Habeas Corpus in the Peruvian Legal System

Por H. H. A. COOPER

Catedrático Visitante

Introduction

Comparatively little has been written in the English language concerning Peruvian law (1) Such writings as exist are generally brief, outline works, often translations of the codes, intended merely to inform as to content rather than to instruct in any profound sense. To write about one's own legal system in a foreign language demands not merely a considerable and specialised linguistic ability, but also a juristic talent and the academic facilities that permit of its exploitation. These qualities and advantages are rarely united in a single person. On the other hand, fewer still are those English jurists, who can write acceptably, in their own language, of foreign legal institutions. To do so demands not merely the requisite fluency in the chosen idiom, but rather the acquisition of a sound appreciation of the relevance and meaning of the matters described and analysed, within their own juristic and political context. With an adequate knowledge of the language it is undeniably possible to give a fair description of a foreign legal system in one's own tongue. Unless, however, such a description is accompanied by a proper understanding of the system itself, from other than mere documentary sources, the end product tends to be superficial and lacking in those qualities which give it value for the purpose of comparative studies. These facts are, naturally, inhibiting and have reduced the material available to scholars, who have neither

(1) How little in fact exists may be appreciated from a perusal of "A guide to the law and legal literature of Peru", Helen L. Clagett, Library of Congress, Washington, 1947. This excellent work urgently needs bringing up to date, but the twenty years which have elapsed since it was written have seen no dramatic increase in material in English on Peruvian law.

the linguistic ability nor the opportunity to study the Peruvian legal system in the original language of its sources. There is much of value for the comparative lawyer in the Peruvian legal system and the growing interest in such studies generally makes it imperative that this material be made available, in acceptable form, to the wider audience. In this regard, the institution of Habeas Corpus in Peru is peculiarly interesting by reason of its unusual nature and development, as well as for the lessons which its history contains for the perceptive jurist.

At the outset, a word must be said about terminology. At times, a literal translation from one language to another can have unfortunate effects, creating an erroneous impression in the mind of the reader. (2) A distinguished Peruvian comparative lawyer has given us a timely reminder that "The same terms ..... may mean different things in two legal systems". (3) This necessary warning has especial significance in the setting of Latin American studies, for the Castillian tongue preserves usages and technicalities which have not achieved acceptance among the Spanish speaking inhabitants of Ibero-America, while at times. words and expressions that have a precise and definite sense in the countries of this great continent sound strange upon the ears of a Spaniard.(4) Moreover, and this warning is very necessary for the unaccustomed who assume a homogeneity of language throughout these countries, there are considerable variations which must be carefully noted if confusions or, at the very least, mistaken impressions are to be avoided.(5) It is often impossible to find a precise equivalent in the English legal vocabulary that expresses perfectly the

(2) A striking example of this is to be found in "A comparative study of Peruvian criminal procedure", Daniel E. Murray, University of Miami Law Review, Vol. 21, Spring 1967, No. 3, pages 607-649, wherein "el Ministerio Público" is translated "Public Ministry". This literal rendering of the words conveys nothing of the true nature of this key institution in Peruvian criminal proceedings and may well mislead the unwary into the belief that some sort of government department is charged with interventions of the nature described.

(3) "Método para el estudio comparado del derecho", Roberto MacLean Ugarteche, Revista de Jurisprudencia Peruana, Tomo XVIII, August 1960, pages 874-881 at pages 879/880.

(4) See, for example, the observations of Niceto Alcalá-Zamora y Castillo, "La reforma procesal penal en el Perú", La Revista del Foro, Lima, 1939, July/December, pages 329/424 at page 333.

(5) Taking the simplest of illustrations, the judges of the Supreme Court of Peru are referred to as "Vocales", while in Chile they are known as "Ministros".

sense of some Peruvian legal term. (6) This, as will be strikingly seen, is the case with Habeas Corpus. Where this difficulty occurs, it has seemed preferable, in accordance with the best of modern practice, to leave the term or expression in its original state, offering to the reader such explanations as will enable him to equate the word or phrase with the appropriate part of his own legal system or experience, or allowing him an insight into the way in which the concept is employed by the Peruvian jurist. (7)

Habeas Corpus itself is a term linguistically foreign both to English and Peruvian lawyers. While few English lawyers, save those about to be examined specifically upon the subject, would care to state its precise origins or the writ from which the term derives its linguistic form, the dictates of our legal education have seen to it that most are aware of our heritage of a Latin legal vocabulary of occasional useful obscurity. The real meaning of the term, by reference to its employment in our legal system, has never been in doubt. Even those whose Latin is too slight to permit of confident translation, by reason of uncertainty as to case endings or the tenses of verbs, have a certainty of understanding impressed upon them by their legal training that enables them to appreciate the relevance of this latinism to a particular legal situation. The history of Habeas Corpus in Peru is by comparison very short; a mere seventy years in fact. The term is alien not merely by reason of its being in a foreign language, but rather because Peruvian lawyers lacked the legal heritage that makes the concept, without translation, perfectly intelligible to the English. Many of the problems to be discussed derive from this fact, which in itself affords a useful lesson in comparative studies. The concept was imported with an insufficiency of knowledge as to its history and, of even greater importance, the history and nature of associated remedies that form so important a part of English constitutional and administrative law. An awareness of this is not yet to be seen in

(6) Thus in "The governmental system of Peru", Graham H. Stuart, 1925, Carnegie Institution, Washington, article 24 of the Constitution of 1920 in the translation refers to "the writ of Habeas Corpus". The words used in the Constitution are "el recurso de Habeas Corpus" and apart from the fact that the very notion of "writ" is meaningless by reference to Peruvian legal proceedings, it will be seen from the development of the present work how this facile substitution serves to obscure the vital legal problems in relation to Habeas Corpus in Peruvian law.

(7) See, for example, the useful precepts suggested by Roberto Molina Pasquel in "Reglas sobre recepción de instituciones jurídicas extranjeras", Boletín del Instituto de Derecho Comparado, México, September/December, 1965, No. 54, pages 677/687.

writings on the Peruvian legal system, for its points of contact with the English Common Law are still too slight for a critical appreciation to be made by the Peruvian jurist. A retracing of steps is, however, essential if some of the present difficulties in this field are to be removed, for it is this lack of knowledge of more general aspects of the English legal system that has led to the Peruvian dissatisfaction with Habeas Corpus in its present form, its modification into something distinctively Peruvian (8) and a general sense of disenchantment with the resulting incongruity.

These feelings have crystallised, in a juristic sense, around the arguments concerning the association of the concept of Habeas Corpus with two terms of vital importance in the Peruvian legal framework, namely *acción* and *recurso*. The difficulties, which have arisen, are substantial rather than merely semantic and represent an almost unconscious groping towards an ideal that tends to be obscured by a mere verbalism. Ironically, the very term Habeas Corpus has served to make prisoners of those who are seeking to express, through it, something which produces a natural reaction from conservatives and legal purists. The nature of this struggle, its partial resolution, and the indications of the eventual settlement of the issue, form a fascinating corrective to the impression, often held, that such processes of evolution, so characteristic of the Common Law, are not to be found in Civil Law systems. The shaping of what is still known plainly as Habeas Corpus, to serve the present day needs of Peru has not been a scientific process at all. By a curious almost fictional interpretation, Habeas Corpus has become something other than that which was first introduced into the Peruvian legal system. The significant thing is that this change has not been produced by the Courts as might confidently have been predicted in like circumstances, under the Common Law, but by the legislature. This is an important and characteristic distinction that serves invariably to separate the Civil Law from the

(8) The true importance of the Peruvian developments, on a wider view, is to be seen when they are related to recent trends in the World Habeas Corpus movement. For parallels of interest see, for example, "Due process of family privacy: world liberty and world Habeas Corpus", Luis Kutner, University of Pittsburg Law Review, Vol. 28, June 1967, No. 4, pages 597/634. Similar extensions of the juristic significance of Habeas Corpus are adumbrated therein, having much of the reasoning that has developed the institution in Peruvian municipal law.

Common Law system. In this matter of Habeas Corpus in Peru, the actual mechanics of the process are themselves of considerable interest for they cast, within the Civil Law itself, an important light upon the process of rulemaking. It is uniquely possible in this instance to contrast the work of legislators, in the political sense, with those great technicians of the law, the jurists, who are generally responsible for the country's codifications and thus for the introduction of fresh concepts into the law and the modification or adaptation of existing ones.

In tracing this process of evolution one is impressed, as ever, by the influence of identifiable persons upon the development of legal institutions. In the case of the Common Law one is able to point to this judge or that as having left, through his creative judgments, an indelible impression upon the legal system. In the case of Peru it is to the jurists, the great compilers of the Codes and Constitutions that one must look to distinguish similar personalities, who have developed and refined the raw materials of their country's social, economic and political experience, into a normative system with characteristics of its own. (9) The chain-like evolution of Common Law principles is often the product of centuries, with one judge adding a link here, another there, with nothing more than an ingrained, professional sense of history to serve as reminder of the judicial mission. A code, by way of contrast, is often essentially the product of one mind, though the thoughts and pens of others may assist in its final redaction. We can thus, in Peru, identify with certainty the author of many institutions, often with an understanding of the notions and motives that prompted him to propose their introduction. It is by a study of these materials as they are presented in the writings of these jurists, that we are able to discern trends in the system's evolution and to comment, sensibly, upon the nature of the concepts to which this normative exercise gives rise. In this study of Habeas Corpus, as indeed with respect to that of any Peruvian legal institution, the foreign observer cannot fail to be impressed with the part played by the University of San Marcos. This, the oldest University of

(9) For a unique insight into the process of codification as understood by one of Peru's greatest exponents see, "Principios que deben inspirar la codificación del Derecho Internacional en materia de responsabilidad de los Estados", Víctor M. Maúrtua, Revista de Derecho y Ciencias Políticas, U.N.M.S.M., Año II, Núm. I, 1937, pages 97/166.

the Three Americas, has nurtured generation after generation of jurists who, while occupying its Chairs of Law, have been called upon to serve in high public office upon the Commissions, which have produced Peru's Constitutions, its Codes and much of its more important legislation. The respect, which these endeavours have been accorded by distinguished Spanish speaking specialists, (10) alike in the cradle of the Castillian tongue as in other countries of the Ibero-American continent, speaks eloquently for the intellectual heritage of this great University.

One final observation may properly be made, for it arises as an illustration from this particular study of Habeas Corpus. Legal education has tended more and more to divide up the broad panoramic structure of the legal system into relatively self-contained units of study. This tends to encourage, at least initially, the belief that there exists, for example, a subject entitled constitutional law as a thing apart from criminal law. An English lawyer, following in the Blackstonian tradition, is perhaps better equipped than most to rid himself of such restrictive beliefs. Recent case law in the United States has tended to throw into emphasis the hard fact that in certain situations constitutional law and criminal law are one and the same thing. This is not so obvious in Peruvian law until one studies Habeas Corpus, where the two branches of law become inextricably intertwined. It is a fair prediction that the final, juristic blossoming of this useful, one might unexageratedly say indispensable, institution will see a further involvement of constitutional law, properly speaking, with other branches, substantive and procedural, of the Peruvian legal system. All this goes to illustrate the essential unity of juristic materials and the need for a balanced, panoramic view that their place in the system be understood and accorded its proper apreciation.

History

One who essays a history of a particular legal institution must necessarily be selective in his presentation of material so as not to overwhelm his readers with matters which have no immediate relevance to his theme. Nevertheless, it is rarely

(10) See, for example, Alcalá-Zamora, op. cit. at page 378.

possible to give a coherent account without some reference to more general matters pertaining to events and personalities that have shaped the nature of a legal institution and contributed to its development. The selective nature of the facts here presented must however, be borne in mind, together with the possibility of their being arranged differently, or of there being a distinct selection of materials, susceptible of another interpretation .The object of the present selection is to show something of the development of Habeas Corpus in Peru by reference to the social, political and juridical climate of the times, together with an account of the work done by those who have played a principal role in fashioning the concept as it is found today. The narrow, particular exercise must always be seen in the wider context of Peru's history and the activities of those who have played their part in its making.

The accounts given in Peruvian texts as to the remote origins of Habeas Corpus differ considerably from one another, but all are agreed that these are to be found in the early English Common Law. (11) To the critical eye of an English lawyer these accounts display many imperfections, due no doubt to the secondary nature of the sources consulted in their compilation. (12) Most, however, manage to present a history of Habeas Corpus in English law which, if not always in precise accord with the facts, at least approximates to the main stages of its development. It is of some importance to note that all these writers, to whose accounts reference is made, introduce the preliminaries by way of explanation of the institution as it is now found in the Peruvian legal system and with a conscious or unconscious regard for the problems to which its present character gives rise. In short, all these accounts are designed to show, by reference to the earlier history of Habeas Corpus that it was once different from what it has since become in Peru. The really unsatisfactory feature of these historical outlines is that none shows how this change has occurred. Two noteworthy features concerning these various accounts are worth remarking. In the

(11) Compare, for example, "Derecho Procesal Penal: procedimientos especiales", Luis del Valle Randich, Lima, 1963, pages 69/77, which gives a very extensive historical resumé, with "Derecho Procesal Penal", Víctor Modesto Villavicencio, Lima, 1965, at pages 298/300.

(12) See, for example, "Derecho Constitucional Peruano", José Pareja Paz Soldán, 3rd edn., 1963, Ediciones del Sol, Lima, at page 457.

first place, none shows an understanding of the fact that the Common Law writ of Habeas Corpus was but one writ among many which served to protect the rights of individuals, securing to them the remedies of the King's Courts. These accounts show no awareness of the place in the Common Law of Mandamus, Certiorari, Prohibition, Quo Warranto etc., much less the great equitable remedies of the injunction and declaration. These histories tend to give the impression, therefore, that the Common Law was concerned exclusively with the physical liberty of the individual, ignoring altogether the extensive processes it has so effectively developed for the protection of other types of interest. This indeed is a serious defect and one which may fairly be said to have coloured Peruvian legal thought about the utility of this institution and its nature and scope in the Peruvian legal system. It must not be thought that Peruvian jurists were so ignorant as to imagine that no such remedies existed in English law, or that their knowledge of the Common Law was merely superficial. There is ample evidence to the contrary. What seems to have happened is rather that the specific institution of Habeas Corpus was lifted out of its context for a particular and limited purpose at a very definite time in Peru's legal history to serve a certain and limited end. Peru's later experiences demonstrated to the jurists and politicians the need to amplify or extend the uses of the institution so imported, but by this time a full study of the framework within which it had once resided was neither practicable nor desirable: the institution had already acquired very definite Peruvian characteristics and was in the process of being modified by distinctively Latin American legal thought. Those who introduced Habeas Corpus into Peru undeniably knew enough about its nature and history to be able to implant it satisfactorily in their own legal system to meet the needs which were then felt. They were not required to consider the similar importation of associated remedies, for the need for these had yet to assert itself. When these needs arose, however, the new generation of lawyers and politicians had come to regard Habeas Corpus not as an alien transplant, but rather as a Peruvian institution to be extended or modified as their own system might permit. It is at this point that some reflection upon the earlier historical context of the institution might have proved valuable.

The second feature is perhaps even more remarkable. While agreeing upon the remote origins of Habeas Corpus and its later history in the British Colonies in North America, none of these accounts is very clear as to how the institution made its way into Peruvian law (13). Some indeed suggest, indirectly, that the historical sequence of its adoption in North America is to be followed, as a matter of course, and by geographical inference, into Ibero-America. An inspection of the historical data reveals clearly the falsity of this attractive explanation. At the time Habeas Corpus was introduced into Peru, its jurists and politicians were very much Europe-oriented. There is no evidence to show that the authors of the project had in mind the development of Habeas Corpus in the United States of America. There is, on the contrary, overwhelming evidence to show that they were thinking in terms of a contemporary English institution concerning which they were well informed and with whose workings they had been exceedingly favourably impressed (14).

Before attention is turned to the facts relating to this initial entry of Habeas Corpus upon the Peruvian legal scene, some general observations concerning Peru's constitutional history and constitutional law might usefully be made. While, superficially, it may seem that Peru has had a large number of constitutional instruments since the Declaration of the Republic in 1821, it has in fact had only three Constitutions in the last 107 years, namely those of 1860, 1920 (15) and that which is presently in force, having been promulgated in 1933. Again, this tends superficially, to suggest considerable constitutional stability whereas the reverse is in fact the case. Peru has suffered numerous political upheavals, constitutional abuses and complete revolu tion while retaining formally intact her fundamental political charter. Indeed, after Peru had suffered a revolution in 1930, putting an end to the absolutist regime of PRESIDENT LEGUÍA, which had ushered in the Constitution of 1920 one of the first substantive acts of the Constituent Assembly, convoked to pre-

(13) See, for example, "Derecho de procedimientos penales", A. Gustavo Cornejo, Librería Peruana, 1932, at pages 260/262.

(14) See, in general, Diario de los Debates (Diputados), Congreso Ordinario, 1892, pages 628 et seq.

(15) This constitution was drawn up in 1919 and is occasionally and confusingly referred to by that date. It, in fact, was effective from 18th January 1920 and will accordingly be referred to throughout by reference to that date.

pare Peru's new constitution, was to declare the 1920 Constitution valid and in force. In a very real sense, each of these upheavals brought about a destruction of the country's constitutional substance for, in theory, as KELSEN would remind us, no pre-revolutionary Constitution can claim validity in such circumstances; the basis of its effectiveness, its *grundnorm,* has perished before a newer, superior norm creating force. The formalities observed in the course of Peru's juristic history do not at first sight appear to accord well with this theory, but the impression is illusory. Each revolution has in fact involved the acceptance of a new *grundnorm,* but this has been obscured by a fictitious, formal lip service paid to the old. Fictitious though this may be, it has always had practical consequences. It affords evidence for the jurist of an important feature of the Peruvian character in these matters. There exists in the Peruvian system a wholesome awe of the written word and its efficacy in the juridical scheme (16). No matter that experience has shown countless times that the written word may be abused, twisted or disregarded, the respect which it engenders as an indispensable part of the juristic armoury remains. It is this which gives to Peru its "paper" Constitutions and its scientifically created, theoretically perfect, but often unenforceable laws. The jurist has often to shelter behind the fictitious security of an institution which can, in the light of Peruvian social fact, have no real existence and can play no effective part in the country's juridical development. At such times, the appraisals of politicians are often more revealing and realistic.

Habeas Corpus was introduced into the Peruvian legal system as a result of a "proyecto" or legislative proposal, presented in the Cámara de Diputados, the lower house of the Peruvian legislature, on the 11th October, 1892. The principal sponsors of this proposal were Mariano Nicolás VALCÁRCEL (17) and Mariano H. CORNEJO. (18) Both were lawyers, comparatively young

(16) That this is sometimes puzzling to the Common lawyer or Anglo-American political scientist is understandable and its consequences receive graphic expression in the words of Professor Stuart at pages 126/128, "The governmental system of Peru", Carnegie Institute of Washington, 1925.

(17) See, "Diccionario Enciclopédico del Perú", Editorial Mejía Baca, Lima, 1966, Vol. III, pages 318/319. Valcárcel became a judge of the Supreme Court in 1920 just before his death.

(18) For an excellent synopsis of the career of this great jurist, politician and sociologist, see "Mariano H. Cornejo; el hombre y su obra", Dr. Hugo Denegri Cornejo, Colegio de Abogados, Lima, 1966.

men, and VALCÁRCEL had during the previous year served as Ministro de Gobierno, a high cabinet office concerned with matters of public order. The proposal was submitted to the "Congreso Ordinario", the normal sitting of the legislature for 1892, and the wording of the preamble is of some importance. This states "Considering, etc. that it is necessary to secure inviolate the liberty of persons guaranteed by the Constitution (Congress) has made the following law". (19) In its original form the proposal had twenty clauses and from their tenor and wording it is unquestionable that the protection introduced by this law was intended to refer exclusively to the physical liberty of a person detained otherwise than in accordance with the precepts of the existing law. The proposal created no new rights; rather it was intended to provide a speedy and efficacious remedy in case of abuse of existing rights, for experience had but lately shown that, despite the liberality of the Constitutional guarantees of 1860, persons were being improperly deprived of their liberty and no process existed whereby they might rapidly and effectively recover it (20). Two features of the lengthy and occasionally acrimonious debate which proceeded are noteworthy. In the first place, this novel remedy was clearly recognised by its authors and those who debated its merits as having not merely English origins, but rather as an immediate derivative from the current English practice concerning its character and employment (21). While the debates show no interest in the importation into and development of this ancient common law remedy in the United States of America, it is clear from many of the speeches that those who chose to speak upon the proposal were thinking exclusively in European terms and considering the utility of the proposed remedy for Peruvian purposes by reference to data deriving from contemporary social, political and economic conditions in England. The speeches of several members of the Cámara reflect this tendency (22). It can, therefore, be said with certainty that Habeas Corpus was introduced into Peru in 1892 directly from the English legal system, by persons well acquain-

(19) Diario de los Debates (Diputados), Congreso Ordinario, 1892, at page 628.

(20) Diario de los Debates (Diputados), Congreso Ordinario 1892, page 629, report of the Commission of the House.

(21) See for example, Diario de los Debates (Diputados), Congreso Ordinario 1892, at page 671.

(22) See for example, Diario de los Debates (Diputados), Congreso Ordinario 1892 at page 661, "It is necessary to remember that we are unfortunately in a country where the llama is a means of communication".

ted with its place in that system and not by way of the United States. It must be remembered that the legal orientation of Peruvian jurists at the end of the last century was towards Europe and such notions of the Common Law as then existed were derived almost exclusively in their pure form from England, a fact that contrasts markedly with the situation at the present day when most of those professing a knowledge of the Common Law will have received their formation in the subject under tuition in the United States or by reference to materials emanating from that country. The second noteworthy point is that the language of the *"proyecto"* and the debates makes it clear that what it proposed is a *"recurso"* in the sense to which reference will be later made.

The opposition to this *"proyecto"* in the form in which it was originally presented was considerable. It took ostensibly three main forms. In the first place it was argued strongly that the way in which it was couched conflicted with the Constitution. This suggestion was stubbornly resisted by the sponsors, who refused any modification on the point. Secondly, it was argued that there was no need for such a measure; that Article 18 of the Constitution of 1860 was adequate in itself. Thirdly, it was suggested that while such an institution was desirable and effective in countries more advanced politically and socially than Peru, its introduction into the Peruvian legal system would not bring the results sought by its sponsors on account of the facts of Peru's peculiar problems of that time. This last reason is perhaps the most substantial of all the arguments levelled at the measure and represents, in one form or another the core of the opposition to its introduction. Those familiar with Peruvian politics and the character of the Peruvian as a man of affairs will recognise in this a simple truth that the historian would do well to heed. The real motives that dictate some particular action must always be sought behind those apparently expressed even with recognisable certainty, by the actors themselves. Often the formal motives are merely a screen for something more substantial upon which the majority can make common cause, yet which few are willing to see expressed in a generally acceptable form. The key to the governmental opposition to this measure is to be seen in the generally disturbed history of the times, the arbitrary detentions then proceeding, the measures

against the press and the government's unwillingness to permit anything that might have fettered formally its executive powers in times of crisis. (23) There was some suspicion that this measure was a clever lawyer's move to embarrass a government whose foundations were far from solid. The fate of this measure is not really surprising. Having passed the Peruvian legislature with but slight modification it was subjected by the Executive to "observaciones", a process allowed by the Constitution whereby a proposed law might be returned to the legislature for consideration of objections made against its promulgation. (24) The objections made in this case were technicalities rather than an attack upon Habeas Corpus in principle and were designed to impede the measure rather than to level a fatal blow against its introduction in some modified form. The nature of the objections taken, however, might well have caused serious problems for the sponsors had they attempted to redesign their *proyecto* and it is by no means certain that they could have procured the support necessary to maintain the measure in the form originally proposed. In the event, the question is academic, for Peru suffered a constitutional upheaval that left the measure "observed" and thus in suspense until its promulgation under substantially changed circumstances five year later. Before leaving this interesting episode a glance at a most pertinent observation on the measure made in the Peruvian Senate provides a revealing insight into a problem which was to worry a later generation of Peruvian jurists. There was little debate on the measure in the Senate, (25) but Senator Domingo ALMENARA BUTLER (26) made a forceful plea for a definition of the term Habeas Corpus. He said, "Those of us who for professional reasons have had occasion to study this law as it is to be found in other countries know what it is; but those who have not and have scarcely heard of the words Habeas Corpus will never learn their meaning nor attain understanding of the scope of the law that it is to be passed. I believe, therefore, that a definition of the right of Habeas Corpus should be given". He proposed the following definition "The right of Habeas Corpus

(23) See "Historia de la República del Perú", Jorge Basadre, 5th edn., Ediciones Historia, 1962, Lima, Vol. VI, Chapter CXV.

(24) Basadre, "Historia", Vol. VI, at page 2842.

(25) Diario de los Debates (Senado), Congreso Ordinario 1893, page 217.

(26) See "Diccionario Enciclopédico del Perú", Vol. I, page 59. This distinguished jurist was not only a prominent politician, but also President of the Supreme Court 1915-1916, a most important period in the history of Habeas Corpus in Peru.

is that of every citizen, detained or imprisoned, to appear immediately or publicly before a judge or tribunal so that after a hearing it may be resolved whether such arrest were legal or not and whether in consequence the detention should be continued". It is clear from this that the notion of Habeas Corpus is definitely restricted to that remedy which protects the physical liberty of the person in consequence of some wrongful detention. It is unfortunate in a way that this sensible and farsighted suggestion did not commend itself to the legislators, but the consequence of the omission left open the later development of the institution in Peruvian law in a way which would not otherwise have been possible.

In 1914, Peru suffered another period of constitutional disturbance, which resulted in the deposition of President BILLINGHURST and a short period of military rule. (27) The formal validity of the Constitution and the legal system generally was preserved, despite the non-functioning of certain organs of State. In this confused period, the attitude of the Supreme Court under a most distinguished President, Dr. Francisco José EGUIGUREN, is noteworthy. (28) Taking a particular interest in the state of prisons and detainees, a supervisory jurisdiction was assumed in criminal matters over the various Courts in the provinces with a view to accelerating proceedings and ensuring that arrested persons were not unduly or unlawfully detained. The Supreme Court at this time attained a formidable and respected stature, which is reflected in a memorable decision on Habeas Corpus, handed down pursuant to the law of 1897. (29) The *dictamen* of the Fiscal, (30) that part containing the legal reasoning of this officer, upon which the Court is recommended to act, is unusually long and strikingly forthright. (31) It is of considerable importance that, by this decision, the Supreme Court should have ruled in favour of its own jurisdiction and that of inferior Civil Courts to consider the "*recurso*" of

(27) See Basadre, "Historia', Vol. VIII, Chapter CLVI.

(28) See Basadre, "Historia", Vol. VIII, at page 3895. See also Anales Judiciales de la Corte Suprema de la República, Vol. XI, 1915, at page 397.

(29) Anales Judiciales, Vol. X, 1914, pages 201/208.

(30) Dr. Guillermo A. Seoane, who had been defending counsel in the sensational case of Mariano A. Belaúnde at a time when the Supreme Court was notoriously weak. See Basadre "Historia", Vol. VII, page 3257.

(31) Habeas Corpus is described therein as "égida de la libertad" (the shield of liberty) which perfectly expresses its intended function at this time.

Habeas Corpus presented against the military authorities. Only an extremely strong, respected and upright court could have taken such a stand amidst the constitutional chaos then existing. It was undoubtedly this attitude of the courts, that led to a reinforcement of the earlier law by that of 1916. (32) The preamble of this new measure expresses the view that the law of 1897 had not produced the effect hoped for by the legislature due to defects in certain of its provisions and that the present enactment was thus necessary to increase the scope of the remedy so that "the liberty of citizens may be duly guaranteed" and that "crimes against it may be punished". Once more, attention to its provisions reveals that the primary preocupation of its authors is with the physical liberty of the subject in case of undue or illegal detention and that the word *"recurso"* is employed throughout the law in conjunction with the words Habeas Corpus.

Much more remarkable however is the law of the same year which preceded it in point of promulgation. (33) The truly revolutionary nature of one its provisions passed unnoticed by contemporaries and later commentators have paid it scant attention. It is, however, the real point of departure of Peruvian Habeas Corpus in the distinctive character it was to assume. This law entitled *Ley de liquidación de prisiones preventivas,* (34) was introduced into the Senate among distinguished company. (35) It underwent many technical and expert (36) amendments and a complete revision of its redaction. It was introduced largely on the initiative of the Supreme Court (37) to correct the unfortunate state of affairs prevailing in the administration of criminal justice, but, it was essentially an ad hoc measure and was intended to be replaced by the new Code of Criminal Procedure which was urgently awaited. (38) What

(32) Ley No. 2253, 26th September 1916, Anuario de la legislación Peruana (Edición oficial). Vol. I. Legislativa 1916, pages 17/19.

(33) Ley, No. 2223, 10th February 1916, Anuario, Vol. X, page 63.

(34) Its purpose, as the title implies, was primarily to clear the gaols of those awaiting trial and to speed the criminal process.

(35) Notable among which was Dr. Mariano H. Cornejo.

(36) Especially at the hands of Dr. V. M. Maúrtua. For the work of this great Peruvian jurist generally and his influence upon the criminal law, see Revista de Derecho y Ciencias Politicas, U.N.M.S.M., 1937/8, No. I.

(37) See Diario de los Debates (Senado), Congreso Extraordinario 1915 at page 314.

(38) The temporary nature of the measure received constant emphasis, particularly from Dr. Mariano H. Cornejo. Diario de los Debates (Senado), Congreso Extraordinario 1915, page 314, pages 331/332, and page 335.

is constant in all the forms in which the projected law is to be found is the extraordinary clause promulgated as Article 7 which is so important that it must be related in full: "All the guarantees contained in Titulo IV (39) of the Constitution of the State give rise to the *recursos* designed to protect those inhabitants of the Republic, who may be threatened in the enjoyment of their liberties or to stop undue restrictions imposed by any authority.

The provisions of the law of Habeas Corpus are applicable to these proceedings so far as they relate to the authorities who should act in the matter, the persons who may initiate them and the rules of the process".

We see for the first time the extension of Habeas Corpus to something other than the protection of the physical liberty of the person. That this was deliberate policy cannot be doubted and that there was general agreement (40) on its desirability is evidenced by the lack of debate on a measure that otherwise received considerable and distinguished attention. Speaking for the Legislation Committee of the Senate, the matter is well put by Senator Antonio MIRÓ QUESADA that "the extension of Habeas Corpus to the rest of the individual guarantees fills a gap in our legislation, because the guarantees of Titulo IV of the Constitution will continue to be inefficacious in the realities of social and political life while there does not exist a summary and vigorous remedy to make them effective". (41)

The year 1919 brought a sudden and violent storm to the Peruvian political scene, which interrupted the four years of relatively tranquil, constitutional government that the country had enjoyed since the deposition of President BILLINGHURST. The immediate underlying reasons for this disturbance are to be found in the tensions produced by the unresolved constitutional questions of 1914 and the uneasy truce among the political factions, each of which was waiting its opportunity to seize a decisive advantage. Behind this uncertainty lay a general, if not always expressed, desire to amend the Constitution of 1860

(39) In the Anuario de la Legislación Peruana (Edición Oficial). Tomo VIII this is incorrectly printed as "articulo iv", a significant error.

(40) There is, for example, complete agreement between the version proposed by the Senate and that contained in an alternative project of the Comisión reformadora de los Códigos Penales, headed by Dr. V. M. Maúrtua.

(41) Diario de los Debates (Senado), Congreso Extraordinario 1915 at page 312.

so that it might conform to the changing needs of the country. Following the events which placed President Augusto B. LEGUÍA in power (42) these feelings crystallised so as to bring about the necessary reforms. Moreover, the general reformist currents that swept around the world following the 1914-1918 war had not by-passed Peru. The liberating effect of these novel tendencies served further to disturb a country already trying to accustom itself to a change from an aristocratic regime to one in which a sharing of power among hitherto less privileged classes had become inevitable. (43) Out of this maelstrom emerged in the years 1919/1920 a number of most significant facts, which were to shape the role and nature of Habeas Corpus. The principal object of the constitutional reform of 1919 was to give legal effect to the proposed 19 Articles, (44) which had constituted a major prop of the Leguiista election programme. Nevertheless, a general revision of the existing Constitution was undertaken by a National Assembly that temporarily replaced for this purpose the Houses of the Peruvian Congress. The task took rather longer than anticipated and a close study of the debates shows a pattern that one accustomed to these matters might expect, namely a rather excessive debating zeal at the outset, detailed and time consuming, with a rather superficial attention directed to later matters. The position is further complicated by the fact that midway through its task, the National Assembly committed itself to a consideration of the projected Code of Criminal Procedure. The major work of preparation was undertaken by the Constitutional Commission of the Assembly itself, without the benefit of preliminaries and this probably accounts for the fact that, excluding the 19 Articles, a very large part of the 1860 Constitution was preserved in the new fundamental, political Charter. (45) The document eventually approved is, therefore, very much a political one, although the Assembly contained some notable jurists, among whom, for the present purposes should be noted Dr. Mariano H. CORNEJO, President of the Assembly, the now ageing Mariano Nicolás VALCÁRCEL and Dr. Javier PRADO Y UGARTECHE, (46)

(42) See Basadre "Historia", Vol. VIII, pages 3936/3940.

(43) See Basadre "Historia", Vol. VIII, page 3931.

(44) See Basadre "Historia", Vol. VIII, pages 3947/3949.

(45) See "Las Constituciones de 1860 y 1920 concordadas", Manuel Vicente Villarán, Librería e Imprenta Gil, Lima, 1920.

(46) Then Rector of San Marcos University. See "Diccionario Enciclopédico del Perú", Vol. II, page 580.

who presided brilliantly over the Constitutional Commission and piloted its proposals through the Assembly.

For the first time, Habeas Corpus became a constitutional precept. Comparing Article 24 of the Constitution of 1920 with Article 18 of the Constitution of 1860 once sees clearly the addition which was intended to erect into an inviolable right the salutary principles earlier introduced by the Habeas Corpus laws already mentioned. (47) In his explanation to the Assembly, Dr. Javier PRADO pointed out that the project made the specific addition of "the time honoured English institution, the precious guarantee of Habeas Corpus". (48) It is, incidentally, only in these debates, that one sees for the first time a real awareness of the United States as a source of influence in these matters, with speeches referring to the suspension of the constitutional guarantees in that country and the supervisory jurisdiction of the United States Supreme Court. Three points concerning this constitutional innovation are noteworthy. Firstly, no fundamental change is made in the nature of Habeas Corpus. It is still conceived as a remedy against wrongful detention. Its collocation in the Constitution is designed to give it prominence and the character of a fundamental right, with which no one might interfere. Secondly, the word *recurso* is retained. Thirdly, the Article postulates the existence of some facultative legislation. The Constitution is declaratory of the right; some other enactment must exist, that effect be given procedurally to it. There existed, of course, the laws of 1897 and 1916, but these in the year 1920 at last gave place to a more permanent instrument, the Code of Criminal Procedure. From the procedural point of view of Habeas Corpus, this latter is by far the most important of the documents to be examined up to this time. The Code was the product of a Parliamentary Commission headed by Dr. Mariano H. CORNEJO, and the work bears the characteristics of his thoughts and expertise. One aspect of it brought a violent reaction from the National Assembly (49) and the debates are instructive both as to the way in which legislation of this type is propounded

(47) See "Las Constituciones de 1860 y 1920 concordadas", at page 7.

(48) Diario de los Debates, Asamblea Nacional, Vol. I, 1919 at page 309.

(49) The germ of this controversy is to be seen as far back as 1914. A strong school of thought to which Dr. Mariano H. Cornejo belonged, was in favour of introducing oral process and the jury trial into Peru. This was bitterly and successfully contested and resulted in the removal of the controversial section of the Code of Criminal Procedure from debate.

and also as to the manner in which the work of the jurisconsult might come to be modified or even rejected through non- juridical and somewhat irrelevant factors. In his "Explanation of motives". which precedes the Code, Dr. Mariano H. CORNEJO states (50) "The important *recurso* of Habeas Corpus has been preserved and its proceedings harmonized with the principles adopted by this Code". These proceedings were designed to make the remedy an effective one in the hands of the judicial authorities. Furthermore, the remedy was to be extended in favour of two further interferences with the liberty of the subject, namely deportations not sanctioned by law and the placing of guards upon a person's habitation with the object of restricting his freedom of movement. All these objectives were given effect in Articles 342/355 of the Code. (51) The nature of the process is plainly revealed by the author's comment on Article 345 that "The *Recurso* of Habeas Corpus has no written proceedings". (52) In a country where virtually all legal proceedings are in writing and the preliminaries are often long drawn out and highly formalised, this feature indicates the extraordinary nature of the remedy and its primary purpose of safeguarding as expeditiously as possible the personal liberty of the individual. The striking extension made by the ley 2223 of 1916 was not incorporated into the new code. (53) In this one sees perhaps the hand of the purist, one whose experience with this institution had already extended practically over thirty years. The result is that once more Habeas Corpus came to be, ostensibly, a *recurso* specifically addressed to the protection of the physical liberty of the individual.

Two further matters relative to this period must be mentioned as reflecting upon the development of Habeas Corpus. In 1919 there began a conflict between the legislature and the Supreme Court which greatly damaged the prestige of the latter and frustrated the possibility of its developing along the lines promised during the period 1914/1917. The judicial power is always, in reality, weaker than other powers of the State and

(50) "Novísimo Código de Procedimientos en Materia Criminal", Mariano H. Cornejo, Torres Aguirre, Lima, 1920, pages XXVIII y XXIX.

(51) Código de Procedimientos en Materia Criminal, pages 138/144.

(52) Pages 140 and 144. This harks back to the law of 1897, Article 20 of which provided that the "recurso" of Habeas Corpus may be solicited and substantiated on common paper, regardless of day or hour.

(53) Perhaps even more significantly, no mention of it is made in the "Explanation of Motives".

depends for its efficacy upon subtle and inexpressed factors of goodwill and tolerance, which give it prestige and the ability to function satisfactorily in the face of the undeniable, practical superiority of the other organs of State. The Supreme Court of Peru fell victim to the factional politics of the times (54) and the swing in the balance of power caused its composition to be called in question. This ugly and uncharacteristic episode had unfortunate effects for Peru and the development of Habeas Corpus, for the very organ upon which reliance ought to have been placed for its effective administration was decisively weakened precisely at the time a more extensive, formal machinery had been set up to safeguard the fundamental liberty of the individual. The other noteworthy event tends to be submerged in the violent events of the time and indeed its juristic significance is marred by them. In 1919, "El Tiempo", one of the principal newspapers of Lima was closed by the Government in order to stifle its strident criticism. (55) The proprietor brought Habeas Corpus proceedings under the 1916 law and the Superior Court of Lima pursuant to its jurisdiction ordered its reopening and the matter was referred to the Supreme Court to secure compliance. (56) The government appealed and the matter was proceeding when the Revolution of 4th July 1919 put an effective end to the point of substance. It was in fact, one of the first matters considered by the National Assembly. (57) The real significance of the affair is that we see for the first time the Courts using this procedure to protect other rights than liberty of locomotion. Habeas Corpus had moved almost unnoticed into the realm of property.

Sadly, the hopes of those who had laboured so arduously to create a legal structure capable of protecting the fundamental rights of Peru's inhabitants, were to remain unfulfilled. The ink had scarcely dried upon these conscientious legislative efforts before Peru descended into a period of the severest absolutist rule that was to last more than a decade. In a careful and fair appraisal of the LEGUÍA regime, BASADRE touches the heart of

(54) See Basadre "Historia", Vol. VIII, pages 3966/3972. The heart of the matter is revealed in a speech by Torres Balcázar in the Asamblea Nacional of 1919 where the Supreme Court is referred to as the last redoubt of "civilismo". Diario de los Debates, Asamblea Nacional, Vol. II, page 1149.

(55) See Basadre, "Historia", Vol. VIII, pages 3934/3935.

(56) Anales Judiciales, Vol. XV, 1919, pages 273/275.

(57) Diario de los Debates, Asamblea Nacional, 1919. Vol. I, page 65.

the matter with the telling phrase: "He tolerated no opposition of any kind". (58) It is clear that one can hope for little that might reflect upon the further development of Habeas Corpus during this period and indeed, as the records show, the Courts were, especially towards the end of this dictatorship, powerless to lend their aid to protect the essential liberties which the Constitution of 1920 had been expressly designed to safeguard. Yet before the darkness closed tightly upon the judicial and political life of the nation, there is one remarkable record (59) in the history of Habeas Corpus and in that of the Peruvian Supreme Court. Once more the dictamen is by Guillermo SEOANE, a brilliantly reasoned document which, had his style and example served consistently as a model for his successors, might have given Peru something corresponding to the judgment of a Common Law court as a source of law. (60) Habeas Corpus was sought by Eduardo GARCÍA in proceedings against the Mayor of Lima. It was refused by the Tribunal Correcional, the court of first instance, and García appealed to the Supreme Court. The case concerned the closure by the City authorities of the appelant's property for being in a ruinous condition. The Tribunal Correcional based its refusal of Habeas Corpus on the belief that Ley 2223 had been impliedly abrogated by the new Code of Criminal Procedure in that this made no express reference to the extension of Habeas Corpus effected by Article 7 of the earlier law. SEOANE argued that this view was erroneous and that a tacit derrogation is produced only when the new law contradicts or is incompatible with the old. In support of his contention he cited a circular in the form of a practice direction of 4th February 1920 from the Supreme Court, which dealt precisely with the point. Moreover, and in this the *dictamen* is exceedingly interesting, he cites as authority for the application of Article 7 an earlier sentence of the Supreme Court given on 20th August 1920. The real question in the case was whether the Mayor had legal powers to make the closure and whether the Courts had jurisdiction, through Habeas Corpus proceedings, to examine whether these powers were being appropriately used. The Court disagreed on these issues and by a four to three majority decided

(58) "Historia", Vol. IX, pages 4243/4245.
(59) Anales Judiciales, Vol. XVIII, 1922, pages 148/152.
(60) For an appreciation of the "Dictámenes Fiscales" of Guillermo A. Seoane, see Basadre, "Historia", Vol. X, pages 4557/4558.

against allowing Habeas Corpus in this case. The majority, in effect, decided that the Court could not, through these proceedings, enter into a technical as distinct from legal examination of whether the Mayor's powers were being properly used. The majority further pointed out that the appellant had other courses open to him to protect his interests in this regard and to test the substantive question. The minority accepted without modification the dictamen of the Fiscal, but the important thing is that none challenged his claim that the Court continued to have this ample jurisdiction under Ley 2223 and his statement may therefore be taken to represent both law and practice. (61) English lawyers, particularly, will see parallels in this interesting case with those in which judicial review of administrative action has been sought in a somewhat cautious judicial atmosphere.

The LEGUÍA regime fell in 1930 and a provisional junta was set up to return the country to constitutional government as quickly as possible. The social and political events of this time in Peru can only be properly appreciated by setting them against the wider background of world affairs. There was, in Peru, a general spirit of renovation, a genuine desire to move boldly into the twentieth century, to do which meant a complete break from the immediate and none too happy events of the past ten years. A glance at the newspapers of the time shows all too well the violently disturbed state of the world, of which this national manifestation was but a tiny though consistent part. Peru's neighbours all suffered violent revolutions and, throughout the world, political regimes of the older order were being cast down and brave, new Constitutions erected to guide and sustain the new ones, which were to take their place. The great, new Constitution of Spain, prepared by Dr. Luis JIMÉNEZ DE ASÚA, was being exhaustively reported in the newspapers of Lima. The Soviet Revolution was at last becoming an accepted fact and the shadow of Nazism was starting to creep across a purged but reviving Germany. The traditional balances of power were rapidly changing and the financial crisis that toppled the MacDonald government in the United Kingdom was front

(61) The matter was made the subject of precise reference by the President of the Supreme Court, Dr. Carlos Eráusquin in his address marking the opening of the Judicial Year, 1921. He sugested that the doubt should be removed by legislation. See "La Revista del Foro, March 1921, at pages 113/114.

page news in Peru. It is only by reference to the less immediate scene that this part of Peru's history becomes intelligible and one is able to appreciate just what those then in charge of her affairs were trying to do and why this was not in accord with the desires of those who were themselves thrusting their way upwards to power through the impetus of the great international currents then flowing in their favour.

Peru has never been enamoured of corporate responsibility in affairs of state and the Junta de Gobierno set about, as rapidly and unostentatiously as possible, preparing the country for Presidential government. This neccesitated the revision of the country's electoral laws and the setting up of an elaborate apparatus, not only for securing the election of the President, but also for choosing Congressional representatives from all parts of the country to take part in a new National Assembly. Though, perhaps, uninspiring, the Junta seems to have done its job conscientiously and without any manifest desire on the part of its members to retain powers for themselves or impede a return to normality, no mean feat in a country emerging from a decade of repression into a very troubled world political scene. The 1920s had seen the birth in Peru of a new and vital left-wing political movement. (62) All shades of opinion were to be found in this progressive, national rejuvenation, but the most potent force was undeniably the Apra party, whose youthful leader was already on his way home from Europe to take part in the Presidential election scheduled for the late part of 1931. A most significant fact for the impartial observer, looking back in time, is what in present day terminology would be termed the "generation gap". (63) The leaders of the new left were all young men, anxious to reform a society which they considered obsolete in every way. The very Constitution of Peru was the embodiment of that obsolescence. That the Constitution had once more to be redrawn was a matter for general agreement; the form the new Constitution ought to take and who should be entrusted with its drafting were matters upon which there was less accord. In the absence of any popular

(62) See Basadre, "Historia", Vol. IX, Chapter CLXXIX.

(63) In connection with the present study, it is interesting to observe that Dr. Mariano H. Cornejo was only 25 years old when he sponsored the first "proyecto" of Habeas Corpus.

mandate, the junta appointed a Commision to draw up a new Constitution for submission to the National Assembly, when this should be at last functioning. (64) The Commission so appointed was perhaps the most distinguished that has ever served Peru. (65) Presided over by the most erudite constitutional lawyer of the time, Dr. Manuel Vicente VILLARÁN, it contained not only a brilliant galaxy of lawyers, but also a fine representation of the other professions. No commission could have been better equipped, technically, to have produced a constitution perfect in every legal detail. Yet its work was doomed from the start, for what was generally desired was a political charter which would satisfy, in a compromise fashion, the aspirations of the various groups clamouring for their share in guiding the destinies of the nation. The matter is well expressed in the letter of Dr. Carlos Manuel Cox, by which he communicated his unwillingness to accept appointment to the Commission. He wrote, (66) "I am sorry to let you know that I cannot accept this appointment because I consider that the new Constitution that Congress is to approve must fundamentally alter the political, economic and social structure of the State, imposing upon it those tendencies, which are triumphant in the forthcoming elections. The new Constitution will, therefore, be the work of Congress and not that of the Commission . . ." While it must be frankly recognised that, in the moment of writing this letter, the youthful Secretary of APRA was thinking in terms of the triumph of his own party in the elections, there were many other political groups which wholeheartedly shared the opinion so expressed.

Yet the work of this great constitutional Commission, delivered after only four months of deliberation, was not entirely lost. The Ante-proyecto formed the basis of the consideration by the Constituent Assembly of the matters eventually incorporated in its own *"proyecto"* that was destined to become the

(64) El Peruano, 20th August, 1931, reporting Resolución Suprema of 7th August 1931.

(65) Those nominated were: Dr. Manuel Vicente Villarán; Dr. Víctor Andrés Belaúnde; Dr. Diomedes Arias Schreiber; Dr. Carlos García Gastañeta; Dr. Carlos Doig y Lora; Dr. Jorge Basadre; Dr. José León Barandiarán; Dr. Toribio Alayza y Paz Soldán; Dr. Ricardo Palma; Dr. Luis Valcárcel; Dr. Antonio de Lavalle; Dr. Carlos Manuel Cox. Drs. Basadre and Manuel Cox declined the invitation and Dr. de Lavalle later resigned. The Commission was enlarged to include Dr. Emilio Romero and Dr. César Antonio Ugarte.

(66) Letter dated 12th August 1931, published in La Tribuna of 20th August, 1931.

Constitution of 1933. (67) Nevertheless, a comparison of the Constitution with the Ante-Proyecto is most revealing and in no matter is the difference in the finished product more striking than in that of Habeas Corpus. The "Explanation of Motives" of the Ante Proyecto is unusually long and the work, as indeed in the case of the Ante Proyecto itself, of Dr. Manuel Vicente VILLARÁN. (68) It is clear from the explanation given in regard to Habeas Corpus (69) that the object of the Commission was to give the widest possible meaning to the institution consistent with its nature in Peruvian law, while erecting it into a Constitutional precept. This meant, in effect, a direct appeal to the spirit of Ley 2223 of 1916, as it was understood by those who promulgated that law and the result is perfectly consistent with Peruvian law and practice up to that time. The Article proposed reads: (70)

> Article 185: All the guarantees laid down by the Constitution shall give rise to the "*recurso* of *Habeas Corpus*,, with the object of protecting those inhabitants of the Republic who may be threatened in the enjoyment of their liberties, or to bring about the cessation of undue restrictions imposed by any authority.

The draftsmanship of this clause is faultless in relation to its objects. The important thing is that it had the unqualified approval of two of Peru's greatest specialists in the subject, both of whom had an excellent knowledge of English and Common Law institutions. (71) Despite the wealth of foreign learning on this topic, in seeking an all-embracing remedy for the protection of every class of rights, Dr. Manuel Vicente VILLARÁN chose an institution already essentially Peruvian, struc-

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(67) I am greatly indebted to Dr. Luis Alberto Sánchez, Rector of San Marcos University for his recollections of the proceedings of the Constitutional Commission of the Constituent Assembly and, in particular, the method, by which it conducted its deliberations. There is no written record, which otherwise provides this information.

(68) See the Prologue of Dr. Luis Echecopar García to the "Ante Proyecto de la Constitución de 1931 por la Comisión de Manuel Vicente Villarán: Exposición de Motivos", Lima 1962. I am also grateful to Dr. José León Barandiarán for the information that the Commission worked upon the basis of papers submitted by Dr. Manuel Vicente Villarán, which were discussed and amended as appropriate.

(69) "Ante-Proyecto, Villarán', page 108.

(70) "Ante-Proyecto, Villarán', page 169.

(71) Dr. Manuel Vicente Villarán had read Professor Stuart's manuscript, see Preface V. The Governmental System of Peru", Dr. V. A. Belaúnde devoted a great part of his course at the San Marcos University to the British Constitution. I am indebted to Dr. Manuel G. Abastos for this recollection.

turing the new provision out of the elements of the old. It was certainly not excessive nationalism nor ignorance of foreign institutions that dictated this course, but rather the fact that Habeas Corpus had already acquired its own distinctive character in the eyes of Peruvian jurists; all that was required was reinforcement of its effectiveness as a Constitutional precept.

The Constituent Assembly began to draft its own *proyecto* on 12th December, 1931, having organised its own Constitutional Commission for the purpose, upon which the minority groups were given a proportional representation. (72) In judging the work of this body, it must be remembered that it was essentially a political organism, riven by party considerations. (73) Few of its members had the prestige or specialist skills represented on the Villarán Committee. Moreover, in the tempestuous times that followed the elections of 1931, a serious blow to the possibility of a calm and agreeable re-drafting of the Constitution was struck by the expulsion from the National Assembly and from Peru of those members of the APRA party who had been elected to serve in it. The Assembly considered the dictamen of its Constitutional Commission with reference to Habeas Corpus on 27th September 1932. (74) Debate took place on this really remarkable document, the authorship of which cannot now be established with certainty. (75) Referring to the individual guarantees proposed, the *dictamen* explains: "The first Article guarantees the security of the individual against arbitrary detention .... This right to security, like all the other rights characterised as pertinent to the individual has

(72) See, Diario de los Debates, Congreso Constituyente, 1931, Vol. I, debate of 11th December, 1931. See also at page 91. The Commission originally had 25 members, among whom were Dr. V. A. Belaúnde and Dr. Carlos Doig y Lora of the Commission Villarán as elected representatives.

(73) The word "party" is used here in the loose sense of any political grouping whose members had a common, even though temporary, cause for association. This meaning must always be kept in mind when party politics in Peru are the subject of study.

(74) Diario de los Debates, Congreso Constituyente, 1931, Vol. VII, at page 3848.

(75) I am most grateful to the Oficiales Mayores of the Senado and Diputados for facilitating my inspection of such records as exist. "Actas" or minutes of the debates of this Commission were evidently taken in the earlier sessions, but these have not been found. It is most likely that in respect of this vital session, in view of the small number of persons attending, such "Actas" were not taken. The nature and state of the "expediente" or working papers also suggest this. I am particularly grateful to the Oficial Mayor of the Senado for his personal recollections of those proceedings at which he was present. My thanks are due also in this matter to Senator Alberto Arca Parró, one of the few survivors of these closed debates, who was able to give me invaluable background information relating to the proceedings and the personalities involved.

as its guarantee the "acción" of Habeas Corpus, proceedings in respect of which are prescribed by the Code of Criminal Procedure". Later the *dictamen* states: "The Constitution ought to prescribe Habeas Corpus as an *accion* and not as a procedural *recurso*. The *acción* of Habeas Corpus guarantees only rights relating to the person not his property. With this in mind, your Commission includes in the "proyecto" Article 13 according to which all the rights recognised by the Constitution give rise to the said *acción*. Account has been taken of the fact that Habeas Corpus, originally granted only in respect of persons improperly imprisoned was extended by the Ley de liquidaciones preventivas to the protection of all rights recognised by Titulo IV of the Constitution of 1860". In debate, this extraordinary and far reaching change provoked only one response from the Assembly, namely the intervention of Dr. Luciano CASTILLO, which in itself is notable on account of its language. (76) He commented, "It is said that every individual right gives rise to the *acción* of Habeas Corpus. The social rights cannot be left without this *recurso*. Therefore we ask that the Article state: Individual and Social rights". This was accepted and there was no further debate. What is now Article 69 of the Constitution of 9th April, 1933 reads as follows: (77)

"All the individual and social rights recognised by the Constitution, give rise to the *acción* of Habeas Corpus".

On the evidence available, a number of pertinent observations may be made. This vitally important clause in no way derives from the Ante-Proyecto Villarán and is the original work of the Parliamentary Commission. Moreover, the working papers of the Commission and the other facts relating to the period indicate that it was probably the product of a very small group of persons forming the, then, dominant nucleus of that body. (78) These persons were not jurists (79) and it is certain

(76) Diario de los Debates, Vol. VII, at page 3863.

(77) Constitución Política del Perú del 9 de abril de 1933, Boletín de la Biblioteca Pública de la Cámara de Diputados, June 1947 at page 16.

(78) Five persons signed the "dictamen". Of these, the most important was Manuel Jesús Gamarra, who had made himself de facto responsible for the measure and defended its principles in the public debates. He was a practising lawyer.

(79) Though a number of these were lawyers of considerable experience. Dr. José Matías Manzanilla, a considerable legal mind and Rector of San Marcos, succeeded Dr. Revilla as President of the Constitutional Commission, but does not seem to have taken part in this important phase of the Commission's work.

that the language both of their explanatory "*dictamen*" and the projected Article would have been rejected by Dr. Manuel Vicente VILLARÁN. Yet what they were trying to do was perfectly in accord with Peru's legislative tradition on the topic and there is a direct link in the reference to the 1916 legislation, which may provide a valuable clue to at least the part author of the Article. Dr. Clemente J. REVILLA had but lately relinquished the Presidency of the Commission to become President of the Constituent Assembly itself. With Senator Antonio Miró QUESADA, he had formed the Legislation Committee of the Senate in 1916, which introduced the extended version of Habeas Corpus into Peruvian law. The only member of the Commission of the Ante-Proyecto present when this Article was debated was Dr. V. A. BELAÚNDE, who was most active in the discussion of this part of the Constitution generally. He was paying the closest attention to the language employed (80) and made a number of interventions. Although referring on another occasion to the Ante-Proyecto, (81) he did not challenge the wording of this Article in relation to the novel employment of the term *acción*. It is safe to assume that none saw its implications in juristic terms and the use by Dr. CASTILLO of the words *acción* and *recurso* in the same intervention did not suggest to anyone a possible difficulty. The *acción* of Habeas Corpus was thus born into Peruvian law, with little ceremony and considerable uncertainty as to its meaning and scope. That this change in legal terminology was not destined for immediate acceptance is patent from the only case on Habeas Corpus shown by the Anales Judiciales for the rest of the 1930s. (82) The *dictamen* of the Fiscal dated 15th April 1933, but a few days after the new Constitution took effect, speaks of the *recurso* of Habeas Corpus and it would be difficult to substitute the word *acción* while retaining the sense of his recommendations. Perhaps even more telling is the *Memoria* of the President of the Supreme Court, Dr. MANUEL FELIPE UMERES, of 18 th March, 1936 (83) He said, "Article 69 of the Constitution of the State provides the *recurso* of Habeas Corpus to give effect to the individual and social

(80) See, for example, Diario de los Debates, Vol. VII at page 3853. "'A Constitution ought to be drafted in the most technical manner possible.....".

(81) In connection with the proposed Article following that relating to Habeas Corpus.

(82) Anales Judiciales, Vol. XXIX, 1933 at pages 95/99.

(83) Anales Judiciales, Vol. XXXI, 1935 at page 461.

guarantees. However, up till now the precept is nominal and illusory. Wherever, practically, use has been made of the expressed *recurso* it is frustrated, etc." It will be remembered that throughout this period, the facultative machinery of the Code of Criminal Procedure and the earlier laws, so far as these had not been expressly abrograted, remained in force and these spoke exclusively in terms of *recurso*.

With the revision of the Code of Criminal Procedure and the entry of the new Code into force on 18th March, 1940 the history of Habeas Corpus for the purposes of this study enters upon its final stage. The reform of the Code of Criminal Procedure was undertaken exceptionally methodically, over a lengthy period, by a great and painstaking jurist, Dr. Carlos ZAVALA LOAYZA, who has left us a detailed record of his thoughts and actions in the matter. Moreover, we have the benefit of his later comments upon the Code as it was finally promulgated and his observations upon the way in which this differs from his own proposals. (84) As an inestimable bonus, we have an incredibly detailed and studious commentary upon the work by the distinguished Spanish jurist, Niceto ALCALÁ-ZAMORA Y CASTILLO. (85). No writer on Peruvian criminal procedure can afford to miss this splendid work, which is a model criticism and which throws much light upon Peruvian criminal institutions. The observations upon Habeas Corpus are most illuminating. There arises the preliminary question whether this was a "new" code or merely a "reform" of the old. Dr. ALCALÁ-ZAMORA was undecided but considered it to be rather more than a mere "reform". (86) The question is very pertinent as far as it concerns Habeas Corpus, for here the reform is far from radical and one has the feeling that Dr. ZAVALA LOAYZA is simply doing his best with the rather unsatisfactory materials that were available to him. Articles 349/359 (the whole of Titulo IX of the new code) (87) thus treat of Habeas Corpus in substitution for Articles 342/355 of the Code of 1920. In the "Exposition of Motives" it is stated: (88)

(84) La Revista del Foro, 1939, July/December at pages 317/328.
(85) La Revista del Foro, 1939, July/December at pages 329/424.
(86) Alcalá-Zamora at page 332.
(87) Código de Procedimientos Penales, Fernando Guzmán Ferrer, 6th edn. Legislación Peruana, Lima, 1966, pages 389/404.
(88) Revista del Foro, 1939, page 309.

"Granted in the Code the use of Habeas Corpus in the classic case of detention for more than twenty four hours without being brought before the competent judge, as well as the case of supervision by guards, the Ante-Proyecto, with attention to that which was prescribed by Article 69 of the Constitution, has extended it so as to permit equally a claim in respect of the violation of those individual and social rights guaranteed by the fundamental charter".

Nevertheless, not once in the proposed legislation itself, nor in any of his writings upon, it, does Dr. ZAVALA LOAYZA use the word *"acción"* in connection with Habeas Corpus proceedings. His own purity of juristic thought, which doubtless led him to eschew the employment of so vague a concept, is strikingly illustrated by a comment culled from another but associated context. (89) "A criminal institution cannot be made subject to civilian rules because these two orders differ in their purposes and consequences". While it must always be remembered that Dr. ZAVALA LOAYZA was concerned primarily with procedure, it is well to appreciate that if there were, in reality, an *acción* of Habeas Corpus, this was the only opportunity that had presented itself for ordering the procedure by which it might be brought and maintained before the Courts. An interesting comment upon the proposed legislation was made by the Supreme Court. This also speaks exclusively in terms of *recurso* and states expressly: (90) "The modern tendency is to widen the radius of action of the *recurso* of Habeas Corpus, so as not to limit it to the case of physical detention, with the object of making a reality the constitutional guarantees for the person who lives in organised society".

No mere selection of isolated items from the great commentary of Dr. ALCALÁ-ZAMORA can do justice to its penetrating criticism. His lengthy comment on Habeas Corpus is deserving of the closest attention by the serious student of the subject in Peruvian law. He had before him merely the project, which he was reviewing, and he had not engaged in a rigorous study of the peculiar development of Habeas Corpus by reference to its Peruvian legislative history. He was clearly

(89) Revista del Foro, 1939, page 321.
(90) Código de Procedimientos Penales, Guzmán Ferrer, at page 389.

puzzled and disconcerted by what he found and was at considerable pains to suggest a complete change of terminology. He wrote: (91) "And in Libro IV, *Amparo* being wider, would have seemed better than *Habeas Corpus* (tit. VIII), *Juicio de revisión* would be more exact than *recurso* (tit. IX)". This great jurist comes to the heart of the matter, unfettered by the considerations that bound the author of the Ante-Proyecto, saying, (92) "Concerning the heading of the title (VII) we should have opted, without hesitation for *juicio de amparo* in place of *Recurso de Habeas Corpus*: the first, so genuinely Hispano-American has, over the other designation, Roman-English, the advantage of being able to cover the other "individual and social rights" guaranteed by the Constitution, while Habeas Corpus, etymologically and historically, is associated in an exclusive or predominant way with only one of them, the defence of personal liberty. The characteristic flourish of Habeas Corpus colours absolutely the Titulo which we are commenting upon in that, in spite of paragraph 2 of Articulo 379 no single disposition contemplates or is activated by violations of constitutional rights other than those of arbitrary restrictions or deprivation of individual liberty". Dr. ALCALÁ-ZAMORA accordingly felt the inadequacy of the suggested proceedings in relation to the end sought and suggested the removal of this provision from the Code. (93)

This historical relation, which leaves for us the juristic problem posed by the two concepts of Habeas Corpus, which have thus become a part of the Peruvian legal system may well close with a few well chosen words from this most percipient of jurists: (94) "Decided supporter as I am of the Parliamentary regime as an instrument of review and political expression, I am not unwilling to recognise that the so called legislative chambers lack the capacity to legislate; and in fact, the great codes and many laws of lesser importance are the work of extra parliamentary commissions of specialists. Even more, Parliament can frustrate the elaboration of a code from the start...." The history of Habeas Corpus in Peru has been that of well intentioned laymen, or non-specialist lawyers trying, imperfectly, to give legislative expression to a strongly felt desire. That this end has

(91) Alcalá-Zamora, at page 334.
(92) Alcalá-Zamora, at page 376.
(93) Alcalá-Zamora, at page 377.
(94) Alcalá-Zamora, at page 385, note 14.

not yet been achieved is a responsibility that must be shared alike by legislator and jurist, for the lack of rapport between these essential components of the legal order has frustrated hitherto the attainment of the agreed objective.

Habeas Corpus: *"acción" or "recurso"?*

The word *acción* enjoys a number of distinct meanings, each of which is governed by its particular context (95). By its very width, it lends itself to imprecise usage. It can mean the totality of substantive rights in virtue of which a person is entitled to make his claim before the competent tribunal or it can mean the proceeding itself by means of which those rights are asserted. In an important sense it is a right to demand that the machinery of justice is placed at the claimant's disposal that his cause be heard according to the regular means which have been established for that purpose (96). Accordingly, it will be seen that the notion of an *acción*, as indeed with the English "action" used in the same sense, presupposes the existence of some formal machinery of justice with the appropriate procedural devices, that this abstract notion of demanding the recognition or fulfilment of something may be given a practical effect. These practical manifestations of the *acción*, the elements of jurisdiction, the hearing and even the procedural trappings, are often referred to as though they were part of the *acción* itself and formed a necessary factor in arriving at a definition of it (97). So far as the common, technical use of language is concerned this means that the word *acción* has the abstract connotation of some particular group of rights which may receive protection before the courts, while having, at the same time, the more practical meaning of the pertinent legal processes by means of which those rights may actually be asserted. One sees something of the dual meaning by considering some of the English legal

(95) See, for example, the very learned treatise on this word in Enciclopedia Jurídica Omeba, Editorial Bibliográfica Argentina, 1954, Vol. I, pages 206/263.

(96) See "Vocabulario Jurídico", Eduardo J. Couture, Montevideo, 1960, pages 73/74. On the philosophy of this usage see "Homenaje a Eduardo J. Couture", Dr. Mario Alzamora Valdez, Revista de Derecho y Ciencias Políticas, U.N.M.S.M., 1956 pages 18/27, at page 21/23.

(97) See, for example, "Diccionario de la legislación peruana", 2nd edn. 1879, Francisco García Calderón, Lima, Vol. I, pages 14/15.

uses of the word "action". We say, for example, that the breach of a duty of care owed to some person, with resulting damage to him, gives him an "action" for negligence. Yet we occasionally speak appropriately of the "action", rather than the tort, of trespass. This latter usage derives from an earlier stage of juristic development, when we are identifying the "action", in a nominalistic sense, with all its manifestations in the legal system (98). When one speaks of the *acción de Habeas Corpus* in the Peruvian legal system, it is vitally important to know whether what is the subject of discussion is the *acción* in this nominalistic sense or whether what is meant is that right or faculty of setting in motion the machinery of justice, that some legal question might be determined according to the proceedings prescribed for the case. In the majority of cases in which this question is discussed, the analysis of the concept is not sufficiently rigorous for it to be determined, with certainty, in what sense the word *acción* is being used (99).

The word *recurso* is most generally used to describe the means by which some part of the legal process is challenged or impugned or the instrument by which defects in the judicial resolution of the matter are corrected (100). It may, however, mean some *acción,* claim or petition directed to a tribunal (101). Once more we find a technical word capable of a number of distinct meanings, which are controlled by the context in which the term is employed. An analysis of these situations reveals certain distinctive characteristics which give to the word *recurso* a more precise and limited meaning than that which *acción* is capable of bearing. In the first place, a *recurso* is always part of a larger, more general proceeding and is usually directed to clarifying or regulating some issue connected with it. It has, therefore, a dependence on these proceedings and is usually merely instrumental in facilitating their resolution. Its character is either "ordinary", in the sense that it forms an optional but normal component of these proceedings, or "extra-ordinary" in the sense that it may appropriately be used only in certain

(98) This is particularly so when we are treating, historically, of the Forms of Action.

(99) Compare for example, "El Habeas Corpus", César Bazo Ibarburo, La Revista de la Facultad de Derecho de la Universidad Nacional de Lambayeque, Año I, No. 1, 1967 at page 451.

(100) See, for example, "Vocabulario jurídico" at page 519.

(101) Ibid.

situations (102). The fundamental nature of the *recurso*, therefore, is one of procedural dependence; it is a means by which some end might be attained by reference to some legal proceedings to which it is pertinent. Almost exclusively in Ibero-american legal literature we see the word *recurso* associated with Habeas Corpus, sometimes with the addition of the qualification *extra-ordinario* (103). This is because, in those systems other than the Peruvian, where Habeas Corpus has retained its original meaning this remedy has been used in some proceeding, where the subject has been deprived of his liberty, precisely for the purpose of challenging the regularity according to the law, of that detention. The extension of Habeas Corpus as a protection of other rights does not of itself involve any necessary change of vocabulary; it is still a *recurso* which would ordinarily be requisite to offer this challenge to authority before the courts. Nevertheless, such a change has been deliberately made in the Peruvian legal system and the significance of that change must be understood.

The crucial question is, what did the Constitution makers of 1933 mean when they said "The Constitution ought to prescribe Habeas Corpus as an *acción* and not as a procedural *recurso*? Neither the *dictamen* nor the debates are very helpful in elucidating their motives or meaning. Nevertheless, certain conclusions may properly be deduced. They certainly wanted to give Habeas Corpus an independent role in the protection of those rights specified by the Constitution; it was not to be relegated to a part of some other proceedings in which it might, incidentally, be raised as a challenge to some improper interference with individual or social rights (104). It was conceived of, furthermore, as having an autonomous existence, in the sense that it constituted proceedings which could be initiated expressly for the purpose of determining, through its agency and no other, some substantive issue. The Constitution does not describe the nature of these proceedings, how they might be

(102) See "Diccionario", García Calderón, Vol. II, pages 1630/1631.

(103) See, for example, "Derecho Constitucional", Rafael Bielsa, 2nd edn., 1954, Roque Depalma, Buenos Aires, at pages 324/330. See, incidentally, note 9, page 327 on its origins. A notable exception is the work of Manuel Sánchez Viamonte, which may well have influenced Peruvian thought: see "Procedimientos especiales", Luis del Valle Randich, page 70.

(104) See "Procedimientos especiales", Luis del Valle Randich, at page 70.

brought or any limitations upon them (105). Such proceedings were unknown to the Peruvian legal system prior to 1933, and it is, therefore, necessary to find some enabling legislation subsequent to that date which might fill in these details, that the mere Constitutional precept be given its proper effect. No such legislation exists, for that of 1897, 1916 and 1920, which remained in force until 1940 does not provide for such proceedings, and that which has since superseded it speaks only in terms of *recurso*, while trying to extend itself by these limited procedural means to cover the wider notion expressly laid down by the Constitution (106). In so far as the term *acción* was intended to convey autonomy of proceedings, it has failed, but only because the machinery necessary to the creation of the independence envisaged has never been set up (107). Nevertheless, these proceedings of Habeas Corpus are something more than a mere *recurso* in the sense of being a procedural appendage of something else and the decisions in recent years at least, despite the confusing variety of language used, have shown Habeas Corpus proceeding as having a distinct character of their own (108). It may accurately be said that, in spite of the vagueness, Habeas Corpus has truly attained the status of an *acción* in the sense of an autonomous legal process by means of which certain rights may be asserted before the Courts. The real problem for Peruvian jurisprudence is to keep entirely separate the consideration of two quite distinct matters (1) the extension of Habeas Corpus beyond its original bounds, into an all embracing institution for the protection of every class of interest and (2) the question of terminology, which is fundamentally one of procedure rather than substance. In most discussions of Habeas Corpus these two matters tend to become

(105) The defective nature of this provision in this respect has often been remarked. See, for example, the Memoria of Dr. Ricardo Bustamante Cisneros, 1961, at page 32.

(106) See the discourse of Dr. Manuel G. Abastos, Decano of the Colegio de Abogados de Lima, 1957 in La revista del Foro, 1957, at pages 69/70. Perhaps the most succinct criticism is that contained in a notable consultative opinion of the Colegio in the case of Dr. Alfredo Benavides Correa, published in La Revista del Foro, 1956, pages 432/440 at page 433.

(107) See especially, La Revista del Foro, 1956, page 433.

(108) See "Jurisprudencia Nacional en Materia penal y procesal penal", Américo Tello Lezana, 2nd edn. Cuzco, 1962 at pages 465/473. Dr. Ricardo Bustamante Cisneros was over hopeful in his claim that the terms of the Constitution had put an end to the debate whether Habeas Corpus was "acción" or "recurso". Memoria, 1960, page 39. See, in particular, the terminology used in the decision at pages 292/294, Anales Judiciales, XLII, 1946.

treated as a whole, (109) which renders any scientific consideration of reform abortive. The first matter is simply a question of policy; the second involves technical issues arising out of whatever might be decided in relation to the first. The question of terminology is a very important one, because only by careful attention to these terms, *acción* and *recurso*, can a proper appreciation of the realities of Habeas Corpus in the Peruvian legal system be made. It is clear that this is a field in which substantial reform is due, that proper effect may be given to the intentions of those who have tried to adapt this institution to satisfy Peru's needs

Conclusion

Habeas Corpus in the Peruvian legal system has become, almost by accident or default, quite different from the institution to which it owes its origins. It now combines, although as yet imperfectly, much of the character of the *Juicio de Amparo* of Mexico and the *Mandato de Seguridad* of Brasil (110). Legislative and judicial interpretation of its nature has given it at least some of the characteristics of the English remedies of Certiorari (111) and Mandamus, (112) with the merest hint of the Injunction for good measure (113). What is entirely absent is any awareness in Peruvian juristic thinking of the place and purpose of these latter remedies in the English legal system and it is principally this fact which has led to a concentration upon Habeas Corpus and its being charged with a situational load inappropriate to its original nature. This has caused considerable

(109) See, for example, the interesting and instructive little treatise by one who had, in many capacities, so much to do with the development of Habeas Corpus in Peru: "El recurso de Habeas Corpus" by Dr. Luis Antonio Eguiguren, Lima 1967. Dr. Eguiguren enjoys the distinction in this matter of having been President of the Congreso Constituyente of 1931, Vocal and President of the Supreme Court and also in a private capacity, applicant for Habeas Corpus in a notable case: Anales Judiciales, XXXVII, 1941, At page 113.

(110) Memoria of Dr. Ricardo Bustamante Cisneros, 1961, page 33.

(111) See, for example, the important decision at pages 147/149. Anales Judiciales XLVI, 1950, and especially the dissent at page 149.

(112) See, for example, Anales Judiciales, XLV, 1949, pages 255/256. Habeas Corpus brought against the Director of a Hospital Board for having refused admission to a patient recommended by a particular physician. See, also, Anales Judiciales, LIII, 1958, at page 134 for a most instructive dissent by Dr. Domingo García Rada, the present President of the Supreme Court, of Peru, which throws light on the aspect of the wrongful use of some "public" power or authority.

(113) See the important Dictamen fiscal at page 177, Anales Judiciales LVII, 1962.

difficulty for the purist, making it appear as though Habeas Corpus in Peru has, or, at the very least, ought to have two distinct modalities (114). There has always been a strong streak of conservatism running through Peruvian jurisprudence; there is also a certain national pride. Although Habeas Corpus was originally adopted into the Peruvian legal system, acknowledgedly from the English, it is now felt justifiably to be a Peruvian institution (115). Habeas Corpus has a certain psychological ring about it which would be hard to replace with some other terminology; this fact alone contains a useful lesson. The reformer must come to terms with the fact and put an end to the arguments that still rage concerning the inappropriateness of the term in relation to the extended meaning it must bear in the Peruvian legal system. The procedural questions ought to be more easily resolved. What perturbs Peruvian juristic thought at present is that what is essentially a penal process is extending itself into the resolution of what are basically civil issues and that, as a concomitant, a process which has all the severity and speed of the criminal law, is being sought in preference to the slower, but more appropriate means of the civil law (116). Habeas Corpus has come to be the remedy sought in almost every case of allegedly wrongful exercise of authority, not merely to secure that authority desist from doing something detrimental to the applicant's interest, but also to ensure that something be done that the law prescribes (117). Once more this is the heritage of the curiously mixed thinking which has gone into the development of the institution and a certain disentanglement will be necessary to give Habeas Corpus its rightful place in the system.

Reform is very much in the air. It is not the purpose of this study to engage in speculation regarding the changes, which will undoubtedly take place, but it would be incomplete without

(114) See pages 33/35 of the Memoria of Dr. Ricardo Bustamante Cisneros, 1961 and La Revista del Foro, 1956 at page 433.

(115) Memoria of Dr. Ricardo Bustamante Cisneros, 1961 at page 32.

(116) This is implicit in the terms of the decision of the Supreme Court of 14th August 1941. Anales Judiciales XXXVII, 1941. See also, for an important exposition of these tendencies the decision reported in the Revista de Jurisprudencia Peruana, Vol. XVII, 1959, pages 452/455, a case of dispossession. The dissent reflects the differing views on the appropriateness of the remedy.

(117) Perhaps no single case is more revealing than that concerning the Fundo Huadquiña and the long reasoned judgment reported (with dictamen Fiscal) at pages 100/106, Revista de Jurisprudencia Peruana, Vol. XXIII, 1965, is illustrative of both points.

some reference to the tendencies which will shape Habeas Corpus in the future. In 1957, an excelent Forum on Habeas Corpus was promoted by the Colegio de Abogados of Lima and reflections of this stimulus are to be found in subsequent utterances on the subject. In 1967, this professional body, with its great prestige and influential media, once more sponsored a series of lectures on the subject. These serve not only to sharpen the focus upon the problems for the public in general, but to inform and orient those actively engaged in the process of reform. There is at present a Commission engaged, under Dr. Luis del VALLE RANDICH upon a revision of the Code of Criminal Procedure and Habeas Corpus will receive its attention. There are a number of *proyectos* before Congress for amendment of the law relating to the subject. What the recent debates have served to do is to bring the topic within the field of comparative studies, that light may be cast upon those aspects of Peruvian Habeas Corpus, which do not accord well with similar institutions found in other legal systems. This is pre-eminently the field for the jurist and if Peru's earlier experiences, which have robbed the institution of its full value, are to be avoided, it would be well were the work of reform entrusted to specialists, whose advice can be unqualifiedly accepted. It is to be hoped that these reforms will truly make Habeas Corpus in Peru what Guillermo SEOANE called, *La égida de la libertad*, in the very widest sense of the expression.

RESUMEN

La introducción explica por qué este artículo ha sido escrito en inglés, la importancia de las lecciones que nos muestra el desenvolvimiento de la institución del Habeas Corpus en el régimen jurídico peruano y algunas advertencias sobre tales estudios comparados en general.

La historia de Habeas Corpus en el Perú, desde su aparición en 1892 en un proyecto de la Cámara de Diputados, se desarrolla mediante un estudio de las fuentes originales y secundarias, hasta que llega la condición en que se encuentra la institución actualmente. Las Constituciones, Códigos y legislación han sido examinados para destacar las características típicamen-

te peruanas que han desempeñado su papel en la elaboración de esta institución jurídica. La importancia de los principales actores es evaluada y a cada uno, le es atribuído su rol en el desarrollo y adaptación del Habeas Corpus, conforme a las necesidades del país. Esta relación histórica demuestra cómo es que la institución ha adquirido su distintiva naturaleza dentro del régimen peruano y la importancia de esa distinción con relación al sistema actual.

La tercera parte explica la significación del debate sobre la cuestión de la naturaleza jurídica del Habeas Corpus como acción o recurso e intenta una separación entre esta discusión y la que se refiere más específicamente a las dos modalidades del Habeas Corpus, con la cual tiende a confundirse. Hace un análisis riguroso de la terminología para enfocar los problemas jurídicos que han impedido hasta ahora la efectividad de Habeas Corpus como protector de los derechos individuales y sociales.

Concluye con miras a las reformas en perspectiva y las posibilidades de perfeccionar, lo que hoy en día se ha convertido en algo netamente peruano pese a sus origenes en la cuna del "Common Law".