

## Chapter 4. Criminalizing social protest

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*We meet at the PIC's clubhouse for a last coffee before traveling to Cajamarca where the trial will start the following day. Before leaving the place, Milton briefly gives his shoes a shine. He puts a book in his pocket and grabs his backpack, then we leave. A mototaxi brings us to the corner where the colectivos (shared taxis) leave for Cajamarca. While Milton looks for a car to take us to the city, Mallu, the Brazilian sociologist who accompanies us, and I stand around and talk. From the corner of my eye I see Milton speaking vividly to another man, but I do not pay attention to it because I assume that it is, as so often, a compañero de lucha or an acquaintance of Milton. When Milton comes back, however, he tells us that the guy he spoke to is the former governor of Celendín – thus, the man who filed charges against him and who will appear as complainant in court the next day. Milton relates that just now the former governor accused him again of being responsible for the deaths in Celendín during the Conga conflict because he had mobilized people for protest. Milton is confounded and shakes his head in bewilderment.*

*We reach Cajamarca after a three-hour drive. Milton meets with his attorney, who works for the local NGO Grufides, and with the representatives from the national NGOs, who have come from Lima for the trial. Mallu and I meet them later in a small café. Milton grins broadly when he spots us coming and shouts from afar: “Angelita! We have a task for you! For you and Mallu. You have to carry the Molotov Cocktails to the courtroom tomorrow!” He bursts out laughing and then explains what it is actually about. His lawyers feel that there is a need to put some pressure on the judges. “We want you to approach the judges to show them that someone from outside is watching the case. Tell them about your research. And take your camera along!”*

*Early the next morning, we meet at the plaza de armas and walk together to Grufides' office some blocks away. The mood has become tense. Milton says he was able to find some sleep last night, but he is unusually taciturn this morning. We are all a little nervous. At the NGO's office we do not see anyone yet, and we wait outside until the secretary shows up and opens the door, which is secured with several locks. While we wait in front of the office, a man in blue jeans and a baseball cap seems to be watching us. He stands half a block away at the corner and looks down the street in our direction. As we enter the office, I just see him turning around the corner and walking away in direction of the courthouse.*

We wait in the entrance room of Grufides' office. Little by little, the other defendants arrive. Most of them are from the district of Sorochuco, a village located in the vicinity of the planned Conga mine. The defendants from Sorochuco had to leave at four in the morning to get to the city in time. Others arrived by colectivo from Celendín. The group of persons facing prosecution consists of sixteen individuals, among them five women. Some of them are dressed as if they were attending Sunday mass, others wear football shirts or other simple clothes. Everybody looks worried. Other people arrive in the office, among them Mallu; Palujo, who is responsible for communication tasks within the PIC; Juliana, who works at EarthRights International's office in Lima; and Victor, a representative of the Coordinadora from Lima. Mirtha, the principal lawyer working for Grufides, arrives with a woman who I have always thought was her friend or assistant, since I had seen the women together a few times before. Later, people will tell me that the "friend" is a plain-clothes policewoman who accompanies Mirtha for security reasons.

Mirtha welcomes everyone and gives a short introduction about what the defendants have to expect today. She explains that the three judges responsible for the case have changed and that the situation has therefore become even more complicated. The new judges are "clearly against us", Mirtha explains, as they are said to have personal links with Minera Yanacocha. One judge is the son of a former consultant of the mining company. Mirtha told me in a conversation some weeks ago that she fears the bench will attempt to teach Grufides and her personally a lesson with this case. Now she chooses her words more carefully so as not to frighten the defendants even more. But she makes clear how tense the situation is. Mirtha explains that she requested help from the Coordinadora from Lima and that, therefore, Victor traveled to Cajamarca to support her in the trial.

Mirtha further describes how the hearing will proceed: "The judges will ask you how you see your guilt. You must explain individually whether you consider yourself guilty or innocent. The judge will tell you that there may be a reduction in punishment if you admit the deed. But because you have not committed this offense, you must all declare that you are innocent." Mirtha also explains that the judges will ask whether the defendants wanted to speak or to remain silent. In an earlier phase of the criminal proceedings, the group discussed who would give a declaration to the court. Those people are again reminded of their task. Milton recalls that the situation is serious and that it is therefore important to always arrive on time and to follow the lawyers' instructions. It becomes clear that the defendants will join the process initiated by the opposite side. They will follow the rules of the game – that is, the rules of the law – and participate in the trial as they are expected to, although they cannot be sure that they will receive due process and that the opposing party and the judicial authorities will respect the rule of law.

We then walk to the courthouse, which is only a few blocks away. The courthouse is an inconspicuous two-story building in a residential area. Our identity cards and bags are checked at the entrance, and then we are admitted. We cross a simple entrance area and reach a patio where we enter the courtroom. The room is small and offers little space. The three judges sit at a large desk at the front of the room. Next to them is a court employee who takes care of the audio recording and other technical matters. The judges are elegantly dressed in suits and ties. In

front of them, the public prosecutor and a procurador<sup>1</sup> representing the interests of the Ministry of Defense sit at a small table on the left side. Mirtha and Victor take a seat at the same level on the right. Microphones are placed in front of them. Mirtha wears the insignia of her bar association, a green medallion with a golden star.

The furniture in the courtroom is shabby and worn out. The defendants, the complainants, the public defender, and we the visitors sit on four benches at the back of the room. There are far too few seats. Several people are leaning against the wall. I recognize the man from the taxi station the day before. He is standing next to one of the defendants. No attempt is made to keep complainants and defendants spatially separated. A Peruvian flag stands behind the judges in the corner. There is a wooden crucifix and a smaller version of the ensign on the magistrates' table. A thick court file and the penal code lie before them. The bench's speaker opens the hearing with the ringing of a small golden bell at nine o'clock sharp.

The hearing begins with the accreditation of the prosecutor, the procurador, and the defense lawyers. All the defendants are then called up individually. They have to declare their presence and recite the number of their National Identity Document (Documento Nacional de Identidad, DNI). They are asked to provide their address, their profession, and their monthly income. Additionally, they are asked for their criminal record. Among the prosecuted are farmers (agricultores), housewives, a carpenter, an accountant, a single mother, and several teachers. Their ages range from mid-thirties to well over fifty. Most of them live either in the city of Celendín or in the district of Sorochuco. Some of them find it difficult to quantify their monthly income. For some, it is embarrassing because they have no steady income. Some people recite their DNI number quickly like a shot; others find it hard to recall the number that establishes their identity and makes them tangible for the state.<sup>2</sup> Three defendants are absent. Mirtha asks for patience and explains that the people had to travel from distant hamlets and probably did not make it in time. The bench decides to declare those absent in contempt of court (declarados contumaces), but to continue the hearing despite their absence.

The prosecutor begins reading the indictment. The sixteen women and men are accused "of the alleged commission of the crime of aggravated abduction [...] and, as an alternative or subsidiary accusation, of the crime against freedom in the form of coercion [...]." In addition, one man is accused of "the alleged commission of the crime against the symbols and values of the homeland in the form of outrage to symbols of the fatherland." The prosecutor recounts the events that led to the alleged crimes. In April 2013, a capacity building workshop for lieutenant governors took place in the community hall of Sorochuco. The defendants are said to have burst into the auditorium and to have violently evicted the attendees of the event and forced them out of the building to the plaza de armas. There, the two aggrieved persons – who were, at that time, governors of the district of Sorochuco and of the province of Celendín, respectively – were

1 The procurador involved in this lawsuit is a legal expert representing the interests of the Ministry of Defense.

2 For a detailed discussion of the role of identity documents in Peru see: Skrabut 2019.

*“deprived of their liberty during approximately one hour.” The defendants are said to have “publicly insulted” the governors, “throwing eggs at them and pointing at them with sticks and then forced them through violence and threats to sign a document in which [the governors] agreed to [...] their own dismissal and they promised that [...] democratic election of the district governor of Sorochocho would take place.” The prosecutor continues by stating that “[l]ater, the mob moved to the governor’s office from where one defendant removed the national coat, which he showed and passed around publicly as if it were a trophy, offending and outraging the symbols of the fatherland. After committing these criminal acts, the defendants continued shouting their slogans and calling the governors mining agents.”*

*Based on the criminal code, the prosecutor’s office requests “the payment of a civil reparation of 10,000 Nuevo Soles [approximately US\$3,000] to be paid to each of the complainants in solidarity by the defendants.” As a penalty, it demands a prison sentence of between thirty-one years and eight months and thirty-three years and six months. With regard to the alternative or subsidiary classification of the alleged offense as coercion, the prosecutor requests a penalty of between eight and sixteen months of deprivation of liberty and a civil reparation to the complainants of 4,000 Nuevo Soles [approximately US\$1,200]. In addition, for the crime of outrage to the symbols of the fatherland, the public prosecutor requests one year and four months of deprivation of liberty and the payment of a one hundred days’ fine in favor of the state.*

*“That’s all, señor juez,” the prosecutor concludes.*

### The dark side of judicialization<sup>3</sup>

In Peru’s mining conflicts, it is not only activists and NGOs who strategically mobilize the law to enforce their claims. State and corporate actors likewise rely on legal means in these conflicts. They use the law with the objective of impeding political mobilization, silencing protest, and restoring the public order, which they see endangered by social movements. In this chapter, I examine this specific form of legal mobilization by tracing a court case in which sixteen leaders of the protest movement from Sorochocho and Celendín were charged with abduction. Two former local representatives of the central government, who were well-known for their support of the Conga project, filed the criminal complaint against the activists. In 2017, the case was dealt with before the Supra-Provincial Criminal Court of Cajamarca.

In the previous chapters, I discussed the (im)possibilities of mobilizing law *from below* to overcome corporate and state actor’s impunity in Peru. I now look at the legal mobilization *from above*. To do this, I turn to a specific way in which corporate

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3 Parts of the material on which this chapter is based were previously published in an article entitled “The Dark Side of Judicialization: Criminalizing Mining Protests in Peru”, *Latin American Research Review* 58, 2 (2023).

and state actors mobilize law: the criminalization of protest. Reduced to a minimal definition, criminalization means to declare a certain behavior to be illegal or criminal. When I speak of the criminalization of social protest, I thereby mean the judicial prosecution of different activities typically linked with social protest, such as the participation in marches or rallies, for example. State and corporate actors rely on the accusation of specific criminal offenses in order to challenge the movements' mobilization against large-scale mining projects. Since these accusations then result in criminal prosecution by judicial authorities, I categorize it as a form of legal mobilization *from above*.

With regard to different Latin American countries, Alexandra Huneus *et al.* observed an increasing use of criminal law in governance in recent years and described this as “a darker side of judicialization” (2010, 11). As an equivalent to social movements' legal activism, criminalization thus forms part of and contributes to the judicialization of social conflicts. In addition, criminalization is to be understood as a form of domination. In Peru's criminalization cases we can observe the state's increased use of law “to regulate [its] populations” (Merry 2017, xi) and to obstruct dissent and counterhegemonic aspirations. In this sense, criminalization reveals different forms of law's domination. The aim of this chapter is to identify these different forms and to discuss how law and legality become effective in these cases. The analysis of the different ways in which law is enacted by corporate and state actors will contribute to our overarching debate on the judicialization of Peru's mining conflicts. From a theoretical point of view, the criminalization strategy illustrates how the judicialization of social conflicts may lead to a “lawfare,” to use the Comaroffs' (2006, 30) term. Therefore, this chapter explores how activists experience these lawfares and how they confront the criminalization processes. I am interested in the hegemonic use of law which political and economic elites apply to retain existing power relations and to impede social mobilization.

In addition, this chapter starts with the observation that the criminalization strategy not only has an effect on the social movements, but also on a personal level on the individual activists. Some of the sixteen people prosecuted in the Sorochuco case were leaders of local groups, such as the PIC or women and church organizations. Many, however, were ordinary members of the protest movement. They were teachers, grandmothers, *campesinos*, active church members, *ronderas*, or accountants. The danger of imprisonment caused them great concern not only for themselves, but also for the children, spouses, and parents they care for. Some of them had been criminalized before for their involvement in the Conga protests, but for most of them it was the first time that they had to participate in a trial. I provide insight into their personal experience and their strategies in dealing with the uncertainty caused by the court case. Thus, I describe what it means for activists to stand “before the law” (Ewick and Silbey 1998). How did they deal with the threat of being convicted? And to what extent did the criminalization processes influence the

activists' legal consciousness? These considerations are central to my overarching research questions because they demonstrate the extent to which law is becoming effective as a hegemonic means of dominating social movements, but also individuals.

As described above, the defense lawyers in the Sorochuco case considered it an advantage to have foreigners in the courtroom. As observers from abroad, Mallu and I approached the magistrates during the trial. We asked for permission to take photos, for a copy of the trial's audio files and for further background information about the case. I still have my doubts as to whether the judges were in any way impressed by our presence. They only smiled mildly and told us that "unfortunately, they were not allowed to speak about an ongoing case." Accompanying the defendants for several weeks, however, allowed me to gain insight into how they experienced the proceedings. Moreover, the Sorochuco case was not the only criminalization case that was ongoing during my stays in Cajamarca. I also attended a trial against a group of *ronderos* from Yagen. They were accused of having kidnapped employees of Odebrecht's Chadín 2 dam project. More generally, the threat of criminalization was an issue people constantly talked about in the field, and there was a wide range of ongoing and already closed cases that I discussed with people in Cajamarca and in Lima. This ethnographic material forms the basis for this chapter.

## Criminalization of mining critics in Peru

The criminalization of social protest is one of the main concerns of the grassroots organizations and the human rights movement I worked with in Peru. Activists involved in the movements against both the Río Blanco and the Conga project faced judicial prosecution for taking part in protests. In most of Peru's recent conflicts over mining, leaders, as well as the movements' ordinary members have been criminalized. The use of criminal law is thus a recurring technique of the Peruvian state for responding to social conflicts. Criminalization is enacted through prosecution and criminal investigations. It consists of pressing charges against individuals or groups of people, which result in years of investigation and litigation. At the end of these criminal proceedings, the complaints are often dismissed because they lack grounds and there is no evidence to prove the accusations. Nevertheless, even the pre-trial stages often place a great deal of emotional strain on those affected.

In the course of the Conga conflict, a series of charges was brought against the leaders and members of the protest movement from Cajamarca. Some leaders in the region had up to fifty charges against them. They were accused of riots (*disturbio*); encroachment (*usurpación*); damage to private property; crimes against public order or against public safety; abuse of authority; disruption of public transport (*perturbación de los medios de transporte*); simple and grievous harm; disobedience and resistance to

authority, rebellion, and coercion; or kidnapping (*secuestro*). In some cases, the proceedings were initiated by the public prosecutor's office, but in others it was the mining company or local representatives of the national government who filed the complaints that led the prosecutor to open an investigation. Thus, the public prosecutor's office again holds an important role as a kind of gatekeeper who decides which suspected offenses are investigated. Most of the allegations that emerged from the Conga conflict concerned events that occurred between 2011 and 2013, when mobilization on the streets reached a peak. In some cases, proceedings were closed in the following years during the procedural stage of preliminary investigations. However, when I was in the region in 2017 and 2018, several cases entered the *juicio oral*, which is the final stage of criminal proceedings before a judgment is passed. In these cases, the risk of conviction was particularly high.

The incident and the alleged offenses that led to the Sorochuco case date back to April 2013. The defendants had participated in a spontaneously organized protest meeting in Sorochuco, which led to a public dispute with two governors, who represented the national government on the local level. In the aftermath of the events, the governors denounced a group of participants of the protest. According to the defendants, the governors had specifically denounced those protesters who had taken a leading role in the protest movement against Conga. A total of about two-hundred people had attended the protest meeting, but only sixteen had been denounced. Furthermore, defendants told me that the criminal investigation had been marked by irregularities. The activists recounted that the proceedings had initially been dropped by the public prosecutor's office, but had later been reopened, allegedly under pressure from the former governors and in violation of existing procedural rules.

In 2015, the *juicio oral*, the court hearing, had started but had repeatedly been postponed due to the absence of judges and other formalities. In accordance with a rotation principle, the judges responsible for the case were then changed and the trial was suspended for more than a year. Thus, when I accompanied the activists to the court in March 2017, they had already experienced some days in court. With this court hearing, the new panel of judges reopened the trial and continued the criminal proceedings. In May of the same year, the trial ended with the *lectura de sentencia*, the reading of the judgment. In between were four further court hearings, which we attended. For the activists, but also for us who accompanied them, it was a time of great uncertainty since it was not foreseeable how the trial would end and whether the defendants were effectively going to be sent to prison for a long time.

During the first day at court in March 2017, Mirtha was given the floor after the public prosecutor and the *procurador* had presented the accusation. From the very beginning, Mirtha challenged the prosecutor's accusation and the allegations made by the complainants. She started her first intervention to the court as follows:

Distinguished magistrates. The defense pronounces itself rejecting the thesis of the prosecutor's office and the civil party. We recognize that freedom is a fundamental good that must be protected, and this is neither unknown to nor denied by my *patrocinados* [protégés], several of whom have held public positions. In this trial we will prove that our *patrocinados* are not responsible for any crime that has violated the freedom of any of the aggrieved here present, nor coercion, even less the crime of kidnapping. On the contrary, we shall prove that what took place [...] was an exercise of constitutional rights, the participation in the political life of a community and in public affairs. [We will prove] that a peaceful assembly took place, and that the right to freedom of expression has been exercised collectively. [...] The public prosecutor's office accuses the defendants of having used physical violence to commit these crimes, and we are going to demonstrate in the present trial that there is no evidence whatsoever to prove such an accusation. – *Mirtha, lawyer with Grufides, intervention to the court, Cajamarca, March 2017 (transcription of the hearing's audio file, own translation)*

Thus from the outset, Mirtha emphasized that the defense recognized the importance of freedom as a “fundamental good,” and at the same time she stressed that there had been no violation of the governor's rights and that there was no evidence to prove the alleged crimes of abduction.

After Mirtha's first intervention, all defendants were called up individually and were asked whether they consider themselves guilty. As Mirtha had predicted, the judges told them that if they admit their guilt the sentence might be reduced. Everyone declared to be “innocent,” “without guilt” or “totally innocent.” The judges then proceeded with the questioning of the individual defendants. While most of them invoked their right to remain silent, Milton provided a declaration. He recounted how the events had occurred from his point of view:

We were going from Celendín to a community called El Lirio, in the upper part of Huasmin. [...] When we were on our way [...] we were told that the authorities were in a meeting in the district municipality of Sorochuco. [...] When we entered the site, the ex-governor of the province of Celendín [...] was speaking. He was just referring to me, with defamations, saying that we are deceiving the people, that we are inciting the population to protest against the Conga project. I asked for permission to speak. [...] Then the population requested the assembly members to go out and to hold the meeting in the *plaza de armas* [...] because there were a lot of people, right? I deny that there was a kidnapping. We have even seen the presence of the police at that moment. This, in my opinion, shows that there has not been any kidnapping. – *Milton, intervention to the court, Cajamarca, March 2017 (transcription of the hearing's audio file, own translation)*

Thus, both Mirtha and Milton denied that an infringement of rights had taken place and that the governors had been deprived of their liberty. Instead, Milton described

the events as a form of political intervention, which coincides with Mirtha's argumentation that her *patrocinados* participated in a political assembly and exercised their right to freedom of expression and to freedom of assembly.

In the eyes of Mirtha, Milton, and the other defendants, the prosecutor and the complainants used the offense of abduction as a pretext to initiate criminal proceedings against their opponents. Within the Conga conflict, the governors had publicly supported Minera Yanacocha's project and had entered into a fierce conflict with the protest movement. This conflict was waged in public, but at the same time, it was also a dispute that took place on a very personal level. The encounter between Milton and the complainant that I witnessed the day before the trial exemplified the conflict's everyday dimension. Through the process of litigation, however, this conflict was transferred to the courtroom, where it was waged under the supervision of the judges. The defense lawyers did not question this judicialization of the conflict in itself. They considered it a legitimate act to file a complaint, and they also agreed to participate in the trial, even though they repeatedly told me that the pre-trial investigation had not followed procedural rules and that the complainants had exerted pressure on the prosecutor's office. More importantly, however, the defendants criticized the complainants and the prosecutor, stating that they had *misused* the criminal law in order to start an illegitimate lawsuit based on unfounded accusations. As I describe in the following section, this misuse of law is one among various forms of how law is invoked in the criminalization cases.

## Law's domination

There are various ways in which law is used to govern people and to secure existing power relations. Like in other forms of legal mobilization from above, we can observe different ways in which domination is exercised in the criminalization cases. Based on the analysis of my ethnographic material, I propose three categories, which I discuss in the following section. First, there is a domination *by* law, thus by specific articles of the legislation. In this sense, criminalization is *encoded* in law. Second, we can observe a domination *of* law itself, i.e. through its institutions and its mechanisms. Then, there is, third, the *misuse* of law, which Mirtha and Milton criticized in the Sorochuco case. These different forms of law's domination all reveal the criminalization's potential to impede counterhegemonic struggles.

### Domination by law

The domination *by* law is the most evident way in which legal mechanisms are used by judicial authorities and by political and economic elites to criminalize opponents. Legal norms in general and criminal law in particular determine which conduct and

activities are permitted in a society and which should be punished. Within the nation state, it is the task of the judicial authorities to enforce these norms and to prosecute unlawful conduct. Marginalized groups who oppose the state and its projects are especially likely to breach the norms of a society. This is, on the one hand, due to their marginality; there are laws that are specifically tailored to groups who live at the state's margins (Das and Poole 2004, 9). On the other hand, states modify rules in order to make unwanted resistance an offense. This later strategy is especially effective if the people affected by legal modifications form part of marginalized groups.

The first aspect, law's tendency to be fundamentally hostile to marginalized groups, has long been a point of criticism of law. As early as 1894, Anatole France formulated his critique of law based on this aspect and ironically described the "majestic equality of the laws, which prohibit the rich and the poor alike from sleeping under bridges, begging in the streets and stealing bread" (cited in: Brinks and Gauri 2014, 375). Everyone is equal before the law, but some have a higher risk of getting into conflict with it. France claimed that the poor are especially vulnerable to this form of legal domination. In her book on the judicial system in South Africa, Johanna Mugler noted that "racially discriminatory laws created an illegal population" (2019, 26) during the time of Apartheid, which led to "criminalization of Black everyday life" (2019, 28). Likewise, Eckert described in her research in India how "illegalization and poverty are intricately connected" (2014, 295). The poor constantly come into conflict with existing norms, purely through their presence, for example, through the lack of a legal way to obtain land rights or to find work in the formal sector. In Peru's mining conflicts, to be involved in protest is, in a similar way, *intrinsically* connected with a breach of norms. If a protest march takes place in the urban area, the offense of obstructing public transport, for example, is very likely to happen. Thus, the activists run the risk of violating the law purely by participating in protests.

What has been much more striking in Peru's mining conflicts, however, is the second aspect of domination by law, which is how existing legislation has been tightened to criminalize participation in demonstrations. This development had already begun in the era of Alberto Fujimori in the context of the internal armed conflict (see Chapter 1, see also: Vásquez 2013, 416). In that time, the penal code was tightened with the aim of combating terrorism, i.e. fighting a specific group that revolted against the state. However, the stricter laws also affected persons who were merely suspected of supporting terrorism, although they did not belong to any subversive group. The Andean population was particularly affected by this policy and by the suspicion of supporting the insurgency.

After the transition, the democratically elected presidents who followed Fujimori tightened the criminal code with regard to social protest. With the increase of socio-environmental conflicts, a new population group became the target of the state's legislative adjustments. Social movements in Peru make their voices heard

primarily through gatherings on the streets, for example through regional strikes, road blocks, and manifestations in the urban centers or in the vicinity of the contested mine sites. New laws have been created, and existing laws have been adapted to make these acts a prosecutable offense. Although the danger of terrorism was officially overcome with the state's victory over the guerillas, new threats to society were found to legitimize the tightening of laws. In many cases, the tightening of specific articles of the criminal code was legitimized by combating "organized crime" or "drug trafficking."<sup>4</sup>

Articles concerning "crimes against public tranquility" and "against public peace" were especially targeted in the efforts to tighten the criminal code (Vásquez 2013, 425). According to various human rights lawyers, this resulted in an "overpenalization" (*sobrepenalización*) of offenses related to social protest (see, for example: Velazco Rondón and Quedena Zambrano 2015, 12, Vásquez 2016, 14). Peru's constitution guarantees freedom of assembly and the participation in protests can thus not be directly punishable. However, criminal offenses were extended to make prosecution against protesters possible.

In 2007, for example, the offense of "extortion" (*extorsión*) was modified to punish protest-related activities. In its earlier version, the article defined the crime of extortion as when someone "by means of violence, threatening or holding a person hostage, compels that person or another person to give the agent or a third party an undue economic advantage." As a result of the modification in 2007, the article additionally defined extortion to include "anyone who, by means of violence or threats, takes over buildings, obstructs communication channels or impedes the free movement of citizens or disrupts the normal functioning of public services [...]".<sup>5</sup> Here, the explanatory statement (*exposición de motivos*) issued in conjunction with the legislative decree which gave rise to the modification is revealing. The statement directly referred to criminal conduct, which was said to occur "under the guise of strikes, protests or claims" (*bajo el disfraz de huelgas, protestas o reclamos*, Consejo de Ministros 2008). The document further noted that "claims for supposed rights" made in this context were "superimposed on the rights of the majority, attacking public and private property, freedom of work, public security and internal order, including socioeconomic development" (*ibid.*, own translation). This example clearly demonstrates how specific articles of the criminal code have been extended to provide the legal basis for criminalizing protest against large-scale development projects such as mining.

Thus, the first way law's domination works in the criminalization cases is through its written norms and through its code, which defines criminal behavior.

4 These are frequently used justifications, as Eckert (2008, 8) pointed out with regard to the anti-terrorism legislation created after 9/11.

5 Article 200, Peruvian Criminal Code, own translation (see also: Kamphuis 2012b, 236).

As David, *Fedepaz'* director stated, it is the “normative system which allows for the criminalization of social protest.” In this form of law’s domination, the danger of criminalization therefore emerges from the law’s code and from the written norms.

### **Domination of law**

The second way in which criminalization becomes effective is the threat to the accused that comes from law itself and its institutions. By domination of law I mean that legal institutions and legal mechanisms are dominant in their way of functioning. Because judicial authorities are built to defend the rule of law and to enforce the legal norms of a society, law’s institutions are powerful; they are made to govern and to dominate people.

One reason for the domination of law lies in the persons who embody the institutions, in particular the judges. Pierre Bourdieu (1987) noted that judges universally belong to the dominant class of a society. He wrote about the “closeness of interests, and above all, the parallelism of habitus” between judges and political and economic elites (Bourdieu 1987, 842). This is also the case in Peru. Especially in rural areas, judges are authorities who hold considerable symbolic power and who represent the power of the state – a state that is, beyond that, not very present in these areas. In addition, Bourdieu wrote that the social proximity between judges and political and economic elites leads to the decisions of magistrates being “unlikely to disadvantage the dominant forces” (Bourdieu 1987, 842). Beyond this social proximity between the judiciary and the elite, we can observe the law’s domination in the legal institutions and the legal mechanisms themselves.

To be confronted with the domination of law is what Ewick and Silbey (1998) have described as to be standing “before the law,” which is one form of legal consciousness that they observed in their study on the justice system in the United States. Ewick and Silbey wrote that, in this form of legal consciousness,

legality is envisioned and enacted as if it were a separate sphere from ordinary social life: discontinuous, distinctive, yet authoritative and predictable. In this form of consciousness, the law is described as a formally ordered, rational, and hierarchical system of known rules and procedures. (Ewick and Silbey 1998, 47)

They describe how the domination of law appears through the materiality of the institution of law itself, through its architecture, the staging of its prescribed processes, its language<sup>6</sup>, and through the theatricality with which judicial processes are performed:

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6 For a discussion on the limits that legal language “may place on law’s democratic aspirations” see the work by Elizabeth Mertz (2007, 3).

Aspiring toward grandeur and permanence, law houses itself in monumental buildings of marble and granite and arranges its agents behind desks, counters, and benches. It expresses itself in a language that is arcane and indecipherable to most citizens. The theatrical scripting and costuming of trials creates an unbridgeable distance from the interactions of everyday life. (Ewick and Silbey 1998, 106)

Law is, in this sense, perceived as a powerful apparatus following procedural rules, which dictate the course of legal processes, but which are often difficult for ordinary people to comprehend. In the Cajamarca criminalization cases I found it striking how little the defendants knew about how the trial would proceed and what they had to expect in which phase of the process. Due to their lack of legal knowledge, they depended heavily on their lawyers, who guided them through the process and who gave detailed instructions on when to speak and how to behave. Although many of the activists told me that they do not believe in the legal processes and in the law, all of them were obedient to the rules of the legal proceedings and actively participated as they were expected. This is how the domination of law became apparent.

As I mentioned at the beginning, the courthouse in Cajamarca was not particularly impressive. The Peruvian state's lack of financial resources was evident, for example in the shabby furniture. Nevertheless, a sense of awe gripped me every time I entered the courthouse with the activists. During the trial, the theatricality of the law was repeatedly demonstrated with small details, for example with the ringing of the bell at the beginning of each hearing, with the accreditation of the parties, and with the way the lawyers filed motions to the court. Social differences between judges and defendants became obvious during the proceedings. There were the judges – educated, well-dressed, and elegant in their appearance – who pulled the latest smartphone models out of their suit pockets during the trial. Before them stood the *comuneros* and *comuneras*, the ordinary, simply dressed people from the country side – the *gente humilde* (humble people), as they are often referred to – who have a simple way of expressing themselves, which is quite different from the law's official language. The defendants were unfamiliar with legal culture and had little to no experience with legal proceedings. They stood “before the law” and were at the mercy of its hierarchical structures and procedures.

The judges treated the accused with the necessary respect, but at the same time did not miss any opportunity to let the other side feel their superiority. In a trial against a group of *ronderos* from Yagen that I attended, for example, several defendants had trouble naming their date of birth. A judge made ironic remarks, for example when one man said that he was born in 1883, instead of 1983. During the trial, the judges hinted at jokes that were not understood by the defendants concerned. The situation was shameful for the defendants. In another instance, a witness made contradictory statements. A judge interrupted him and asked him about his level of education, a question that was in no way related to the issues on which the witness

was supposed to provide information. The man was only asked about his education in order to subtly expose and embarrass him. The judges clearly demonstrated the domination of law, the power of the institution and their own social position. Thus, this is the second way in which law's domination works in the criminalization cases.

### **Domination through the *misuse* or the *manipulation* of law**

Finally, a third way in which law's domination manifests itself in criminalization cases is the *manipulation* of legal means. The Inter-American Commission on Human Rights defines criminalization as the “misuse [*uso indebido*] of criminal law” (CIDH 2015, own translation). According to the commission, it is “the manipulation of the punitive power of the state” through non-state and state actors to “control, punish or prevent the exercise of the right to defend human rights” (CIDH 2015, 18). A central element is the notion that criminal law is misused to prevent the legitimate exercise of rights, such as freedom of expression or the right to protest. In Latin America, criminalization is often directed against (environmental) human rights defenders – thus against actors who collectively or individually and “in a peaceful manner, strive to protect and promote human rights” (Special Rapporteur on the Situation of Human Rights Defenders 2016, 4) and who “promote or procure in any way the realization of human rights and fundamental freedoms recognized at the national or international level” (CIDH 2015). The legal system is “manipulated” to silence legitimate but unwanted critics (Vásquez 2013: 423).

There is a slight, but important difference between the cases in which the law's code is modified so as to define a certain act as criminal and those cases in which the law is misused to criminalize an act, thus the difference between domination *by* law and the *misuse* of law. In the Sorochuco case, the prosecutor categorized the alleged deed as “aggravated abduction.” The defense confirmed that the protest meeting had occurred and that the defendants had participated. Yet they denied that the complainants had been deprived of their freedom but insisted that a legitimate form of protest and political participation had occurred. They claimed that the crime of kidnapping was misused as a pretext for threatening heavy prison sentences. In their view, criminal prosecution became judicial persecution.

The offense of abduction (*secuestro*) has often been used in criminalization cases in Cajamarca in recent years. In many cases members of local *rondas campesinas* have been prosecuted under this offense, but, as the Sorochuco case revealed, the strategy has also been applied to other groups of mining opponents. Among the sixteen defendants and among approximately two-hundred other participants of the protest meeting in Sorochuco were members of local *rondas campesinas*. As during other protest events, some of them had brought their *binzas*, their whips, which is one of the *ronda's* identifying marks, but during the protest meeting they had not intervened in their role as *ronderos* or *ronderas*.

In contrast to this, in the Yagen trial the defendants had acted in their role as members of the *ronda*. An important task of the *rondas* is to carry out patrols in the *comunidades*. In the case of Yagen, the *ronda* had stopped a group of Odebrecht workers during such a patrol and took them to the community house. In a similar manner, two *ronderos* from the comunidad of Quillamachay in the district of Oxamarca were prosecuted for having stopped four people who wanted to purchase land in their community for Odebrecht's Chadín 2 dam project. The two *ronderos* had been acquitted of the kidnapping charge about six months before the start of the trial in the Sorochuco case but had been sentenced to one year in prison for coercion. In both the Oxamarca and the Yagen case, the defendants were prosecuted for carrying out their tasks as *ronderos*, although Peru's legislation entitles the *rondas* to control and detain suspects in their communities.<sup>7</sup> In the context of the criminalization of social protest in Cajamarca, however, the local public prosecutor's office did exactly this and used the crime of kidnapping to prosecute the *ronderos*.

As mentioned in the first chapter, the *rondas campesinas* are local authorities responsible for "administrating justice at the margins of the state" (Gitlitz 2013).<sup>8</sup> They arose in the late seventies in Peru's northern highlands in response to the state's absence (Gitlitz 2013). The function of the *rondas* is encoded in the constitution, and their members have a clearly regulated autonomy to exercise justice for specific crimes. Furthermore, the *justicia ronderil* is an important pillar of the *campesino* population's identity in Cajamarca. *Rondas campesinas* have played a significant role in the struggles against Conga and against the hydroelectric dam projects in the Río Marañón. They were decisively involved in the protest movements' success since, in many *comunidades*, the *rondas* play an important role in the organization of social life. Therefore, the *rondas* were particularly effective in organizing local resistance and political mobilization. Challenging the *rondas campesinas* and their members meant targeting the core of the social movements in Cajamarca's rural areas. The state's strategy to prosecute and sanction the *rondas* for exercising their functions thus affected their political mobilization.

Beyond that, the attack on the *rondas* must be seen in a broader context of ordinary judiciaries' unease with legal pluralism. In many Latin American countries, indigenous and *campesino* communities have the constitutional right to autonomously

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7 A plenary agreement of the Peruvian Supreme Court clearly stated that *ronderos* and *ronderas* cannot be charged with abduction if they arrest a person in their official capacity and if they respect the involved persons' fundamental rights (Corte Suprema de Justicia, V Pleno Jurisdiccional de las Salas Penales Permanente y Transitorias 2009).

8 The main legal frameworks that define and regulate the *rondas campesinas*' competences in administering justice within their territories are Article 149 of the 1993 Constitution, Law No. 27908 (*Ley de Rondas Campesinas*) and its regulations (approved by *Decreto Supremo* N° 025–2003-JUS). For further details on the role of the *rondas campesinas* in Cajamarca and Piura in general and within mining conflicts, see Chapter 1.

exercise justice. However, as Rachel Sieder and Anna Barrera (2017, 642) have described, representatives of the ordinary judiciary and the police are often “resistant” to recognizing legal pluralism and to accepting the existence of alternative judicial authorities on the local level. With regard the *rondas campesinas* in Peru, Julio Faundez wrote that “the legal profession and the judiciary [...] have difficulties accepting that community justice organizations have any role to play within the legal system” (2005, 201). To judges and prosecutors, legal pluralism constitutes a challenge to their own profession and they often meet community justice institutions with great mistrust.<sup>9</sup> The persecution of *ronderos* and *ronderas* on the pretext of kidnapping should be understood in this context. During the judicialization of social conflicts, the latent tensions between the *justicia ordinaria* and the *justicia ronderil* have re-emerged and have been fought out in the courtrooms.

In addition, relying on the offense of abduction not only makes it possible to attack the *justicia ronderil* as an important social institution in Cajamarca, but also allows for demanding long prison sentences. According to Peru’s criminal code, abduction is a serious crime which is to be punished with no less than twenty years of imprisonment. The penalty shall be not less than thirty years in particular cases, for example if the aggrieved party is a state official or a public servant (*funcionario o servidor público*).<sup>10</sup> The long prison sentences demanded could thus be attributed to the fact that the governors were in official service at the time of the incident. The criminal code also provides for this severe penalty when the aggrieved is kidnapped for his activities in the private sector, which was relevant in the Yagen and Oxamarca cases.

In the activists’ perception, this threat of long prison sentences did not correspond in any way to the description of the events. The complainants in the Sorochuco case, for example, had great difficulty explaining in court why the protest meeting had been an abduction. It was foreseeable that a conviction under this classification would have been difficult to enforce legally. On the other hand, because this type of criminalization is a misuse or manipulation of the law, it was not clear whether the judges would follow the written norms and the criminal code’s categorization of offenses. The case of the *ronderos* from Oxamarca, who had been convicted for coercion, had demonstrated this. The risk in such cases does not emanate from the law or its code itself, but from a misuse thereof. This makes these cases particularly dangerous because the rules of the game are not clear, and it is not possible to foresee the basis on which the judicial authorities will make their decisions.

In the case of domination of law or domination by law, the rules of the game are clear at the outset. Criminal law may be strict toward certain population groups or

9 Yet this distrust is mutual. I discuss the mistrust the rural population in Peru feels toward official judicial authorities in Chapter 1 (see also: Faundez 2005, 190).

10 Peruvian Criminal Code, art. 152.

with regard to specific behavior, or the law, as an institution, may be disadvantageous to those who have no litigation experience and do not speak the language of law. However, these two types of law's domination can be responded to with specific counterstrategies, as I discuss in the final part of this chapter. In law's domination through the misuse of the criminal code, however, the rule of law is eliminated and a situation of arbitrariness prevails. This contributed to the threat and the great uncertainty in the Sorochuco case.

## The threat of criminalization

*The first day of the Sorochuco trial continues with the questioning of witnesses. Both the prosecutor and the procurador, as well as the defense may interrogate them. The prosecutor is a man in his late thirties who hectically leafs through his files. He seems poorly prepared for the case. The judges repeatedly rebuke and correct him during the witnesses' interrogation. The hearing ends with the questioning of a policeman who was on duty in Sorochuco when the protest took place. The officer's statements are of little help to the complainants. Although he confirms that a demonstration took place, he does not confirm the allegations of abduction, and his statement does little to clarify the issues at stake. After questioning that witness, the judges declare the hearing closed. They announce that the trial will resume ten days later. We leave the courtroom. The defendants seem relieved to have made it through the first day in court.*

*After the hearing we meet again in Grufides' office. Mirtha and Victor, the Coordinadora lawyer, are satisfied with how the trial has gone so far. The attorneys' observation is that the complainants were not able to attribute any concrete offense to the individual defendants. The prosecutor's performance was unconvincing, they say, since he made many formal mistakes and was repeatedly reprimanded by the judges. "Technically, there should be an acquittal," Mirtha concludes. But then she also expresses concerns and recalls the case of the ronderos from Oxamarca, who were sentenced by the same judges to a year's unconditional prison sentence, not for kidnapping as initially demanded, but for coercion, the subsidiary accusation. In the defense's view, there had been no evidence of a crime in this case either, yet a sentence was issued. The two ronderos were able to escape from the courthouse and to evade arrest but have been hiding ever since. Mirtha makes clear that this case demonstrated how unpredictable the judges are. Her experience with the Oxamarca case thus becomes a benchmark from which the Sorochuco case's threat is deduced.*

*Then there is time for questions from the defendants. For some of the accused, the focus is on clarifying practical, everyday issues. Manuel, a teacher from Celendín, asks whether he should ask for permission to stay away from work next week when the trial continues. He is worried about getting into trouble with his superiors. Other defendants react by laughing at him, saying that if he was convicted next week, he could forget his work as a teacher anyway. Emperatriz, one of the women from Sorochuco, expresses concern as to how she would be informed about the further course of the proceedings. She explains that she no longer has a mobile phone*

*because she was constantly receiving threatening phone calls. Therefore, she is difficult to contact at the moment. She says that she is being harassed in Sorochuco by the mine's supporters. Sorochuco is a small community. Those who, like Emperatriz and the other defendants, publicly speak out against the mine are exposed to harassment and threats. Because of her commitment, Emperatriz was ostracized by her family. She and her children now live in the market where she also works. The social defamation is a heavy burden on her. She says that unknown people have killed her dogs in order to intimidate her. But despite all her worries, Emperatriz smiles confidently and says, "They will not defeat me."*

The strategy of criminalizing social protest is not limited to the legal sphere, but affects people's everyday lives, their social relations, and their political aspirations. Activists and human rights lawyers claim that there is a policy of criminalization in Peru. Part of this policy is, on the one hand, that the national government and its local allies construct a hegemonic discourse against those who question extractive projects. The adaptation of legislation with regard to crimes committed in social protest is part of this policy, but it also includes other strategies which go beyond the law. Criminalization is about defining and sanctioning criminal behavior, whereby it remains socially contested who retains the power of definition to determine what is considered criminal or legitimate behavior. Public defamation and the stigmatization of opponents through this hegemonic discourse plays an important role in criminalizing social protest. In the following sections, I argue that the law's threat emerges from different fields and affects the activists in their everyday lives, through the loss of time and money, but also in their political mobilization, through defamation and stigmatization. Furthermore, social conflicts in the Cajamarca region have revealed that the latter aspect permeates communities and families and leads to social tensions and even violence in the affected *comunidades*.

## Losing time and money

*The Sorochuco trial continues about ten days after the first hearing. As a precaution, only those defendants are present who did not attend the first hearing and who have therefore been declared in contempt of court, which theoretically means that a warrant can be issued for their arrest. The other defendants are not obliged to join the hearing because they have already been questioned. Since it is not clear whether the court will pass a judgment, they have stayed away to avoid being arrested in case of a conviction.*

*During accreditation, Mirtha states that she represents fifteen defendants. "Only fifteen?" asks the judges' spokesperson. A short discussion follows, in which it becomes clear that the one man who is not represented by Mirtha has no lawyer of his own and that he will therefore be represented by the public defender. In contrast to the first hearing, however, no representative of the public defender's office is present. The concerned defendant is not here either. The judges decide that the hearing cannot continue under these circumstances. The spokesman suspends*

*the hearing and postpones the further course of the trial until the day after tomorrow. Mirtha is frustrated. She hoped that the trial would come to an end soon. The two defendants who are present today will have to travel again to Cajamarca two days later, which will mean a further loss of time and money for them because of the travel costs, but also because they will again be absent from work on that day.*

Criminal proceedings against activists in Peru are lengthy and often drag on for years. Delays occur when new judges are appointed and when these judges must familiarize themselves with the cases. Every year in February or March, the judiciary is on holiday for thirty days; nearly the entire institution stands still for a month. In addition, strikes are not uncommon and often paralyze the judiciary. But even when it operates properly, delays and interruptions in criminal proceedings often occur. Hearings are suspended because public prosecutors, public defenders, translators, or judges are absent (Vásquez 2018). Another common reason is when the responsible authorities have not had the time to study the files and to prepare for the hearing. The lawyers of criminalized activists see this as a delay tactic to keep the court cases open for as long as possible (see also: Chérrez *et al.* 2011, 115). In other Latin American countries, this strategy is widespread too. The IACHR observed that criminal proceedings against human rights defenders often take a disproportionately long time. According to the commission, the underlying aim is to intimidate the prosecuted individuals and to restrict them in their political and social work. The constant postponement of hearings is described as a strategy to prolong court proceedings (CIDH 2015, 96–7).

The loss of time, and consequently of money, is one of the major impacts on the daily lives of prosecuted activists. The authorities considered the Sorochuco case to be a complex legal process. It was therefore not dealt with in Celendín, as it would normally be the case since the events took place within the province of Celendín. Instead, it was transferred to a court in the city of Cajamarca. For the people of Sorochuco and Celendín, each court hearing meant the loss of an entire working day. This high expenditure of time is related to the law's locality. As Ewick and Silbey (1998, 96) described, judicial institutions are placed in specific locations. For people living in geographically marginalized places, for example in rural areas, it is often a great burden to travel to the places where the law is administered. People who want or need to interact with the law often cover longer distances and "have to enter literally the space of the law" (Ewick and Silbey 1998, 96). This loss of time has a social aspect, too. Ewick and Silbey borrow E. P. Thompson's expression of "the law's time" to describe the temporal dimension of legal processes. "The law's time" is the "time spent away from work, or family, or neighbors, or leisure" (1998, 98). It is a disruption of people's routines and everyday life.

In many cases, it is the "physical distance of courts from local communities" (Faundez 2005, 202) that becomes an obstacle for defendants. For the *ronderos* from

Yagen, for example, a single court date in the city of Cajamarca meant a three-day trip. Their village is not connected to the national road network. Therefore, the *ronderos* first walked for six hours to Bella Aurora, where they took a shared taxi to Celendín. In Celendín they spent the night before going to Cajamarca the next day. When their hearing was suspended after fifteen minutes because the public defender and two of the defendants were not present, as sometimes happens, this led to great frustration among the *ronderos*. They left their families and their work behind for nothing and unnecessarily spent money on travel, money that was already scarce.

Thus, law is not only socially distant from rural people through the domination of law and through the peculiarity of its mechanisms and its language but is also distant through its geographical location. To stay away from work means the loss of a full day's income for the accused, especially for those who are self-employed or who work in agriculture. Thus, a court hearing has negative effects on the financial situation of the prosecuted. As the example of Manuel from Celendín revealed, for those who are formally employed, a court case is a burden, too, since it is difficult to conceal from superiors. Defendants must ask for permission to be absent from work for a hearing, which can result in sanctions.

In addition, the loss of time is characterized by a gender dimension with women facing particular difficulties. Due to court hearings they cannot fulfill their duties and care work at home. Among the defendants from Sorochuco was Cecilia, a woman who takes care of her grandchild because her daughter lives and works in Lima. Cecilia suffered accusations from her family because she had to abandon this task during the trial. For her, being confronted with the trial meant not being able to fulfill the role that her family expected her to take on. In addition, court hearings are a particularly heavy burden for young mothers. Tatiana, a single mother from Celendín, experienced this when she appeared during one of the court hearings in 2015 with her son, whom she had to breastfeed. She was not admitted to the courtroom with her child but was also unable to find someone to take care of her son during the hearing. She was threatened with being declared in contempt of court because she did not comply with the call to attend the trial. Thus, she was restricted in her right to defense and had to reckon with reprisals by the judicial authorities (see also: Silva Santisteban 2017, 85, 102). These examples illustrate how the legal sphere stands in stark contrast to the sphere of everyday life, how the criminalization affects the activists in their daily activities, and also how tasks of daily life limit defendants in their possibilities in criminal proceedings. This materializes in the loss of time and money, the first form of how criminalization threatens the individual activists.

## Disputes and defamations

Beyond disrupting everyday life or working life, the criminalization strategy also has an emotional effect on the prosecuted activists. Eckert (2014) wrote about how the threat of criminal prosecution in the context of terrorism prevention affects the social relations of those prosecuted and how it limits their scope for action. In the Sorochuco case, we observed a similar phenomenon, which stems from two different types of threats. First, the legal proceedings were in-and-of-themselves threatening to ordinary people who had no experience with the judiciary and who had never before set foot in a courthouse. To stand before the law and to face the judges who interrogated them was an intimidating experience for many of the accused. It was a moment when the domination of law was clearly invoked by the judicial authorities.

Second, the prosecuted had to face the threat of a concrete sanction because of the domination *by* law and because of the *misuse* thereof, thus the threat emerging from law's consequences. During the trial, the threatened prison sentence of more than thirty years led to a quite dramatic situation for the activists, especially shortly before the judgment was passed. Precautions were taken within the movement, and discussions were held regarding which persons would take over the organizations' leadership in case of a conviction. In addition, the threat was effective at the individual level, too. Tatiana, the woman from Celendín, told me afterwards that on the day of the judgment she had set off toward the Ecuadorian border to escape a possible arrest. "I am a single mother," she told me. "I cannot go to prison. Who will then take care of my child?" This threat also stemmed from the activists' lack of knowledge of legal processes. They depended on the decisions of the court and the work of their lawyers and lost control over their future prospects. This uncertainty was difficult for many to bear.

Regarding their political mobilization, the criminal proceedings had, on the one hand, brought the group of activists closer together, some of whom had hardly known each other personally before the trial. On the other hand, however, some of the activists involved will in the future think twice about whether to participate in political protest and risk receiving another criminal complaint. Moreover, the threat of prosecution acts as a deterrent to those affected by such criminalization cases, and it also discourages other people from becoming involved in social movements. An activist from Sorochuco pointed out, for example, that there are hardly any young people involved in the social movement in his community. He said: "Young people ask themselves, 'Why do you put yourself in that situation?'" In his view, social protest is de-legitimized in order to gradually neutralize it and to deprive it of the population's support. Criminalization restricts the activists' political space and prevents other people from joining the protest. In addition, criminalization not only acts as a deterrent to future protesters, but it also reduces the probability that activists will be able to hold official political office, because criminal proceedings

make it much more difficult for them to run for office. This was an important issue when it came to deciding whether members of the social movements in Celendín would stand as candidates in the regional elections. Many activists saw the court proceedings against them as attempts to keep them from running for office. This, too, reveals the dimension and impact of criminalization on political mobilization.

In addition, there is the social dimension of the consequences of criminalization. Criminalization also restricts people in their personal relations. The lines of social conflict often run across communities and even across families. Emperatriz, for example, was disowned by her family because of her involvement in the protest. Others recounted that they had conflicts with their partners, siblings, or other family members who accused them of being involved in criminal activities. Many of the activists said that as a consequence of the defamation they participated less often in public events and communal festivities. Participation in the carnival, for example, was repeatedly discussed by the activists. Many of them were afraid that opponents could attack them during these festivals. In order not to unnecessarily expose themselves, they stayed away from the events. Moreover, there was not only fear of assault, but also of social exclusion. Cecilia from Sorochuco is active in her church. She told me that, as a consequence of the social conflict, she no longer travels to other villages to attend masses because people there had discredited her for her commitment to the social movement.

The activists from Celendín complained that the defamation they experienced in their communities and their families was fueled from outside. In their opinion, untruths about the social movement were spread via local newspapers, radio stations, and social media portraying them as criminal, violent, or even associating them with terrorism. During the *Escuela de Líderes y Líderesas* in Celendín, these defamation campaigns were discussed. Mirtha led the discussion and asked the participants to share their experience:

*Mirtha:* How do people look at us? How do they look at the one who says, for example, “I don’t want this mining project to enter my territory because it’s damaging my life?” How do they qualify us?

*Activist:* They treat us like troublemakers.

*Mirtha:* What else?

*Activists:* [They call us] revolutionaries. – Radicals. – Terrorists. – Crazy. – Violent. – Anti-development.

*Mirtha:* That’s it. Those qualifications are part of the criminalization. Criminalization is a web of not only political, legal, but also communication strategies. The communicational part has contributed in a great way to construct the criminal subject as someone who, like us, thinks differently. – *Escuela de Líderes y Líderesas, March 2017, Celendín (field notes, own translation)*

According to Mirtha and the other activists, the media, but also state and private actors, play an important role in bringing up such defamation campaigns. Through defamation, the other side would try to delegitimize the role of human rights activists and to “construct the criminal subject.” By being constructed as “criminal subjects,” activists lose their fundamental rights, such as the right to protest or the right to political participation. Moreover, they become outlawed criminals who can be attacked with impunity. Thereby, activists become vulnerable, not only to attacks by mine advocates, but they “could be attacked by any ordinary person who believes that discourse,” as Mirtha said.

In extreme cases, the social tensions caused by the defamation campaigns result in physical violence in the communities. During the workshop, Mirtha went on by saying the following:

Because we are already criminalized, we are already qualified as a criminal subject. If one day someone kills us, people will say, “For being a criminal, for being violent, for being unruly, that happened to him.” That’s what they said about our *compañeros* who died [during the protests in July 2012 in Celendín], right? “For being unruly,” or “for joining the *revoltosos* [rioters].” Or “What were they doing in the middle of the mob of *revoltosos*?” They have already created a criminal subject in us to legitimize even the aggressions we may suffer. That is the policy of criminalization which is being deployed. –*Mirtha, lawyer with Crufides, Escuela de Líderes y Lideresas, March 2017, Celendín (field notes, own translation)*

One case that strikingly highlights these violent conflicts in the communities is the case of the leader and *rondero* Hitler Rojas from Yagen. Hitler Rojas was a leading critic of the Chadín 2 dam project and was elected mayor in his district. Only a few days after his election, he was shot dead in December 2015 by a member of his community. The murderer was prosecuted and convicted, but various shortcomings marked the criminal proceedings. In the first instance, the murderer was sentenced to a six-year imprisonment, which in the eyes of the social movements meant a mild sentence. Only after Rojas’ family appealed the ruling, did the judicial authorities tighten the sentence from simple murder (*homicidio simple*) to aggravated homicide (*homicidio calificado*) and increase the prison sentence to twenty-one years. According to Mirtha, who led the appeal, the message that the judges sent with the first judgment was clear: “This man’s life is worth nothing.” She repeatedly compared Rojas’ case to the criminalization cases. The prosecutor demanded a prison sentence of more than thirty years for the participants of what she considered to be a legitimate protest, but an activists’ murder had resulted in a prison sentence of only six years. For Mirtha and the activists, this direct comparison revealed the arbitrariness of the local judicial authorities’ jurisdiction and the unpredictability of legal processes. Furthermore, it again pointed to the misuse of law in the criminalization cases.

## De-constructing the criminal subject

*On the third day of the juicio oral of the Sorochuco case, the defendants who could not previously attend the trial are questioned. In addition, a local journalist is summoned and interrogated as witness, and the admission of different pieces of evidence to the trial is discussed. Then the prosecutor and the defense lawyer make their closing argument. It is the moment when the two sides are again given time to present their legal argumentations. The statements made during the juicio oral by the defendants, the complainants, and the witnesses are used to underline these positions. The prosecutor insists that the trial has proven that the accused held the two governors captive for about two hours and that they consequently kidnapped them. He maintains the demand for a prison sentence of more than thirty years.*

*Mirtha, by contrast, does not again go into the discussion of what happened in Sorochuco on that day in April 2013, but focuses her summation on the trial and the results that have come to light during the hearings. She relies exclusively on procedural arguments and declares: "I want to start by saying that, basically, if there is not sufficient and adequate evidence in a given process, we cannot declare the guilt of any person. This violates fundamental principles." She continues, saying that no evidence has been presented during the trial which proved the defendants' involvement in the alleged crimes and that the evidence presented to the court "has ended up losing all evidentiary value." With regard to the formal procedural rules of a criminal proceeding, Mirtha explains that "we all know that the evidence must meet the requirements of existence, validity, and evidentiary effectiveness [existencia, validez y eficacia probatoria]." In her view, the evidence presented by the prosecutor did not meet these requirements. Therefore, Mirtha concludes by saying that "it would be a complete absurdity for justice to declare the guilt of my patrocinados for any crime that is imputed here" because the "jurisprudence speaks of sufficient evidentiary material to preserve the presence of innocence. If we do not have sufficient evidentiary material [...] this does not have accrediting force."*

*In addition, Mirtha claims that after the validity of the evidence and the witnesses had been refuted, only the statements of the complainants remained and that, therefore, the question arose regarding whether a conviction for a criminal offense could be given based only on the statements of the aggrieved parties. "The doctrine, the jurisprudence says yes," Mirtha admits. However, she continues, explaining that the jurisprudence asks certain "guarantees of certainty" to be provided, for example "the absence of subjective incredibility, the verisimilitude, the persistence of incrimination." She points out that these requirements were not fulfilled and concludes by saying, "In that sense, I ask your honorable office to value these means of evidence and to declare the acquittal of all my patrocinados."*

*Then everything happens very quickly. The bench's speaker asks everyone to leave the room. We go into the small courtyard and wait. Mirtha says that the judgment will now be rendered. We all maintain a tense silence. After a few minutes, we are invited back in. The bench's speaker announces the judgment: "The court considers that the public prosecutor's office has not complied with its constitutional function, which is to provide evidence to support a conviction against the accused." The judge states that the accusation was "weak" and could not identify*

any illegal behavior on the part of the accused. He follows Mirtha's argumentation in saying that the only pieces of evidence available to support the allegations were the statements of the complainants. In the trial, however, it had become evident "that they are surrounded by a certain subjective incredibility." The spokesperson concludes that "with these considerations, the Collegiate Court of Cajamarca decides to acquit the accused." He announces that the official judgment will be read twelve days later and closes the session.

Immediately after the judgment, the situation in the courtroom remains calm. Nobody speaks out loudly; nobody cheers. We inform the defendants of their acquittal via WhatsApp. Mirtha packs her files and we leave the courtroom. About twenty police officers in full gear with helmets and shields are standing in front of the courthouse's entrance. Apparently, it had not been clear what the judgment would be today, and the police was requested to be ready to intervene in case of any protest against a conviction.

We return to Grufides' office for a short evaluation of the judgment. The news about the acquittal has instantly spread to Celendín and Lima. Mirtha is constantly receiving calls from people who congratulate her on her success. Like the defendants who had to join the hearing today, the lawyer also seems relieved. She tells us that she woke up at four in the morning and went through her summation again. She had also felt very nervous in recent weeks, she admits, because she felt that the lives of others depended on her work.

The activists prosecuted in the Sorochocho case coped in different ways with law's domination and with the threat of criminalization. Some activists found support in religious beliefs, which became apparent, for example, in the way and to whom the defendants manifested their gratitude for support after the acquittal was reached. After the *lectura de la sentencia*, the judgment's official reading, we met again in the office of Grufides to discuss the judgment and to celebrate the activists' victory. Almost all sixteen prosecuted activists were present that day, and many of them rose to speak and to individually express their gratitude. Many thanked, "first and foremost, God for guiding them through this process." Cecilia from Sorochocho, for example, thanked God for "touching the hearts of the judges." A man thanked God for "giving doctora Mirtha the knowledge and strength" that led to the acquittal.

For others, the success in the criminal case depended on secular strategies. The support of national and international networks, for example, was perceived as important by many of the criminalized activists. In the Sorochocho case, various national and international NGOs reported on the trial. NGOs sent a joint letter to the judicial authorities in Cajamarca expressing their concern about the case. The aim of this letter was to discursively de-construct the image of the criminal subject and to counter the hegemonic narrative of the violent activists as depicted by the complainants. In addition, the aim was to highlight that the protest in Sorochocho had been a legitimate political intervention. As I discuss later in this book, this kind of influence on the judicial authorities is an attempt by human rights organizations to challenge the hegemonic discourse of criminalization. It is difficult to assess to

what extent this strategy was ultimately successful in the Sorochuco case because other strategies played a significant role in the acquittal, as well. However, for the activists themselves, the support they received from outside was an important source of strength, at least emotionally.

What seems much more important to me was Mirtha's legal reasoning. In one of the first meetings, she explained that her aim was to challenge the strategy of criminalizing social protest by invoking law and legality herself. "We have to *legally* deconstruct the discourse of criminalization," Mirtha announced. The prosecutor's strategy had been to indict a large group of people. Mirtha took advantage of this by asking witnesses and complainants repeatedly during the trial whether they could ascribe a specific act to the individual defendants. In doing so, she relied on the principle in criminal law that a person can only be convicted if an act can be directly attributed to him or her. Neither the complainants nor the witnesses were able to make such an attribution and to specify who of the sixteen prosecuted had actually committed the alleged crimes of abduction or coercion.

Two witnesses were questioned in the criminal trial, a police officer, and a journalist. Both testified that they had been in Sorochuco when the alleged events took place, but neither of them could give a precise description of the incident. Their statements were contradictory and inaccurate. The journalist even said during his interrogation that he did not want to accuse anyone of anything, but what he wanted was "peace for his village." In addition, a police report (*acta de constatación policial*) was presented as evidence in which the events were recorded by the police. During the trial, however, it turned out that the document's author described the events based on information given by a third person and not based on own observations. Mirtha argued that the presented *acta* therefore lacked veracity and validity as a piece of evidence.

In the trial, Mirtha based her argumentation on judicial norms and on the Peruvian legal framework. She strictly applied the written word of the Peruvian criminal code and on the exact text of the criminal procedure code. While the prosecutor and the ex-governors mobilized the law *from above* in order to intimidate the activists and to restrict them in their political mobilization and in their daily life, Mirtha also succeeded in using judicial mechanisms to get the activists acquitted. She also "enacted" (Welker 2014) the law, its written norms, and its procedures and thereby wanted to overcome the misuse of law through the prosecutor. Thereby, Mirtha took advantage of law's intrinsic procedural nature, as described by Rodríguez-Garavito (2011b, 273), i.e. the characteristic and the ability of law to establish and impose social rules and a lingua franca for negotiation between otherwise opposing parties.

The defendants did not oppose the law either. As Milton recalled to the group in one of the first meetings, it was important "to follow the instructions given by the lawyers," that is, to participate in the trial according to the rules endorsed by the judicial experts such as the lawyers, prosecutors, and judges. They did not involve

themselves in “a resistance understanding of legality” and did not “enact a resistant consciousness of legality” (Ewick and Silbey 1998, 188–9), but rather followed the rule of law, although many of them had little to no confidence in the system of justice. This again reveals the domination of law and the hegemonic power judicial institutions impose on the individuals standing before the law.

## Conclusion

Criminalization of social protest does not stop at the doorstep of the courthouse but enters the political sphere as well as the communal and family domain. Criminalization arises from the power to define a certain behavior as illegal and to define who is prosecuted as a criminal subject and sanctioned for his or her actions. Ewick and Silbey described how people who perceive legal means as unreliable “turn to other means, such as acts of resistance” (1998, 238). What I found in the Sorochuco case, however, was people being confronted with an attempt to misuse and manipulate the law. Their strategy was not to turn to other means, but to recapture law and legality in order to win in court. Their counterhegemonic act was not to defy the law or to take a stance against it, but rather to invoke it against those who attempted to misuse it.

At the same time, however, legal mobilization *from above* in these criminalization cases stands in sharp contrast to the impunity of state and corporate actors for human rights violations, which I describe in Chapter 3. In the perspective of many activists in Cajamarca, the system of justice is hardly accessible to them. “If we file a complaint against the *mineros*, the public prosecutor’s office will immediately dismiss it. But if they report us, we are prosecuted and we face long prison sentences,” one activist told me. These differences in the official treatment of rights violations have led social movement activists to adopt a negative attitude toward legal processes. They perceive law as an instrument used by “groups of power” (*grupos de poder*) – be it powerful economic or political actors – to repress dissent and to criminalize social protest. As this chapter has demonstrated, criminal proceedings are a major hurdle for the persons concerned, restricting them in their everyday lives, but also in their social relations and political activities. In the Sorochuco case, Mirtha was able to obtain an acquittal, but other cases, such as the case of the *ronderos* from Oxamarca, demonstrated that trials can also end in convictions.<sup>11</sup> It is this indeterminacy of law and the unpredictability of legal processes that makes the criminalization of protest particularly dangerous for social movements.

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11 The two *ronderos* appealed against the ruling and were later, in May 2019, acquitted of all charges.

In the Sorochuco case this unpredictability of legal processes became apparent once more after the acquittal. When I returned to Cajamarca for the second round of fieldwork in 2018, I was surprised to hear that the lawsuit had been reopened and sent to the Court of Appeals in Cajamarca. When I had left Cajamarca some months before, the activists had told me that the deadline to appeal had elapsed without any further actions by the opposing party. As it turned out, however, the activists had misinterpreted this deadline because it did not begin on the day when the official reading of the judgment took place, but when the complainants and the prosecutor's office were notified in written form about the court order. The appeal was therefore lodged within the prescribed time. According to the activists, the two governors, the prosecutor's office, and the *procurador* had all appealed the first judgment.

Thus, we went back to the courtroom in May 2018 – about fourteen months after the first acquittal had been granted. For me it was a nice opportunity to meet the people from Sorochuco again, but for them it was frustrating to appear once more before court. The hearing can be summarized very briefly as it was suspended from the outset. We waited in the courtroom. The ex-governors were also present. After waiting a short time, a court clerk appeared and informed us that the hearing would be postponed because the judges had changed recently and had not had enough time to prepare for the hearing. For the defendants this meant, once more, that they had traveled in vain to Cajamarca. Later, the activists told me that the hearing was finally scheduled to take place in August 2018. However, it was then postponed again because one of the judges was unable to attend, and the magistrate appointed to replace him was busy with other proceedings. Ultimately, the hearing on the appeal took place at the beginning of September 2018. The court rejected the objections of the opposing party and confirmed the acquittal of the sixteen activists. After five and a half years of criminal proceedings and about more than a dozen court hearings, their acquittal was final.