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## **“Where does *the Indian* begin and where does it end?”: Legal-Criminal Categories in Peru, 1920s-1940s, and two Bolivian cases from the 1940s\***

*“Onde começa o índio e onde termina?”: Categorias Legais-Criminais no Peru, anos 1920-1940, e dois casos bolivianos dos anos 1940*

*“¿Dónde empieza y acaba el indio?”: Categorías jurídicas-penales en el Perú, años 1920-1940, y dos casos bolivianos desde la década de 1940*

Lior Ben David\*\*

**Abstract:** How to treat the Indians? During the first half of the 20<sup>th</sup> century, with the rise of the *indigenismo* and under the influence of positivist ideas, this old colonial question reappeared in Latin America in the field of criminal law. A major part of the debate over the legal status of Indian criminals revolved around who exactly was the Indian that deserved or needed a special penal treatment. This question will be examined here mainly in the context of Peru, where the 1924 Penal Code introduced new legal categories of Indian criminals, and also in two Bolivian legislative proposals that sought to adapt the criminal law to “the Indian reality” of their country. The ways by which these criminal categories were interpreted by Peruvian courts and reformulated by various Peruvian and Bolivian legislative proposals, reshaped internal boundaries within these nations, and implicitly redefined the term “*Indian*” itself. In the Peruvian context, they also reflected the changes in the *indigenismo* during the 1920s-1940s.

**Keywords:** *indigenismo*; Indians; criminal law; Peru; Bolivia.

**Resumo:** Como tratar os Índios? Durante a primeira metade do Século 20, com a ascensão do *indigenismo* e sob a influência das ideias positivistas, esta antiga questão colonial reapareceu na América Latina no campo da legislação criminal. Uma grande parte do debate sobre o *status* legal dos criminosos indígenas girava em torno de quem exatamente seria o Índio que mereceria ou precisaria de um tratamento penal especial. Esta questão será examinada aqui, principalmente no contexto do Peru, onde o Código Penal de 1924 introduziu novas categorias legais de criminosos Indígenas, e também em duas propostas legislativas Bolivianas que procuraram adaptar a legislação criminal à “realidade Indígena” do seu país. As maneiras como estas categorias criminais foram interpretadas pelas cortes Peruanas, e reformuladas por diversas propostas legislativas Peruanas e Bolivianas, redesenharam as fronteiras interiores destas nações, e implicitamente redefiniram o termo “índio” em si mesmo. No contexto Peruano, elas também refletiram as mudanças do *Indigenismo* durante os anos 1920/1940.

**Palavras-chave:** *indigenismo*; índios; lei criminal; Peru; Bolívia.

**Resumen:** ¿Cómo tratar a los indios? Durante la primera mitad del siglo 20, con el surgimiento del *indigenismo* y bajo la influencia de las ideas positivistas, esta antigua cuestión colonial reapareció en América Latina en el ámbito del derecho penal. Una parte importante del debate sobre la situación jurídica de los criminales indígenas giraba en torno a quién exactamente era el indio que merecía o necesitaba un tratamiento penal especial. Esta cuestión se analizará aquí principalmente en el contexto de

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Perú, donde el Código Penal de 1924 introdujo nuevas categorías legales de criminales indígenas, y también en dos propuestas legislativas bolivianas que pretendían adaptar la legislación penal a "la realidad indígena" de su país. Las maneras en que estas categorías criminales fueron interpretadas por los tribunales peruanos y reformuladas por diversas propuestas legislativas peruanas y bolivianas, rediseñaron las fronteras interiores de estas naciones, y redefinieron implícitamente el propio término "indio". En el contexto peruano, también reflejaban los cambios en el indigenismo durante los años 1920-1940.

**Palabras clave:** indigenismo; indios; ley criminal; Perú; Bolivia.

## Introduction

On April 1940, Zacarías Asencio and Ezequiel Rivera were sentenced by the Criminal Court of Puno (Peru) to ten and nine years in prison, respectively, for the murder of a man whom they considered insane. They appealed to the Supreme Court to nullify their verdict and in Lima, the prosecutor of that court agreed with them that their punishments had been too severe. The accused, he claimed, were Indians, semi-civilized, and the crime they committed stemmed from their "foolish ignorance" and from the belief existed among them that crazy people were dangerous and harmful spirits that should be eliminated. According to his opinion, the accused were controlled by that prejudice, which prevented them from estimating the results of their actions. Punishment in such cases, he added, should not be too harsh since it would not achieve the objectives of social defense. Such practices, he continued, could not be cancelled by drastic penalties, but rather by education and civilization, which were not to be achieved through jails. This was exactly the case, the prosecutor concluded, where the principle of the individualization of punishment should be broadly implemented, "while we are sentencing those Indians [...] whose lives are full of superstitions and barbaric customs [...]". The Supreme Court accepted these arguments and in its decision from November 1940, based on article 45 of the Peruvian Criminal Code, reduced the sentences of both men to six years imprisonment.<sup>1</sup>

At that time, legal and criminal aspects of "the Indian question" gained the attention of not only Peruvian courts of justice but also of jurists, criminologists, policy makers and various scholars from across the continent. Thus, it is not surprising that "the social protection of the Indian races by means of protective laws" was one of the many issues discussed at the First Inter-American *Indigenista* Congress, held at Pátzcuaro, in

the Mexican State of Michoacán, on April 1940. In this context, the congress recommended that American countries, which have indigenous populations, would include in their laws protective measures in their behalf, based on their cultural conditions. However, the resolution adopted by the congress stressed that "discriminatory legislation based on racial differences" was not considered protective of the interests of those populations, and consequently ought to be abolished. Instead, the congress in Pátzcuaro favored the concept of judicial discretion, as a preferable method for the protection of native populations and therefore recommended "that judges be requested to take into consideration the customs and special circumstances of the indigenous groups in applying the general principles of Law".<sup>2</sup> This recommendation did not refer specifically to criminal law. Nevertheless, it reflected quite well the opinion presented at that congress by some of the most prominent Mexican criminal jurists of that period, who strongly rejected the idea of enacting "special penal legislation for criminals of the Indian race", declaring that crime was not an act of races, but an act of men, and suggesting that racial differences be confronted only by extensive judicial discretion (CENICEROS, 1940).<sup>3</sup>

To some extent, the decision of the Peruvian Supreme Court in the case of Asencio and Rivera was in line with the recommendation of that congress in Pátzcuaro. The court in Lima considered the "cultural conditions" of the accused, it took into account their customs and beliefs, and finally used judicial discretion to reduce their punishments considerably. At the same time, its terminology unmistakably echoed the

<sup>1</sup> Cuaderno No. 1124, Año 1940, *Revista de los Tribunales* [Peru], 1941, p. 5-7.

<sup>2</sup> *Primer Congreso Indigenista Interamericano*, Tomo I, Pátzcuaro Michoacán, abril 1940, p. 130-131. For an English translation see: *Final Act of the First Inter-American Conference on Indian Life*, Held at Pátzcuaro, Michoacán (Mexico), April 14-24, 1940, A translation, published by the U.S. Office of Indian Affairs, Washington D. C. p. 28-29.

<sup>3</sup> Cenicerros, José Ángel; Raúl Carrancá y Trujillo; Carlos Franco Sodi; y Javier Piña y Palacios, "Las Razas Indígenas y la Defensa Social", in *Primer Congreso Indigenista Interamericano*, tomo II, Ponencias, Pátzcuaro (Michoacán), abril 1940, p. 110-115.

prevailing criminological discourse of those years, in which concepts such as "social defense" and "individualization of punishment" were frequently repeated, as demonstrated, for instance, in the Second Latin American Congress of Criminology held in Santiago de Chile, just few months later, on January 1941. Also this congress did not avoid "the Indian question". It recommended to the American countries that "while undertaking the reform of their criminal laws, would take very much into account the indigenous factor, especially those nations in which this ethnic element is numerous, seeking the adoption of a tutelary legislation preferably tending to their incorporation to civilized life".<sup>4</sup>

Despite the clear differences between the recommendations of those two congresses, they both shared at least one common characteristic: The use of vague terms such as "cultural conditions", "special circumstances" or "the indigenous factor" regarding the question of what exactly the criminal law was required to take into account when dealing with indigenous populations, or in other words, who were these populations and what allegedly made them (or at least some of them?) deserving of special legal treatment in the sphere of criminal justice. These questions will be discussed here mainly in the context of Peru, where criminal legislation along the lines recommended by the Congress in Santiago had been in force already since the 1920s. As will be shown in this article, the ethnic legal categories created in the 1924 Peruvian Criminal Code, as well as their implementations and interpretations by the courts and their reformulations by later legislative proposals, distinguished not only between Indians and non-Indians, but also between Indians of different "types". By making these legal classifications, legislators and judges, jurists and prosecutors, constantly reshaped the internal boundaries of the national community and explicitly or implicitly redefined the term "Indian" itself. Furthermore, I will argue, the changes that occurred in the Peruvian *indigenismo* between the 1920s and 1940s were reflected not only in the "indigenista criminology", as Poole (1990) has already shown,<sup>5</sup> but also in the field of criminal law itself. If

the enactment of the 1924 criminal code manifested, in some important aspects, the perception of "the Indian question" as a major socio-political problem, in the course of the following two decades, criminal judgments, as well as legislative projects that were meant to substitute this code, tended to portray the Indian problem primarily in cultural and "scientific" terms. This tendency was well expressed also in two proposals to reform the Bolivian criminal code, which were raised in the early 1940s, and will be scrutinized in the last part of the article. Their examination shed further light on the connection between ethnic-criminal categories and the construction of national identities.

### **Peruvian Andean Indians: Between tutelary legislation and criminological discourse**

In 1924, the Peruvian Congress introduced a new Penal Code, whose main author was the jurist and diplomat Víctor M. Maúrtua. Its enactment, together with the Constitution and the Code of Criminal Procedure legislated four years earlier, reflected the desire of the regime to reform and modernize the Peruvian legal system, as part of its vision and effort to modernize and develop the Peruvian state. This spirit of progress and modernization was manifested in new concepts and scientific innovations in the fields of penology and positivist criminology that were included in the provisions of the new Penal Code.<sup>6</sup> One of its clear and important innovations was the treatment it accorded to a special "category" of criminals: Indians who were classified as "semi-civilized" or "degraded by servitude and alcoholism". According to article 45 of this code, when a criminal act (any criminal act!) was committed by an Indian in this category, the Peruvian judges were required to consider his "mental development", his "cultural level" and customs, and then to punish him "prudently", as an offender with limited responsibility. The meaning of this was a legal option to reduce his punishment significantly. In addition, when dealing with this category of Indian-criminals, article 45 also authorized the courts to substitute punishments of penitentiary and prison for "security measures" (*medidas de seguridad*),

<sup>4</sup> *Segundo Congreso Latino Americano de Criminología*, realizado en Santiago de Chile entre el 19 y 26 de enero de 1941, Tomo Primero, Santiago, 1941, p. 122-123.

<sup>5</sup> Poole, Deborah A. "Ciencia, peligrosidad y represión en la criminología indigenista peruana". In Aguirre, Carlos and Charles Walker, eds., *Bandoleros, abigeos, y montoneros. Criminalidad y violencia en el Perú, siglos XVIII-XX*; p. 335-376. Lima: Instituto de Apoyo Agrario, 1990, p. 366-367.

<sup>6</sup> The innovations of this penal code included, inter alia, the abolition of capital punishment; the introduction of indeterminate and suspended sentences; the foundation of a criminological institute within the Penitentiary of Lima and the introduction of other new methods concerning the tutelary regime for minors.

such as sentencing the accused to an agricultural penal colony or to a school for arts and crafts.<sup>7</sup>

Hence, in 1924 the Indian population of Peru was formally introduced into the national penal code of the republic, bringing an end to 100 years of supposed equality before the law. The idea that the law should distinguish between Indian criminals and others was not completely new in this part of the world. A similar approach had characterized the Spanish-colonial legislation, which clearly stated that "being part of the Indian race" should be considered as a mitigating circumstance if the Indian was the perpetrator of the crime and as an aggravating circumstance if the Indian was the victim (ALTMANN SMYTHE, 1944, p. 203).<sup>8</sup> Liberal Peruvian legislators of the mid-19<sup>th</sup> century rejected this colonial legacy, instead emphasizing equality before the law. Accordingly, it is not surprising that in the first Peruvian penal code of 1862 (that was replaced in 1924) there was no reference to the Indian population of the country. That code was merely based on the Spanish penal code from 1848 and for José Simeón Tejada, one its formulators, it was only natural that the Spanish code would serve as a guide and a model for the Peruvians, whose customs, according to him, were formed by "the eternal molds of the laws and the language of Castile" (HURTADO POZO, 1979, p. 42-43).<sup>9</sup> Thus, the term "Peruvians" referred mainly to descendants of the Spanish conquerors, or at least to those who adopted the Spanish customs, laws and language. The Indians, from this legal perspective, became not only "equal before the law" but rather invisible.<sup>10</sup>

<sup>7</sup> The provisions included in article 45 of the 1924 Penal Code, as well as those of article 44 of this code (which referred to "savages" and will be discussed later on) appeared already in the Criminal Code Project that was published in 1918, under articles 68 and 69 of this legislative project. See: *La Reforma del Código Penal, Proyecto de 1916, Presentado a la Cámara de Diputados*, Lima, 1918, p. 28-29.

<sup>8</sup> Altmann Smythe, Julio. *Reseña histórica de la evolución del derecho penal*. Lima: Sanmartí y compañía, 1944, p. 203.

<sup>9</sup> Hurtado Pozo, José. *La ley 'importada': Recepción del derecho penal en el Perú*. Lima: CEDYS, 1979, p. 42-43.

<sup>10</sup> The disappearance of the Indian as a legal category occurred under Liberal governments also in other Latin American countries during the 19<sup>th</sup> century. For the Ecuadorian case, Guerrero argues that "the old [Indian] 'tributaries', who did not fit into the category of white-mestizo citizenship, were shifted into an implicit category: they were transformed into ethnic subjects of the Republican State; they remained enclosed in a silent category, never legislated upon, hidden beneath the body of the citizenry". See: Guerrero, Andres, "The Construction of a Ventriloquist's Image: Liberal Discourse and the 'Miserable Indian Race' in Late 19th-Century Ecuador", *Journal of Latin American Studies*, v. 29, n. 3 (Oct. 1997), 555-590, p. 558. For Mexico see: Horcasitas, Beatriz Urías. *Indigenay Criminal. Interpretaciones del derecho y la antropología en México 1871-1921*, México: Universidad Iberoamericana, 2000, p. 9-10.

In 1924, when enacting the new penal code, Peruvian legislators could no longer ignore the Indians. Since the second decade of the 20<sup>th</sup> century, the violent conflicts between Indian peasants and land-owners in the southern districts of the Andean range, which were often described as "Indian revolts", raised the "Indian Question" to the top of the public agenda, and also reaffirmed its association with criminality. Reverberations of the Mexican Revolution (and few years later also of the Bolshevik Revolution) only increased the tension in the region.<sup>11</sup> Moreover, violence in the south-eastern provinces strengthened the demand for state protection for the Indians. In many aspects, the Peruvian criminal code of 1924 was indeed part of a wider legal project which was meant to protect the Indians throughout "tutelary legislation".

Protection of the Indian was among the oft-reiterated objectives of the "New Fatherland" regime, which adopted the *Indigenismo* as part of its official ideology and integrationist project. One of the ways President Augusto B. Leguía sought to establish his image as "protector of the Indian race" was through legislation. Leguía recognized the legal personality of indigenous communities and during his presidency, an abundance of "tutelary laws" for the Indians was proposed. This idea was also expressed in article 58 of the 1920 constitution, which declared that "the state will protect the Indian race and will dictate special laws for its development and culture in harmony with its necessities". The *indigenista* campaign for special tutelary legislation for the Indians was largely based on two interrelated arguments: The first presented the Indians as victims of a long chain of abuses, exploitations, violence and repression, both in the past and in the present. The second argument focused on the image of the Indians as powerless and vulnerable, who were unable to defend their rights by themselves due to their miserable social and moral condition. The Indians' status was described as equivalent to minors, persons without legal capacity and even missing persons. The *Asociación Pro-Indígena* claimed in 1915 that

<sup>11</sup> For Peruvian anarchists, the Mexican revolution was a model and a non-European source of inspiration that was first in its kind. See: Leibner, Gerardo. "La Protesta y la andinización del anarquismo en el Perú, 1912-1915", *Estudios Interdisciplinarios de América Latina y el Caribe (E.I.A.L.)* 5:1, enero-junio 1994, 83-102, p. 99. Voices calling for "a social revolution like the one in Mexico" were also heard in Cuzco of the mid-1920s. See: López Lenci, Yazmin. *El Cuzco, paqarina moderna. Cartografía de una modernidad e identidades en los Andes peruanos (1900-1935)*, Lima: Fondo Editorial de la UNMSM, 2004, p. 278.



"the personality of the Indian almost does not exist". Therefore they recommended that the State would treat him as a minor and protect him efficiently, until his civil rights were restored (CAPELO, 1915, p. 161).<sup>12</sup> In his essay "A Contribution to an Indian Tutelary Legislation", published in 1918, the prominent and influential *indigenista* José Antonio Encinas explained that in order to integrate the Indians into national life there was a need to provide them with special laws that would protect them, which would take into account their situation of inequality and that would enable them to fully exercise their rights. Encinas rejected the claims against dualistic legislation. "Today", he argued, "the law tends to diversity. The new codes are more interested in the social factor than in the individual one, precisely because the civilization created a deep social inequality that the state must eradicate."<sup>13</sup> As Sala i Vila (2011) demonstrated, in those years, various Peruvian jurists, especially through the legal journal *El Derecho*, had expressed similar positivist ideas and supported a special criminal legislation for the Indians (SALA I VILA, 2011).<sup>14</sup>

The idea of "tutelary legislation" for the Indians was clearly codified in the 1924 criminal code. Article 225 set a special punishment for those who put Indians in a situation equivalent or similar to servitude, abusing their ignorance and their moral weakness. Leguía y Martínez, the president's cousin and prime minister in the early years of his government, explained the rationale behind that provision: On the one hand, he pointed to the landlords of the Andean mountain range and the other "exploiters of the Indian race", whose treatment of Indians became so scandalous and intolerable to justify special legislative protection. A complementary justification for this special legislation rested in the Indian's alleged ignorance and moral weakness that made him vulnerable and incapable of defending his own rights (LEGUIA Y MARTINEZ, 1931, p. 473).<sup>15</sup> Article 45 of the code, which referred to Indian *criminals*, also expressed the

idea that the Indians should be protected (as long as they were classified as semi-civilized or degraded by alcoholism and servitude)—both in its unusual demand to judge and punish them "prudently" and even more practically, in enabling a considerable diminution of their punishment.

However, "tutelary legislation" was not the only underpinning of the special treatment accorded to Indian criminals in the penal code. Another important factor was the emergence of what Deborah Poole called "the *indigenista* criminology"—a discourse that focused on the characteristics of the Indian offender and the causes for his criminality (POOLE, 1990).<sup>16</sup> This discourse reflected the encounter between European positivism (and better yet, positivist criminology) and the Peruvian *Indigenismo*. A good example of this encounter is also provided by Encinas, in his research from 1919, "Causes of the Indian Criminality in Peru: An Essay of Experimental Psychology". As an *Indigenista*, Encinas severely criticized the Peruvian social order as the main cause for Indian criminality. According to his view, social inequality, economic exploitation, the latifundist system, the lack of salary, poverty, expulsion from lands and the consumption of alcohol and coca all drove the Indian to break the law. Nevertheless, as a "criminologist", Encinas also conducted experiments and interviews with Indian prisoners in various Peruvian jails and "uncovered" the "causes for Indian criminality" in the mental structure of the Indian (ENCINAS, 1919). Thereafter, the issue of "Indian criminality" continued to capture the attention of jurists, criminologists and other intellectuals. Whether their explanations for this "phenomenon" were based on environmental, social, economic, cultural, psychological or even biological factors, they usually portrayed "the Indian criminal" as a distinctive "type" that merited special treatment. This criminological discourse was also manifested in the aforementioned demand of the penal code to consider the question of whether the perpetrator of a certain crime was a "semi-civilized" Indian or an Indian "degraded by servitude and alcoholism" and to pay attention to his mental development, cultural level and customs. Also characteristic of this discourse was the emphasis on the restricted responsibility and diminished culpability of the Andean-Indian criminal, who was frequently presented as blameless for his "criminal condition" and as a person whose criminal acts were the result of

<sup>12</sup> Capelo, Joaquín. "Espinas y Abrojos". *El Deber Pro-Indígena*. Año III, No. 36, Lima, sept. de 1915, p. 161; cited by Kapsoli, Wilfredo. *El Pensamiento de la Asociación Pro Indígena*. Cusco: Centro Las Casas, 1980, p. 25.

<sup>13</sup> Encinas, José Antonio. *Contribución a una Legislación Tutelar Indígena*, Lima: 1918, p. 12.

<sup>14</sup> Sala i Vila, Núria. "Ciudadanía y diferenciación penal indígena. Una reflexión desde el Perú", in *"Movimientos indígenas y territorialidad en América Latina"*, Papers de l'IRH, Girona, 2011, 35-62, p. 54-56.

<sup>15</sup> Leguía y Martínez, Germán. *Diccionario de la legislación criminal del Perú*, Lima: Librería e Imprenta Gil, 1931, p. 473.

<sup>16</sup> Poole, Deborah A. "Ciencia, peligrosidad y represión en la criminología indigenista peruana".

circumstances beyond his control. This idea was in line with the broader *Indigenista* argument, according to which the Indians in general could no longer be blamed for the problems and illnesses of the Peruvian nation.

The combination of *indigenismo* with criminology produced another argument that stressed the duties and obligations of the society and the state towards Andean Indians in the field of criminal justice. In his report from 1923 about "the Indian criminality" in Puno, Anfiloquio Valdelomar (1923, p. 4) from the Supreme Court of Puno and Madre de Dios expressed very clearly his opinion about the responsibility of Peruvian society for this problem: "[...] in societies like ours", he wrote, "in which the individual, since his birth, is left to his own devices, and moreover, is pushed into crime, encouraged by alcoholism and deprived of work and education [...] in societies like ours, of a total disorganization, in which the society goes against the individual, the punishment should be lessened, by reducing part of the penalty in accordance with the responsibility of society itself". Valdelomar's argument is revealing for some reasons. First, he treated Indians and non-Indians as members of one national society. Second, he clearly reflected the broader *indigenista* discourse that accused the state of abandoning the Indian in the hands of his exploiters, of depriving him of education and justice, and in general, of being responsible for his miserable condition. Third, he required the Peruvian legal authorities to take all this into account when judging "Indian criminals". According to this argument, Andean-Indian criminals, classified as "semi-civilized or degraded by alcoholism and servitude", were considered only "semi-responsible" for their acts because the society that oppressed them and the state that abandoned them were no less responsible for their crimes.

Still, from the legal system's perspective, the state's treatment of its Indian citizens did not give them a license to break the law. In a different context, which is also relevant to ours, Robert Buffington (2000, p. 4) referred to "the opposition of criminal and citizen" as "the fundamental dichotomy within modern Mexican society". Not only in Mexico but in many other countries, the criminalization of certain socio-political conflicts, the description of groups or individuals struggling for justice as "criminals", and specifically in the case of indigenous people—denying their capability as political subjects—all served to construct and reinforce the dichotomy

between criminals and citizens.<sup>17</sup> The Peruvian case is especially interesting in this aspect because of its image of the Andean Indian as neither a "fully capable citizen" nor just an "ordinary" criminal.

The historical context, in which the *indigenista* discourse on the need to defend the Indians emerged in Peru, is important here. While "tutelary legislation" was based on "Indian defenselessness", violent conflicts between Indians, landowners and some local authorities in the Andes presented a different picture of Indians who actually defended themselves and protected their rights. That was a problem for the regime in Lima and for large sectors of the Peruvian elites: violent Indians were intolerable. The detention in 1919 of Pedro Zulen, who encouraged the Indians in Marco to join the army in order to learn how to use weapons not only to defend the fatherland but also to protect their rights, illustrates this dilemma (LEIBNER, 2003, p. 172). Hence, Indian violence was not portrayed as a legitimate response of political subjects who were fighting for their rights, but was rather labelled as "insurgencies" and "criminality". Encinas' (1919) "Causes of the Indian Criminality in Peru" equated the violent social and political conflicts in the Andes with "Indian criminality". He wrote:

The spirit of the [Indian] race has suffered profound imbalances so that the passions, the most violent ones, would have a determining influence. We simply have to look at the evolution of the spirit of the Indian—from the time of the despotic regime of the Incas until his total abandonment in the hands of his exploiters—in order to think of his passionate process that keeps showing up, marking that alarming percentage of criminality (ENCINAS, 1919, p. 28).

Some criminal cases from this period, which emerged from socio-political conflicts between Indian communities and local landowners, featured this "transformation" of Indians from political subjects to "criminals". However, as "criminals" those Indians were also considered to be deserving of special

<sup>17</sup> In 19<sup>th</sup>-century Mexico, for example, during the *Porfiriato*, Indians who reacted against their dispossession of their lands were often described in the press as criminals. See: Rabiela, T. Rojas. (Coordinadora), *El indio en la prensa nacional mexicana del siglo XIX: catálogo de noticias*. México D. F.: SEP, 1987, p. III. For the "transformation" of Indians from political subjects to irrational and uncivilized criminals in 19<sup>th</sup>-century Bolivia, see: Irurozqui, Marta. "Ciudadanos armados o traidores a la patria? Participación indígena en las revoluciones bolivianas de 1870 y 1899", *Iconos, Revista de Ciencias Sociales*, n. 26, p. 35-46, sept. 2006.

tutelary treatment and reduced punishment. In other words, the negation of their capability of being "full citizens" and of acting as political subjects—for being "semi-civilized"—also justified a more benign penal treatment that took into account their "peculiar circumstances". Such, for example, was the case of Lewis Yabar from Marcapata, in the province of Quispicanchi, who was murdered by a group of Indians. According to the penal code, the perpetrators of this crime could expect at least a six-year prison term, but in 1925 the criminal court in Cuzco sentenced the Indians to only four years in prison, citing article 45 of that code. The court considered the Indians' social conditions and their abuse and exploitation by Yabar and other neighbors. However, the court also took into account the defendants' "moral conditions" as "Indians with absolutely no education or culture, semi-civilized, lacking mental development and with semi-savage habits". Furthermore, Yabar's murderers were also described by the court as people who acted spontaneously and impulsively, out of furious rage and an almost uncontrolled urge for revenge.<sup>18</sup>

Reading between the lines of this sentence reveals quite a different picture: Yabar and his companions acted under the authority of the local governor. They tried to prevent local Indians from sending representatives to Lima in order to complain against their oppressors. In response, a group of Indians kidnapped Yabar and his companions and held them as prisoners for two days, transferring them from one place to another, before they finally decided to kill Yabar and release the remaining prisoners. The portrayal of these Indians as irrational and impulsive criminals, acting out of furious revenge, was in line with the construction of their image as uncivilized human beings with semi-savage customs who lacked proper education and mental development. This representation of the defendants allowed the court to reduce their punishment significantly, but it came with a price: The criminalization of these Indians, the blurring of the socio-political dimensions of their behavior and the denial of their rationality. Another case with quite similar characteristics occurred at that time in the neighboring province of Chumbivilcas, in which Carlos Vidal Berneño, a local landowner, was murdered by a politically organized group of Indians.

Marisol de la Cadena (2000, p. 111-118) describes how in the course of their trial the Indian defendants were presented as furious and irrational and in this way the political dimension of the events was blurred.

However, article 45 of the penal code was more often used in situations that had nothing to do with conflicts between peasants and landowners or Indians and non-Indians. In fact, the question whether an "Indian criminal" deserved a lesser punishment under this article did not depend on the sort of crime and the situation in which it was committed, but on his classification as "semi-civilized". The following case from the same year (and the same court) is just one example to illustrate this point. On May 27<sup>th</sup> 1921, José Choque's body was found hanging by the side of a road that led to one of the villages in the province of Canchis. Signs of violence were still visible on the body; his poncho, which had been used as a hanging rope, was wrapped around his neck. Circumstantial evidence led the local authorities to the three Espinoza brothers, with whom Choque had quarreled a short time before he was killed. This tragic event was not unusual; in fact, it was one of many violent incidents that occurred in the region at that time.<sup>19</sup> The criminal act committed by the Espinoza brothers was not related to social conflicts between Indians and non-Indians, neither to customs, beliefs or cultural practices that could be considered "Indian" or "indigenous." Nevertheless, in its verdict of September 1925, the court in Cuzco referred not only to the essence of the crime but also to the nature of its perpetrators, who were described as "illiterate, semi-civilized Indians, with absolutely no sense of culture." This classification of the defendants under the provisions of article 45 enabled the court to reduce their prison sentences significantly and for two of them, that reduction resulted in an immediate release from jail.<sup>20</sup>

The idea that classification as a "semi-civilized Indian" could guarantee a reduced penalty was well understood by defendants and their lawyers or *tinterrillos* (petty lawyers). Polonia Amao, for example, who was detained at the prison of Urubamba for injuring her brother, claimed that her punishment could not exceed one year in prison, "since I, as an

<sup>18</sup> Tribunal Correccional del Cuzco, *Instrucción N. 988 Año 1922 seguida contra Mariano Mamani Rodríguez y otros*. Archivo General de la Nación (hereinafter AGN), Archivo Histórico (hereinafter AH), Ministerio de Justicia (hereinafter MJ), Penitenciaría de Lima (hereinafter PL), Testimonios de Condena (hereinafter TC), Libro No. 3.20.3.3.1.16.44, p. 376-380(v).

<sup>19</sup> On the escalation of crime and violence in Canchis during that time, one can learn from a memorandum sent on December 3<sup>rd</sup> 1925 by a judge of the local court, Dr. Geronimo Pacheco, to the President of the Supreme Court in Cuzco. AGN, AH, MJ, Expediente No. 77-1 1926.

<sup>20</sup> Tribunal Correccional del Cuzco, *Instrucción No. 462 contra Sebastián, Laureano y Bartolomé Espinoza*. AGN, AH, MJ, PL, TC, Libro No. 3.20.3.3.1.16.45, p. 339-342.



Indian, lacking education (*carente de cultura*), have limited responsibility, in accordance with article 45 of the Penal Code."<sup>21</sup> To use Guerrero's (1997, p. 588-589) terminology, Amao's petition was a good example of legal ventriloquism. She was "speaking" to the court, "but the pen, the ink, the words and above all the logic" of her argument were provided by an ethnic mediator who wrote in her name in terms of her (lack of) civilization, the exact terms that could be accepted by the legal system. In fact, in many criminal cases in Cuzco and Puno during the 1930s and 1940s, lawyers underlined the "Indianness" of their defendants, reminding the courts of the special "privileges" that arose from their condition as "semi-civilized" in order to obtain more lenient sentences.<sup>22</sup>

### Legal categories and degrees of civilization

The legal status of "semi-civilized" Indian criminals in the Peruvian penal code differed not only from that of "ordinary" or "civilized" offenders but also from the status of another ethno-legal category of criminals—those who were classified under section 44 of that code as "savages". If "semi-civilized" Indians were considered as not fully capable citizens; the "savages"—the indigenous inhabitants of the jungle area—were the complete opposite of "civilized citizens". According to the Peruvian jurist Ángel Gustavo Cornejo (1926, p. 132-134), the term "savages" referred to those "primitives" who lived totally outside the state's political and legal community, completely unaware of the world around them and lacking any contact with civilized Peru and its institutions. Cornejo even doubted if the term "human group" should be used in their case. His racist explanations were also deceptive. Contrary to his argument, since the end of the 19<sup>th</sup> century, due to the growing demand for rubber, the "savages" of the Amazon basin had already experienced painful encounters with "civilized" Peruvians and foreigners who penetrated their lands (COSAMALÓN AGUILAR, 2011, p.35; SALA I VILA, 2011, p.41-52). In order to control

and "civilize" them, article 44 of the criminal code established that in cases of offenses committed by those "savages", the judge was required to consider their "special condition". Then, it enabled him to replace sentences for imprisonment with assignment to a penal agricultural colony for up to 20 years, irrespective of the sentence that the offense would entail if a "civilized man" had committed it. Upon the completion of two-thirds of that sentence the "savage" offender could gain his conditional release, but only if he had entered into "civilized life" and "the legal framework of the country". Thus, this code accorded differential treatment to different categories of Peruvians, according to their "grade of civilization". It portrayed Peru as a fractured society, composed of civilized, semi-civilized and uncivilized human beings. This ethnocentric view placed the western ("civilized") man at the top of the evolutionary ladder, and the "primitive" or "savage" at its bottom (BALLÓN AGUIRRE, 1980, p. 72-73). In the middle was the semi-civilized Indian who actually represented the majority of the population (HERZOG, 1997, p. 407). As Hurtado Pozo (1979, p. 70) argued, Peruvian legislators viewed criminal law as a tool for the "civilization" of savage groups. In this "social era" of law (KENNEDY, 2003, p.633), criminal law was meant to serve as another instrument for social engineering. Nevertheless, those "security measures" that, allegedly, were needed for transforming Indians into civilized citizens—penal agricultural colonies or schools for arts and crafts—were never established (LAHURA OLIVO, 1942, p. 20). An explanation for this gap between "law in the books" and "law in action" can be found in Carlos Aguirre's broader argument that, in Peru, as well as in other Latin American countries in that period, there was a huge distance between a rhetorical commitment to rehabilitate criminals and government incompetence in this matter. This gap, he adds, reflects a reality of hierarchical, racial and authoritarian societies, and their elites' view of criminal punishment as a mechanism of class and racial control (AGUIRRE, 2005, p. 1-3, 86, 107-108, 208; 2008, p. 189-221).

Comparing sections 44 and 45 of the criminal code, it is clear that "savages" were denied the benign and protective treatment that was accorded to the Indian classified as "semi-civilized or degraded by servitude and alcoholism". Judges were not required to treat the "savages" prudently or to consider their customs (only their "special condition"). More important, they did not have the simple option just to mitigate

<sup>21</sup> *Causa Criminal No. 252/1935*, Corte Superior de Justicia Penal- Prov. Año: 1933-34, Archivo Regional de Cuzco.

<sup>22</sup> For Cuzco see also: *Causa Criminal No. 82/1925*, Archivo Central de la Corte Superior de Justicia del Cuzco. For Puno see: Castillo, Victoria A. *Indigenous "Messengers" Petitioning for Justice: Citizenship and Indigenous Rights in Peru, 1900-1945*, doctoral dissertation, The University of Michigan, 2009, p. 220-223.

their punishment. This can be easily explained by the notion that "savages" were, by definition, more dangerous than "semi-civilized" Indians. However, the gap between the treatments of these two categories of "Indian criminals" also mirrors the socio-political arena. The "savages" were generally relegated to the background, as a social group located at the margins of "the Indian problem" and *indigenista* discourse. Demographically, the "savages" of the Amazon basin were a relatively small "group" compared to the other indigenous populations in Peru; culturally, they were not related to the glorious ancient civilizations that became part of the national pantheon; economically, they were neither producers nor consumers; and politically, they were not part of "the Indian revolts" that drew the attention of Peruvian elites to "the Indian problem". Therefore, for the *Asociación Pro Indígena*, the government's efforts to protect "the Indians" were to be devoted to the support of the Indians "who were not savages", the Andean-Indians who were living "at the heart of Peru" and subjected to expulsion and exploitation (BARCLAY REY DE CASTRO, 2010, p.160-161). Article 45 of the Criminal Code was meant not only to "civilize" these Indians when they broke the law and violated the social order, but also, to some extent, to protect them, as victims of the same order.

Over the next few years, legislative proposals to reform the Peruvian penal code reaffirmed the notion that certain types of Indian offenders required special attention. The 1928 Criminal Code Project of Ángel Gustavo Cornejo and Plácido Jiménez<sup>23</sup> also referred to "savages" and "semi-civilized Indians" but without differentiating between them and without mentioning the label "degraded by servitude and alcoholism." The project's legal-scientific approach was purely positivist and focused mainly on the dangerousness of the criminal. In some articles of this project, psychopaths, deaf-mutes, savages, and semi-civilized Indians "who did not speak Spanish" all formed a special category of criminals and were accorded a similar treatment (CORNEJO and JIMENEZ, 1928, p. 37-39). From the perspective of this legal proposal, Indian inferiority was not social and had nothing to do with servitude or any other form of oppression; it was psychological and cultural.

A different approach is to be found in Atilio Sivirichi's (1946) monumental work *Derecho Indígena Peruano: Proyecto de Código Indígena*. To some

extent, Sivirichi's code reflected the transformation of Peruvian indigenismo between the 1920s and 1940s from a critical and even radical movement to a moderate and institutionalized one. The Cuzquenian indigenista Luis E. Valcárcel illustrates best this transformation. In his 1927 book *Tempestad en los Andes* (Storm in the Andes) he endorsed a revolutionary indigenista vision, calling for an Andean movement that would get rid of all European-foreign influences in Peru (GIRAUDO; LEWIS, 2012, p. 4-5). In the 1940s, he moderated his views when he became minister of education (1945). At that time, Valcárcel "no longer saw Andean culture as a force for radical political and social transformation [...] from his ministerial office [he] sought to integrate indigenous people into the nation, promoting rural education and a cultural policy of indigenous character" (GONZALES, 2012, p. 39). In 1947 he became the director of the Peruvian Indigenist Institute (Instituto Indigenista Peruano—IIP), an institution that, as Gonzales points out, Valcárcel himself would have opposed in his younger years (Ibid, p. 36). "Indigenismo as embodied by the IIP", he adds, "was a journey from rebellion to participation in the establishment. Discussions of power relations or the need to carry out a thorough land reform gave way to scientific thinking, technology and rationalism" (Ibid, p. 41).<sup>24</sup>

Unlike Valcárcel in his early years, Sivirichi (who was also a Cuzquenian indigenista) endorsed and developed Uriel García's vision of a spiritual indigenismo, in which the modern "New Indian" embodied the future of the Peruvian nation (POOLE, 1992, p.73-74). In 1937, Sivirichi called for an "indigenist revolution", but stressed that this would be a non-violent, spiritual and artistic revolution.<sup>25</sup> This revolution was the solution to the dichotomy between the "two Perus": The authentic Indian Peru of the Andes, and the exotic and cosmopolitan Peru of the coast, whose capital, Lima, "a fortress of colonialism", always "turned its back to the national reality, out of deep disgust to everything that was Indian".<sup>26</sup>

<sup>24</sup> For the transformation of Peruvian Indigenismo in that period, see also: Coronado, Jorge. *The Andes Imagined. Indigenismo, society and modernity*, Pittsburgh: University of Pittsburgh Press, 2009, p. 70.

<sup>25</sup> SIVIRICHI, Atilio. "El contenido espiritual del movimiento indigenista", *Revista Universitaria* (Cuzco), v. 26, n. 72 (1937), 1-23.

<sup>26</sup> Ibid, p. 19-20. González Prada raised a similar argument in the late 19th century. See: Leibner, Gerardo. *El Mito del Socialismo Indígena en Mariátegui*, Lima: Fondo Editorial de la Pontificia Universidad Católica del Perú, 1999, p. 30. On "the two Perus" see also: García, María Elena. *Making Indigenous Citizens: Identities, Education and Multicultural Development in Peru*, Stanford: Stanford University Press, 2005, p. 43.

<sup>23</sup> Jiménez, a deputy from Cajatambo, was also a member in the codifying committee of the 1924 criminal code.

Sivirichi (1937, p. 21-22) saw himself as part of an indigenista vanguard formed of poets, intellectuals, artists and men of science, whose role was to lead millions of Indians to modernity and civilization, to social and political redemption.

In his 1946 Indigenous Code (published the same year when the IIP was created), Sivirichi argued that the Indian problem was a problem of both economic and cultural inferiority that was to be resolved not by revolution but rather by legal measures. According to his code, "authentic Indian Peru" needed to be civilized and integrated into the economy, society, culture and legal order of the state. This required a comprehensive and completely separated legal framework that would regulate all the aspects of the Indian problem. One of them was criminal law. In accordance with his notion that the redemption of the Indians should be done, inter alia, by "men of science", the criminal part of his code included an abundance of positivist concepts, such as social defense, security measures and pre-delinquency dangerousness. Sivirichi's mission was to adapt them to the Indian reality of Peru.

His code defined the Indians as the descendants of the country's native inhabitants that remained in a state of social, political and economic inequality, those who lived on the margins of the legal and democratic regime, while maintaining their customary law in contrast to the civilized life (SIVIRICHI, 1946, p. 201). However, in the code's criminal part we find again various "degrees of civilization" and distinctions between different types of Indians. While most of its articles referred generally to "Indians", some were relevant only to those of the jungle area (*selváticos*), to "savages" or to Indians that were labeled once again "semi-civilized or degraded by servitude and alcoholism".<sup>27</sup> In line with the code's civilizing mission, some of its articles were aimed to prohibit or at least to regulate Indian social and cultural practices, like the use of *chicha*, coca leaves and witchcrafts.<sup>28</sup> On the other hand, the abduction of women or young girls for purposes of marriage (*rapto*) was respected as an "Indian custom" and was not criminalized.<sup>29</sup> Sivirichi also adopted penal practices that were part of the customary law of the Andean Indians like expulsion from the

community (when the community itself decided such a punishment).<sup>30</sup>

Legislative proposals like Cornejo-Jiménez' project or Sivirichi's code were never adopted and the 1924 criminal code, with its special treatment of "semi-civilized Indians", remained in force. According to the jurist Juan José Calle (1927, p. 36), this category referred in fact to most of the population of the Andean area, but the code itself did not define the term "semi-civilized Indian". Therefore, in criminal procedures it was up to the court to determine what constituted this special category of criminals. In many cases the Peruvian courts did not devote too much attention to this question. Sometimes, the Supreme Court returned the case to the lower court for a determination of this issue, indicating that being a semi-civilized Indian was not a question of law but a question of fact.<sup>31</sup> Still, usually, any indication that the accused was an illiterate Indian, an Indian of a "low educational level" or "without any notion of culture" was sufficient to satisfy this requirement.<sup>32</sup> Nevertheless, in some cases from the 1930s and 1940s the classification of the accused as a "semi-civilized" Indian was disputed.

In the late 1930s, a man who had been charged with raping a teenager and stealing her money was sentenced by the Criminal Court in Cuzco to one year in prison. The prosecutor had demanded three years but the Court held that the accused was an Indian who should be judged according to article 45 of the Penal Code. The Supreme Court in Lima overruled that decision, explaining that the defendant, although an Indian, was a shoemaker who knew how to read and write, and therefore could not be considered "semi-civilized" nor "degraded by servitude or alcoholism". On the other hand, the court also rejected the victim's claim that she had contracted a venereal disease due to the defendant's acts, noting that her disease could also be caused by lack of hygiene, a situation that according to the court "was so common among this people".<sup>33</sup> In the late 1940s, the prosecutor of

<sup>27</sup> Sivirichi, Atilio. *Derecho Indígena Peruano. Proyecto de Código Indígena*, in articles 887, 891 and 892.

<sup>28</sup> Ibid, p. 358-362.

<sup>29</sup> Ibid, p. 363.

<sup>30</sup> Ibid, p. 354, 360. López Albújar's famous story *Ushanan Jampi* deals with this practice. See: López Albújar, Enrique. *Cuentos Andinos*, Lima: Peisa, 22da edición 1995 (Primera edición: 1920), p. 45-58.

<sup>31</sup> Cuaderno No. 1099, Año 1929, *Revista de los Tribunales*, 1931, p. 89-90; Cuaderno No. 202, Año 1931, *Revista de los Tribunales*, 1931, p. 162-163; Cuaderno 322 de 1945, *Anales Judiciales*, 1945, p. 292-293; Causa No. 2725/47, *Revista de Jurisprudencia Peruana*, 1948, p. 352-353; Causa No. 852/62, *Anales Judiciales*, 1963, p. 256.

<sup>32</sup> See for example: Tribunal Correccional de Puno, Instrucción No. 99 (Libro 34) contra Mariano Candelario Betanzos. AGN, AH, MJ, PL, TC, Libro No. 3.20.3.3.1.16.47, p. 236-238.

<sup>33</sup> Cuaderno No. 524, Año 1938, *Anales Judiciales*, 1938, p. 55-58.

the Supreme Court expressed a similar perception in a case of another illiterate "semi-civilized" Indian who had murdered his wife's lover. The prosecutor explained that the motivation for the crime was jealousy and therefore he asked the court to reduce the punishment, considering "the way of life and lack of morality of these people from the Andes who are degraded by servitude and vice".<sup>34</sup>

In another case from the early 1940s, the Criminal Court of Arequipa sentenced three men who had been convicted of robbery to 18 months imprisonment, taking into account their condition as "semi-civilized Indians". On appeal, the prosecutor convinced the Supreme Court in Lima that this classification was wrong. The inhabitants of the Province of Arequipa, he claimed, could not be considered as 'semi-civilized' merely for not speaking Spanish and being illiterate. The legal concept of the "semi-civilized", he added, was that of a man who lived a primitive life, outside of any center of culture, ruled by the moral principles whose "retarded and ignorant intelligence" imposed on him. "Uneducated as the Indians of Arequipa may be", he concluded, "They do not ignore the significance of acts like the one on trial".<sup>35</sup>

These and other cases demonstrate that judicial classifications could vary between the capital and the provinces, depending on the perspectives of different judges and prosecutors who contributed to the delineation and refashioning of ethnic, social and cultural demarcations. They also show that during the 1930s and 1940s, the judiciary tried sometimes to narrow the definition of "semi-civilized Indians" by restricting it to certain moral deficiencies, to specific cultural practices or to customs and beliefs (as in the case of Asencio and Rivera that opened this article), which were considered more "Indians". As will now be illustrated, also in Bolivia of the 1940s there was a debate over who were the Indians that deserved a special legal-criminal treatment.

### **On Indians and national culture in two Bolivian criminal legislative proposals**

One of the participants in the Second Latin American Congress of Criminology was the Bolivian professor of criminal law from the University of

Potosí, José Medrano Ossio. In the spirit of that congress' recommendations, it was clear to him that the national criminal law could no longer keep ignoring the "indigenous factor". This "factor" was not part of the Bolivian Penal Code enacted already in 1834, a code that remained in force 139 years without major alterations until it was replaced in 1973. However, in the 1930s and 1940s, some important efforts were made in Bolivia to reform the criminal law, inter alia, in order to make it more in line with "the national reality". The first was the draft Penal Code presented by Julio Salmón in 1935, which took into account several factors unmentioned in the code of 1834, including the treatment of Indians. Salmón considered the Indian a useless element in the current society who had lost his "mental, moral and economic personality". The criminal code, he believed, could help the Indian to recover his personality by protecting him from any form of servitude (VILLAMOR LUCIA, 1977, p. 177-178). Yet, for other scholars, the main legal-penal aspect of "the Indian problem" was not servitude, but rather the supposedly enormous gap between "the Indian" and the most fundamental principles of criminal law.

In his paper from 1941 on "the criminal responsibility of the Indians" Medrano Ossio argued that the Indian's mental condition and social situation did not correspond the unjust and anti-scientific criminal liability imposed on him by the current criminal law. The Indian, he explained, was totally unaware of this liability because he lived at the margins of all political and social activities, did not exercise the rights granted to all citizens and even did not speak the official language. The Indian's position, he added, was very different from that of the white or the mestizo. Due to his "congenital timidity and absolute sadness", the Indian did not share the benefits of civilization and was a maladjusted to all the artifices of actual society. Medrano Ossio had no doubt that the Indian was unable to comprehend the reality (MEDRANO OSSIO, 1942, p. 313-314).

Medrano Ossio rejected the idea of inferior and superior races, but still argued that some races were more adapted to civilization. The Indians, in his view, were not among them. He further explained why the Indian's psychology differed from that of the white man and the mestizo. The Indian was dominated by fanaticism of degenerate religious ideas and subconscious ancestral impulses that nullified his perceptions, his conscious-volitional processes and his feelings. His world, according to Medrano Ossio, was different from everyone else's. The coca and alcohol wreaked

<sup>34</sup> Causa N. 3545/48, Procede de Puno, Dictamen Fiscal, Lima, 14 de abril de 1948, *Revista de Jurisprudencia Peruana*, 1949, p. 214.

<sup>35</sup> Cuaderno N. 2022, Año 1942, *Revista de los Tribunales*, 1943, p. 28.



havoc on his organism, weakened his mental functions, intelligence and will, and permanently disrupted his memory and attention.<sup>36</sup> Crimes committed by Indians, Medrano Ossio argued, were the result of causes beyond their control. Therefore, he added, from the perspective of criminal law, Indian offenders were "naturally irresponsible" and should be considered non-imputable. Criminal law, he concluded, should treat the Indians not by "fruitless punishments" but rather by psycho-pedagogic, psychiatric and other measures that would render them harmless and incorporate them into the current civilized society.<sup>37</sup> For Medrano Ossio, criminal law's mission was primarily preventive, not retributive. Its sole purpose was "social defense", that is the prevention of crimes and especially repeated crimes.<sup>38</sup> From this perspective, lack of "civilization" meant not only penal irresponsibility but also criminal dangerousness, and hence, "the civilizing mission" was also a measure of "social defense". Medrano Ossio's thesis reflected not only an absolutely positivist doctrinal point of view, but rather a clear division of the Bolivian (and even the broader Latin-American) society into two separate categories: The whites and the mestizos, on the one hand, and the Indians, on the other. While the former were full citizens, the latter were only subjects deemed unfit to assume the rights and responsibilities of citizenship.<sup>39</sup> From Medrano Ossio's racist perspective, all the Indians were included in one legal-criminal category of uncivilized human beings.

In his prologue to Medrano Ossio's text, the leading Spanish jurist and expert on criminal law Luis Jiménez de Asúa argued that if the Indian's "quality of citizen" was indeed a lie, then it would be unjust to treat him as equal before the law only when it came to the criminal law. Furthermore, he added, "criminal law starts from the norm, which is culture [...]" and the Indian described by Medrano Ossio, seemed to be incapable of knowing the norms of the culture in which the white and the mestizo lived; incapable of understanding the significance of his acts, as criminal intent (*mens rea*) required. However, he stressed, this was only valid for the rural Indians, those who "fled civilization", not for the Indians who lived in the

cities "with western-educated whites and mestizos". Regarding the latter, he noticed, there was no problem in applying the normal punitive laws with democratic equality.<sup>40</sup> Thus, according to this logic, the Indians were to be excluded from the "ordinary" criminal law only if they preferred to remain rural and live away from "educated whites", or in other words, only if they insisted on remaining "Indians". Indians could be civilized, but *Indian* and *civilization* were, by definition, two different things. As Drinot argued, this was exactly the same logic behind the exclusion of Indians from the Peruvian Social Security Law in the 1930s. In order to be included in this law, Indians had to be "redeemed", to become "de-Indianized workers", or simply "workers" (which by definition were not *Indians*). Their exclusion as Indians from the Social Security "and by extension from the project of national redemption", he concluded, "reflected the fact that by definition national redemption was understood as a project of racial improvement that necessarily involved the de-Indianization of Peru" (DRINOT, 2011, p. 222-229).

A legal-penal distinction between different "types" and "classes" of Indians was also made by Manuel López-Rey Arrojo, a disciple of Jiménez de Asúa and a well-known Spanish jurist in his own right. Like Jiménez de Asúa, López-Rey also found himself in exile in Latin America at the end of the Spanish civil war. He arrived in Bolivia, started teaching law and criminology and received a Bolivian citizenship. In 1940, the Bolivian government asked him to prepare a new criminal code for his new country and in 1943 he presented his official draft of the Criminal Code of Bolivia (which was never enacted). Perhaps to justify his ability and willingness to take on this task, in the explanatory notes to his code he wrote that the time he had spent in Bolivia allowed him to get to know it appropriately in order to accomplish this mission. He

<sup>36</sup> Medrano Ossio, José. "Responsabilidad Penal de los Indígenas", p. 314-316.

<sup>37</sup> Ibid, p. 316-319.

<sup>38</sup> Ibid, p. 313.

<sup>39</sup> On this distinction between subjects and citizens see Yashar, Deborah J. *Contesting Citizenship in Latin America: The Rise of Indigenous Movements and the Postliberal Challenge*. New York: Cambridge University Press, 2005. p. 35-36.

<sup>40</sup> José Medrano Ossio, "Responsabilidad Penal de los Indígenas", p. 309-310; Jiménez de Asúa, Luis. "El derecho penal de los indios (con motivo del trabajo de José Medrano Ossio)", *El Criminalista*, tomo IV, Buenos Aires: Editorial La Ley, 1944, p. 256-257. Some years earlier, Jiménez de Asúa supported the enactment of a special tutelary criminal legislation for uncivilized Indians also in regard to the Peruvian criminal code. See: Jiménez de Asúa, Luis. *Derecho Penal en la República del Perú*, Lima: 1987 (1a. ed. Valladolid: 1926), p. 48. For Jiménez de Asúa's biography and vast influence in Latin America see: Sala i Vila, Núria. "Ciudadanía y diferenciación penal indígena", p. 59-61; Garrido, Luis, *Notas de un penalista*, México: Ediciones Botas, 1947, p. 33-42; Academia Mexicana de Ciencias Penales, *Luis Jiménez de Asúa en México*, Cuadernos "Criminalia", No.13, México, D. F., 1943.

also added that in any case, a Spaniard could never feel a stranger on American soil.<sup>41</sup>

According to López-Rey, until that time the Bolivian criminal legislation had turned its back to the indigenous reality of the country. This reality, he argued, expressing a common *indigenista* position, showed that the Indian, despite everything, was "the mainstay of the nation" and therefore it required to take him into account in any legislative work.<sup>42</sup> López-Rey rejected vehemently the way by which Medrano Ossio faced this problem, criticizing his perception of "a general incapability of the Indian". He refuted the assumption that all Indians lacked criminal responsibility and represented dangerousness, which allegedly required their subjection merely to security measures within a special legislation. The meaning of such legislation, he argued, was to put Bolivia in a psychologically difficult situation, because it would be like declaring that 80% of the national population was incapable or criminally "dangerous".<sup>43</sup>

Moreover, in his view, Medrano Ossio's position was very erroneous because it failed to reflect the diversity of the national population and "the complex nature of the expression 'Indian'".<sup>44</sup> "Where does *the Indian* begin, and where does it end?" he asked, "How can we reinforce a general theory of inferiority regarding a huge part of the population, when often we do not know where does this sector begin and where does it end?"<sup>45</sup> For López-Rey, a criminal (or any other) legislation which failed to recognize that "there are Indians and Indians" and founded upon a general notion that "Indian" meant mental inferiority, represented and reaffirmed a racial division that contrasted the humanist conception of man.<sup>46</sup>

In López-Rey's view, "the penal condition of the Indian" was a real complicated problem because it was not just a question of numbers "but of different qualities and situations". In Bolivia, he explained, there were various classes of Indians, from the Indian of the Altiplano (the Andean Plateau) to the Indian of the jungle area, while in between, there was a series of species that must be taken into account, using as much legislative flexibility as possible.<sup>47</sup> Not every Indian, he stressed,

"by the fact of being an Indian" was in a state of criminal incapability or dangerousness. These concepts, in his view, were not compatible with the situation of many Indians who were merchants, workers, employees or notorious professionals; with the Indian who lived in the city and the Indian that had done a military service; with all the Indians "who were more or less incorporated into national life".<sup>48</sup> For him, in contrary to Jiménez de Asúa, it was not just a matter of distinction between rural and urban Indians, because even the cultural isolation of the Indian who did not live in the city "was not so great to make him ignore the fundamental ethical values".<sup>49</sup>

Considering all these classes of Indians, López-Rey arrived to the conclusion that the Bolivian Indian, aside from very notable exceptions, was more or less tightly incorporated into Bolivian life. At this point, López-Rey made a distinction between "incorporation" and "identification". Incorporation in a life or a culture, he explained, did not necessarily mean identification with it. Although the Bolivian Indian, in general, was not "identified with the total Bolivian culture" he was incorporated into it, forming a subculture with unique characteristics within the broader national-Bolivian culture. In general, he continued, for the purposes of criminal law and taking into account its minimum requirements, incorporation into a culture was sufficient to establish criminal responsibility. "Although remote and largely lost", he added, the current culture of the average Indian or the Indian "subculture" (López-Rey stressed that the term had no pejorative meaning) had in itself the sufficient ethical elements required to constitute the necessary intellectual features in order to have knowledge of unlawful or criminal acts.<sup>50</sup>

Therefore, whether living inside or outside the cities, "the average Indian"—López-Rey used this term to exclude the rustic Indian (the *selvático*) and "other exceptional cases"—possessed the minimal capability required by criminal law.<sup>51</sup> Hence, he finally distinguished between two main classes of Indians in Bolivia. The minority consisted of those who were obviously rustic or "separated from the Bolivian reality", having spent their entire life (or at least most of it) in a cultural milieu obviously inferior to the "configurator world" of the Bolivian cultural reality. These Indians, according to his criminal code (article 20[2]), were exempted from criminal responsibility and subjected only to security measures. The majority—Indians that were more or

<sup>41</sup> López-Rey Arrojo, Manuel. *Proyecto Oficial de Código Penal*, La Paz: Publicaciones de la Comisión Codificadora Nacional De Bolivia, 1943, p. xciii-xciv.

<sup>42</sup> Ibid, p. XXX.

<sup>43</sup> Ibid, p. XXXIII.

<sup>44</sup> Ibid, p. XXXI.

<sup>45</sup> Ibid, p. XXXIII.

<sup>46</sup> Ibid, p. XXXIV.

<sup>47</sup> Ibid, p. XXIX.

<sup>48</sup> Ibid, p. XXXI.

<sup>49</sup> Ibid, p. XXXI.

<sup>50</sup> Ibid, p. XXXI-XXXII.

<sup>51</sup> Ibid, p. XXXIII.

less integrated into the Bolivian culture (although not identified with it)—were not exempted from criminal responsibility. Yet, López-Rey believed that also the “average Indian” deserved some special attention. Thus, for example, when any Indian was subjected to criminal sanctions, his judges were always required to consider his “special psychology, peculiar culture and way of life” for the purpose of achieving, together with the imposition of the most appropriate sanction, the best incorporation and socio-legal adaptation of this Indian.<sup>52</sup>

In López-Rey's criminal code, the penal condition of the Indian was indeed a complicated problem, but it was merely a cultural problem, almost without any economic or political dimensions. Furthermore, as a legal-cultural issue of criminal responsibility it was finally reduced and restricted to a small group of Indians, those who were “separated” from the nation. One thing was clear: There was a distinction in this code between “the Indian” and “Bolivian life” (or culture). The former was to be incorporated into the latter, and yet, these were two different terms. Bolivian life (or culture) was not Indian. It is precisely the reason why a Bolivian government could naturally ask López-Rey to write a new criminal code for his new homeland. As he said, “a Spaniard could never feel a stranger on American soil”.

## Conclusion

Article 45 of the 1924 Peruvian Criminal Code, adopted in the heyday of Peruvian indigenismo, was an expression not only of criminal-positivist perceptions but also of the reformist indigenismo of the 1920s, which contrary to the more radical one, sought cultural and legal solutions to the Indian question. However, according to article 45, this was not merely a cultural question. The treatment it accorded to Indians that were classified as “semi-civilized” or “degraded by servitude and alcoholism” also expressed a perception of the Indian question as a problem of power relations. It echoed a critical indigenist stance against the injustices and oppression of the existing social order. And yet, it seems that over the years, as Peruvian indigenismo became less critical and subversive and more institutional and scientific, only the “semi-civilized” Indian, characterized by cultural inferiority and moral deficiencies, remained the main protagonist of this special legal category.

<sup>52</sup> Ibid, article 80.

In Bolivia of the 1970s, López-Rey's work was not forgotten. The 1973 Bolivian Penal Code adopted some of his ideas and accorded a special treatment to the Indians of the Oriente (selváticos) who had “no contact with the civilization” and to the Indians of the Altiplano who were not adapted to the “Bolivian cultural environment” (CHIVI VARGAS, 2008, p. 16). In Peru of those years, despite the fact that under Velasco regime, the Indians formally became “campesinos” (peasants), the 1924 Criminal Code with its ethnic-legal categories was still relevant. In 1970, the Supreme Court in Lima once again dealt with the question of who was a “semi-civilized” Indian. In this case the court clarified that ignorance; poverty and the use of alcohol were not mitigating circumstances. The court also reaffirmed that semi-civilized Indians were only those who lived “on the margins of civilization”, in contrast to the defendants that had been to school, owned property, were married and also had a criminal record.<sup>53</sup> As we have seen, this ruling was in line with previous restrictive judicial decisions on this issue, which had been taken in Peru already in the 1930s and 1940s. After all, as López-Rey hinted, treating a large portion of the population as a criminal exception was quite problematic not only legally but also in terms of national identity.

Legal texts can be viewed as stories that people tell about themselves, their nations, about “who they are” or “who they aspire to be”(On the function of law in the formation of identities, see: LIKHOVSKI, 2006, p. 3, 9; PARKER, 2002 p. 581; AGUIRRE; SALVATORE, 2001, p. 1-2, 11-12.). Within the stories that were told here, López-Rey's question “where does the Indian begin and where does it end” was left hanging in the air. The “Indian” that began as a colonial (legal) category reemerged in the 20<sup>th</sup> century in the form of many legal (or proposed legal) classifications: savage, semi-civilized, disintegrated or simply Indian. The “Indian” and the colonial legacy of its creators were presented in all these categories; they simply did not end.

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<sup>53</sup> Exp. No. 792-70, Procede del Cuzco, *Revista de Jurisprudencia Peruana*, p. 1001-1002, 1970.

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