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A Comparative Study of Peruvian Criminal Procedure

Daniel E. Murray

University of Miami School of Law

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A COMPARATIVE STUDY OF PERUVIAN CRIMINAL PROCEDURE

DANIEL E. MURRAY*

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I. INTRODUCTION

It is the purpose of this article to make a comparative study of selected sections of the Peruvian Code of Penal Procedure of 1940, as amended,¹ which govern the procedure for the ordinary criminal case. No discussion will be made of special procedures governing cases of slander, defamation, insults and crimes against sexual honor.² Neither will any attention be devoted to special proceedings governing the trial of minors,³ absent accuseds,⁴ and crimes committed by public employees.⁵

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1. CÓDIGO DE PROCEDIMIENTOS PENALES, 1940. All references to this Code are taken from Malpica, *CÓDIGO DE PROCEDIMIENTOS PENALES (Segunda Edición Aumentada 1964)*.

2. CÓDIGO DE PROCEDIMIENTOS PENALES arts. 302-317 (1940). All future references will be to this Code unless otherwise noted.

3. CÓDIGO DE MENORES.

4. Arts. 318-322.

5. *Ley de 28 de Septiembre de 1868*.

In order to place Peruvian criminal procedure in its proper setting, it is necessary to note that the investigative stage—known as the “instruction”—is under the complete control of a “judge instructor,” appointed by the executive branch of the government from a list of candidates submitted by the Superior Court.⁶ *Ad hoc* judge instructors may also be appointed by the Superior Court. The judge instructor may initiate *ex-officio* the instruction when he acquires through public means knowledge of a crime which may be prosecuted by the public authorities.⁷ He may also initiate the instruction at the request of the Public Ministry (the prosecuting branch of the government), or by denunciation of the victim of the crime,⁸ or by an *auerella* (complaint) when so authorized by the Code. The prosecution of the crime rests with the Prosecutor (*Fiscal*) who is an agent of the Public Ministry.⁹

During the instruction stage the judge instructor takes testimony from the accused, the victim, witnesses, experts, and the police. When he is satisfied that his thorough investigation has proved the *corpus delicti* and the culpability of the accused, he will send the record of his investigation along with his opinion (also termed the “instruction”) to the Correctional Tribunal, a branch of the Superior Court, for trial.

The Superior Court (*Corte Superior*) is divided into a Civil Court (*Sala Civil*), which is the intermediate appellate court in civil matters, and a Correctional Tribunal (*Tribunal Correccional*) which is the trial court for criminal matters.¹⁰ Both the Civil Court and the Correctional Tribunal may be composed of one or more courts (*salas*) depending upon the population of the district where the Superior Court is located.¹¹ The actual trial is conducted before a panel of three judges in one of the *salas* of the Correctional Tribunal. Two affirmative votes are needed to convict the accused in most cases, with the exception that sentences of exile and death require a unanimous vote.¹²

The supreme Court of Peru has final jurisdiction over the “appeals of nullity” (appeals based on a ground that the judgment violates certain legal principles) as well as original jurisdiction over “complaints” (*quejas*), questions of jurisdiction (*competencia*) between judge instructors and between Correctional Tribunals and writs of extradition.¹³ The Supreme Court is divided into two main courts (*salas*)—the first

6. LEY ORGÁNICA DEL PODER JUDICIAL arts. 47-50 (1963); CONSTITUCIÓN POLÍTICA DEL PERU art. 223 (1933).

7. Art. 75; see note 42 *infra*.

8. Art. 74.

9. Arts. 42-48.

10. LEY ORGÁNICA DEL PODER JUDICIAL arts. 139-141 (1963).

11. LEY ORGÁNICA DEL PODER JUDICIAL art. 130 (1963).

12. Art. 282; Ley 12341, art. 5.

13. Art. 15, as amended.

court has jurisdiction over most civil matters while the second court has jurisdiction over some civil matters, all criminal appeals and labor cases.¹⁴

It may be asserted that since the Peruvian system of criminal procedure is inquisitorial in nature—the complete antithesis of the accusatorial system in use in the United States—any attempt to compare the two systems is futile. It is submitted that this assertion over-emphasizes the differences and ignores the similarities. While admittedly the use of the emotionally charged word “inquisitorial” may conjure a picture of secret proceedings which deny any rights to the defendant, in fact, there are only two basic differences between the Peruvian investigative stage—the instruction—and its counterpart in the United States. First: Both systems have a “fifth amendment” as to forced confessions—they diverge solely on the point of the use of silence. In Peru (as well as in most civilian systems) the accused is asked to confess by a judge instructor. He cannot be forced to admit his guilt, but his refusal to speak can be considered as evidence of guilt. In the United States confessions cannot legally be coerced and the refusal to speak cannot be considered by the trier of fact or commented upon by the prosecution.¹⁵ Second: In the Peruvian system all of the results of the instruction—the pre-trial investigation—are introduced at the trial along with the report of the judge instructor, while in the United States the results of the pre-trial investigation are not admissible in their totality but are introduced separately in accordance with the rules of evidence. In Peru, however, because most of the pre-trial investigation “testimony” may be repeated at the trial stage if necessary, there is not as great a difference between the two systems as there would seem to be at first glance.

Of course, there are other differences in concept and detail between the two systems, and they will be discussed in the appropriate sections of this article.

II. THE INSTRUCTION (*La Instrucción*)

A. *Constitutional Guarantees (Garantías de la Constitución)*

The Peruvian Constitution of 1933 provides for guarantees which protect the individual's rights in a manner somewhat familiar to the Anglo-American. Except in case of *flagrante delicto*, no one may be detained except by a written order duly issued by a competent judge or by those authorities charged with conserving public order. In every instance the accused must be placed at the disposition of a proper court within

14. LEY ORGÁNICA DEL PODER JUDICIAL art. 117 (1963). There are also third and fourth *salas* which have jurisdiction over other appellate remedies, but any discussion of these matters is outside the scope of this article.

15. *Griffin v. California*, 380 U.S. 609 (1965).

twenty-four hours. This court shall order liberty or imprisonment for the period designated by the law.¹⁶

The Peruvian concept of a search of domicile differs from the United States constitutional precepts in that a search warrant need not necessarily be issued by a judge. The domicile is not inviolable. One may enter by showing a previously issued written order motivated either by a judge or "the competent authority."¹⁷

The right to enter, travel and leave the territory of the Republic is free except for those limitations which are established by the penal laws, health laws and laws for foreigners.¹⁸ No one may be banished from the territory of the Republic, nor separated from the place of his residence, except by an executed sentence or by application of the Law of Foreigners.¹⁹ When the security of the State requires it, the Executive Power may totally or partially suspend, for all or part of the national territory, the guarantees declared in Articles 56, 62, 67 and 68. If the suspension of guarantees is decreed during a session of the Congress, the Executive Power shall give the Congress an immediate account of its action. The period of suspension of guarantees shall not exceed thirty days and to prolong this period a new decree is required. The "law" shall govern the scope of authority of the executive power during the suspension of guarantees.²⁰ These particular personal guarantees were suspended for a period of thirty days during the period that the author was writing this article²¹ because of communist terrorist activities in the Country.

There are additional individual guarantees which are not subject to governmental suspension. No one may be condemned for an act or omission which at the time of committing it (*de cometerse*) was not "qualified" (*calificados*) in the law in an express and unequivocal manner as a punishable infraction, nor may he be judged except by the tribunals established by law. All declarations (in the sense of confessions) obtained by violence are invalid (*carece de valor*). The penalty of confiscation of goods may not be imposed.²² Correspondence is inviolable. Letters and private papers may not be held (*ocupados*), intercepted or searched except by judicial authority in those cases and in the manner established by the law. Letters and private papers which are violated (*violados*) or seized (*sustraidos*) shall have no legal effect.²³ Violation of any individual and social rights

16. CONSTITUCIÓN POLÍTICA DEL PERU art. 56 (1933).

17. CONSTITUCIÓN POLÍTICA DEL PERU art. 61 (1933).

18. CONSTITUCIÓN POLÍTICA DEL PERU art. 67 (1933).

19. CONSTITUCIÓN POLÍTICA DEL PERU art. 68 (1933).

20. CONSTITUCIÓN POLÍTICA DEL PERU art. 70 (1933).

21. *Decreto Supremo*, July 4, 1965. This suspension was extended for an additional thirty day period on August 3, 1965, because of a continuation of Communist terrorist activity. *Decreto Supremo*, No. 56, Aug. 3, 1965.

22. CONSTITUCIÓN POLÍTICA DEL PERU art. 57 (1933).

23. CONSTITUCIÓN POLÍTICA DEL PERU art. 66 (1933).

recognized by the Constitution "give cause for" (*dan lugar a*) the action of habeas corpus.²⁴

B. *Habeas Corpus* (*Recurso de Habeas Corpus*)

In the United States anyone who is being improperly deprived of his liberty may resort to a writ of habeas corpus. In many of the states, an arrested person has the right to resort to this writ if he is not brought before a committing magistrate "without unnecessary delay."²⁵ This system has a somewhat similar counterpart in Peru.

Any person confined to prison for more than twenty-four hours without a competent judge having commenced to take his "instructive declaration" is entitled to the extraordinary remedy of habeas corpus. The exercise of this right shall likewise lie for a violation of the individual and social rights guaranteed by the Constitution.²⁶ However, habeas corpus may not be availed of by vagrants who are arrested, expelled, or made to work by the police.²⁷

The petition for habeas corpus is presented before a judge instructor, or before the Correctional Tribunal whenever the detention is attributed to a non judicial authority. If the detention is attributed to a judicial order, the petition will necessarily be presented before the Correctional Tribunal.²⁸

The petition for habeas corpus may be presented by the detained person or by his kin, up to the fourth degree of consanguinity and the second degree of affinity, without any power of attorney. The petition must "forcibly contain" a sworn affirmation that more than twenty-four hours of detention have elapsed without the commencement of the instruction; that he is not being detained as a convicted criminal; that he is not subject to an instruction for any crime; that he is not a deserter from the Army, Police, Navy or the Air Force; that he has not been conscripted into the armed forces, nor arrested by his military superior, if he is in the armed forces; that he is not legally fulfilling the constraint decreed by a competent judge or tribunal, and moreover, the petition shall indicate the site where he is being detained.²⁹

The judge who receives the petition for habeas corpus shall immediately go to the place where the detained person is to be found. If he does

24. CONSTITUCIÓN POLÍTICA DEL PERU art. 69 (1933).

25. *E.g.*, Rules 5 and 9, FED. R. CRIM. P.; FLA. STAT. §§ 901.06, 901.23 (1965). If an accused is held more than 24 hours and he makes an incriminating statement, the statement may be held inadmissible for this reason in some courts. *E.g.*, *Vorhauer v. State*, 212 A.2d 886 (Del. 1965).

26. Art. 349.

27. *Ley* 4891.

28. Art. 350.

29. Art. 351.

not find any instruction by a competent judge and if he is certain of the affirmations of the petition, he shall immediately release the detained person and give an account to his Superior Tribunal. If he knows that the detained person is under the jurisdiction of any judge he may contest the jurisdiction of that judge if the grounds of the contest are in accordance with the law.³⁰

The judiciary in the United States stands as a kind of buffer between the executive authorities and the individual citizen, but it has no inherent right to punish the police for any improper deprivation of liberty or other abuse unless the aggrieved citizen institutes a proper civil action.³¹ In the Peruvian system the judiciary actually control the police authorities and, therefore, they have been authorized *ex officio* to punish infractions of the rules.

If the head of the establishment where the detained is found refuses to give ingress to the judge or to comply with the verbal order to liberate the defendant, a suitable instruction will be commenced against him for a crime against individual liberty.³² When the petition for habeas corpus is presented before the Correctional Tribunal, it may be entrusted to one of the judge instructors in order that he may go to the site of detention and liberate the detained individual, provided that the petition is proper according to these rules.³³ Whenever the detention is in a place separate from the one where the judge or Tribunal has received the petition, the judge instructor or the Tribunal shall order a judge instructor, or justice of the peace, of the particular district to comply with the provisions of these rules.³⁴

If the petition for habeas corpus is declared well founded and the order of detention had been given by the political authority, the Tribunal which decreed the liberty, or to which the decree of liberty was communicated by the judge instructor, shall cite the official who appears guilty, the injured person, and the prosecutor (*fiscal*) to a hearing. After arguments have been submitted in accordance with the rules of this Code the Tribunal shall impose a penalty upon the official of deprivation from employment to which he may not return until two years have passed. The Tribunal may also imprison the official for a period of up to three months in case it considers the "abuse" to be a grave abuse of authority.³⁵ The authority who carried out the illegal imprisonment may not be excused from the responsibility and the penalty stated above because he acted

30. Art. 352.

31. *E.g.*, *Monroe v. Pape*, 365 U.S. 167 (1961); *Wakat v. Harlib*, 253 F.2d 59 (7th Cir. 1958), *but see* *White v. Towers*, 235 P.2d 209 (Cal. 1951).

32. Art. 353.

33. Art. 354.

34. Art. 355.

35. Art. 356.

under the order of a superior.³⁶ If the inculpatated authority alleges an order from the Government as an excuse, the Tribunal, without prejudice to imposing the penalty upon the authority performing the act, shall give an account of the proceedings to the Chamber of Deputies so that they may consider it as an accusation and comply with what is prescribed by the Law of Responsibility.³⁷

The placing of guards at a domicile shall be considered as arbitrary detention of the person who occupies it, or of the one whose liberty is attacked, and habeas corpus may be used.³⁸

C. *The Commencement of the Instruction-Citation and Detention of the Accused (Principio de la Instrucción-Citación y Detención del Inculpado)*

As indicated in the introduction to this article there is a dramatic difference between the pre-trial investigative stage in the United States and Peru. In the United States the investigation of a crime is under control of the police and prosecuting authorities. The intervention of the judiciary is limited to hearing writs of habeas corpus, the preliminary hearing (which is often an arid formality) and arraignment. The investigation is conducted in secret and the accused normally has no right to participate in it. Limited discovery rights have been granted to criminal defendants in some states,³⁹ but in general, the prosecution retains the right to maintain secrecy until the trial. The only real judicial control of the prosecuting authorities is at the arraignment stage when the accused may move to suppress the results of an unlawful search and may make other pre-trial motions, and later at the trial stage when the rules of evidence act as a check upon the prosecution.

In the Peruvian-civilian system the judiciary controls the prosecuting authorities from the beginning of the investigation until its conclusion. With this cohesion between the judiciary and the prosecuting authorities it might be thought that the judiciary would lose the quality of impartiality; however, this danger has been curtailed by having one judge—the judge instructor—make the investigation and then having a separate court of three judges try the case.

The “instruction” is designed to gather the proof of the accomplishment of the crime, the circumstances in which it has been perpetrated, its motives and to discover its authors and accomplices. This purpose is accomplished by establishing the distinct participation of those who

36. Art. 357.

37. Art. 358.

38. Art. 359.

39. Traynor, *Ground Lost and Found in Criminal Discovery in England*, 39 N.Y.U.L. REV. 749 (1964); 6 WIGMORE, EVIDENCE §§ 1851-1855a (3d ed. 1940, Supp. 1964); 2 UNDERHILL, CRIMINAL EVIDENCE § 501a (Supp. 1962).

have taken part in the preparatory acts, in the execution of the crime, or who have become involved after its accomplishment by erasing the clues which serve for the discovery of the crime, by giving aid to the persons responsible or by having wrongfully benefited from the results of the crime.⁴⁰

The instruction is private. Defense counsel may be informed in the office of the judge of instruction of those proceedings which the accused does not attend, it being sufficient that he requests the right to be informed during "working" hours. Nevertheless, the judge may order that some steps be conducted in private for a period of time when he judges that the knowledge of the defense counsel may obscure or make difficult in any manner the end of the investigation which is being conducted. In any case, the secret nature of the instruction shall cease when the judge places the completed instruction at the disposition of the defense counsel for a period of three days in order that he may inform himself of the entire instruction. This is true whether or not he has attended the steps of the instruction.⁴¹ It is to be noted that defense counsel under this system will learn the prosecution's case in advance of the trial; the same cannot be said for defense counsel in the United States. In this light, which system is more "inquisitorial"?

The instruction may be initiated by the judge instructor *ex officio*, or at the request of the Public Ministry, or by denunciation by the victim or his kin, or by complaint (*querrela*—a complaint of criminal nature with regard to some specific crimes in which the action is not "public" but at the *request* of the injured party) in those cases established by this code.⁴²

The instruction steps shall commence *ex officio* when the commission of a crime, which does not require the previous accusation or complaint of the aggrieved party, comes to the knowledge of the judge instructor. In such case, the prosecuting agents, superior political authorities or the members of the judicial police shall denounce the criminal act in writing before the judge instructor. When the act does not deal with a crime *en flagrante*, the denunciation before the judge instructor may only be made by the victim, his ascendants, descendants, spouse, and collateral kindred within the fourth degree of consanguinity and within the second degree of affinity, adoptive fathers or sons, guardians or curators.⁴³ The "popular action" (*acción popular*—in the sense that any member of the public may institute criminal proceedings even though he is not the victim and has no unique interest in the case) shall be granted only in those cases of *en flagrante delicto* and shall be denounced in writing before the Public

40. Art. 72.

41. Art. 73.

42. Art. 74.

43. Art. 75.

Ministry, who shall request the judge to begin the instruction when he (the Public Minister) considers that the act is true and that it constitutes a crime.⁴⁴

In the United States it would appear that the arrest of the accused is the standard way of initiating the investigation. There would not seem to be any inherent reason for this procedure in cases involving persons with fixed places of abode and family and financial roots in the community who are accused of less than capital crimes. The efficacy of arrest (as enabling the police to question the accused) has also been seriously affected by the holding in *Miranda v. Arizona*.⁴⁵ It is wondered if the Peruvian system of ordering the accused to appear before a judge would not be a sensible alternative to our present system?

The judge instructor may dictate an order of appearance or of detention against the accused. The order to appear (whose text shall remain in the records) shall set forth the crime of which the cited person is accused and shall order that he present himself to the court on a designated hour and day with a warning that he will be detained if he fails to appear. This citation shall be delivered by the clerk (*actuario*-court clerk) to the accused or left with a person who has been placed in charge of his domicile. The clerk shall make a written report stating the identity of the person to whom he gave the summons, that he found such place to be the domicile of the accused and that he has not left the place of the proceedings.⁴⁶

If the accused fails to appear, the judge instructor may consider that the accused has not been informed of the citation, or that he is evading it, and he may repeat the order to appear or decree his detention.⁴⁷

Provisional detention of the accused shall be ordered:

1. When he has been surprised in the act of committing the crime, or in acts preparatory to the same, or when he was pursued immediately by the victim, the police or by any person;
2. When it is a crime against the possessions of the state;
3. When it is requested by the Public Ministry and the nature of the crime demands it in the judgment of the judge instructor;
4. When he is a "repeater" (*reincidente*), a vagrant, lacks a domicile or there are founded presumptions that he will evade the trial (*juzgamiento*).⁴⁸

44. Art. 76.

45. 384 U.S. 436 (1966); see also *Escobedo v. Illinois*, 378 U.S. 478 (1964); Sutherland, *Crime and Confession*, 49 HARV. L. REV. 21 (1965); Milledge, *Escobedo—Toward Eliminating Coerced Confessions*, 19 U. MIAMI L. REV. 415 (1965).

46. Art. 79.

47. Art. 80.

48. Art. 81.

When the detention has been accomplished, the head of the establishment where the detained person has been delivered shall immediately give written notice to the judge instructor, or, in his absence, to the Public Ministry. In case this notice is not made within twenty-four hours, the head of the establishment shall be responsible for the crime of arbitrary detention.⁴⁹ The principal purpose of the provisional detention is for the accused to give his "instructive declaration." After this has been accomplished, the judge instructor shall release him with the knowledge of the prosecuting agent if there are no founded motives for supposing the accused is responsible for the crime. If the prosecuting agent opposes the release of the accused, the detention shall be continued until the steps of the instruction have been performed. Provisional detention may not last more than ten days and the release or definitive detention of the accused must be ordered within this period. The judge instructor will be legally responsible for a violation of this rule.⁵⁰

If, after the instruction has terminated or after the first steps requested by the prosecuting agents have been performed, the judge presumes the culpability of the accused, he shall order the definitive detention of the accused which will continue during the proceedings, except when he is granted provisional liberty under a bail bond or pledge (*caución o fianza*).⁵¹

The instructive declaration of the accused must be taken, or at least commenced, by the judge instructor before the accused has been detained for twenty-four hours.⁵² The head of the penal establishment is obligated to deliver the detained person to the office of the judge instructor when forty-eight hours have passed and the instructive declaration has not been commenced.⁵³ The accused who has not been notified of the order of provisional detention before twenty-four hours, or of the order of definitive detention after ten days, may complain (*quejarse*) to the Correctional Tribunal about the arbitrary detention. The Tribunal after informing the judge and without other proceedings than hearing from the prosecutor, shall decide what is proper. If the Tribunal considers that the complaint is well founded, it shall order the release of the accused or commit the instruction to another judge instructor.

The judge instructor must communicate to the Correctional Tribunal the reasons for the commencement of the instruction and the order of detention (provisional or definitive) or liberty, in such case.⁵⁴ When the Tribunal judges it to be unfitting for the instruction to be continued before

49. Art. 82.

50. Art. 83.

51. Art. 84.

52. Art. 85.

53. Art. 86.

54. Art. 88.

the judge instructor who initiated it because of the merits of the communications received from him, or by information or petitions received from the prosecuting agent, the civil party or the accused, it may commend the instruction to another judge or designate a judge *ad-hoc*. The Correctional Tribunal may order the detention of the accused who has been erroneously liberated. This detention shall be considered definitive and may only be suspended in the form articulated in Articles 110 et seq.⁵⁵

Subordinate questions, exceptions or prejudicial questions which are raised in the instruction shall be tried separately from the main case as "incidental issues."⁵⁶

The Public Ministry must be cited for all of the steps of the instruction, but his attendance is optional. The accused and the civil party shall attend those steps which the judge instructor believes necessary.⁵⁷ The steps of the instruction may be performed any day or any hour of the day.⁵⁸

When a detained accused has fled, the head of the penal establishment shall immediately inform the judge instructor of this fact, and shall submit to him the data which serve to establish the circumstances of the escape and the persons responsible for what has taken place.⁵⁹

D. *Provisional Liberty (Libertad Provisional)*

An accused in the United States is generally entitled to be released on bond when he is being detained for less than a capital offense.⁶⁰ The bail provisions of the Peruvian law are much more restrictive; however, the use of the order to appear rather than arrest may temper the harshness of the system.

An accused against whom a definitive detention order has been dictated may request that he be granted provisional liberty under a bail bond or pledge (*caución o fianza*). Provisional liberty shall be granted to those accused of crimes which are punishable by a maximum penalty of not more than two years imprisonment. The accused may also be granted provisional liberty when the crime is punishable with a greater penalty if the evidence "causes the charges which have been made against the accused to disappear." Finally, provisional liberty may be granted in those cases of crimes against property (*patrimonio*) if, in view of the amount and the circumstances of the crime, the judge prudently estimates that the sentence shall not exceed two years in prison, even when the maximum

55. Art. 89.

56. Art. 90.

57. Art. 91.

58. Art. 92.

59. Art. 93.

60. E.g., FLA. STAT. § 903.01 (1965). See ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 107-113 (1947).

limit of the penalty provided by law exceeds two years. Moreover, provisional liberty requires that the accused have a known domicile and habitual employment which shall be confirmed by means of a duly founded report from the police authority. In ruling on the request, the judge instructor must take into account the judicial antecedents, the penalties which may be imposed on the accused and the possibility that the accused may use this freedom to elude being tried.

In no case shall provisional liberty be granted under a pledge to appear (*fianza*) when the imputed crime merits more than six months imprisonment as a maximum penalty. In this case, provisional liberty shall only take place when it is granted under a bail bond (*caución*).⁶¹

In no case shall provisional liberty be issued:

1. For those officials and employees of any class of service of the State, cities, charities or institutions of a public (*fiscalizadas*) character, or under State supervision, accused of crimes against the property of the State or of the governmental entities for which they work;
2. For those accused of dynamiting fish, etc.;
3. For those accused of the crimes of abortion;
4. For those accused of crimes against the public health.⁶²

Nor will requests for provisional liberty be granted to "repeaters" (*reincidentes*), fugitives and those who have criminal habits, and these facts will be appraised from the criminal record of the accused which shall be added to the file which is made for each case.⁶³ In order to fix the sum of the bail bond or pledge, the Public Ministry and the Judge Instructor shall take into account the nature of the crime, the quality of the accused, his antecedents and the circumstances which make his flight improbable.⁶⁴ The accused shall make bail in the sum fixed by depositing it in the Office of Deposits and Consignations to the order of the judge instructor.⁶⁵

The personal surety (*fador*), after he has offered his personal guaranty and has expressly accepted the conditions designated by the judge, is obligated to present the person he vouched for as many times as it is demanded of him and, if he fails to do so, to make within 48 hours a deposit of the amount of the guarantee without any recourse. If he is summoned to make the payment and does not make it within the time designated in the summons, the judge shall order his detention for a period

61. Art. 103.

62. Art. 104.

63. Art. 105.

64. Art. 106.

65. Art. 107.

which may not exceed six months.⁶⁶ If liberty has been granted under a bond and the accused has not presented himself after having been notified at the domicile designated in the court records, he shall forfeit the sum deposited.⁶⁷

A pledge from a surety shall not be accepted if he has given one for another accused in the same or another instruction while this guarantee is pending.⁶⁸

If the judge instructor believes that a request for provisional liberty is proper, he will remit the request in a separate file to the prosecuting agent in order for him to express his opinion, and, if it is a favorable one, to fix the amount of the bail bond or pledge. After the return of the "incident" of provisional liberty by the Public Ministry, the judge instructor shall issue the proper order within the second day after its return. If the order deals with the bail bond, it shall require the presentation of a certificate which proves the deposit of the fixed sum.⁶⁹

The judge instructor may grant provisional liberty contrary to the opinion of the Public Ministry, as well as increase or diminish the amount of the bail bond or pledge designated by him, but the setting free of the prisoner shall not take effect in this case until the order is final.⁷⁰ The judge instructor shall flatly deny provisional liberty when he judges it to be improper.⁷¹ The judge instructor may also *ex officio*, or at the request of the Public Ministry, suspend the provisional liberty already granted and order a detention when he considers it proper.⁷²

The bail bond or pledge shall be cancelled:

1. When the personal surety is subrogated or when he surrenders the accused. The request for subrogation shall be dealt with on the same form as the offer to give bond.
2. When the accused has been restored to prison in order for the judge instructor to take his "instructive declaration."
3. When the proceedings are filed in the archives because the case does not merit going to the trial stage (*juicio oral*).
4. When the final sentence has been issued.
5. When the penal action is extinguished according to this Code.⁷³

66. Art. 108.

67. Art. 109.

68. Art. 110.

69. Art. 111.

70. Art. 112.

71. Art. 113.

72. Art. 114.

73. Art. 115.

The Correctional Tribunal shall resolve the incident of provisional liberty after receiving an opinion from the Public Ministry and citation of the accused. If the Correctional Tribunal disapproves of the Procedures of the judge instructor, it may withdraw the instruction and entrust it to a judge *ad hoc* if it is necessary.⁷⁴

The sum received for the bail bond or for the pledge shall serve for compensating the aggrieved party for his damages in case the accused is condemned. The excess which remains, or the entire sum if civil indemnification does not take place, shall be remitted to the Local Counsel of Patrons (*Consejo Local de Patronato*) in accordance with Article 404 of the Penal Code.⁷⁵

The accused to whom provisional liberty was granted shall be obliged to appear before the judge or before the political authorities at the times fixed in the order granting his release. Likewise, he must reside in the place of the instruction and may not change his habitation without previously communicating this fact in writing to the judge instructor. If the accused violates any of these rules, the judge shall order his recapture.⁷⁶ Orders deciding questions dealing with provisional liberty and bail are appealable in "both effects" (*ambos efectos*—in both effects means that the progress of the case or incident is stayed pending a decision on the appeal) by the Public Ministry, the civil party or by the accused. The recourse of nullity is not available with respect to these orders.⁷⁷

E. The "Instructive" Declaration of the Accused (*La Instructiva*)

An indigent accused in the United States is entitled to a court appointed attorney at the trial stage⁷⁸ and at any "critical stage" of the pre-trial proceedings.⁷⁹ It would also appear that he is entitled to retain an attorney as soon as he is arrested.⁸⁰ These rules are paralleled in the Peruvian code along with the concept that an accused may intelligently waive the appointment of an attorney.⁸¹

Before taking the instructive declaration, the judge instructor shall state to the accused that he has the right to be assisted by counsel (*defensor*) and if he does not designate one, the judge shall appoint one *ex officio*. If the accused agrees to the latter alternative, the judge instructor shall designate an attorney (*abogado*) or, if there are none, an "honorable

74. Art. 116.

75. Art. 117.

76. Art. 118.

77. Art. 119.

78. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

79. For a rather reactionary application of the "critical stage" rule, see *Montgomery v. State*, 176 So.2d 331 (Fla. 1965).

80. *Miranda v. Arizona*, 384 U.S. 436 (1966).

81. For an illustration of the "intelligent waiver" concept, see *Mason v. State*, 176 So.2d 76 (Fla. 1965).

person." But if the accused refuses to have an attorney, a record shall be made of his refusal and this record must be signed by the accused. The judge shall indefectibly appoint an attorney if the accused is illiterate or a minor.⁸²

At first glance, the Peruvian concept of an "instructive declaration" of the accused would seem quite strange to the eyes of an attorney from the United States. However, it is not too dissimilar from the police practice of questioning an arrested person. After *Miranda v. Arizona*,⁸³ it would seem that the police cannot question an accused after he has made a demand to consult an attorney; at least any questioning must apparently be made in the presence of his attorney. This latter rule closely resembles the Peruvian procedure.

The declaration shall be taken by the judge instructor in the presence of the defense attorney, of an interpreter if the accused is ignorant of the Spanish language and of the clerk of the court (*actuário*). The presence of any other person is prohibited.⁸⁴ Only in urgent cases or those in which the period of twenty-four hours is about to close, may the judge instructor commence the examination of the accused without the presence of defense counsel. In such cases, the taking of the instructive declaration shall not be closed until the defense counsel attends. The judge instructor shall immediately replace defense counsel who fails to respond to citations and shall impose upon him a fine of up to two hundred *soles*.⁸⁵

The judge instructor shall ask the accused his given name, paternal and maternal surnames, nationality, domicile, age, civil status, profession, if he has children and their number, if he has been "indicted" (*procesado*) or condemned before, and other data which he deems lawful for the identification of his person and the clarification of the circumstances in which he was found when he allegedly committed the crime. In succession he will be asked to express where, in whose company he was and his occupation on the day and hour in which the crime was committed, and a whole account with respect to the act or acts which have been imputed to him and his relations with the victims.⁸⁶

The questions which the judge instructor asks of the accused must not be obscure, ambiguous, nor suggestive or misleading. The questions shall, if possible, follow the chronological order of the facts. It is the purpose of the questions to make known to the accused the charges which have been imputed against him to the end that he may "destroy" or clarify them. If the accused invokes facts or evidence in his defense, they shall

82. Art. 121.

83. 384 U.S. 436 (1966).

84. Art. 122.

85. Art. 123.

86. Art. 124.

be verified in the briefest possible period.⁸⁷ If the judge instructor formulates questions which are not in accord with the above precepts, the defense counsel may explain or clarify them to the accused.⁸⁸

If the accused refuses to answer any of the questions, the judge instructor shall repeat them as clearly as possible, and if the accused maintains his silence a record will be made of this fact. The judge shall tell the accused that his silence may be taken as an indication of culpability.⁸⁹ This latter rule is, of course, directly contrary to the rule in the United States.⁹⁰ Those objects which are considered as means of proof of the crime shall be presented to the accused in order that he may acknowledge them.⁹¹

The answers of the accused shall be dictated to the clerk by the judge who will advise the accused and his attorney that they have the power to make corrections which they deem necessary. When the accused requests that he dictate his own answers and the judge believes that he has the capacity to do this, he shall accede to the request. The accused may read his declaration or it may be read by his attorney.⁹²

The Public Ministry or the accused may request a confrontation with the witnesses that he designates and who have already given their declarations. The judge instructor shall order the confrontation unless well founded reasons exist for denying it. In case of a denial, a record shall be made of the reasons and a copy of the decree will be remitted to the Correctional Tribunal. The accused may request that a copy of his plea be attached to the decree. In this case, the Correctional Tribunal shall decide whether or not the confrontation shall be permitted. The confrontation between accuseds may not be denied by the judge if the Public Ministry or one of the accused requests it.⁹³ The judge instructor may *ex officio* order a confrontation of the accused with one or more witnesses.⁹⁴

The judge instructor is absolutely prohibited from employing promises, threats or other means of compulsion even if it is only moral compulsion. He must exhort the accused to tell the truth, but he may not demand an oath nor a "promise of honor."⁹⁵ This latter rule is quite common in the civilian systems.⁹⁶ It seems to be based, at least in part, upon

87. Art. 125.

88. Art. 126.

89. Art. 127.

90. *Griffin v. California*, 380 U.S. 609 (1965). The Supreme Court of the United States has recently held that the *Griffin* holding is not to be given retroactive application. *Tehan v. Shott*, 382 U.S. 406 (1966).

91. Art. 128.

92. Art. 129.

93. Art. 130.

94. Art. 131.

95. Art. 132.

96. *E.g.*, see Murray, *The Proposed Code of Criminal Procedure of Guatemala*, 29

the realistic notion that it is quite unfair to extract an oath from an accused who may be expected to lie in order to save himself.

The judge instructor may maintain the accused incommunicado for not longer than ten days even after he has given his declaration when it is indispensable for the ends of the investigation. This incommunication may not impede conferences between the accused and his attorney in the presence of the judge instructor who may, however, deny the right to these conferences if he judges it unfitting. The judge shall give notice of the incommunication to the Correctional Tribunal and shall express his reasons for ordering it.⁹⁷ As a practical matter, virtually every accused is held incommunicado until he has given his instructive declaration because the judges of instruction believe that he will manufacture an alibi with the help of his attorney if he is allowed to see him in private. Many judges of instruction permit the accused to confer with his attorney before the judge; however, this procedure would seem to inhibit the fabrication of false testimony. This procedure of holding the accused incommunicado is improper in the United States, although it was perhaps too common prior to *Escobedo*.⁹⁸ Defense counsel shall give an oath or a promise on his honor, at his election, to guard absolutely the secrecy of the instructive declaration and the incidents of the instruction which have been communicated to him in accordance with this Code. In case of incommunication, he must promise or swear not to carry any kind of message between the accused and any other person, even a member of his family. The secrecy to which he is obligated shall last only during the period of the instruction. Likewise, any interpreter shall take an oath or promise on his honor that he will faithfully discharge his duty and that he will guard the secrecy of the instruction.⁹⁹

In case the instructive declaration is too extensive, it may be continued on different days, but it necessarily must be concluded before the tenth day. In the course of the instruction the judge instructor may examine the accused as many times as he believes fitting, observing always the rules prescribed in this section of the Code.¹⁰⁰

The confession of the accused does not relieve the judge instructor from performing all the steps necessary to prove the existence of the crime and the veracity of the confession.¹⁰¹ A similar rule, although too often breached perhaps in the trial courts, exists in the United States.¹⁰²

LA. L. REV. 728, 743 (1964); Murray, *A Survey of Criminal Procedures in Spain and Some Comparisons With Criminal Procedure in the United States*, 40 N.D.L. REV. 7, 39 (1964).

97. Art. 133.

98. *Escobedo v. Illinois*, 378 U.S. 478 (1964).

99. Art. 134.

100. Art. 135.

101. Art. 136.

102. *E.g.*, *Hodges v. State*, 176 So.2d 91 (Fla. 1965).

The instructive declaration must be signed by the judge instructor, the accused, defense counsel, the interpreter (if there is one) and the clerk of the court (*actuário*). If the accused does not know how to sign his name, his fingerprint impressions will be made on the declaration.¹⁰³

F. Witnesses (*Testigos*)

The judge instructor shall cite as witnesses:

1. The persons designated in the denunciation of the Public Ministry, or of the person harmed or in the police certificates as having knowledge of the crime or of the circumstances which preceded, accompanied or followed its commission;
2. Those persons whom the accused designates as useful for his defense, as well as those whom he specially offers for the purpose of demonstrating his probity and good conduct. The number of the witnesses included in these categories shall be limited by the judge, according to his criteria, to those necessary to elucidate the facts which he believes to be indispensable. The judge, moreover, may cite all persons whom he supposes may submit useful data for the instruction.¹⁰⁴

The judge shall designate the day and hour for the appearance of a witness under warning that he will be made to appear by force if he fails to appear.¹⁰⁵ If the cited person is a public employee or in military service, the judge, in addition to the direct citation to him, shall officially advise the witness' superior of the fact of citation towards the end that he will order his appearance.

A witness may not excuse himself from the responsibility which he incurs by a failure to appear because the order from his superior was not made. If the remiss witness is a soldier, these responsibilities will fall back on the superior officer who did not order his appearance.¹⁰⁶

The following persons shall not be obligated to declare as witnesses:

1. Clergymen, lawyers, doctors, notarys and mid-wives with respect to those secrets which have been confided to them in the exercise of their professions;
2. The spouse of the accused, his ascendants, descendants, brothers and sisters and brothers and sisters-in-law. The foregoing persons shall be advised of the right which they have to refuse to make a declaration, in whole or in part.¹⁰⁷

103. Art. 137.

104. Art. 138.

105. Art. 139.

106. Art. 140.

107. Art. 141.

It is readily apparent that the Peruvian classification of privileged communications is slightly broader than its counterpart in the United States.¹⁰⁸ It is also to be noted that the above relatives of the accused (with the exception of the accused's spouse) would be forced to testify in the United States.¹⁰⁹ Further, the Peruvian exemption from testifying may be asserted by the witness; in the United States the privilege may be asserted only by the accused.¹¹⁰

Before receiving the declaration of a witness, the judge instructor shall ask him if he professes a religion; if he does, the judge shall demand an oath, and, if he does not, the witness shall promise on his honor to tell the truth. The judge instructor may not demand an oath or a promise to tell the truth:

1. When witnesses, who are privileged from being forced to testify, do in fact testify;
2. From minors under the age of eighteen and from those persons whom from a lack of mental development or from mental decadence are considered in a less than normal intellectual state. The judge shall explain to each witness that he will incur penal responsibility if he fails to tell the truth.¹¹¹

The injured party shall necessarily be examined and in the same manner as the witnesses.¹¹² Deaf and dumb witnesses who are literate shall give their oath (or promise) and declaration in writing. Those deaf mutes who do not know how to write shall testify by means of sign language provided that this reveals facts of easy perception and which are comprehensible in the opinion of the judge.¹¹³

The witnesses shall be asked for their names, given names, nationality, ages, religion, civil status, domiciles, their relations with the accused, with the injured party or with any person who is interested in the proceedings. And ordinarily they shall be invited to express the facts which the judge deems pertinent, procuring, by means of opportune questions and precise observations, that the declarations are complete, that the contradictions are clarified and that explanations are given for the affirmations or denials which have been made.¹¹⁴ When the interrogation deals with whether a witness recognizes a person or thing, he must first describe the person or thing, and afterwards he or it will be presented to him by procuring a re-establishment of the conditions in which the per-

108. 8 WIGMORE, EVIDENCE 541-641, 818-868, 869-878 (McNaughten ed. 1961).

109. MCKELVEY, EVIDENCE 543-544 (5th ed. 1954).

110. As to who may assert the privileges in the United States, compare 8 WIGMORE, EVIDENCE §§ 2196, 2241, and 2321 (McNaughten ed. 1961).

111. Art. 142.

112. Art. 143.

113. Art. 144.

114. Art. 145.

son or thing existed when the fact occurred. Likewise, the judge instructor may reconstruct the scene of the crime or its circumstances when he judges it necessary in order to appraise the declaration of any witness, the victim or the accused.¹¹⁵

Witnesses who are ill or disabled from appearing shall be examined by the judge instructor in their domiciles. In case of danger of death, the witness shall be examined immediately.¹¹⁶ The President of the Republic, the Arch-Bishop and Bishops (in their respective dioceses) shall declare, at their election, either in their domiciles or in the site of their offices.¹¹⁷

The declarations of accredited diplomatic agents in Peru shall be given by means of a report, and to this effect a copy of the interrogatory shall be given to the Ministry of Foreign Relations for delivery to the diplomatic agent.¹¹⁸

The examination of witnesses who are residents of another province shall be made by means of an *exhorto* (letters requisitorial) to the judge of this place by explaining in the commission (*despacho*) the facts which must be investigated. For declarations of witnesses who are residents of the districts of the same province, the *exhorto* shall be issued to judges of the peace when the judge instructor decides that the personal attendance of the witnesses is not indispensable. These commissions (*despachos*) are secret and they may not be communicated by the judge who receives them to any person before the declaration of the witness has been completed. Whenever railroad transportation or other rapid means of transportation is available between the place of the trial and the place where the witnesses reside, the judge instructor shall order the personal appearance before him of those witnesses whom he judges to be important to the case.¹¹⁹

In urgent cases, the commission to examine witnesses may be given by means of telegraph, telephone or radio. The important data which results from a declaration may be transmitted by the same means wherever the judge instructor requests it. However, the declaration must be made in writing in accordance with the rules established by the code.¹²⁰

These latter provisions are important in Peru because of the vast length of the country and the fact that access to many areas is difficult. Some areas are accessible only by airplane because of the Andes mountains. An interpreter shall attend at the examination if the witness is ignorant of the Spanish language, but the declaration shall be recorded in

115. Art. 146.

116. Art. 147.

117. Art. 148.

118. Art. 149.

119. Art. 150.

120. Art. 151.

both languages. The interpreter shall swear or promise on his honor to loyally discharge his duty.¹²¹

Those witnesses whose declarations are of capital importance, in the judgment of the judge instructor, shall be advised that if the Correctional Tribunal judges it necessary, they must attend the trial (*juicio oral*).¹²² The judge instructor shall advise these witnesses that they have a right to request an indemnification. If any of them request it, the judge shall be guided in fixing the amount by the habitual occupation of the witness. The amount advised by the judge and the amount fixed shall be stated in the declaration.¹²³

Witnesses shall be examined separately. Confrontations of witnesses with each other are prohibited, but this shall not prevent questioning a witness in order to clarify contradictions which appear between a declaration and references or versions previously recorded from another witness.¹²⁴ This Peruvian rule forbidding the confrontation of witnesses with each other is contrary to the rule prevailing in many other civilian systems.¹²⁵

The judge instructor shall personally communicate to the accused or his counsel the names of the witnesses, before they declare, in order that the accused or his counsel may make remarks about their capacity or impartiality. The responses which the accused or his counsel make shall be expressly recorded. In case of objections to the witnesses, the judge shall question the objectors as to how they may prove the facts on which they have based the objection and he *ex officio* shall make the investigations which are necessary for this proof. The objection does not impede the receipt of the declaration of these witnesses.¹²⁶

The accused personally, or through his counsel, may petition the judge instructor that he be granted the right to be present during the declarations of some or all of the witnesses. The judge shall accede to this request with respect to those witnesses who may not be influenced by the presence of the accused and when he believes that this confrontation shall not affect the discovery of the truth.¹²⁷ When the accused attends during the declaration of a witness, he shall do so with his counsel who may request the judge to ask the witness certain questions. The judge may

121. Art. 152.

122. Art. 153.

123. Art. 154.

124. Art. 155.

125. E.g., see Murray, *The Proposed Code of Criminal Procedure of Guatemala*, 29 LA. L. REV. 728, 754 (1964) and Murray, *A Survey of Criminal Procedure in Spain and Some Comparisons with Criminal Procedure in the United States*, 40 N.D.L. REV. 7, 44 (1964).

126. Art. 156.

127. Art. 157.

accede to or deny this request according to his judgment. In case of a denial, a record shall be made of the offered questions.¹²⁸

The questions and answers in each declaration must be recorded with perfect fidelity. The declarant must respond orally without the aid of any writing or document. After the declaration has been written, it shall be read to him in order that he express his agreement. Nevertheless, the witness may read it himself when he requests it. The judge and those who have attended this step shall sign the record. The witness' fingerprint impressions will be placed on the declaration if he is illiterate.¹²⁹

G. *Experts (Peritos)*

The Peruvian code seems to place a much greater weight on the opinions of experts than does the law in the United States. This difference of approach may be attributed, in part, to the average North American's vague feelings of doubt and unease about the intellectual. Also, most of the experts appointed in the Peruvian system are career employees of the state. They are, therefore, more likely to be free of the partiality to be expected in a United States expert who is especially employed by the prosecution or the defense.

The judge instructor shall appoint experts when he believes it necessary in order to know or evaluate any important fact which requires expert knowledge. The accused, the Public Ministry, and the civil party will be notified of this appointment.¹³⁰ Only two experts are to be appointed and the judge must give preference to specialists (if there are any available), and he must prefer those who are serving the State. If there is a lack of professionals available, he must appoint persons of "known honorability and competence" in the matter. The judge who designates experts not serving the state must determine their honorarium in the order appointing them.¹³¹ In the same decree in which the judge appoints the experts he must fix a period of time in which they are to present their opinion, and he must take care that this period will be sufficient.¹³² Experts who delay their opinion will be compelled to issue it within forty-eight hours.¹³³ Experts (who have received privileged communications or are related to the accused) may be excused from this duty in the same manner that witnesses under similar conditions may refuse to give their declarations.¹³⁴

The accused may object to the experts for the same reasons that

128. Art. 158.

129. Art. 159.

130. Art. 160.

131. Art. 161.

132. Art. 162.

133. Art. 163.

134. Art. 164.

he may object to witnesses. The judge shall investigate the facts on which the objection is based. If the objection has been proved, he will then appoint other experts. However, the objection to the experts which was raised by the accused will not impede the presentation of the opinion. Both the accused and the civil party may then appoint an expert whose opinion will be added to the instruction.¹³⁵

If the circumstances demand an immediate examination because of fear that the clues of the crime will be obliterated, the judge instructor may order that it be performed by one or two experts. In this case, it is not necessary to cite anyone and the operation must be performed within twenty-four hours. The opinion issued in this manner may be submitted to the study of other experts (designated in accordance with the foregoing rules) who will as soon as possible examine the things which were the subject of the first opinion. The experts who made the first report will be cited to appear at this examination.¹³⁶

The experts shall personally deliver their opinions to the judge instructor who, in the same act, will take their oath or promise to speak the truth and they shall be questioned as if they were witnesses. He shall ask them if they are the authors of the opinion which they present and if they have proceeded impartially in the examination and in the information which they have subscribed. He shall also ask about the circumstances necessary to clarify the opinion and which are derived from the facts known from the instruction and from the opinions. If there are contradictions in the opinions, the judge shall open a hearing in which each one of the experts shall state the reasons which he has for his opinion, and the judge shall require them to write a synthesis of their arguments. The experts may not refuse to give explanations which the judge requests. The experts must bring the persons or objects of the expert examination to this hearing if it is possible to do so.¹³⁷ The examination of the experts is obligatory upon the judge instructor. The accused, his counsel, the Public Ministry, and the civil party may attend this hearing. Any of these persons may request the judge instructor to demand the clarification of any point by the experts.¹³⁸

H. *Special Investigative Steps (Diligencias Especiales)*

When the crime which is being prosecuted has left clues or material evidence of its perpetration, the judge instructor shall recover and conserve them for the trial (if it is possible) by making a visual inspection and description of everything which may have a relationship with the existence and nature of the act. To this end he shall record a description of

135. Art. 165.

136. Art. 166.

137. Art. 167.

138. Art. 168.

the place of the crime, the site and condition of the objects which were found, the descriptive details (*accidentes*) of land or situation of the habitations and all other details which may be used for the accusation as well as for the defense. When it is convenient, for the purpose of greater clarity or verification of the facts, a sufficiently detailed plan of the place will be reproduced or a picture of the persons who have been the subject of the crime will be drawn, or a copy or sketch of the effects or instruments of the crime will be made.¹³⁹

Instruments, arms, and effects which have been recovered shall be sealed (if it is possible) by ordering their retention and conservation. The records of this step shall be signed by the person in whose possession these objects were found, or by two witnesses if that person refuses to sign. If it is not possible to conserve the objects in their original form, the judge shall decide what he deems the best manner to conserve them.¹⁴⁰

In the instruction for a case of violent death or suspected criminality, the judge and the experts shall make an examination of the cadaver before its burial, and the judge shall order that the autopsy be performed in his presence by appointed experts and shall request explanations from them which he considers necessary. A written record will again be made of this step.¹⁴¹ The identity of the cadaver shall be established prior to the autopsy by interrogating the person accused of causing the death and those who knew the deceased.¹⁴² If there are no witnesses who may identify the cadaver and if the condition of the body permits it, the body shall be exposed for twenty-four hours to the public in an appropriate place by taking the proper precautions and by fixing a placard which indicates the site, hour and circumstances in which the body was found and the obligation of those who know the identity or have any data to submit it to the judge instructor.¹⁴³

If the cadaver is not identified, the judge instructor shall have photographs made of the body and conserve all of the clothing which may serve for identification. Besides the photographs, the records will be annotated with all the marks and scars useful to determine the identity or elucidate the circumstances of the death.¹⁴⁴ The physician who attended the deceased in his last illness shall be "invited" to attend the autopsy to give technical information about the course of the illness.¹⁴⁵

The autopsy may be made in the presence of the accused and his

139. Art. 170.

140. Art. 171.

141. Art. 172.

142. Art. 173.

143. Art. 174.

144. Art. 175.

145. Art. 176.

counsel if they request it. The judge instructor must record the observations which they may make during this step.¹⁴⁶

If the crime has been denounced or discovered after the burial, the judge instructor shall order the exhuming of the body, and shall accomplish the examination and the steps previously indicated as soon as possible.¹⁴⁷

The autopsy must always include the opening of the cranial, pectoral and abdominal cavities. It shall also extend, in necessary cases, and provided that it is practical, to the spinal (*raquidea*) cavity and any organs which must be examined in detail and methodically in accordance with scientific indications. When the autopsy deals with a new-born child, the body shall be examined to ascertain if the child was alive after or during the birth, if it was completely developed, and if it was born "in conditions of viability."¹⁴⁸ If indications of poisoning exist, the experts shall examine the viscera and suspected matters which they find in the cadaver or elsewhere and remit them in suitable wax sealed vessels to the criminology laboratory of the Judicial Police. The specimens examined by the experts shall be conserved, if possible, in order to be presented during the trial.¹⁴⁹

In case of physical wounds, the judge instructor shall demand that the experts determine in their report the arms or instruments which caused, them, if they have left deformities and permanent scars on the face, if they put life in danger, caused incurable infirmity or the loss of any member or organ and, in general, all of the circumstances which in conformity with the Penal Code are of influence in the classification of the crime.¹⁵⁰

In abortion cases, the experts shall prove the pre-existence of the pregnancy, the demonstrative signs of the violent expulsion of the fetus, the causes, the probable authors and other like circumstances which serve to evaluate the character and gravity of the act.¹⁵¹ The experts must verify the pre-existence of the the subject matter of the crime in crimes against patrimonial property (*patrimonio*).¹⁵²

The exhibition or delivery of a docket of papers or writings preserved in an official archive must be made by the head of the office, but in case he declares that these papers contain official secrets, it shall require the authorization of the corresponding Ministry who may refuse to submit

146. Art. 177.

147. Art. 178.

148. Art. 179.

149. Art. 180.

150. Art. 181.

151. Art. 182.

152. Art. 183.

documents which contain military or diplomatic secrets by limiting the exhibition to a copy of a part of the document. If the judge instructor considers it necessary, in grave crimes he may take the correspondence of the accused whether it is found in the post-office, or in a telegraph office, or in the possession of the persons who have received it¹⁵³ and retain that which refers to the crime. Those parts of the withheld letters or telegrams which may be communicated without harm to the instruction shall be delivered to the addressees under a court order.¹⁵⁴

Investigations in public offices, military and political quarters, social clubs, convents and schools and in places in charge of an authority, must be facilitated immediately by the superior found there pursuant to a simple request of the judge instructor under penalty of being considered responsible for a crime against the administration of justice.¹⁵⁵

Only the judge instructor may read the papers of the person who is the object of the search, and he must separate those which he considers necessary for the instruction and communicate them to the prosecuting agent.¹⁵⁶ The material objects of the crime may be returned to the owner, and a record shall be made of this act.¹⁵⁷

The judge instructor *ex officio*, or upon petition of defense counsel or the prosecuting agent, shall order a mental examination of the accused by two expert psychiatrists when it is suspected that the accused suffers mental derangement or other pathological condition which may alter or modify his criminal responsibility. Defense counsel or the prosecuting agent may also appoint an expert. The judge instructor shall compel the accused to attend his psychiatric examination.¹⁵⁸ If the judge instructor, by evaluating the conclusions of the mental examination, acquires the conviction that the accused is not deranged, or that his actions are only the perturbation of his conscience, which does not relieve him from responsibility even though it may attenuate it, he shall order the continuation of the instruction at the end of the hearing. In this case, this incident shall then be submitted to the Correctional Tribunal which may, after a hearing, reserve the question until the instruction is remitted to it, or order a new examination, or entrust the case to another judge of instruction or dictate measures which it judges fitting.¹⁵⁹ On the other hand, if the judge instructor is persuaded that the accused suffers a mental derangement he shall order, after hearing the prosecuting agent, his entry to an insane asylum and shall submit the instruction to the Correctional Tribunal in order that it may definitively resolve the question.¹⁶⁰

153. Art. 184.

154. Art. 185.

155. Art. 186.

156. Art. 187.

157. Art. 188.

158. Art. 189.

159. Art. 190.

160. Art. 191.

If the accused becomes ill during the detention, to the point that it is necessary to deliver him to a hospital, he shall request this of the judge who shall accede to his request after having considered medical information and after taking necessary security measures. This same rule will be applied by the Correctional Tribunal when the accused becomes ill during the time he is under its jurisdiction.¹⁶¹

When a death occurs, or the crimes of homicide, wounds (*lesiones*), arson, or of any other nature are committed on railroads or ships, the captain, conductor or head of the vessel shall make the first investigations by securing the presumed delinquent and preparing a record of the declarations of persons who were present at the act and whose evaluation will be useful for its elucidation. The accused and these records shall be delivered to the nearest police authority in order that they may be placed at the disposition of a "competent judge" (in the sense of a judge who has jurisdiction over the subject matter),¹⁶² who will be the first one to whom denunciation of the crime is feasible.

For the investigation of an act which constitutes a crime or for the identification of those who are culpable, all the scientific and technical means which are possible shall be employed, such as examinations of fingerprints, blood, stains, traces, documents, arms and projectiles.¹⁶³ In addition to the previously discussed steps, the judge instructor or the Correctional Tribunal may order, at any time, the examination of the accused or the witnesses in order to determine their physiological, intellectual, and physical condition.¹⁶⁴

I. *The Conclusion of the Instruction (Fin de la Instrucción)*

The prosecuting attorney in the United States has virtually uncontrolled discretion in prosecuting or not prosecuting an accused. He may subject an accused to the embarrassment and expense of a criminal trial while knowing that he is unable to prove a case; conversely, he may *nolle prosequere* charges which he knows that he could prove. The prosecuting attorney may be impeached or retired by the voters, but there is little judicial control over his actions.¹⁶⁵ Under the Peruvian "checks and balances" system, primary responsibility for prosecuting or not prosecuting rests with the judge of instruction who is subject to the check of the individual prosecutor and his office—the Public Ministry. All of them, in turn, are subject to the control of the trial court.

The instruction period of the case will be concluded when the judge

161. Art. 192.

162. Art. 193.

163. Art. 194.

164. Art. 195.

165. Compare 5 WEARTON, CRIMINAL LAW AND PROCEDURE 227 (1957) with ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL, 216-218, 337-343 (1947).

instructor considers that he has accumulated sufficient evidence to prove the corpus delicti and the probable guilt of the accused, in accordance with article seventy-two of the Code.¹⁶⁶ If the judge considers the instruction terminated, he shall remit it to the prosecuting agent in order that he might express his opinion about its merits.¹⁶⁷ If the prosecuting agent upon receiving the instruction considers that substantial steps have been omitted in order to complete the investigation, he shall indicate those steps which are necessary in his judgment and shall request the judge to extend the instruction. On the other hand, if he believes that the instruction has satisfied its aims, he shall express his opinion about the crime and the responsibility or innocence of the accused.¹⁶⁸

If the judge instructor judges that the extension requested by the prosecuting agent is improper, he shall deliver the records to the Public Ministry for the issuance of a report. After the report has been issued, the judge shall submit the records to the Correctional Tribunal with his report about the points indicated in the preceding paragraph.¹⁶⁹

If the judge considers that the crime and the responsibility of the accused has been sufficiently proved and the accused has been detained, he shall order his delivery to the seat of the Correctional Tribunal. When the accused is at liberty under bail or pledge, he shall be notified to present himself to the Tribunal under warning that he will be detained if he fails to do so; a citation will also be made upon the surety. If the judge agrees with the opinion of the prosecuting agent about the innocence of the accused, he shall be placed at liberty and the records will be elevated to the Correctional Tribunal; the accused shall be notified that he must present himself to the Correctional Tribunal in case it declares that a trial must take place.¹⁷⁰

The judge may order the unconditional liberty of the accused at any stage of the instruction in which the non-culpability of the accused has been fully proved. However, the order granting unconditional liberty may not be executed until it has been approved by the Correctional Tribunal.¹⁷¹

It is the responsibility of the officials who have taken part in the instruction to terminate it within a maximum period of six months.¹⁷² After the period of six months has elapsed, the instruction shall be indefectibly elevated to the Correctional Tribunal in the stage which it has reached along with the reports of the prosecutor and the judge instructor.¹⁷³ The instruction will be placed in the office of the judge at the

166. Art. 196.

167. Art. 197.

168. Art. 198.

169. Art. 199.

170. Art. 200.

171. Art. 201.

172. Art. 202.

173. Art. 203.

disposition of the parties for a period of three days before it is elevated to the Tribunal.¹⁷⁴

J. *The Instruction Against Absent Accuseds (De la Instrucción contra Inculpados Ausentes)*

The Peruvian rule resembles the usual rule in the United States that the investigation of a crime may be made even though the accused has not been apprehended; however, they differ as to the trial of an absent defendant. In the United States the accused who has not been apprehended may not be tried at all while in Peru he may be tried and a sentence of "absolution" may be entered. He may not be condemned during his absence, but if a condemnatory sentence was entered against his co-accuseds who were present, his own trial upon his capture will be rather brief.¹⁷⁵

The instruction against an absent accused shall be conducted by the judge who will appoint an *ex officio* defense counsel who must intervene in all of the steps and make use of the appropriate legal remedies. One defense counsel shall also be appointed to represent all absent accuseds who are included in an instruction being conducted against accuseds who are present. If there is a manifest incompatibility between the defenses of the absent accuseds, the judge shall appoint such additional counsel as may be necessary.¹⁷⁶ The judge instructor shall then elevate the records to the Tribunal with his respective report when the instruction against the absent accused is completed.¹⁷⁷

III. THE TRIAL (*Del Juicio*)

A. *The Correctional Tribunal (Tribunal Correccional)*

The trial is before the Correctional Tribunals, constituted in each Superior Court by one Court of Justice (*sala*), composed of three judges (*vocales*) and must be oral and open to the public.¹⁷⁸ The Correctional Tribunals shall function in various courts in a number provided by law. The Presidents of the Superior Courts shall order the establishment of additional Tribunals if there are an excessive number of cases; these *ad hoc* tribunals shall be formed by two substitute judges and a member of the Court who shall preside over the court (*sala*).¹⁷⁹

174. Art. 204.

175. Arts. 318-322. For the required confrontation rule in the United States, see Murray, *The Power to Expel a Criminal Defendant From His own Trial: A Comparative View*, 36 COLO. L. REV. 171 (1964), *Pointer v. Texas*, 380 U.S. 400 (1965) and *Douglas v. Alabama* 380 U.S. 415 (1965).

176. Art. 205.

177. Art. 206.

178. Art. 207.

179. Art. 208.

The intervention of the Public Ministry in the trials (*audiencias*) is obligatory except in those trials which are reserved for the private action. The omission of this intervention shall cause the nullity of the trial. The prosecutor may be replaced by a substitute.¹⁸⁰ The trial may not be conducted without the presence of the accused and his counsel.¹⁸¹ If the prosecutor or the attorney designated by the accused or by the Correctional Tribunal is not able to attend the trial because of illness or other impediment, he shall be substituted for by another prosecutor or defense counsel, as the case may be. The tribunal may then adjourn the trial for one, two or three days, in accordance with its judgment, in order that the substitute may inform himself of the instruction and confer with the accused.¹⁸²

The accused shall appear at each hearing without bindings or chains and accompanied only by those members of the police necessary to prevent his escape.¹⁸³

The Secretary and the *rappporteur* (*Relator*) of the Correctional Tribunal shall attend the trials. The *rappporteur* shall read the records which the President orders and the secretary (clerk) shall precisely record all that occurs in the trial.¹⁸⁴ When the Tribunal orders the attendance of any experts or witnesses, their attendance is obligatory. Nevertheless, their absence shall not annul the proceedings when the Tribunal decides to carry out the trial.¹⁸⁵

A trial judge in the United States has very limited power to order that a criminal trial be conducted in private because of the constitutional requirement that an accused is entitled to a public trial.¹⁸⁶ It is submitted that this constitutional requirement, which was designed to protect the accused from the evils of a trial *in camera*, has been especially utilized by sex criminals as an escape mechanism when the victim has refused to press charges, or to testify after the case has been instituted, because of the embarrassment of a public trial. There ought to be a better way of protecting both the accused and the victim, and perhaps the Peruvian system would be a solution.

The trial shall be public under penalty of nullity. In exceptional cases, the Tribunal may order that the trial be performed in private or

180. Art. 209.

181. Art. 210.

182. Art. 211.

183. Art. 212.

184. Art. 213.

185. Art. 214.

186. U.S. CONST. amend. VI. *E.g.* *Thompson v. People*, 399 P.2d 776 (Colo. 1965). For the opposite extreme of "too public" a trial, see *Estes v. Texas*, 381 U.S. 532 (1965) which seemingly held that televising a criminal trial deprived the defendant of his fourteenth amendment due process rights. The *Estes* case reviews the legal and historical basis for the public trial rule in the United States.

with the attendance of a limited number of persons. An order of the Tribunal shall be required in order to exclude the representatives of the press.¹⁸⁷

The trial shall always be carried out in private in cases dealing with crimes against sexual honor. Only those persons may attend who are permitted to do so by the President of the Correctional Tribunal for special reasons.¹⁸⁸ The President of the Tribunal may delegate his functions for the trial to another judge (*Vocale*).¹⁸⁹

B. *Preparatory Acts for the Accusation and the Trial (Actos Preparatorios de la Acusación y de la Audiencia)*

The Peruvian "checks and balance" system, which was previously discussed,¹⁹⁰ again is put into operation by the trial court after it has received the instruction and prior to its opening the trial.

After the instruction has been received by the President of the Correctional Tribunal, he shall remit it to the prosecutor with all of the antecedents which are in the office of the Secretary (clerk) in order that he may express his views about it within a period of eight days.¹⁹¹ If the prosecutor requests an extension of the instruction because he opines that it is incomplete or defective, the Tribunal shall order it and designate at the same time a peremptory period for its completion. The prosecutor's opinion shall precisely state the steps which were omitted, or which must be redone, or completed.¹⁹² If the prosecutor is of the opinion that the instruction has proved the *corpus delicti*, but that it has not disclosed the identity of the delinquent and the Correctional Tribunal is of the same opinion, it shall order the provisional filing of the proceedings in the archives. If the instruction has proved the existence of the *corpus delicti* but not the responsibility of the accused, the Tribunal shall declare that the trial shall not take place and shall order the provisional filing of the proceedings in the archives. The filing of the proceedings in the archives shall be definitive when the *corpus delicti* has not been proved.¹⁹³

If the prosecutor opines that a trial should not take place and the Tribunal is of a different opinion, it shall order the instruction to be extended or that the proceedings be remitted to another prosecutor in order that he may prosecute (*acuse*).¹⁹⁴ When the second prosecutor does not find grounds to prosecute, he may present the recourse of nullity, but if the Supreme Court declares that there are merits for the trial the records

187. Art. 215.

188. Art. 218.

189. Art. 216.

190. *Supra* notes 165-174.

191. Art. 219.

192. Art. 220.

193. Art. 221.

194. Art. 222.

will be returned to the prosecutor who asked the nullity in order that he may formulate the accusation.¹⁹⁵

Whenever the prosecutor believes that it is fitting, he shall confer with the accused in order to obtain the data or declarations which he judges necessary. This conversation shall be private.¹⁹⁶ After *Escobedo v. Illinois*,¹⁹⁷ this practice would seem to be improper in the United States.

The written accusation which the prosecutor formulates must contain:

1. The surname, given names, age, civil status, profession, nationality, place of birth and domicile of the accused;
2. The punishable action or omission and the circumstances which determine responsibility;
3. His opinion on the manner in which the instruction has been conducted;
4. The pertinent articles of the Penal Code and, in cases of alternative penalties, those which are applicable, the duration of the principal and accessory penalties, or the means of security which substitute for the penalty;
5. The amount of civil indemnification, the manner of making it effective and the person who is entitled to it;
6. A statement whether the prosecutor has conferred with the accused, whether he is in prison or free under bail bond or pledge and the exact time he has been detained; and
7. The experts and the witnesses who, in his judgment, must attend the trial.¹⁹⁸

The "accusation" would seem to resemble a combination of the "long form indictment" and a list of prosecution witnesses in use in some of the United States. The prosecutor shall remit sufficient copies of the accusation to the Tribunal in order that a copy be delivered to the accused, the civil party and to third persons who are subject to civil responsibility.¹⁹⁹ When the civil party claims damages which are not estimated in the accusation, or when he does not agree with the amount fixed by the prosecutor, he may present, at any time up to three days before the trial, a petition in which he shall state his estimate of the damages caused by the crime, or the thing which must be restored to him, or the payment which must be made to him, as the case may be, and the name of the witnesses or experts who may be questioned about the truth of these estimates. He may not name more than three witnesses nor more than two experts.²⁰⁰ This petition shall be accompanied by the necessary copies

195. Art. 223.

196. Art. 224.

197. 378 U.S. 478 (1964).

198. Art. 225.

199. Art. 226.

200. Art. 227.

in order that copies may be delivered to the prosecutor and each one of the accuseds, who in turn, may offer the declarations of up to three witnesses and the opinion of two experts about the points proposed by the civil party.²⁰¹

Within three days after receiving the written accusation, the Tribunal shall decide:

1. The date and hour of the trial by designating the earliest date possible after the tenth day;
2. Who shall be entrusted with the defense of the accused if he has not named defense counsel;
3. Who are the witnesses and experts who must attend the trial;
4. The citation of third persons civilly responsible; and
5. If the attendance of the civil party is obligatory.²⁰²

The Tribunal shall inform the Supreme Court of the omissions, delays and faults which it has noted in the instruction and which are imputable to the judge instructor or the Public Ministry in order that the Supreme Court may order, according to the case, a warning, suspension or dismissal of the judge instructor or prosecuting agent.²⁰³ The citation of the accused, defense counsel, experts and the witnesses who must attend the trial, shall express that they must appear one-half hour before the opening of the trial under a warning that they will be conducted there by force if they fail to do so. The civil party has the right to attend the trial, but his presence will not be obligatory unless the Tribunal has ordered it.²⁰⁴

The accused and the prosecutor may make a written offer of new witnesses or experts until three days before the trial; this written offer shall contain the names of these witnesses or experts and the points about which they must declare. This written offer must also be accompanied by enough copies for each one of the interested parties, and the President of the Tribunal shall order their delivery. The Tribunal shall order the appearance of these witnesses or experts and shall assess the costs on those who have offered these witnesses or experts.²⁰⁵ It is the duty of the President to have ready in an appropriate place the objects which must be presented at the trial.²⁰⁶

C. *Trials (Audiencias o Juicio)*

In many civilian countries, the criminal "trial" is a rather brief affair lasting an hour or less. The trial will consist mainly of the court's

201. Art. 228.

202. Art. 229.

203. Art. 230.

204. Art. 231.

205. Art. 232.

206. Art. 233.

interrogation of the accused, the accusation of the prosecutor and arguments of the prosecutor and defense counsel. Little attention will be devoted to the hearing of witnesses because this testimony has been gathered already in the instruction stage. However, the Peruvian code provides for a system of trial practice which is not too dissimilar to the practice in the United States. One recent *cause célèbre* in Lima required twenty-four separate trial hearings before it was concluded.²⁰⁷ Of course, the average non-complex criminal trial will last only a few moments.

On the day and hour designated and with the prosecutor, the accused (in those cases when his attendance is obligatory), and the defense counsel present, the President of the Tribunal shall declare the opening of the trial which shall continue through consecutive sessions until its conclusion.²⁰⁸ The accused shall be placed directly in front of the Tribunal while the prosecutor and the civil party will be on its right side and defense counsel on its left.²⁰⁹

The witnesses and experts shall occupy a room contiguous to the courtroom. The President shall take the necessary means to prevent the witnesses from talking with each other, and they shall only be introduced to the courtroom as they are called by the President of the Tribunal.²¹⁰ This Peruvian "invoking of the rule" is similar to the prevailing rule in the United States.²¹¹

The President shall then order the *rapporteur* (*Relator*) to read the list of experts and witnesses who are in the next room. At the end of this reading, the President shall ask the prosecutor, defense counsel and the accused if they have any new expert or witness to present.²¹² In case defense counsel offers new witnesses or experts, he shall be obliged to present written interrogatories. The President shall order the "rapporteur" to read them aloud, and he shall ask the prosecutor and the civil party if they have any objection to make or any challenges to these witnesses or experts. In accordance with the answers which the parties make, the Tribunal shall decide whether or not it must hear these new witnesses or experts. If the Tribunal accepts this new evidence, the witnesses and experts shall be ordered to go into the special room set aside for the witnesses. The Tribunal may only refuse to accept new witnesses when the interrogatories are impertinent, but if only some of the questions are

207. The trial of Ingrid Schwend de Oliveira (a married woman) for the murder of her alleged paramour was given great publicity because of the sex aspects of the case. The hearings extended from May 18 to June 21, 1965. *LA PRENSA*, Año LXII—No. 26650 Page 1, Column 1, June 20, 1965.

208. Art. 234.

209. Art. 235.

210. Art. 236.

211. The majority rule in the United States is that the exclusion of witnesses from the courtroom until they are called to testify is discretionary with the trial Judge. See *Jackson v. State*, 177 So.2d 353 (Fla. 3d Dist. 1965).

212. Art. 237.

impertinent the Tribunal shall reject those and admit testimony about the others.²¹³ If the prosecutor offers new witnesses and the defense opposes them, the Tribunal shall decide whether to accept them in view of the reasons which are proffered.²¹⁴

Physical objects which have a relationship to the crime may be presented in the trial if the Tribunal believes that it is fitting. Petitions by the prosecutor, the accused or civil party with regard to this physical evidence shall be decided immediately by the Tribunal. In case of a refusal to admit this evidence, the petitioner may have the reasons for his petition made part of the record.²¹⁵ Before the trial starts, the accused, his counsel, the prosecutor, or the civil party may request that the trial be adjourned until cited experts and witnesses who have not appeared, or the newly offered witnesses or experts, come to the trial. The President shall ask the other party what he has to express about this request, and with consideration given to his answer, the Tribunal shall immediately decide the request by fixing a new date if it accepts the delay.²¹⁶

The witness, expert or civil party, cited by the Tribunal who has failed to attend without duly proved just cause, shall be immediately penalized by the Correctional Tribunal with a fine which may reach to five-hundred *soles* (approximately twenty dollars).²¹⁷

The President shall continue the trial by ordering the reading aloud of the opinion (*dictamen*) of the prosecuting agent, the report of the judge instructor and the instructive declaration of the accused. After the conclusion of this reading, the President shall question the accused.²¹⁸ The questions which the President asks the accused must be based upon his declarations given during the instruction, and are designed to have the accused explain the acts in which he has taken part or those which have been proposed to exonerate himself. Likewise, he may question him to learn his disposition, habitual manner of conduct and the determinative motives of the crime.²¹⁹ If the accused keeps silent, the President shall direct the question to defense counsel in order that he exhort the accused to answer the question, or indicate the motives for his refusal to answer. The President shall continue with questioning if the accused insists on his attitude, but at the conclusion of each interrogatory he shall ask the accused if he has anything to say.²²⁰ If there are several accuseds, the President may examine them separately or in the presence of each other. In case they are examined separately, the declarations of all of the ac-

213. Art. 238.

214. Art. 239.

215. Art. 240.

216. Art. 241.

217. Art. 242.

218. Art. 243.

219. Art. 244.

220. Art. 245.

cuseds will be read aloud before the prosecutor commences his accusation.²²¹

The other members of the Tribunal and the prosecutor may interrogate the accused directly after the President has concluded his examination. Defense counsel and counsel for the civil party may question the accused through the President as an intermediary.²²²

The witness must declare in the order established by the President. The declaration which the witness gave in the instruction must not be read to him before he gives his testimony orally at the trial under a penalty of nullity of the trial and the sentence.²²³ If any of the witnesses who must declare at the trial have not been in attendance at the beginning of the trial or when they were called, but were present before the accusation was read, their declarations shall be taken.²²⁴ If the President notes differences in important points between the declarations given in the instruction and at the trial, he shall ask appropriate questions of the witnesses in order for them to explain clearly and in detail the reasons for these differences.²²⁵ After the President has terminated his interrogation of the witness, the other members of the Tribunal, the prosecutor, defense counsel and counsel for the civil party, after asking for the floor from the President, may also question the witness directly. The President is empowered to declare questions impertinent and to suspend the cross-examination.²²⁶

The President *ex officio* or at the request of either the prosecutor, the accused, his counsel or the counsel for the civil party, may order that the Secretary immediately record the part of the declaration completed in the trial which is in disagreement with that given in the instruction. This part of the declaration at the trial which is especially recorded shall be read to the witness to see if he confirms it.²²⁷

The following must be read and submitted at the trial:

1. The declarations of those witnesses who have deposed in the instruction, who have announced to the Tribunal that they will be unable to attend, or who have ratified their declarations and the Tribunal has not insisted that they attend.
2. Declarations of those witnesses who for duly proved just cause are unable to attend the trial; and
3. Other declarations which the Tribunal considers necessary

221. Art. 246.

222. Art. 247.

223. Art. 248.

224. Art. 249.

225. Art. 250.

226. Art. 251.

227. Art. 252.

or which are requested by the prosecutor, defense counsel or the civil party.²²⁸

Witnesses who are offered to demonstrate "the motives of partiality" which a witness has at the trial shall be limited to declare about this matter, and no more than two witnesses can be offered on this point.²²⁹ The witnesses may neither converse with nor interrogate each other.²³⁰

The prosecutor and the accused, or his counsel, may request that a witness declare without being overheard by the others, or that he be questioned in the presence of one or more determinate witnesses. The Tribunal may accede to or refuse this request.²³¹ If a witness has testified falsely in the declaration given or read at the trial, the Tribunal may *ex officio* or upon the request of the prosecutor, the accused or the civil party, order the detention of the witness until the final sentence is entered and it shall then decide if there are reasons for opening an instruction against him.²³²

The President shall, if it is necessary, appoint an interpreter when the accused or the witnesses are ignorant of the Spanish language. The appointment may devolve on those persons who acted as such interpreters in the instruction. The interpreters may be challenged (because of relationship, etc.) in the same manner as the witnesses.²³³

After the declarations of the witnesses have been concluded, the President shall examine the experts or technicians who have been cited by taking their oaths or promises of honor to tell the truth. The prosecutor, the accused or the civil party may request that examinations be made of experts or technicians who were not cited by the Tribunal, and it shall decide whether or not this examination shall be made. It is obligatory that the expert opinions presented in the instruction or at the trial be read aloud.²³⁴ When the attendance of the civil party has been made obligatory, he will be examined after the accused but before the witnesses.²³⁵ When the civil party has voluntarily attended the trial, the prosecutor or the accused may request that he be examined or the Tribunal may order it *ex officio* and, in this case, he will be examined before the accusation of the prosecutor is made.²³⁶

The written records or documents which are in the instruction, or which have been enclosed with the accusation by the prosecutor, shall be read aloud after the interrogatories have been made, and the President

228. Art. 253.

229. Art. 254.

230. Art. 255.

231. Art. 256.

232. Art. 257.

233. Art. 258.

234. Art. 259.

235. Art. 260.

236. Art. 261.

shall ask the accused what he has to say about them. In case of a charge of falsity against any document, defense counsel shall present a written brief of the reasons on which the charge is based. The prosecutor, or the civil party if he was the one who presented the challenged document, shall submit a written brief in answer to the charge.²³⁷

If the trial discloses that the crime has a graver character than was indicated in the written accusation, the prosecutor may, before starting the oral accusation, request an extension of the trial to present a new accusation. The Correctional Tribunal shall decide what is fitting after hearing from defense counsel and the civil party.²³⁸ If the Tribunal accedes to the petition of the prosecutor, it shall fix the day and hour of the new hearing which may not be sooner than eight days nor later than twelve days from the date of the order. In this case, the prosecutor is required to present the new accusation within forty-eight hours from the hour of the suspension. The new accusation must also indicate the witnesses who must declare.²³⁹

In case the trial throws responsibility upon a person not included in the accusation, or the trial discloses that the crime committed is distinct from the subject matter of the proceedings, the prosecutor may request the opening of a new instruction. The Tribunal shall decide after hearing from the accused and the civil party, and, if it orders a new instruction, it shall designate the judge instructor who must conduct it. The Tribunal may order the continuation of the trial without prejudice to a new instruction about another crime or about another accused.²⁴⁰

After it has been opened, the trial (*juicio oral*) shall continue through sufficient consecutive hearings until its conclusion is reached. Nevertheless, the President shall suspend the opening of the hearing if any of the members of the Tribunal, the prosecutor, the accused, his defense counsel, or any of the witnesses whose declarations the Tribunal considers necessary, fail to attend. The accused, his counsel or the witnesses must fully prove justifiable cause for their failure to attend.²⁴¹ When the suspension of the trial lasts more than three days, the hearings which have been performed shall be declared without effect.²⁴² The hearing must be suspended when any member of the Tribunal, any of the accused, any of the cited witnesses whose oral declarations are considered indispensable by the Tribunal, the prosecutor, or defense counsel become suddenly ill in such a manner that they are unable to carry out their functions. The hearing shall continue, after citation, the day following the ceasing of the impediment if the illness does not last more than three

237. Art. 262.

238. Art. 263.

239. Art. 264.

240. Art. 265.

241. Art. 266.

242. Art. 267.

days.²⁴³ In case the illness of a member of the Tribunal, the prosecutor, or defense counsel continues for more than three days, substitutes will be named and a date for the new hearing shall be designated.²⁴⁴

If a witness who lives in the locality of the trial becomes ill and the Tribunal considers his oral declaration to be of "transcendental importance," the Tribunal may suspend the hearing, and then meet at the witness' home and examine him there. Only the members of the Tribunal, the prosecutor, the accused and his counsel, the civil party and the Secretary (clerk) of the Court may attend. The declaration of the witness in these cases shall be recorded literally.²⁴⁵ A similar provision would seem worthy of adoption in the United States.

All of the "incidental issues" which arise in the trial shall be stated orally, but the conclusions must be presented in writing. The Tribunal shall either decide these incidental questions immediately or postpone them for decision in the final sentence.²⁴⁶

After the trial proper has been terminated, the President shall recognize in succession the prosecutor, the civil party, the defense counsel, the third persons who are civilly responsible and the accused.²⁴⁷

The prosecutor shall then explain the facts which he considers proved in the trial and their legal classification, the responsibility of the accused and the civil responsibility of third persons, and all of the considerations conducent to explain them to the Tribunal, but he must confine himself within the limits fixed by the written accusation. He must conclude by expressing the facts about which the Correctional Tribunal must pass judgment, and he shall request the penalty which he judges legal and also the proper indemnification. These conclusions shall be submitted in writing to the Tribunal.²⁴⁸

The prosecutor may withdraw the accusation. The withdrawal is required when new evidence has been produced in the trial which modifies the "juridical situation" previously evaluated. The reasons which motivate the withdrawal must be presented in written conclusions.²⁴⁹ After the prosecutor has withdrawn the accusation and after hearing from defense counsel and the attorney for the civil party, the Tribunal shall suspend the trial in order to decide what is proper. If the Tribunal finds that the conclusions of the prosecutor are well founded, it shall dictate an order granting the withdrawal of the accusation, ordering the liberty of the accused and the definitive filing of the proceedings in the archives.

243. Art. 268.

244. Art. 269.

245. Art. 270.

246. Art. 271.

247. Art. 272.

248. Art. 273.

249. Art. 274.

In a contrary case, the Tribunal may order that the instruction be extended, or that the records be given to another prosecutor in order that he may formulate a new accusation. This new prosecutor may request that the instruction be extended.²⁵⁰ The civil party may elucidate "with all amplitude" the criminal acts which create civil responsibility and like circumstances which influence their evaluation, but he must refrain from classifying the crime. His conclusions must be presented in writing.²⁵¹

Defense counsel must conclude his arguments by requesting the absolution or diminution of the penalty requested by the prosecutor, but he may agree that the accused is civilly responsible. Defense counsel's written conclusions shall state factual points which the Correctional Tribunal must decide and the legal classification of the crime which he agrees upon.²⁵² Any third party who is alleged to be civilly responsible and who is personally present or represented by counsel may, after defense counsel has concluded his defense, express orally what is proper for his rights and then present his written conclusions.²⁵³

The President shall then grant the floor to the accused in order that he might express what he deems proper in his defense. After he has completed his statement, the trial is suspended in order that the Tribunal may vote on the questions of fact and dictate a sentence. Once the hearing is resumed, which must be precisely on the same day, the votes of the judges on the points of fact and the sentence will be read. The dispatch of the sentence may not be delayed for more than twenty-four hours under penalty of nullity.²⁵⁴

This rule should be compared to the practice in the United States where often weeks intervene between the finding of guilt by the jury and the sentencing by the judge. This delay is often necessary for the making of a pre-sentence investigation.²⁵⁵ In Peru the "pre-sentencing investigation" is made during the instruction, hence there is no need for delay.

D. *Sentences (Sentencias)*

The sentence which is imposed at the end of the trial must evaluate the confession of the accused and other like evidence introduced in the trial as well as the testimony of witnesses, opinions of experts and proceedings of the instruction.²⁵⁶ In entering sentence the Tribunal shall state and vote about each one of the questions of fact by taking into

250. Art. 275.

251. Art. 276.

252. Art. 277.

253. Art. 278.

254. Art. 279.

255. MORELAND, *MODERN CRIMINAL PROCEDURE* 292-294 (1959); 5 WHARTON, *CRIMINAL LAW AND PROCEDURE* 372-374, 422-423 (1957).

256. Art. 280.

consideration the written conclusions of the prosecutor, defense counsel and the civil party. The Tribunal shall then vote as to the penalty. Both decisions shall be recorded in the sentence.²⁵⁷ A majority of votes will be enough for a decision on the questions of fact as well as whether to condemn or absolve the accused. When there has been disagreement among the three members of the Tribunal with respect to the penalty, they shall discuss the question again and then vote on the points on which there has been dissent. If the disagreement continues on the second vote, an intermediate penalty shall be imposed, *i.e.*, the penalty which was voted for by the member who was in disagreement with those who voted for a greater or lesser penalty.²⁵⁸ However, it requires a unanimous vote to impose the penalties of indeterminate exile (*relegación indeterminada*), internment (*internamiento*) and death.²⁵⁹

The facts and the evidence which supports the facts shall be evaluated with the "criteria of conscience."²⁶⁰ The absolving sentence must contain an exposition of the imputed act and a declaration that it has not been performed, or that the evidence has demonstrated the innocence of the accused, or that the evidence is not sufficient to prove his culpability.²⁶¹ The condemnatory sentence must contain a precise designation of the delinquent; an exposition of the criminal act; the evaluation of the declarations of the witnesses or of the other evidence upon which the culpability is founded; the circumstances of the crime; the principal penalty which the convicted person must suffer; the date from which this penalty begins to run; the date of its termination; the place where he must fulfill the principal and accessory penalties, or the measures of security which may be ordered in substitution of the penalty; the amount of the civil reparations; the person who is to receive the reparations and the names of those persons obligated to satisfy it, by citing the articles of the Penal Code which are applicable.²⁶²

The Correctional Tribunal may suspend the execution of the penalty in those cases in which the sentence imposes a fine or imprisonment for not more than six months against a person who has not been previously condemned in Peru or any foreign country and provided that the antecedents and the character of the condemned person make it foreseeable that he will not commit a new crime. The prosecutor and the civil party may present the recourse of nullity against this decision.²⁶³ The declaration that the accused has a dangerous character (*peligrosidad*), which is requested by the prosecutor in conformity with article 116 of the Penal

257. Art. 281.

258. Art. 282.

259. *Ley* 12341, Art. 5.

260. Art. 283.

261. Art. 284.

262. Art. 285.

263. Art. 286.

Code, must be voted upon as a question of fact and it requires a unanimous vote.²⁶⁴

The sentence shall be signed by the three members of the Correctional Tribunal. If there are individual opinions (*votos singulares*) they shall follow in continuation.²⁶⁵ After reading the sentence, the President, shall first ask the accused and then the prosecutor if they are going to present the recourse of nullity. The answers of these persons and the decision of the Tribunal will be made a part of the record.²⁶⁶ The sentenced defendant may present the recourse of nullity in writing within twenty-four hours.²⁶⁷ The civil party may only present the recourse of nullity in writing within the period of twenty-four hours.²⁶⁸

The record of the trial shall be signed by all the members of the Correctional Tribunal and by the prosecutor and defense counsel who may make comments which they deem fitting and they shall be made a matter of record.²⁶⁹

IV. CONCLUSION

The Supreme Court cases extending from *Mapp v. Ohio*²⁷⁰ through *Miranda v. Arizona*²⁷¹ have tended to interject the judiciary into the criminal investigative process virtually from the beginning, but in a rather backhanded manner. Throughout this period the courts have repeatedly reached back into the beginning of the investigative process to invalidate: unlawful search and seizures, confessions obtained by duress, confessions obtained before the retention of counsel by the suspect after the investigation has focused upon him, evidence secured from the mouth of the accused out of the presence of his attorney, etc. A better trained police force would no doubt result in a higher rate of successful prosecutions, but it does seem unreasonable to expect that every policeman should have the legal training and judgment of a judge.

It is submitted that perhaps a modification of the Peruvian system would be an acceptable solution to the delicate problem faced in the American courts of protecting the rights of the accused and the corresponding rights of society to be secure. Under this proposed system a judge would be in charge of the investigative process for each case. He

264. Art. 287.

265. Art. 288.

266. Art. 289.

267. Art. 289.

268. Art. 290.

269. Art. 291.

270. 367 U.S. 643 (1961). *Linkletter v. Walker*, 381 U.S. 618 (1965) recently held that the rule of *Mapp* (excluding evidence seized in violation of the search and seizure provisions of the Fourth Amendment of the United States Constitution is required of the states by the due process clause of the Fourteenth Amendment) does not have retroactive application to cases finally decided prior to the *Mapp* decision.

271. 384 U.S. 436 (1966).

would issue all search warrants and make certain that every accused was brought before him for bail within a matter of a few hours after arrest. He would be charged with the responsibility of seeing that every accused had legal counsel and that no questioning of the accused was conducted by the police out of his presence and the presence of the attorney for the accused. Of course, full recognition would be given to the fifth amendment rights of the accused. The accused would be entitled to observe the questioning of all witnesses during this preliminary investigation. The accused would be required to disclose all of his witnesses and they would be questioned by the investigating judge (or by the police before the judge) in his presence. The state would be responsible for defraying the costs of securing any witnesses needed for the defense. These latter provisions would, of course, eliminate the element of surprise from the criminal trial. This is as it should be, for the administration of criminal justice is too serious a matter to be treated as a game of chess.

The record of this investigation would not be disclosed to the trier of fact (whether judge or jury) at the trial stage. Of course, any witness could be impeached at the trial if his testimony differed from that given during the investigative stage. After the trier of fact had reached a decision on the facts, then the investigative record could be given to the judge for his use in determining the sentence.

It is submitted that this proposed system would protect the constitutional rights of the accused and interests of society by insuring that more wrongdoers did not escape punishment through procedural-constitutional lapses by the prosecution. Although this suggested system appears at first blush to be a rather shocking innovation, it has certain parallels in our present system. A special master in chancery is, in reality, an *ad hoc* judge whose findings of fact may not be lightly overturned, and he has more power than would an investigating judge under the proposed system. The same may be said of a referee in bankruptcy, a deputy commissioner in workmen's compensation proceedings and an examiner in certain quasi-judicial administrative proceedings. Any novelty in this proposed system is more in its application than in its conception.