The Coloniality of Law in Peru:Legal Positivism, Rape & Racialized Morality in Early Twentieth-Century Courts ❧

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Abstract. Objective/context: In the early twentieth century, Peru rejected legal pluralism and, once again, selected a highly European-inflected penal code, undergirded by the prevailing tenets of legal positivism. In doing so, criminal courts became a particularly contested site, where indigenous and *mestizas* (mixed-race) women shaped and negotiated racial sentiments constructed around their sexuality. In also shaping the meaning of the law itself, I contend that virginity—or lack thereof—patterned legal positivism in Peru. I first detail the historical impact of legal positivism on Peru's judiciary. I then showcase women's courtroom narratives (alongside other juridical testimonies) that reveal their struggle for political inclusion. **Methodology:** This article is built from an analysis of primary and original archival data and is the synthesis of 55 cases of alleged sexual transgressions occurring in the region of Cuzco from 1924 to 1949. **Originality:** This paper is significant because it is one of only a few that examine the history of legal positivism and rape prosecution in the early twentieth century by incorporating primary archival data to show how women were protagonists in shaping Peru's unique legal, political and cultural history. **Conclusions:** Expanding the arguments of imminent Andean scholars of postcolonialism, I argue that the 'coloniality of law' in Peru is illuminated by the collusion of legal positivism and *fin de siècle* racial ideologies that created a new subjectivity for women. In addition to refashioning repressive honor codes (literally embodied in ideas about morality and chastity), the new penal code also broadened a gap where indigenous and *mestizo* women argued their juridical humanity in criminal courts.

Keywords: coloniality of law, indigenous resistance, legal anthropology, positivism in Latin America, race as morality, rape legislation.

La colonialidad del derecho en el Perú: positivismo jurídico, violación y moralidad racializada en los tribunales de principios del siglo xx

Resumen. Objetivo/contexto: en el temprano siglo xx, el Perú rechazó el pluralismo jurídico y, una vez más, optó por un código penal de fuerte influencia europea, sustentado en los principios imperantes del positivismo jurídico. Los tribunales penales se convirtieron en un lugar especialmente conflictivo, donde las mujeres indígenas y mestizas dieron forma y negociaron los sentimientos raciales construidos en torno a su sexualidad. Sostengo que, al configurar también el significado de la propia ley, la virginidad —o la falta de ella— marcó el positivismo jurídico en Perú. Primero detallo el impacto histórico del positivismo legal en el poder judicial peruano. A continuación, expongo las narrativas de las mujeres en los tribunales (junto con otros testimonios jurídicos) que revelan su lucha por la inclusión política. **Metodología:** este artículo se cons-

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truye a partir de un análisis de datos de archivo primarios y originales y es la síntesis de 55 casos de presuntas transgresiones sexuales ocurridas en la región del Cuzco entre 1924 y 1949. **Originalidad**: este artículo es significativo porque es uno de los pocos que examinan la historia del positivismo jurídico y la persecución de la violación sexual a principios del siglo xx, incorporando datos de archivo primarios para mostrar cómo las mujeres fueron protagonistas en la configuración de la singular historia jurídica, política y cultural del Perú. **Conclusiones**: al ampliar los argumentos de inminentes estudiosos andinos del poscolonialismo, sostengo que la "colonialidad del derecho" en el Perú se ilumina por la colusión del positivismo legal y de las ideologías raciales de fin de siglo, que crearon una nueva subjetividad para las mujeres. Además de remodelar los códigos de honor represivos (literalmente encarnados en ideas sobre la moralidad y la castidad), el nuevo código penal también amplió una brecha en la que las mujeres indígenas y mestizas argumentaron su humanidad jurídica en los tribunales penales.

Palabras clave: antropología jurídica, colonialidad del derecho, legislación sobre violación, positivismo jurídico en América Latina, raza como moralidad, resistencia indígena.

A colonialidade do direito no Peru: positivismo jurídico, estupro e moralidade racializada nos tribunais de princípios do século xx

Resumo. Objetivo/contexto: no início do século xx, o Peru rejeitou o pluralismo jurídico e, uma mais uma vez, optou por um código penal de forte influência europeia, apoiado nos princípios imperantes do positivismo jurídico. Os tribunais penais se tornaram um lugar especialmente conflituoso, em que as mulheres indígenas e mestiças deram forma e negociaram os sentimentos raciais construídos em torno da sexualidade. Defendo que, ao configurar também o significado da própria lei, a virgindade — ou a falta dela — marcou o positivismo jurídico no Peru. Primeiro detalho o impacto histórico do positivismo legal no poder judicial peruano. A seguir, exponho as narrativas das mulheres nos tribunais (junto com outros depoimentos jurídicos) que revelam sua luta pela inclusão política. **Metodologia**: este artigo é construído a partir de uma análise de dados de arquivos primários e originais e é a síntese de 55 casos de supostas transgressões sexuais ocorridas na região de Cuzco entre 1924 e 1949. **Originalidade**: este artigo é significativo porque é um dos poucos que analisam a história do positivismo jurídico e a persecução do abuso sexual a princípios do século xx, incorporando dados de arquivos primários para mostrar como as mulheres foram protagonistas na configuração da singular história jurídica, política e cultural do Peru. **Conclusões**: ao ampliar os argumentos de reconhecidos estudiosos andinos do pós-colonialismo, argumento que a "colonialidade do direito" no Peru é iluminada pelo conluio do positivismo legal e das ideologias raciais do final do século, que criaram uma subjetividade para as mulheres. Além de reformar os códigos de honra repressivos (literalmente encarnados em ideias sobre a moralidade e a castidade), o novo código penal também ampliou uma brecha na qual as mulheres indígenas e mestiças argumentaram sua humanidade jurídica nos tribunais penais.

Palavras-chave: antropologia jurídica, colonialidade do direito, legislação sobre estupro, positivismo jurídico na América Latina, raça como moralidade, resistência indígena.

Introduction

On April 3, 1922, Marcelina Hancco was brutally gang-raped by seven men in Paucartambo (a remote rural province in the highland region of Cuzco, Peru). In Marcelina's statement to the court, she is identified as a monolingual Quechua speaker whose parents died some years back. She is not quite sure of her age but estimates it at about seventeen or eighteen. Marcelina states that after finishing a late shift at the *chichería* (local corn-beer pub) of Benita Pinares (where she usually slept), she sought refuge in a neighbor's house. She feared the rowdy men who had

gotten drunk during her shift. Despite her efforts to avoid problems, they pursued her shortly after she left the *chichería* and gang-raped her. The medical report revealed the following facts about the rape of Marcelina:

> 1) The larger lip folds, or vulva, are completely swollen and inflamed from too much friction with a penis. 2) The lesser lip folds, or *ninfas*, are in such a state of inflammation that they are completely enveloped by the inflamed vulva. 3) The clitoris is badly irritated and mildly bleeding due to the effects of friction. 4) The membrane of the hymen no longer exists, and all that can be found in the out and inner folds of the vagina are residues of semen, figuring that the rape (*desfloración*) happened very recently. 5) The inner leg area contains whelps and flayed skin due to the swollen vulva. 6) The undergarment of the petticoat (*pollera interior*) is stained with blood, and 7) upon examination, the patient felt pain in the pubic region and hips. Also, her left arm is sprained, and, in addition, her lung is bruised impeding free movement of the arm. She also has slight swelling of the right arm, supposedly caused by the great amount of pressure holding her down on the floor. [...] It is our conviction that the victim was a virgin[1].

The ensuing court case embroils the whole town into turmoil. Flagrantly false accusations about Marcelina's previous sexual conduct are aired, witnesses are threatened, and bribery allegations emerge. The local judge, in an impassioned letter to his superiors in the city of Cuzco, implores:

> On the third of April of this same year, at 11 o'clock at night, a very young orphaned Indian girl, Marcelina Hanco, was attacked by a bacchanalian orgy of lechers who raped her, fueling their depraved appetites. This rape echoed resoundingly through the interior of the society, who saw the imminent threat approaching in a town that is in need of more police and where public safety has no other guarantee than the mutual respect of its residents. What is worse is that two police guards were amongst the principal protagonists in the debauchery. As a result of the incident and in addition to being raped, the victim was passed gonorrhea (*una infección de blenorrágica*) by one of the rapists, which has of consequence put her life in serious danger[2].

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1 "Contra Juan de Dios Vivero, Cirilo y José Jiménez, Inocencio Quintanilla, Segundo Sarmiento, Hermógenes Villalva, Domingo Velásquez y Eduardo Garriod, por violación a Marcelina Hancco," Paucartambo, April 11, 1922, case n.º 557, Archivo de la Corte Superior de Justicia del Cuzco (ACSJC), Cusco-Perú. ACSJC is located in the basement of the Palacio de Justicia on the avenue El Sol, near the main square. Unlike its colonial counterpart located in the university, there is effectively no order for the legal documents housed here between 1900 to 1960, which cover the entire jurisdiction of the regional province of Cuzco from this period. These case files are neither catalogued nor indexed, in either a manual or digital format. Case files are deposited into stacks according to the year they were initiated and then piled onto long wooden shelves running the entire ceiling height and length of the basement. To complicate matters, each case file had its own system of numeration and was often handwritten. Thus, I had to develop my own citation system. To title these documents, I have cited the handwritten title pages in Spanish exactly as they appeared. I have used the year and place/province of initiation as the formal citation date. (The number appearing on the first page of the case file is always my citation reference for these cases even though the actual case file number varies several times within the case file itself). The state of the archives in Cuzco is an all too obvious metaphor. It reveals a power structure in which the law is a very useful tool in the continued subordination and disenfranchisement of indigenous people. This is what Ann Stoler refers to as the "pulse" that underscores postcolonial historiography in her insightful study, Ann Laura Stoler. *Along the Archival Grain* (Princeton: Princeton University Press, 2010) 47-50.

2 "Contra Juan de Dios Vivero, Cirilo y José Jiménez, Inocencio Quintanilla, Segundo Sarmiento, Hermógenes Villalva, Domingo Velásquez y Eduardo Garriod, por violación a Marcelina Hancco," 37.

As a consequence, the accused were jailed temporarily in Cuzco, awaiting further testimony from Marcelina. Yet, she never pursued charges. All of the accused made bail and were released a few months after the rape. The case was archived permanently five years later.

Marcelina's case underscores the major factors that would constitute rape prosecution in early-twentieth-century Peru: bodily traces of sexual violence, the primacy of virginity, embattled courtroom dramaturgy, the idea of race, and, too, a beleaguered judiciary deciphering its role in the prosecution of egregious public crimes. Equally, the narratives and legal testimonies from (and about) indigenous and *mestizo* (mixed-race) women in rape trials unearth the occluded histories.[3] Postcolonial codification exposes the lability of unstable hierarchies and the possibilities of resistance underwritten by a sexuality defined via the law.[4]

Peruvian sociologist Anibal Quijano recalibrated the pre-eminence of the so-called conquest of the Americas.[5] In his works, European encroachment is a foundational (and not differential) moment in European modernity. He contends that Europe and its colonies mutually constitute a shared identity and modernity, whose fates are tied together. But what is more, he also argues that the idea of race was formed in the Americas. In Quijano's frame, the 'coloniality of power' created by European encroachment in the Americas is an axis that frames the capitalist world order with race as its organizing principle. Maria Lugones advances Quijano's thinking by asserting that modernity/coloniality must be understood as a simultaneous articulation of race and gender.[6] Taken together, these authors show that coloniality in the Americas apportions the world accordingly, by conferring a specific racial logic.[7]

I argue in this essay that the coloniality of law in Peru is illuminated in the collusion of legal positivism and *fin de siècle* racial ideologies that created a new legal subjectivity for women. This subjectivity was extrajudicially rendered from new positivist ideologies and criminal codes (evidently intended to regulate and redeem indigenous men). The penal code of 1924 irrefutably created—at least on paper—the singular racist genre of the Indian as criminal.[8] However, my primary archival research reveals that the real story of legal positivism in Peru must also include how this race-thinking refashioned repressive honor codes embodied in ideas about virginity and female chastity in rape cases. To this end, this article focuses on women's experiences as victims of sexual transgressions in the context of radical legal change. In doing so, it contrasts existing

3 Laura Ann Stoler, *Duress: Imperial Durabilities in Our Times* (Durham: Duke University Press, 2016), 1-20.

4 Samera Esmeir, "At Once Human and not Human: Law, Gender and Historical Becoming in Colonial Egypt," *Gender & History* 23, n.º 2 (2011): 235-249, doi: https://doi.org/10.1111/j.1468-0424.2011.01636.x

5 Anibal Quijano, "Coloniality of Power and Eurocentrism in Latin America," *International Sociology* 15, n.º 2 (2000): 215-232.

6 María Lugones, "The Coloniality of Gender," in *The Palgrave Handbook of Gender and Development*, edited by Wendy Harcourt (London: Palgrave Macmillan, 2016), 13-33.

7 Walter D. Mignolo, "Delinking: The Rhetoric of Modernity, the Logic of Coloniality and the Grammar of De-Coloniality," *Cultural Studies* 21, n.º 2-3 (2007): 449-514, doi: https://doi.org/10.1080/09502380601162647

8 For a discussion of indigenous criminality during this period some excellent sources are Deborah Poole "Ciencia, peligrosidad y represión en la criminología indigenista peruana," in *Bandoleros, abigeos y montoneros. Criminalidad y violencia en el Perú, siglos XVIII-XX*, edited by Daniel A. Morales-Gómez and Carlos Alberto Torres (Lima: Instituto de Apoyo Agrario, 1990), 335-367; and Lior Ben David, "'Where Does the Indian Begin and where Does it End?': Legal-Criminal Categories in Peru, 1920s-1940s, and two Bolivian Cases from the 1940s," *Estudios Ibero-Americanos* 43, n.º 1 (2017): 21-36, http://dx.doi.org/10.15448/1980-864X.2017.1.24278

scholarship that focuses on legal change through the epistemology of criminology.[9] My work is also different from similar scholarship in Latin America surrounding this period[10] in its attempt to reveal how republican penal codes catalyzed racial discourse thereby also creating an agency space in which women struggled in the courts.[11]

Silvia Rivera Cusicanqui argues that it was not the long evolution of colonization but rather the advent of republican systems in the Andes that were the most destructive force in terms of patriarchization. The reformulation of penal and civil codes in the early twentieth century radically reshaped the quotidian experiences of women, their rights, and the terms and conditions through which they could engage and petition the state. Consequently, what is also elided is how indigenous and *mestizo* women actively shaped the law. In this context, I contend that rape in Peru is essentially a republican era crime. [12] Before independence from Spain, cases concerning sexual violence and transgressions were primarily an ecclesiastical matter. Existing scholarship shows a steady number of such cases in colonial ecclesiastical archives, and in the Republican era, these cases flooded the courts.[13]

Women plaintiffs in these cases, I propose, were at the forefront of battles for political inclusion in Peru. This article is the synthesis of 55 cases of alleged sexual transgressions occurring in the region of Cuzco from 1924 to 1949.[14] In taking the 1924 penal code as a point of departure, I first describe the socio-cultural environment in the region of Cuzco to delimit the historical specificity of race. I then detail how legal positivism affected penal re-codification, judicial reasoning, and the prosecution of rape crimes. Subsequently, in the final sections, I juxtapose this legal history of rape prosecution in Peru with testimonies in actual case files to explain how women confronted extrajudicial sentiments, racial discrimination and gender bias. As Marcelina's case shows, archival documents are often incomplete and inconclusive. In parallel fashion, this article argues that the narratives and testimonies[15] derived from these cases form a basic blueprint for the paths in which indigenous women and *mestizas* sought justice in their quotidian lives and redress from the state in this era in pursuit of their juridical humanity.

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9 For a discussion of legal theories surrounding law and modernity see, Peter Fitzpatrick, *Modernism and the Grounds of Law* (Cambridge: Cambridge University Press, 2001).

10 Sueann Caulfield, *In defense of honor: Sexual morality, modernity, and nation in early-twentieth-century Brazil* (Durham: Duke University Press, 2000).

11 Laura Bunt, "White Heat: Race, Rape, and the Legal Culture of Cusco, Peru (1909-2001)". (PhD dissertation; UMI Press. Ann Arbor, Michigan, 2006).

12 Silvia Rivera Cusicanqui, "La noción de "derecho" o las paradojas de la modernidad postcolonial: indígenas y mujeres en Bolivia," *Temas Sociales* 19 (1997): 27-52.

13 Christine Hunefeldt, *Liberalism in the Bedroom: Quarreling Spouses in Nineteenth-Century Lima* (University Park: Penn State Press, 2000), 223-272.

14 I use José Tamayo Herrera's (1978) characterization of this period of Cuzco's history as its "first modernity" (1900-1949). To situate the cases' interval, see José Tamayo Herrera, *Historia social del Cuzco republicano* (Lima: Universo, 1978), 10-25.

15 The testimony in court cases is sworn, although it is often through interpreters or translators from Quechua to Spanish. It would be naïve to assume that these testimonies were always the unique product of the plaintiff. That is, they were often crafted in collusion with parents, lawyers, and public prosecutors. Nonetheless, the historical record does show instances of women in command of their legal teams and testimonies; I have tried to show this where possible or probable.

1. Towards a Coloniality of the Law in Cuzco, Peru: Race-thinking, Republican Era Codification and Rape Legislation

Race and the law were integral to the "conceptual, philosophical and material emergence of the modern nation-state".[16] Prevailing state formation in Peru, nevertheless, transpired later than in other Latin American republics. By the turn of the century, Peru was sorely in need of social equity and structural change. Altering the oligarchic republic meant especially eschewing its laws, which were now seen as elitist, retrograde, and archaic.[17] During the eleven-year reign of President Augusto Legía (1919-1930), Peru set upon a path of massive re-codification of its penal, civil, mineral, water, and naval codes, as well as codes governing bankruptcy.[18] Re-codification in Peru intended to modernize society—but it also housed an ideological drive—it sought to further mold the nation-state by taming its allegedly savage inhabitants. It is crucial to note, however, that the vast majority of Peru's inhabitants were still considered to be about 70% indigenous. Even the state's muddled attempts to measure race in census-taking arguably showed that indigeneity was rising at the beginning of the twentieth century.[19] Nonetheless, most people had been excluded *de facto* from the guarantees of liberal democracy. Only gainfully employed or land-owning men were granted citizenship and suffrage, i.e., more than 85% of the population may have been disenfranchised.[20] Thus, early-twentieth-century Peru remained a predominantly "indigenous, rural and Andean country".[21]

Liberals and idealists believed that transforming the law would create inclusion, a new national united identity and quell social exclusion. The idea was to eliminate discrimination against the indigenous population while simultaneously redeeming it from its alleged barbarism. Nonetheless, Peruvian elites rejected creating a homegrown or pluralist legal system that would have incorporated indigenous customs (i.e., common-law marriage, communal tribunals, community sanctions)[22]. Instead, the government in Lima opted for a highly European-inflected system of codes. In an era of a perceived increase in criminality and rural unrest, re-codification would

16 David Theo Goldberg, *The Racial State* (Oxford: Blackwell, 2002), 4.

17 For a discussion of pre-republican law and legal thinking, see Fernando Granada de Trazegnies, *La idea de derecho en el Perú republicano del siglo XIX* (Lima: Pontificia Universidad Católica del Perú, Fondo Editorial, 1992).

18 Stuart H. Graham, *The Governmental Systems of Peru* (Washington D.C.: Carnegie Institution of Washington, 1925), 40-65.

19 Paul Gootenberg, "Population and Ethnicity in Early Republican Peru: Some Revisions," *Latin American Research Review* 26, n.º 3 (1991): 109-157, https://www.jstor.org/stable/2503666

20 For statics surrounding citizenship during this period see, María Elena García, *Making Indigenous Citizens:Identities,Education, and multicultural Development in Peru* (Redwood City: Stanford University Press, 2005).

21 Gonzálo Portocarrero, "Peru: Education for National Identity Ethnicity and Andean nationalism," in *Education, Policy and Social change: Experiences from Latin America,* edited by Daniel A. Morales-Gómez and Carlos Alberto Torres (Westport, CT: Prager, 1992), 71.

22 This was problematic because the Peruvian Constitution of 1920, in Article 58, had already tactically recognized the juridical character, and vulnerability, of its indigenous population. However, many indigenist lawyers argued that the indigenous population was so unlike Europeanizing Peruvians that they needed a separate penal code that promised to normalize and punish indigenous transgressors on their own terms and take into account cultural practices. The two most prominent examples of this legal thinking are José A. Encinas, *Contribución a una legislación tutelar indígena* (Lima: Casa Editorial E.K. Villarán, 1920) and later Atilio Sivirichi, *Derecho Indígena Peruano: proyecto de código indígena* (Lima: Ediciones Kuntur, 1946).

heighten how the public and private spheres were defined in Peru. The criminalization of rape, in particular, radically shifted into a modern variation that would become a new kind of offense—both personal and public—meriting state intervention in its prosecution.

In the colonial period, rape (usually amalgamated with violent sexual transgressions, seductions or "deflowerings") was not a secular or public offense. Ecclesiastic courts almost always handled such crimes and met out their own forms of justice and redemption. This usually meant either marriage arrangements or financial settlements. By the early twentieth century, in the still fledging Peruvian republic, rape cases "had moved from the priest's quarters and ecclesiastical tribunal to the courthouse and police station".[23] As the state extended into the private lives of its populace, public prosecutors (*fiscales*), judges and the police became the gatekeepers of justice—especially in pursuing rape cases for very young girls. Alongside the state, more mature women also sought redress by pursuing rape charges at their own initiative. This augmented a gap in the inroads made by non-elite women who had defended their "honor" in ecclesiastic colonial courts and early republican tribunals.[24] Yet, the women who dared to seek justice for rape were not the kind from strata of a society imbued with elite notions of honor and social respectability. The female plaintiffs in rape cases in early twentieth-century Cuzco exclusively were from the lower classes and were always either indigenous or *mestizas*.

Although the modern nation-state was expanding the reach of legal and civil rights to its population (and the courts created new spaces for airing grievances), such arenas were still constricted by enduring hierarchies. What was special about the idea of race in Latin America was how it captured the imagination of later republican state-crafters. In particular, they were drawn to race's seeming compatibility with the new science of eugenics and positive criminology.[25] In this vein, as an entirely social construction, the idea of race in Latin America is essentially tied to state formation.[26] The race gets enunciated further in struggles over political inclusion and the constitution of the community. I posit that race—as experienced, negotiated and created in courts of law by indigenous women and *mestizas*—is a lived experience in the quotidian state.[27]

Women in Cuzco, it is argued, are more Indian.[28] That is, they are more susceptible not only to physical violence but also to the ascriptive discourses of race in Peru that are enmeshed in discourses of sexuality and sexual comportment. Nevertheless, most women's sexual practices in Peru

23 Sueann Caulfield, Sarah C. Chambers and Lara Putnam, eds. *Honor, Status, and Law in Modern Latin America* (Durham: Duke University Press, 2005), 10.

24 For discussion of illegitimacy and female-headed households in ecclesiastical courts see María Emma Mannarelli, *Pecados públicos: La ilegitimidad en Lima, siglo XVII* (Lima: Centro de la Mujer Peruana Flora Tristán, 2004); and Tanja Christiansen, *Disobedience, Slander, Seduction, and Assault: Women and Men in Cajamarca, Peru, 1862-1900* (Austin: University of Texas Press, 2004).

25 Nancy Stepan, *"The Hour of Eeugenics": Race, Gender, and Nation in Latin America* (Ithaca: Cornell University Press, 1991), 2-17.

26 For a discussion of race and state formation see Nancy P. Appelbaum, Anne S. Macpherson, and Karin Alejandra Rosemblatt, eds. *Race and Nation in Modern Latin America* (Chapel Hill: University of North Carolina Press, 2003).

27 In terms of theorizing a postcolonial penalty very few studies separate themselves from the grand narratives of statehood and the law to focus on the everyday "lived experiences of individuals", see Mark Brown, *Penal Power and Colonial Rule* (New York: Routledge, 2014), 190.

28 Marisol de la Cadena, "Las mujeres son más indias," *Detrás de la puerta: hombres y mujeres en el Perú de hoy, compiled by* P. Ruiz Bravo (Lima: Editorial PUCP, 1996), 181-202.

were at odds with reigning notions of traditional (i.e., "white" Castilian Christianity) morality or honor codes.[29] Honor for women was attained through marriage or in chastity (namely in virginity until marriage) in this postcolonial lexicon. Some scholars assert that the social and political uncertainties of nation-state building actually heightened the policing of morality. However, rural indigenous women often practiced a pre-Colombian trial marriage tradition, known in Quechua as *servinacuy*.[30] *Mestizas* often practiced pre-marital sex and cohabitated; most were in female-headed (husbandless) households with their illegitimate offspring.[31] As such, these women were not bestowed elite honor but negotiated these codes on their own terms in court cases in Cuzco.

2. The 1924 Penal Code of Maúrtua: Legal Positivism and Rape Legislation

As early as 1900, a governmental commission ordered that work begins on a new penal code. The commission stated that urgent changes were needed to "fill the gaps and fix the imperfections" in the existing penal code.[32] However, it was not until 1916 that the Peruvian Congress finally mandated a special law ordering a commission to be formed to write the new code. The three most prominent members of this committee—Víctor M. Maúrtua, Plácido Jiménez, Alfredo Solf y Muro—were law professors from the University of San Marcos who had served as magistrates on Lima's Superior Court. These men were not, however, experts in penal law. Maúrtua was the driving force behind the code, which even today bears his name. Congress finally approved *The Code of Maúrtua* on January 19, 1924, and promulgated it on July 28, 1924, which is calculatedly also Peruvian Independence Day.

Before he began work on the penal code, Maúrtura was the Peruvian ambassador to Switzerland. In this post, he developed a great "admiration and knowledge of the Swiss legal system".[33] Peruvian legal scholar Raul Peña Cabrera has commented that it is the intense Helvetian influences of Maúrtua that most markedly characterize the code:

> Without exaggerating, one can easily affirm this influence which is found in all the titles of the Code, even from the first articles, faithful to the principle of the legality, until the final laws of the last section, are devoted to applying the Code with vigorous regulation. This influence is particularly well-defined in reference to those elements that deal with infractions and those concerning security. The Helvetian dispositions on impunity and culpability have been faithfully transcribed, as well as the causes of guilt and justification. The dispositions that regulate the sending of idle delinquents to work camps, or to internment in a hospital, or to homeless shelters, or to low-security prisons, are also directly inspired by the law of this European country.[34]

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29 Lyman L. Johnson and Sonya Lipsett-Rivera, eds. *The Faces of Honor: Sex, Shame, and Violence in Colonial Latin America* (Albuquerque: UNM Press, 1998), 1-17.

30 For a discussion of pre-Columbian marriage traditions see Roberto Maclean y Estenos, "Sirvinacuy o tincunacuspa," *Perú Indígena* 2, n.º 4 (1952): 4-12 and Ward Stavig, *Amor y violencia sexual: valores indígenas en la sociedad colonial* (Lima: IEP, 1995).

31 Mannarelli, *Pecados públicos,* 34-56.

32 Jorge Basadre Ayulo, *La historia de las codificaciones en el Perú* (Lima: Cultural Cuzco, 2003), 159.

33 David M. Valderrama, *Law & Legal Literature of Peru, A Revised Guide* (Washington D.C.: Library of Congress, 1976), 152.

34 Raul Peña Cabrera, *Tratado de derecho penal* (Lima: Grijley, 1999), 159-160.

What probably impressed Maúrtua most about the Swiss legal system was its ability to execute the law despite cultural diversity. Traditionally what had marked Swiss legal culture were its culturally diverse 'states,' called cantons. Each canton had an independent discreet cultural disposition and even disparate regional identities. While unity had come at a price, it is generally argued that reverence towards the law held the Swiss confederation together.[35]

It is also important to highlight that Maúrtua was deeply influenced by the rising school of positivism in Latin America, or reform-minded law, which had a distinct focus on redemption.[36] Peruvian historian, Jorge Basadre Grohmann, believes that Maúrtua's code should be viewed as an advanced and ambitious model of the positivist school of criminology:

> [...] it repeated the previous legislation in reference to civil reparation. It brought novelties such legal individualization of sentences...amplifying the freedom of action of the judge. It established conditional sentences and terms of bail; the individualization of the jail term under the influence of the prisoner's conduct and duration in jail, that is, it left the sentence undetermined, or rather left the jail term fluid and dependent on the situation of the accused after trial, and according to circumstances at hand. It rendered the social redemption of the incarcerated and the reform of centers of incarceration, as such it established a regime of prevention for minors.[37]

The intention of the penal code, as some Peruvian scholars have argued, was the erasure of indigenous ways of life, which were typically viewed as degenerative by the Peruvian "white" elite. For example, Francisco Ballón Aguirre has argued that the 1924 penal code's drive towards modernization was a massive leap directed at "westernization." This was underpinned by increasing capitalistic expansion in rural areas in the early twentieth century. Ballón Aguirre provocatively contends that the goal of the code was essentially a racial cleansing of Peru through legal practices. That is, for the vast majority of Peru's population (which was arguably 70% indigenous at this juncture), the 1924 code amounted to a kind of juridical subjugation that continued to corrode traditional social patterns, especially in rural areas like Cuzco:

> To get rid of the Indian without getting rid of their labor force was the objective that the 1924 Penal Code intended to accomplish. The task proposed by the legal text allied itself with the dominant penal doctrine integrating the theoretical basis that at the same time sustained the necessity of an "adequate" repression of each delinquent, and in this sense in order to be able to rationalize the sphere of penal suppression (that fundamentally bases itself in the classificatory system of the "real" or what we call *The Law*, or that ideological system par excellence).[38]

My analysis of rape cases indicates that rather than creating a more humanistic tool for reformation, the legal lexicon in Maúrtua's code only served to remobilize racial sentiments in tandem with gender bias in Cuzco. That is, judges turned their race-thinking upon women. In arguing

35 For a discussion of Swiss democracy and its reverence towards law see Venelin Tsachevsky, *The Swiss Model: The Power of Democracy* (Brussels: Peter Lang, 2014).

36 Arturo Ardao, "Assimilation and Transformation of Positivism in Latin America," *Journal of the History of Ideas* 24, n.º 4 (1963): 515-522.

37 Jorge Basadre Grohmann 1924, as cited in Basadre Ayulo, "La historia de las codificaciones en el Perú," 161.

38 Francisco Ballón Aguirre, *Etnia y represión penal* (Lima: Centro de Investigación y Promoción Amazónica, 1980) 16-17.

with Ballón Aguirre, I contend that judges developed their own "anthropological vision" in deciphering guilt or innocence, fixing punishments, and also assessing the veracity and creditability of plaintiffs in criminal cases.[39] This newfangled juridical race-thinking (rather than arming judges with reformative tools as intended) recreated and reinforced already existing cultural divisions.[40] It catalyzed the prism through which judges, public prosecutors and litigants viewed race in Cuzco. Attaining a fair trial, especially in the case of rape, would prove incredibly difficult for indigenous women and *mestizas,* who had to confront the new norms of limited culpability, heightened moral policing, and empowered judicial authorities all at once.

Maúrtua's code discarded the Hispanic model entirely, copying Swiss penal laws concerning rape "nearly verbatim."[41] Maúrtua's modern and positivist code also housed another milestone. It reflected the general shift in the idea that rape was a crime against individuals and personal freedoms and no longer a crime against familial or personal honor. The modern criminology of Maúrtua's code construed rape as a moral crime.[42] Morality, in its late modern manifestations, weds an ecclesiastical ethos to the idea of how one should live an ordered and proper life—within the variable currents of personal freedoms. Popular conceptions of morality as constrained yet well-ordered personal freedoms (or as *lifeways*) are the characteristic feature of modern thought. As the notion of criminality began to shift focus towards offenses against individual persons in the modern era, the conceptualization of rape crimes changed too. Rape was increasingly understood as a personal transgression.

The hallmark of late modern criminality is that retribution was increasingly marked by the degree to which the individual's personal liberty was harmed. Thus, rape marks a transgression against the utmost inner essence of personal freedom—a violation against sexual freedom (or the right to choose with whom one has sex). Rape is thus reproduced in court cases through the constitution of "moral character".[43] The construction of this moral character in criminal courts would also prove problematic for women that did not merit state intervention and had to hire lawyers to pursue their cases.[44]

The punishment of rape crimes under the code of Maúrtua, copied from Swiss legislation, fed fire into the already volatile idea of the race in Cuzco, especially assessing the moral character of indigenous women and *mestizas*. On the whole, Peruvian judges superimposed elite ideas of chastity and virginity onto the laws. It is crucial to note that the penal code of 1924 governing rape crimes makes no mention whatsoever of the words "virginity," much less "honesty" in delving out

39 Ballón Aguirre, *Etnia y represión penal*, 18.

40 Meri, L. Clark, "The Emergence and Transformation of Positivism." In, *A Companion to Latin American Philosophy*. Edited by Nuccetelli, Susana Ofelia Schutte and Otávio Bueno. London: Wiley-Blackwell, 2010.

41 José Hurtado Pozo, *La ley "importada": recepción del derecho penal en el Perú* (Lima: Centro de estudios de derecho y sociedad, 1979), 34.

42 Joanna Bourke, *Rape: A History from 1860 to the Present* (London: Hachette UK, 2015), 305-328.

43 Gregory Matoesian, *Reproducing Rape: Domination Through Talk in the Courtroom* (Chicago: The University of Chicago Press, 1993), 22.

44 Even to this day, Peru is one of the few countries in Latin America where the state requires fees for forensic sexual exams and the victim's continued initiative in pursing rape charges. For a discussion of this, see Fiona Macaulay, "Judicialising and (De) Criminalising Domestic Violence in Latin America," *Social Policy and Society* 5, n.º 1 (2006): 103-114, doi: https://doi.org/10.1017/S1474746405002782

punishment to a defendant nor in assessing the reliability of the plaintiff.[45] In interpreting judges' decisions in rape trials, what is at stake is how the law was bent and reshaped to fit the reigning social biases. Judges and public prosecutors often conflated the punitive ideas within all of the articles to fit their rulings in an *ad hoc* manner. Latin American legal scholars have long noted this trend and tendency as the "unrule" of law where written law merely provides a scaffolding in which social transactions occur.[46] In the highland region of Cuzco, Maúrtua's code was also adapted extrajudicially to fashion local lexicons of morality that often viewed indigenous women and *mestizas* as inherently non-virginal, lascivious and sexually degenerative.[47]

3. Racialized Morality: The Moral Triad of Age, Honor and Virginity

The influxes of positivist criminology emboldened judges and considerably expanded their judicial powers in early-twentieth-century Peru. The literature concerning judicial discretion, particularly over the past three decades, has produced various models on how judges decide cases. These models, however, focus most squarely on the theoretical reasoning applied in appellate court cases and not in the lower courts.[48] In Peru, very few cases are appealed to higher courts. Most are decided at the tribunal level in Cuzco, based on the information and recommendations of the lower court judges. In addition, developing a way in which to approach juridical decision-making concerning trial judges is difficult in Cuzco in particular because the lack of literature on the subject has been shrouded in secrecy.[49]

In the framework of the 1924 code (which extended throughout the twentieth century), judges were thus given an exorbitant amount of discretion in weighing guilt and innocence, as well as establishing jail terms and, if applicable, the terms of bail and probation. In addition to redefining ideas of criminality and punishment, Maúrtua's code went hand-in-glove with Peru's radically reformed judicial structure, mandated by the Constitution of 1920. This constitution established the fragile separation of powers within the Peruvian branches of government. In turn, this placed even more power and responsibility upon judges, especially in the lower-level rural courts where the vast majority of cases were heard.

The High District Courts in provincial capitals, such as Cuzco, serve as courts of appeal stemming from the rulings of judges of the first instances who had "original jurisdiction over some

45 The laws pertaining to rape crimes are located in the Third Section of the 1924 code, under the rubric "Crimes Against Proper Customs: Title I, Crimes Against Liberty and Sexual Honor" (*Delitos contra las buenas costumbres: Título I, Delitos contra la libertad y el honor sexuales*).

46 For a discussion of the history of the 'unrule' of law in Latin America, see Juan E, Méndez, Guillermo A. O'Donnell and Paulo Sérgio de M S Pinheiro, eds. *The (Un) Law and the Underprivileged in Latin America* (Notre Dame: University of Notre Dame Press, 1999).

47 Marisol de la Cadena, *Indigenous Mestizos: The Politics of Race and Culture in Cuzco, Peru, 1919-1991.* (Durham: Duke University Press, 2000), 131-176.

48 The history of appellate decisions is detailed by John Henry Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (Redwood City: Stanford University Press, 2018).

49 Peru's most eminent contemporary jurist, Luis Pásara, discusses this history of secrecy in *Jueces, justicia, y poder en el Perú* (Lima: CEDYS, 1982), also the role of judicial discretion in *Derecho y sociedad en el Perú* (Lima: Ediciones El Virrey, 1988).

cases".[50] Most cases of rape in Cuzco were heard by judges of the first instance and then sometimes passed onto a panel of judges, which is called the Correctional Tribunal. Rarely, however, were rulings appealed to higher courts, much less the Supreme Court in Lima. Thus, given the ideology of the 1924 penal code and the structure of the judiciary, rape cases heard in the judicial district of Cuzco give us a unique look at judge-made law in Peru. These courts of the first instance also have a unique *modus operandi*:

> They, too, have original and appellate jurisdiction and in addition perform functions of an administrative nature. Their original jurisdiction covers both criminal and civil cases, ecclesiastical matters, questions of marriage and divorce, and litigations concerning mineral and water rights. In all important criminal cases the judge of the first instance acts in a similar capacity to the *juge d'instruction* in France, that is, he holds a preliminary hearing, and presents a *dossier* containing all the evidence and his opinion to the correctional division of the superior court.[51]

The evidence collection by lower court judges forms the basis of proof in rape trials. Procedurally, however, the treatment of rape cases by the twentieth-century Peruvian judiciary has been handled in an inconsistent, sometimes makeshift, manner. According to Peruvian legal scholar Yván Montoya Vivanco, judicial reach and its regulation had "neither followed a course that is clear and coherent."[52] In addition to augmenting the judicial scope of judges, the prosecution of rape crimes under positivist criminology also heralded a growing number of trained lawyers whose numbers had dramatically increased in early-twentieth-century Peru.[53] Equally, public prosecutors in Peru rose significantly.[54] As rape cases poured into the criminal courts, public prosecutors increasingly became gatekeepers of honor, along with a cohort of criminal lawyers trained to confront them.

By the time the 1924 code was in effect, sexual violence became a growing concern for the state. Yet, in the cases flooding the courts, judges turned their newfangled juridical freedoms and race-thinking upon female plaintiffs (rather than on the redemption of defendants). The archive shows judges and public prosecutors interpreted the penal code extrajudicially. Likewise, overburdened public prosecutors were particularly entrenched in deciphering the norms surrounding state intervention. While the state was eager to protect very young girls, teenagers and mature women had less traction in courts. Despite the guarantees of sexual liberty enshrined in the 1924 positivist code, virginity was an absolute requisite for setting one's foot in the police station or courthouse. The idea of sexual honor (mentioned only in the code's title) would be rendered locally into Cuzco's racial lexicon that delimited its social hierarchies. Proving and defending one's age,

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50 Graham, *The Governmental Systems of Peru,* 88.

51 Graham, *The Governmental Systems of Peru,* 89.

52 Yván Montoya Vivanco, "Discriminación y aplicación discriminatoria del Derecho Penal en los delitos contra la libertad sexual e infracciones penales contra integridad personal," in *Problemas actuales de la administración de justicia en los delitos sexuales. (Discriminación sexual y aplicación de la ley):* 5 vols., edited by Rocío Villanueva Flores (Lima: Defensoría del Pueblo, 2000), 55.

53 For a discussion of the role of legal training and tradition in Latin American history see Rogelio Pérez-Perdomo, *Latin American Lawyers: A Historical Introduction* (Redwood City: Stanford University Press, 2006).

54 For a discussion of the role and importance of public prosecutors in Latin American jurisprudence see María Norma Mogrovejo Aquise, "La violación en el Perú. Realidad y tratamiento jurídico," *Nueva sociedad* 94 (1988): 65-72; and Andrea Pozas-Loyo and Julio Ríos-Figueroa, "Enacting Constitutionalism: The Origins of Judicial Institutions in Latin America," *Comparative Politics* 42, n.º 3 (2010): 293-311.

virginity, and honor formed a *moral triad* in rape trials in Cuzco. This triad also shaped how litigants fashioned their testimonies, collected evidence, and pursued redress in criminal courts. This moral triad illuminates how public prosecutors shaped legal arguments (for or against) plaintiffs and how judges ruled on cases. Taken together, I argue that age, honor and virginity engendered a *racialized morality* where chiefly indigenous women and *mestizas* claimed their humanity in embattled courts of law. Race in this context is tantamount to the extent to which women could prove their age, defend their virtuous sexual reputations, and produce (corporal) evidence of virginity.

My analysis of court cases reveals that judges and public prosecutors conflated the 1924 code in court cases and ignored its most important tenet, i.e., that any woman could be the victim of rape. The 1924 penal code protects all women (despite their age, sexual reputation, or previous sexual experience) from rape and sexual violence. It is, however, considered statutory rape to have sex with a woman less than sixteen years of age, regardless of her consent. Only cases of seduction had a stipulation concerning the victim's age (sixteen to twenty-one years). Irreproachable conduct was also a requisite for prosecuting seduction—most public prosecutors and judges interpreted this conduct as virginity before the alleged rape. Nonetheless, public prosecutors interpreted state intervention as extending only to minors. The cases analyzed below reveal, however, that the code was conflated into a dominant paradigm that law only protected innocent young virgins. This would prove tricky in a rural province where births were not usually registered and children not always baptized. Moreover, popular and indigenous cultures did not necessarily value virginity or female chastity.

The question of age is reflected in the case of Juana Ccanccapa, who was violently raped by two men and consequently contracted gonorrhea. Juana was unable to produce a birth certificate or baptismal record to prove her age because she was from a very rural province. Yet, despite the fact that her medical exam revealed she was a virgin before the attack, the presiding public prosecutor argued that her age (in this case, physical appearance) denied her full state intervention. The chosen police official to examine Juana also notes that "a defloration must have taken place just a while ago, something that can only be determined in conjunction with the breasts which share an intimate relationship with virginity in that their development signals its loss."[55] Juana and her father were forced to hire a private attorney, and they pursued the case on their own for a short while. But her case ran into a dead end when one of the accused died for unknown reasons. In requesting that the case be closed due to the death, Juana asserts that "the public prosecutor fails to recognize that the original charges involved multiple actors."[56] Juana's case is representative of the many impediments to justice a woman had to face in filing rape charges, namely the difficulty indigenous women had in proving their age. But Juana had to also contend with a judiciary that could be swayed by pseudo-scientific ideas about virginity and sexuality.[57]

55 "Instrucción criminal contra Adrian Gutiérrez y Ezequiel Loayza por violación en la persona de la menor Juana Ccanccapa," Urcos, January 14, 1926, ACSJC, case n.º 263, 25.

56 "Instrucción criminal contra Adrian Gutiérrez y Ezequiel Loayza por violación en la persona de la menor Juana Ccanccapa," 45.

57 The idea of breast tissue texture and its so-called scientific relation to virginity would filter into forensic rape exams well into late twentieth-century prosecutions. See Laura A. Bunt, "White Heat: Race, Rape, and the Legal Culture of Cusco, Peru (1909-2001)." and "A Quest for Justice in Cuzco, Peru: Race and Evidence in the case of Mercedes Ccorimanya Lavilla." *PoLAR: Political and Legal Anthropology Review* 31, n.º 2 (2008): 286-302, https://doi.org/10.1111/j.1555-2934.2008.00026.x

Another case during this period concerned the violent gang rape of a thirty-two-year-old *mestiza*. This case also ended when the instructing judge noticed the "mature age of the victim" in the police report.[58] The victim's social status, cited in the case file as an illiterate cook suggests that she probably had little financial resources for pursuing the case any further on her own. Very young girls, on the contrary, were usually shown greater sympathy and the state would pursue charges in such cases. Yet, other factors affected how justice was administrated. Such was the case of Tula Araújo, a six-year-old girl whose medical exam showed a possible attempted rape. Nonetheless, the public prosecutor closed the case due to a lack of evidence. In his final statements, he revealed his subjective belief that the child's *mestiza* mother was not a credible witness.[59] Public prosecutors showed more enthusiasm when other types of sexual transgressions could be proven more concretely. Such was the case of the twelve-year-old Bonifacia Hurtado Barrionuevo, in which the public prosecutor constructed a passionate accusation against the accused because the child had contracted gonorrhea.[60]

While age was the first hurdle for women seeking legal redress for rape, it was not the only one. The idea of sexual honor also converged with age. Women had to prove themselves as sexually honorable before the courts would take their accusations of rape seriously. Honor, however, was always read as virginity and chastity. For example, in the case highlighted below, although the 1924 code makes it clear that forced sex with any woman (except with wives) is criminal, judges in Cuzco revived the centuries-old idea that raping a prostitute (or even a "loose" woman) is impossible.

In the city of Cuzco, on September 21, 1935, a formal police complaint was filed in the courthouse on behalf of Julia Ortiz.[61] It alleges that on the 19th of the same month, a taxi driver named Mamerto Anaya (and other accomplices), instead of taking Julia home, drove her to the isolated location of Pampa de Pólvora, where they attempted to rape her. The complaint also alleges that this crime would thus constitute an act of kidnapping (*rapto*), as well as a crime against Julia's sexual honor and personal liberty *(la libertad y el honor sexuales)*, i.e., an attempted rape. In ratifying her version of the events, Julia (a twenty-eight-year-old seamstress from rural Urubamba who worked in the urban city of Cuzco) admits to having had a few beers and climbing into the taxi with the men before the attack. She also attests to the violent injuries she sustained in defending herself and notes her immediate quest for justice at the police station after the men dumped her off in Limacpampa Chico.

In the ensuing investigation, the police report reveals that the accused admitted to being in the presence of Julia in the evening in question. But the men turn on each other, blaming one another for the attempted rape.[62] The police report to the judge notes:

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58 "Instrucción contra Julio Gamarra, Bautista Escalante y Agustín Castilla por delito contra la libertad y honor sexual," Acomayo, June 22, 1932, ACSJC, case n.º 647, 48.

59 "Investigación seguida contra Justo Conto Luna por el delito contra el honor sexual en agravio de Tula Araújo," Cuzco, August 4, 1948, ACSJC, case n.º 49, 43.

60 "Instrucción contra Miguel Delgado por delito contra el honor sexual en agravio de la menor Bonifacia Hurtado Barrionuevo," Sicuani, November 5, 1945, ACSJC, case n.º 481, 42.

61 "Instrucción seguida contra don Mamerto Anaya y otros por el delito contra el honor sexual, en agravio de doña Julia Ortiz," Cuzco, September 21, 1935, ACSJC, case n.º 1588, 1.

62 "Instrucción seguida contra don Mamerto Anaya y otros por el delito contra el honor sexual, en agravio de doña Julia Ortiz," 2-3.

> [...] attached are of the declarations taken from the persons involved, which in their explicatory measure you will see the graveness of the misconduct and to a certain extent the attempted rape against Julia Ortiz. The same woman who is cited as a 'clandestine prostitute' [*una meretriz clandestina*] contracted by Espinoza, with whom she was companioned during the whole day yesterday in the district of San Sebastian. They returned to the city at around eight o'clock at night when the taxi driver stopped the car. Taking advantage of the drunken state of Espinoza, the taxi driver and his helper attempted to rape the aforementioned woman, and if it were not for the intervention of Braulio Hermoza, they very well may have achieved their goal. In sum, it turns out that Anaya beat the woman as severely as he beat Mr. Hermoza, and this is backed up by the different declarations, for this reason I am handing the matter over to you, so that it can be properly handled in the courts[...][63]

As the case went on, Anaya was never jailed, and orders of capture were issued for Hermoza and Espinoza because they refused to give testimony or ratify their police statements. By December of the same year, the judge ordered the case elevated to the Correctional Tribunal to see if it merited an oral trial. Julia's case, however, never makes it to this stage, despite the convincing nature of the police report. The file only shows that by early May of 1938, the presiding judge archived the case. Anaya's attorney argues:

> The supposedly offended Julia Ortiz, in her declaration in front of the instructing judge, makes no claim that Mamerto Anaya actually tried to rape her [...] and from another angle, the fact that Ortiz is a clandestine prostitute [*meretriz clandestina*], according to page nine of the case file, excludes the possibility that she could have negated and much less resisted the desires of Anaya in the case that he tried to force her to have sex.[64]

Julia's valiant attempt to seek justice for attempted rape was most likely truncated by the accusation lodged against her by Anaya, marking her as a 'prostitute,' or at a minimum, as an unchaste woman who drinks indiscreetly with men. Though unproven, this accusation seemed enough to halt the case.

Of course, other women (and their attorneys) took more aggressive strategies in seeking retribution for rape. In a judiciary increasingly inhospitable to women, sexual honor was essential in discerning guilt, innocence, and penalty. Honor counted as evidence in judicial decision-making. Although not bestowed with notions of elite honor, indigenous women crafted their own strategies around honor and race. In 1940, thirteen-year-old Felícitas Chara's brother charged Anastacio Ccjaya with a violent rape allegation. A child, who died shortly after being born, had resulted. In the declaration that opened the case, Felícitas's brother details how the Indian (*el indio*) who attacked his sister did so with the "ferocity of a cat tackling her to the ground."[65] The reason he had waited so long to denounce the case was that he believed "justice would never come because of the way it is administered in this province, but however imploring your spirit

63 "Instrucción seguida contra don Mamerto Anaya y otros por el delito contra el honor sexual, en agravio de doña Julia Ortiz," 9.

64 "Instrucción seguida contra don Mamerto Anaya y otros por el delito contra el honor sexual, en agravio de doña Julia Ortiz," 20.

65 "Instrucción No. 118 de Espinar seguida contra Anastacio Ccjaya por el delito de estupro en agravio de Felícitas Chara," Yauri, December 6, 1940, ACSJC, case n.º 421, 1.

of justice, I ask that you capture this man [...]"[66]. The racial languages employed by Felícitas and her family are part of a larger strategy aimed at attaining justice. The 1924 penal code states that financial compensation should be awarded to the plaintiff in rape cases and as financial support if a child was the product of a rape.

In her claim for financial compensation, Felícitas argues that even with the public prosecutor's assistance, she still had to pay additional court costs to keep her case going. She is also incensed over the public prosecutor's arguments for a relatively small civil reparation of only two hundred *soles*:

> [...] there something that cannot intrinsically be given value—this would be my honor, which has been scathed as a consequence of my feeble condition as a woman and a minor. I have been dishonored, my modest dignity taken, my only treasure. Indigenous women (*las indígenas*) like me also have our honor and dignity, and for this reason the derisory sum of two hundred *soles* as dowry was awarded to me. The dignity of the mestiza race should not be evaluated by a different means, but rather in the same way as that of the indigenous race. I think this is an issue that should be called to the attention of the Judicial System, or whatever governing authority necessary, so that no misdeed is committed by taking advantage of people's ignorance.[67]

Ultimately, she was awarded civil reparation, though less than she petitioned. She was conferred a monthly sum of six *soles*, even though the child who was the product of the sexual encounter died. In a rare instance of conviction, Ccjaya was sentenced to eighteen months in prison.[68]

In addition to establishing age and honor, the most strident requisite for effectively pursuing rape charges was (bodily) proof of virginity. Despite no mention of the term in the 1925 penal code, it appears that judges were so intent on this requisite that even victim's age diminished in proportion. In fact, the Supreme Court in Lima notoriously established a forceful moral yardstick for evaluating the degree to which rape would be measured. In 1937, the highest court in the land ruled: "The law does not protect the fact of virginity in itself, but rather the notion of honesty. An honest woman is the one that has not had carnal access to a man voluntarily and previous to the time in which the alleged crime occurred".[69]

The hallmark of judicial rulings in most of the rape cases found in Cuzco during the early twentieth century reflects the logic that a woman can only be "raped" if she were a virgin, even despite her age or "honor." Successful rape prosecution within the legal culture of Cuzco required the mandate of virginity. While tender age often compelled the courts to act, not every young victim was treated uniformly. That is, despite the letter of the law concerning age and consent, "corrupted" young girls were shown little mercy in facing the powerful precedent of virginity. One such example occurred in 1927. Cipriana Trujillo, a fourteen-year-old girl, charged thirty-five-year-old Leopoldo Villacorta Salazar with rape. Court documents show she was able to produce reliable

66 "Instrucción No. 118 de Espinar seguida contra Anastacio Ccjaya por el delito de estupro en agravio de Felícitas Chara," 1.

67 "Instrucción No. 118 de Espinar seguida contra Anastacio Ccjaya por el delito de estupro en agravio de Felícitas Chara," 52.

68 "Instrucción No. 118 de Espinar seguida contra Anastacio Ccjaya por el delito de estupro en agravio de Felícitas Chara," 87.

69 Dino Carlos Caro Coria and César San Martín Castro, eds. *Delitos contra la libertad e indemnidad sexuales: aspectos penales y procesales* (Lima: Grijley, 2000), 26.

witnesses and could document her age. Nonetheless, the district attorney was unwilling to push for an oral trial, citing the medical examination that reveled: "[...] a previous defloration. Against such medico-legal proof, which is irrefutable, the declarations of the plaintiffs are worthless."[70]

Ambiguity in sexual forensic exams could destroy a case. For example, in 1940, charges were brought against Sergio Miranda in Quillabamba for the rape of fourteen-year-old Emperatriz Carpio. Because of the victim's age, the public prosecutors pursued the case right away. Miranda, a twenty-eight-year-old Quechua-speaking peasant, is jailed and held for trial due to the convincing testimony of Emperatriz, her mother, and other witnesses that pin him to the crime scene. Things look bleak for Miranda, as the only witness that can back up his alibi have to be hauled in by the police. But the medical exam reveals surprising evidence; it appears that Emperatriz's hymen (a membrane that partly covers the opening of the vagina and whose occurrence is usually taken to be proof of virginity) shows anomalous characteristics. The forensic sexual exam of Emperatriz reads:

> In the act of deflowering the hymen tears, generally at its posterior borders in two places, to the right and left of the middle section, though sometimes only on one side. After the deflowering, there appear two characteristic tears and, in some cases, the process produces scaring or scars. There are cases in which the hymen is very strong and elastic, very much like that of the Lobatus Hymen that does not give way after the sexual act. This kind of hymen does not permit one to differentiate between the normal hymen with any more certainty, in that after the sexual act, it would be necessary for it to produce tears. [...] Medical scholars recommend extreme prudence in these kinds of cases...CONCLUSION The case of Emperatriz Carpio involves a Hymen Lobatus with smooth borders. The exam reveals that the hymen is incredibly elastic in and of itself, it shows no sensitivity to pain. For these reasons, the doctors who performed this examination cannot categorically affirm if we were dealing with the original act of deflowering, or whether the girl has a Lobatus Hymen.[71]

As the case progresses, other witnesses are called. They place Miranda at the crime scene but cannot stipulate his behavior in the evening in question. Miranda, facing a two-year jail term, continues vehemently to deny the charges. Inexplicably, the public prosecutor recommends that the case not be elevated to oral trial. In his petition to the Correctional Tribunal, he notes that the case would be impossible to pursue further because "it is impossible to determine or affirm if the case involves an old deflowering marked by scars or a hymen that has a 'lobatus form'"[72]. In sum, even given the young age of the victim, prosecutors believed that the role of her virginity was the base of the case and the only grounds for continuing a state investigation into the alleged events.

The intrinsic nature of how virginity functioned as racialized morality is also revealed in the 1942 case of Hilaria Monroy in Paruro. One day the fifteen-year-old girl had been sent off to run errands. Before returning to Pillpintuyoc, where she lived, she encountered Saturnino Saire. In the words of the public prosecutor, Saire then "took advantage of this solitary place and, overcome by

70 "Instrucción criminal contra Leopoldo Villa contra Salazar por violación," Abancay, April 16, 1927, ACSJC, case n.º 741, 18.

71 "Ministerio Fiscal contra Sergio Miranda Ayala por el delito de violación en agravio de la menor Emperatriz Carpio," Quillabamba, August 16, 1940, ACSJC, case n.º 135, 10.

72 "Ministerio Fiscal contra Sergio Miranda Ayala por el delito de violación en agravio de la menor Emperatriz Carpio," 28.

the effect of her voluptuous presence, sought the virginal love of the said girl."[73] Later, in his plea to elevate the case to oral trial, the public prosecutor also notes Hilaria's fierce resistance against Saire. Hilaria's brother Wenceslao, who spearheaded the lawsuit, diligently delivers the necessary evidence and testimonies in a passionate quest for justice. In constructing the case, Wenceslao narrates how he found objects belonging to Saire at the crime scene: "a gray blanket with a red border, a used walnut-colored poncho, and a used shoveling hoe," that the accused was unable to collect as he hurried from the scene of the crime. Despite the 'evidence' found by Wesceslao and witnesses that confirmed Hilaria's disheveled and disabused state following the crime, the case is not elevated to oral trial.

The presiding judge notes the sincerity of the witnesses but rules that the evidence alone is insufficient. The factor most damaging to Hilaria's case is the fact that no medical exam was performed. The judge rules that without this exam, "they cannot establish if there were even a defloration."[74] The judge also notes that such an exam at present would be inadmissible as evidence since nearly a month has passed since the alleged crime. Incongruously, he also records that such a medical exam would have been impossible to perform on the girl in the first place because the rural province lacked the means and personnel to administer them. Given the primacy of virginity in these forensic exams, I claim it is virginity that patterned legal positivism in Peru.

Conclusions

In considering the changes ushered in by legal positivism and rape legislation in early twentieth-century Peru, my paper ultimately poses two key questions about the coloniality of law in Peru: To what extent did indigenous women and *mestizas*, in their pursuit of justice for rape crimes, mutually constitute the very definition of race in this era? How did their quest for justice create and negotiate the meaning of the law itself? While archival research does not render truths, it does produce ontological approximations of postcolonial realities.[75] The handful of cases I highlight here attest to the hurdles and heroism of women who dared to argue their juridical humanity in criminal courts.[76]

In placing indigenous women and *mestizas* as protagonists of the law in Peru, I acknowledge, along with Esmeir that, "modern law was a civilizing force mobilized to overcome pre-modern legal orders, which colonial states branded as arbitrary, primitive, and uncivilized".[77] In particular, positive law, codification and judicial autonomy were political tactics targeting the destruction of pre-modern (pre-Columbian) life-ways into a pervasive and "gapless legal order."[78]

Yet, despite this metanarrative of modern law as a civilizing force that has overcome the pre-modern legalities, they actually "continue to haunt it; they are constitutive outsides against which the

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73 "Instrucción seguida contra Saturnino Saire Cruz, por el delito de estupro, en agravio de Hilaria Monrroy," Paruro, December 21, 1942, ACSJC, case n.º 738, 47.

74 "Instrucción seguida contra Saturnino Saire Cruz, por el delito de estupro, en agravio de Hilaria Monrroy," 48.

75 For a discussion of colonial ontologies and the archive see, Ann Laura Stoler, *Along the Archival Grain: Epistemic Anxieties and Colonial Common Sense* (Princeton: Princeton University Press, 2010).

76 Samera Esmeir, *Juridical Humanity: A Colonial History* (Redwood City: Stanford University Press, 2012).

77 Samera Esmeir, "On the Coloniality of Modern Law," *Critical Analysis of Law* 2, n.º 1 (2015), 19

78 Esmeir, "On the Coloniality of Modern Law," 21.

modern defines itself."[79] This relieves what Stoler refers to as the reflective lens through which bourgeois selves have been conceived *vis-à-vis* the alleged colonial, pre-modern, and savage sexuality.[80] In Peru, indigenous women's and *mestizas'* allegedly lasciviousness and disdain for virginity were pitched against the norms of "modern" "white" and "lawful" sexuality. In this context, I contend that rape in Peru was essentially a republican-era crime, in which virginity pattern positivism.

While incomplete and partial representations of the past, the testimonies of indigenous women and *mestizas* in these court cases may be the only surviving written documents from this era that give them voice.[81] Their stories are occluded histories that hold sway over the present. As histories of the present we find in them that women and their sexual comportment were central historical facets in legal preoccupations about the state's role. Consequently, they were fundamental in shaping the law itself—especially where we find the law is not always practiced as written.[82] The plight of indigenous women and *mestizas* in criminal courts also created a powerful theatre where the race gets reenacted in the recounting of sexual transgressions. In these legal narratives, the race is a visceral experience for women invariably etched on the body itself.

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