference of the traditionalist viewpoint. If a code of procedure is thought of in terms of making effective the normative content of the substantive law, it can be said that the Code of *Mariano H. Cornejo* went a very long way towards the realization of this objective. That it was not an unqualified success was due to endemic failings in Peru's legal thinking and her administration of criminal justice rather than as a result of any technical inadequacies or poor orientation on the part of its author.

The primary objective of the *Mariano H. Cornejo* Code was to bring out the criminal process from behind the archaic screen of technicalities, which bedevilled the trial of even the simplest issues and to erect a proceeding which would combine the best features of the inquisitorial system with the most admirable characteristics deriving from the penal procedures of Common Law countries. (150) The result was acknowledgedly a hybrid with its elements drawn from France and Spain and in its most important and controversial respect, from England. (151) It is upon this last element, the jury, that the adoption of the Code nearly foundered and the projected Code in fact only passed into law after the controversial fourth part, providing for jury trial, had been withdrawn by its sponsors. The opposition to the adoption of jury trial in any form was sustained and at times almost hysterical. (152) Nevertheless, the considered opinions of Peru's most distinguished jurists on this question were sober, measured and deserving of the respect, which permitted them to prevail. (153) Although political undertones were not entirely absent from this debate and the eventual solution of the question, perhaps no truly juristic issue has ever been so hotly argued. Prejudices on both sides ran strong

(150) Ibid. at pages xii and xiii.

(151) See "Código de Procedimientos Penales", Sexta Edición por Fernando GUZMAN FERRER, 1966, Exposición de motivos del anteproyecto at pages 8 and 9.

(152) The sound and fury of the argument is best appreciated from a reading of the Congressional debates, see Diario de los Debates, Asamblea Nacional, 1919.

(153) See "El jurado en el Perú", containing the opinion of Tomás JOFRE, Imp. Torres Aguirre, Lima, 1920. See also, "Anales Judiciales, Vol. XII", 1916, pages 356/366.

and deep and the subject affords fascinating material for study of the effect of professional predispositions and the traditions of a particular legal education upon law reform. (154) The practical result was a typical, legalistic compromise, in which the principle of popular trial was conceded, that the more important reform of the oral, public trial following a preliminary, investigative stage be firmly established. Many of the elements, now more logically grouped together in the Code of 1920, can be discerned in earlier Codes and Constitutions. The real reform lay in their ordered nature so as, at last, to produce a coherent framework of procedural principles which, having regard to the state of the nation's juridical development, would permit of the satisfactory administration of criminal justice. That these reforms were possible at all having regard to the continuing political difficulties of the times, is a tribute to the collective, legal conscience of Peru as much as to the efforts of individual crusaders. It is of considerable consequence that the Supreme Court from the year 1910 onwards had grown greatly in stature and influence and between the years 1914 to 1919 in particular it was a most dynamic and beneficent element in the process of law reform. (155) It is a tragedy that this feature, which could have had so important a consequence for the rule of law in Peru was prematurely truncated by reason of the unfortunate dispute, in which the Court found itself in 1919 with the Executive, from which it could not have hoped to and from which indeed it did not, emerge victorious. (156)

Under the Code of 1920, the ungainly and largely impracticable division of the criminal process into its two parts of *"sumario"* and *"plenario"* gave place to a preliminary stage to be called the *"Instrucción"* (157) and a secondary stage, the trial proper, called the *"Juicio"*. (158) This reform was much more than a mere exercise in semantics. Instead of the highly complicated "trial before trial" there was substituted a true process of factual investigation directed by a single, specialised judge, whose sole function was to be the thorough examination of all

(154) See, for example, the Memoria of Dr. Manuel Vicente VILLARAN, La Revista del Foro, Lima, Año III, No. 2, 1916, at pages 107/109. See also, Año III, No. 6, at pages 169/176 and Año III, No. 7, 1916 at pages 201/213.

(155) See BASADRE, op. cit. supra at note 112, Vol. VIII at pages 3696/3698 and pages 3765/3766.

(156) Ibid. at pages 3966/3974.

(157) See Articles 43/73, "Código de Procedimientos en Materia Criminal".

(158) See Articles 183 et seq. "Código de Procedimientos en Materia Criminal".

the circumstances of the case and the proper ordering of the materials, which might be acceptable in evidence, that the case be tried according to law by the competent tribunal. (159) In the event of finding no case for the accused to answer, the *"Juez instructor"* could, subject to objection by the *Fiscal*, order his immediate release. (160) The intention behind the reform seems to have been to preserve all that was good in the inquisitorial process, this latter being in accord with the realities of Peruvian life and society, while liberating this process from those procedural impediments which prejudiced the outcome of the eventual trial of the formulated issue. The language of the Code in regard to the creation of this new criminal proceeding is somewhat involved, (161) but its principles, well tried in other civil law systems were not novel or unaccustomed to the Peruvian jurist and practitioner. This part of the Code was generally welcomed and its implementation caused little difficulty in practice.

That part of the Code concerned with the *"Juicio"* or the trial proper was designed to give effect to the principle called *"El criterio de conciencia"*. (162) The underlying idea of the reform seems to have been the entire and wholesome eradication of the purely mechanical weighing of evidence in arriving at judgments and to permit the judge an intellectual liberty of appreciation of the matters, which he had perforce to consider. (163) It seems to have been rather casually assumed by the author of the 1920 Code that his use of this expression and all that it imported for the actual terminology, which translated this idea into normative form, would be perfectly intelligible to all and, indeed, insofar as no immediate objection was raised, his unconcern would seem justified. Subsequent events, however, would indicate that more detailed explanation of what was intended might have been helpful, that the judges might the better have understood the new role that had been inten-

(159) See Mariano H. CORNEJO, op. cit. supra at note 130, page 124. See also, "Código de Procedimientos en Materia Criminal", Juan José Calle, Librería e Imprenta Gil, Lima, 1920 at page 33.

(160) Article 53, "Código de Procedimientos en Materia Criminal". See the observations of Mariano H. CORNEJO, op. cit. supra at note 130, page 27, setting out the advantages over the old process.

(161) This is probably due to the rather prolix style of Mariano H. CORNEJO himself and the disinclination of his contemporaries to redraft his proposals in simpler form.

(162) Mariano H. CORNEJO, op. cit. supra at note 13, page xix.

(163) Ibid., pages xxix to xxvii. See also pages 106/7 and the commentaries on Articles 259/260 of the Code.

ded for them. (164) By and large, it may be said that the reform was successful in this regard. The old pitfall of the mass of written proofs, which virtually obliged the judges of the *"Plenario"* to come to a certain conclusion, was avoided and this combined with the orality of the proceedings and the testing of the evidence afresh in open court, gave the trial far less of a procedural dependence upon the preliminary stage than had been the case with the devices it replaced. This opening up of the judicial function and the consequent independence of action thus conferred is really one of the principal features of the new Code. The trial throughout retains much of its inquisitorial character with the trial judges taking a most active part in the search for what is conceived to be the truth of the matter in issue. (165)

The principal institutional reforms introduced by the Code of 1920 concerned the office and role of the *Fiscal* and the structure of the main criminal courts themselves. A whole section of the Code was devoted to the office and attributes of the *Fiscal* and the older notions of this post were taken and elaborated upon to produce what was entitled the *"Ministerio Fiscal"*. (166)

This in effect, comprised the aggregation under a single heading of all the officials exercising these public functions at whatever level of jurisdiction. The composite, hierarchical body was entrusted with wide directive powers, in the public interest, in regard to the initiation, control and trial of all criminal proceedings. The reform was not organic, but rather definitive and represented a logical extension of clearly observable trends over the preceding half century or so. To give effect to the proposals relating to trials, the Code designated the principal courts of first instance in criminal matters, *"Tribunales Correccionales"*, defining their organisation and functions in relation to the tasks set for them. (167) These institutional re-

(164) See, for example, "El criterio de conciencia en la legislación penal del Perú", Víctor Modesto VILLAVICENCIO, Revista de Derecho Procesal Penal, Buenos Aires, Año X, (1952) No. 4, pages 62/80. VILLAVICENCIO writes (pages 62/63). "La amplitud que los codificadores le dieron al instituto del criterio de conciencia, empezando por el Doctor Mariano H. CORNEJO, el adversario más tenaz del sistema de la prueba tasada, ha provocado una verdadera anarquía en la comprensión exacta de sus alcances. En treinta años de vigor, de ambos códigos de procedimientos penales, la jurisprudencia no podría decirnos en que consiste el criterio de conciencia".

(165) See, especially, Articles 213/218, Código de Procedimientos en Materia Criminal.

(166) Articles 11/16, Código de Procedimientos en Materia Criminal.

(167) Article 184, Código de Procedimientos en Materia Criminal.

forms were intended to complement the movement towards oral proceedings, to ensure the public nature of the administration of criminal justice and to improve generally the professional calibre of those entrusted with giving practical effect to these objectives. The *"Juez de Paz"* was retained for dealing with minor offences and it is curious in view of the attention paid to the question of the jury, that more criticism was not directed at what was, for political reasons and the unpaid nature of the office, a far from satisfactory imitation. (168) It is equally worthy of note that those who were so strongly, at this time, arguing for a measure of decentralisation in government did not seek to adapt the, *"Jueces de Paz"* to serve this end.

For all its more obvious faults, this Code of 1920 represented a notable reform and a very real attempt to correct the defects in the administration of justice. Its principal failing lay inevitably, in the fact that it had been based upon the incorporation of some form of jury trial in the Peruvian system. The Code in its emasculated form still bore the traces of what had been excised, for even the most skilful of surgery could not have eradicated what was, after all, one the fundamentals upon which the Code and its operation was to have been based. In its language one can detect much of the persuasive oratory for which *Mariano H. Cornejo* was so deservedly famous. Its style, in the light of the requirements of precision and clarity, leaves something to be desired. Neither its preparation nor promulgation can be said to have been unduly hurried, but having regard to the historical context in which the Code was set, it can be said with confidence that, had it not passed into law when it did, it might never have become law at all. While it did not have a very long, effective life, many of its forms continued and continue to rule from the grave. For all its superficial leanings towards the Common Law, the Code of 1920 was a natural product of its Spanish past and while the then current Spanish Code undoubtedly served as a model, (170) it

(168) See, La Revista del Foro, Lima, Año IV, No. 2, 1917, pages 35/37.

(169) See particularly the terminology of Libro Segundo. See also, Exposición de Motivos, Código de Procedimientos Penales, edn. cited at note 151 supra at page 9. See also, "Código de Procedimientos en Materia Criminal", Darío RODRIGUEZ LLERENA, Chiclayo, 1936, at p. 295.

(170) See "La reforma procesal penal en el Perú", Niceto ALCALA-ZAMORA y CASTILLO, "La Revista del Foro", Lima, XXXI, 1939, No. 7 and 12 at page 344.

was Peru's own Hispanic heritage that permitted of its adaptation and utilization according to the dictates of her then juristic needs.

In 1936, the difficult years, through which Peru had but lately passed, at last gave way to a period of tranquility, in which reform of criminal procedure could once more be considered. The task was most wisely entrusted to one whose career and experience in themselves represented something of a guarantee of success. Dr. *Carlos Zavala Loayza* has left us the most careful record of his thoughts and motives in almost every particular relating to the *"Código de Procedimientos Penales"*, which became law on the 18th March, 1940. (171) In addition, the entire work, almost to a comma, was subjected to the most rigorous criticism by a renowned specialist in the field, Dr. *Niceto Alcalá-Zamora y Castillo.* (172) Even after nearly thirty years of experience with the Code, this latter work leaves little more that can be usefully said by way of structural analysis. Dr. *Alcalá-Zamora* has dissected article by article the Code of 1940, laying bare faults obvious only to the practised eye of one versed in the lore of differently oriented penal procedures. (173) The result of this learning is that, from this distance, one can write of this Code and its historical signficance with a confidence that would not have been justified in the case of earlier legislation. As a general observation it may be averred that while the *Zavala Loayza* Code does not have the quality of originality of its predecessor to commend it, its own intrinsic qualities mark out for it a special place in any history of Peruvian legislation. For all its inadequacies, it does represent an enormous and observable, technical advance not only in respect of its content, but also its structure and language. (174) With all, however, it is at best a reform or improvement of the old rather than some vital, new orientation that is being witnessed. (175) The Code of 1940 is a re-sharpening of some of the older, tried and trusted procedural tools, with their occasional restyling to suit the modern fashion. The historian who looks for the

(171) See "La Revista del Foro", Lima, Año XXXI, 1939, No. 57/12, pages 269/328.
(172) Ibid, pages 329/424.
(173) Ibid. page 330 where Dr. ALCALA-ZAMORA describes his own formation as Germano-Italian by way of contrast with that of Dr. ZAVALA LOAYZA which he describes as Anglo-French.
(174) ALCALA-ZAMORA, op. cit. supra at note 170, pages 333/335. "Uno de los mayores aciertos de A. Z. en su brevedad".
(175) Ibid, page 332.

drama and majesty of the 1920 "leap forward" will look in vain.

The Code of 1940 sought to grapple resolutely with the central procedural problem, namely, the division of the process into two stages. This, as has been demonstrated, existed *de facto* or *de jure* from the earliest times. The practical and theoretical inconveniences were thrown into relief by the definitive solution offered by the Code of 1863; the answer of the 1920 Code was the *"instrucción"*, it being left to the Code of 1940 to give precision and refinement to this concept. For those whose thoughts travelled along the lines of the Peruvian jurist, the problem was to avoid the pre-trial of the issue, while investigating the case with sufficient thoroughness to the point where an issue for trial could indeed be formulated. Deep and only half perceived problems lay at the root of this dilemma. The defect of the earlier Codes was the repetitive nature of the process, a mere trampling over well trodden ground. (176) The difficulties really stem from regarding this initial investigative stage as a judicial proceeding at all, but the system having so decreed it, the consequences for the secondary stage, the trial of the issue thus defined, are inescapable. What the 1940 Code did was to give yet more prominence to the *"Instrucción"* stage and yet more freedom and power to the judge who was to undertake it. (177) Inevitably, this circumscribed still further the trial process itself and the Code and the arguments for it are all redolent with an appreciation of this fact. (178) While the Code of 1940 upholds and reinforces the *"Criterio de Conciencia"* its provisions in fact limit severely the area over which the beneficent core of this concept holds sway. The 1940 Code has tended to swing the emphasis upon the *"Instrucción"* stage in the most real sense leaving the trial itself for a forensic appreciation of what emerges from it. The trial thus becomes a complex battleground of argument on law, for there is, by

(176) Mariano H. CORNEJO, op. cit. supra at note 130, page xxi. "El plenario escrito no tiene explicación de ninguna clase: es la repetición de la instrución, no sólo estéril, sino dañosa y contraproducente.....".

(177) See ZAVALA LOAYZA, op. cit. supra at note 102, at page 76.

(178) Ibid. page 76. In the words of Dr. ZAVALA LOAYZA, "El propósito legislativo tenía que dirigirse, consultando los principios doctrinarios, a dar a la instrucción una función histórica y científica a través de la cual se descubriera el delito y su agente responsable para entregarla después a la labor crítica de los que habían de expedir la sentencia definitiva.....". Something of the philosophical dilemma can be appreciated from a proposal made by Daniel E. MURRAY, "A comparative study of Peruvian Criminal Procedure", University of Miami Law Review, Vol. 21, No. 3, at page 649.

the time this stage is reached, little else about which to argue. The *"Instrucción"* is seen as the stage of discovery; the trial perforce reduces itself to argument about what has been discovered.

Two important innovations were made by the Code of 1940, the creation of the *"Policía judicial"*, (179) a special body of police entrusted with the task of collaborating in the *"Instrucción* and the *Ministerio de Defensa"*, (180) providing for the defence at public expense of those who could not satisfactorily employ the services of a lawyer on their own account. Given the increased prominence of the *"Instrucción"* and the nature of the organisation of the police in Peru, the creation of a special body under the direction of the judge was essential that the objectives of this part of the process be attained. (181) The police do not appear as accusers, but rather as expert informants as to the circumstances of the case, with the additional resposibility of making available to the Court not only the evidence, but also the accused person. The creation of a special provision for the official authorised defence of the accused responded to a felt need in the legal profession that mere legal aid could not satisfy. The stigma of defending an unpopular accused could be so damaging professionally, and obedience to the tenets of the professional code of ethics such, that some persons would perforce have been without counsel before the courts had not these salutary provisions been incorporated in the Code.

The Code of 1940 makes important modifications in relation to the establishment of civil responsibility (182) The 1920 Code had treated of the matter in a somewhat confused fashion, influenced perhaps in part by the strict separation of the civil from the criminal in proceedings under the Common Law system. Having regard to the admitted principle of unity implicit even in the 1920 Code, its successor logically gave form to this for the purpose of preserving the public as distinct from private charac-

(179) Articles 59/66, Código de Procedimientos Penales.

(180) Articles 67/71, Código de Procedimientos Penales.

(181) No "Policía Judicial" as such has, in fact, ever been created and the functions of this important body as it was conceived by the author of the 1940 Code are carried out by a branch of the ordinary police investigation service. See Luis del VALLE RANDICH, op. cit. supra at note 1, page 313. See also, "Instituciones de Derecho Procesal Penal', Domingo GARCIA RADA, Ediciones Studium, Lima, 1965 at page 409.

(182) See Articles 54/58, Código de Procedimientos Penales GUZMAN FERRER at page 115.

ter of the action. Some of the difficulties of this mixed civil and criminal jurisdiction make themselves felt elsewhere as in the case of Habeas Corpus proceedings, in which the distinguished author of the 1940 Code found himself more than ever imprisoned by the bonds fashioned for him by his predecessors. (183)

In the 1940 Code the concept of the *Fiscal* as protector of the public interest in the proper administration of criminal justice reaches the flowering of its maturity. The office is converted into what is described as the *"Ministerio Público"* (184) and incorporated within the ambit of the judiciary itself. The *Fiscal* has, therefore, prestige and impartiality conferred upon it by association with this most stable of the branches of government, while retaining the dynamic qualities of representation through the attributes, which have been conferred upon it in the interests of the public at large. The role of the *Fiscal* is thus both active and passive, as the promoter and initiator of the criminal process and as the guardian throughout of its rectitude. It would be correct to characterize the office of *Fiscal*, as it is presently found, together with the structuring of the *"Instrucción"* phase of the proceedings, as being the most distinctive features of modern Peruvian criminal procedure.

The Constitution of 1933 had laid down the broad principles governing the structure and functioning of the judiciary. (185) It may be to some extent a valid criticism of the 1940 Code of Criminal Procedure that it occupied itself with institutional matters that might more appropriately have received attention elsewhere. The nature of the reforms undertaken, however, and the absence of other legislation dealing with the aspects in question made it necessary for Dr. *Zavala Loayza* to deal with such institutions as the *"Tribunal Correccional"* and the offices and atributes of the *"Fiscal"* and *"Juez Instructor"*. Not until 1963 did these matters receive their due treatment when, following the report of a distinguished commission of jurists, there was promulgated the *"Ley Orgánica del Poder Judicial"*. (186) This "Code" relating to the judiciary contains little

(183) See COOPER, op. cit. supra at note 143, pages 325/326.

(184) See Articles 42/48, Código de Procedimientos Penales, GUZMAN FERRER at pages 105/106.

(185) Articles 220/231.

(186) See "Ley Orgánica del Poder Judicial" (decreto Ley No. 14605) and the excellent comentary of Dr. Mario ALZAMORA VALDEZ, a member of the revising commission. Universidad Nacional Mayor de San Marcos, Lima, 1965.

by way of innovation, but lays down clearly and with considerable definition the hierarchy of the Peruvian system and the functions and attributes of its component parts. Of particular interest in relation to the present subject are those sections dealing with the *"Ministerio Público"* (187) and the *"Ministerio de Defensa"*. (188) An important section deals with the *"Jueces de Paz"*, (189) which unites in one convenient enactment the regulation of this office and restores to it some of the importance it had been in danger of losing during the earlier part of this century. A very full treatment is accorded the *"abogado"* and his place in the administration of justice is thus assured. (190)

Epilogue

Peru stands on the threshold of yet another reform of her criminal procedure and institutions. (191) Many of the juristic ideas that were valid in the decades between the two world wars have been questioned and a fresh approach is required to the problems, which different economic, political and social circumstances have created. History teaches us that a radical break with Peru's traditions in these matters is neither likely nor desirable. While this ought not to preclude a more thorough and scientific examination of other systems than has, at times, been the case in the past, Peru must in this as in other fields, strive to identify and give precision to her own philosophical basis, upon which to construct the type of procedures and institutions best suited to her own peculiar needs. This is not something which can be done in isolation and it is clear that the old narrow concepts of codification are breaking down before a realization of the wider ramifications of the undertaking. One lesson of history is how difficult it is escape from the imprisoning realm of ideas to the real world of action. The defects in Peru's criminal procedures are largely due to the fact that ideas have not, for all their brilliance, always corresponded with reality. Criminal procedure is the dynamic which, working through the ma-

(187) Articles 330/347.
(188) Articles 348/353.
(189) Articles 195/209.
(190) Articles 308/329.
(191) By Decreto Supremo No. 135-AL of 25th March 1965 a Commission was set up to draft for consideration a new code of criminal procedure.

chinery of the appropriate institutions, converts the energy of the substantive criminal law into an effective agent of control and regulation (192). All too often reform has meant a simultaneous change of the energy source as well as the machinery it was meant to drive. This has delayed reform to the point where it has been overtaken by events thus to fall among the mischief it was meant to correct. Time in this as in other matters is certainly not on the side of the reformer.

RESUMEN

Este estudio relata y comenta la historia del derecho procesal penal y sus instituciones en el Perú. La exposición se divide en cuatro partes. La primera trata de la época pre-hispana; la segunda comprende el dominio español; la tercera abarca el período desde la Declaración de Independencia hasta el fin del siglo XIX; y la última se refiere al siglo XX hasta el presente. El objetivo del estudio es la ilustración de los factores que más se han destacado en la evolución del sistema, creyéndose que una mayor comprensión de la historia constituye la clave indispensable que da entendimiento de lo actual.

Primera parte.— Se observa la ausencia de materiales escritos pertinentes a esta época y el estudio examina el carácter de las fuentes y su valor. Hace una exposición de las características principales del régimen incaico en base de las Crónicas y fuentes secundarias. Comenta los aspectos institucionales del sistema incaico y encuentra la distribución de responsabilidad a través de las distintas categorías de funcionario como el factor más significativo. El sistema penal incaico era notable por su celeridad y una fuerte noción de justicia que servían para inculcar el espíritu sumiso en que el orden jurídico se basaba. Llama la atención que el régimen incaico carecía de un sentido legalista debido en parte al carácter despótico del Incario y en parte a la ausencia de una abogacía. El sistema administrativo con su intrincada jerarquía de autoridad es mues-

(192) Compare "Derecho Procesal Penal", Enrique JIMENEZ ASENJO, Editorial, Revista de Derecho Privado, Madrid, Vol. 5, pages 3/5.

tra de una habilidad gubernamental de orden extraordinaria y la efectiva imposición de la reglamentación incaica a través de todo el antiguo territorio del Perú constituye un triunfo procesal debido a las cualidades de la raza autóctona.

Segunda parte.— La llegada de los Conquistadores causó una ruptura completa, en el sentido institucional, con el sistema estructurado por los Incas. Perecieron, como consecuencia de la imposición de una cultura ajena, todas las instituciones que dependían del poder incaico. El advento de los españoles causó la sustitución de nociones jurídicas derivadas de una cultura europea de cierta madurez en lugar de una tradición normativa que se hacía efectiva mediante la actividad de los funcionarios que obraban en nombre de los Incas. En lugar de un estado de orden se estableció el estado de derecho con todo el aparato institucional para asegurarlo. Además de las leyes escritas y los conceptos técnicos aportados por los españoles, se erigieron un sistema judicial en lo penal para reglamentar la vida de los habitantes conforme a los propósitos políticos de los Reyes de España. El Perú heredó las nociones hispanas de la superioridad de la palabra escrita y del proceso inquisitivo. Las principales instituciones jurídicas españolas se involucraron, inerradicablemente, durante los primeros años de esta época. Los papeles del juez, del Fiscal y del escribano se fijaron de manera que la actitud hacia estas instituciones y otras influenciaba la administración de justicia en forma imborrable. Aunque el régimen nativo pereció completamente, la persistencia de la actitud sumisa ante las muestras institucionales de autoridad hizo fácil la transición y permitió la aceptación de la vida jurídica española con todas sus implicancias.

El estudio traza el desenvolvimiento del orden jurídico en el Perú colonial mediante un examen de las Recopilaciones y el funcionamiento de los componentes de la administración de la justicia penal; las Audiencias; los Corregimientos (más tarde Intendencias); y los Cabildos. Hace una comparación del carácter discriminatorio de la justicia penal español y las discriminaciones practicadas bajo los Incas. Postula que estas características de tal antigüedad, aunque proveniente de distintas fuentes, hayan afectado la formación de actitudes procesales. Se opinó que los desperfectos endémicos se deben al colonialismo y que el derecho penal de la época reflejaba los he-

chos y prejuicios de una sociedad que todavía no se identificaba plenamente, con su medio físico Sin embargo, los pensamientos españoles se impusieron, inexorablemente, de modo que el régimen procesal penal de épocas posteriores tendría, forzosamente, que soportar el peso no solamente de estas ideas sino del mismo aparato institucional mediante el cual se los realizaban.

A distinción del sistema incaico se nota la prolijidad del proceso y su incertidumbre. Puede percibirse la diferencia entre las dos concepciones de la función del derecho procesal penal. Bajo el sistema español se ve manifestada una clara preferencia por soluciones legalistas, tales como el sistema de pruebas por escrito y su examen subsiguiente, así reemplazando la confrontación directa y oral del sistema incaico. Y a la vez se ve la génesis de instituciones modernas e inauditas bajo el régimen anterior, tales como la multa pecuniaria, la libertad provisional bajo fianza y el concepto de costas en lo penal. Se ha calificado este período, entonces, como una "Edad de Oro" en el derecho procesal penal.

Tercera parte.— Con la independencia, el Perú experimentó una liberación manifiesta a través de todo el campo jurídico. Las Constituciones indican la orientación de sus autores y sus tentativas de escapar de la estrecha prisión de ideas exclusivamente hispánicas que habían regido hasta aquel momento. El estudio considera el aporte de esas Constituciones a la estructuración del nuevo régimen penal y especialmente la reforma del poder judicial. Se nota la introducción de la noción del jurado y el desarrollo de las funciones de la Fiscalía de modo que ésta iba convirtiéndose en verdadero defensor de los intereses públicos.

La codificación del derecho procesal penal es tratado en extenso, empezándose con el Código Santa Cruz. El contexto político y social en que se elaboraba el Código de 1863 recibe atención para que sus preceptos tengan su verdadero significado y énfasis. La importancia de esta codificación como muestra de las nuevas corrientes en el Perú es notada y el estudio ensaya un análisis de algunos de sus rasgos típicos, tales como el cuerpo del delito y las dos etapas del juicio mismo, es decir el sumario y el plenario. Se hace una crítica de estos elemen-

tos y otros, exponiendo sus efectos sobre la elaboración de Códigos subsiguientes.

Corresponde a este período la creciente influencia de la Corte Suprema de la República tanto por su posición constitucional como por adiestramiento e idoneidad. La noción del valor jurídico de la jurisprudencia se hace sentir en esta época y se nota también los esfuerzos constantes dirigidos hacia el logro de una mejor administración de la justicia penal.

Cuarta parte.— La última parte del estudio consiste, principalmente, en una exposición de los dos Códigos procesales en lo penal y un análisis comparativo de sus más importantes características. Son examinadas sus bases y los pormenores de su elaboración desde el punto de vista de su filosofía fundamental. Explica las reformas planteadas por el Código de 1920 y la novedad de algunas de sus soluciones. Nota el gran debate sobre el jurado y los efectos de su rechazo como instrumento procesal bajo el régimen penal peruano. Describe la introducción del régimen híbrido y sus conceptos según las ideas del autor del Código. La importancia de la nueva estructuración del proceso es comentada especialmente con relación al juez instructor y el criterio de conciencia que se destinó a regir en el juicio. Las dificultades que impedían la realización de este último son resaltadas. En la esfera institucional se notan la creación del Tribunal Correccional y el nuevo concepto del Fiscal como integrante de un verdadero "Ministerio Fiscal". Se alaba la originalidad de este Código y su valor, comparándose con la reglamentación anterior.

Continúa con un resumen de las reformas y modificaciones efectuadas por el Código de 1940. Opina que este Código representa la maduración de ideas ya planteadas en vez de ser en sí algo original. La experiencia con algunas de las concepciones introducidas por el Código de 1920 llamó la atención a sus desperfectos mientras que las exigencias de una sociedad en vías de desarrollo señalaron la necesidad de otros cambios. Notables son el estilo y brevedad de la nueva legislación y su tratamiento distintivo de la etapa de la Instrucción y la responsabilidad civil. Las importantes reformas institucionales de los Ministerios Públicos y Defensa y de la Policía Fiscal son expuestas y comentadas. Se nota el papel impresionante del Fiscal en esta última etapa de la evolución de su ministerio. Concluye esta par-

te, con una breve mención del contenido de la Ley Orgánica del Poder Judicial en cuanto se relaciona con el tema tratado.

Epílogo.— Termina el trabajo con miras hacia el futuro y conjeturas acerca de las perspectivas de reforma en el campo de los procedimientos penales. Advierte las lecciones de la historia de la materia en el Perú y opina que futuros cambios deben fundamentarse en una sólida base filosófica de genuina peruanidad.