Conclusion. The ambiguous forces of law

This book's analysis of the processes of judicialization in Peru's mining conflicts has revealed that everyone is equal before the law but that some are more equal than others. Courtrooms have become central battlegrounds for disputes over transnational mining projects. I have discussed how social movements as well as corporate and state actors actively use legal means to assert their interests in these social conflicts. Legality has provided the language, procedural mechanisms, and normative framework for negotiating conflicts that were previously fought out in the political field.

The examples of the mining conflicts Conga in Cajamarca and Río Blanco in Piura have demonstrated that the Peruvian justice system is "slow and not always just." Legal proceedings concerning human rights violations committed by state actors in connection with the two transnational mining projects illustrated this in an exemplary manner. The case studies that I analyzed in this book have revealed the obstacles and hurdles with which the Peruvian human rights movement is confronted in its attempts to mobilize the law *from below*. The local judicial system is characterized by corruption, the alleged lack of political will on the part of the authorities, practical problems – for example, in obtaining evidence – structural deficiencies, and weak institutions.

I argued that the figure of the public prosecutor plays a decisive role in criminal proceedings against corporate and state actors. As a sort of gatekeeper of the law, prosecutors render human rights litigation difficult or even impossible. Under these circumstances, hardly any court case involving allegations of human rights violations reaches the trial stage. Within criminal proceedings, however, the trial constitutes a decisive phase in which the legal responsibility of defendants would be addressed and negotiated. In many of the lawsuits that I analyzed, adjudication had become a distant goal that could not be achieved. In this way, corporate and state abuses have often remained unpunished. The difficulty in most cases lies not in the law and legal norms themselves but in their implementation and application to specific cases involving powerful actors.

At the same time, criminal proceedings against social movement activists are progressing relatively easily in Peru. In contrast to complaints filed by legal NGOs

and social movements, this mobilization *from above* leads to criminal investigations. The resulting legal proceedings often remain open for a long time and in some cases result in trials and adjudication. I traced an emblematic lawsuit against activists and social leaders involved in protests against the Conga mining project in Cajamarca. The criminal proceedings against sixteen activists from Sorochuco and Celendín revealed how this criminalization of social protest works and what it means for individual defendants to "stand before the law" (Ewick and Silbey 1998).

By characterizing three different ways in which law's domination is exercised in these criminalization cases, I described the threat posed by law and legality – both on a political level for social movements and on a personal level for the individual activists. The domination *of* law includes aspects inherent in law and legality, such as its architecture, language, rituals, and hierarchies. The domination *by* law is related to state and governmental authorities' attempts to strengthen legal norms in order to regulate specific parts of the population. In Peru's mining conflicts, the law's code became, by itself, a source of danger for the social movements because their protest activities were subject to heavy penalties. In recent years, the national authorities in Lima repeatedly made use of legislative modifications to prevent or impede social protests against major economic projects in the provinces.

However, I have also shown that it is usually not this form of law's domination that poses the greatest threat to social movements, but it is rather a third form, which I categorized as *manipulation* or *misuse of* law. In the case study described, the criminal offense of kidnapping was used as a pretext for declaring a protest action to be criminal. The defendants and their lawyer, however, claimed that the protest had constituted a legitimate form of political expression. According to their view, it was only due to a misuse of the law on the part of the complainants and the public prosecutor's office that the proceedings reached the trial phase. During the oral hearings, the activists' lawyer managed to restore the rule of law and obtain an acquittal. In doing so, she also mobilized the law and explicitly invoked procedural norms to prove the legal manipulation of the opposing party. The human rights lawyer was thus able to put an end to the abuse of the law by making use of law's mechanisms herself.

Both the example of the legal mobilization *from below* and *from above* point to the room for negotiation that exists in the legal sphere. Litigation is about applying generally established norms to specific cases. The implementation and application of legal texts to concrete cases may lead to indeterminate outcomes. This indeterminacy is part of the nature of law, as various authors have described before. Many of them considered the law's indeterminacy to provide an opportunity for elites to use the law to their advantage (see, for example: Kress 1989, Miéville 2005). In contrast, I agree with Marks (2007) that the law's indeterminacy leaves room for negotiation in order to impose counterhegemonic demands from below as well. Legal NGOs and human rights organizations in Peru consider the law to be a contested field in which it is not always clear from the outset which positions will prevail. Through strategic

litigation and by changing the legal opportunity structure of the parties involved, it is, in their view, possible to enforce demands from below and to legally challenge the hegemonic position of economic and political elites. The legal NGOs hope that this way of using the law in a counterhegemonic manner on behalf of marginalized groups of the population could initiate social change. In a nutshell, this is the key expectation that the Peruvian human rights movement places on the law.

In chapters 5 and 6 I discussed different strategies of the legal NGOs for overcoming or circumventing the obstacles in the domestic justice system. In both chapters the collaboration with allies abroad as well as the transnational dimension of the social movements' struggles played a crucial role. On the one hand, the Peruvian human rights NGOs have attempted to influence the domestic judicial authorities by relying on the support of transnational advocacy networks. As I have indicated, this can be a promising approach to prevent legal mobilization *from above*. The international attention paid to a specific lawsuit may protect activist defendants from the misuse of law and from criminalization. In this sense, international NGOs and advocacy networks may support counterhegemonic discourses that challenge the criminalization of social protest. However, these transnational advocacy campaigns are often not effective enough to significantly advance the legal mobilization *from below* and thus to overcome impunity for human rights violations. Moreover, the counterglobalization aimed at by such transnational advocacy campaigns also involves risks for the social movements on the ground as well as for the individual persons concerned, as the case of Máxima Acuña has made clear. This is mainly because legal processes lead to an individualization of broader social conflicts, and individual litigants are strongly exposed in this way.

A similar pattern of risks became apparent in the transnational legal actions against parent companies. In these court cases, too, legal activism entails a certain danger for plaintiffs and for social movements on the ground, for example with regard to out-of-court settlements and financial compensation. Under certain circumstances, however, the strategy of litigation *abroad* may have a positive effect on legal proceedings before domestic courts. The FLA application of behalf of Elmer Campos was a case that demonstrated the potential of addressing foreign courts. Thus, this chapter again demonstrated the importance of considering contextual aspects in order to assess the strategy of legal activism and the emancipatory force of legal means.

Finally, in the last chapter I illustrated that the law also has inherent limitations that confront human rights lawyers with doubts about their strategies. I thereby discussed that even those actors who otherwise rely on and trust so heavily in legality become skeptical about the law under certain circumstances. The human rights lawyers learned that relying on the "right of having rights" (Arendt 1998 [1951], 614) and on human rights discourses in general is often not enough to overcome the hardships faced by local communities in Peru. Especially in view of corporate de-

velopment projects and CSR programs, the resources and strategies of legal NGOs appear to be insufficient. An additional limitation of law arises from the relationship between plaintiffs and lawyers, as I have argued. This relationship is largely predetermined by law's mechanisms. However, in the everyday practices of legal activism, the characteristics of this relationship may lead to social tensions or disagreements on the ground. In human rights litigation in Peru, there are thus not only differences of power between the parties in dispute, but also between plaintiffs and their lawyers.

The processes of judicialization that I have analyzed in this book demonstrates how legal disputes are characterized by struggles over hegemonic positions and discourses in a society. Law is a contested field in this context. Access to institutional power, financial resources, powerful allies, and political influence are important elements of effective legal mobilization. These elements often decide who "comes out ahead in court" (Galanter 1974). At the same time, however, I have also made clear that the use of law can help to strengthen *both* hegemonic and counterhegemonic positions. This points to the ambiguity of law as both a hegemonic means of regulation and control and a counterhegemonic means of resistance.

On closer inspection of this field, it becomes clear that the liberal principle of equality before the law does not correspond to the patterns and processes I observed in my case studies. Law is a social practice and is thus also subject to the processes of negotiation and power within a society. I contend that the various aspects I addressed in the analyses in this book have pointed to different forces of law. We can observe these various forces of law in (1) the hegemony of law, and (2) in the issue of law as a weapon of the weak. I address these different forces of law in the following.

Law's hegemony

The first aspect of the forces of law that I repeatedly encountered in my case studies was the hegemony of law. Law's hegemony is based, on the one hand, on the domination *of* law, as I characterized it in Chapter 4. Judicial authorities and institutions hold enormous authority within a society. Moreover, they are equipped with the power of the state. Law intimidates, controls, and regulates; it punishes and acquits; and it judges everyone.

On the other hand, law's hegemony is also based on the "force of law" (Bourdieu 1987) to settle disputes and to mediate between opposing parties. That is the functioning of law as a social practice. In this regard, law provides the grounds for negotiations through its "intrinsic procedural nature" (Rodríguez-Garavito 2011b, 273). By setting a central frame of reference that regulates coexistence in a society and that permeates the everyday life of people, law's hegemony becomes effective. However, this notion of hegemony is not the same as what theorists such as the Comaroffs

(2006) have described when claiming that law serves as a *hegemonic means for elites* to maintain their power and to impede political change from below. Rather, in the notion of *law's hegemony*, it is the law itself that holds a hegemonic position in society.

We could observe law's hegemony in the criminalization cases in Cajamarca, for example. The activists from Sorochuco and Celendín took part in the hearings, although they had doubts that the judicial authorities and the complainants' side would respect and comply with the procedural rules of criminal law. The activists agreed to participate in the legal processes, obeyed the justice system, and were not resistant to the law. By participating in the court hearings and by following the judicial mechanisms in the criminal process, the activists expressed their concession with law and legality. In a Gramscian sense, this highlights the fact that the way in which law is hegemonic is not based on the mere exercise of force, but on the consent of the actors involved. It is a rule by consent and not a rule by force in which law regulates and controls the population (see also: Im 1991, 127).

On the other hand, mining companies also accept the hegemony of the law. I illustrated this with the example of Minera Yanacocha and its parent company, Newmont Mining Corporation. It is true that the companies have repeatedly appealed judgments given by the courts, thereby expressing their disagreement with the rulings. Furthermore, corporate actors have recurrently sought to evade litigation. They attempted to keep the issue of their legal responsibility out of the courtrooms, for example when it came to proceedings over police violence in the context of their mining activities. However, all these efforts were made *within* the framework and *in accordance with* the procedural requirements of the law itself. Thus, corporate actors obeyed the justice system as well. In addition, I mentioned that corporations resort to options outside the law, such as out-of-court settlements, when their legal mobilization fails. This does not call into question the hegemony of the law, but rather underlines the force of law and its hegemonic position in society. It demonstrates that law holds the force to regulate powerful actors, too.

With this research I contend that in disputes and social conflicts law serves as a powerful tool for those who can best use its mechanisms and institutions. Epistemologically, this supports the approach of closely examining what happens in the judicialization processes and considering both the *processes* and the *outcomes*, as I suggested in the introduction (see also: Sieder *et al.* 2005, 16). Based on the analysis of the two mining conflicts, I argue that law's hegemony involves both the elites – be they political or economic elites – and civil society actors and marginalized population groups recognizing law as a binding social framework for the resolution of disputes.

It is the law's codes, i.e. the established norms of a society, that define which behavior is permissible and which is not. The fact that both the elites and marginalized groups and most of the population groups in between acknowledge and recognize the law as such a binding framework makes the hegemony of the law effective wit-

hin a society. It is true that law, in some cases, helps elites maintain their hegemonic position, as the Comaroffs (2006) argued. However, at the same time, law also helps social movements challenge the elites' discourse and position, as my case studies revealed. This is what Merry references when noting that "law constructs power and provides a way to challenge that construction" (1990, 8).

Being in the right and gaining recognition of being right through a legal process gives social movements and marginalized groups a powerful position, too. This is reflected in the expectation that Peru's human rights movement places on the law. "Justice means to know the truth," David of *Fedepaz* told me. Knowing the truth is, first, a central aim for the directly affected people, the "victims" of human rights violations. I argue that "being in the right" and having the law on their side gives moral authority to those affected by human rights violations. In this perception of legality, we can again observe the hegemony of the law. The force of the law is to identify and acknowledge a human rights violation as such. A judgment clearly identifies who is the perpetrator and who is the victim, whose rights have been violated, who is punished, and who receives compensation. To receive public recognition of the suffering someone has experienced constitutes, in the Peruvian context, a central part of obtaining justice.

Second, establishing the truth through legal proceedings is also pivotal for the human rights movement and its political struggles. In the cases of human rights violations that the legal NGOs bring to court, it is, first, a matter of obtaining public recognition for the suffering of the complainants. Second, it is also a matter of getting official acknowledgment of the guilt of the perpetrators, which may result in sanctions and punishment. Third, relying on the law is about officially attributing responsibility, for example, to a mining company or a state institution like the Ministry of the Interior. This is aimed at disclosing the underlying chains of responsibility that link the direct perpetrators to the "intellectual" perpetrators of the abuses. By pointing to these chains of responsibility, the human rights movement seeks to bring about change within state institutions and in the behavior of corporate actors. For Peruvian human rights lawyers, the court cases are not only legal battles, but also political struggles. Taking a case to court therefore does not mean depoliticization, but rather constitutes a political act.

Finally, the fact that the law is such a contested field also points to the notion of the hegemony of law within a society. More specifically, it explains why it is so important for both elites and social movements' actors to gain influence in the legal sphere. In many areas of a society, law holds a decisive defining power. It decides on admissibility and prohibition, on possession and entitlement, on abuse and legal redress. Those who have the law on their side have access to one of the most important state institutions. This also applies to those actors who otherwise have little political or economic influence. Thus, if they succeed in mobilizing its resources in their favor, the law can help social movements bring about social change. At the same time,

however, this also means that the failure of social movements in legal struggles can lead to a lack of social change. In other words, it means that elites can use their dominance in the legal sphere to prevent social change. Therefore, whoever has the power of law will prevail in the social struggles at stake.

The emancipatory force of law or law as a weapon of the weak?

Thus, the law can be and is mobilized both *from above* and *from below* to enforce political interests. The discourse in legal anthropological research on law's ambiguity has also been confirmed by the example of social conflicts over mining in Peru. However, with regard to the mobilization of law *from below*, the question remains whether law actually serves as a "weapon of the weak" in the sense of Scott (1985), or whether it is – in the case of Peru's human rights movement – another social group that uses law as a weapon *on behalf of* the weak. This issue also raises important aspects with regard to the ambiguous forces of law.

As previously mentioned, one of the human rights lawyers' fundamental tasks in the legal struggles over transnational mining projects is to build trust in the judicial authorities among people who live on the margins of the state. These groups of the population feel abandoned and forgotten by the state's institutions and authorities, as various authors have described (see, for example: Poole 2004, 36, 38, Yashar 2005, 6, Nuijten and Lorenzo 2009, 101). The experience of police violence and the criminalization of social protest has reinforced the negative attitude that many activists and ordinary citizens in the mining regions hold toward state institutions. Under these conditions, legal NGOs sought to convince the people they represent before the courts that it makes sense to use the law – not only to counter criminalization, but also to demand justice for suffered abuses.

In comparison to the people they represent before court, human rights lawyers form part of a national elite. Most of them belong to the middle class of Lima, have a regular income, and have a good education. Within the legal sphere, they are experts and "repeat players" (Galanter 1974, 114) in litigation. In comparison with the power of the "armies of corporate lawyers" that the mining companies hire to defend their interests, the human rights lawyers may seem relatively "weak." However, compared to the people they represent in court, they have a powerful position. This reveals that the question of who is among the "weak" in the legal processes is relative and highly contextual.

At the same time, human rights activism in Peru is not, however, a privilege of a group of middle-class lawyers from the capital that is brought to the marginalized regions of the country. Rights discourses and the reliance on legal demands form part of the social movements' political mobilization on the ground and provide the activists with an important frame of reference to make demands on the state. The

juridification has strengthened their social protest and allowed them to establish networks and to take up larger political discourses. Law and legality provide the language for their resistance and their protest against corporate and state actors' behavior within the social conflicts. Thus, within the social movements a strong "rights consciousness" (Epp 1998, 13–7) was already present before the judicialization of the mining conflicts.

Thus, there is a part of the population that feels forgotten and abandoned by the state but that, on the other hand, claims its rights as citizens of that very same state. In this way, the social movements in Peru analyzed in this research differ, for example, from anarchist or indigenous movements, which question the state per se, its institutions and its influence. While the local population in Peru's mining regions distrusts the state institutions as well, they, at the same time, adhere to the actual idea of the state, in particular to the idea of the state as a guarantor of rights. This points to a phenomenon that Eckert (2006) observed in her research as well. As she wrote, legalism from below creates new relationships "between the governing and the governed" (*ibid.*, 70), thus between the state and its population. By mobilizing the law, the governed make demands on the state and claim to become beneficiaries of its institutions and services. Thereby, they confirm the importance and the power of the state and its institutions within society. If the movements were to reject the state, they would not invoke its legal norms. This explains why state institutions are met with mistrust but why they are nevertheless accepted and respected by the population in Peru's highland regions.

It was in this context that human rights NGOs sought to use the domestic justice system with all its mechanisms and instruments to the benefit of these marginalized population groups. As I mentioned before, it was not these legal NGOs that promoted the *juridification* of social protest. However, these organizations were decisively involved in using rights not only discursively in political struggles, but also as a means in court. Thus, they played a pivotal role in the *judicialization* of social conflicts. In their strategies, human rights lawyers build on the fact that the state plays an important role for the people in the mining regions. Through the mobilization of law, they aimed to restore people's trust in the state. The legal NGOs' aim, in this sense, was not to act against the state, but rather to strengthen its institutions. In the perspective of human rights movements, litigation is intended to restore the rule of law and thus to reaffirm the functioning of the institutions. This in turn should ensure that marginalized population groups can also benefit from the rule of law and that their fundamental rights are guaranteed and respected.

I argue that this is the emancipatory force of law.

Furthermore, the human rights organizations that I have portrayed in this book perceive the strategy of legal mobilization as a way to strengthen marginalized population groups in their negotiating position *vis-à-vis* state or corporate actors. Empowerment processes are part of the legal advocacy trainings they conduct with

communities and grassroots organizations. The aim of this strategy is to make plaintiffs aware of the legal mechanisms available to them. Thus, the legal NGOs actually attempt to make the law a weapon of the weak.

In the field, I witnessed how individual complainants could become eloquent users of the law and acquire a great deal of knowledge about legal processes. Thus, they are unexperienced and "one-shotters" (Galanter 1974) in legal proceedings, but they know their rights, and as a result, they have specific expectations of the justice system. According to my observations, the people concerned acquired this legal expertise both by participating in the NGOs' legal capacity trainings and by being involved as litigants in lawsuits on human rights violations. Thus, the judicialization led to an empowerment process among the involved complaints and activists.

However, I had a completely different perception after accompanying the criminalized activists from Sorochuco and Celendín to the court hearings. They had also acquired a certain expertise about their rights, but in the context of law's domination, which the actual proceedings revealed, they became largely powerless. During the trial, the activists depended on their lawyers, who told them when and how to speak, who suggested the legal strategy, and who presented the arguments that eventually led to the acquittal. The criminalized activists were dependent on the expert knowledge required in the legal sphere, which the lawyers have due to their training and experience, and which they themselves lack as ordinary citizens. This central importance of expert knowledge in litigation fundamentally calls into question the idea that the "weak" can use the law as a weapon by themselves when standing before the law.

In addition, further doubts about the notion of law as a weapon of the weak become apparent when looking at the original concept as Scott (1985) used it. In his research, Scott described the way peasants develop strategies of opposition in their everyday life and how they engage in so-called "everyday forms of resistance." In social anthropology and other disciplines, the concept was subsequently used by various authors to categorize legal activism from below in general as a powerful instrument of "the weak" (see, for example: Sieder 2000, Eckert 2006, Jacquot and Vitale 2014, Gloppen 2018).

However, as I demonstrated using the criminalization cases in Cajamarca, judicial proceedings can have a massive impact on the everyday lives and social relations of the defendants. What I found in the field, however, was that the use of legal mechanisms is, for complainants or activist defendants, anything but ordinary or linked to their "everyday lives." Most of my interlocutors had never before been involved in litigation. To enter into the field of the law means for them to – literally and figuratively – leave their everyday life. People directly involved in the court cases constantly stressed about the loss of time due to the court cases. Furthermore, they were unfamiliar with the judicial field, with the legal authorities, and with the processes and practices the legal sphere entails.

In this sense, the knowledge and resource requirements that make access to the legal system possible in the first place prevent "the weak" from using these mechanisms. Only when they have a "support structure" (Epp 1998) that provides them with legal expertise and knowledge, financial resources, and political influence can they successfully participate in court proceedings. Only in this way can they gain the opportunity to "come out ahead in court" (Galanter 1974). In the case of the legal disputes in Peru's mining regions, it was the legal NGOs that provided this support structure. However, to my understanding, once litigants have received this support and thus successfully strengthened their legal opportunity structure they no longer belong to the "weak."

All these aspects point to the fact that the legal sphere is not only a highly contested field, but also an ambiguous field that allows for changing positions. I started this book with the notion of, on the one hand, the activists on the ground, who do not believe in the law because "all judges and prosecutors in Peru are corrupt, and the law only serves the elites." On the other hand, there were the human rights lawyers who enthusiastically spoke of strategic litigation and the use of the law on behalf of marginalized and vulnerable groups of the population. Both positions were contested and have undergone considerable changes on the journey that the judicialization processes took.

I argue that this reveals the ambiguous forces of law.