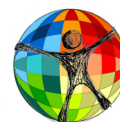


Between Gender and Ethnicity: The Becoming of an Awajún Woman and Sexual Violence in Peru

Natalia Koper

McGill Centre for
Human Rights
and Legal Pluralism



Centre sur les droits de la
personne et le pluralisme
juridique de McGill



McGill

Faculty of Law Faculté de
Droit

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ABSTRACT

This paper reflects on barriers to accessing justice encountered by female victims of sexual violence in Peru's Awajún communities. Between 2012 and 2017, Peru's Ombudsman Office registered an alarming number of 273 cases of sexual violence against minors in Amazonian schools, with 216 of instances denounced in the province of Condorcanqui, inhabited by Awajún peoples. Additionally, according to the estimates, nearly eight in ten Awajún victims do not report violent crimes. From those who do, few vindicate their rights. Courts frequently interpret rape as culturally acceptable among native communities, and thus absolve the perpetrator, invoking the criminal defence of "cultural error." Community justice, on the other hand, shows leniency, and women who come forward often face hostility from the family.

The pervasiveness of violence and impunity contrasts with the rising post-civil war reconceptualization of Peruvian relationship with Indigeneity, which brought expectations of multiculturalism and reconciliation. But while Peruvian politics and law readily embraced the language of international human rights standards, the country's blind pursuit after Latin American "pluriculturalism" did not erase the nation-building aspiration embedded in the Peruvian identity. The author examines historical tensions between gender, ethnicity and class in Latin America, and Peru specifically, to tease out the forces shaping the contemporary identity of Amazonian women and its place in the Peruvian imagery. The author concludes that the interplay of Amazon's geographic, historical, and symbolic isolation from the rest of Peru's territory continues to reinforce the nation-building marginalization. Ultimately, the failure to reconcile Indigenous cultural rights with gender equality by both communal and state authorities exposes the country's inability to recognize a colonial imprint on Peru's identity.

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Introduction

As we sat down, Judith took notice of Peru's wartime photographic exposition surrounding us. "They remind me of the times of terrorism,"¹ she said, referring to the photograph in front of her, which displayed a breastfeeding Asháninka woman around others, rescued from a Shining Path camp. Judith remembered the Shining Path insurgents, even though she was only seven years old when the violence reached the Peruvian Amazon. "They made us wake up early and march," she said, "until one day the Yanesha and Asháninka brothers came together to defend the territory. They knocked on everyone's door and spoke [...] to my mom, 'grab your kids, we're going to the beach because we're going to make *justice*,' they said... indeed, they took them to the beach, shot the terrorists with arrows, and the whole river was full of bodies. I was there to watch."²

There was a symbolic and spatial continuity to Judith's story, who is a Yanesha women's rights defender, a lawyer, and an entrepreneur. We first connected during a training course for Latin American human rights defenders, organized by the Inter-American Commission on Human Rights (IACHR) in Lima in July 2019. Now, we were meeting at the Institute for Democracy and Human Rights, a research facility born from Peru's post-war Truth and Reconciliation Commission (TRC). And so, while we talked mostly about the meaning of empowerment for Amazonian women today, the rocky landscape of human rights history in Peru and Latin America weaved its way through both Judith's story and the places that accompanied us.

The historical glance becomes pertinent in the wake of ethnic and gender politics emerging throughout Latin America. Following the end of Peru's civil war in 2000, the country has undergone significant transformations. One of them is the reappearance of the category of Indigeneity in the public discourse. Before and throughout internal unrest, the discourse of national identity projected the structure of the Peruvian society as class-based, repressing ethnic tensions in the collective consciousness and, nonetheless, driving anti-Indigenous

¹ Interview of Judith Reymundo Ruiz (31 July 2019) conducted at the Institute for Democracy and Human Rights in Lima (Peru).

² *Ibid.*

sentiments. Peru's efforts to reconcile with past human rights violations put to the fore the voices of rural – or Indigenous – Peru. As such, the reclaiming of Indigeneity as identity opened up space to political claim-making.

This process also coincided with the rise of women's rights movements with a strong agenda against sexual violence, raising many questions about the role of gender in the Indigenous rights movement. What is the shape of empowerment for which Indigenous women in Peru advocate? What does the traditional male-female asymmetry among Indigenous cultures of Peru mean for the agency of Indigenous women? What are Peru's and communal justice systems' responses to the needs of Indigenous women?

To address these questions, I examine the barriers to accessing justice, encountered by female victims of sexual violence in Amazon's Awajún communities. Between 2012 and 2017, Peru's Ombudsman Office registered an alarming number of 273 cases of sexual violence against minors in Amazonian schools, with 216 of instances denounced in the province of Condorcanqui, inhabited by Awajún peoples.³ Additionally, according to the estimates, nearly eight in ten Awajún victims do not report violent crimes.⁴ From those who do, few vindicate their rights. Courts frequently interpret rape as culturally acceptable among native communities, and thus absolve the perpetrator, invoking the criminal defence of "cultural error." Community justice, on the other hand, shows leniency, and women who come forward often face hostility from the family.

I will argue that despite Amazon's geographic, historical, and symbolic isolation from the rest of Peru's territory, the pervasiveness of violence and impunity in the region, while embedded in Amazon's gender experience, is actually a product of Peru's history of nation-building. Peru's blind pursuit after multiculturalism does not negate historical conceptualizations of Amazon, and the category of Indigeneity is used to further marginalize Awajún women. Ultimately, the failure to reconcile Indigenous cultural rights with gender equality by both communal

³ See Peru, Oficina Defensorial de Amazonas, *Oficio 84-2018-DP/OD-AMAZ* (Chachapoyas, 2018) cited in Instituto de Democracia y Derechos Humanos (IDEHPUCP), *Agenda indígena. Mujeres indígenas awajún y wampís* (Lima: IDEHPUCP, 2018) at 18.

⁴ See *ibid* at 25.

and state authorities exposes the country's inability to recognize a colonial imprint on Peru's identity.

This paper draws on a variety of historical, ethnographic, and socio-legal materials. I base the Awajún case study on legislative and judicial sources, supplemented with anthropological and governmental reports, which present testimonies from the victims and their relatives. Additionally, my understanding of the Amazonian reality was enriched by an in-depth interview I had the opportunity to conduct with Judith Reymundo Ruiz.

This paper is divided into three main sections. In section one, I formulate the theoretical framework and examine the historical interplay between gender and ethnicity in Latin America, showing its influence on the discourse of the inter-American jurisprudence. In section two, I situate the historical tension between gender, ethnicity and class in the Peruvian context. Section three presents the case study of sexual violence perpetrated in Awajún communities and analyzes the historical imprints of ethnicity and gender on the contemporary public and customary justice systems.

Identity and Latin America

The Theoretical Framework

The category of *identity* does not exist outside history, society, or power dynamics.⁵ It is an instrument, allowing individuals to situate themselves in relation to others, by creating a sense of membership. At the same time, classifying human experience in collective terms entails the creation of exclusion boundaries between different identity-based groups.⁶ The ongoing cultural negotiation of what belongs and not within a certain identity is informed by those two processes of positioning ourselves and positioning others within societal contexts.⁷

⁵ See Stéphanie Rousseau & Anahi Morales Hudon, *Indigenous Women's Movements in Latin America. Gender and Ethnicity in Peru, Mexico, and Bolivia* (New York: Palgrave Macmillan, 2017) at 1.

⁶ See Courtney Jung, *The Moral Force of Indigenous Politics* (Cambridge: Cambridge University Press, 2008) at 21-22.

⁷ See Stuart Hall, "Cultural Identity and Diaspora" in Jonathan Rutherford, *Identity: community, culture, difference* (London: Lawrence & Wishart, 1998) 222 at 225; José Antonio Lucero, *Struggles of Voice: The*

Contemporary social movements, thus, formulate political claims around the identity of their group, employing social markers that have historically served to marginalize them. The once excluding categories like race, gender, ethnicity, or class are reclaimed to channel the group's empowerment.⁸ From this perspective, the formation of identity is a potent political tool that gives the formerly-marginalized voices access to the political claim-making.⁹ On occasion, however, this process sacrifices the fluidity and richness of voices comprising the collective for the sake of increasing societal appeal and the clarity of demands.¹⁰ As a result, it risks detaching itself from the lived experiences of the actual members.¹¹

To address this problem, many activists gradually began elevating intersectionality to the level of demand in its own right.¹² This trend recognizes the complexity of human experience, the plurality of voices within one community, and that by reducing individuals to one identifying characteristic, social movements can turn one-dimensional *identity* into a new source of political subjugation.

Identity in Latin America

These theoretical considerations resonate with the historical evolution of ethnic and gender identities in Latin America and its impact on their contemporary formulations. The notion of Indigeneity dates back to the first encounter with European colonizers, who stretched the boundaries of *identity* according to particular economic, political, and legal interests of the elites.¹³

Politics of Indigenous Representation in the Andes, (Pittsburgh: University of Pittsburgh Press, 2008) at 78.

⁸ See Jung, *supra* note 6 at 37-38.

⁹ See Roberta Rice, *The new politics of protest: indigenous mobilization in Latin America's neoliberal era* (Tucson: University of Arizona Press, 2012) at 117-118; Marisol de la Cadena & Orin Starn, *Indigenous experience today* (New York: Berg, 2007) at 4.

¹⁰ See e.g. Raúl L Madrid, *The rise of ethnic politics in Latin America*. (New York, Cambridge: Cambridge University Press, 2012) at 186-190.

¹¹ See Anne Phillips, "Multiculturalism, Universalism, and the Claims of Democracy" in Maxine Molyneux & Shahra Razavi, *Gender Justice, Development, and Rights* (Oxford: Oxford University Press, 2002) 115.

¹² See Rousseau & Morales Hudon, *supra* note 5 at 9.

¹³ For instance, the Spanish colonial penal legislation had a built-in paternalism, achieved by differentiating offences and punishments according to race and social status of the offender. The Indigenous race constituted an attenuating circumstance in the Spanish legislation, whereas offenders of violent crimes perpetrated against Indigenous victims faced harsher sentences.

The intersectionality of that experience was also commonly present in the colonial realities, where the matter of miscegenation, political marriages, and legitimizing sexual violence constituted critical dimensions of the colonizer-colonized interactions. The sliding scale of social inferiority was thus conceived both on ethnic and gender axes.¹⁴ Frequently, to justify abuse of Indigenous women, the colonial imagery invoked the biblical dichotomy of sinful Eve and the virtuous Virgin Mary that positioned Indigenous women as immoral, promiscuous and fallen.¹⁵ Historians accentuated women's sexual roles, reducing their experience to being either victims or traitors. The Peruvian chronicles of Guamán Poma de Ayala, for instance, portray Indigenous women as "deceitful, lustful, thieving, disobedient, and above all, great whores. [...] They prefer to live as concubines of the Spaniards, and on occasion with black and mulatto men than marry an Indian commoner."¹⁶

After the newly established republics gained independence from the metropole, the politics of identity continued to be the center of reflection. In search of unified national identities, many Latin American countries rejected the ideal of racial purity and replaced it with the glorification of interracial mixing, i.e. *mestizaje*.¹⁷ Being a *mestizo* triumphed as a normative identity and ethnicity became gradually substituted with class differentiation.¹⁸

See Lior Ben David, "Modernización y colonialismo en la 'Patria Nueva': La perspectiva de los delincuentes indígenas 'semi-civilizados'" in Paulo Drinot, ed, *La Patria Nueva: Economía, sociedad y cultura en el Perú, 1919-1930* (Chapel Hill: The University of North Carolina Press, 2018) 115 at 118; see also Matthew D O'Hara & Andrew B Fisher, eds, *Imperial Subjects. Race and Identity in Colonial Latin America* (Durham: Duke University Press, 2009); Héctor Díaz Polanco, *Autonomía regional. La autodeterminación de los pueblos indígenas* (Mexico City: Siglo XXI, 1991[2006]) at 42-60.

¹⁴ See Peter Wade, *Race and Sex in Latin America* (London: Pluto Press, 2009) at 209 [Wade, *Race and Sex*]; O'Hara & Fisher, *supra* note 13.

¹⁵ See Sara Vicuña Guengerich, "Virtuosas o corruptas: Las mujeres indígenas en las obras de Guamán Poma de Ayala y el Inca Garcilaso de la Vega" (2013) 96:4 *Hispania* 672.

¹⁶ Felipe Guaman Poma de Ayala, *El primer nueva crónica y buen gobierno*, (c. 1615) at 869 cited in Karen Vieira Powers, *Women in the Crucible of Conquest. The Gendered Genesis of Spanish American Society, 1500-1600* (Albuquerque: University of New Mexico Press, 2005) at 69.

¹⁷ See e.g. Wade, *Race and Sex*, *supra* note 14 at 217.

¹⁸ See Deborah J Yashar, *Contesting Citizenship in Latin America: The Rise of Indigenous Movements and the Postliberal Challenge* (Cambridge: Cambridge University Press, 2005).

Paradoxically, silencing Indigeneity led to internalizing colonial discourses: the Indigeneity remained associated with backwardness but could be “redeemed” through interracial unions or cultural whitening.¹⁹ On the one hand, Indigenous heritage belonged to the past, celebrated as the symbolic origin of each nation.²⁰ The exaltation of pre-Hispanic cultures nourished collective memory as unique and distinct from the metropole. On the other hand, the proliferation of *indigenista* tutelage policies framed Indigenous populations as obstacles to progress and highlighted the need to overcome the Indigenous “condition” through assimilationist education.²¹ In words of Peru’s Dean of the Faculty of Letters, “[t]hanks to education, the contemporary man can transform his physical milieu and even his race.”²² In Mexico, the same philosophy underpinned establishing the peculiar *Casa del Estudiante Indígena* in the 1920s. The school intended to transform “pure” Indigenous men into “sophisticated Mexican gentlemen,” who would later return to their villages and pass the acquired knowledge to other community members.²³

Not coincidentally, the opportunities for Indigenous women were not contemplated in the phenomenon of cultural whitening, and philosophers did not even entertain the idea of “de-Indianizing” Indigenous women. In general, all women’s capacity to reason was still highly contested, and only a handful of women from the upper-class managed to access higher education by the end of the 19th century.²⁴ Consequently, the only

¹⁹ See e.g. Peter Wade, *Race and Ethnicity in Latin America* (London: Pluto Press, 2010) at 31-35; Alan Knight, “Racism, revolution, and indigenismo: Mexico, 1910–1940” in Richard Graham, ed, *The Idea of race in Latin America, 1870–1940* (Austin: University of Texas Press, 1990) 71 at 73; Thomas E Skidmore, “Racial Ideas and Social Policy in Brazil, 1870-1940” in *ibid* 7 at 10.

²⁰ See e.g. Jung, *supra* note 6 at 97.

²¹ See also Jung, *supra* note 6 at 95-96; Díaz Polanco, *supra* note 13 at 86-108.

²² Javier Prado, “Memoria del decano de letras del año 1908” (1909) *Revista Universitaria de San Marcos* at 52 cited in Marisol de la Cadena, “Silent Racism and Intellectual Superiority in Peru” (1998) 17:2 *Bull Latin Am Research* 143 at 145-146.

²³ See Alexander S Dawson, “‘Wild Indians,’ ‘Mexican Gentlemen,’ and the Lessons Learned in the Casa del Estudiante Indígena, 1926–1932” (2001) 57:3 *The Americas* 329 at 330.

²⁴ Only five Latin American countries created access to higher education for women by the end of the 19th century (Brazil, Mexico, Chile, Argentina, Cuba) but women’s presence in academia remained challenged long after that. See Alicia I Palermo, “El acceso de las mujeres a la educación universitaria” (2006) 4:7 *Revista Argentina de Sociología* 11 at 27, 31.

role available for Indigenous women in the nation-building project was the romanticized culture-keeping.

The emergence of neoliberalism in the 1980s, democratization, and the promise of multiculturalism carved out the path for the emancipation of Indigenous peoples from the assimilationist and exclusionary approaches.²⁵ The adoption of international instruments like ILO Convention 169, or more recently, the UN and the Inter-American declarations contributed to the revaluation of regime structures.²⁶ By 2000, most Latin American constitutions recognized Indigenous peoples as a collective entity, which preceded the formation of national states. As a result, the new model of multicultural constitutionalism created a bundle of autonomy rights, such as the recognition of customary law as binding or protection of the *sui generis* status of collective lands.²⁷ The active participation of Indigenous groups in constitutional reforms positioned them as bearers of rights, which opened up the possibility for culture-based political parties, such as MAS in Bolivia, Ecuador's Pachakutik, and strong social movements like EZLN in Mexico or Sem Terra (Landless Workers) in Brazil.²⁸

The new legal instruments, however, fell short of providing concrete mechanisms to ensure an effective safeguard of Indigenous autonomy.²⁹ As well, conceptualizing the autonomy as the "mother of all demands"³⁰ confined the policy-makers' attention to renegotiating the relationship between the state and the Indigenous nations, while silencing discussions on substantive social protections within the communities. Therefore, the principle

²⁵ See Yashar, *supra* note 18; Donna Lee Van Cott, *From Movements to Parties in Latin America. The Evolution of Ethnic Politics* (Cambridge: Cambridge University Press, 2005) [Van Cott, *From Movements to Parties*]; Rice, *supra* note 9.

²⁶ See Felipe Gómez Isa & Mikel Berraondo, eds, *Los derechos indígenas tras la Declaración. El desafío de la implementación* (Bilbao: Universidad de Deusto, 2013).

²⁷ See Donna Lee Van Cott, "Latin America's Indigenous Peoples" (2007) 18:4 J Democracy 127 at 132 [Van Cott, "Indigenous Peoples"].

²⁸ See Rice, *supra* note 9; Donna Lee Van Cott, "Explaining Ethnic Autonomy Regimes in Latin America" (2001) 35:4 Stud in Comp Intl Dev 30 at 31 [Van Cott, "Ethnic Autonomy"].

²⁹ See Gómez Isa, *supra* note 26.

³⁰ Díaz Polanco, *supra* note 13 at 157.

of limiting state interference in community affairs perpetuated the marginalization of women's rights.³¹

The historical evolution of gender and ethnicity in Latin America finds its reflection in the inter-American jurisprudence. On the surface, the vast majority of Indigenous rights cases brought before the Inter-American Court challenge the violations of collective land rights and the right to life. Only a handful of cases engage the rights of Indigenous women specifically. The Court, however, constructs the category of *identity* as fundamental for human existence and applies this approach in an intersectional manner to justify broadening the scope of interpretation of the American Convention.³²

For instance, the early decisions, starting with the landmark land rights case *Awas Tingni* in 2001, highlighted the multidimensional relationship between the collective land patterns with the cultural, economic, and spiritual survival of the Indigenous peoples.³³ Later, the value of cultural identity was also used to explain the gendered impact of human rights violations. In *Plan de Sánchez* case, the Court accepted that the death of Maya women, who were oral transmitters of the Maya-Achí culture, created a "cultural vacuum," depriving the next generations of learning the ancestral knowledge.³⁴ The Court also recognized the gendered impact of the massacre on the victims of rape, which intended to "destroy the dignity of women at the cultural, social, family and individual levels."³⁵

The Court also pointed to the patriarchal reality lived by the victims, as the violated women who survived the attack still

³¹ See Aída Hernández Castillo, "National Law and Indigenous Customary Law" in Molyneux, *supra* note 7 384 at 384; María Teresa Sierra, "Indigenous women fight for justice: gender rights and legal pluralism in Mexico" in John-Andrew McNeish & Rachel Sieder, eds, *Gender Justice and Legal Pluralities: Latin American and African Perspectives* (London: Routledge, 2015) 56.

³² The American Convention on Human Rights is a binding human rights instrument of the Organization of American States. The Inter-American Court of Human Rights is vested in interpreting and enforcing its provisions. See *American Convention on Human Rights "Pact of San José, Costa Rica"* (B-32), 22 November 1969 OASTS No 36, 1144 UNTS 123 art 62 (entered into force 18 July 1978).

³³ *The Mayagna (Sumo) Awas Tingni Community Case (Nicaragua)* (2001), Inter-Am Ct HR (Ser C) No 79 at para 149.

³⁴ *The Plan de Sánchez Massacre Case (Guatemala)* (2004), Inter-Am Ct HR (Ser C) No 116 at paras 49(12), 85, 87(b) [*Plan de Sánchez*].

³⁵ *Ibid* at para 49(19).

suffer stigmatization in their communities.³⁶ The two Mexican cases from 2010 echo these considerations. There, sexual violence against Indigenous women required reparations both on the individual and community levels.³⁷ The Indigeneity of the claimants, the fact that they did not speak Spanish, as well as their socio-economic status and the remoteness of the community, all affected how the victims experienced the violation of their rights.³⁸ In another case from 2016, the Court affirmed the gendered understanding of loss and spoke about particular cultural vulnerabilities experienced by forcefully displaced Indigenous women. While their particular identity was the source of vulnerability, it also became the tool to demand rights and reparations:

[t]he Court emphasizes the existence of clear evidence of the differential impact of the forced displacement [...] on the women from Chichupac village [...] at cultural, social, family, and individual levels. [The women] had to take care of their families and, together with their children, face the pain of the violence that they survived. This put them at increased risk to suffer other forms of violence [emphasis added].³⁹

Intersectionality in Peru

The narratives of identity in Peru are informed by the Latin American evolution but do not fit neatly within its framework because of the additional local distinction between the Amazonian “savages” and the Andean “noble Incas,” predating the Spanish colonization. The highland Quechua speakers had already used (and continue to use) pejorative labels like *chuncho* or *jívaros* for native Amazonians, denoting their ostensible

³⁶ See *ibid.*

³⁷ *Fernández Ortega y otros Case (Mexico)* (2010), Inter-Am Ct HR (Ser C) No 215 at para 223 [Fernández Ortega].

³⁸ *Rosendo Cantú y otra Case (Mexico)* (2010), Inter-Am Ct HR (Ser C) No 216 at para 9 [Rosendo Cantú].

³⁹ *Miembros de la Aldea Chichupac y comunidades vecinas del Municipio de Rabinal Case (Guatemala)* (2016), Inter-Am Ct HR (Ser C) No 328 at para 198 [translation by the author] [Chichupac].

primitivity and out of control manners. The Spaniards recognized that tension and exploited it through colonial practices.⁴⁰

To an extent, the Inca nobility and sophistication of Inca culture were respected by the Spaniards and later celebrated by the nation-building thinkers, who shared the sentiment that “without the *indio* the *peruanidad* [Peruvianity] is not possible.”⁴¹ The Peruvian philosophers saw in the Inca civilization a reflection of the great “Europe-funding” civilizations, which warranted building the national identity on Inca symbols.⁴² For instance, in the influential 19th century study “Conquest of Peru,” the culturally and biologically determined racism coalesced into one. The Inca nobility stood out as superior to all other Indigenous groups: “[t]hey were to the conquered races of the country what the Romans were to the barbarous hordes of the Empire.”⁴³ The Inca dominance, according to the historian, owed to their intelligence, which – like his contemporaries – he explained with biology: “[t]hey possessed [...] an intellectual pre-eminence, which [...] gave them authority with the people. [...] The crania of the Inca race show a decided superiority over the other races in the land in intellectual power.”⁴⁴

This account conflicts, however, with other passage, which admitted that noble Inca women, including the clergywomen, were commonly assaulted by the Spaniards, which reduced “its heaven-descended aristocracy [...] almost to the condition of the peasant [emphasis added].”⁴⁵ It is noteworthy that the conduct of “licentious soldiery”⁴⁶ towards Inca women had little meaning outside the sphere of politics: it merely illustrated Spanish cruelty, which signalled the conquistadors’ true intentions to the Inca male nobility: “the Inca, himself treated with contemptuous indifference,

⁴⁰ See Shane Greene, “Entre lo indio, lo negro, y lo incaico: The Spatial Hierarchies of Difference in Multicultural Peru” (2007) 12:2 J Latin Am & Caribbean Anthropology 441 at 454 [Greene, “Entre lo indio”].

⁴¹ José Carlos Mariátegui, “El problema primario del Perú”, *Mundial* 6 February 1925 [translation by the author]; see also Greene, “Entre lo indio”, *supra* note 40 at 455.

⁴² See de la Cadena, *supra* note 22 at 151; see also Greene, “Entre lo indio”, *supra* note 40 at 458.

⁴³ William Hickling Prescott, *History of the conquest of Peru* vol. 1 (London: Routledge, 1862) at 25.

⁴⁴ *Ibid.*

⁴⁵ William Hickling Prescott, *History of the conquest of Peru* vol. 2 (London: Routledge, 1862) at 25.

⁴⁶ *Ibid.*

found that he was a poor dependant, if not a tool, in the hands of his conquerors [emphasis added]."⁴⁷

In other words, throughout colonial and independence periods, the notion of race – seen sometimes through biological, sometimes through cultural or even socio-economic lenses – extended on a vertical scale and nourished the narratives of power. The Inca were subjected to multilayer racialized and gendered mistreatment. By the exertion of colonial power over their racialized and gendered bodies, the colonial violence institutionalized and naturalized the exclusion of the Inca women from the scope of power.⁴⁸ Rape symbolized power, constructing femininity as submission. At the same time, the Incas were deemed superior to other ethnic groups precisely because of the perceived qualities of their race.

Amazonian peoples did not form part of Peru's search for identity. In fact, they are largely absent from any historical accounts, even though the Amazon represents 62% of Peru's territory, inhabited by 56 ethnic groups.⁴⁹ In the national Peruvian history, the tropical lowlands figured as empty and unexplored, and their Indigenous inhabitants existed only in relation to who they were not, that is, the Incas.⁵⁰ Unlike the noble Incas, the Amazonian Indigenous groups were considered as the truly savage natives,⁵¹ and – in line with the exoticizing conception of the tropics – the Amazonian women were romanticized as curvaceous, untamed and sexually insatiable.⁵² Consequently, the region was considered incapable of contributing anything to the Peruvian identity, remaining at the periphery of the Peruvian

⁴⁷ *Ibid* at 25-26.

⁴⁸ Shari M Huhndorf & Cheryl Suzack, "Indigenous Feminism: Theorizing the Issues" in Cheryl Suzack et al, eds, *Indigenous Women and Feminism: Politics, Activism, Culture* (Vancouver: UBC Press, 2011) 1 at 1; Jelke Boesten, "Inequality, Normative Violence, and Livable Life: Judith Butler and Peruvian Reality" in Paulo Drinot, ed, *Peru in Theory* (New York: Palgrave Macmillan, 2014) 217 at 218.

⁴⁹ Susel Paredes Piqué, *Invisibles entre sus árboles. Derechos humanos de las mujeres indígenas Amazónicas del Perú* (Lima: Centro de la Mujer, 2005) at 15.

⁵⁰ See Shane Greene, "Getting over the Andes: The Geo-Eco-Politics of Indigenous Movements in Peru's Twenty-First Century Inca Empire" (2006) 38 *J Latin Am Stud* 327 at 331 [Greene, "Getting over the Andes"]; see also Greene, "Entre lo indio", *supra* note 40 at 462, 467.

⁵¹ See Rousseau & Morales Hudon, *supra* note 5 at 145.

⁵² See Paredes Piqué, *supra* note 49 at 19.

imagination even in the 1920s, the heyday of Peruvian positivism, *indigenismo*, and nation-building efforts.

In the modernist spirit, the government of Augusto Leguía (1919-1930) undertook reforms that threw a spotlight on “the problem of the *indio*.”⁵³ First, he adopted a new Constitution in 1920, which created a vague and protectionist state commitment to safeguarding Indigenous development and recognized Indigenous property rights.⁵⁴ Then, in 1924, he issued Peru’s second penal code, which reintroduced the colonialist idea to distinguish offenders based on the ethnicity ascribed to them.⁵⁵ Articles 44 and 45 created two tutelage categories, one for Amazonian Indigenous people, referred to as “savages,” and another for Andean Indigenous people, referred to as “Indigenous persons who are semi-civilized or degenerated due to servitude or alcoholism.”⁵⁶ Officially, the reform meant to acknowledge and remedy the legacy of abuse suffered by the Indigenous Peruvians. The code instructed the judges to consider the offender’s “mental development, their degree of culture and customs,”⁵⁷ providing for lighter punishments for Indigenous offenders and the possibility for replacing jail sentences with being sent to a penal agrarian colony.⁵⁸ In practice, the criminal code legitimized a racialized understanding of progress, reaffirming the colonial glorification of cultural superiority/inferiority and the missionary role of the state. From this perspective, state

⁵³ Mariátegui, *supra* note 41.

⁵⁴ The 1920 Constitution establishes that “the property of [...] Indigenous communities is imprescriptible and shall be transferred only through the public title, subject to law” (Article 41). Article 58 recognizes that “the State shall protect the Indigenous race and shall promulgate special laws for their development and culture, in a manner harmonious with their needs. The Nation recognizes the legal existence of Indigenous communities and the law shall declare their corresponding rights” [translation by the author]. *Constitución para la República del Perú* [Constitution for the Republic of Peru], Asamblea Nacional, 18 January 1920 (Peru).

⁵⁵ The first Peruvian penal code from 1862 copied to a great extent the Spanish criminal code, which is why it lacked any references to Indigeneity. While, on the surface, the code manifested the principle of equality before the law, it, in reality, reflected the invisibility of Indigenous peoples in the Peruvian society. See Lior Ben David, *supra* note 13 at 119.

⁵⁶ Arts 44-45 Código Penal [Penal Code], 1924 (Peru) cited in Carlos Ramos Núñez, “La Ley Penal y el Indio: de la Realidad del Discurso al Discurso de la Realidad” (2019) forum historiae iuris at para 53 [translation by the author].

⁵⁷ Art 45 Penal Code, 1924 (Peru) cited in Lior Ben David, *supra* note 13 at 118.

⁵⁸ See *ibid* at 118.

protectionism was seen as a necessary measure to counter the questionable moral blameworthiness of the Indigenous peoples:

[w]hat is – pondered one criminologist – the degree of *indio's* morality? Is it the same as the one we possess? [...] The *indio* needed more freedom, but instead he was given slavery [...]. He needed more purity of his religious ideas, and he was offered practices and beliefs that only distanced him from his ancient religious control. That contrast produced a nervous degeneration in his Indigenous soul, which explains his moral attitude [...].⁵⁹

The legislative rhetoric of the era positioned the Amazonian inhabitants as unevolved and institutionalized them as objects of state protection and development. This abstract conceptualization complemented the geopolitical isolation of the region and the romanticization of Amazonian exoticism. For one, these trends manifested themselves in nationalist education. During official cartography lessons on “the Geography of the Fatherland” in the 1920s, students learned to connect different economic, military, and administrative characteristics with Peru’s regions, whereas, in the context of the Amazon, they were only expected to identify the region’s “savage tribes.”⁶⁰ The later efforts to integrate the Amazon with the Peruvian territory preserved these civilizational state aspirations. When in 1943 the government in Lima organized the Amazon Expo to celebrate the 400 years since “the discovery” of the Amazon River, the event meant to symbolize recent Peruvianization of the jungle.⁶¹ The exposition divided the story of the Peruvian Amazon into six pavilions, representing six perceptions of the still-objectified Amazon identity: the evangelization, the history, the military, the industrial development, the natural history, and the fine arts.⁶²

⁵⁹ José Antonio Encinas, *Causas de la criminalidad indígena en el Perú. Ensayo de psicología experimental* (Lima: la Facultad de Jurisprudencia de la Universidad Mayor de San Marcos, 1919) at 8 cited in Ramos Núñez, *supra* note 56 at 23 [translation by the author].

⁶⁰ See Ombeline Dagicour, “Construir el Estado, forjar una nación. La «nueva geografía» y su enseñanza en el Perú del Presidente Leguía (1919-1930)” (2016) 106 *Caravelle* 79 at para 11.

⁶¹ See François Bignon, “Propaganda prädista: Patria, caídos y Amazonía en torno a la guerra Perú-Ecuador de 1941” (2018) 47(2) *Bulletin de l’Institut français d’études andines* 117 at 129-130.

⁶² See *ibid* at 130.

The progressivist drive of Peru, associating Indigeneity with an obstacle to progress, was followed by the emergence of Marxist ideology in the Andean nations, which saw class tensions as the explanation for social inequalities.⁶³ Both of these trends favoured the rhetorical transition from the category of “Indigenous” to “peasant.” The revolutionary dictator Velasco Alvarado, Peru’s president between 1968 and 1975, moved away from the language of “Indigenous communities,” previously recognized in the 1920 Constitution. Instead, his agrarian reform in 1969 reconceptualized the racialized Peruvians in socio-economic terms as peasant communities. In a TV broadcast, Velasco explained that “Indigeneity” has a negative connotation:

[...] the Agrarian Reform law gives its support to the great multitude of peasants who today belong to Indigenous communities and from this day forward – abandoning unacceptable racist habits and prejudice – will be called the Peasant Communities. [...] To the men of the land, we can now say in the immortal and liberating voice of Túpac Amaru: Peasant: the Master will no longer feed off your poverty! [emphasis added].⁶⁴

Interestingly, Velasco invoked the Inca revolutionary symbolism but failed to include the Amazonian lowlands in the “liberating” image he painted. Indeed, the Amazon was not covered by the rhetorical shift, which manifested with the adoption of the *Law of Native Communities* in 1978.⁶⁵ The assimilationist purpose of this legislation was to “incorporate the native collective [i.e. the inhabitants of the Amazon] to the national economic life,” by recognizing their right to territorial integrity.⁶⁶ By limiting the applicability of the ethnic discourse to the Amazonian territory, Velasco’s laws gave away the tension between ethnicity, class,

⁶³ See Gisela Cánepa, “The fluidity of ethnic identities in Peru” (2008) Centre for Research on Inequality, Human Security and Ethnicity, University of Oxford Working paper No 46 at 17.

⁶⁴ Juan Alvarado Velasco, “The Master Will No Longer Feed Off Your Poverty” cited in María Elena García & José Antonio Lucero, “Un País Sin Indígenas? Rethinking Indigenous Politics in Peru” in Nancy Grey Postero & Leon Zamosc, eds, *The Struggle for Indigenous Rights in Latin America* (Brighton: Sussex Academic Press, 2004) 158 at 162-163.

⁶⁵ See Greene, “Getting over the Andes”, *supra* note 50 at 331.

⁶⁶ Preamble and Art 10 Ley de Comunidades Nativas y de Desarrollo Agrario de la Selva y de Ceja de Selva [Law of Native Communities and Promotion of Agriculture in the Lower and Upper Rainforests] Decreto-Ley No 22175, 1978 (Peru).

geography, and how they coexisted in the Peruvian collective consciousness.

The invisibility of Amazonian Indigenous peoples as political actors prompted them to seek alliances outside Peru. When the rise of neoliberal extractivism triggered global concerns over the environment, the Amazon peoples found a natural platform for their advocacy. At least since the 1980s, Indigenous groups in the Amazon have been developing a web of connections with international environmentalist organizations and played an essential role in creating transnational eco-coalitions.⁶⁷ The “marketing” of Amazonian Indigenous peoples as rainforest stewards became a structural opportunity towards empowerment and has been employed to advocate for other causes too, like the recognition of cultural rights or Indigenous entrepreneurship.⁶⁸ This is because the Indigenous environmentalism is strongly ethnicized: it is understood not as mere conservation of nature, but rather as embedded in sustainable cultural practices, where both the environment and culture are essential to the expression of their ethnic identity.⁶⁹

Amazonian women also channel the eco-ethnicism to advance their rights. To an extent, the emerging female-associated conciliatory vision of politics has challenged the traditionally male-gendered domination of politics. Still, the political spaces in the Amazon are limited for women.⁷⁰ A survey on women’s participation in politics support this reality. When asked to ascribe different qualities to male and female politicians, respondents in the Amazon believed that women are more honest (53% to 7%), that they care more about the poor (50% to 6%) and that they are better administrators (36% to 25%) than men. Yet a decisive majority of respondents thought that men have more authority than women (61% to 13%).⁷¹ As a result, the respondents saw

⁶⁷ See Greene, “Getting over the Andes”, *supra* note 50 at 339.

⁶⁸ For example, Judith Reymundo talked to me about the chocolate “Charem Yanseha,” produced by Yanesha women, and which she helps to promote in Peru. She mentioned that the marketing of Indigenous products as organic and eco-friendly increases the visibility of the brand, which in turn has a positive impact on creating sustainable business opportunities for Amazonian women. See interview of Reymundo Ruiz, *supra* note 1.

⁶⁹ See also Greene, “Getting over the Andes”, *supra* note 50 at 330.

⁷⁰ See also *ibid.*

⁷¹ The study collected data in several Peru’s cities. The above results are from Peru’s most populated Amazonian city Iquitos. See Cecilia Blondet, “Percepción ciudadana sobre la participación política de la mujer: El poder

women as worse suited for assuming prominent political roles e.g. respondents considered men to be better PMs than women (24% to 17%), and the bias was significantly higher for the minister of economy (36% for men to 15% for women) and the Peru's president (47% for men to 13% for women).⁷²

In our conversation, Judith Reymundo Ruiz mentioned that many Indigenous women shirk from assuming leadership positions because they feel constrained by family responsibilities ascribed to them, like child-rearing.⁷³ She also mentioned other pervasive structural obstacles, such as the discouraging impact of corruption within Indigenous-led organizations and lack of opportunities, higher education, or sometimes even just role models for women.⁷⁴

When I was around eight years old, two women came to the community, a lawyer and a sociologist – recalled Reymundo – so I was asking, ‘and lawyers, what do they do? I want to be like you.’⁷⁵

Most importantly, Reymundo kept referring to the examples of her grandmother and mother, both single mothers, and the sense of resilience, confidence, dedication to hard work and dignity she learned from them.

My grandma was abandoned... my grandpa left elsewhere, leaving her with five kids and a granddaughter. [...] She woke up at four in the morning every day; we cooked; we worked our *chacra* [the plot]; we cultivated everything... the yuca... we collected the bananas... then we went back to make lunch... we worked some more at the *chacra*; then we went to the river to get fish for supper. I never suffered from hunger. I've always had the yuca, the bananas, all the wild fruits: lemons, *cocona*, *pomarosa*, *caimito*, *pacay*. [...] You have to show the world that the world didn't end because the man is gone. You gotta work... work is not a curse, it's a blessing.⁷⁶

político en la mirada de las mujeres” (1999) Instituto de Estudios Peruanos Working paper No 98 at 12.

⁷² See *ibid* at 17.

⁷³ Interview of Reymundo Ruiz, *supra* note 1.

⁷⁴ *Ibid*.

⁷⁵ *Ibid*.

⁷⁶ *Ibid*.

Reymundo's pride in her family's empowerment is intimately linked with food security and the land. She measures the well-being of her family through the ability to cultivate the land and the availability of the forest-produce, which fits well into the Amazon's eco-ethnic agenda.

The violent internal conflict between 1980 and 2000, which resulted in an estimated 70,000 deaths and disappearances, reveals yet another articulation of how gender, ethnicity, and class intersected in Peruvian history. During the conflict, 80% of victims were young men of Indigenous origin, mostly from the Andean region, which demonstrates the persistence of the racialized structure of violence in Peru.⁷⁷ In this context, women suffered as witnesses, victims, and survivors of violence. The widespread use of rape and other forms of sexual violence, perpetrated by the armed forces and to a lesser degree by the insurgent groups, Shining Path and the Túpac Amaru Revolutionary Movement, also affected Indigenous women disproportionately.⁷⁸ The TRC found that 75% of women raped by members of the armed forces were Quechua speakers.⁷⁹

The violence of the wartime period left a permanent mark on the Peruvian collective memory, but the legitimacy of perpetrating systematic violence against Indigenous women was normalized through perceptions of race, class and gender that preceded the war. The physical and sexual exertion of control over racialized female bodies symbolized the triumph of heteronormative masculinity – continuing colonial understandings of power. Often, the perpetrators also suffered marginalization because of their race or class. They formed part of a society that associates masculinity with brutality, Indigeneity with victimization – and channeled these concepts to perpetuate violence.⁸⁰ Moreover, sexual violence was commonly construed as collateral

⁷⁷ See Jelke Boesten & Melissa Fisher, "Sexual Violence and Justice in Postconflict Peru" (2012) United States Institute of Peace Special Report No 310 at 2.

⁷⁸ Among different forms of sexual violence, the report identified rape, forced prostitution, unions, abortion, pregnancy. The TRC estimated that state agents were responsible for 83% of acts of sexual violence and the insurgency forces perpetrated 11% of the sexual crimes. See Comisión de la Verdad y Reconciliación [the Truth and Reconciliation Commission (TRC)], "Informe Final, Tomo VI" (2003) at 264-265, 277 [TRC].

⁷⁹ See *ibid* at 358.

⁸⁰ See Eduardo González-Cueva, "Conscription and Violence in Peru" (2000) 112:27 *Latin Am Perspectives* 88 at 100.

damage – something expected to be endured.⁸¹ For instance, until 1997, Peru's legislation did not hold rapists accountable for their crimes if they married the victim.⁸² As well, many survivors did not report the crimes out of fear of retaliation and stigmatization from their communities, but those who decided to come forward faced shaming and mockery. TRC gives account of a victim who was refused medical assistance after surviving a brutal gang rape. The doctor told her, "you have nothing, just scratches."⁸³ As such, the wartime violence does not constitute a marked departure from Peruvian history and should be understood within the wider context of peacetime violence and gender relations.⁸⁴

Sexual Violence in Amazon

Awajún Society

Despite the long history of ethnicized and gendered politics in Peru, the scholarship disregards the state-sanctioned origin of the contemporary manifestations of sexual violence and instead emphasizes the traditional male-female asymmetries of Indigenous cultures. Anthropologists point to the fact that historically, Awajún men were warriors, and Awajún society glorified the role of physical strength. The Awajún men organized attacks on other communities to kill their enemies and kidnap women. With time, the enslaved women became part of the Awajún community by marrying into the warrior's family.⁸⁵ Women did not participate in military combat and instead dedicated to agriculture (*chacras*) and child-rearing. These two factors, the forced and violent introduction to the community and their less prestigious role in sustaining the family, rendered Awajún women inferior in social stratification.

The difficulty of maintaining peace in a patrilineal society driven by combat meant that the marriage was essential to balancing between alliances and vendettas. Spousal fights, thus, were unacceptable because they constituted a real threat to

⁸¹ See TRC, *supra* note 78 at 275; Boesten, *supra* note 77 at 236.

⁸² See Boesten, *supra* note 77 at 233.

⁸³ Interview of 450168, Province of Huallaga, department of San Martín, 1999, cited in TRC, *supra* note 78 at 284 [translation by the author].

⁸⁴ See also Boesten, *supra* note 77 at 230.

⁸⁵ See Norma Fuller, *Relaciones de Género en la Sociedad Awajún*, (Lima: CARE, 2009) at 14-15.

community cohesion.⁸⁶ While Awajún men were allowed to take more spouses, women could not divorce or have more partners. The Awajún men also frequently married with distant cousins, which only required consent from the future wife's father.⁸⁷

As a result, the community norms forced women on occasion to show submissiveness and endure mistreatment for the sake of the group's wellbeing. Other than silent resignation or running away, the Awajún culture offered women only one more possibility: suicide. Young women used their own life as the ultimate weapon, threatening to kill themselves out of rage and vengeance – emotions associated with combat. A woman's death created debt to the woman's family, collected by murdering the husband or claiming financial compensation.⁸⁸

Prior to the 20th century, contacts between the Awajún peoples and Peru were sporadic. Neither the Incas nor the Spaniards ever managed to subdue the Awajún peoples.⁸⁹ Eventually, the gradual abandonment of combat, the introduction of trade and money, and the establishment of missions in the region in the second half of the 20th century substantially transformed the Awajún culture, leading to discontinuation of some of Awajún's controversial practices.⁹⁰

Currently, however, the Awajún understanding of sexual violence does not offer coherent conclusions. On the one hand, the Awajún society recognizes the crime of *Nihija chigkaku*, that is, assault of a girl who has not menstruated yet: "[s]ome say it didn't exist before, but of course it did. [...] [The perpetrator] would then become [the girl's] husband. If the rape happened only once, there was no punishment. But this is a by-gone era."⁹¹ On the other hand, the Awajún peoples still often refer to the first sexual contact as rape (*violación* in Spanish) without make a distinction as to whether the intercourse was consensual or not.⁹² The ambiguous terminology and the recent evolution of communal

⁸⁶ See Paredes Piqué, *supra* note 49 at 26.

⁸⁷ See Fuller, *supra* note 85 at 17.

⁸⁸ See Paredes Piqué, *supra* note 49 at 26; see Fuller, *supra* note 85 at 25.

⁸⁹ See Paredes Piqué, *supra* note 49 at 24.

⁹⁰ See Fuller, *supra* note 85 at 32.

⁹¹ Interview of an Awajún community member (woman, over 40 years old), cited in Peru, Ministerio de Educación, *Desenrollando la impunidad* (Lima, 2017) at 27 [translation by the author].

⁹² See *ibid* at 36.

norms fuel the difficulty in speaking about consent and gender relations.

Peruvian Justice System

The ostensible conclusion that gender inequalities are inherent to Awajún societal norms led some Indigenous people to argue that sexual violence forms part of Awajún cultural identity and thus merits legal protection. The penal code, which provides for a culturally conditioned conception of error as a defence, lends some support to this argument:

[a] person who, due to his culture or customs, commits a punishable act without being capable of understanding the criminal character of his act [...] shall be exempted from responsibility. When, for the same reason, his capacity is diminished, the sentence shall be mitigated [emphasis added].⁹³

The provision illustrates the collision of Indigenous rights, gender equality protected under Peru's public law and colonial values. In a way, Article 15 hopes to meet international human rights standards. It conveys sensitivity to diverse cultural identities of Peru's pluriethnic nation and echoes the self-determination aspirations of Indigenous rights groups promised in the ILO Convention 169. The principle also implicitly recognizes that non-Indigenous judges may not have the necessary legitimacy or understanding of Indigenous cosmovision to adjudicate on the merits of a criminal case involving cultural behaviours.

At the same time, the language of "capacity" evokes the tutelage rhetoric enshrined in so many Latin American legislations before, a tradition initiated in the Spanish colonial penal code. The Indigeneity here offers a partial or full defence to one's criminal actions, reinforcing the historical imagery of levelling "native communities" with hypersexualized and unredeemable "savages." Additionally, the code confuses the distinction between ordinary and customary law by confounding the mandate to resolve conflicts by the community with a blanket immunity to perpetrate criminal offences.

Next, even if the lawmaker intended to advance Indigenous self-determination and demonstrate a blind

⁹³ Art 15 Código Penal [Penal Code], 1991 (Peru) [translation by the author].

commitment to multiculturalism, the code neglected to balance the interests of individual members of Indigenous communities, such as women, children, LGBTQ people, disabled and elderly people etc. For instance, when the Inter-American Court incorporates cultural identities within the scope of its judicial reflections, it is still cognizant of the internal constraints, like paternalism and stigmatization, which may make certain members of the community more vulnerable to discrimination within the community.⁹⁴ As well, the Inter-American Court construes the category of *identity* in such a way as to advance the intersectional understanding of experiencing human rights, not to stifle it.⁹⁵

Consequently, not only did the penal code provision leave the judges confused, but it also created uncertainty in the law because it was applied inconsistently. What kind of anthropological expertise is sufficient to prove a causal connection between a cultural norm and the offence? Should the cultural norm always offer an excuse, even if it does not invalidate one's "capacity" to appreciate the criminal nature of an action? Should the defence apply to norms, which are unreasonable or inconsistent with either constitutional fundamental freedoms or international obligations? The Supreme Court grappled with these questions on several occasions.

In a 2006 decision concerning the sexual assault of an eight-year-old, the Court refused to apply Article 15 and sentenced the defendant to twenty years of imprisonment.⁹⁶ In this case, the perpetrator was a teacher in an Awajún elementary school and the victim's stepfather. The victim was systematically raped until she reached fourteen years old and – "tired of what was happening"⁹⁷ – she moved in with her uncle. The defendant invoked the "cultural error," claiming additionally that the victim's mother consented to his sexual relationship with the daughter and that he was mistaken about victim's age due to her abnormal physical development.⁹⁸ The Court did not accept the cultural defence, noting that the Awajún defendant received education outside the community, and added that the victim and the offender

⁹⁴ See e.g. *Plan de Sánchez*, *supra* note 34 at para 49(19); *Chichupac*, *supra* note 39 at para 198.

⁹⁵ See e.g. *Fernández Ortega*, *supra* note 37 at para 223; *Rosendo Cantú*, *supra* note 38 at para 9.

⁹⁶ See Corte Suprema de Justicia, Segunda Sala Penal Transitoria, San Martín, 4 April 2006, *Recurso de nulidad* No 004706-2005 (2006) (Peru) at 5.

⁹⁷ *Ibid* at 1-2 [translation by the author].

⁹⁸ See *ibid* at 2.

did not share the same culture because they were originally from two different communities.

The sole condition of being a member of an Amazonian ethnic group does not exempt the accused from criminal responsibility; such would only follow had the defendant and the victim: lived in the same community; abided by the same customs; never left the Amazonian community or never learned about customs different than the ones existing in the Amazonian community.⁹⁹

The Court, uncomfortable with the onerous Article 15, construed its scope narrowly. The judges limited it to individuals who have never had any contact with other cultures, mimicking the historically-validated vision of Amazon as unexplored and isolated. As well, the undertone of the judge's reasoning was paternalistic and reminded of *indigenista* educational initiatives: the defendant received higher education outside the community, ergo he should have known "better" by now. Lastly, the judge factored in the victim's cultural background in the measurement of the defendant's moral blameworthiness, as if consent from an eight-year-old girl or her mother could have impacted the outcome of the case.

In a 2014 Andean case, on the other hand, the Court used Article 15 to ultimately reduce the sentence. In this case, the defendant, who had recently migrated to the city from a rural community, satisfied the Court that he had not adjusted yet to the cultural norms of urban Peru. The Court took into consideration the expert opinion, according to whom it is socially accepted in the pastoral setting that "children [...] engage in sexual relations from a young age, without knowing if it is good or bad."¹⁰⁰ The Court also factored in the defendant's sincere remorse, his lack of criminal record, and the small age difference between the defendant who was eighteen years old at the time and the victim who was twelve years old. This case shows judicial inconsistencies: after all, in the case mentioned above, the Court pointed to the defendant's education and experience outside the community as invalidating the cultural error defence.

⁹⁹ *Ibid* at 3 [translation by the author].

¹⁰⁰ Corte Suprema de Justicia, Segunda Sala Penal Transitoria, Arequipa, 15 July 2015, *Recurso de nulidad* No 3148-2014 (2015) (Peru) at 5 [translation by the author].

In 2015, the Supreme Court, alarmed with the mixed application of Article 15, issued a clarification in the form the *Plenary Accord* on the appropriate interpretation of cultural defence in cases concerning the sexual assault of minors under 14 years old. The Court condemned the judicial practice of validating sexual abuse by absolving or reducing sentences for cultural reasons.¹⁰¹ Such use of Article 15 promotes a collective sense of impunity, the Court concluded.¹⁰² The source of this practice, according to the Court, lies in the judges' unfamiliarity with Indigenous realities and a misguided use of anthropological expert opinions, which are frequently generic and biased in favour of the accused.¹⁰³ Among other shortcomings, the Court criticized the tendency to legitimize consensual sexual relationships involving children when these were denounced by a third party.¹⁰⁴ The Court also overviewed the changing social practices in Andean and Amazonian regions, highlighting that the communal authorities themselves express interest in advancing gender equality.

Furthermore, the Court reminded about Peru's international obligations towards the rights of women and children, calling for incorporating a gender-sensitive approach in judicial analysis. Specifically, Article 2 of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) commits member states "to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women [emphasis added]."¹⁰⁵ This formulation placed on Peru's judiciary an obligation to intervene whenever customary law or social norms violate women's right to equality. Ultimately, the Court called for case-by-case evaluations, which determine the existence of factors such as the degree of vulnerability of the victim, attempts to negotiate financial

¹⁰¹ See Corte Suprema de Justicia, IX Pleno jurisdiccional de las salas penales permanente y transitoria, Lima, 21 June 2016, *Acuerdo Plenario* No 1-2015/CIJ-116 (2016) (Peru) at para 8 [*Plenary Accord*].

¹⁰² See *ibid* at para 16.

¹⁰³ See *ibid* at para 9.

¹⁰⁴ See *ibid* at para 9.

¹⁰⁵ *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979 art 2f (entered into force 3 September 1981, accession by Peru 13 September 1982) [CEDAW].

compensation for the assault, the duration of the forced relationship, the degree of acculturation etc.¹⁰⁶

Despite its clear message, the *Plenary Accord* failed to remedy the clash between Indigenous and women's rights, and courts continued to struggle with balancing the intercultural and gender perspectives. Additionally, the recent criminal justice reform only aggravated judicial vertigo. The lawmakers confirmed the validity of employing Article 15 in all sexual assault cases, subject only to the consent of the parties to engage in the intercourse.¹⁰⁷

The effects of this legal inconsistency are present in the contradictory outcomes of the two most recent cases. In a 2018 case, which involved members of Ese Eja and Shipibo communities, the Court was presented with two contradictory versions of the facts.¹⁰⁸ According to the prosecutor, the accused raped a twelve-year-old girl, and the following year he raped her on two other occasions. To keep the victim from reporting the crimes, the perpetrator offered her money and threatened to kill her family. As a result of the assault, the victim became pregnant and lived with her perpetrator until he abandoned her two months after she gave birth. Subsequently, over the span of one year, the perpetrator raped the victim's sister (who was eleven and then twelve years old) on three separate occasions, also threatening to kill her family.¹⁰⁹ The medical records of both girls showed a strong indication of sexual abuse.¹¹⁰ The Court, however, accepted court testimonies of the expert, the victims, and their parents, who indicated that both sexual relationships were consensual with prior authorization from sisters' parents.¹¹¹ According to the expert testimony, in the Shipibo culture, a

¹⁰⁶ See *Plenary Accord*, *supra* note 101 at para 16.

¹⁰⁷ Ley que modifica el código penal y el código de ejecución penal para fortalecer la prevención y sanción de los delitos contra la libertad e indemnidad sexuales [Law modifying the penal code and the code of penal procedure to strengthen the prevention and sanction of crimes against sexual freedom and security] Ley No 30838, 4 August 2018 (Peru).

¹⁰⁸ See Corte Suprema de Justicia, Segunda Sala Penal Transitoria, *Madre de Dios*, 28 August 2018, *Recurso de nulidad* N.º 1134-2016 (2018) (Peru).

¹⁰⁹ See *ibid* at 1-2.

¹¹⁰ See *ibid* at 3.

¹¹¹ See *ibid* at 6.

woman who began menstruating may initiate sexual contacts with parental consent.¹¹²

The Court's reasoning drew from both the multicultural and paternalist rhetoric of the positivism at the same time: the Court reasoned that the penal code, which "recognizes that Peru is a pluricultural society,"¹¹³ absolves a socially accepted behaviour, even if the code finds it "reproachable" and "morally condemnable."¹¹⁴ The Court, further, invoked the right to cultural identity enshrined in Article 27 of the ICCPR and Article 2.2(b) of the ILO Convention 169.¹¹⁵ This absolution, based on the (somewhat suspicious) consent, follows the legislature's reading of Article 15, but conflicts with its interpretation outlined in the *Plenary Accord*. First of all, the Court failed to meet the CEDAW standard of guarding against customs and practices that discriminate women. Secondly, in accepting intercourse with minors as customary, the Court disregarded that the intimidation and money used to silence the victims negates the defendant's mistaken belief in consent or the conclusion that the defendant did not appreciate the criminal nature of his actions.

Then again, a 2017 decision did follow the cautionary guidelines of the *Plenary Accord* and refused to recognize the special status of the Awajún offender, sentencing him to life imprisonment.¹¹⁶ In this case, the accused took advantage of his position as a local teacher to lure a twelve-year-old to come to his house where he raped her.¹¹⁷ The defence argued that the relationship was consensual, bringing as evidence the declaration signed later by the victim under the pressure of communal authorities.¹¹⁸ The Court concluded that any form of conciliation or compensation is unacceptable where the matter engages the violation of fundamental rights.¹¹⁹ What mattered for the Court in

¹¹² See *ibid*.

¹¹³ *Ibid* at 5 [translation by the author].

¹¹⁴ *Ibid* at 7 [translation by the author].

¹¹⁵ See *ibid* at 8; see also *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 art 27 (entered into force 23 March 1976, accession by Peru 28 April 1978) [ICCPR]; *Indigenous and Tribal Peoples Convention*, 27 July 1989, No 169 art 2 (entered into force 5 September 1991, accession by Peru 2 February 1994) [ILO Convention 169].

¹¹⁶ See Corte Suprema de Justicia, Segunda Sala Penal Transitoria, Amazonas, 15 August 2017, *Resolución judicial* No 002692-2016 (2017) (Peru) at 13 [Resolución 002692-2016].

¹¹⁷ See *ibid* at 2.

¹¹⁸ See *ibid* at 3, 7.

¹¹⁹ See *ibid* at 8.

this case, however, was the victim's age, not gender norms. The child's wellbeing is legally protected, as the premature introduction to sexuality produces severe damage to one's health and development. As a result, even the minor's consent would not have changed the outcome of the case. Additionally, the fact that the defendant took advantage of the bond of trust aggravated the nature of the crime.¹²⁰ In light of the legislative reform, this case could be decided differently today.

Community Justice

The pressure from the community to resolve conflicts internally, like in the case above, has legal, cultural, and pragmatic bases. The community authorities invoke internationally recognized right to self-determination and cite Peru's Constitution to support this approach:

[a]uthorities of [...] native communities [...] may exercise jurisdictional functions at the territorial level in accordance with common law, provided they do not violate the fundamental rights of the individual. The law provides forms for coordination of such jurisdiction with Justices of the Peace and other bodies of the Judicial Branch [emphasis added].¹²¹

On the one hand, the Constitution suggests that the communities have a full jurisdiction as long as the customary law is consistent with fundamental freedoms. And while the Constitution affirms that the relationship between communal jurisdiction and the public courts will be regulated by the law, Peru still has not created any mechanisms to this end. In this sense, the judicial scrutiny of the community's affairs should be incidental to community's jurisdictional autonomy. This interpretation prevailed in the Constitutional Court of Colombia, which offers similar constitutional protections to Indigenous justice:

[i]n principle, the community has the competence to resolve conflicts related to Indigenous children [...]. However, when the Indigenous jurisdiction or the community itself violates the essential components of

¹²⁰ See *ibid* at 10.

¹²¹ *Political Constitution of Peru*, 29 of December 1993, the Congress of the Republic
<congreso.gob.pe/Docs/files/CONSTITUTION_27_11_2012_ENG.pdf> art 149 [Constitution].

restrictions imposed on the Indigenous jurisdiction [...], [the law] may act as the guardian of children's rights, as children retain their individual rights, which cannot be negated by the collective.¹²²

On the other hand, the Constitution could be interpreted as limiting the communal jurisdiction to cases that do not engage fundamental freedoms. For instance, in the 2017 case presented above, Peru's Supreme Court rejected the victim's signed declaration, stating that conciliation is not an available avenue when fundamental freedoms are at stake.¹²³ Peru's Ombudsman voiced a similar opinion. In 2018, the Office registered a case, in which the Awajún Administration in Alto Marañón sentenced a sexual offender, who raped his two stepdaughters (of age 7 and 11), to one year of imprisonment and mandated him to the treatment with medicinal plants and compensation of 3,000 soles to the victims.¹²⁴ In the commentary, the Ombudsman cautioned that the autonomy rights emanating from the Constitution and the ILO Convention 169 could not encroach on Peru's judicial system and the international human rights law. Consequently, the communities are not deemed the appropriate forum for cases involving fundamental freedoms.¹²⁵

Yet communal authorities are frequently the first point of contact in reporting crimes. Most Awajún communities are located in remote areas, which makes it a long and sometimes a prohibitively expensive journey to report crimes with state authorities.¹²⁶ To this adds the cultural distance: the unfamiliarity with the laws, linguistic barriers, distrust in state institutions, and the fear of rejection from the community.¹²⁷

As a result, many Awajún community statutes legislate against sexual crimes. In such cases, the punishment aims at restoring peace within the community, which is accomplished through a settlement that both sides agree to. For instance, the internal regulation of the Awajún community of Winchu-San Rafael sets a mandatory minimum sentence of one year of

¹²² Corte Constitucional de Colombia, Bogotá, 11 January 2012, *Sentencia T-001/12* (2012) (Colombia) [translation by the author].

¹²³ See *Resolución 002692-2016*, *supra* note 116 at 7.

¹²⁴ See Peru, Defensoría del Pueblo, *El Vigésimo Segundo Informe Anual de la Defensoría del Pueblo* (Lima, 2019) at 74.

¹²⁵ See *ibid.*

¹²⁶ See Peru, Ministerio de Educación, *supra* note 91 at 80.

¹²⁷ See Paredes Piqué, *supra* note 49 at 48.

imprisonment.¹²⁸ For the offender to be released after one year, his family has to agree to pay 1,000 soles to the injured family.¹²⁹ On the other hand, the community of Chipe Kusu only establishes the framework for financial compensation: a distant relative who assaults a minor receives the punishment of 500 soles.¹³⁰ This statute is silent about other forms of abuse or categories of offenders, perhaps due to the community leaders' broad discretion in the exercise of justice.

There are three main reasons for such lenient solutions. First of all, crimes concerning sexual violence do not have a compensatory equivalent, so in principle, conciliation always fails to compensate the victim. Secondly, the parties involved in the conciliation are predominantly male: usually, it is the father of the victim who appeals to the authorities on behalf of the victim; most community leaders (*apu*) are also men. This means that the decision-makers may be ill-equipped for understanding the gendered impact of damage resulting from sexual violence. Lastly, most Awajún families have very limited economic resources, which may place pressure on the injured family to accept a monetary settlement instead of committing to lengthy and costly legal proceedings:

[s]o I go back to talk to *apu* – recalls J.T., a father of the victim – and I asked the mister rapist, is this true? Pay him 300 soles, said the *apu* [...]. Since we're Awajún, we don't have much economy, so to solve this, pay the raped lady. So the mister promises to pay, and when he brings her the money, it's all resolved. [...] He took responsibility, [...] he paid, and he never bothered again, he was saying he made a mistake. Now, we speak normally with him, he's my family, we share food, it's all normal.¹³¹

In the long term, seemingly peaceful solutions only exacerbate the sense of impunity and undermine the importance of women's personal integrity. When J.T.'s other daughter was assaulted, he again reported the crime to the *apu*. This time, the perpetrator disregarded the family's settlement offer, taking advantage of the

¹²⁸ See Art 5 Reglamento Interno [Internal Regulation], Comunidad Nativa Winchu-San Rafael (Peru), cited in *ibid* at 46.

¹²⁹ See Art 5(1) *ibid*.

¹³⁰ See Art 6(b) Reglamento Interno [Internal Regulation], Comunidad Nativa/Centro poblado menor Chipe Kusu (Peru), cited in *ibid* at 47.

¹³¹ Interview of J.T. the victim's father, cited in Peru, Ministerio de Educación, *supra* note 91 at 73 [translation by the author].

cost of accessing public courts: “[t]he Awajún has no fear of justice [...]. [The perpetrator] tells me ‘you have no money; you’ll never send me to jail.’”¹³²

Conclusion

In Peru, the resurfacing of ethnic politics in the 20th century drew from the simultaneous fascination with and disdain for Indigenous cultures, which had successfully smoothed out the multidimensional experience of discrimination residing in regionalized Indigenous identities. The positivists’ idea that the corruption of the noble Inca diminishes their Indigeneity to the level of peasantry, the Velasco-era clumsy attempts to conceal Peru’s ethnic tensions, ethnically-charged sexual violence during the wartime era as well as Peruvian courts’ superficial reading of multiculturalism: all contested the complex interplay between gender, ethnicity and class. But this does not mean that the positionality of ethnicity or gender is not informed by circumstances of poverty, access to social services, education, fluency in Spanish etc. The understanding of gender is measured through perceptions of race and class and vice versa.¹³³ Thus, while the official ideologies always sought to underplay these ambiguities, the self-determination of Awajún women has constantly been negotiated through identity-driven variables: noble-savage, Spaniard-Indigenous, Andean-Amazonian, Indigenous-peasant, cultured-primitive, culture-nature, masculine-feminine.¹³⁴

This paper explored different ways in which the historical collisions between gender, ethnicity, geography and class shaped the modern-day manifestations of sexual violence and inequality in Awajún communities. Ultimately, the case of Awajún women shows that the Indigenous cultural identity, as institutionalized in Peru’s legislation, never fully renounced its perverted, colonial roots. On the contrary, even when the courts or the legislation seek to mimic the language of multiculturalism, they easily backslide to the paternalist dichotomy of the state-the saviour and the native communities-the rescued. Furthermore, the relatively recent appearance of state institutions in Amazon paired with the

¹³² *Ibid* at 74 [translation by the author].

¹³³ See also Hernández Castillo, *supra* note 31 at 61; Boesten, *supra* note 77 at 229.

¹³⁴ See de la Cadena & Starn, *supra* note 9 at 2.

simultaneous absence of legislation coordinating the relationship between the communities and the state creates a legitimacy crisis for community authorities. The place of both Indigenous and state jurisdictions in Awajún order is uncertain, stimulating the sense of impunity and inviting abuse.

Any durable solution cannot replicate international obligations without recognizing Peru's complex history of identity-driven oppression. As the post-war reconciliation efforts opened the path for Indigenous claim-making, bottom-up ethnic-based social mobilizations have a chance to gain more political salience and upend the hierarchical structure of state-Indigenous relations. This process, however, needs to recognize the rightful place of Amazonian women in leading the change, so that the substantial rights underlying the demand for autonomy correspond with the lived experience of all members of Indigenous communities. And, hopefully, as Judith Reymundo told me, "as a woman changes, the community – and even the nation – will change with her."¹³⁵

¹³⁵ Interview of Reymundo Ruiz, *supra* note 1.

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