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## *Habeas Corpus in Peru: Myth and Reality*

H. H. A. Cooper\*

"Prayse is like a kind of paint. It makes everything seem better than it really is." *John Manningham*

**A** WELL-ARGUED CASE for world habeas corpus is being increasingly urged upon the international conscience, ever-plagued with abuses against the most basic of human rights.<sup>1</sup> The idea, in theory, is attractive and the seeming universality of habeas corpus or its equivalent in the developed legal systems of the free world makes the extension of the concept on an international scale both philosophically harmonious and notionally practical. The purpose of the present article is not to criticize the laudable project of those whose object is to secure better protection for fundamental human rights, but rather to examine in detail the theory and practice of habeas corpus in one Latin American country, Peru, and to demonstrate that the greatest encroachments on human rights come not from political tyranny, as is popularly imagined, but from the malfunctioning of the legal system itself, against which even the most perfectly conceived habeas corpus is quite ineffective. It is trite but true that a legal system is only as effective as the human agency engaged in running it. It is sad to relate that, for all their apparent excellence on paper, the majority of Peruvian laws, as anyone with but slight acquaintance with the country can testify, are a dead letter. Of nothing is this truer than of the law relating to habeas corpus in Peru.

### **History and Development of the Habeas Corpus in Peru**

Peruvian habeas corpus has an extremely interesting, if somewhat short history,<sup>2</sup> having been introduced in 1897. Its sponsors and those who opposed its introduction knew perfectly well what habeas corpus was designed to protect, and the difficulties of making it work in the socio-political and geographic context of Peru.<sup>3</sup> Its English parentage is unmistakable, but the doubts of those who declared themselves against the importation of this bulwark of the common law were soundly based. They understood well the philosophies of their countrymen and the difference between theory and practice. This is not to say that the attempt to transplant the centuries-old concept of habeas corpus in the evolving Peruvian legal system ought never to have been undertaken. What is suggested here is that it ought not to have been undertaken so idealistically; a lesson that might perhaps have wider significance in relation

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<sup>1</sup> See, e.g., Kutner, *World Habeas Corpus: Ombudsman for Mankind*, 24 U. MIAMI L. REV. 352 (1970).

<sup>2</sup> Cooper, *Habeas Corpus in the Peruvian Legal System*, XXX REVISTA DE DERECHO Y CIENCIAS POLITICAS 297-385 (Universidad Nacional Mayor de San Marcos 1967).

<sup>3</sup> See, e.g., the interesting observation: "It is necessary to remember that we are, unfortunately, in a country where the llama is a means of communication." DIARIO DE LOS DEBATES (DISPUTADOS), CONGRESO ORDINARIO 661 (1892).

to the movement for world habeas corpus. The result was that for the first nineteen years of its life, Peruvian habeas corpus was virtually ineffective against the abuses it had been meant to correct and, in the form in which it was then legislated, satisfied no one, not even its sponsors. In 1916, however, Peruvian habeas corpus assumed the shape, which was to distinguish it from other remedies of the same name and lineage and which was to lead to endless arguments as to its true nature and a confusion unresolved among jurists to this day. In short, Peru rolled *certiorari*, *mandamus* and habeas corpus up in the same bundle and called it all habeas corpus.<sup>4</sup> This splendid omnibus remedy was intended to protect all classes of rights and interests, not merely the physical liberty of the person, against all manner of official interference—a breathtakingly ambitious extension of the concept for a country then racked with internal dissension, which had deposed one president two years earlier and was to depose another one two years hence.<sup>5</sup> Nevertheless, the idea stuck and in 1919, this augmented habeas corpus became enshrined for the first time in a Peruvian constitution. No sooner had this precept been enacted than Peru was plunged into the darkness of a bitterly repressive dictatorship that was to last for eleven years, virtually the whole time until the new constitution of 1933 was written. It is sufficient to say that habeas corpus was quite ineffective in preventing the illegal detentions and deportations of the Leguia regime. This occurred in 1920, the twilight of the Peruvian Supreme Court,<sup>6</sup> which six years earlier had inspired much hope by its energetic upholding of human freedoms against executive tyranny by means of habeas corpus.

In 1920, however, another more durable instrument, from the point of view of habeas corpus, was promulgated. The 1920 Code of Criminal Procedure of that year<sup>7</sup> was in force until 1940 and, even now, its basic structure lives on in the 1940 Code of Criminal Procedure, which is currently in force. In its treatment of habeas corpus, however, it is indeed an extraordinary legal instrument, in that it seems to have forgotten all about the extension of the concept that had been effected legislatively a mere four years earlier.<sup>8</sup> The Code of 1920 reiterates the classical concept of habeas corpus as the supreme remedy for the protection of the individual against arbitrary arrest and detention, and the procedural machinery is geared, exclusively, to this end. This is hardly surprising, taking into account that its author was Dr. Mariano H. Cornejo, one of the sponsors of the 1897 law and a staunch anglophile, who was roundly defeated in his efforts to introduce jury trial as standard practice into the Peruvian legal system. This inexplicable aberration caused great

<sup>4</sup> See Cooper, *Apuntes criticos sobre el Habeas Corpus en el Peru*, 28 DERECHO 5 (Pontificia Universidad Catolica del Peru 1970).

<sup>5</sup> Cooper, *supra* note 2, at 310.

<sup>6</sup> *Id.* at 315-316.

<sup>7</sup> See *Codigo de Procedimientos en Materia Criminal*, LEGISLACION PERUANA (Lima, 1920), with *Exposicion de Motivos* by M. H. Cornejo.

<sup>8</sup> By means of the Ley 2223 of 1916. M. H. Cornejo was, curiously, one of the legislators.

confusion, as the amplified version of habeas corpus was now constitutionally guaranteed, but there existed no procedural machinery to make it effective. It is a measure of the unreal character of Peruvian habeas corpus at this time that this deficiency was scarcely felt in practice. It was, however, to cause further acute confusion in the future.

There was a real revolutionary spirit in the air when the Peruvian constitution of 1933 was promulgated. A glance at the newspapers of the time indicates very clearly, in the light of subsequent events, how the cauldron of world affairs was bubbling and how improbable it was that Peru should have escaped being caught up in this maelstrom of ideas. In fact, Peru itself was in a ferment,<sup>9</sup> and much of the constitution was the product of vague, undefined enthusiasms rather than concrete, sensible legislation in conformity with the country's needs. The provision with regard to habeas corpus did nothing to clarify the earlier doubts, and sowed new ones of even greater magnitude through the sincere, if mistaken, desire of the sponsors of the project to provide an all-embracing, completely autonomous remedy for every class of infringement of any of the individual or collective rights recognized by the constitution. The problem lay in the fact that no such "action" had as yet been acknowledged in existing Peruvian legislation; there was only the *recurso*, a purely criminal law concept in this particular field, the strict and narrow rules for which were contained in the Code of Criminal Procedure of 1920.<sup>10</sup> The uncertainty this caused among judges and practising lawyers is very apparent;<sup>11</sup> the real arguments among the academics (many of whom were or had been judges and practising lawyers) were to develop much later. It had been somehow assumed, as happens so often in Peru, that the broad, general principle enunciated in the constitution would receive detailed consideration, together with a legislative exposition of the machinery necessary to make it effective, very shortly after the adoption of the constitution.<sup>12</sup> By this means it was hoped to sort out the "criminal" and "civil" aspects of habeas corpus, laying down the appropriate procedure for each. Nothing of the kind ever happened and, by one of those not uncommon oversights of codifiers', however experienced and enthusiastic, the earlier error repeated itself uncorrected.

The Code of Criminal Procedure of 1940<sup>13</sup> has received high praise from one well qualified to judge its merits.<sup>14</sup> Nevertheless, it is not a new

<sup>9</sup> The youthful APRA party gained legal representation in the Constituent Assembly for the first time, but its representatives were expelled during the course of the constitutional debate. The assassination of the constitutionally-elected president, Sanchez Cerro, took place in the same year as the promulgation of the constitution.

<sup>10</sup> Cooper, *supra* note 4, at 8.

<sup>11</sup> See, e.g., *Rebagliati, Garantias Constitucionales*, 27 DERECHO 37 (Pontificia Universidad Catolica del Peru 1969).

<sup>12</sup> See, e.g., art. 132 of the Constitution of 1839.

<sup>13</sup> F. G. Ferrer, *Codigo de Procedimientos Penales LEGISLACION PERUANA* (Lima, 1966); for a general account in English, see Murray, *A Comparative Study of Peruvian Criminal Procedure*, 21 U. MIAMI L. REV. 607 (1967).

<sup>14</sup> See the article by Niceto Alcalá-Zamora y Castillo, XXXI REVISTA DEL FORO 339 (Lima 1939).

and original work, but rather an intended improvement on the old Code, that of 1920, which it was designed to replace.<sup>15</sup> In the matter of habeas corpus this was most unfortunate, for the distinguished author of the Code had not attended to developments since 1920 and, in particular, the now well-established broadening of the concept. The matter was aggravated by the fact that Dr. Zavala Loayza was patently dealing only with criminal habeas corpus, yet the incongruity of what he was proposing never seems to have occurred to him for an instant. Peru, only seven years after the present constitution had been enacted, giving in the broadest of terms a general "action" of habeas corpus to protect every conceivable right recognized by the constitution itself, found itself with procedural rules that were designed only for the protection, in the criminal courts, of the physical liberty of the subject and the very terms of the Code itself limited, once more, the concept to a mere *recurso*, a procedural device with none of the autonomy that the architects of the constitution had intended.<sup>16</sup> That this was not a mere failure to take into account the changes in the law, but rather a failure to understand their purport, is conclusively proved by the direct reference to the constitutional changes in the first article of the Code dealing with the granting of habeas corpus.<sup>17</sup> The inconvenient and, indeed, incongruous result is that a procedure intended for the protection of the liberty of the subject, with all the urgency implicit in the concept, became equally applicable for the protection of other interests of a different nature altogether. The very wording of the Code, as applied to such situations, is irrelevant and the proceedings are incompatible with the end sought. This thoroughly unsatisfactory situation persisted uncorrected until 1968, when the military regime, which had recently assumed control of the country's affairs, passed, not wholly disinterestedly, a measure designed to separate procedurally the civil and criminal aspects of habeas corpus.<sup>18</sup> Thereafter, the civil remedy was to be more leisurely and governed by considerations more clearly referable to the nature of the interests for which protection was being sought. Like much of the legislation of the military regime in its early days, it bears the marks of haste and does not really solve the serious legal problems inherent in Peruvian habeas corpus. Interesting though the civil aspects of habeas corpus may be, it is in the criminal field that the real test of its usefulness in practical terms has to be made. To this end, some detailed consideration of the Peruvian Code of Criminal Procedure is necessary.

<sup>15</sup> See Cooper, *A Short History of Peruvian Criminal Procedure and Institutions*, XXXII REVISTA DE DERECHO Y CIENCIAS POLITICAS 258 (Universidad Nacional Mayor de San Marcos 1968).

<sup>16</sup> For a discussion of the technical aspects of this point, see Cooper, *supra* note 2, at 328-332.

<sup>17</sup> Art. 349, CODIGO DE PROCEDIMIENTOS PENALES.

<sup>18</sup> Decreto Ley 17083 of 24th October, 1968, was promulgated to "facilitate" the proceedings arising out of the expropriation of the Peruvian property at the International Petroleum Co.

### How the Habeas Corpus Works in Peru and its Failures

It is a strict rule of law in Peru that habeas corpus lies in every case where a person has been detained for more than twenty-four hours without having rendered his declaration before the examining magistrate.<sup>19</sup> This declaration, the *instructiva* or "confession" as it is sometimes termed, is of prime importance in the Peruvian criminal proceedings.<sup>20</sup> It might well be described, without exaggeration, as the very basis of the whole process. The confession is obligatory and, later, at the trial, it will be read to the accused and he will be questioned on its contents. The law lays down that the principal object of the preventive detention of the accused person is to ensure that this declaration is duly rendered.<sup>21</sup> Moreover, it is expressly established that this declaration must be rendered, or at least started, within twenty-four hours of arrest,<sup>22</sup> and in the case of twenty-four hours having passed without the taking of this declaration, the obligation is imposed upon the head of the establishment where the detainee is held, to take him, without further delay, before the examining magistrate.<sup>23</sup> There are serious penalties attaching to the breach of these provisions.<sup>24</sup> As an additional safeguard, the commencement of the criminal process must be reported to the trial court,<sup>25</sup> which is charged with a supervisory role in all aspects relating to the conduct of the investigation. As though these measures were thought insufficient in themselves to guarantee the rights of the subject, there is the *Ministerio Publico*,<sup>26</sup> which, acting through its *Fiscales* and *Agentes Fiscales*, oversees the work of the judges at every level, acts as public prosecutor and generally protects the public interest in the administration of justice according to law. One would say, with such a powerful apparatus, that there was little possibility of arbitrary detention or abuse of the subject's rights. Habeas corpus would provide a speedy and effective remedy. It is very sad to have to report that this, in practice, is very far from being the case. There is an unfortunate tendency in the realm of descriptive, comparative legal studies to judge the effectiveness of a system by reference to the theoretical perfection of its precepts. It is to be remembered that one cannot really tell where a shoe pinches until one comes to wear it.

In matters of habeas corpus, this professional myopia is allied with another sentiment, which, more than any other, tends to pervert the true, academic objectivity, which ought to be brought to bear in an enquiry of this sort. Habeas corpus is thought of largely, and quite erroneously, in political terms. Its value or ineffectiveness is judged by reference to the

<sup>19</sup> Art. 349, CODIGO DE PROCEDIMIENTOS PENALES.

<sup>20</sup> See DOMINGO GARCIA RADA, *LA INSTRUCCION 287 et seq.* (Lima 1967).

<sup>21</sup> Art. 83, CODIGO DE PROCEDIMIENTOS PENALES.

<sup>22</sup> Art. 85 CODIGO PROCEDIMIENTOS PENALES; *supra* note 20 at 111, 112.

<sup>23</sup> Art. 86 CODIGO DE PROCEDIMIENTOS PENALES.

<sup>24</sup> Art. 340, CODIGO PENAL, and arts. 353-356, CODIGO DE PROCEDIMIENTOS PENALES.

<sup>25</sup> Art. 88, CODIGO DE PROCEDIMIENTOS PENALES.

<sup>26</sup> Cooper, *supra* note 15, at 261. See Cooper, *The Administration of Justice in Peru*, 53 *JUDICATURE* 339 (1970); Cooper, *El Ministerio Publico*, XXXIV, *REVISTA DE DERECHO Y CIENCIAS POLITICAS* 205 (Universidad Nacional Mayor de San Marcos 1970).

number of political prisoners in any particular country, and their treatment in the matter of basic human rights.<sup>27</sup> The falsity of this yardstick is clearly demonstrable in the case of Peru, where it can be said, with absolute justification, that there are no political prisoners<sup>28</sup> and, consequently, none of the well publicized abuses as in Greece, Haiti and the Iron Curtain countries. Theoretically, in Peru, there exists the rule of law, guaranteed by a liberal constitution, a strong Code of Criminal Procedure and independent courts, with a whole armory of weapons at their disposal for the protection of every class of human rights. Neither the ordinary visiting academic nor the most assiduous student of the country's legal literature can become aware of the true position. In fact, as a protection of basic human rights, the elaborate structure described is quite useless and habeas corpus, in itself, is of no practical value as a guarantee against arbitrary detention and procedural irregularities, however grave. These are most serious charges, made unhesitatingly and without fear of contradiction. In every case, what fails is the human element. No campaign for the better protection of human rights can afford to ignore these realities. There are certain hard facts of life, which are known only to those who have had direct contact with the problems. These facts are not prominent in the official records and are never alluded to in learned publications. For the purposes of the present article, they must be stated unequivocally.

Thousands of ordinary persons accused of common crimes are regularly kept for quite long periods in police detention without being placed at the disposition of the investigating magistrate in flat defiance of the law. This is the usual, indeed, the invariable practice, in the case of minor criminals, a fact readily verifiable by direct enquiry. The fact is confirmed, when one knows what to look for, by examination of the case papers and a comparison of the date on which the police investigation was opened with that on which the first declaration was rendered before the examining magistrate. At times the facts of important cases become notorious through publicity. Three cases are worth mentioning to illustrate the point.

In February and March, 1968, a massive fraud in the Customs Branch of the Lima Post Office was discovered.<sup>29</sup> As a result, a number of customs officers were arrested, and some spent forty-six days in a police precinct without having been placed at the disposition of the examining magistrate or rendering the declaration required by law. It may be accounted somewhat extraordinary that the public prosecutor, whose duty is to bring such irregularities to the notice of the court, should have referred to this fact in quite a different sense in the course of his accu-

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<sup>27</sup> This is particularly the case of those who argue for the extension of habeas corpus in the international field. See, e.g. Kutner, *supra* note 1, and the material cited therein.

<sup>28</sup> The PERUVIAN CRIMINAL CODE, unlike those of some other countries, for example, Mexico, does not contain a definition, even by inference, of the *delito* "political-social," so that it is very difficult to say who is detained on political grounds. In the event, a general amnesty was granted to all political prisoners on 23rd December, 1970.

<sup>29</sup> Expediente No. 431/70, 2d TRIBUNAL CORRECCIONAL, Lima.

sation, alleging that the defense put forward by some of the accused was fabricated during this illegal detention.

In January, 1970, two members of a very prominent Peruvian family were arrested as the result of the disappearance of the sum of 690,000 U.S. dollars from a bank account, which had passed from private to public control as a consequence of the agrarian reform of July, 1969. The case had very obvious political implications, and the government had a direct financial interest in the matter, but the offenses alleged were common larceny and falsification. Nevertheless, these two people, plus a third, were held for many days in police custody before finally being placed at the disposition of the examining magistrate. Habeas corpus, which clearly lay in this case, was solicited and denied.<sup>30</sup>

On the 15th of December, 1970, a particularly brutal homicide took place in Lima, followed four days later by a double suicide, the circumstances of which attracted considerable notice and speculation. A suspect was taken into custody on the 19th of December, and the police investigation proceeded in a blaze of publicity prejudicial even by Peruvian standards. The suspect was not handed over to the examining magistrate until the 29th of December.<sup>31</sup>

The purpose and effect of these illegal detentions need little explanation. In each of these cases, habeas corpus was the remedy designed to correct the abuse. In these and thousands of similar cases, it is ineffective despite the theoretical perfection of the Peruvian system. Only experience and a profound study of Peruvian law in action can show why this should be so.

Before going on to suggest, in concrete terms, an answer to this poser, a detailed analysis of two cases will reveal the practical deficiencies in Peruvian criminal law and the inability to do anything about them by means of habeas corpus. The Peruvian citizen is an extremely well-documented individual. Provided he is honest, he will have at least three documents of identity,<sup>32</sup> possibly many more. Every time he needs an official document of any kind, he will have to obtain a certificate of residence from his local police precinct. By the time he reaches the age of majority he will have given his fingerprints many times over with an abandon that would make an Englishman shudder and many a common law chief justice turn in his grave. It would seem very difficult, therefore, that a person might find himself, inadvertently, in the toils of the law through a simple case of mistaken identity, in a purely documentary sense. It is even more incredible that anyone, in a country that relies so heavily on the written process, should have spent six months in prison on that account and might well have spent very much longer. Yet this is exactly what happened.

In the early days of January, 1970, Victor Garcia Flores<sup>33</sup> was picked up by the police as a vagrant. He had committed no crime and the only

<sup>30</sup> The case had been duly reported to the *Juez Instructor de Turno*, el Señor Martin Figueroa, but he had not taken the *instructivas* in the time allowed by law.

<sup>31</sup> This case is particularly grave as the charge carried the death penalty, and the obligation of the examining magistrate was to carry out the investigation in the strictest reserve; art. 73 CODIGO DE PROCEDIMIENTOS.

<sup>32</sup> *Libreta electoral*; *libreta militar*; *libreta tributaria*. Many ordinary transactions cannot be carried out without the production of one or other of these documents.

<sup>33</sup> See *El Peruano*, 8th of June and 20th of June, 1970.



brush he had had previously with the law had resulted in a six month sentence for larceny in 1961. On consulting their records, the standard procedure in these cases, the police found that there was a court order for the arrest of one Victor Garcia Flores for a matter then pending in the Fifth *Tribunal Correccional of Lima*.<sup>34</sup> In vain, the arrested man averred there must be some mistake. Without more ado, and without ever having seen a judge of any kind, he was packed off to prison to await the slow, grinding processes of the Peruvian judicial mill. It is important to note that, if this individual had been the Victor Garcia Flores cited in the judicial order, which was the only basis for his detention, habeas corpus would not lie. Nor is there any reason why it should. The protection of the subject in such cases lies, notionally, in other remedies. Nevertheless, in neither case would he see or be seen by a judge before being committed to prison; he is held, often for years, on a piece of paper that might or might not be in order. The arrested man in the present case was clearly *not* the person named in the proceedings; his physical characteristics and personal history were quite different. The fingerprints of both men were on record. Instead of a speedy release with the appropriate apologies, the unfortunate Victor Garcia Flores was consigned to prison, presumably to await a trial that was unlikely to be held for a long time, if at all. Meanwhile, unscrupulous court officials began to bleed anxious relatives white on the pretext of securing the detained man's release.<sup>35</sup>

It is curious that none of the persons consulted saw this as a proper case for the use of habeas corpus. This simple fact tells much about the degeneration of the remedy and its lack of practical application among members of the Lima Bar. All the elements required by law were present:<sup>36</sup> The detained man was, on proof of his identity, not subject to any criminal proceeding that had been initiated against him; he had been detained more than twenty-four hours without being placed at the disposition of the examining magistrate; his detention had not been ordered by a judge or competent court; he was not under sentence or subject to military law. After suffering five months detention in this condition, with the prospect of this illegal situation continuing indefinitely, habeas corpus was finally presented on his behalf.

Now habeas corpus in all countries where it exists is the most expeditious of remedies, and Peru, theoretically, is no exception. The Code of Criminal Procedure lays down that in the case of habeas corpus pre-

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<sup>34</sup> The judges of these *Tribunals Correccionales*, the *Vocales*, change each Judicial year. In the year in question, the personnel of this Tribunal did not enjoy a very satisfactory reputation, one judge being dismissed from the judiciary and the President and the remaining judge being suspended without salary for two months on a later occasion.

<sup>35</sup> This is the rule rather than the exception in Peru, but it is, as a practical matter, impossible to contain as it is a serious crime to suborn judicial officials. Notionally, the judges have, in virtue of the *Ley Organica del Poder Judicial* of 1963, oversight of their subordinates and adequate disciplinary powers. In practice, without influence, it is impossible to reach the judges themselves as one must first pass these minor officials. If one has the requisite influence one does not encounter the difficulties indicated: vicious circle.

<sup>36</sup> Art. 351, CODIGO DE PROCEDIMIENTOS PENALES.

sented directly before the *Tribunal Correccional*, that court may refer the matter for investigation to an examining magistrate, who shall proceed *immediately* to the place of detention and, if he finds that the matters alleged are true, order the release of the detained person.<sup>37</sup> The habeas corpus in the present case had to pass the very same officials responsible for the corrupt practices that were blocking the subject's release. The presentation of this petition, moreover, was extremely embarrassing to the court itself. Had it been processed in the normal way, it might have served not merely as an awkward precedent but as a permanent record of the court's own blameworthiness at a particularly sensitive time for the judiciary.<sup>38</sup> For over a fortnight nothing was done, then, without any explanation, the subject was released by order of the *Tribunal Correccional*. Some days later, the habeas corpus, which now had no basis, was summarily dismissed. Undoubtedly, it had served its purpose for all the irregularities that attended its consideration by the authorities.

The other case is even more revealing of the fundamental defects from which the Peruvian criminal process suffers in practice. It is perilously easy for a certain class of person to find himself taken into custody in Peru; getting released is often a very difficult and always a time-consuming process. The wildest of accusations are sometimes made and acted on by the authorities,<sup>39</sup> often as a result of bribery at the lowest levels. A person caught up in such toils of corruption has usually no alternative but to "settle" the matter while it is in the hands of the police or suffer for his principles. Once again, the theoretical perfection of the system should be noted: the false accusation is punishable as a crime,<sup>40</sup> and there are adequate procedural devices for bringing this situation to the notice of the courts. In theory, the accused person must, by law, be brought within twenty-four hours before an examining magistrate, who will personally<sup>41</sup> investigate the charge and, if he finds it to be without merit, liberate the subject without further delay. If the matter is more complicated, he may retain the suspect in custody for a maximum of ten days, during any of which he can release the prisoner on his own responsibility on being satisfied that the charges are without foundation.<sup>42</sup> By the tenth day, the examining magistrate must either order the detention of the subject for the whole of the period of the investigation, which for practical purposes means until he is tried, or order his unconditional release.<sup>43</sup> In the majority of cases, bail is not permissible. By law, the maximum period allowed for the investigation of any offence is six

<sup>37</sup> Art. 352, CODIGO DE PROCEDIMIENTOS PENALES.

<sup>38</sup> Decreto Lay 18060, Dec. 24, 1969.

<sup>39</sup> Very often as the result of a sensationalist, mal-intentioned newspaper campaign, which leaves the judge little alternative but to act precipitately or appear grossly negligent before an avid but ill-informed public.

<sup>40</sup> Arts. 186 & 330 CODIGO PENAL.

<sup>41</sup> See the Circular of the Corte Suprema, Oct. 28, 1942.

<sup>42</sup> Art. 83, CODIGO DE PROCEDIMIENTOS PENALES.

<sup>43</sup> Art. 84, CODIGO DE PROCEDIMIENTOS PENALES.

months;<sup>44</sup> in some cases, this period is ninety days.<sup>45</sup> In practice, this period is subject to innumerable extensions through the incompleteness of the investigation when the case papers are sent up to the trial court, and it is not uncommon, despite the strictest rules to the contrary, for the investigation to be extended without the requisite authorization. Periods of two- or three-years pre-trial detention are common.

There exists a variety of remedies for this situation, all of which consist, fundamentally, of a complaint to the trial court and, if nothing is done, of a further complaint to the Supreme Court, which has extensive disciplinary powers over all judges. These remedies are, in fact, almost never used. The *instruccion* or period of judicial investigation is of supreme importance in determining the fate of an accused person. The trial itself turns largely upon an interpretation of the material elicited at this early stage.<sup>46</sup> It is no exaggeration to say that those who have had no defense or a poor defense at this stage of the proceedings are doomed from the start. Consideration of the case now to be described must proceed from this standpoint.

On the 13th of March, 1969, Porfirio Lara Altamirano,<sup>47</sup> a Quechua-speaking native of the highlands of the interior was in Lima with his "common law" wife. While in a chemist's shop making a purchase, they overheard a woman asking the assistant for an abortifacient. Outside the shop, the woman accosted them and struck up a conversation, in the course of which she accompanied the couple, uninvited, for some distance. The couple was very obviously provincials and neither spoke Spanish well (in fact, Lara's companion did not speak to the woman at all). They all shared a *colectivo*, a taxi-type conveyance common in Lima, to a destination outside the city, during the course of which the woman made advances to Lara, asked him for money and insinuated that he leave his companion and take up with her instead. Lara made it clear that these attentions were unwelcome, but on arriving at their destination, a small village outside Lima, the couple was disconcerted by the fact that the strange woman continued to follow them and had started to become cruelly abusive. She then began to throw stones at the couple, who responded in kind, whereupon she departed. While the couple was making their way along the road some short while later, a police patrol car drew up and took Lara into custody. He was taken to a nearby police post, where the strange woman, whose identity he never learned, accused him of having stolen from her the sum of 2,000 soles (approximately 47 U.S. dollars) and having twice sexually assaulted her. The couple was searched in the police post and finding nothing incriminating on either of them, Lara's companion, who spoke no Spanish and seems to have been of very low intelligence, was released and promptly disappeared. Lara was kept in police custody for two days, during which he

<sup>44</sup> Art. 202, CODIGO DE PROCEDIMIENTOS PENALES.

<sup>45</sup> For example, in the case of certain offences against the Customs and tax laws, and certain sexual offences.

<sup>46</sup> See Cooper *supra* note 15, at 259-260.

<sup>47</sup> EXPEDIENTE No. 312/69.

was threatened and abused and made to sign a number of papers which he did not understand at all. Meanwhile, his accuser, also detained, was submitted to a number of indignities and begged to let the whole matter drop. Exactly what happened to her in the police post is a matter for conjecture, but she was eventually released and was never seen again.

Lara was placed at the disposition of the *Ist Juzgado de Instruccion* of Lima on the 15th of March, 1969. He should, theoretically, have been brought immediately before the examining magistrate, who, had he been conscientious,<sup>48</sup> would have found, on the evidence, no grounds for proceedings. In this case, as in 90% of similar cases, Lara neither saw the examining magistrate, nor gave his declaration according to law with the appropriate safeguards of legal representation. This declaration, which the law regards as so important that it cannot even be delegated to another judge of equal rank, was taken in Lara's case by the *escribano*, the examining magistrate's clerk and passed up later for the judge to sign. Thus, Lara had no opportunity to bring the injustice of his case before a magistrate competent to enquire into it and to order his immediate release. He was, instead, remitted to prison and absolutely nothing was done in his case for the simple reason that his accuser had disappeared.

Had the case followed its normal course, it is quite probable that Lara would have been detained for a very long time. Flimsy though the accusation was, it is even possible that the matter might have gone for trial. The real problem, as in so many of these cases, lay in the fact that Lara could not afford a lawyer. Although he was entitled to the services of a court-appointed lawyer,<sup>49</sup> in practice these never take an interest in the case unless the accused person or his family is prepared to pay. During Lara's custody, the only investigative act was the initial taking of his declaration by the clerk. In September, 1969, a habeas corpus was presented, based on the irregularities of his detention and the consequent infringement of his constitutional rights. The argument was that a "competent magistrate" had not taken the declaration, in contravention of Article 121 of the Code of Criminal Procedure. Since this very argument could open the gates for perhaps 90% of all prisoners held in preventive custody in Peru, its "inconvenience" is obvious. The result, as in the case discussed earlier, was that after some days hesitation, Lara was released and the proceedings in his case discontinued.

### Conclusion

These two cases are, unfortunately, the rule rather than the exception. They reveal a state of affairs that habeas corpus is quite unable to correct, and the relative success of the remedy in these two instances may be fairly attributed to the very audacity of its employment, which

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<sup>48</sup> *The Juez Instructor*, by reason of Art. 77, CODIGO DE PROCEDIMIENTOS PENALES, has very wide powers as to whether he will open a judicial investigation at all. Having done so, he is obliged to continue it according to law, but he has sufficiently wide powers, nevertheless, to place in liberty an accused person, during the first ten without reference to any other authority, if he is convinced that the accusations are without merit.

<sup>49</sup> See Arts. 67-71, CODIGO DE PROCEDIMIENTOS PENALES.

clearly threw the system off balance. Certain general conclusions may be drawn and these serve not merely as a measure of the effectiveness of habeas corpus in Peru, but also as a test of the conditions necessary for the effectiveness of this remedy in any given legal system.

There must exist a strong and incorruptible legal profession, not merely to appreciate the technical aspects of the situations in which habeas corpus might lie, but rather to provide the dynamic without which the remedy remains purely academic. The legal profession must be capable of exerting real force upon the collective judicial conscience for habeas corpus to be an effective protection of the subject's rights.<sup>50</sup> Yet it is precisely in those countries where, according to its protagonists, world habeas corpus is most needed, that the legal profession is at its weakest and most subservient.<sup>51</sup> In Peru, on the surface, the profession is independent and well organized. For reasons that only a person who has studied the problem profoundly can understand, this independence of attitude and action is quite illusory.<sup>52</sup> It is the counterpart of other professional attitudes, less pronounced, in other parts of the world, which combine to frustrate the effectiveness of legal remedies such as habeas corpus. To be effective as a remedy, as the case of Peru clearly shows, the interests of justice must be placed above self or profession. In a country like Peru, there is no inducement for this to be done and the lawyer, who sees himself as a crusader of sorts in this field, is likely to bring opprobrium on himself at best and ostracism or more serious professional disasters at worst. For the proper safeguard of the subject, it is essential that the presentation of habeas corpus be not at the mercy of timorous professionals, who in a moment of crisis might weigh their own convenience against the liberty of the petitioner. In Peru there is no lack, even in times of danger, of lawyers willing to risk themselves and their reputations in the presentation of habeas corpus in political cases.<sup>53</sup> There are obvious compensations as well as risks. What is lacking is the energy or desire to use habeas corpus in the cases in which it is most needed, of which those discussed are typical examples. The effectiveness of habeas corpus must be judged on this basis rather than on the notional one that has tended to prevail in circles where this remedy is most discussed. Habeas corpus in Peru will continue to be a purely paper remedy until lawyers force the police to comply with their legal obligation to place suspects before the examining magistrate in every case within twenty-four hours. This is the proper field of habeas corpus

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<sup>50</sup> For reasons which can only be adequately explained at length in a work devoted exclusively to the subject, it may be stated that the effect of the legal profession upon the collective legal conscience in Peru is negligible. The judges have no real respect for or fear of the Bar as an entity, a fact which has a profound effect upon the administration of justice generally.

<sup>51</sup> See, e.g., Cooper, *Diez ensayos sobre el Common Law*, EDITORIAL UNIVERSO, 47 (1967).

<sup>52</sup> In Peru, all documents presented at any stage of a legal proceeding must be signed by a lawyer. It is a fact, that no lawyer can be found in many cases to submit a complaint, however justified, for fear of the consequences this might have on his professional prospects.

<sup>53</sup> See, e.g., the case *Dr. Anibal Aliaga Imparraguirre*. 6 *BOLETIN COLEGIO DE ABOGADOS* 233 (1970).

and, as even the most superficial of studies will show, it is virgin territory for lawyers in Peru. It is probable that habeas corpus has simply become too sophisticated, in Peru, for everyday use.<sup>54</sup>

Equally, it is safe to assert that habeas corpus is of little or no value where bench and bar are venal and corrupt. There are a great many situations in Peru where habeas corpus is the proper remedy to safeguard the liberty of the subject, but attempts to use it are frustrated by these unhealthy combinations, the only object of which is to save the responsibility of those against whom it would run. It is sadly true that, in Peru, the detention of the client is regarded all too often as the lawyer's lien for his fees. This unsatisfactory attitude has infected the administration of justice to such an extent that the majority of criminal lawyers are cruelly indifferent to the plight of their clients or are cynically content that their fees are thus secured. To think of habeas corpus in such a tainted atmosphere is absurdly incongruent. It may be said that habeas corpus is only effective where there exists a real concern among the legal profession for the liberty of the subject. Where, instead, there exists a calculated or cynical indifference,<sup>55</sup> habeas corpus cannot play any sort of role in the safeguarding of basic human rights and becomes, as it is in Peru, a pretty, juristic ornament, serving only to deceive the unwary or ill-prepared student of the legal sciences. A good lawyer, with a sound professional conscience, never lacks the right remedy. It is not only a battery of procedural devices that are needed to safeguard human rights but also a certain spirit among lawyers themselves. It is this, rather than the formal aspects of habeas corpus, that has served to give this remedy its unique character in the common law and it is precisely this dynamic quality which is lacking, presently, in Peru. This, obviously, cannot be supplied by legislation; what is wanted is a thoroughgoing change of heart and mind.<sup>56</sup> Perhaps even more important than an honest, aggressive spirit at the bar, is the real independence of the bench. Despite appearances, this is totally lacking in Peru, an assertion painfully easy to demonstrate. Once more, this lack of independence is not of prime importance in "political" issues, but rather in attitudes towards commonplace matters. The timorous, retiring attitude of the judges has reduced habeas corpus in Peru to a mere cypher.<sup>57</sup> Seen in purely for-

<sup>54</sup> In marked contrast to the famous aphorism of Maitland, in which he attributed the continuing vigour of the common law precisely to this quality of not having become too "fine" for everyday use.

<sup>55</sup> The only adequate comparison with the Peruvian attitude to habeas corpus, encountered by the author, finds expression in the irreverent words of J. D. Passos, "My ass to Habeas Corpus". 42nd PARALLEL, CARDINAL at 109.

<sup>56</sup> That these are not simply the strictures of a disappointed foreign observer may be seen from some of the more outspoken criticisms that appear in print from time to time. See, for example, *La reforma judicial*, by Alfonso Carpio Alcocer (a recent unsuccessful candidate for a judgeship) published in *ULTIMA HORA*, 27th January, 1971. The article contains serious factual errors, but the criticism, coming from a prominent, practising member of the Lima Bar are valid. He mentions, incidentally, the case of a foreigner who spent 12 years among Peru's worst criminals on the island of El Fronton because he had no documents. And Habeas Corpus?

<sup>57</sup> A perfect example is afforded by the case of Don Julio Eduardi Fontecilla Rojas, a Chilean national, son-in-law of General Viaux, a suspect in the case of the shoot-

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mal, constitutional terms, the Peruvian judiciary is independent on a functional footing; the matter is not ordinarily put to the test on great questions of state. In fact, judged on the basis of everyday matters, the judges, almost without exception, are seen to be self-serving to a quite extraordinary degree. This is the true and realistic test of judicial independence and, by it, Peru's judges fail notably. It is by this test that the value of world habeas corpus, too, must be measured.

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ing, in Chile, of General Schneider. This individual entered Peru, legally, in November, 1970, but his detention was requested by the Chilean authorities. He was arrested and a most curiously worded order for his expulsion was made on the 9th November, 1970. His wife brought habeas corpus proceedings to challenge the validity of the order. On the 26th January, 1971, the matter came, at last, before the *Tribunal de Vacaciones "B"*, but was not attended to, "Por las recargadas labores del Tribunal": *El Peruano*, 27th January, 1971 at 8. In fact, the only work done by the Tribunal that day was to continue two trials of comparatively slight importance, as is testified by the official publication to which reference is made.