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Judicial Review in Peru: Its Origins, Development and Present Situation*

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I. PRELIMINARY REMARKS

This paper offers a historical account of the institutions of control of constitutionality in Peru. It is concerned primarily with the constitutions and codes enacted during the post-Independence period of the nineteenth and twentieth centuries. Despite the fact that there is a long tradition of constitutional law studies in Peru, this particular aspect of constitutional theory has received extremely scant attention. Therefore, this work may constitute the

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first attempt to establish a systematic study of control of constitutionality in Peru. The research undertaken thus far reveals that in Peru such control has been undertaken both through the constitutions themselves and through a form of judicial review. The central aim of this account, therefore, is to bring into light this unique aspect of Peru's constitutional theory.

The paper is structured chronologically. Its account begins with the first Constitution enacted in 1823 and ends with the present Constitution enacted in 1993. However, special attention is given to the Civil Code of 1936, which instituted a form of judicial control of the constitutionality of laws similar to judicial review in the American legal system. Although I will focus primarily on legal norms, considerable attention will be given to the somewhat fragmentary doctrinal ideas regarding this institution, particularly in the nineteenth century.

II. ATTEMPTS MADE AT A LEGISLATIVE LEVEL

As I have already mentioned, Peru proclaimed its political independence from Spain in 1821, which, like Mexico's, was very late compared to the independence of other countries of the Spanish American world, such as Argentina in 1810, Venezuela in 1811, Chile in 1816, and so on. The Argentinean General José de San Martín proclaimed the Peruvian independence. He conducted a successful military campaign liberating Argentina, Chile, and then Peru, where he arrived with his troops in 1820.

It is worth having in mind various aspects of San Martín's campaign. On the one hand, he did not have, from the logistic point of view, the capacity to defeat the Spanish Army. On the other hand, although he proclaimed political independence, he was not really a Republican. Like many others at that time, he could not resist the monarchic temptation (the ad hoc commission he appointed to find a European prince for Peru, a project that did not have a happy ending, is well known). However, the arrival of General Simón Bolívar's troops, which came successfully from Caracas, changed San Martín's plans, because he alone could not consolidate the independence he had proclaimed.

In fact, Bolívar had to finish in 1824 what San Martín had started. He did it in the Ayacucho fields, an Andean city of Peru, where he sealed, so to speak, the independence of Spanish America (leaving only the islands of Puerto Rico and Cuba and the Philippines in Asia, which all proclaimed independence in 1898).

But what happened at a legislative level during those years when, despite periods of upheaval, several rules were sanctioned?

San Martín declared himself the Protector of Peru, and under his protectorate was, as expected, some normative activity. But it was only provisional, as Peru was finishing the independence war. Thus, the Provisional Regulation was issued on February 12, 1821 and the Provisional Statute on October 8, 1821. Both had several provisions given during the war and validated the Spanish legislation ruling in Peru, as long as it did not contradict the independence aims. Likewise, general laws were passed for the freed areas as well, while the whole territory was not yet liberated. Furthermore, some provisions were given for convening the Constitutional Congress, an institution which, in October 1822, sanctioned what was called the "Basis of the Peruvian Constitution." It was a brief document approved by the Constitutional Congress that included, in twenty-four points, the organic aspects and civil rights on which Peru would be built. Therefore, Peru would definitely be a Republic and not a Monarchy as other people, not only Peruvians but also foreigners, wanted. In fact, through a *sui generis* process, Brazil proclaimed itself an Empire with the Lusitanian royal household in 1822. It continued as an Empire until 1889 when it became a Republic.

However, none of these texts had anything related to the control of constitutionality, not only because this matter was not discussed, but also because at that time, in the middle of a war, it was not a matter of interest.

Nevertheless, it was addressed by the first Constitution, sanctioned in 1823. Under the influence of the 1812 Cadiz Constitution (in which many Peruvians had taken part, some of them participating in its debates), Article 90(1) of Peru's 1823 Constitution included for the first time the so-called "political control" — i.e. a control of constitutionality carried out by the Conservative Senate. The Senate had to ensure, along with the Congress (Article 186), the observance of the Constitution. This method was very well used in most of the European Countries with parliamentary régimes during the whole nineteenth century and the beginning of the twentieth. But something amazing happened with this 1823 Constitution. It died the day it was born, as Professor Manuel Vicente Villarán stated. It was solemnly approved on the November 12, 1823, and was suspended the same day by the Constitutional Congress, which in turn gave absolute power to Bolívar while finishing the war against the Spaniards. For this purpose, all the powers were given to Bolívar as this delicate situation required.

The end of the war took place in Ayacucho in December of 1824, as was above mentioned. Afterwards, instead of handing over command and abiding by the Constitution in force at that time, Bolívar thought up a new, tailor-made Constitution in order to stay in power. This Constitution was inspired in the 1799 French one. It had three Chambers instead of two and a life Presidency, which fell on Bolívar himself. This text, thought up and written by Bolívar (known today due to the projects published), was passed as the Constitution of the new Republic of Bolivia, created under his defense and protection — although he did not agree with the original idea of creating this new country. It was later passed in 1826 as the Peruvian Constitution. In these cases we could see Bolívar the legislator, with the constitutions of Peru and Bolivia, and the same text was also used for the Great Colombia (which included present day Venezuela, Colombia, Panama and Ecuador).

Thus, the 1826 Constitution was the second Peruvian constitution and was identified as Bolivarian, Bolivian, or Life Constitution. Under Article 51(1), the House of Censors had to ensure the fulfillment of the Constitution by the government and to watch over its violations. But it lasted a very short time — no more than seven weeks in practice — and was repealed six months later.

However, shortly before the electoral colleges approved the Life Constitution, Bolívar had to leave Peru in an untimely way to go to the Great Colombia, where the internal problems and his long absence had brought about a hostile and warlike environment that threatened his own position. He never came back to Peru and died, disappointed, in 1830, in the Colombian town of Santa Marta, as he was planning to travel to Europe.

In Bolívar's absence, the civil society, jaded his authoritarian projects, took advantage of this opportunity by declaring the Liberator's powers concluded and making the Colombian troops return to their country.

We should have in mind that although the formal independence was in 1821, the practical independence was in 1824. Nevertheless, the execution of Ayacucho capitulation lasted two more years, which explains why these first two Constitutions, from 1823 and 1826, did not have any effect at all.

The 1826 Constitution was somewhat exotic, as I have already mentioned. Regarding the matter of our concern, it repeated the same concepts as its predecessor, involving the political model of control, which did not have any application.

III. THE FIRST LEGISLATIVE STEPS

In 1827, when the territory was actually liberated of every foreign military force, friendly or unfriendly, Peru started to institutionally organize. During that period, a new Constitutional Congress discussed and approved the 1828 Constitution, which, due to its structure, subject matter and influence, would be very important for the Peruvian historical-political future. This is the reason why Professor Villarán called it, fairly, the mother of all our constitutions, since it laid the foundations for everything that came afterwards. Moreover, it established a five-year time period for a complete review of the Constitution, which was done within the specified period, approving a new Constitution in 1834. The 1828 Constitution created, in Article 92, the State Council, made up of ten senators elected by both Chambers and functioning only during Congressional recess. One of its functions was to ensure constitutional observance (Article 94,1), independent of the power of impeachment, which could be initiated for the same purposes by each Chamber separately. Likewise the Congress evaluated violations against the Constitution immediately after its session opening (Article 173).

It is worth having in mind that constitutional observance and constitutional violations, concepts appearing in the first Peruvian constitutions and repeated in the subsequent ones, came from the 1812 Spanish model of Cadiz and referred to observances and controls of *acts* or *facts* as opposed to laws, for they, being an expression of the legislative body, had the legitimacy given by the vote.

But, although there is not a specific norm saying so, the 1828 Constitution — as well as the ones following it in the nineteenth century — implicitly contained the idea of normative hierarchy, i.e., that the Constitution is supreme, followed by laws and regulations, and then a number of provisions.

The 1828 Constitution was replaced by the 1834 one, which continued political control by the State Council (Article 96), which was comprised of two advisors who represented each one of the provinces or regions and were elected by the Congress. This time the Council had more powers; one of which was to ensure observance of both the Constitution and the law. As in the 1828 Constitution, Article 103 provided that its powers were only consultative and so were its decisions. Article 165, repeating previous texts, stipulated that every Peruvian citizen could claim, before the Congress or the Executive, constitutional violations. It was understood in both cases that only *acts* or *facts*, not regulations, could be challenged on constitutional grounds.

This 1834 Constitution did not last. Afterwards, the Peru-Bolivian Confederation, a real two-state federation, was created in 1836. It lasted a very short time, and after the collapse of the Confederation in 1839, a new Constitution was necessary, and it was done in 1839. It was an authoritarian Constitution and maintained the State Council (Article 96). But, regarding constitutional observance, it was in effect longer and was actually activated, having the power to ask for reports and to demand responsibilities.

The 1839 Constitution was followed by the 1856 one, which brought a new approach to the subject.

IV. THE 1856 CONSTITUTION

The 1856 Constitution contained the following two aspects: (1) Article 10, which in its first part stipulated that "any law opposed to the Constitution is null and void", and then added that "the acts of the people usurping public functions are also null"; and (2) the dismissal of the State Council, leaving up in the air everything concerning constitutional observance.

Although this measure was new in Peru, the doctrine itself was not — not even in the positive Constitutional Law of other Spanish American republics. Thus, the 1811 Venezuelan Constitution, which could be considered the first constitution of the recently independent Spanish American world, contained a similar measure in its Article 227, which stipulated the following:

> The present Constitution, the laws issued in consequence to execute it, and all treaties terminated under the authority of the Union Government, shall be the supreme law of the Land . . . but the laws issued against its tenor shall not have any value . . . .

Similar measures could be found in other constitutional texts of that time.

Now, is the mere solemn declaration of a so important principle sufficient to ensure the existence of a real and concrete control of constitutionality?

Some scholars, delighted with the declarations appearing in the nineteenth-century Latin American constitutions — as the one I have quoted — concluded, hurriedly in my opinion, that declaring that unconstitutional regulations will be punished and that laws transgressing the Constitution will be nullified is alone a sufficient proof of the existence of the control of constitutionality.

I do not share this criterion. We perfectly know that there is, on the one hand, the substantive concept behind the declarations and principles; on the other hand, there must be instruments in place to make those concepts a reality. They are two sides of the same coin, complementary and independent. One could exist without the other. The eighteenth-century French revolutionaries had been wrong, because they believed that the human rights declaration alone was sufficient to ensure its real and effective fulfillment.

In reality, the declarations are important, but not sufficient. They themselves do not guarantee anything. They could be convincing, but if they do not have the procedural instruments for their fulfillment, they will not be achieved.

Therefore, Article 10 of the 1856 Constitution, although significant, was a solemn declaration only on paper, for no developmental or complementary law was issued to make it effective.

At that time, Mexico had declared similar rights and constitutional supremacy in its constitutions, but only when the "Amparo" was created in 1841 and ratified in 1847 did it have the structural institutions needed to realize these kinds of aspirations.

V. THE 1860 CONSTITUTION

The 1860 Constitution, which lasted from 1860 to 1920, removed the State Council, which had been gradually diminished in the previous texts. Instead of the State Council, it established in Article 105 the Permanent Committee, which, among other powers, had to ensure compliance with the Constitution. This was the only reference to control of constitutionality, although only political, shown at that time by the text. However, the Permanent Committee did not last long. An 1874 constitutional reform removed it, and it was never reinstated.

Nevertheless, among the Congress' powers in Article 59, 4 was the authority:

> to examine preferably the violations of the Constitution and arrange what is considered advisable to make effective the liabilities of the offenders.

This precept confirmed the political control, and it would be repeated in subsequent texts.

VI. THE TWENTIETH CENTURY: THE 1920 AND 1933 CONSTITUTIONS

The first two twentieth-century constitutions, from 1920 and 1933, followed the same tendency. They assigned to Congress the task of dealing with constitutional violations, but they did not create any control system.

However, it should be pointed out that, when the Constitution was debated in 1919, a parliamentary committee chaired by Javier Prado, a senator from Lima, proposed to introduce the jurisdictional control of constitutionality of laws carried out by the Supreme Court. This proposal never prospered.

The same proposal was made while debating the 1933 Constitution. The ad hoc Committee chaired by Professor Manuel Vicente Villarán to write a draft of the Constitution, had the same point of view. But the project regarding this subject was not approved either.

Nevertheless, we should emphasize that the 1920 Constitution re-introduced the State Council in Article 134, which would be made up of seven members appointed by the vote of the cabinet and approved by the Senate. It would only be consultative, even though by law it could be given the veto power for certain affairs. Law number 4042 from January 31, 1920, stated the council's functions would be almost all administrative and consultative.

However, the government eventually became an authoritarian regime, in power for ten years, and the State Council did not work as its members were never appointed. It has never been present in later Peruvian constitutional texts, and finally disappeared.

VII. DOCTRINE ON THIS SUBJECT

When Peru declared independence in 1821, it was done in a very precarious state, for the war continued and the young republic continued to stir up under the shadow of political leaders for several decades.

Nevertheless, we should have in mind that the old University of San Marcos, founded in May 1551, was still working. All leaders and actors in favor of the independence had graduated from the University, and therefore, there was a long tradition of education.

This explains why, in 1826, lawyer Antonio Amézaga was appointed to teach a new course in Constitutional Public Law at the Law School. He was practically unknown, except for his relationship with some outstanding men of those times.

Curiously, in 1827, the *Lecciones de Derecho Público Constitucional* (Lessons on Constitutional Public Law) by Ramón de Salas, professor in Salamanca, was printed in Lima, probably without its author's authorization or knowledge. The Lessons had been published in two volumes in 1821 in Spain as a presentation and general comment on the 1812 Spanish Constitution.

This book appears to be the first manual generally used by students at that time, although we should not discount other readings of the Enlightenment then in circulation in their original languages of English and French. Likewise, it was the first book about the constitutional subject printed in the independent Peru. Salas's book, however, did not deal with the subject of control of constitutionality, which was perfectly explainable at that time. The subject was mentioned only in passing when talking about the Conservative Power.

Years later, a translation from French of the *Compendio de Derecho Publico Interno y Externo* (Compendium on Internal and External Public Law) by the Portuguese Silvestre Pinheiro Ferreira was published. The translation was made by Bartolomé Herrera, and it had long notes written by him. This book would have great importance with the passing of time and had great influence. Its first edition is from 1848, and the second, which was practically just like the first, has no date, but it is likely to be from the 1860s according to the information we have.

This translated text and the notes that Bartolomé Herrera wrote in it, which were as lengthy as the book commented, had no direct reference to the control of constitutionality, even though it was implicitly mentioned. Both authors supported the thesis of the so-called "Conservative Power," created years before by Benjamín Constant in France.

Around that time, Felipe Masías published in 1855 his *Breves Nociones de la Ciencia Constitucional* (Brief Notions on Constitutional Science), which would have a second edition in 1860. This was the first textbook presented on this discipline in an organic and complete way. Here, its author makes a statement about the control of constitutionality to be carried out by the Judiciary, a proposal known as the American model.

Soon afterwards, José Silva Santisteban published his book entitled *Curso de Derecho Constitucional* (Course of Constitutional Law), whose first edition was released in 1856. It did not say anything new. The same happened with the second edition in 1859 and with the third, very expanded version of 1874.

The book written by Luis Felipe Villarán was very important due to its great influence as a university book text for more than twenty years. It was entitled *Comentarios a la Constitución peruana* (Commentaries of the Peruvian Constitution) and only had one edition, made in 1899. Its author was cautious about this problem and had serious doubts about the constitutional control being carried out by the Judiciary. In any case, he was reluctant about this institution.

Manuel Vicente Villarán, son of Luis Felipe Villarán, who was also in the university teaching field, was a resolute supporter of the Judiciary, as demonstrated by his university lessons from 1915 to 1916. Those lessons were widely circulated during that time, even though they were published decades later, after his death. His thesis was included in the constitutional draft presented in 1931, as shall be mentioned below.

VIII. AN ASSESSMENT OF THE NINETEENTH CENTURY

During the nineteenth century, the control of constitutionality was not seen in Peru. But it was considered by other Latin American countries (such as Mexico since 1841 and Argentina since 1868), and it was widely known as the doctrine contained in *The Federalist* and in the classical book of de Tocqueville on democracy in America.

Furthermore, the only time the principle was expressly embodied in 1856 was in a brief enunciation, which required a procedural development that was never carried out. Therefore, it made that principle completely ineffective. The enunciation of the 1856 Constitution served only to justify revolutions and uprisings against the constitutional power of the government, which is why the text was removed when debating the 1860 Constitution.

The same could be said about the doctrine, which was sparing in that sense. The experience of the State Council in the period of 1839-1855, which would never be repeated, was interesting, but was not of a judicial nature.

In a few words: the nineteenth century practically ignored judicial review.

IX. THE EARLY TWENTIETH CENTURY

We shall highlight some interesting events that happened at the beginning of the twentieth century. The first is the verdict of the Supreme Court from August 1920 according to the Public Prosecutor, Guillermo Seoane's opinion. The highest tribunal held not

only that the Constitution was the maximum regulation of the juridical organization which no law could contradict, but also that the Judiciary must declare the supremacy of the Constitution over all the other regulations.

This Judicial supreme decision is, as far as we know, the first case of unconstitutionality known by the Peruvian Judiciary. It declared the inapplicability of a law, even though it was not very clear in the enunciation. This case, which apparently did not have any precedent, was important, but unfortunately, it was not followed up, did not awaken a favorable current of opinion toward the decision, and did not motivate the appearance of a new judicial statement. On the contrary, this trend was abandoned for many decades until the environment changed, as we will see below.

Simultaneous to this judicial decision, as I have already mentioned, there was the Constitutional Reform Project, which set up a parliamentary committee in 1919, chaired by Javier Prado. It clearly proposed to give the Supreme Court the power to declare the unconstitutionality of laws. The Project made the proposal official and gave rise to constitutional doctrine of subsequent years. Unfortunately, although the Project proposed by Prado's Committee was submitted to the plenary session of the National Assembly, it was never discussed. A review of the "Congressional Records" of that time shows that the text on control of constitutionality was not debated in the plenary, because Prado himself, who was a senator from Lima, removed it from the project for unknown reasons. It was likely due to commitments or political pressures of that time, which would be understandable considering that the just-initiated regime had hardened its repressive policy of fundamental freedoms. The reason why Prado, a gifted and very prestigious man, agreed to withdraw the project is unknown because he died tragically a few months later in 1921.

X. THE FIRST STEP: THE CIVIL CODE PROJECT OF 1923

It is clear that the control of constitutionality of laws became a subject of public debate, at least in the academic environment, after it was incorporated in the draft of the 1920 Constitution. This explains why the topic was present in the Civil Code Reforming Commission, appointed by the Government in 1922. This Commission's aim was to reform the 1852 Civil Code in force at that time.

The published written records show that this subject was addressed some time after the Commission's settlement, and it was intended to be incorporated into the Civil Code. In that time, they

believed that this idea could be valid as the Civil Code contained the basic principles of the juridical system.

It was intended to incorporate a provision of public nature into the Preliminary Title of the Code's draft under discussion. Nevertheless, in order to do that, they decided to discuss it with three personalities through a letter dated May 5, 1923. The three chosen persons were the following: Anselmo G. Barreto, a distinguished judge who was president of the Supreme Court; Eleodoro Romero, a university professor and a very prestigious attorney; and Manuel Vicente Villarán, former President of the Lima Bar Association and former President of the University of San Marcos. Without any doubt, these were the best constitutionalists of that time. Of the three persons consulted, only the first one positively answered the inquiry in writing. It is unknown what happened with the other two.

The proposal to introduce the judicial control was approved within the Reforming Commission in the February 28, 1923 session, and it was so informed afterwards.

XI. THE 1936 CIVIL CODE AND THE CONTROL OF CONSTITUTIONALITY

The project on the new Civil Code was finished in 1928. The Commission's president, Juan José Calle, a distinguished judge of the Supreme Court, died in 1929, motivating the Commission to go into recess.

However, years later in 1936, it was taken up again, and the Civil Code was thus enacted. It was included in article XXII of its Preliminary Title, which literally said "[i]f there is incompatibility between a constitutional provision and a legal provision, the former shall prevail."

Constitutional scholars welcomed this contribution, and we could see it, for instance, in *Comentarios al Código Civil Peruano* (Commentaries on the Peruvian Civil Code) by José León Barandiarán in volume IV, which appeared in Lima in 1952. Regarding the constitutional doctrine, the book *Comentarios a la Constitución Nacional* (Commentaries on the National Constitution), published in Lima in 1939 by José Pareja Paz-Soldán, stood out. On page 134, the following was stipulated:

> The principle of not enforcing unconstitutional laws constitutes an indispensable complement to the Judiciary . . . . It represents an advance in the Republic's institutional life, one of the phenomena of the trend to power rationalization and an

opportune defense of constitutional principles and regulations.

Therefore, these regulations were well received by both the private law experts and the constitutionalists. Nevertheless, the political environment did not value the principle, and it was not developed by the legislation or the tribunals' decisions.

XII. THE HARD WAY OF THE 1936 CIVIL CODE

However, some cases of control of constitutionality arose during those years. Only very few among them were interesting. Isolated cases tried to apply the control of constitutionality, but the general tendency was another. On different occasions from 1948-1956 it was actually asserted that article XXII of the Preliminary Title of the Civil Code was too general, that it had not been developed, and that, in any case, it was only to be applied in the private sphere and not in the public, since it was framed within a Civil Code. That is to say, regulations sanctioned by the Legislature could not be invalidated with such an article.

Nevertheless, what calls our attention even more is that in the opening speech of the judicial year 1956-1957, the president of the Supreme Court, Mr. Carlos Sayán Álvarez, defended this stance. He said that the principle contained in the Civil Code could not be applied, for it had not been appropriately developed. Furthermore, he stated that the Judiciary should only enforce laws and not avoid its applications, because it would represent a usurpation of functions to which the Judiciary had not been authorized by anyone. Finally, he invoked the Congress to sanction a law allowing judges to exercise the diffused control.

A democratic government began in July of 1956, which left behind the hard times through which the country had passed from 1948-1956, and allowed a better exchange of ideas. An important debate was organized at a national level, involving the entire Juridical Community, including attorneys, Professors of Law, etc. It is worth mentioning that at this point the majority of attorneys supported what is called the diffuse method or American control, i.e., a control exercised by the Judiciary. This was how the subject was considered in the events organized by the Lima Bar Association in 1960 and 1961.

Around that time, in the opening of the 1959 judicial year, the new president of the Supreme Court, Ricardo Bustamante Cisneros, held in a fundamental speech that a control of constitutionality of laws was needed and that such control had to be exer-

cised through the Judiciary. Soon afterwards, a Commission appointed by the government drew up a project of the Organic Law for the Judiciary, which was surprisingly sanctioned by the *de facto* government. The project lasted a year, from 1962-1963, and it was a work prepared by top-level people. Such Organic Law, in no. 14, 506, included the following paragraphs:

> Article 8. — If judges and tribunals, when hearing any kind of trials, find that there is incompatibility between a constitutional provision and a legal provision, the former shall be prevail.
>
> (a) If the judicial decisions of first instance where this precept is applied are not appealed, they shall be taken to the First Chamber of the Supreme Court.
>
> (b) The judicial decisions of second instance shall be taken to the First Chamber of the Supreme Court if an appeal has not been filed.

Therefore, this was how the principle of control of constitutionality of laws was clearly incorporated in a highly detailed manner, and was applied during the 1963-1968 period.

A new *coup d'etat* took place in 1968 and established a Military Junta for twelve years from 1968 to 1980. In spite of this, when the military's political project was exhausted, it agreed with the political parties to return to the democratic life. So, a schedule to convene a general election in 1980 (which was indeed done) was made, but before then, a Constitutional Convention had to be called and a new constitution approved.

The importance of the 1979 Constitution is that, for the first time, a system of constitutional control at the highest level was formalized, taking advantage, in part, of the Peruvian experience over the years, but also incorporating some aspects of contemporary European constitutional law, as we shall see below.

XIII. THE 1979 CONSTITUTION

1968 began a long period of military government in Peru which lasted twelve years — the longest of our history. During that time, many things were carried out, some of them very debatable and others not. But above all, the military elite had thought, from the first moment, that the country needed a new Constitution more appropriate to those days.

In fact, a review of the nineteenth-century Peruvian Constitutions and the first twentieth century ones, especially the 1920 and 1933 Constitutions, confirms that all of them were alike, which was understandable at that time. But in 1968, mainly after the Second World War, constitutionalism was very different.

Therefore, after making an agreement with political parties, a plural and democratic Constitutional Convention was called. It worked one year, from July 1978 to July 1979, after which a new Constitution, which brought new ideas compared with the previous constitutions, was approved.

This text was a model that laid the guidelines for what came afterwards. It included two control systems, both diffuse, which came from the past tradition, and the concentrated, which was adopted by this Constitution according to the European model.

Thus, such text conferred to the Judiciary in Article 234 the power to declare the inapplicability of unconstitutional laws in all kind of proceedings. This formalized the highest normative level of the diffuse control which, first incorporated in 1936, had ups and downs and was applied only to cases and controversies.

In addition, it created the Court of Constitutional Guarantees as a concentrated control organ, independent and separated from the Judiciary, which had only few powers. Its most important function was to analyze through an abstract and general proceeding unconstitutional laws and to remove them having *erga omnes*, or general, effects.

Curiously, within the Peruvian juridical organization, the two systems were made to coexist, without being mixed; therefore, describing it as a mixed system, as has been done, does not do justice to what is really in existence. I have actually dared to think that it is a dual or parallel system, a connotation that explains more clearly how it works compared to the previous one.

XIV. THE 1993 CONSTITUTION

After the 1992 *coup d'etat* carried out by president Fujimori with the support of the armed forces, a Constitutional Congress was convened, and in 1993 it approved a new Constitution. This was put into practice and is in force at the present time with only a few amendments.

Regarding the judicial review problem, the model was slightly expanded and some amendments were introduced, but it was essentially the same. Thus, there was established:

(a) A judicial review only for concrete cases in charge of the Judiciary has special characteristics, i.e. only for parties involved in

an action. A power that can be exercised by any judge, which is known as diffused control.

(b) An abstract process, of a general nature, carried out through the so-called "unconstitutionality process", which is an exclusive competence of the Constitutional Court, the new name of the institution replacing the previous Court of Constitutional Guarantees.

During the long period Fujimori was President (1990-2000), there was a restricted exercise with no serious consequences of either the diffused control, under the authority of the Judiciary, or the abstract control, under the exclusive authority of the Constitutional Court.

Subsequently, after Fujimori collapsed in November 2000, a transition period began. Elections were convened in 2001 and also in 2006. We can see that the continuity of democratic governments has been established. Likewise, this has allowed both the Judiciary and the Constitutional Court to act more freely.

The Constitutional Court has undoubtedly been most active in this field, taking the European model based on the Austrian experience. It has played an active and interesting role with its decisions, although it has made some significant excesses and committed some mistakes, which have been criticized by both the public opinion and the specialized juridical sphere. But we have to accept that the final evaluation of their work was positive.

XV. CONCLUSION

If we analyze the constitutional regulations of Spanish American countries, we can see that all of them had a great American influence on Public Law. Several countries contributed some interesting innovations, such as Mexico, Brazil, Colombia, Venezuela and Argentina in the nineteenth century, and Cuba in the first half of the twentieth century before Castro.

Peru, on the contrary, was slow in establishing a control system, which, although suggested by several jurists, was not established at a positive level until 1936 in the Preliminary Title of the Civil Code and in the so-called "American control System."

At a constitutional level, it was accomplished for the first time in the 1979 Constitution, which involved both the diffuse and the concentrated methods of control, putting an ad hoc Tribunal in charge of executing the latter.

The 1993 Constitution is currently in force. Although different from the previous one regarding its economic chapter, it does not differ on the control of constitutionality subject. It generally repeats the 1979 Constitution's framework with some refining (it

includes the Constitutional Court with that name and increases some of its powers). Most likely, the constitutional reform in progress will only reiterate what exists at the moment.

Regarding the legal effect of such controls, they have mainly operated during democratic periods, especially during the 1963-1968 period and the 1980-1992 period as well. In 1992, Fujimori's *coup d'etat* changed the situation because an authoritarian regime was installed. In 2000, this regime collapsed and a democratic recuperation of the country began. Now, we are still in that situation.

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In Peru, the subject of control of constitutionality and its origins has not been studied in an organic way, and practically there is not any detailed research on this subject. This forces us to deal with a large number of unfocused documents. For a **general view** we could point out the following: Domingo García Belaunde, *La jurisdicción constitucional en el Perú* (The constitutional jurisdiction in Peru), "Revista de la Universidad Católica" (Lima), No. 3, May 1978; Carlos E. Becerra Palomino, *Antecedentes sobre la jurisdicción constitucional en el Perú* (History of the constitutional jurisdiction in Peru), "Notarius", II, No. 2, 1991, and Ernesto Blume Fortini, *El Tribunal Constitucional peruano como supremo intérprete de la Constitución* (The Peruvian Constitutional Court as the supreme interpreter of the Constitution), "Pensamiento constitucional" (Constitutional Thought), No. 3, 1996.

The **constitutional texts** can be found in José Pareja Paz-Soldán, *Las constituciones del Perú* (The Peruvian Constitutions), Ed. Cultura Hispánica, Madrid, 1954, and Domingo García Belaunde, *Las Constituciones del Perú* (The Peruvian Constitutions), publications of the Ministry of Justice, Lima, 1992; 2nd edition, revised and expanded in 2006 and published in 2 volumes under the Fondo Editorial de la Universidad San Martín de Porres. Regarding the Constitution currently in force, *cf.* Domingo García Belaunde and Francisco Fernández Segado, *La Constitución peruana de 1993* (The 1993 Peruvian Constitution), Ed. Grijley, Lima, 1994 and Víctor García Toma, *Análisis sistemático de la Constitución peruana de 1993* (Systematic Analysis of the 1993 Peruvian Constitution), Fondo Editorial de la Universidad de Lima, 2 volumes, Lima, 1998.

For information about the **State Council**, focusing on its most active and significant period, there are numerous documents of that time, cf. Daniel Soria Luján, *Los mecanismos iniciales de defensa de la Constitución en el Perú: el poder conservador y el Consejo de Estado: (1839-1855)* (The initial defense mechanisms of the Peruvian Constitution: the conservative power and the State Council (1839-1855)); thesis to obtaining the lawyer degree in the Universidad Católica dated October 2nd, 1997; its summary can be found in "Pensamiento constitucional" (Constitutional Thought), No. 5, 1988.

The main **nineteenth-century doctrinaire texts** are the following: the book by Ramón de Salas, originally published in two volumes in Madrid in 1821, was reproduced in Lima, and has the following book card: *Lecciones de Derecho Público Constitucional* (Lessons on Constitutional Public Law), Imp. Republicana de José María Concha, 2 volumes, Lima, 1827, 247 pages. Regarding the Peruvian edition of Salas's book, refer to Edgar Carpio Marcos's essay, *El primer libro de Derecho Constitucional publicado en el Perú* (The first book on Constitutional Law published in Peru), included as an appendix in Javier Tajadura Tejada's book, "El Derecho Constitucional y su enseñanza" (Constitutional Law and its teaching), Ed Grijley, Lima, 2001.

Silvestre Pinheiro Ferreira's book was published in 1848 and has the following card: *Compendio de Derecho Público Interno y Externo* (Compendium on Internal and External Public Law), notes and translation by Bartolomé Herrera for the use of the San Carlos School, Printer's of the School, Lima, 1848. A second edition, without date, but probably from 1860, was published shortly afterwards, without changing the text, but with different cases. Already started the twentieth century, Jorge Guillermo Leguía reproduced it in the "Biblioteca de la República" (Library of the Republic) along with other Herrera works, and under the general title *Escritos y discursos* (Writings and Speeches), Ed Rosay, 2 volumes, Lima, 1929-1934. Among the numerous sources that can referenced about Herrera, for its compendious nature, *see* Agustín de Asís, *Bartolomé Herrera, pensador político* (Bartolomé Herrera: political thinker), Sevilla, 1954. Likewise refer to *Silvestre Pinheiro Ferreira (1769-1846)*, Bibliografía y estudios críticos (Critical Bibliography and Studies), Centro de Documentacâo do pensamento brasileiro, Bahia, 1983. Pinheiro, born in Lisboa, had an agitated life and published mainly in French, including the *Précis* in 1830, which is translated by Herrera.

Felipe Masías published the first, although small, **text book** on the constitutional subject. He did it in 1855, *cf. Breves nociones de la Ciencia Constitucional* (Brief notions of Constitutional Science), Lima, 1855, which has as an appendix a selection of Ahrens, probably translated from French by himself. He published a second edition in 1860, but without the appendix of Ahrens. Masías taught Political Economy, but not Constitutional Law, at the University.

José Silva Santisteban published many books about the most diverse subjects; concerning judicial review *cf. Curso de Derecho Constitucional* (Course of Constitutional Law), which appeared for the first time in 1856, dedicated to the young liberal Emilio Castelar. It seems they met during one of his trips to Spain. A second edition was published in 1859, and the third one in 1874, which has the following book card: *Curso de Derecho Constitucional* (Course on Constitutional Law), Lib. de A. Bouret and son, 3rd edition, Paris, 1874. Silva Santisteban died in 1889, but his heirs published two more editions in Paris in 1891 and 1914, which have been called the 4th and 5th edition, respectively. But, these two last editions are only reprints of the 1874 3rd edition, which, therefore, has to be considered the definitive one.

Luis Felipe Villarán published several texts which were summarized at the end of his life in one text entitled *La Constitución peruana comentada* (Commentaries of the Peruvian Constitution), E. Moreno editor, Lima, 1899, and was the only reference book until the beginning of the twentieth century. Manuel Vicente Villarán, replaced L. F. Villarán as professor in the university chair, has numerous texts and some *Lessons on Constitutional Law* from the 1915-1916 period; they were widely circulated, but have only been reprinted many years afterwards (I was in charge of it and it was carried out within the Fondo Editorial de la Universidad Católica in 1998).

Regarding the **1856 Constitution**, there are almost no comments because it lasted a very short time. However there is a highly favorable opinion on it; relating to article 10 is: Toribio Pacheco, *Tratado de Derecho Civil* (Civil Law Treaty), Government Printer, volume I, Lima, 1872 (the first edition is from 1860).

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Regarding the **1920 Constitution**, *cf.* Toribio Alayza y Paz-Soldán, *Derecho Constitucional General y del Perú* (Peruvian and General Constitutional Law), Imp. Cervantes, Lima, 1928; and Graham H. Stuart, *Governmental system of Peru*, Carnegie Institution, Washington, 1925. About the 1933 Constitution, *cf.* Toribio Alayza y Paz-Soldán, *Derecho Constitucional del Perú y*

leyes orgánicas de la República (The Peruvian Constitutional Law and organic laws of the Republic), Imp. Sanmartí, Lima 1934; and José Pareja Paz-Soldán, *Comentarios a la Constitución nacional* (Commentaries on the National Constitution), Talleres Graf. del Hosp. Víctor Larco Herrera, Lima, 1939. With additions and updates, Pareja himself subsequently published the same work under the title *Derecho Constitucional Peruano* (Peruvian Constitutional Law), Ed Lumen, Lima, 1951, which has had numerous editions and had an enormous influence during the subsequent decades.

Regarding the **1979 Constitution**, *cf.* José Pareja Paz-Soldán, *Derecho Constitucional Peruano y la Constitución de 1979* (Peruvian Constitutional Law and the 1979 Constitution), Ed Justo Valenzuela, 3rd edition, Lima, 1984, with reprints.

And about the **1993 Constitution** currently in force, *cf.* Enrique Bernales Ballesteros, *La Constitución de 1993* (The 1993 Constitution), in collaboration with Alberto Otárola, 5th edition, Ed Rao, Lima, 1999; Marcial Rubio Correa, *Estudio de la Constitución Política de 1993* (Research on the 1993 Political Constitution), Fondo Editorial de la Universidad Católica, 6 volumes, Lima, 1999, and the already quoted work of Víctor García Toma.

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