Introduction

Law and legality shape our everyday lives and our way of living together in society. Law is used to settle disputes, strengthen or weaken relationships, ascribe property rights, exercise power, define responsibilities, negotiate accountability, obtain justice, and order penalties and punishment. Whenever people come into contact with each other, law is often not far away. The use of law is a social practice and inherently important for the conduct of social relations.

At the same time, the law is also a means for collectives and social groups to carry out political struggles. In recent years, an increasing "*juridification* of social protests" (Eckert *et al.* 2012a, emphasis added) has occurred worldwide. Social movements invoke rights to justify their claims and enforce their demands. Therefore, law is not only a social practice, but also a discourse on the basis of which claims are made and power relations are questioned. Furthermore, courts have become an important arena for social conflicts in this context. This *judicialization* of social disputes is reflected in an increasing reliance on courts, lawsuits, and legal norms. The principles of legal liberalism play an important role in this context; reference is made to the fact that, by virtue of fundamental rights, everyone is equal before the law. The mechanisms of the law should guarantee this equality. Consequently, law is also said to serve marginalized groups to make their voices heard and to demand justice, thus being a counterhegemonic means for social change.

When I started doing research for this book, I traveled to Peru with the aim of analyzing processes of judicialization in the context of social conflicts. More specifically, I intended to examine the strategies of mobilizing the law *from below* by movements struggling against transnational mining projects. At the beginning of my fieldwork, I spent several weeks in Lima where I met lawyers working with national and international non-governmental organizations (NGOs). These lawyers were exactly in line with the theoretical framework I had read about before going to the field: They pursue the approach of strategic litigation, use criminal and constitutional complaints to discuss emblematic cases of human rights violations in courts, and rely on national legislation to ensure access to justice for people affected by human rights violations. They work with *campesinas* and *campesinos*, i.e. with peasants who lost access to land or water resources as a result of mining

activities; they represent people in court who have been injured by state or private security forces during demonstrations against mining companies. In general, these lawyers provide legal assistance and access to the judicial system for marginalized groups. As one NGO lawyer put it, "We want to make the judicial system take responsibility." My expectations, which had arisen from engaging with literature on the juridification of social protests thus seemed to have been fulfilled.

However, after I left Lima and traveled to Cajamarca, a region in the country's Northern Highlands, and things immediately became more complex. Over the past twenty-five years, Cajamarca has become the scene of large-scale industrial mining. As a result, various social conflicts have broken out between parts of the local population and the mining companies operating in the area. I contacted a grassroots movement that formed part of the social movements against transnational mining projects and told them about my intentions to investigate the use of law as a strategic means for social movements. During the first meeting I had with representatives of the group to present my research project, the activists only smiled mildly. One of them expressed what everyone in the room was thinking and said, "I think the answer to your research question is very simple from our point of view. Judges and prosecutors in Peru are all corrupt and are on the side of the companies. If we, from the social movement, file a complaint, it is immediately dismissed. At the same time, we are criminalized by the state for our activities and commitment." Thus, the group of activists completely disagreed with the human rights lawyers I had met in Lima. "The law is on the side of the powerful," the activists told me, "not on the side of marginalized groups." At the same time, however, this grassroots organization, as many other protest movements in Peru's mining regions, was closely collaborating with national and international NGOs that pursue the approaches of strategic litigation and legal mobilization, among them the lawyers from Lima mentioned above. The group's attitude toward the use of the law was therefore not as clear-cut as the activists argued. Moreover, this example revealed the ambiguity of law and legality.

It is precisely these encounters with different positions toward the law and the patterns of law's ambiguity that I examine in this book. My research starts with the observation in the field of what activists and lawyers involved in Peru's human rights movement experience when they engage in debates about whether law serves as an instrument of counterhegemony or whether it is rather a hegemonic instrument used by elites to prevent social change.

An ethnography of Peru's judicialized mining conflicts

This book traces the process of juridification and the "patterns of judicialization" (Sieder *et al.* 2005, 11) of Peru's mining conflicts. By analyzing how social conflicts over transnational mining projects in Peru are dealt with in the legal field, it exam-

ines the functioning of law as a social process. In doing so, I aim to trace the social life of the law in Peru's mining conflicts.

Empirically, I focus on two social conflicts that emerged from large-scale mining projects in Peru's Northern Highlands: the Conga conflict in Cajamarca and the Río Blanco conflict in Piura. The mining projects that led to these conflicts were both initiated by transnational corporations (TNCs) and received much support from the Peruvian national government. A large part of the population in the two affected regions, however, fears the mines' negative impacts on the environment, on the water supply, on local agriculture, and on people's health. As a result, parts of the local population have opposed the projects and organized protests against the corporations' plans to build the mines. In both cases, these local protests led to the suspension of the projects; neither the Río Blanco nor the Conga mine could be built. At the same time, the social conflicts were marked by severe human rights violations. During the protests, several people were injured, and some were killed by state security forces.

This volume examines how the two social conflicts were dealt with by the Peruvian judicial system and beyond. I examine how the various parties in the conflict approached the judicial system to enforce their interests. To this end, I analyze a number of court cases that arose from the mining conflicts in Cajamarca and in Piura. On the one hand, local social movements have attempted to bring legal actions against those responsible for human rights violations, i.e. against state security forces and against the corporations and their employees. I examine how activists and human rights NGOs make (strategic) use of the existing legal system in order to gain access to justice. Since both social conflicts involve the participation of foreign corporations, the question of the involved TNCs' responsibility plays a significant role in this part of my analysis.

On the other hand, however, state and corporate actors also use the judicial system to impede social protests and to enforce their economic interests. They sought to criminalize the members of the social movements for their involvement in the protests. In consequence, law and legal processes do not only serve the social movements as an instrument for resistance, but also pose a threat to them. The courtrooms in Piura and Cajamarca have become important battlegrounds for mining disputes – a process I call the *judicialization of social conflicts*.

Conceptually, I rely on two different theoretical approaches: the juridification and judicialization of politics, on the one hand, and anthropological debates on law as a social process, on the other hand. The *judicialization of social conflicts* is not only a judicialization of politics and of conflicts which were earlier dealt with in the field of politics and which are now brought to courts. Rather, the judicialization of social conflicts also includes the "judicialization of social relations" (O'Donnell 2005, 293) and thus goes beyond judicial processes in courts. Therefore, I am not only investigating how these social conflicts are negotiated in court, but I am also interested in how these court cases come about, what prevents them, what underlying negotia-

tion processes they involve, and what effects and consequences they entail. It is thus the social life of law that I am concerned with. Thereby, my research also includes the process of judicialization "beyond the courtroom" (Rodríguez-Garavito 2011a) and incorporates everyday disputes and non-judicial aspects of Peru's mining conflicts. In this sense, I follow Huneeus *et al.*, who wrote that "law is created and lived not just in the court and through litigation, but beyond, in the conversations of lawyers and their clients, in social movements, in academia, and in everyday life" (2010, 14). I am interested in how the judicialization of social conflicts shapes the involved actors' perception of the "force of law" (Bourdieu 1987).

As Felstiner *et al.* argued, "disputes are not things: they are social constructs" (1980, 631). Consequently, studying "the emergence and transformation of disputes means studying a social process as it occurs" (*ibid.*, 632). Starting from this approach, the book examines the social processes that are initiated when conflicts emerge between transnational mining companies, state actors, and social movements and which are transformed when these conflicts are carried out in the legal sphere. This book asks what people gain on their journeys to the courts and what they lose, leading to the question of whether law and legal processes may serve as an emancipatory means for groups that are otherwise politically, economically, and socially marginalized in a society. More broadly, this contribution analyzes what conclusions we can draw from the observation of the judicialization of social conflicts in Peru's mining regions with regard to the functioning of law as a social process.

Judicialization of politics and the ambiguity of law

From a theoretical point of view, I follow Sieder *et al.*, who wrote that "[i]n analyzing processes of legal mobilization and judicialization, we need to distinguish between *process* and *outcomes*" (2005, 16, emphasis in original). This book's focus is therefore on both the actual processes and the consequences of these processes when mining conflicts are dealt with in the legal sphere. To analyze these different aspects, I rely on two theoretical approaches, which are, however, closely linked.

In studying the law's *processes*, I mainly rely on legal anthropological approaches dealing with, what I call, the "ambiguity of law." With this approach, I follow the observation that law has both a hegemonic and a counterhegemonic character. Legal anthropological research has traditionally been less interested in the judicial outcomes of specific lawsuits, thus in the judgments given by the courts, but has rather focused on the processes induced or shaped by the juridification in general – whether these are social, political, or legal processes and whether they take place in only the courtrooms or also beyond. Legal anthropologists analyze the use of law as a social process to settle disputes, to attribute responsibility, and to negotiate social

relations. Law holds a central role in the organization of societies, and consequently, the use of law should, from a legal anthropological point of view, be examined in the context of the prevailing social conditions. The book's analysis is based on this theoretical background.

However, as mentioned above, the *juridification*, and moreover the *judicialization* of social conflicts not only induces legal, political, and social *processes*, but also leads to very specific *outcomes*, i.e. social consequences for the actors involved, and also to legal outcomes such as judgments or judicial orders. It is not sufficient to examine only the social processes that accompany legal mobilization, but that an analysis of what happens in the specific lawsuits is also of fundamental importance. We must understand how law is applied, utilized, and implemented in the particular lawsuits and how different forms and bodies of law actually work. In this sense, I wish to go beyond the anthropological approach, which often lacks an analysis of what is actually done and achieved in litigation. Rather, I base this part of my analysis on the theoretical considerations of political scientists and legal scholars who worked on legal mobilization. As an important complement to the legal anthropological analysis, this approach helps provide an understanding of the ambiguous forces of law by focusing on the mechanisms and instruments it entails.

Law's ambiguity

Since the discipline's very beginning, social anthropology has been closely linked to the research of law and legality.[1] The study of law was as much an integral part of early social anthropological research as the study of religion, exchange relations, and social organization. In the first decades of the twentieth century, the sub-discipline of legal anthropology, which emerged from early social anthropologists' generalist research, focused primarily on comparative studies analyzing the differences between "ordinary" Western law and so-called "customary" or "traditional" law in the (former) colonies. After the discipline's "reflexive turn" (Conley and O'Barr 1993, 48) in the second half of the twentieth century, legal anthropological studies became involved in the analysis of power relations related to law. Contemporary legal anthropology was shaped by the increased importance of rights discourse, which manifests, in the great amount of ethnographic research on justice, resistance, and legal activism, as a form of political action in the current world order (Goodale 2017, 117).

In this context, law's ambiguity or the "Janus-faced" (Nader 2002, 207, Comaroff 2012, ix) character of law became a central issue in legal anthropological research. The ambiguity of law is manifested in the ambivalence that law serves, on the one hand, as a hegemonic instrument favoring the interests of elites and, on the other

1 For a historical overview of the development of legal anthropology and the anthropology of law, see, for example, Poole (2001), Nader (2002), Sieder (2010a), or Goodale (2017).

hand, as a potentially emancipatory mechanism for marginalized groups to strive for social change. Sally Engle Merry wrote that "law contains both elements of domination and the seeds of resistance" (Merry 1990, 8). Elsewhere, she claimed that "[l]aw empowers powerful groups to construct normative orders that enhance their control over resources and people, but also provides to less privileged people avenues for protest and resistance" (2006a, 109). In a similar manner, Mark Goodale described law's ambiguity by referring to "law-as-regulation" and "law-as-agency" (2017, 118), a contradiction which he explained with the paradox "that sets the outer limits to exclusion (but also to inclusion), inequality (but also equality), and injustice (but also justice)" (*ibid.*, 138). In the words of Laura Nader, law "may serve those who contest power as well as those who wield power" (2002, 207), and Susan F. Hirsch and Mindie Lazarus-Black wrote that "law is simultaneously a maker of hegemony and a means of resistance" (2012, 9). With regard to the situation in Peru, finally, Deborah Poole (2004) characterized the judicial system as both a "threat" and a "guarantee" for people living at the margin of the state.

Thus, while a certain consensus has been established within the discipline regarding this ambiguity or the Janus-faced character of law, two different currents emerged within legal anthropology, each of which focuses on one of the two specific characteristics of law. Stuart Kirsch (2018, 16–7, 229) summarized this as the debate between *hegemony* and *counterhegemony* theorists. As I outline in the following, these two theoretical positions do not necessarily have to be in opposition to each other, but should rather be seen as complementary, since they describe different forms of legal mobilization. Both approaches describe how positions of power, social norms, and aspirations for change are negotiated in the contested field of law. When considered in combination, these two positions provide a useful theoretical framework for examining the *processes* induced by the judicialization of social conflicts in Peru.

Law, lawfares, and hegemony

There is a large body of literature from the field of anthropology and beyond on how political or economic elites use law as a hegemonic instrument in order to maintain existing power relations or to silence those who speak up. The discourse of so-called *hegemony theorists* has been especially shaped by the work of Jean and John L. Comaroff, who coined the debate with terms such as "fetishism of constitutionality" (2006, 24), "fetishism of the law" (2006, 25, 2007, 134), "culture of legality" (2009, 33, 2012, 78), and "lawfare"[2] (2006, 30, 2009, 36–7). Based on research in the "postcolonies" in southern Africa, but also on examples from U.S. courts and politics, they

2 For a more detailed discussion and conceptualization of the term "lawfare" beyond the term's use by the Comaroffs see the work by political scientist Siri Gloppen (see, for example: Gloppen 2018).

criticize the increasing use of law and claim that because of the judicialization of politics, "litigation has become an autonomic reflex of political life" (2012, 34). According to the Comaroffs, this has not led to an empowerment of marginalized groups, but has rather served the interests of elites and thus consolidated existing power relations.

The spread of law-oriented NGOs and "the planetary explosion of human rights advocacy" (2009, 34) have, in the Comaroffs' view, contributed to the fact that former political conflicts are now being fought out in the legal sphere. They criticized this development since the turn to law has, in their opinion, led to a depoliticization of conflicts. They acknowledged the efforts of the "little people" (2012, 150) to gain access through litigation to justice, or at least to reparation, but at the same time, they stressed that these struggles cannot be successful because "ultimately, it is neither the weak nor the meek nor the marginal who predominate in such things. It is those equipped to play most potently inside the dialectic of law and disorder" (2006, 31). Thus, according to the Comaroffs, the "'haves' come out ahead" in lawfare, to use Marc Galanter's (1974) phrasing, because elites have the knowledge and the resources to resort to the law as a political instrument and to implement and enforce legal mechanisms in their interests. Thus, in lawfare it is the powerful who can maintain their hegemony through law.

This criticism of the law's hegemonic tendency has a longer tradition. As a movement bringing together left-wing legal theorists and other scholars, Critical Legal Studies (CLS) criticized the hegemonic character of law since the late seventies (see, for example: Trubek 1984, Hunt 1986, Fitzpatrick and Hunt 1987, for a detailed overview on CLS see Kelman 1987). The CLS movement emerged from approaches inspired by Marxism and critical social theory as well as post-structuralism and Foucault's and Derrida's concepts of deconstruction (Fitzpatrick and Hunt 1987, 2, Merino 2017, 240). Its representatives saw themselves as a counter to the liberal ideology that dominated the field of legal studies at the time. Diverse views were represented in the movement, but CLS scholars shared the "rejection of the dominant tradition of Anglo-American legal scholarship, the expository orthodoxy or, more crudely, the 'black-letter law' tradition" (Fitzpatrick and Hunt 1987, 1). With the aim of developing radical alternatives to existing legal education and legal doctrine, CLS theorists examined the practices of legal institutions and explored how these support a "pervasive system" characterized by "oppressive, inegalitarian relations" (Fitzpatrick and Hunt 1987, 1–2). They called for new approaches to overcome the hegemonic character of law, which gave rise to approaches such as the *critical race theory* and *critical legal feminism* (Merino 2017, 241).

Conceptually, CLS scholars criticized the "indeterminacy" of law, which in their view enables legal practitioners, such as judges, in particular, to apply the law in the interests of elites (Kress 1989, 286). According to this approach, the indeterminacy of law calls into question the legitimacy of adjudication. It is this concept that has con-

tinued to receive much support, even after the CLS movement lost importance in the late nineties. In more recent years, the criticism of law's indeterminacy was again raised by Marxist theorists, such as China Miéville (2005), for example, who focused on the, in his view, limited emancipatory character of international law. Miéville observed that "[f]or every claim there is a counter-claim" (*ibid.*, 281) in international law. Based on Karl Marx' phrase that "between equal rights, force decides," he concluded that its indeterminacy impedes law of contributing to progressive change (*ibid.*, 8). Miéville ends his book with the pessimistic conclusion that "[t]he chaotic and bloody world around us *is the rule of law*" (*ibid.*, 319, emphasis in original), meaning that international law is a fundamental part of imperialist domination (see also: Marks 2007, 204). He argued for "eradicat[ing] the legal forms" and demanded a "fundamental reformulation of the political-economic system of which they are expressions" (Miéville 2005, 318).

Compared with other theorists, Miéville is undeniably radical in his argument to "eradicate the legal forms." Some aspects of his criticism, however, have been shared by others and are relevant for my research. From the turn of the millennium onward, several authors have criticized the hegemonic character of law emerging from its connection with neoliberalism. In the view of political scientist Wendy Brown (2015), for example, the use of law and legal reasoning are part of neoliberal governance practices that allow for the control and the regulation of specific groups of a society (see also: Foucault 2004). According to this approach, the rule of law is a fundamental precondition of neoliberalism. The link between the spread of neoliberalism and the juridification of politics was also stressed by the Comaroffs who saw in the "growing salience of the law […] an integral feature of the neoliberal moment" (2012, 88). In addition, Suzana Sawyer wrote that "law, legal rhetoric, and abstract liberal principles have often been the trump card of a privileged elite" (2004, 188). Her research on Ecuador revealed how the use of the existing legal framework and the enactment of new laws foster the hegemony of elitist interests, especially in the context of the extractive industries (*ibid.*, 14). In a similar way, legal scholar Ugo Mattei and anthropologist Laura Nader (2008) claimed that the "rule of law" is an imperial instrument to be used for the "plunder" of natural resources in the Global South. These considerations are particularly relevant to my research because Peru's national government has pursued a strict neoliberal policy, especially in the extractive industries, since the early nineties. Thus, these reflections on law and neoliberalism are crucial in understanding Peru's mining conflicts.

In addition, some legal scholars examined the way in which law is beneficial for "those who have," be it corporations or other economic elites. Katharina Pistor, for instance, analyzed how "law helps create both wealth and inequality" (2019, 3). In her book "Code of Capital," she described how law, in the form of property rights, but also bankruptcy law, for example, benefits the holders of capital assets (Pistor 2019). Pistor examined how capital holders influence legislators through lobbying

and other forms of interference so that they enact laws that protect property. In this sense, she demonstrated how the law serves capital in a very direct way.

In view of this range of different research approaches and theoretical concepts, it is evident that the category of hegemony theorists is only a loose classification. What all these authors' approaches have in common, though, is that they perceive law as an elitist means of preserving existing power relations and maintaining the domination of subordinate population groups. The term "hegemony," as coined by Antonio Gramsci (1992), is particularly suitable in these debates for describing law as an instrument of elitist – be it political or economic – actors. Gramsci understood hegemony as the "predominance obtained by consent rather than force of one class or group over other classes" (Femia 1975, 31). In this sense, hegemony is not a "rule by force," but a "rule by consent" (Im 1991, 127), which builds on the "production, reproduction, and mobilization of popular consent" (Hunt 1990, 311) of a society's masses. Thus, hegemony is not necessarily forced upon the subordinate classes, but they themselves – directly or indirectly – reproduce it, since it forms part of a society's prevailing discourses and power relations. The elites' hegemony permeates all fields of society, including the legal field, and law thus contributes to the consolidation of domination. These are precisely the theoretical considerations of hegemony theorists that are relevant to the discussions in this book.

Counterhegemonic struggles and the emancipatory force of law

The theoretical claim that law and legal processes serve as hegemonic means of elites is thus a powerful claim, which has had a considerable impact on legal anthropology and beyond. In recent years, however, the hegemony theorists' approach has been increasingly questioned. Empirical research, notably by anthropologists and often conducted in the context of the global "human rights revolution" (Goodale 2017, 101), has given rise to these debates. *Counterhegemony theorists* studied the emergence of new rights discourses, especially among marginalized or subordinated groups, such as women's, peasants,' and indigenous peoples' movements in the Global South, that "recognized" that "the law is not omnipresent" (Ewick and Silbey 1998, 196).

Counterhegemony theorists' research has demonstrated that legal mobilization by organized and well-connected movements may lead to social change and that the hegemony of political and economic elites can thus be challenged through the use of law "from below" (Sieder *et al.* 2005, 5). Boaventura de Sousa Santos and César Rodríguez-Garavito (2005) speak in this context of "counter-hegemonic movements," which represent a counterweight to the neoliberal globalization driven by business actors. They observed an increasing tendency, particularly in Latin America, of social movements to make strategic use of national law (see: Santos 2002, 2005, Rodríguez-Garavito 2005, 2011a). These movements attempt to use precedents in court to demand rights that benefit not only the people directly affected but also broader

population groups. Regarding the development of the counterhegemony theorists' approach, we can observe that there was a temporal correlation with the new rights discourses, which marked the beginning of a global human rights revolution after the end of the Cold War (Moyn 2010, 4, 213, Goodale 2017, 181, Merry 2017, x).

In contrast to the Comaroffs' criticism against "lawfares," the mobilization of law is positively connoted by counterhegemony authors. They claim that the strategy of using law and legality may lead to the empowerment of marginalized groups. In this context, the "right to have rights," as described by Hannah Arendt (1998 [1951], 614), plays an essential role (see also: Dagnino 2003, 213). Social movements and activists claim to have rights and actively demand these rights before courts, and this often leads to the judicialization of their struggles. According to Rodríguez-Garavito (2011b, 273), it is in "law's intrinsic procedural nature" to offer a "lingua franca" that allows for contact and negotiation between otherwise radically different ideas and perceptions, for example, between protest movements and state institutions. The law is thus ascribed an ordering power that provides the mechanisms for resolving disputes but also for formulating demands and for making political claims. Whereas the hegemony theorists claim that the turn to law silences the marginalized, counterhegemony theorists, on the contrary, claim that law provides these groups both with a channel to express their demands and with a language to formulate these claims.

To make their voices heard, however, the movements do not only resort to legal mechanisms. For many counterhegemony theorists, transnational networks play a key role in successful judicial activism from below. Santos described these transnational attempts to use legal means from below as "subaltern cosmopolitan legality" (2005, 54); Manuel Castells wrote about a "global social movement for global justice" (2005, 13); Kate Nash (2012) called them "subaltern cosmopolitans;" and Rodríguez-Garavito (2005) used the term "transnational advocacy networks," a concept which was originally coined by Margaret Elizabeth Keck and Kathryn Sikkink (1998). Thus, the recipe for success of judicial activism from below seems to lie in organizing people, whenever possible, on a transnational scale. According to many counterhegemony theorists, international NGOs play a major role in building transnational advocacy networks and in organizing activists beyond borders (Fortun 2001, 51, Castells 2005, 13, Rodríguez-Garavito 2005, 66, Kirsch 2006, 17, 2007, 2016, Nash 2012, 801). These networks help establish the flow of information between actors in different world regions, and they contribute to the transnational sharing of values and the creation of common discourses (Keck and Sikkink 1998, 2). The neoliberal globalization of corporations and political elites is, in this sense, opposed by a "counter-hegemonic globalization" (Santos 2002, 458–9, 2005, Rodríguez-Garavito and Arenas 2005, 242).

In a Gramscian sense, it is thus a matter of changing the discourses in the globalized world society. Counterhegemonic power becomes effective only through the

emergence of such a counter public. This counter public introduces new discourses into international law or into domestic law in different world regions. Only when these discourses of a new "legalism from below" (Eckert 2006, 46) are established can the law become "emancipatory" (Santos 2002, 495, Nash 2012, 83–804). In this sense, the law becomes a "weapon of the weak" (Scott 1985). In her research on legal activism in Bombay's slums, Julia Eckert (2006, 2012, 152) described how ordinary citizens turn to courts to address their demands and to require a response of government institutions and state officials. Although the success of this judicial activism in individual cases may be small or only symbolic, these successes nevertheless "add up to a more profound transformation" and change "the ideas about the relation between citizen and the state" (Eckert 2006, 61–2). As Eckert concluded, the use of law enables marginalized groups to challenge elites and, in some instances, leads not only to normative but also social change (*ibid.*, 71). In this sense, her research also calls into question the hegemony theorists' concerns that the juridification of politics leads to a depoliticization of conflicts, because it, in turn, provides a powerful basis for making political demands.

In addition, counterhegemony theorists have also engaged in the debate on law's indeterminacy. In direct response to hegemony theorist Miéville's work, Susan Marks held that international law is not indeterminate per se and that the "emancipatory force" of international law is "not fixed, but context-dependent" (2007, 199). She argued that "[i]f force decides, it does not do so always and ever in the same way" (*ibid.*, 208), and thus, there is hope for people who mobilize law from below. Marks' observation that the emancipatory force of (international) law depends on the particular context may not come as a surprise for anthropologists. It underlines the importance of empirical studies on the ground which look at how law works in practice. In this way, we can assess the extent to which forces prevail and become effective in legal processes.

Context dependence also holds a decisive role for other counterhegemony theorists in assessing the emancipatory force of law. Many of them have also addressed the risks of judicial activism and of unforeseen processes that can be triggered by the mobilization of law. They have acknowledged that court cases tend to "individualize" social conflicts and that there is a risk of exposing individuals, leading to a possible demobilizing effect on social movements (Santos 2005, 50, Kirsch 2018, 38). Following this consideration, the strategy of legal mobilization prioritizes a specific form of knowledge, although social movements do not always have this legal expertise (Santos 2005, 56). Thus, a critical attitude toward law and its mechanisms is also an important part of counterhegemony theorists' considerations.

In addition, counterhegemony theorists stress law's ambiguous character. Kirsch, for example, observed how "indigenous peoples must present their claims in legal systems historically used to facilitate their dispossession" (2018, 16). International law has provided specific rights to indigenous peoples for some years.

At the same time, indigenous groups are often especially affected by large-scale development projects, such as dams, mines, or other extractive activities. In most cases, these activities are only made possible through (neoliberal) legislation and the hegemony of economic actors, such as TNCs, which has been consolidated by law. Bilateral or multilateral trade agreements facilitating such projects, for example, are an integral part of international law. Therefore, this kind of global legal pluralism again enhances the ambiguity of law as it provides the basis for resistance from below but also for maintaining dominant power relations.

In this context, Rachel Sieder described how the increasing role of international law concerning indigenous peoples has led to a "new rights consciousness" (2010b, 171), for example, among Mayan activists in Guatemala, who are, at the same time, affected by multilateral development projects. Sieder consequently wrote that although law "continues to be one of the principal tools of neo colonial power" under the current world order, the juridification processes "signal the counterhegemonic use of law" (*ibid.*, 178). This links back to the fact that most legal anthropologists have stressed the ambiguity of law – that is, the character of law to be *both* a hegemonic and a counterhegemonic instrument.

Legal mobilization and rights revolutions

This book examines specific lawsuits that were brought to court in the context of two mining conflicts in Peru. Accordingly, as mentioned above, I do not only examine the *juridification* of social conflicts – that is, actors invoking rights and legal discourses in disputes (Sieder 2010b, 162). Rather, I examine the *judicialization* of Peru's conflicts – that is, the strategy of litigation and of using courts as a "stage" for struggles over mining projects (Huneeus *et al.* 2010, 3). Court proceedings, litigation, and further activities taking place in law firms, offices of legal NGOs, and courtrooms are an important subject in this research. As outlined above, I examine not only the *processes* but also the lawsuits' *outcomes* and rely on the literature of the judicialization of politics in this part of my analysis.

More specifically, I follow Catalina Smulovitz's (2010, 235) definitional approach, which distinguishes between two different but interrelated aspects of the judicialization of politics. On the one hand, there is the core aspect of the judicialization of politics in the sense that courts – usually supreme or constitutional courts – decide on legal norms created by parliaments or governments and examine the potential unconstitutionality of a legal text. The courts thus pass a legal judgment on a norm created by political processes. This process of judicialization of politics can be initiated by the courts themselves, but often it is backed up by civil society organizations that file lawsuits in order to obtain a decision by a court on a socially or politically controversial legal norm. In the United States, these attempts were framed as a possible "Rights Revolution" (Rosenberg 1991, McCann 1994, Epp 1998); in Latin America

they were discussed in relation to the concept of a "new constitutionalism" of social and economic rights (Brinks and Gauri 2014, Brinks *et al.* 2015).

In many Latin American countries, the institutional mechanism of constitutional complaints or injunctions (so-called *amparo* or *tutela* processes) assume a central role in this context. Such constitutional complaints deal with the violation of fundamental rights by private actors or by state officials or institutions (Smulovitz 2010, 242–3). This form of legal mobilization has been extensively discussed in relation to Latin America, for example, in Costa Rica by Bruce M. Wilson (2005), in Mexico by Pilar Domingo (2005), in Argentina by Smulovitz (2005, 2006, 2010), and in Colombia by Rodríguez-Garavito (2011a, 2013, 2019).

The second aspect of judicialization of politics, as described by Smulovitz, encompasses a much broader framework, which includes the development that politicians, state agents, (organized or loosely affiliated) social groups, and ordinary citizens increasingly turn to courts to resolve conflicts that were previously carried out either in private or political spheres but not in the judicial sphere (see also: Huneeus *et al.* 2010, 8). These court cases go beyond the use of constitutional law and also include civil and criminal proceedings. The purpose behind the lawsuits, however, remains the same: By bringing emblematic cases to court, the aim is to obtain a judgment that has a broader impact on the political and social circumstances that led to the violation of rights. A judgment should then not only benefit the plaintiffs directly involved but also other persons affected by the same rights violation. Such cases are often referred to under the concept of strategic litigation.

Various legal scholars and political scientists have examined the conditions under which these types of legal mobilization from below can lead to social change. As early as the seventies, legal scholar Mark Galanter (1974) explained "why the 'haves' come out ahead" in courts. He described the conditions that give the powerful an advantage in litigation and that limit "the possibilities of using the [legal] system as a means of redistributive (that is, systemically equalizing) change" (*ibid.*, 95). Galanter's finding was that the "haves" are much more experienced at using legal means because they are "repeat players" (*ibid.*, 97–8). This confers an advantage since they "develop expertise," have "access to specialists," and know the rules of the game and the processes of law in depth (*ibid.*, 98). Ordinary citizens or the so-called "have-nots," on the other hand, are, in his terminology, "one-shotters," since they often only come into contact with the legal system once (*ibid.*, 103). They lack experience in the legal field and depend heavily on lawyers who represent them. Lawyers, for their part, are repeat players who engage in litigation on a regular basis (*ibid.*, 114). According to Galanter, litigation has "a flavor of equality." By referring to the principle of being "equal before the law," he reminds us that "the rules of the game do not permit [actors] to deploy all of their resources in the conflict, but require that they proceed within the limiting forms of the trial" (*ibid.*, 135). In principle, therefore, the conditions are given to transform legal mobilization into a

redistribution process. To utilize these conditions, however, institutional barriers for accessing the legal system must be reduced, and "one-shotters" need to organize themselves. In this way, Galanter concluded, the chances for social change through litigation may increase (*ibid.*, 150).

Galanter's contribution was later taken up by various authors discussing the notion of the *legal opportunity structure* for legal mobilization. To change the legal opportunity structure means, in the view of these authors, not only guaranteeing access to the legal system, but also strengthening the bargaining power of plaintiffs who would otherwise be in a rather powerless position (Brinks *et al.* 2015, 295, Gloppen 2018). According to Charles Epp (1998, 17–20), social organization, the support of "willing and able lawyers," the existence of "rights consciousness" among plaintiffs, sufficient material support and resources – often provided by rights-advocacy organizations – and a favorable legal framework are the basic prerequisites for successful legal mobilization. In addition, Siri Gloppen (2018) wrote that it is not enough to strengthen the position of the plaintiffs but that it is also necessary to change the political, legal, and normative opportunity structure of other actors involved, such as judges, for example, who decide on a particular case. She pointed out that litigation is multi-sited, dynamic, and highly political, which requires a diversified strategy (Gloppen 2018, 26). Since lawsuits are, as she demonstrated in her research, political struggles, it is a matter of changing the underlying discourses. This notion reminds us of the discussions of counterhegemony theorists and their claim to challenge legal discourses as implemented from above.

Peru's mining conflicts as a research field

The research field from which this book emerged has been shaped by two different but complementary dimensions: On the one hand, the investigated social conflicts and the resulting court cases are clearly determined by national circumstances. I examine how *domestic* law is applied by *local* actors within Peru in order to address human rights violations that have occurred *locally* and to bring about social change at the *national* level. Peru's political, historical, and social background marked the field in which this research was developed and thereby contributed to the particularity of the case study.

On the other hand, the field of judicialized social conflicts in Peru is also strongly influenced by transnational developments, discourses, and relations. I am investigating attempts to hold *transnational* mining companies liable. These corporations are – from a legal perspective – Peruvian companies, but at the same time, they are also subsidiaries of TNCs based in China and the United States. Thus, they are also part of *globally* operating corporations. From a local perspective they are often referred to as "foreign companies." In addition, the NGOs and social movements I

worked with cooperate with *international* legal NGOs and form part of *transnational* advocacy networks. In their struggles against human rights violations, activists travel abroad to make their voices heard. They rely on *international* human rights norms and address *supranational* bodies such as the Inter-American Commission on Human Rights (IACHR), or even bring legal claims to foreign courts to hold the involved TNCs responsible. All this suggests that not only the TNCs' operations but also the social movements' struggles are thoroughly shaped by a transnational dimension. The research field is thus strongly influenced by the binaries between the national and the transnational, the local and the global, the domestic and the foreign. I outline these binaries in the following to provide insight into the research field.

The local dimension: a mining country

According to its Ministry of Energy and Mines, Peru is "*un país minero lleno de oportunidades*" (MINEM 2020), "a mining country full of opportunities." Since the former autocratic president Alberto Fujimori set the national economy on a tightly neoliberal course in the early nineties, the country has become one of the world's most important exporters of mining products such as copper, gold, zinc, and silver.[3] A large proportion of these minerals are extracted in industrial large-scale mines operated by TNCs, with artisanal and small-scale miners playing only a marginal role in production.

In the course of the sector's expansion, the mining industry has entered regions, which had previously been dominated by small-scale agriculture, especially in the Andean highlands (Li 2009, 218–9). The territory of indigenous and peasant communities has often been disproportionately affected by this expansion of extractivism (de Echave 2008, 19). Because of the mining activities' negative impacts on the environment and on peoples' livelihood, social conflicts between mining companies and parts of the local population have increased in the past twenty years (Working Group on Business and Human Rights 2018, 6). In many of these conflicts, the nation state and the central government in Lima were accused of actively siding with the corporations rather than acting as mediators in the disputes (Bebbington, Humphreys Bebbington, *et al.* 2008, 2900, Kamphuis 2012a, 574, Silva Santisteban 2013, 435). The governments that followed the transition in 2000 continued Fujimori's neoliberal economic policies and supported large-scale mining projects, arguing that they were "of national interest" (Bebbington 2008, 275, Arellano-Yanguas 2011a, 88). The

3 The development of the industrial mining sector in Peru has been extensively studied and is very well documented (see, for example: Bury 2005, Bebbington and Bebbington 2009, de Echave *et al.* 2009, Arellano-Yanguas 2011a, 2016, Bebbington 2012a, Gómez 2013, Hoetmer *et al.* 2013, Li 2015).

Conga mining project in Cajamarca and the Río Blanco project in Piura have emblematically illustrated this development.

I discuss the course of the social conflicts in Cajamarca and Piura in detail in the first chapter. In doing so, I provide an overview on the role of law in Peru's mining conflicts. The role that law plays in these conflicts is, for obvious reasons, closely tied the role of the nation state. Since the return to democracy in 2000, Peru is again officially considered a state under the rule of law, even though its institutions are still weak in many respects (Cotler *et al.* 2009, 117, Arellano-Yanguas 2011a, 619). Bribery scandals surrounding the Brazilian company Odebrecht revealed the high level of corruption within the former governments and the established political parties in the past years. Despite several attempts at decentralization, Peru is still an extremely centralized country, in which all the threads run together and all the major political decisions are made in the capital, Lima (Passuni and Chirinos 2013, 484–5, Pinker 2015, 97–8). In many of the rural areas of the Andean highlands and the Amazon lowlands, in contrast, the nation state and its institutions are still hardly present, as various authors have described (see, for example: Poole 2004, 36, 38, Yashar 2005, 6, Harvey and Knox 2015, 39). Consequently, the rural population in many regions feels forgotten or abandoned by the state and national governments (Nuijten and Lorenzo 2009, 101). The large gap between Lima and the provinces is further aggravated by pervasive racism in Peru's society (Drinot 2006, 19, Silva Santisteban 2013). The risk of being affected by poverty is considerably higher in the Andean region than in the coastal region. In this sense, the population of the rural area lives geographically, economically, and socially on the margins of the Peruvian state.

Despite these different aspects that cause or reinforce the marginalization of the highlands, however, the nation state and its system of justice are an important reference point for a large part of the rural population, especially in the context of recent mining conflicts. As I discussed elsewhere (Lindt 2015), citizenship rights play a pivotal role in Peru's protest movements opposing large-scale mining projects, especially in the Northern Highlands where people mostly do not consider themselves indigenous, but instead rely on their identity as *campesinos* or *campesinas*, thus as peasants (Thorp and Paredes 2010). As a political argument within these conflicts, people in the Cajamarca region, for example, invoke their "right to have rights" (Arendt 1998 [1951], 614) as citizens of the Peruvian state, although the nation state often does not guarantee these rights in practice. Invoking citizenship rights promises them a certain level of public accountability. Furthermore, it enables them to make their struggles heard on an international level and to exert pressure from abroad, which is linked to the worldwide spread of transnational rights movements and (human) rights discourses discussed above.

Moreover, protest movements in Peru's mining regions address their demands to the nation state and not, for example, to the corporations involved, because their rights as citizens provide them with certain legal guarantees. The relationship with

the mining companies, in turn, is characterized by the concept of corporate social responsibility (CSR), which is based on soft law and legally non-binding regulations. After many years of experience with TNCs, people in Peru's mining regions have come to know the voluntary character of CSR programs. The role of the law for social movements as an important frame of reference within the mining conflicts thus results from the binding nature of the law (Lindt 2015, 94–5). In addition, since opportunities for political participation by the local population in large mining projects are limited, the law also provides a forum for making demands to the state. Within the social conflicts with the mining companies, social movements and local NGOs turn to the domestic justice system in order to make their voices heard. The social movements thus carry the conflicts into the courtrooms, thereby contributing to their judicialization.

On the other hand, the law is, by its very nature, also an important frame of reference for the nation state and its institutions. This is particularly evident in Peru's neoliberal economic policies, which were introduced by the adoption of new legal norms and by the enforcement of new legal provisions. The preconditions for Peru being a "mining country full of opportunities" for TNCs are laid down and encoded in law. In addition, state officials justify their action by referring to the law. They argue with the existing constitutional, legal, and normative framework, which allows for the state's interventions, for example, when police forces take action against protesters. Furthermore, as I describe in one of the chapters, state representatives also make active use of the existing legal framework in order to impede protest activities and to criminalize social movements. The research field's national dimension is thus characterized by this importance of law as a discourse for both state actors and social movements.

The transnational dimension: struggles against corporate impunity

My research field's second dimension goes beyond the national perspective in Peru and takes a closer look at the third important group of actors in these mining conflicts: the transnational mining corporations. As mentioned above, this part of the research field is not geographically bound, but rather includes transnationally circulating discourses and notions about the responsibility of TNCs. According to Kirsch (2014, 1), the corporation is "one of the most powerful institutions of our time." When these institutions act transnationally, their influence increases even further. TNCs are key actors in the contemporary globalized world order; they dominate global economy and influence our everyday life (Bury 2008, 308). In recent decades, TNCs have established a worldwide net of economic activities. This allows them to create value in even the remotest areas of the world. However, the influence of TNCs goes beyond the economic sphere and the everyday lives of people, and also has an impact on the field of law. As Juan Martinez-Alier (2002, 196) noted, in theory, corporations

do not have political power but operate only in the economic sphere. In practice, however, their bargaining power *vis-à-vis* individual states is immense (Deva 2012, 26). The commercial power of some large TNCs now exceeds the economic output of individual states (Kremnitzer 2010, 909). This results in the fact that TNCs have considerable influence on national legislations (Pistor 2019, 68).

At the same time, we can observe a discrepancy between TNCs' political influence and their worldwide profits and the fact that corporate power does not result in global responsibility chains. The costs for remediating social and environmental damages caused by TNCs are, in large part, externalized to the *home* states, thus to the countries in which these corporations operate (Kirsch 2014, 4). Corporate impunity for human rights violations and environmental damages remains the norm not an exception, despite more than twenty years of self-regulating business standards and CSR programs.

The mining sector is a prime example of this global lack of transnational accountability. Firstly, there are environmental hazards caused by industrial mining activities – which occur in spite of the companies' commitment to so-called "sustainable mining" technologies (Benson and Kirsch 2010). Secondly, transnational mining corporations have repeatedly been involved in human rights violations – either committed by corporate employees or in complicity with state actors, such as military or police forces. This discrepancy between corporate profits and corporate impunity has been criticized for years by social movements from the Global South, but also by so-called solidarity groups in the Global North. The cooperation of these movements in the Global South and in the North gave rise to a transnational movement, whose aim is to "dismantle corporate power and stop impunity," as an international NGO campaign with the same name puts it.

Furthermore, pressure on TNCs has also increased over the years on the part of international organizations, such as the United Nations or the Organization for Economic Co-operation and Development (OECD). As a consequence of this multifaceted criticism, many companies have claimed to recognize the problem and have announced plans to overcome the "challenges" in their "global value chains." The efforts undertaken by TNCs are, however, almost exclusively limited to the area of CSR. Non-binding international frameworks such as the Global Compact, which is based on the companies' *self-responsibility*, were co-launched and implemented by various TNCs. Civil society organizations complained that these attempts are ineffective because they are based on voluntary and so-called soft law approaches.

Even the United Nations Guiding Principles on Business and Human Rights (UNGPs), an international framework unanimously adopted by the UN Human Rights Council in 2011, are now considered insufficient by many international NGOs because they are not legally binding. Within the United Nations' human rights system, this critique of voluntary frameworks was shared by some member states, and, in consequence, an "open-ended intergovernmental working group on

transnational corporations and other business enterprises with respect to human rights" was established by the UN Human Rights Council in 2014. The intergovernmental working group has since attempted to elaborate an "international legally binding instrument on transnational corporations […]" (UNHRC 2014, 1). Due to resistance from the business community and from a considerable number of states, this attempt is, however, making only slow progress. This example illustrates the difficulties involved in holding companies liable for human rights violations related to their activities.

However, the lack of an international legally binding instrument regarding the responsibility of TNCs has not discouraged transnational advocacy networks from seeking alternative routes to overcome corporate impunity. Bringing human rights violations to court is often especially difficult in the *host* states, i.e. in the countries in which the TNCs operate. Various NGOs and civil society organizations have therefore tried, in cooperation with lawyers from the Global North, to bring claims before courts in the *home* states – that is, in the countries where TNCs' parent companies are headquartered. I later discuss the challenges of bringing such transnational claims to court, but we can clearly see a tendency toward the judicialization of social conflicts in these processes as well.

The transnational field in which the responsibility of TNCs is debated, demanded, and negotiated is thus thoroughly shaped by legal discourses, as well. The demands that come from local social movements, such as those in Peru, for example, characterize these transnational discourses. At the same time, however, transnational discourses also shape social conflicts at the local level and influence the arguments, discourses, and rights used in local courts. This reveals how the judicialized social conflicts in Peru's mining regions are shaped by transnational and national discourses, international and local efforts, and different ideas about the law. This context serves as a field of research to explore the emancipatory potential of law in this book.