Chapter 7. Law's limitations

Introduction

I started this book by referencing the legal anthropological debate on law's ambiguity, thus on the observation that law is "simultaneously a maker of hegemony and a means of resistance" (Hirsch and Lazarus-Black 2012, 9). Throughout the book, I discussed the differences between Peruvian human rights lawyers – especially those from Lima – and activists from grassroots organizations in the provinces when it comes to hopes and expectations placed on law. I have argued that it is the ambiguity of law that leads to the different experiences and that shape the actors' legal consciousness. Human rights advocates have much more faith in the force of law as a counterhegemonic means than the activists do. As I highlighted in the preceding chapters, this is not only related to the lawyers' professional relationship with the law. Rather, it is also related to their experience with successfully applying legal means as an emancipatory tool in their political struggles. Activists on the ground, in turn, are confronted with the law primarily in connection with the issue of criminalization. Thus, they mainly experience the "dark side of judicialization" (see also: Lindt 2023). In addition, they often witness the mobilization of law from below against human rights violations going unpunished. The task of the human rights lawyers in this context is to convince the people at the margins of the state that it makes sense to mobilize the judicial system as an ally.

The human rights lawyers I worked with in the field have remained firm in their belief in law despite the limitations imposed by the lack of implementation or abuse of the law. But, as I illustrate in this final chapter, even among themselves, this belief in the law is far from being beyond all doubt. Doubts were not caused by the practical and jurisdictional hurdles mentioned in the discussion on the difficulties of litigating human rights from below. These lawyers have learned that courtrooms are a battlefield in which conflicts of interest exist. They have also learned that their opponents are powerful actors who have the resources and power to "come out ahead" (Galanter 1974) in court. They have become aware that corruption, a lack of political

will on the part of the judicial authorities, and the influence of companies on the judiciary are integral parts of the Peruvian justice system. Rather, doubts were caused by limitations inherent in the law and the legal mechanisms themselves. These doubts usually surfaced in the direct negotiation processes with the persons the lawyers represented in court. First, they emerged in situations where it became apparent that it is not enough to only have a "right to have rights" (Arendt 1998 [1951], 614, Dagnino 2003, 213). Second, there are also several controversies arising from the relationships in law – that is, the relationships between lawyers and plaintiffs, which is shaped and predetermined by law's proceedings. I discuss these two limitations of law in this chapter.

Beyond the right to have rights

During my fieldwork, law's limitations mostly became apparent in unexpected situations. Such a situation occurred during a trip to a *comunidad nativa*, which I made with the team of *Fedepaz* in March 2018. Lawyer Rosa, anthropologist Ingrid, and I traveled to the province of San Ignacio, in the northernmost part of Cajamarca, where we visited the Awajún *comunidad* of Supayaku. *Fedepaz* has been working with this *comunidad* since 2013, providing the community members with legal assistance and representing them in a legal dispute with the mining company Exploraciones Águila Dorada S.A.C. (Sanca Vega 2017, 8). In 2013, *Fedepaz* had filed a constitutional complaint, a so-called *amparo*, demanding the suspension of the mining project Yaku Entsa that threatened the community and its natural resources (Servindi (online) 2013, Sanca Vega 2017). In 2016, the corresponding constitutional court ruled in favor of the community, thereby ordering the mining project's suspension; two years later, this judgment was upheld during an appeal.[1] Consequently, the mining project was halted. With its legal work, *Fedepaz* had thus significantly supported Supayaku's resistance against mining.

In addition, *Fedepaz* formed part of a coalition of NGOs that supported the *comunidad* in the defense of its territory and livelihood. This collaboration resulted in a so-called *Plan de Vida*, a "life plan," which community members had elaborated with *Fedepaz*, *Grufides*, the Catalan association *Ingeniería Sin Fronteras*, and the Peruvian NGO *Soluciones Prácticas* (Comunidad Nativa Awajún de Supayaku *et al.* 2015, see also: Sanca Vega 2017, 194, 223). Based on a long-term participatory process, this plan set out the joint projects that the *comunidad* wanted to pursue in order to achieve their vision of the *tajimat pujut* (*buen vivir* or the "good life" in Awajún). It contained proposals and visions of how the community wanted to develop in terms of economic,

1 *Corte Superior de Justicia de Lima, Quinto Juzgado Constitucional de Lima, Sentencia, Resolución 26*, 10.12.2018, court order on file with author (see also: Fedepaz 2018a).

cultural, and social aspects over a fixed period of ten years. During the elaboration of this plan and beyond, *Fedepaz* focused primarily on legal capacity training with the community. The legal assistance provided by the NGO thus went beyond the actual defense of the *comunidad* in the courtrooms.

Several times a year, members of *Fedepaz* traveled to Supayaku and conducted workshops: for example, on the rights of indigenous communities, on women's rights, or on other topics that were determined in dialogue with the community. During the trip on which I accompanied the team, Rosa and Ingrid conducted a workshop on domestic violence with the women of Supayaku. In addition, they worked with the community members on revising the community's statutes. This was a long-term project on which the *comunidad* and the NGO had been focusing for several months. According to the national legislation, every *comunidad nativa* and *campesina* in Peru needs such a set of rules that defines the local customs and regulates the most important aspects of community life. The statutes usually include points such as the regulation of membership in the *comunidad*, political decision-making, the use of communal land and forest resources, and the organization of community work. In many cases, however, these statutes are outdated and no longer correspond to everyday practice in the communities. *Fedepaz* considered it a key issue to revise the community's own norms together with its members. The revision of the statutes was aimed at strengthening the community members in their collective and individual rights, as Rosa told me. In this sense, the workshops that she and Ingrid conducted in Supayaku illustrated what *Fedepaz* understood by the premise of initiating empowerment processes in the communities through legal advocacy training.

The days in Supayaku were intense, especially because Rosa and Ingrid were seen by many community members as much more than external advisors in legal matters. Rather, the *comuneros* and *comuneras* who participated in the workshops also brought their personal concerns to the NGO staff. Women talked about conflicts with their husbands, parents discussed problems at school, and many others asked Rosa and Ingrid for advice on internal family problems or issues with state authorities. The workshops had hardly been completed when people were already standing at the door of the community house, waiting to discuss their personal concerns with the two NGO employees. This demonstrated the close relationship and the mutual trust that *Fedepaz*' team has built over the years with individual members of the *comunidad*. Rosa and Ingrid's intention in taking me to the field was precisely to demonstrate this relationship and their way of working with the *comunidad*. The two wanted to make sure I understood that their human rights work was not only being completed in the office in Lima, but rather took place in the communities as well.

The day we left the community to travel back to San Ignacio, we were picked up by a private driver as there are no bus or *colectivo* connections to Supayaku. There is only an unpaved road connecting the *comunidad* to the next settlements. The drive

takes several hours and is only possible with a 4x4 off-road vehicle; in case of rain, the road quickly becomes impassable. For this reason, vehicles leaving from Supayaku to the city are always full. Among the group of people who shared our trip to the city was Hernán, a young, timid man from the *comunidad*, who worked in San Ignacio. Hernán was employed by the provincial authority as special representative for the *comunidades nativas*.[2] In this function, he had participated in the workshops of *Fedepaz*. In spite of his official position, however, he had been rather reserved during the workshops and had hardly participated in the discussions.

However, as soon as we left Supayaku behind us, Hernán overcame his shyness and did not stop talking. He recounted that there was a contract between the community and a lumber company allowing for cutting timber within the communal territory. Hernán seemed nervous when he talked about this issue. I later suspected that he had been told by other community members to address the matter with the NGO staff on the way back to the city. Rosa and Ingrid were surprised since they had never heard about such a contract. At first, they directly questioned what Hernán had told them. They argued that if this were the case, the members of the *comunidad* would certainly have told them about it. Just the day before, they said, during the revision of the statutes, the issue of extracting timber from community forests had been discussed, and participants of the workshop had not mentioned anything along these lines. Instead, they had reaffirmed their position that the community does not want to have such collaboration with external companies, Ingrid and Rosa argued. However, Hernán insisted that the contract existed. He said that he himself had been involved in the negotiations. In this way, it came to light that the *comunidad* had begun negotiations with a timber company and had not talked with *Fedepaz* about this collaboration. Rosa and Ingrid later spoke, by phone, with community representatives, who confirmed the negotiations with the company. During our stay in Supayaku, the same members of the *comunidad* had not said a word about it.

"Después de la resistencia, después de la victoria, ¿qué?"

The episode on the way back from Supayaku revealed a dilemma that Peruvian human rights lawyers and legal NGOs have often been confronted with in recent years. The point here is that, in view of their difficult economic situation, it is often no longer sufficient for many local communities to simply have rights and defend these

2 The official name of the authority for which Hernán worked was the so-called *Oficina de Enlace de Asuntos Indígenas*, the "Liaison office on Indigenous Affairs." In his position, Hernán was responsible for ensuring that, within the provincial municipality of San Ignacio, the interests of the *comunidades nativas* were adequately represented. For *Fedepaz*, this office has been an important partner in its work of strengthening the indigenous community.

rights against unwelcome extractive industry projects but that alternatives for economic development must also be offered. This raises the question of what should follow the victory over a major industrial project like a mine, for example. What comes after the victory, after the successful resistance against the undesirable economic development? For the human rights NGOs, the questions arise regarding what they can offer to the *comunidades* as alternatives to the economic development promised by the companies. This situation is particularly striking because mining projects are often located in Peru's highland regions, which are marginalized areas characterized by high poverty rates and a poorly functioning local economy. Under these circumstances, NGOs are quickly accused of having prevented the economic development of a region – whatever this economic development may have meant in practice and whatever negative side effects it may have had.

In the capacity-building workshops of various NGOs that I attended in Lima, Celendín, and San Ignacio, the term *fortalecer* appeared repeatedly. NGO representatives said that it was about "strengthening" the *comunidades* and empowering them in their rights and in their resistance against the mining projects. This discourse also included discussions with the community about alternatives for a different kind of economic development, development that was not based on extractivism and the exploitation of natural resources. What this alternative development should look like in practice, however, often went unanswered. NGO representatives and grassroots activists likewise talked about encouraging the development of *microempresas* (micro-enterprises) or the promotion of agriculture, ecotourism, and handicraft products. As human rights organizations, however, the NGOs were not in a position to provide the knowledge and resources to build such alternatives. Their area of expertise is the legal sphere, not the promotion of local economic development.

Regarding the issue with the timber company in Supayaku, it later became clear that the representatives of the community had not yet signed a contract but that negotiations were ongoing. Back in Lima, *Fedepaz*' team had various conversations with the community's leaders via phone, and Ingrid traveled back to Supayaku shortly later to discuss the issue with the *comunidad*. *Fedepaz* offered to review the contract to make sure the *comunidad* was not being ripped off by the company. At the same time, the NGO employees did not want to force themselves on the community with this offer so that they did not get the feeling that *Fedepaz* wanted to interfere and dictate to them how they should decide to proceed in this case. Furthermore, the opportunities offered to them by law, as the most important of their allies, were simply insufficient for this situation. Their role as a human rights organization repeatedly threw them back into the pattern of being unable to do more than promote rights, while people on the ground had the expectation to be able to enjoy the substance of these rights (see also: Mukherjee 2019, 72).

In this regard, Rosa told me that she and her colleagues were fully aware that it is not enough to only have rights and to be able to claim these rights if people, at

the same time, do not have the opportunity to sustain themselves (*sustentarse*). Pure legal assistance is not enough, Rosa said; rather, they must look for cooperation with organizations that can work with the *comunidades* in the "productive" sector (for example, in agriculture) and thus offer them practical support for economic development. With the elaboration of the *Plan de Vida*, *Fedepaz* and the other NGOs had taken steps in this direction with the community of Supayaku. However, it had become clear that these efforts were not enough.

To only have rights is not enough

At the heart of this dilemma is the limitation of law, especially that of international human rights law. This limitation was discussed by Moyn (2018), who claimed that human rights are "not enough" to demand distributive justice. His key message was that human rights discourses are not an appropriate way to fight for social justice, because they rely on the concept of *sufficiency* rather than *equality.* In his book *Not Enough*, Moyn lamented that in the post-Cold War era of human rights, the "egalitarian aspiration" (*ibid.*, 5) of political struggles has been lost and that human rights have become a "worldwide slogan in a time of downsized ambition" (*ibid.*, 6). "The call for a modicum of distributive equality" (*ibid.*, 3) had, in his view, increasingly fallen silent in the course of human rights discourses because "[h]uman rights guarantee status equality but not distributive equality" (*ibid.*, 213).

When applied to communities such as Supayaku, Moyn's theory means that while it is all well and good to invoke the right to live in a healthy and clean environment, free from damage caused by mining, it is, however, not enough to lift marginalized communities out of poverty. This means that while it is desirable for the community to be granted the right, as an indigenous group, to be consulted on major development projects, these rights are not enough to overcome the daily economic hardship the people experience. Human rights discourses and the juridification of social protests are suitable for preventing a mining project, as I have made clear in the previous chapters. At the same time, however, legal discourses, especially human rights discourses, do not provide marginalized population groups with a sufficient basis to demand distributive justice – neither from the state nor from other actors. Large-scale projects may be prevented by human rights discourses, but, at the same time, the marginalization remains.

These limitations of human rights law in relation to poverty issues have been discussed in recent years by various other authors. James Ferguson, for instance, described this dilemma using the example of an NGO workshop on housing rights in Cape Town. At the end of the legal capacity training, a man raised his hand and said that he did not want the *right to a house*, but that he wanted a *house* (Ferguson 2015, 48). As in Supayaku, the promises of justice alone were not enough for this

South African; he was not content with only knowing that he had a right to a home but demanded the enforcement of this right.

In addition, Harri Englund (2006) observed that human rights activism in Malawi was primarily driven by the country's elites. Among the impoverished population, in turn, the concept of human rights had acquired a strongly negative connotation. As Englund described, due to the poor translation of human rights concepts to local contexts, the local population considered these concepts insufficient to actually meet their concrete needs. Thus, the human rights discourse was seen as something foreign, something brought in from the outside. However, this does not correspond to the situation as we can observe it in Peru. The concept of human rights, or the right to have rights in general, plays a major role in social movements as well as for the marginalized sections of the population who oppose industrial mining projects. As I have discussed elsewhere (Lindt 2015), they actively invoke their rights, not only in capacity-building trainings with legal NGOs but also in their political struggles and in everyday life.

Rights talks and the demand for rights are therefore not only discourses that emanated from an elite of human rights lawyers from Lima. Rather, the juridification of protest also emerged from the local resistance itself. At the same time, however, it has become apparent over time that these demands for rights are not enough, especially when facing the promises of corporate development programs. Social movements and grassroots organizations were especially exposed to such criticism because they had fought against the mining projects even on the most demanding front, as the example of Cajamarca reveals.

Facing corporate anti-politics

> El agua no se vende, ni por mochilas ni cocinas.
> – *Protest poster carried by a group of young girls during the Conga conflict in Sorochuco, 2012*[3]

In the field, I observed that the limitations of human rights discourses are particularly evident in regions where transnational mining companies are active with CSR programs, such as in Cajamarca. Minera Yanacocha had learned from the social conflicts of the past and had made great efforts to address the criticism voiced in the region. Activists criticized that the company attempted to "buy" the "social license to operate" with gifts and donations to individuals, institutions, *comunidades*, and

3 "The water is not for sale, neither for backpacks nor for kitchens." Picture on the PIC's blog *Celendín libre* (https://celendinlibre.files.wordpress.com/2012/04/sorochuco-paro-regional.jpg).

municipalities. The protest poster cited above referred to precisely this kind of criticism. Donating "kitchens" – mostly gas stoves – and school supplies, including backpacks, to economically disadvantaged families in the mine's area of direct influence was regarded as one of the company's most infamous strategies for gaining support among the local population. Minera Yanacocha had already begun to implement development projects with the launch of the Conga project; after its suspension, it kept them going.

"The water is not for sale (*el agua no se vende*)" because "water is worth more than gold (*el agua vale más que el oro*)," was one of the slogans with which the protest movement opposed the Conga project. In its resistance, the right to water was at the center of the movement's demands and united the rural and the urban population. The political mobilization on the streets proved to be particularly effective. Through strikes, roadblocks, and demonstrations, the social movement was able to build up the necessary pressure to assert their interests from below. Thereby, they challenged the nation state's hegemonic development discourses. In the end, the Conga mine project was stopped because of the local population's broad political mobilization. The demand for rights and the resulting juridification of the protests played a major role in this. As I have argued elsewhere (Lindt 2015), it was precisely the reference to the "right to have rights" that provided an important basis for making demands on the nation state and urging the government to stop the mining project. Legal discourses thus served as a key justification for resistance. Furthermore, the juridification of its protest also helped the local social movement build coalitions with national human rights organizations and foreign supporters. In this way, the rights discourse provided a common ground to link the local demands to a broader political context. The juridification thus strengthened the movement in several ways.

At the same time, however, the judicialization of the social conflict – i.e. the struggle in the courtrooms – had been much less successful. Legal NGOs had tried to have the Conga project declared inadmissible through constitutional complaints, but the claims were dismissed. With criminal charges, the NGOs could at best take retroactive action against human rights violations, but the legal mobilization from below could not prevent these abuses. At the same time, activists on the ground were confronted with the increasing threat of criminalization and the use of law by their opponents. Therefore, it comes as no surprise that grassroots organizations such as the PIC, in retrospect, see political mobilization as much more effective than legal mobilization. The *juridification* of the protest bolstered their resistance and their political demands, while the *judicialization* had little effect in this regard.

In the phase that the social conflict had reached during my fieldwork, however, the situation in Cajamarca had become even more complicated. The Conga project was suspended, and political mobilization on the streets against it had ended. At the same time, the economic situation in the region had deteriorated, partially because mining activities had decreased, but for other reasons as well. As a consequence,

the region had entered a severe recession. Minera Yanacocha and the other mining companies operating in the area, in turn, were still strongly present with CSR programs, which caused the social movements great concern. Members of the grassroots movements repeatedly expressed worries that these CSR projects would break the population's resistance against mining. Milton, for example, repeatedly said that the social movement must not lower its guard (*no bajar la guardia*) and must remain vigilant; otherwise the company would come back with the Conga project, and the social movement would lose the fight. He and other activists clearly saw, behind the corporate development projects, an attempt to break the political resistance; in the perception of the social movement, the CSR programs were a kind of "anti-politics machine" (Ferguson 1994) that they faced after the suspension of the actual mining project (see also: Sydow 2016).

During the *Escuela de Líderes y Lideresas* in Celendín, the corporations' activities in the rural areas were an important point of discussion. A woman from Sorochuco expressed her concerns by saying,

> Right now Yanacocha is entering through the *anexos*, [the peripheral settlements of the district]. The company arrives with gifts, for example, with water tanks for the people. Now they are going to have the neighborhoods with solar panels [of] Yanacocha. What do they say? What do the people of Sorochuco say? [They say to us,] "Yes, it's fine if you defend the water. But what do the people from the social movements give us? Yanacocha provides us with many things and with what do you provide us? None of you take care of us." That's the way people talk in Sorochuco these days. – *Women activist from Sorochuco,* Escuela de Líderes y Lideresas, *March 2017, Celendín (field notes, own translation)*

Within Sorochuco, a strong division of the population has taken place due to the Conga conflict. After the project's suspension, the members of the social movement suffered defamations and were presented as those who would have prevented economic progress. These accusations were often made by young people who hoped for employment in the mine and who demanded to see economic progress in the region. Older people, in turn, would have been much more committed to the resistance, as several activists told me. During the critical phase of the social conflict, it had been far easier for the social movement to counter the development discourses of the company. The CSR projects are based on so-called soft law, they are thus voluntary and dependent on the "moralization of responsibility," as Eckert (2016, 254–6) termed it. The social movements, on the other hand, demanded legally binding concessions from the state. They did not want to be dependent on the mercy and goodwill of the company, as I have argued earlier (Lindt 2015, 94–5), but they rather demanded their rights as citizens.

In the aftermath of the large protests, however, doubts arose as to the extent to which resistance based on this appeal for rights could be sustained. The activists became aware that it is good and right to have rights, but people must also remain convinced that their opposition to powerful actors such as transnational mining corporations is worthwhile. The company would supposedly offer something to the community, and would carry out projects, as the woman recounted during the *escuela*. The *ambientalistas*, the environmentalists, on the other hand, were accused of having nothing to offer. They themselves remained convinced in their resistance, but there were doubts that invoking rights in this phase of the social conflict would be a useful means of maintaining the broader population's resistance against mining. In this sense, it became clear that the human rights discourses exposed considerable limitations not only for the national legal NGOs, but also for the grassroots organizations. While human rights lawyers and activists on the ground may have different expectations of law and litigation, thus of the *judicialization* of social conflicts, both sides face the same limitations of such conflicts' *juridification*. This constitutes the first of law's limitations that the human rights movement has been confronted with.

Relationships in law

It is May 2018, a few days before the end of my fieldwork. The two legal NGOs IDL and EarthRights International – represented by its Peruvian team based in Lima – hold a press conference in the city of Cajamarca. Through the local media, the NGOs want to inform about a constitutional complaint they filed that morning in a court in Celendín. Thereby, they intend to make the background of the complaint known to the wider public. The legal action lodged concerns about Chadín 2, a planned hydroelectric dam project in the province of Celendín. With a so-called proceso de amparo, *an injunction, the human rights organizations seek to challenge the award of the concession for the dam project. In the lawsuit, they argue that the project violates fundamental rights of the local population, in particular the right to a "healthy and ecologically balanced environment" (*derecho a un medio ambiente sano y equilibrado*).*

The press conference is held at the Restaurant El Zarco, a traditional restaurant not far from Cajamarca's plaza de armas. *Among the representatives of NGOs from Lima are Juan Carlos, one of the leading constitutional lawyers and attorneys of IDL, Juliana, the head of the Peruvian office of EarthRights International, as well as Valentina, the communications officer of EarthRights International's headquarters in Washington. On behalf of the local organizations, Milton for the PIC, and Ula, the president of a* comunidad campesina *in the Río Marañón basin, are there to provide information. About ten media representatives came to hear the NGOs' announcements.*

The majority of the journalists seem to belong to those newspapers of Cajamarca that hold a rather critical position toward social movements. The most central question they ask concerns what conditions would need to be met for the social movements to be satisfied with a major eco-

nomic project for once. They thereby voice the accusation that the NGOs and grassroots organizations, as ambientalistas*, would always prevent any economic progress in the region from the outset. Juliana and Juan Carlos, for their part, are trying to steer the conversation toward the constitutional complaint. They explain its content and emphasize, time and again, that the Peruvian state has a duty to protect the rights of its citizens, even in the face of major economic projects. They place the constitutional complaint in a broader context and refer to similar lawsuits in Colombia and other countries, as well as to international human rights agreements. Milton and Ula hardly ever rise to speak during the press conference. Ula initially expresses his support for the lawsuit but then lets the lawyers speak. Milton gives a longer explanation of why the dam project poses a threat from the perspective of the social movements. Afterward, however, the questions and answers revolve mainly around legal aspects, and Milton gives the floor to the attorneys, who are experts in this field.*

Later that day we go to the studio of Radio Líder*, a private radio station in Cajamarca that has supported the resistance against Conga and has close ties to the social movements. Juliana, Juan Carlos, and Ula go into the recording studio and answer the moderator's questions. Meanwhile, the rest of us sit down in the studio's entrance area and wait. Suddenly, Milton receives a call from Wilmer, a* rondero *leader from Yagen. Yagen is one of the villages that will be most affected by Chadín 2. Consequently, parts its population have met the project with strong resistance. The local* rondas campesinas *have joined the PIC and its protest movement. Locally, Chadín 2 led to severe tensions between the project's supporters and opponents, resulting in several deaths in recent years. Furthermore, many of the activists from the village have been criminalized for their resistance. Among those criminalized was also Wilmer. Wilmer is a shy, reserved man in his thirties, an* agricultor *(a farmer) and father of two children. After the death of Hitler Rojas, he took a leading role within the* ronda campesina *in Yagen. This led to serious negative consequences for him; he has repeatedly received death threats. In the past few weeks, the psychological strain was increasingly visible in his worried face. When I had returned to Cajamarca for the second round of field research some months earlier, I was struck by how emaciated he had become. He had also become even quieter within a short period of time.*

During the phone call, Wilmer informs Milton that the ronderos *from Yagen decided to withdraw from the constitutional complaint. The day before, a group of* ronderos *came to Cajamarca, where they had a court hearing in a criminalization case. Afterward, a meeting was held with Maritza and Miguel, two Peruvian lawyers working with IDL and EarthRights International, respectively. The NGO representatives explained what exactly the constitutional complaint was about, and the* ronderos *signed it afterwards. Then the* ronderos *and the lawyers traveled to Celendín, where they filed the lawsuit this morning. Subsequently, Maritza and Miguel returned to Cajamarca.*

Now, a few hours later, the ronderos *inform Milton by phone that they want to withdraw from the case. At first, it is not entirely clear why they decided to take this step. Initially, Milton assumes that Wilmer and his people got the impression that the representatives from the other affected communities did not cosign the complaint and that they, from Yagen, were the only ones who supported the case. Milton tells Wilmer that this is not the case. Later, it becomes clear*

that the group from Yagen is afraid that the court case will expose them even more as individual opponents of the project. By signing the lawsuits, they could become the target of further attacks by supporters of Chadín 2.

The NGO representatives from Lima and Washington are, at first, a little helpless and worried about how to proceed. After the radio interview, they discuss what they should do. They are afraid that the lawsuit might fail now, which would mean that the work of several years would be ruined, as some attorneys keep saying. Finally, the lawyers decide to travel to Celendín again. They want to discuss the situation once more with the ronderos *before they return to Yagen, where the phone connection is poor and communication to the outside world is therefore difficult. When they set off, the NGO lawyers are convinced that they will be able to persuade the* ronderos *that it was the right decision to take the legal route.*

Unfortunately, I was not able to find out afterward how the meeting between the lawyers and the *ronderos* ended because I left Cajamarca and Peru shortly after. Facebook is a reliable channel to follow how lawsuits are filed, court decisions are obtained, and appeals are lodged. However, it is not always easy, via social media, to keep track of what is happening on the ground, especially with regard to subtle social tensions between lawyers and plaintiffs going on behind the scenes. Shortly after filing the complaint, EarthRights International and IDL informed about the lawsuit via their online channels (EarthRights International 2018b). Apart from that, there was little public information about the complaint in the following months. Then, in May 2019, the corresponding court in Celendín declared the case to be inadmissible. In its order, it argued that the complaint failed to fulfill several formal requirements (IDL 2019). Thus, the legal action was formally unsuccessful.

Moreover, the incident in Cajamarca indicated that the lawsuit must also be considered a failure with regard to the underlying social processes. The episode points to a second limitation of the law that the Peruvian human rights movement is confronted with and that has led – even among human rights lawyers – to doubting the strategy of legal mobilization. This second limitation results from the relationship that human rights attorneys in Peru have developed with the plaintiffs they represent in court.

This relationship is determined, first, by judicial processes and by the very nature of litigation. Law and litigation require specific roles of lawyers and plaintiffs and define how these two parties relate to each other. At the same time, this social relation may lead to considerable difficulties on the ground. There is, on the one side, the plaintiff as the injured party, the "victim," or the object of a legal dispute; on the other side stands the lawyer as his or her "defender," as the actual litigant and expert in the law. Lawyers have "ready access to important symbols of political legitimacy," as Stuart A. Scheingold (2004 [1974], 134) noted. This includes access to the courts and thus to one of the most central institutions of power in a society. Moreover, la-

wyers are the "gatekeepers to legal institutions," and they "maintain the control over the course of litigation" (Felstiner *et al.* 1980, 645).

In Chapter 3, I used Kafka's parable to describe prosecutors' role as gatekeepers of the law. I now argue that human rights lawyers also hold considerable power in this regard. In comparison with corporate actors, they may appear relatively powerless. From the perspective of the plaintiffs, however, they also form part of an elite. Access to the knowledge of law and thus to the institutions of the state gives them an authority which in turn shapes their interaction with the people they represent *vis-à-vis* these institutions. The human rights attorneys decide which cases to bring to court and whom they provide with access to the legal system. The procedural circumstances and mechanisms of the law entail that lawyers have a decisive say in deciding who gets a voice in court cases. Like the "haves," they are also "repeat players," to return to Galanter's terminology (1974, 114). It is they who are able to question the hegemonic discourses of corporate and state actors through their legal knowledge and their expertise as lawyers. At the same time, this legal expertise gives them a dominant position *vis-à-vis* the plaintiffs.

Second, the relationship between lawyers and plaintiffs is characterized by the social positioning and the socio-economic background of the actors involved. In human rights litigation in Peru, the constellation is usually that of middle-class lawyers from Lima representing plaintiffs who belong to marginalized groups from the rural areas of the highlands. As I point out below, this constellation has specific consequences for the interaction with plaintiffs. Thus, the lawyer-plaintiff relationship is, on the one hand, foregrounded by the law and by legal requirements. However, on the other hand, it is also, to a large extent, marked by the socio-economic background of the persons involved. As I argue in the following section, the resulting relationship is perceived as problematic for different reasons and from different points of view.

Allegations of manipulation

The profession of lawyers is associated with specific social concepts. In many societies, there exist precise ideas of what a lawyer should and should not do, what expectations she should meet and what her relationship with the "clients" she represents should be like. These ideas are even more explicit when it comes to *human rights* lawyers. These attorneys are widely considered the "good guys," the "ethically superior lawyers," or even the "saviors," as Makau Mutua (2001) described it. According to this perception, human rights lawyers work for a low wage but under a high

price of self-sacrifice. They uphold human rights and stand up for the protection of humanity; thus, they defend morally noble goals.[4]

These ideas of human rights lawyers can also be found in Peru, but only in a specific social sector and political camp. Within the left-liberal circles, the well-educated, upper middle-class segments in Lima and other large urban centers, human rights lawyers enjoy much support. Within Peru's grassroot movements, human rights lawyers hold a great deal of influence. This includes not only the NGOs and activists in Lima, but also the social movements in the highlands, including in the rural areas. The *doctoras* and *doctores* – as the human rights attorneys are mostly called – are treated with much appreciation and respect.

Beyond this social minority, however, human rights lawyers have a rather poor reputation in Peru. "Here, we are the *terrucos*, the terrorists," *Coordinadora* lawyer Mar told me. Since the time of Fujimori's regime, legal NGOs have often suffered public defamation for taking on the defense of suspected "terrorists" (see Chapter 1). There is a clear historical development in this respect. In the eighties and nineties, the human rights lawyers were accused of being "*los abogados de los terrucos*," the terrorists' lawyers. Today, they are labeled the defenders of the *anti-mineros*, the radical anti-mining activists. These attempts to delegitimize human rights lawyers mainly come from the right-wing or conservative sections of the population who are close to the military and to Fujimori's political movement. Thus, they are the supporters of the groups of actors the legal NGOs had sought to bring to trial in the nineties for the abuses they had committed. Johana, a sociologist working with the *Coordinadora*, once told me that this was the greatest burden of the internal armed conflict for the human rights movement. In her opinion, it had been possible to put an end to Fujimori's regime and put him in prison for the crimes he had committed. However, the human rights movement had not managed to win the discursive struggles and to anchor human rights narratives in public discourse. In this counterhegemonic struggle, the movement had so far failed.

In the context of the social conflicts around mining, new accusations have been added to this outside perception. There is now the criticism that human rights lawyers and NGOs from Lima would manipulate parts of the impoverished population of the highlands to rebel against large-scale economic projects. Again, it is mainly actors from the politically conservative sector who uphold this position. These critics accuse human rights NGOs of being either agents of "foreign powers" or "radicals"

4 This is, at least, the common opinion on human rights lawyers, which is held by the political left-liberal camp. On the other side of the political spectrum, human rights lawyers in many countries are often seen as "traitors" who want to harm the nation state with their legal actions against authorities and government, as several NGO employees and lawyers in Berlin and London told me.

who, through their "extreme" political demands, seek to prevent any economic prosperity in the country. Furthermore, they are accused of inciting the local population to resist mining projects in affected regions and stirring up protests.

The fact that legal NGOs resort to the law only constitutes, in the logic of these critics, further proof that the human rights movement does not have the necessary political support and must therefore rely on other means to assert its allegedly dubious interests. One example of this kind of criticism is a question that a journalist asked during the press conference on the constitutional complaint against Chadín 2:

> *Journalist:* So, you have taken the legal route?
> *IDL lawyer Juan Carlos:* Yes, it's the legal route.
> *Journalist:* There is also [another] route; that is the social route. And the social route, whether we like it or not, is that many people are supporting the issue of Chadín 2. That is to say, we shouldn't close our eyes either, right? There is a group, yes, that will be affected [by Chadín 2], communities that will be affected; it's in the Marañón basin. But a large part of the population [of the region of Cajamarca] does want these projects to go ahead. You are taking the legal route because you do not have, let's say, the total support of the population. – *Press conference concerning the* amparo *claim against Chadín 2, May 2018, Cajamarca (field notes, own translation)*

On the one hand, this criticism is clearly directed at the lawyers, supposedly abusing the representation of their subordinates to pursue their own political interests. On the other hand, however, it also depicts an image of plaintiffs who are manipulated because they do not have the agency themselves to pursue their own political intentions. This criticism thus manifests a clear interpretation of the lawyer-plaintiff relationship as one marked by difference.

The fact that the plaintiffs come from the highlands plays a central role in this perception. In this sense, the accusations clearly include racist undertones. They are based on a discourse emanating mainly from the capital region, that the "uneducated" inhabitants of the highlands cannot represent themselves and are therefore susceptible to manipulation from NGOs and human rights lawyers from the coastal area, in particular from Lima. The local population's participation in social protests results, according to these critics, from the fact that they are either controlled, paid, or manipulated by the NGOs, not from their own political intentions. The plaintiffs' own rationality is thereby discursively denied.

In the context of transnational mining projects, these discourses were used even at the highest political level. For instance, former president Alan García invoked these stereotypes in a widely read series of newspaper columns to degrade the population of the Amazon and the Andean regions as second-class citizens who impeded the country's prosperity by opposing mining and other large-scale projects (García Pérez 2007a, 2007b, 2008, see also: Arellano-Yanguas 2011a, 107, Silva Santisteban

2013, 435). García saw the population's rejection of mining and other extractive projects as caused by "demagogy and fraud (*demagogia y engaño*)" from environmentalists. In his opinion, the "*medioambientalistas*" are, in reality, what he calls the disguised twenty-first century version of the "old, communist, anti-capitalist" who resists any investment (García Pérez 2007b, own translation).

In a similar way, a representative of the Swiss Embassy in Lima also referenced these same narratives and discourses when he wanted to make me understand the difficulties that transnational mining companies in Peru were facing. During an interview, he told me that when protests against a transnational mining project in the highland area occur it is often because the local population is "stirred up" by external individuals or organizations pursuing "political interests." He did not go into further detail about the extent to which he considered such political interests to be legitimate or not, but he underlined the difficulties this had caused for the mining companies. Quite directly, he mentioned that, in his perception, the local population was not actually against the mining projects but that they were, in most cases, simply misled by outsiders. This also conceals the discourse of denying the local population in the highlands their own agency in political debates.

Several authors have described these discourses in other political contexts in Latin America. Sergio Miguel Huarcaya (2015, 2019), for example, observed the same accusations in the Otavalo region in Ecuador. In the face of indigenous uprisings in the early nineties, Huarcaya wrote that "such a massive, well-organized, and countrywide mobilization did not fit the stereotype of the indio, which characterized indigenous Andeans as submissive and passive" (2019, 571). Convinced of the view that indigenous people were not in the position or condition to lead such protests, their opponents claimed that "leftist agitators were behind it," as Huarcaya further noted (*ibid.*, see also: Huarcaya 2015, 807). Similarly, Kregg Hetherington (2011, 39–40) described this phenomenon using examples from Paraguay. He showed how the *campesino* population there was accused of being easily manipulated by populist politicians because of their alleged inability to participate in rational political debates. Finally, Maruja Barrig (2008) noted how representatives of the Catholic Church have used the same discourse in relation with forced sterilizations in Peru. As Barrig described, women belonging to the indigenous or the *campesino* population have been labeled irrational beings in these debates. Old stereotypes have been used, which speak of the "indios" as "naive creatures, [who] do not reach the category of adults, are subject to manipulation, devoid of will, of the capacity to express themselves and to assume their own defense" (*ibid.*, 234, own translation).

The judicialized mining conflicts in Peru's highland region lent themselves particularly well to applying these discourses against human rights lawyers for three reasons. First, the human rights NGOs themselves have repeatedly argued that they represented the poor, the marginalized, and the disadvantaged, i.e. those who otherwise would not have the resources and opportunities to use the judicial system. Re-

presenting the weak is part of the human rights movement's actual *raison d'être*. In a way, the lawyers themselves have also reproduced the image of the disadvantaged highland population, even if they did not use the same racist stereotypes as their critics. Although human rights lawyers place great importance on the fact that court cases should not lead to a process of re-victimization of the persons concerned, the NGOs, through their narratives, convey specific ideas about the injured party or the "victim." As Mutua (2001) discussed, this is an integral part of the "savages-victims-saviors construction" with which the human rights movement struggles worldwide.

Second, there is clearly a relationship of dependence that binds the plaintiffs to the skills of the lawyers. As I have demonstrated in the previous chapters, human rights litigation in Peru requires specific expertise, which the general population lacks but which is made available to plaintiffs by lawyers. Furthermore, as I discussed at the beginning of this section, litigation is based on a specific form of access to the judicial system, which is provided by the lawyers as gatekeepers. It thus follows from the characteristics of law's relationships that plaintiffs rely on lawyers. However, this process-related dependency also entails social vulnerability for the plaintiffs, which can quickly lead to accusations of manipulation, whereas the complexity of law's processes renders it extremely difficult to overcome this dependency.

Third, the legal NGOs themselves postulated that they wanted to initiate political change with the legal processes. Their expectations of the law are precisely to conduct strategic litigation in order to change the prevailing circumstances, and they see legal processes as political struggles, as I discussed in the previous chapters. As a consequence, the human rights lawyers are especially vulnerable to the allegation of using the law for their own interests, or, as their critics claim, of having dubious or dark political motives. Along with the other two reasons, this explains why it is so difficult for the lawyers to negate the external accusations that they are manipulating the plaintiffs.

Speaking on behalf of whom?

In addition to these accusations of manipulation raised by outsiders, there are internal controversies that Peru's human rights lawyers are confronted with, which have arisen from the issue of representation. The incident in the constitutional complaint, in which the plaintiffs from Yagen suddenly wanted to withdraw from the lawsuit, is an example of how these internal controversies have manifested themselves on the ground.

During the press conference on the *amparo* claim, the NGO employees made great efforts to emphasize the support of the local population for the complaint. EarthRights International lawyer Juliana, for instance, stressed that the complaint had emerged from a long-term collaboration with the affected communities. Before the groups of journalists, she said, "Today, it is an act of filing the lawsuit, but in reality,

the construction of this process has been a long process. It has been a serious, responsible process that the two organizations present here have worked on together with the communities. This has been a process of several years." A few days earlier, I had attended a public event at the Law Faculty of the *Universidad Católica* in Lima. On that occasion, EarthRights International, IDL, and some of the leaders of the protest movement against Chadín 2 had presented the constitutional complaint to the public. At this occasion, Juliana had already repeatedly pointed out that the lawsuit was a legal process that resulted from "joint work" or "joint efforts" (*un trabajo conjunto*) with the affected communities. She said that the lawsuit emerged from the *voluntad*, the wish or willingness of the *comunidades*.

This emphasis on long-term cooperation with the *comunidades* is an important cornerstone of the narrative invoked by the human rights lawyers in legitimizing their representation of plaintiffs. As I argued in the previous chapters, the legal NGO's aim is to "empower" the local communities and to strengthen their struggles through legal actions. In practice, this means that the affected communities or the individual plaintiffs should acquire the processes, that they become subjects in the court proceedings, and that they perceive a legal action as part of their own political struggle. This aspect was repeatedly raised in the legal capacity trainings that I attended during fieldwork. For example, Sonia, a lawyer working with a national NGO based in Lima, said, with regard to constitutional complaints, during a workshop in Celendín,

> So, one strategy… look, I'm not saying it's the only one, but one strategy is to demand your rights peacefully. Peacefully! Without exposing yourself, that's filing an *amparo*. But that doesn't mean that you give up the fight. No, it's just one more mechanism. […] The *amparo* will go […] accompanying your social struggle. At the same time that you fight, the *amparo* will also fight, right? – *Sonia*, Escuela de Líderes y Lideresas, *March 2017, Celendín (field notes, own translation)*

The idea behind this is that legal action can be used to steer social conflicts into institutional channels and thus prevent outbreaks of violence, as I mentioned in Chapter 2. In Sonia's opinion, legal action would reduce the exposure of the actors on the ground. In the case of Yagen, however, we could observe the opposite development. In this case, it was the lawsuit itself which the activists on the ground perceived as a danger to their own safety. Due to procedural requirements, the complaint's petitioners had to admit to the lawsuit by name and thus exposed themselves individually. Although constitutional complaints can be filed for the benefit of entire population groups, it is individual plaintiffs who put their name under the complaint. This individualization through the legal process can entail a great risk for the plaintiffs involved (see also: Santos 2005, 50, Kirsch 2018, 38).

In addition, during the workshop, Sonia underlined the importance of the plaintiffs actually becoming part of the legal proceedings. In that sense, she said, "We will contribute to the legal part, [but] you have to contribute to the social part" because "you are the protagonists of these lawsuits. Here, the lawyers are not the protagonists; we advise you, but you are the interested parties, […] you are going to *build the process*. It's more *you* than *us*." To underline how much a lawsuit depends on the plaintiffs, Sonia added that a lawsuit is "a social construction; if you do not get involved, it is difficult (*es una construcción social; si no se involucran es difícil*)." From the point of view of the legal NGOs, this involvement of the plaintiffs in the litigation process is clearly aimed at the empowerment processes mentioned above on several occasions. The example from Yagen, as well as other cases, however, illustrates the limitations of this approach; this, too, is related to the relationships in law and to the requirements set by legal mechanisms.

One difficulty in the relationship between lawyers and plaintiffs is already evident in the geographical distance between the remote communities in the highlands and the NGO offices in Lima. As the example of *Grufides* demonstrated, there are individual NGOs working directly in the provinces. Most of the important legal NGOs are, however, based in Lima. Furthermore, the case of *Grufides* and, in particular, of its main lawyer Mirtha also highlighted the fact that human rights attorneys working directly in the mining regions are personally exposed and must live with reprisals when they take on politically sensitive cases. Attorneys working for national NGOs in Lima are better protected from these security risks.

From an office in Lima, however, it is more difficult to know and follow the local contexts and circumstances. With plaintiffs living in areas that are hours away from the nearest provincial capital and that often have inadequate road and communication networks, this is a major challenge. In the case of the constitutional complaint filed by IDL and EarthRights International on behalf of the communities in the Marañón basin, these aspects undoubtedly played a significant role. The geographical inaccessibility of the village of Yagen had obstructed close cooperation between the lawyers and the plaintiffs. Consequently, the attorneys did not succeed in overcoming the social distance that resulted in part from the geographical distance to the plaintiffs.

Furthermore, the example of Yagen also illustrates that the marginalized location of the communities is a major difficulty, not only geographically but also in terms of safety issues. As I mentioned above, the conflict over the Chadín 2 dam project led to social tensions within the village, which resulted in outbreaks of violence between community members. Under these circumstances, it had not been possible for the lawyers from IDL and EarthRights International to personally travel to Yagen. The ideal vision of these NGOs involves their cooperation with the communities taking place through the *asamblea*, the community assemblies. "The *asamblea* represents the door to a *comunidad*," an IDL lawyer told me, so any information concerning a lawsuit

involving a community should be provided during these assemblies. As this lawyer further noted, the *asamblea* provides a familiar space for the *comuneros* and *comuneras*. It thereby helps to build trust and create transparency. Many human rights lawyers are convinced that the more openly a decision is discussed in the *asamblea*, the less danger there is of social tensions arising and camps forming within the *comunidad* due to a lawsuit.

In the case of the constitutional complaint against Chadín 2, however, such a negotiation through an assembly was not possible in the case of all the affected communities, in particular in the case of Yagen. Since the NGO staff could not travel to Yagen themselves, they could only negotiate with a small delegation of *ronderos* who occasionally traveled to Celendín to meet with social movement activists or to take part in events organized by the PIC. Therefore, the complaint did not have the necessary social backing. This clearly indicates how far removed the constitutional complaint against Chadín 2 was from the ideal that the NGO lawyers actually claim to pursue in their work with the communities.

Finally, to construct a process (*construir el proceso*), as Sonia framed it during the workshop in Celendín, in practice means to *technically* build a judicial case. This includes, first, writing a complaint and filing it with the judicial authorities. In doing so, however, not only the willingness – *voluntad*, as Juliana noted – is necessary, but also the resources and the knowledge about the judicial processes. In terms of this knowledge, the plaintiffs depend on the lawyers since they are the legal experts. This illustrates the specific role that legal processes impose on lawyers. David, who works with *Fedepaz*, considers his role as a lawyer to be primarily that of a "technical advisor (*un asesor técnico*)," as he told me. In our conversations, David repeatedly argued that human rights lawyers who call for protests and participate in them themselves do not understand what their role is.

At the same time, as I mentioned above, through their expertise and their access to the judicial system, lawyers hold a great deal of power in their relations with the plaintiffs. On the one hand, they are thus, in their self-perception, only the implementing force – the technicians who have the necessary knowledge, "take instructions,"[5] and execute the decisions of the plaintiffs. On the other hand, however, it is this expertise that gives them the power to act as gatekeepers, to influence decisions, and to set strategies within the legal actions. Although the human rights lawyers seek to adopt a participatory approach and to ensure that the plaintiffs are involved in the proceedings, the role established by the law continually throws them back into these power relations. This raises questions of representation, such as, for example,

5 Using the example of transnational lawsuits against parent companies, I discussed elsewhere (Lindt 2020) how Peruvian human rights lawyers view this issue of taking instructions from the plaintiffs and how they distinguish themselves in this respect from *pro bono* lawyers in the Global North.

who has a say in these legal processes, who speaks for whom, and to whom do the lawyers provide access to the legal system. It is precisely these aspects of the legal relationship, which are evoked in litigation and promoted by legal processes, that demonstrate to human rights lawyers a further limitation of the law. In particular, these circumstances raise questions of whether legal mobilization can actually be an emancipatory means not only *on behalf of* "the weak," but also an actual "weapon *of* the weak," to refer to James Scott's (1985) term.

Beyond law and litigation

The relationship between lawyers and plaintiffs as well as the above-mentioned debates that having rights is often not enough illustrate the limitations of the law that Peruvian human rights lawyers face. As I have argued, these limitations are inherent to the law. Therefore, these limitations of law cannot be circumvented or overcome by the human rights lawyers; or if they can, it would be difficult. In the last section of this chapter, I discuss a third limitation of the law, not from the perspective of human rights lawyers, but from that of corporate actors. These limitations, which are also inherent to the law, explain why human rights lawyers still hold on to their belief in the law despite the limitations I have pointed out in the previous sections.

Setting limits to corporate power

> I think all of us in this room, we've had the opportunity to make a mistake along the way, and I think what is really important is to not get defensive and actually take the opportunity and learn from that issue or whatever caused it. – *Gary Goldberg, CEO Newmont Mining Corporation, UN Forum on Business and Human Rights, November 2018, Geneva*

In November 2018, representatives of TNCs, states, and civil society organizations met in Geneva for the seventh UN Forum on Business and Human Rights. The forum began with an opening plenary in the pompous Assembly Hall of the *Palais des Nations*. Part of this plenary was a "conversation with business leaders." The then chairman of the UN Working Group on Business and Human Rights, Dante Pesce, discussed, with CEOs of various TNCs, "experiences with human rights issues along their corporations' journey" in recent years. Gary Goldberg, who was the CEO of Newmont Mining Corporation at the time, was one of the corporate managers participating in this discussion. When Dante Pesce asked him to share his experience with human rights issues, Goldberg admitted that his company had made mistakes "along the way." Moreover, he replied,

> I'll point to an issue in Peru where we have had … actually an ongoing issue where … / it is a land rights issue around a mine next to our Yanacocha mine, at Conga, where we acquired the land from … essentially a family back in the early nineties, and in 2011 the land was occupied by the descendants of this family. […] And at that time a decision was made to go through a legal process, which is quite an extensive legal process to address the landownership. We have now gone through the courts, both in the U.S. and Peru, and… they have come out with decisions that we follow the right process for acquiring that land. Yet that hasn't yet resolved the issue. […]
>
> You know, at the end of the day for me, I am not happy with the situation at all. I think we took a very legalistic approach to try to resolve it, and it is still not resolved today. And I think, had that situation posed itself today, we'd have taken a different approach based on what we have learned so far. […] [Newmont Mining's experience in Cajamarca] just shows that the different approach [of] listening and actually not taking the legal approach – I think it has been mentioned by several people here today: Don't depend on the law. Get down, and listen to the people, and understand what their concerns are. That is critical. – *Gary Goldberg, CEO Newmont Mining Corporation, UN Forum on Business and Human Rights, November 2018, Geneva*

In his remarks, Goldberg referred to the land dispute that Newmont Mining's subsidiary Minera Yanacocha had been having with the Chaupe family for several years. Goldberg admitted that in this case it was not possible to use the law to obtain the land of the Chaupe family. The "legalistic approach" had not led to success from the point of view of the corporation. Goldberg did not specifically mention that the company had failed in the criminal case against the Chaupe family. In his opinion, the court cases had confirmed that the company had taken the "right process" for acquiring the disputed land, which is a rather surprising interpretation of the outcome of the criminalization case and the judicial process in the United States. As we have seen in Chapter 5, the Chaupe family was acquitted of the charge of illegal occupation of land. Furthermore, the U.S. courts had not even dealt materially with the conflict between the mining company and the family but had dismissed the case on jurisdictional grounds. Whether the Chaupe family or the company are the legally entitled owners of Tragadero Grande would only be decided in a civil case in Peru, which has not yet been concluded. Therefore, it comes as no surprise that Goldberg is dissatisfied with the strategy of relying on the law, although he claims that the judiciary has proven the company right.

From Goldberg's point of view, the legalistic approach had failed. The judicial system in Peru had set limitations to the corporation's power by acquitting the Chaupe family from the allegation of having illegally occupied the disputed plot of land. I have already discussed at length how this court order was obtained. What is in-

teresting to note in this case, in addition, are the alternatives that Gary Goldberg suggests in the face of these limitations the corporations faced because of the law. Instead of taking disputes to the court, he proposes that one should "get down, and listen to the people, and understand what their concerns are." Thereby he referred to the CSR programs that Minera Yanacocha has been conducting for years in its direct sphere of influence in Cajamarca. As I mentioned in the second section of this chapter, mine opponents in the region argue that with these programs the company is attempting to buy the support of the population by profiting from their disadvantaged economic situation. From the company's point of view, however, it is a matter of clarifying needs and of thereby preventing or eliminating disputes. In retrospect, Goldberg believed that this "direct dialogue" with the local population is a far better approach than relying on the law and negotiating conflicts in court.

This indicates that even corporate managers such as Goldberg recognize the emancipatory power of law. With his comment, Goldberg acknowledged that legal action can also lead to companies not always "[coming] out ahead" in court (Galanter 1974), and the law may not always be on the side of the "haves" (*ibid.*). Law and litigation thus set limits for the powerful. As Goldberg's statement further illustrates, if corporate actors are unable to use legal means to defend their interests, they turn away from legality and rely on approaches outside the law. Thereby, they attempt to maintain their hegemonic position.

Alternative dispute resolution

This turn away from law is what Laura Nader coined "alternative dispute resolution" (Nader 1999, 304–9). Along with Ugo Mattei, Nader observed how powerful actors search for alternatives to the law as soon as judicial authorities decide against their hegemonic positions (Mattei and Nader 2008, 18–9, 76–7). In doing so, the powerful resort to extrajudicial alternatives, which ostensibly aim at harmony rather than adjudication and are intended to create a consensus between the parties to the conflict (Nader 1999, 309). According to Mattei and Nader, this strategy is aimed at suppressing resistance, "by socializing them toward conformity by means of consensus-building mechanisms, by valorizing consensus, cooperation, passivity, and docility, and by silencing people who speak out angrily" (2008, 77).

In a similar way, Pistor (2019, 139–40) described corporations' turn away from law by using the example of pharmaceutical companies defending patent rights. As soon as they are defeated in court, companies turn to the mechanisms of investor-state dispute settlements (ISDS) and attempt to have their privileges defended before this private institution. A third example of corporations' search for alternative routes involves the out-of-court settlements that I mentioned in the discussion of transnational lawsuits in Chapter 6. These settlements are aimed at reaching an agreement in the private sphere rather than in the public space of a court. They are, in

this sense, "removed from public view," as Eckert (2021) put it. Furthermore, out-of-court settlements are based on private negotiation and not on adjudication, which is an external evaluation by judicial authorities according to binding norms. As I have discussed with regard to the Monterrico case, this leads to situations in which the political demands and moral claims underlying a lawsuit go unaddressed (see also: Lindt 2020).

As these examples discussed by Nader, Pistor, and myself have revealed, corporate actors seek extrajudicial solutions as soon as they believe themselves to be on the defensive in the courtroom. The Comaroffs (2006) criticized the juridification of conflicts as a tendency toward depoliticization. Based on the analysis in the previous chapters, I argue, in turn, that it is precisely the recourse to such alternative dispute resolutions or other extrajudicial mechanisms that depoliticizes disputes and social conflicts. Extrajudicial dispute resolution serves as a sort of "corporate antipolitics," to use Suzana Sawyer's (2004, 118) wording. In this sense, I follow the position of Eckert *et al*. (2012a, 5–6), who questioned the Comaroffs' depoliticization claim. To "[g]et down, and listen to the people, and understand what their concerns are," as Goldberg framed it, allows companies to use their power in private negotiation processes, thereby "silencing people who speak or act angrily" (Nader 1999, 308). This is what may contribute to a depoliticization of the claims from below.

Conclusion

As I have discussed in the previous chapters, due to various obstacles and hurdles, the idea in legal liberalism that everyone is equal before the law is often illusory in everyday judicial practices in Peru. In my case studies, corruption and undue influence on the side of corporate actors prevented access to the legal system; and the abuse or manipulation of the law led to inappropriate proceedings that did not comply with legal standards. These mechanisms set limits on the use of law by marginalized groups. At the same time, the criminalization cases in Cajamarca, for example, demonstrated that, if social movements succeed in using the "indeterminacy of law" to their advantage, counterhegemonic positions can also be enforced in the courtroom (see also: Marks 2007). The judicialization of social protests and the reliance on legal mobilization offers social movements opportunities to use institutional mechanisms; it allows them to make themselves heard by state authorities, to prevent outbreaks of violence, and to question and challenge differences in power *vis-à-vis*, for example, corporate actors. So far in this book, I have argued that the difficulties faced by the Peruvian human rights movement lie not in the law itself but in the lack of implementation or in the manipulation of existing legal norms. This chapter has taken us a step further in examining some of the limitations inherent to law itself.

In addition, this chapter has asked what limitations the law sets against those who attempt to mobilize it from below. In this sense, it sheds light on the fact that law and legal mechanisms themselves also have inherent limits that complicate the human rights lawyers' counterhegemonic work. I have identified limitations, especially in the insufficient power of human rights discourses and in the lawyer-plaintiff relationship. As the example of Goldberg and the alternative dispute resolution mechanisms illustrate, however, the law also sets limits for powerful actors. This indicates that there is still hope for the legal mobilization from below and adds to the observation of the ambiguity of law I have described in my previous analysis.