Chapter 3. Human rights litigation from below

> La justicia es lenta, y la justicia no siempre es justa.[1] – *Juliana, human rights lawyer, Lima*

> Before the Law stands a doorkeeper on guard. To this doorkeeper there comes a man from the country who begs for admittance to the Law. But the doorkeeper says that he cannot admit the man at the moment. The man, on reflection, asks if he will be allowed, then, to enter later. "It is possible," answers the doorkeeper, "but not at this moment." – *Franz Kafka, The Trial (cited in: Ewick and Silbey 1998, 74)*

I sit with Marina in the meeting room of the human rights NGO for which she works. Marina is a young lawyer in her mid-twenties. On the table in front of us lies a thick court file containing various letters from the public prosecutor's office, a whole series of notifications, resolutions and orders, letters from Marina and her colleagues to the prosecutor, copies of documents and certificates they have submitted, and the criminal complaint they filed some months ago. Marina leafs through the file and explains step by step how she has proceeded in this case.

The complaint concerns an incident in which a mining company's security forces allegedly attacked a group of people, threatening them, insulting them, and damaging their property. Marina's aim is to make me understand how difficult it is to get the responsible public prosecutor to start a preliminary procedure, a so-called diligencia preliminar *– that is, to begin with the first phase of a court case under Peruvian criminal law. "This case is being handled by [local prosecutor]* doctor *Walter," Marina explains. "When* doctor *Walter receives the complaint, what does he have to do first? He has to investigate! It's called a preliminary procedure. Preliminary procedures are carried out by the prosecutor himself, with the help of the police, if necessary. So what is done? The most urgent statements are taken – that is, all the acts of investigation, the most urgent ones, for example, the inspection of the place, right? As it just happened, we go to the place to see so that the scene of the events, let's say, is fresh, that it hasn't changed much over time. That's an urgent procedure. The statements of all the people involved are taken."*

1 "Justice is slow, and justice is not always just."

Marina continues to leaf through the folder and comments on the documents. The incident occurred on March 16, and the NGO filed the complaint on behalf of the injured party shortly after. On April 6, the prosecutor's office confirmed to have received the complaint and ordered a judicial inspection for May 30. "However, this inspection did not take place," Marina adds, "because, if I remember correctly, the prosecutor's office car ran out of gas." She reads the file and adds, "No, that's not true. This time it was, as you can see here, because the other prosecutor working in the same office needed the car, as well. There is only one vehicle available at the office." Marina says that this is the way it always works: Sometimes there is no fuel, sometimes the car is not available, sometimes the assistant to the prosecutor is sick, and sometimes the weather is bad and they cannot go out to the countryside. In the case before us, the judicial inspection was postponed four times for such reasons and finally took place on August 9, almost five months after the incident. Marina explains that it is often difficult to detect damages and gather evidence on site after such a long period of time.

*In the present case, the preliminary procedure ended with the inspection of the site. Another five weeks passed between this inspection and my conversation with Marina. She must now wait and see how the prosecutor proceeds. According to the legal requirements, in the next step, the prosecutor should decide whether to open preliminary investigations: "He studies the case and sees if there are sufficient indications for the commission of a crime." In case he decides to open a preliminary investigation, more evidence will be gathered, the case will be further studied, and, based on this, the prosecutor submits a request to a judge of preliminary investigation (*juez o jueza de la investigación preparatoria*) for an indictment or for a so-called* sobreseimiento, *a dismissal.*[2] *Whether charges will ever be brought in this case remains unclear. In Marina's experience, such complaints are usually dropped by the prosecutor on the grounds that there is supposedly no evidence for the alleged crime, that the perpetrators supposedly could not be identified, or for other reasons. The prosecutor's office then closes the case and puts it on file.*

Human rights litigation in Peru requires much patience, tenacity, knowledge about legal proceedings, and, above all, *time*, a lot of time. In Peru, "[j]ustice is slow, and justice is not always just," as Juliana, a lawyer working at EarthRights International's office in Lima, noted in a presentation before law students at the *Universidad Católica*. The other human rights lawyers with whom I came into contact in the field would likely all agree with this statement. Peru's judicial system is full of hurdles and barriers, it is slow, and whether justice is finally obtained is not guaranteed. However, they all use the system of justice and bring cases of human rights violations to court. One could argue that of course these actors use the law because, after all, they are lawyers who are trained in law. There are, however, further reasons for these attorneys to use the legal system other than just their professional relation to law. We can

2 For a discussion of the various stages of the Peruvian criminal procedure, see: Oré Guardia and Loza Avalos 2005.

observe these different reasons in the way they use the legal system, in the norms they invoke, and in the strategies they apply.

In this chapter, I analyze different court cases brought before local courts by legal NGOs in connection with the mining conflicts in Piura and Cajamarca. The chapter is structured in three parts. In the first part, I discuss the obstacles that have arisen in these lawsuits and examine the approaches the lawyers have used to overcome them. Thus, I provide insight into the hurdles and the strategies of legal mobilization *from below*. In the second part of the chapter, I focus on the public prosecutor's office, which plays a crucial role in most of these lawsuits. In doing so, I shed light on the prosecution by examining its role as a kind of doorkeeper guarding the access to law's doors. Finally, in the chapter's third part, I discuss how the presence of transnational mining companies influenced these court cases. There are reasons, both in law and beyond, that complicate litigation when powerful actors such as TNCs are involved as defendants. At the same time, there are different strategies human rights NGOs use to attribute legal responsibility to these corporate actors.

"Slow and not always just"

Filing a complaint, initiating an investigation

The torture case from Piura is one of the court cases that exemplified human rights litigation as practiced by legal NGOs in Peru's mining conflicts. As I mentioned in Chapter 1, this case concerns a group of twenty-eight protesters who were detained and tortured within the Río Blanco mine camp in 2005. *Fedepaz* brought this case to court with the support of the *Coordinadora*, the umbrella organization of Peru's human rights movement. As described earlier, a prosecutor visited the mine site to interrogate the detained demonstrators. Thus, the local prosecutor's office had knowledge of the abuses. When the group of protesters was released after three days, however, the same prosecutor did not open an investigation into the allegations of torture, but, on the contrary, took action against the detainees and against nearly eighty demonstrators for participating in the protest march.

Under these circumstances, it took the NGO lawyers nearly three years to file a complaint about the abuses the twenty-eight detainees had suffered. One reason why this took so much time was the lack of evidence for proving the abuses. In January 2009, *La República*, one of Peru's most important daily newspapers, published pictures that revealed the protesters' detention (Prado 2009). The photos showed the detainees sitting on the floor with their hands tied, blindfolded, and surrounded by armed police officers. With these pictures in mind, it is difficult to understand how it could take the judiciary so long to deal with this incident. However, the photos only became public after the complaint had already been filed. An anonymous source

leaked them to the newspaper a few months after *Fedepaz* and the *Coordinadora* had lodged the complaint. When they began building the case, the lawyers did not have any such evidence and only relied on the declarations of the detainees.

Due to its long-standing cooperation with the social movements in the region, *Fedepaz*' team knew some of the persons involved, especially the social leaders who had been detained. But among the detainees were also ordinary members of the protest movement whom the lawyers did not know. As the two *Fedepaz* lawyers David and Rosa told me, it was difficult to reconstruct the events and to establish contact with the affected people who came from remote communities. Some of them lived a several hours' walk from the nearest towns and did not have a telephone connection. Due to this spatial marginalization, keeping contact with the complainants was a challenge, which was also related to the fact that the NGOs' offices are located in Lima, more than one thousand kilometers away from where the complainants live. Rosa told me that, later on, when the proceedings had started and when they had to inform the complainants about appointments with the prosecutor, for example, they used personal messages sent via local radio stations because there was no other way to contact them. In Peru's rural areas, radio stations were – and still are – an important means of communication. Early in the morning, before people went to the *chacra*, to their agriculture field, they would listen to the radio. *Fedepaz* used this as a platform to keep the complainants informed about their lawsuit. This example illustrates the practical hurdles the lawyers faced when preparing the complaint.

The situation was further complicated because, as a consequence of the severe offenses, many of the complainants had suffered a psychological shock, which made it difficult to organize them as a group. *Fedepaz*' team had the difficult task of convincing them to turn to the judicial system, a system that worked closely with the police officers who had abused them. To make matters worse, the heavy repression of the social movement and the criminalization of its members continued for a long time after the incident. In general, the rural population's distrust of state institutions, including the judiciary, is widespread in Peru's highlands, as Deborah Poole discussed in detail (2004). According to Monique Nuijten and David Lorenzo's (2009) research on Peru's central highlands, this mistrust is rooted in, among other things, the weak presence of the state in these regions and the local perception that the authorities in Lima had not only marginalized them, but also had abandoned and forgotten them. This description also applies to the Andean region in Piura. The state is present in these areas through institutions such as schools and basic health care facilities. However, these institutions often function inadequately, are poorly equipped, and underfunded. The local population therefore perceives the state primarily through the presence of repressive police forces, and the absence of the state as an institution that would support the population is a recurrent complaint.

The group of complainants in the torture case included a teacher, a journalist and a woman who had studied at a university; thus people who had frequent contact

with the state in their daily lives. The remaining complainants, however, were almost all *campesinos* and *campesinas* who lived off subsistence agriculture, had low incomes and education levels, and from whose daily lives the Peruvian state was largely absent. Instead of the nation-state, by contrast, institutions of local social organization played a significant role in the lives of these *campesinos* and *campesinas*. Many of them had taken a prominent role and led the local protest organizations within the social movements against Río Blanco. Due to their political commitment, some of them had come into contact with the legal system earlier, in particular because they were criminalized for participating in the protest movement. However, in view of the powerful opponents they faced, I would classify the group as rather inexperienced in the field of judicial processes. In terms of power, financial resources, and legal expertise they were so-called "one-shotters" in the sense of Galanter's (1974, 97) terminology. In the judicial proceedings, they depended on the human rights lawyers who had the experience and the knowledge of the law and who acted on their behalf before court as "repeat players" (Galanter 1974, 114).

The fact that they lacked evidence and that they received no support from the public prosecutor's side hampered the work of the human rights lawyers. In their efforts to support the case, *Fedepaz* and the *Coordinadora* turned to foreign partner organizations, among them the international NGO Physicians for Human Rights, which helped systematize the complainants' statements. Physicians for Human Rights sent two medical specialists to Peru to examine some of the complainants and to evaluate the physical and mental consequences they had suffered. In doing so, doctors working for an international NGO fulfilled a task that would typically fall under the responsibility of the prosecution in a criminal investigation. According to Mar, a lawyer working with the *Coordinadora*, this NGO report finally made it feasible to file the complaint to the Provincial Criminal Prosecutor's Office in Piura in June 2008. Thanks to their integration in a transnational advocacy network, it was thus possible for the lawyers to take the decisive step toward opening a criminal proceeding.

The complaint[3] focused on the offenses of torture and aggravated kidnapping; other crimes were included, as well. The main allegations were brought against three different groups of actors: first, three high-ranking and personally named superior police officers who were responsible for the region where the alleged crime took place; second, the police officials directly involved in the protesters' detention and mistreatment; and third, the security staff of the mining company. The mining company's officials were also named as accused parties. Moreover, the complaint mentioned, first, the killing of the *campesino* who was shot during the police's repression of the protest march; second, the "acts against the modesty" (*actos contra el pudor*) of

3 Criminal complaint to the *Quinta Fiscalía Provincial Penal de Piura*; document on file with author.

the two detained women; third, the "omission of criminal proceedings" on the side of the prosecutor who visited the mine site but who did not intervene; and, finally, the issuance of false medical certificate by members of the criminal investigation division in Piura, who had examined the demonstrators after their release and allegedly issued false documents about the state of their health, thus concealing the traces of torture. Accordingly, the complaint was extremely detailed and included many pieces of information that the lawyers of *Fedepaz* and the *Coordinadora* had researched.

Leading a case through criminal proceedings

The torture case garnered national interest some months after the complaint was filed when *La República* published a series of pictures revealing the abuses in January 2009. Despite the publication of these images and despite the detailed complaint *Fedepaz* and the *Coordinadora* had filed, however, the prosecutor's office decided in March 2009 to take action against only the low-ranking police officers and dismissed the other allegations brought forward. *Fedepaz* appealed this decision and requested the reopening of the case (Fedepaz 2009).

In the following seven years, this process of closing the case, on the side of the authorities, and the process of appealing and demanding the investigation's reopening, on the side of *Fedepaz,* was repeated several times, not only on the level of the prosecution, but also later when the charges were brought and when the courts dealt with the case. The filing of appeals became *Fedepaz*' most effective tool. At each new stage, the prosecutorial and judicial authorities found new reasons to obstruct the continuation of the proceedings, attempting to close the case and to stop the legal investigation of the incident. The human rights lawyers' efforts were mainly to keep the court case going and to prevent a definitive dismissal, as David told me in retrospect.

Finally, the judicial authorities split the initial complaint into different lawsuits. The proceedings concerning the killing of the one *campesino* were soon dropped because it could not be established who was responsible for his death. After exhausting all legal possibilities to appeal against this decision, *Fedepaz* had to accept this dismissal. In other aspects of the complaint, however, the NGO was more successful. The allegations of torture and kidnapping were investigated in two separate cases: one against fourteen police agents directly involved, and another against the high-ranking police officers (Velazco Rondón and Quedena Zambrano 2015, 51). Behind this separation was allegedly the attempt to split the responsibility of the "ordinary" police officers from that of their superiors, thus from the direct perpetrators, on the one hand, and the "intellectual actors" (*autores intelectuales*) of the abuses, on the other hand, as *Fedepaz* called them. In the following years, the NGO's legal team sought to prevent this fragmentation of responsibility and, in March 2016, managed to com-

bine the two cases again (Fedepaz 2016). The allegations of torture and kidnapping were then again investigated as a single case. The legal proceedings, however, still did not lead to a trial. There were delays because detailed aspects of the accusation needed to be clarified.[4]

During my stays in Peru in 2017 and 2018, I was repeatedly told that the proceedings in the torture case would "soon" enter into the phase of the *control de acusación*, in which the charge is "controlled" by a judge, who decides whether all the procedural requirements are fulfilled. After this step, a case proceeds to the final phase, the *juicio oral*, the oral hearing (Hurtado Poma 2009). Thus, nearly ten years after filing the complaint and more than thirteen years after the human rights violations occurred, the lawyers working with *Fedepaz* finally expected a trial to start sometime "soon," as they told me.

Due to the location of the incidents, all the proceedings were conducted in Piura, which meant that *Fedepaz*' lawyers had to take a flight for each hearing or appointment with the prosecutor. For *Fedepaz*, which finances itself on a project-by-project basis through partner NGOs, the long process was a financial challenge. In addition, with this temporal aspect in mind, Rosa stressed the importance of keeping complainants updated about their case. Since the justice system is so slow, the human rights lawyers' task is to convince complainants that there is still hope of getting justice one day, even though proceedings seem to get stuck. Their efforts involve assuring that the processes are "slow" but still "just." Rosa told me, however, that the long wait and the associated feeling of being forgotten by the judicial system is often difficult for complainants.

In her research on the justice system in Peru's central and southern highlands, Poole analyzed historical court cases and described how people who file a complaint with a prosecutor had to wait years for a response. She used a specific case to illustrate how a complaint was passed from one judicial authority to another, moving back and forth between different locations. Poole called this "the *expediente*'s [the court file's] routings, or 'driftings,'" (2004, 48). She noted that "the vast majority of legal cases that are 'directed' to the next level of the judicial apparatus do indeed seem to drift more or less aimlessly from one office to the next, before finally being returned, unresolved and often years later, to their points of origin" (*ibid.*, 42). In the cases I examined, the files are sometimes moved back and forth between the authorities, but from the complainants' point of view, they do not drift around but rather get stuck and do not move on. A man from a *comunidad campesina* in Cajamarca, for

4 For example, *Fedepaz* demanded that the involvement of the Ministry of the Interior, as the institution responsible for the police, to be discussed in the court case, too (see third part of this chapter). Moreover, the NGO requested the aggrieved party to be included as "civil actor," which allows for the active participation in the oral hearing (Fedepaz 2018b). These issues had to be clarified before the hearing could start.

example, once noted that "it seems that the papers are sleeping in the courts," in reference to a complaint his community had filed. So, from the point of view of these plaintiffs and complainants, it is not the drifting, but the actual immobility that captures the cases, and this immobility is linked to the inactivity of the authorities.

In the perception of the human rights lawyers, there are several reasons for this inaction of the authorities. I explore these aspects in the second section when discussing the role of prosecutors as gatekeepers. For now, I would like to emphasize that it is these long and exhausting procedures which represent the greatest difficulty in the cases of human rights litigation that I analyzed. The cases that I summarize in this book as "human rights violations" actually involved assault, killing, torture, and kidnapping. Some of them also involved less serious crimes such as property damage, harassment, or threats. All these criminal offenses are clearly regulated in Peru's criminal code and are categorized as inadmissible. Thus, the problem does not lie in the law – that is, in law's code itself – but rather in law's proceedings and in the way the institutions administer them. Once a complaint is filed, cases often get stuck in the system, which in turn results in litigation being "slow and not always just." However, there is one specific area in which the legal basis does present a difficulty, and that is when it comes to regulating state security forces; I address this issue in the following.

Opening investigations against state security forces

Social conflicts between corporate actors and social movements in Peru have repeatedly resulted in outbreaks of violence in recent years. However, the violence often did not originate directly from company employees but from state security forces. The *Coordinadora* records the number and the names of the people killed under such circumstances (see, for example: CNDDHH 2012, 163–4, 2015, 62–93, 2017, 72–81).[5] According to these statistics, from Peru's return to democracy in 2000 to 2017, over 150 civilians were killed by state security forces during social conflicts.[6] Human rights NGOs and activists complained that in many conflicts, in particular those arising from large investment projects, state security forces did not take on the role of mediators but instead sided with corporations by using force against protesters.

As *Grufides* lawyer Mirtha Vásquez wrote, the military and police personnel would "confront protesters as 'criminals' or 'enemies'" (2013, 425, own translation). Former executive secretary with the *Coordinadora* Rocío Silva Santisteban noted that the state would use narratives to portray the demonstrators in mining conflicts

5 These numbers include not only mining but also other social conflicts.

6 See, for example, the contribution of Ana María Vidal, representative of the *Coordinadora*, during the hearing on "Human Rights and Extractive Industries in Peru" held on May 25, 2017 in Buenos Aires, Argentina, during the 162nd Period of Sessions of the IACHR.

as "terrorists" or as "inferior others" who "oppose the economic development of the country," thereby discursively legitimizing the use of violence against these population groups (2013, 2016). Many activists in Cajamarca told me about their experiences of being labeled "resistant" or "violent enemies of the state" during the Conga conflict. They said that, in this way, the state had attempted to "discredit the protest movements' legitimate protests" and to "justify the use of violence." The use of force by the state was thus discursively negotiated within the social conflict. In addition, this form of state violence is structural in nature and there is a legal framework allowing for such abuses. In this sense, the state institutions secure themselves in the use of force not only through discursive argumentation but also based on legal norms.

One condition laid out in the law that facilitates the use of force by state actors in social conflicts is the possibility of contracts for "extraordinary services" between Peru's National Police (PNP) and private parties.[7] These contracts allow members of the PNP to carry out missions for the benefit of private actors, such as corporations. Companies operating in the extractive industries have made frequent use of this possibility in recent years and have "rented" officers to protect their properties. When providing these extraordinary services, the officers wear their usual uniform, equipment, and weapons (Velazco Rondón and Quedena Zambrano 2015, 23). Therefore, it is not always possible to determine whether they are providing such private security services or acting as public servants. Various authors have argued that this practice has led to a partial privatization of the Peruvian police (Kamphuis 2011, 72, 2012a, 540, Jaskoski 2012, 96, Silva Santisteban 2013, 446).

For this research, I analyzed several such contracts between transnational mining companies and the PNP.[8] These contracts stipulate that the individual police officers perform the extraordinary services "on a voluntary basis" during their holidays

7 Supreme Decree No 004–2009-IN; *Decreto Supremo que aprueba el Reglamento de Prestación de Servicios Extraordinarios Complementarios a la Función Policial* ("Supreme Decree approving the Regulation on the provision of extraordinary supplementary services by the police forces").

8 The analysis included a total of five contracts concluded between the PNP and the mining companies Minera Yanacocha, Empresa Minera Xstrata Tintaya, and Empresa Minera Las Bambas. The conventions were issued between May 2011 and October 2017. All documents are on file with the author. Three contracts were publicly available on the website of the Ministry of the Interior (2020), whereas two contracts were published by the information platform Servindi (2016). With regard to the Río Blanco project in Piura, it is not known whether the company had a contract with the PNP when the torture case occurred in 2005. However, the company coordinated with the police on the deployment of the special unit to protect its facilities when the incident occurred. Moreover, as Kamphuis (2011, 77) reported, a general of the National Police publicly explained that the company did not pay the police officers directly for their deployment but for their food and transport. This statement was also confirmed by David of *Fedepaz*. It therefore seemed that this case was more of an informal collaboration, rather than a contract-based cooperation between the PNP and the mining company.

or at a time when they are released from their normal duties (see also: Kamphuis 2011, 70). The conventions regulate the number of officers, the location of the operation, and the officers' tasks. In addition to the salaries that the officers receive based on these contracts, the companies also pay for their transport and food. However, all documents I examined explicitly stated that the contracts did not imply a direct employment relationship between the police officers and the mining company and that, consequently, no pension entitlements would arise for the officers. Most of the contracts stated, in addition, that "nothing in this convention shall be construed to mean that the PNP, or any of its members, are agents, partners, employees or representatives" of the concerned mining company.[9] Thus, according to the contracts, there is no subordination of the police, the company has no power of command, and the police must not be restricted by the extraordinary services in performing their functions of "maintaining internal order."

The legislation that allows for such private contracts dates back to the internal armed conflict. At that time, mines recurrently became targets of attacks by insurgent groups because they stocked large amounts of dynamite (Jaskoski 2012, 91). Peru, as a "weak" state that lacked financial resources, thus "invited" private companies to "subsidize state security forces," as Maiah Jaskoski (2012, 81) put it (see also: Avant 2005, 181). However, this practice was not limited to the time of the internal armed conflict but was also maintained after the return to democracy in 2000. Civil society organizations have argued that the legal basis allowing for such contracts is against the constitution since they violate the state's monopoly on the use of force in the sense of Max Weber (2014 [1919], 9). Legal NGOs have argued that by breaking its own monopoly on the use of force, the state would no longer fulfill its fundamental task, i.e. the protection of the rights of its citizens, and would instead place itself at the service of private economic interests. Therefore, it comes as no surprise, the NGOs argued, that the PNP has repeatedly used violence in conflicts between protesters and mining companies, since these same companies hold contracts with the police.

State authorities have repeatedly responded to this criticism from civil society by invoking the law. For example, in a hearing before the IACHR, a state representative argued that "there is a constitutional framework, a legal framework, a normative framework that allows the Peruvian state [to sign] these extraordinary agree-

9 See, for example: *Convenio específico de cooperación entre Minera Yanacocha S.R.L. y la Policía Nacional del Perú* (Specific cooperation agreement between Minera Yanacocha S.R.L. and the Peruvian National Police), issued in October 2017; document on file with author; own translation.

ments."[10] To underline this argument, he referred to the "Law on the Peruvian National Police,"[11] which regulates services of state security forces. Based on this example, I argue, first, that the exercise of state violence in social conflicts in Peru is structurally determined and made possible by law.

A second institutional aspect that allows the exercise of violence by state agents within social conflicts lies in the legal basis that, under certain conditions, grants impunity to members of the police and the army if they kill or seriously injure someone "in the performance of their duties" (*en el cumplimiento de su deber*). The legal basis that established this form of impunity has been revised several times in recent years. During the government of President Alan García, the regulation in the Peruvian Criminal Code on the "in-imputability" (*inimputabilidad*) was extended to include "reasons which exempt or diminish the criminal responsibility" of someone who violates the law. The corresponding article declares that, for example, minors cannot be held criminally liable. With a legislative decree adopted in 2007, the article was supplemented by a clause concerning the personnel of the armed forces and the police, which then read as follows:

> Article 20.- To be exempted from criminal liability is […]
>
> 11. The personnel of the Armed Forces and the National Police, who in the fulfillment of their duty and in the use of their weapons in a regulated manner, cause injury or death. – *Article 20.11, Peruvian Criminal Code, as applied from 2007 to 2014, own translation*

As Kamphuis wrote, it was the first time in Peru's history that "this type of immunity [had] been legally codified" (2012b, 236). In 2013, the Congress went even further by passing Law 30151, which again modified Article 20, paragraph 11 of the Criminal Code. With this modification, the term "in a regulated manner" was removed; instead, the phrase was supplemented and stated that to be exempted from criminal liability are police and military forces who "in the course of their duty and in the use of their weapons *or other means of defense*, cause injury or death."[12] Within the human rights movement, this change in the law caused great criticism and objection. Several legal NGOs protested against Law 30151 by declaring it a "violation of fundamental rights," a "carte blanche" for the state security forces, or even a "license to kill" (IDL 2013, 3, Vásquez 2013, 427). They feared that the change in the law would result

10 Hearing on "Citizen Security and Reports of the Irregular Use of Police Forces in Natural Resource Exploration and Mining Activities in Peru" held on 1 October 2018 in Boulder, United States, during the 169th Period of Sessions of the IACHR.

11 Article 51.1, *Ley orgánica de la Policía Nacional del Perú*.

12 Article 20.11, Peruvian Criminal Code, own translation, emphasis added. This version of the article applied until March 2020, when it was again modified.

in human rights violations committed by state security forces remaining in "absolute impunity" (Velazco Rondón and Quedena Zambrano 2015, 14). This is a second example that demonstrates the structural nature of police violence in Peru's social conflicts and the codification of impunity in the country's legal code.

IDL, a national human rights NGO based in Lima, argued that the law would award the state security forces a license to kill, even "when they act under the sponsorship of privates" (IDL 2013, 3, own translation), thus referring to the extraordinary services the PNP provides to companies. This also demonstrates how the various legal texts intertwine and form a pattern that allows for the use of state violence, which in most cases remains unpunished. There is thus a clear legal basis favoring the use of violence by state security forces.

Public prosecutors as doorkeepers

Peter Brett (2018, 45) noted that "[j]udicialisation requires courts willing to hear cases, and lawyers willing to support them." I agree with this statement, but I would add that in criminal law there is above all a need for prosecutors who are willing and prepared to accept and support a case and thus to enable legal mobilization. In this sense, I follow Johanna Mugler who wrote that:

> Prosecutors occupy an important function in the court process where the accountability of people who are accused of having committed a crime is discussed, interpreted and established. They can be pivotal in assisting victims of crime to seek "protection" from further harm and to obtain "justice". It is up to them to ensure that "everyone is equal before the law" by holding also the "rich, powerful and well-connected" to account for wrongdoings. And it is amongst their responsibilities that every accused receives a fair trial. (Mugler 2019, 24)

In Mugler's view, it is thus the public prosecutors who should uphold and defend the principles of legal liberalism of equal treatment before the law. They should ensure access to the courts.

Standing before the law's doors

Marina, the human rights lawyer mentioned at the beginning of this chapter, underlined the prosecutor's pivotal role by telling me that in an initial phase of a criminal proceeding, a case's success "doesn't depend on me, nor on the injured person, nor on anyone else, only on the prosecutor, right? That the prosecutor feels like saying: 'Well, that's what happened; let's go and see how it was' – so, that he's *concerned* with investigating." Thus, it is the prosecutor's decision whether to follow a specific case

or not. Since the opening of an investigation is the cornerstone of any criminal proceeding, a prosecutor thereby decides who has access to the system of justice and who does not (see also: Michel 2017, 196).

Therefore, I argue that prosecutors act as gatekeepers of the law, comparable to the doorkeeper in Franz Kafka's "The Trial." Kafka used a parable to describe how a guard stands "before the law" and prevents a man from the country, who wants to appeal to the law, from entering. He wrote that:

> The man from the country did not expect such difficulties; the Law is supposed to be available to everyone and at all times, he thinks, but when he takes a closer look at the doorkeeper in his fur coat, with his large pointed nose, his long, thin, black Tartar moustache, he decides he had better wait until he is given permission to enter. The doorkeeper gives him a stool and lets him sit down at the side of the door. He sits there for days and years. (Kafka 2009 [1925], 154)

Over the years, the man from the country repeatedly attempts to convince the doorkeeper to grant him access, but he fails. Shortly before his death, though, he asks the guard why he was the only one to ask for admission, in all those years, despite the fact that everyone is striving for the law. The guard replies, "No one else could ever be admitted here, since this gate was made only for you. I am now going to shut it" (Kafka 2009 [1925], 155).

I propose that in Peru's criminal proceedings the position of persons affected by human rights violations in relation to mining conflicts is comparable to Kafka's man from the country. They "stand before the law" and ask to be admitted but are hindered from doing so by a guard, which, in Peru, is the public prosecutor.[13] To the persons standing before the law it is not comprehensible which criteria the gatekeeper uses to decide whether to grant them admission. With the support of lawyers who represent and advise them, they submit evidence and invoke the existing procedural norms in order to convince the prosecutor of the necessity to open a criminal investigation, thus to let them access the law, but they often fail.

Mugler stressed that prosecutors "decide *who* to charge with a criminal offence, *what* charges to file and *when* to dismiss or withdraw a case" (2019, 21, emphasis added). In a similar manner, Verónica Michel noted, with regard to several domestic human rights trials worldwide, that "a prosecutorial organ dictates *what*, *when*, and *whom* to prosecute" (2017, 193, emphasis added). In this regard, "prosecutorial discretion" plays a major role, as both Michel and Mugler stressed. Mugler explained that prosecutors are equipped with "extensive powers of discretion to initiate or discontinue criminal proceedings on behalf of the state, backed by the power of the state"

13 In a similar manner, Michel described prosecutors as "key gatekeeper[s] of the courts" (2017, 193).

(2019, 21). In the mining conflicts in Peru, it is precisely this power of discretion prosecutors have to decide *when* and *who* to investigate for *what* alleged crimes.

According to the country's new procedural code, "[t]he Public Prosecutor's Office is in charge of exercising criminal action. It acts *ex officio*, at the request of the victim, upon popular action, or police report."[14] In addition, the prosecution is obligated to be independent, "adapting its acts to an objective criterion and being governed solely by the Constitution and the law."[15] In doing so, however, it enjoys discretionary powers. Discretion is part of the very nature of law. In any interpretation of the law – i.e. in the application of a legal principle to a specific case – there is a certain degree of discretionary power that allows for different outcomes. To rely on discretionary power is thus not against but, in contrast, inherent to law. In Peru's mining conflicts, human rights lawyers have argued, however, that there is a misuse of this discretional power on the part of the involved prosecutorial authorities.

To underline these accusations, the NGO lawyers referred, for example, to the collection of evidence, which is a central task of the public prosecutor's office. The reasons put forth by prosecutors to postpone judicial inspections and thus to gather evidence on site, such as in the case described by Marina, are perceived by the lawyers as inadmissible pretexts. Mar, the *Coordinadora* lawyer, told me that due to the prosecutors' unwillingness to gather evidence, this task often falls to the complainant side. She told me that:

> It's just that [the prosecutors] – *ex officio* – would have to see what evidence could help to know what happened. But no, it's never like that. If the [complainant's] lawyers do not constantly expedite things themselves, proposing evidence, and sometimes even bringing them the evidence, they would not do it. – *Mar, lawyer with the* Coordinadora, *January 2018, Lima (interview transcript)*

By gathering and submitting evidence, the complainants undertake tasks which, according to the law, are the responsibility of the prosecutor. Furthermore, if prosecutors close a case, it is up to the aggrieved party to appeal against this action in order to reopen the law's doors and to keep a case going. This was particularly evident in the torture case, in which *Fedepaz* repeatedly appealed against the orders to dismiss the claims. The lawyers had to exert constant pressure to ensure that the authorities would fulfill their duties as encoded in the law.

A specific characteristic of criminal proceedings is that, in contrast to civil law, the state is also among the aggrieved parties. A prosecutor is therefore a public lawyer who investigates, in many cases, *ex officio* when norms of the state were violated (Michel 2017, 196). Thus, the prosecutor's role is to defend both the rights

14 Article 60.1, New Peruvian Criminal Procedure Code, own translation.

15 Article 61, New Peruvian Criminal Procedure Code, own translation.

of the complainants and the interests of the state. Mirtha, an NGO lawyer from Cajamarca, told me in this regard, "The public prosecutor's office itself must be the defender of legality and normally plays the role of siding with the complainant because it is he who is reporting a crime, not only against him but against society, as well." A prosecutor who does not take action, even though he or she has knowledge of a violation of rights, acts not only against the interests of the injured party but also against the state.

The human rights lawyers argued that, furthermore, the prosecutors also act against the law, not because of relying on their discretional power not to investigate but because of their alleged misuse of this power not to do so. The NGO lawyers thus acknowledged that prosecutors hold a certain discretion to decide whether to investigate; they complained, however, that in cases of human rights violations involving corporate and state actors, the margin of discretion is improperly or even unlawfully interpreted against the complainants. According to the NGO lawyers, the reason for this is the alleged "lack of a political will" to investigate against powerful actors.

"A lack of political will"

The reasons for this alleged lack of political will to initiate investigations in the context of mining conflicts are probably as diverse as the public prosecutors and their personal backgrounds. One reason, which social movements' activists and human rights lawyers have repeatedly mentioned, is corruption. As Palujo, an activist from Celendín told me, "corruption changes people," thus the best trained and most dedicated prosecutor "is worth nothing" if he or she begins taking bribes. Another activist told me that corruption in the authorities leads to the fact that "they do not care about the truth."

Corruption[16] is a particular problem in regions like Cajamarca, where mining companies act as powerful regional players. At the same time, the phenomenon is also a central issue at the national level. During my stays in the field, discussions in Peru's national media and in public space were strongly influenced by the then recently revealed corruption scandal surrounding the Brazilian corporation Odebrecht. As in other Latin American countries, this scandal uncovered the bribery of a number of Peruvian politicians, including *all* five presidents who governed the country after the transition in 2000 until 2020, as well as many high-ranking politicians

16 As in other humanities and social sciences, a growing interest in corruption as a field of research can be observed within social anthropology in recent years (for an overview see, for example: Haller and Shore 2005, Torsello and Venard 2016, Anders and Nuijten 2017). Although I recognize the phenomenon as an important object of research, too, it would go beyond the scope of this book to include the theoretical approaches of the anthropology of corruption in my analysis. Rather, I consider and include corruption in this book as an emic concept that has emerged from the field.

and members of Congress. Because all the former presidents were investigated for corruption, social movements activists saw their suspicion confirmed that a network of high-level corruption links the government, members of Congress, and the judiciary to corporations. For many grassroots activists, corruption is one of the most striking features of the local judiciary. I have been told many times that "all prosecutors and judges are corrupt." This perception has led many activists to adopt a hostile attitude toward judicial and prosecutorial authorities, and it explains why many people are critical of legal proceedings. Interestingly, however, people direct their distrust mainly at the people who embody the law, i.e. judges and prosecutors, and the judicial system they represent, but not at the law itself as an idea and a social institution. Thus, people make a clear distinction between, on the one hand, judges, prosecutors, and the institutional system with which they come into contact due to the juridification of social conflicts, and, on the other hand, the law, of whose functioning they have a fixed idea and towards which they have a social expectation. In this context, corruption is seen as something that attacks and challenges the purity of law and its social function. This explains the supposed contradiction that people criticize the judicial system as corrupt and as therefore untrustworthy, while at the same time invoking the law and its ordering function in society.

In addition, the experience with corruption has also shaped the attitude of the lawyers who generally ascribe an emancipatory or counterhegemonic effect to the law. Mirtha told me that it is "obvious to everyone in Cajamarca" that mining companies use bribery to influence the judicial authorities and that this constitutes a large disadvantage for social movements. Despite the fact that the corruptibility of the judiciary is publicly known, however, it is difficult for human rights organizations to take legal action against corruption. Mirtha noted that:

> It's very easy for companies to collude with and corrupt authorities. It's very common here. So, you have to litigate in a context where you have a judicial power or a prosecution that is "presumably" corrupt [laughs], … and we say "presumably" corrupt because, for us, corruption does not leave any real traces. It is very difficult to prove, but it is evident that the actions of … for example, the public prosecutor's office, the mining company would almost not need lawyers because they have the public prosecutor's office defending them and trying to pull their chestnuts out of the fire, as we say here, right? – *Mirtha, lawyer with* Grufides, *February 2017, Cajamarca (interview transcript)*

With her statement that "the mining company would almost not need lawyers because they have the public prosecutor's office defending them," Mirtha also pointed to the social networks that link members of prosecutorial and judicial authorities with corporate actors. At the national level, it is the "revolving doors" through which individuals move back and forth between the private sector and the state adminis-

tration, thereby creating personal linkages and, consequently, an interdependence between institutions and corporations (Urteaga-Crovetto 2012, Durand 2016). At the local level, activists and lawyers complained about the revolving doors between the prosecutor's office and Minera Yanacocha, for instance. In addition, they also alleged direct personal networks and family ties between state and corporate actors that called into question the independence of the institutions.[17]

Corruption and other forms of personal linkages are thus a major obstacle to legal mobilization from below. At the same time, attributing the problem of influential public prosecutors and judges only to corruption would mean oversimplifying the situation. Rather, there are also subtle ways in which powerful actors control the judicial system. Various lawyers from Lima as well as their colleagues in the provinces told me about "trustworthy" and "just" prosecutors and judges who were known to be independent and incorruptible. The lawyers repeatedly observed how exactly these officials were transferred to other places, presumably as a measure of promotion. In Cajamarca, for example, a judge who was "*más o menos probo*" – "more or less righteous", as the activists described him – was "promoted" and transferred to the province of Chota. There he held a higher position in the institutional hierarchy, but he was, at the same time, far away from the court cases related to the mining conflicts in the southern provinces of the region. In the perspective of the lawyer who told me about this transfer, the judge's colleagues, who had proposed his promotion, had acted strategically to "get him out of the way."

Having the prosecutors and judges' individual situation in mind, I argue that judicial officers are personally exposed when they are involved in lawsuits dealing with corporate or state actors. They directly face pressure to close cases or to delay or even disrupt proceedings. Various other authors have written about disciplinary measures within judicial authorities in Peru and in other countries. Coletta Youngers (2000, 15–6), for example, described a tendency toward self-censorship in her research on Peru's judicial system during the Fujimori regime. Similarly, Matthew Hull (2003, 289, 300–1, 2012, 128), in his ethnographic research on Pakistan's bureaucracy, described how officials attempt to avoid personal sanctions by producing as little written material as possible that would allow conclusions to be drawn about their person. In this way, the officials attempt to "collectivize" the responsibility for individual decisions and actions. It goes beyond the scope of my research to discuss how individual officials of Peru's judiciary perceive such challenges, but these examples provide insight into the assertion that corruption is far from being the only reason for prosecutors' and judges' reluctance to investigate politically sensitive cases such as those involving human rights violations.

17 I discuss this point in Chapter 4 when analyzing a specific criminalization case from Cajamarca.

Furthermore, there are also structural reasons that lead to the prosecutorial organs lacking willingness. In court cases dealing with police violence, a state authority – the prosecutor's office – is required to investigate and punish the involvement in human rights violations of another state authority: the police. In Peru, prosecutorial and police authorities are institutionally close to each other and collaborate in everyday work. The NGO lawyers see this as a reason why judicial authorities are reluctant to take action against the police. Despite this institutional closeness, however, the human rights lawyers also claim that the prosecution often lacks the specific expertise to take action against police forces, as Mar noted:

> They also don't know about the procedures of the police, nor do they know how the police work administratively, how decisions are made within the police; and so, they don't know what evidence, what documents to request, who to call to testify. And of course, the police and the army don't help them at all, right? – *Mar, lawyer with the* Coordinadora, *January 2018, Lima (interview transcript)*

The case of the five men killed during the Conga conflict confirmed this allegation. All the attempts made by the *Coordinadora* to investigate these deaths were ultimately unsuccessful since the authorities argued that it was not possible to identify the direct perpetrators – that is, the police officers or the members of the armed forces who had shot the demonstrators. Although forensic investigations, the so-called *peritajes judiciales,* proved the involvement of the police and the military in the killings, the case was repeatedly dismissed. The state security forces allegedly withheld information by claiming that the *cuaderno de afectaciones,* the list in which the distribution of weapons to the units was recorded, no longer existed. Without this information from within the institution, it was impossible for the prosecution and the complainant's lawyers to trace who the shooters were.

Furthermore, and as explained above, Peruvian police officers and members of the army are exempt from punishment if they seriously injure or kill people "in the fulfillment of their duties." In a few cases, the judicial authorities invoked this law to justify the termination of prosecution against members of the police.[18] Mar confirmed to me, however, that in the actual proceedings it is not this legal norm which causes impunity, but rather the fact that the prosecution does not investigate other state authorities, such as the police or the army. This means that the cases never reach the procedural level where the law on police impunity would be applied. The

18 The first case that came to light in this regard concerned a group of police officers who had violently attacked student protests in the Huancavelica region in 2011. The four police officers were under investigation for the deaths of four students. In the first instance, however, they were acquitted on the basis of Law 30151, the law on police impunity (court ruling on file with author, see also: Fowks 2012).

law on impunity was therefore, in Mar's opinion, a political decision to provide reassurance to the state security forces and also served as a political message to the public. In practice, however, the security forces do not need the law on impunity at all because the public prosecutor's office protects them from criminal prosecution anyway, as Mar claimed.

Finally, there are also institutional issues that complicate criminal proceedings. *Fedepaz*' lawyer David complained that the actual "administration of justice" was, in large part, not functioning properly. As in many other parts of the world, the high case load is a major issue in Peru. To overcome this difficulty, a judicial reform has been underway for several years. This reform involved the introduction of a new procedural code in criminal law. The aim of the reform is to make the system of justice more "efficient," for example, by simplifying processes and by including innovations such as electronic court files and the digital notification of the parties (Ministerio de Justicia y Derechos Humanos 2016, 9–10). According to David, under the old procedural norms, the process of notifying parties – i.e. informing the parties about a further step taken by the authorities – can take two months. In Cajamarca, I observed the false notifications repeatedly leading to problems because complainants or defendants were not correctly informed at their *domicilio procesal* (officially registered address) and thus had no knowledge of upcoming court hearings, which led to delays in the proceedings. The human rights lawyers' hope is that the situation will improve somewhat with the new procedural code. However, it will still take time for this reform to be fully implemented.

All these points illustrate that complaints about human rights violations get stuck in the system not just because of the "lack of political will" of the public prosecution authorities or because of corruption. Rather, there are many other causes and preconditions that also impede legal mobilization from below.

Altering the opportunity structure for legal mobilization

Given these circumstances, to what extent does it make sense for lawyers in Peru to invoke the law and use judicial means to support people affected by human rights violations? To return to Kafka's parable, I argue that in the light of prosecutors' wide discretion in criminal proceedings, it is the role of these lawyers to guide the "people from the countryside," who stand "before the law," through the criminal process and to ensure their access to the justice system, thus to ensure that they may pass through law's door. From a theoretical point of view, this is what Gloppen (2018) labeled altering the involved actors' *legal opportunity structure*.

This includes, first, the attempt to change the opportunity structure of judicial authorities by improving the "courts' responsiveness" (Gloppen 2018, 18) to cases of human rights violations. As already mentioned, many legal NGOs in Peru form part of transnational advocacy networks. Within these networks, the NGOs ask interna-

tional partner organizations to write and submit so-called *amicus curiae* letters to the courts in Peru.[19] These *amicus curiae* letters serve, first, to demonstrate a judicial case's international support. In this sense, they allow one to "put the spotlights on a judge," as a lawyer working with IDL noted, and to make a judge feel that an international audience is closely following the case he or she is dealing with.[20] Second, the aim of *amicus curiae* letters is also to provide judges with information concerning, for example, developments in international law. In complex lawsuits, judges must often decide on specific details on which they lack expertise or in relation to which there is not much jurisprudence. Maritza, an IDL lawyer, told me that *amicus curiae* letters may be of great support. She said, "As the name suggests, it is an advice from a 'friend of the court,' and a judge may or may not consider it." In her experience, however, many judges in Peru accept the statements provided by foreign legal experts, which is, in a global comparison, not always the case.[21]

This supply of legal expertise and technical support can also come from the directly involved human rights lawyers or from the complainants themselves, as another example revealed. According to the *Coordinadora*'s reports, it has only been possible in one case to hold police forces accountable for the killing of protesters during social conflicts. A lawyer from Lima told me that, in this one exceptional case, three police officers and one superior were sentenced for the shooting of student activists in the Huancavelica region. The favorable ruling was made possible because of constant pressure of the students' families and because "the prosecution was given technical support and that the prosecutor accepted that help."[22] To alter prosecutors' and judges' opportunity structure thus means to strike a balance between placing external pressure on the authorities and at the same time providing them with support.

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19 Some lawyers also rely, in these attempts, on contacts with law clinics, for example of universities in the United States. An activist from Celendín told me that they prefer the intervention of foreign law clinics to that of foreign NGOs because the foreign law clinics are often considered by Peruvian judges to be "more independent" and therefore more trustworthy than NGOs.

20 In Chapter 5, I discuss this strategy of using external pressure, which is widely used by transnational advocacy networks, not only in Peru, but in many other countries (Keck and Sikkink 1998).

21 A lawyer working with ECCHR in Germany told me that in India, unlike in Peru, for example, there was, in her experience, no point in filing an *amicus curiae* letter because Indian judges would interpret such an intervention as "legal imperialism" and would reject it on the grounds that they did not allow foreign lawyers to explain to them how to dispense justice. Judges in Peru, in turn, are said to be more receptive to such interventions, although this does not mean that they follow the foreign advice in their ruling.

22 This is the same case from Huancavelica that has already been mentioned regarding the application of the law on impunity for police officers. In the first instance, the police officers were acquitted on the basis of law 30151. However, the higher court then issued a conviction against the police forces. Court ruling on file with author.

This strategy also considers that prosecutors and judges are under great pressure from other state institutions or corporate defendants, as I mentioned above.

A second way of influencing prosecutorial or judicial authorities' behavior is by relying on the state institutions' ratification process, thus on the official accountability mechanism. At the time of my fieldwork and until June 2018, judges and prosecutors in Peru were elected and appointed by the plenary of the National Council of the Judiciary (*Consejo Nacional de la Magistratura, CNM*).[23] Every seven years all judges and prosecutors had to undergo ratification by the CNM, which should ensure the authorities' accountability. Several human rights lawyers in Lima and Cajamarca told me that they had made active use of this ratification process to put pressure on the authorities, for example by filing complaints about specific judges.

Third, there are also legal means of intervening against the inactivity of authorities who do not follow their duties. In the torture case from Piura, for example, the inadmissible actions of the responsible public prosecutor were especially obvious. The complaint filed by *Fedepaz* and the *Coordinadora* included allegations against the local prosecutor for his failure to report the committed crimes despite being present during the events. This led to a criminal investigation. In 2012, the public prosecutor was sentenced to a three-year imprisonment, a disqualification for public functions for one year, and the payment of 6,000 Nuevo Soles (approximately US$3,000) for civil reparation (Velazco Rondón and Quedena Zambrano 2015, 51). This demonstrates that prosecutors cannot be sure that they will be protected from prosecution for their inaction.

Thus, the human rights movement in Peru reacted to the set of obstacles and hurdles in the judicial system with various strategies from the legal field, as well as beyond. As Mar told me, "In reality, these cases are not only defined by what the rules say. They are super political cases, so you have to use all the tools." In the following chapters, I discuss various examples of how the Peruvian human rights movement has applied these strategies and tools to make a difference in human rights litigation and to guarantee access to the legal system.

23 Article 150, Peruvian Political Constitution of 1993. The only exceptions were those judges appointed by popular vote, for example judges of the peace. The CNM was a constitutionally autonomous body, its members were appointed by various state institutions. Due to the involvement of members of the Council in a major corruption scandal, the body was suspended by President Martin Vizcarra in July 2018 and, following a reform, replaced by the *Junta Nacional de Justicia*, which took over the CNM's tasks in February 2019 (La Ley (online) 2018, 2019).

Attributing corporate liability

According to Peru's human rights movement, there are various reasons to take action in the judicialization processes over mining against the companies and not only against the direct perpetrators of the abuses, who often belong to the state. These includes moral, legal, and political considerations. In the third part of the chapter, I discuss this strategy of attributing corporate responsibility. First, I examine the specific hurdles that arise from the involvement of corporate defendants. With the so-called civilly liable third party, I then discuss a strategy used by Peru's human rights movement to overcome these difficulties. This provides further insight into the possibilities of legal mobilization *from below*.

Powerful opponents, insufficient resources

> There is an asymmetry – that is to say, you have to fight against someone who is much more powerful, who has various weapons at their disposal to act against you, against the aggrieved people, right? It's very difficult, it's very complicated. […] We're always going to be at a disadvantage. – *Mirtha, lawyer with* Grufides, *February 2017, Cajamarca (interview transcript)*

There are several reasons why human rights lawyers are "always at a disadvantage" when facing corporate defendants, as Mirtha put it. One important reason is again the issue of corruption and, consequently, the lack of independence of judicial and prosecutorial authorities. A lawyer working with IDL in Lima told me about a case from Espinar, a mining region in the southern part of the country, where a mining company constructed the building in which the public prosecutor's office later operated. Such examples demonstrated, in this lawyer's view, how the independence of authorities is compromised because "you don't bite the hand that feeds you," as she said. Social movement activists and human rights lawyers in the provinces and in Lima all shared this complaint about the "corporate capture" of judicial institutions. Leo, an activist with the PIC, told me that judicial officials always "go against the ordinary citizen but never against the economic power," and Milton complained that "the state is captured by economic power, and [its institutions] act according to the needs of the companies, not the needs of the people." They all agreed that the complexity of judicial proceedings in Peru's mining regions is further aggravated by the entry of powerful players such as TNCs.

The fact that legal NGOs are at a disadvantage compared to companies in court proceedings is also related to financial and human resources. Elena, a former NGO lawyer who now works for a state institution, told me that "the mining companies' strategy is to tire us out (*cansarnos*)." She told me that companies would take advantage of the fact that NGOs have limited financial resources, and it would there-

fore benefit the companies if court cases were delayed. "Whatever step we've taken, they've always attacked us," she said. By using all possible formal and legal arguments, corporate defendants attempt to prevent, delay, or dismiss claims, which requires extensive resources and expertise from the side of the NGOs to oppose these efforts.

As mentioned in the second chapter, the leading human rights lawyers in Peru are well educated and experienced. Most of the lawyers in Lima graduated from prestigious universities. Many of them have been litigating human rights violations for years or even decades and have extensive legal experience. Nevertheless, many of them consider their counterparts to be dauntingly powerful. They complain that companies have infinite financial resources, which would allow them to hire an "army of lawyers." Marina told me about her experience of the judicial inspections, wherein the complainant and defense counsel, along with the prosecution, visit the scene of the alleged incident to establish evidence. She said that normally "about eight or nine engineers, about four, five lawyers, and all the staff of the mining company go to the site. In contrast, we went… Well, only one of our lawyers went there." Similarly, IDL lawyer Juan Carlos told me about a case in which he represented an indigenous community in the Amazon region that was affected by an oil exploration project. He recounted:

> In the hearing there was an indigenous leader, a young lawyer who had just obtained his title, and me. On the opposite side: Eighteen lawyers from the four main law firms in the country, including an ex-vice minister, who went to the judge and said: "I was vice minister, I was in the Ministry of Justice, just to make this clear." – *Juan Carlos, lawyer with IDL, February 2017, Lima (interview transcript)*

The difference in power between corporate and NGO lawyers also has, in the experience of the latter, a clear gender aspect. A large proportion of Peru's human rights attorneys are women; lawyers I worked with in the field – such as Mar, Rosa, Mirtha, Juliana, Maritza, Vanessa, and Marina – confirmed this picture. Although Juliana complained that the leading positions in many human rights NGOs are still held by men, the crucial and determining role that women play within the organizations is undisputed. On the opposite side, however, the situation is quite different. Elena told me that from her experience with litigating corporate abuses, on the companies' side "there were all male lawyers and all from Lima; there were no lawyers from here," from the provincial town in the highland where Elena lived and worked.

In addition, there are several legal obstacles in attributing corporate responsibility. From a legal perspective, the difficulty in suing corporate actors often lies in proving causality. In cases of contamination or environmental damages, for instance, the aggrieved party must prove the link between a company's activities and the harm that has occurred, for example the pollution of water sources. Vari-

ous lawyers working for NGOs in Lima told me that they often lack the necessary technical reports to prove this link. An example of this are the attempts to bring legal actions in the Espinar region in Peru's southern parts against mining company Antapaccay, a subsidiary of Swiss mining company Glencore. As various lawyers working on this case told me, the judiciary would not recognize independent studies by universities. When the NGOs requested a technical study from the relevant state institutions, they learned that the authorities either did not have the capacity, the knowledge, or the will to carry out these studies. As no evidence could be provided, the company evaded judicial proceedings.

In cases of human rights violations, the difficulties lie in proving the causal link between a corporation's behavior and the misconduct of police officers, for instance, who shot or injured protesters. For complainants, it is difficult to understand how the collaboration between the police and the mining companies work in practice, how and by what means instructions are given, and how the chains of command function. The contracts between the mining companies and the PNP that I described above had, for a long time, been "confidential," meaning that they were not available to the public. Due to pressure from the human rights movement, this has changed, and all inter-institutional contracts currently in force are now publicly accessible on the Ministry of the Interior's website (Ministerio del Interior 2020).

However, these contracts only provide general information, such as the agreements between the police and the corporation concerning the area of operation, the supply of food, or the equipment provided to the police units. It remains unclear how the collaboration works in practice. Human rights lawyers who attempt to base their claims against the corporation on this collaboration with the police can only rely on this public information and lack access to documents from within the corporations or state institutions. Pedro, a lawyer who worked with IDL, told me that companies in Peru are not obligated to disclose their cooperation with the police and that they are also "not so honest" to do so on their own initiative. And state institutions, for their part, are likewise not transparent enough to inform about this, he added.

Furthermore, there is an ongoing debate among human rights lawyers in Peru regarding whether the legal basis is actually suitable to attribute corporate liability, especially with regard to criminal cases. Some lawyers in Lima and Cajamarca told me that the problem is that "in criminal law there's supposed to be personalized authorship" and that, therefore, "a legal person cannot be the object of criminal liability." If legal actions are taken against the natural persons – that is, against representatives of the company – it is often not possible to prove that this person was directly involved in the offenses. In addition, a lawyer told me that when managers are sued, the problem is that the company will simply replace them, but the company's behavior may not change. This in turn provides support for suing the corporation as a legal entity. However, as another lawyer told me, "it is still under debate whether this is possible." Pedro told me that he is observing efforts in academia in Lima to ad-

dress corporate criminal liability but that political discussions have not yet reached this point and that "Congress is thinking more about other things." Therefore, the "norms are not designed to hold companies legally responsible for the crimes they commit," as Mirtha put it.

Mirtha added that some state institutions have now realized that the existing legal regulation is inadequate with regard to the field of business and human rights. She told me that Peru's authorities followed the international developments on this issue and made efforts to support and implement the many *soft law* approaches and multi-stakeholder initiatives which have emerged in recent years. The Voluntary Principles on Security and Human Rights played a pivotal role in this. Many of the transnational mining companies operating in Peru have committed themselves to these voluntary standards, which make legally non-binding recommendations on how companies should conduct their cooperation with public and private security forces.[24] According to Mirtha, however, the Voluntary Principles are only "*un saludo a la bandera*," a symbolic gesture, which is based on the companies' self-regulation and not on state regulation. Mirtha said that this initiative would not work to sanction companies for abuses they committed. She referred to the so-called *governance gap* on corporate responsibility, which arises between the inadequacy of state regulation, on the one hand, and the lack of effectiveness of so-called *soft law* regulations, on the other (Zerk 2006, Simons and Macklin 2014). Thus, I learned that the legal framework is insufficient to attribute liability to mining companies in Peru.

However, I then talked to *Fedepaz* lawyer David about this issue and asked him whether the lack of corporate criminal liability in Peru was the reason the investigations against the company involved in the torture case had been dropped. David raised his eyebrows and asked, in a stern tone, "Who claims that there is no corporate criminal liability in Peru?" He then reached for the penal code lying on his desk, opened it, and read the following:

> Article 105: Measures applicable to legal persons
>
> If the punishable act was committed in the exercise of the activity of any legal person or by using its organization to favor or cover it up, the judge must apply all or some of the following measures:

24 For instance, Newmont Mining Corporation, Minera Yanacocha's main shareholder, joined the Voluntary Principles in 2002 and became an active member of a multi-stakeholder group that aims at implementing the principles in Peru (RESOLVE 2016, 14). For a detailed discussion of the Voluntary Principles on Security and Human Rights, see: Pitts 2011, Hönke and Börzel 2012, 22–35, Simons and Macklin 2014, 122–9.

> 1. Closure of its premises or establishments [...].
> 2. Dissolution and liquidation of the company, association, foundation, cooperative or committee.
> 3. Suspension of the activities of the company [...]. – *Article 105, Peruvian Criminal Code, own translation*

According to David, the legal basis for corporate liability is thus clearly stated, and it is, in his opinion, quite strict. To make this clear, he said, "In Peruvian law there is only one form of the death penalty," which is enshrined in Article 105, with the possibility of a judge ordering the dissolution of a company. The problems in attributing corporate liability are thus, in his view, not judicial but political problems.

Vanessa, a lawyer who worked with the NGO *CooperAcción* in Lima, agreed with David's opinion, and told me that this example revealed, once again, that the problem does not lie in the legal basis but in its implementation. She explained that by Latin American standards, Peru, "together with Colombia and maybe Brazil, has a progressive legislation with regard to the regulation of companies, even if there are still some gaps in the legislation." In her opinion, the problem arises not from the law itself but, first, from access to the legal system in order to use the legislation and, second, from the implementation and enforcement of this legislation.

By taking a closer look at the individual cases, we can observe what this actually means. In the torture case from Piura, for instance, *Fedepaz* also attempted to make the legal responsibility of the mining company Río Blanco and of the private security company Forza an issue in the criminal proceedings. In the complaint, the NGO lawyers demanded that an investigation be opened against the mining company's security personnel for the crimes of torture and aggravated kidnapping. In addition, in its further description of the incident, the complaint mentioned that several detainees alleged the involvement of corporate employees in the abuses (see also: Kamphuis 2012a, 546). In its concluding section, the complaint demanded to "clarify the level of participation of the company's employees in the commission of the crimes" and listed several indications "of the corporate managers and security personnel's responsibility in the reported events, by showing a high degree of knowledge of what was happening, as well as by the provision of assistance for the development of police activities."[25]

25 Criminal complaint to the *Quinta Fiscalía Provincial Penal de Piura*, p. 22; document on file with author; own translation. As David explained, for tactical reasons the degree of involvement of the company was not mentioned more specifically. For example, the company was not directly accused of "aiding and abetting" the police because it would have been possible that the company representatives were involved as "direct perpetrators," as David told me, and "it is not the complainants' job to clarify and define the degree of involvement of an accused," as he further noted.

In the proceedings, the task was then to effectively prove the corporations' involvement in the abuses. There was no available evidence that the company Río Blanco had a contract for extraordinary services with the police because, at the time, these contracts were still subject to a confidentiality clause. It was clear to the lawyers involved that corporate actors had decisively contributed to the torture and the kidnapping of the group of protesters, for example by providing logistical support to the police forces. But they lacked the evidence to prove this support. The fact that the incidents took place within the company's property supported their position. In addition, it became apparent during the criminal proceedings that key company representatives in Lima were informed of the events within the mining camp in which the abuses occurred (Kamphuis 2012a, 547). However, the investigation against the mining corporation and its employees as well as against the private security staff was dropped during the legal procedure. The public prosecutor's office decided that due to the lack of evidence, it could not find a responsibility for the alleged acts on behalf of the corporate actors.

Fedepaz' lawyers then decided not to insist on this issue because, as David told me, "this would have endangered the entire court case," and they would have risked the entire proceeding being dismissed. As I mentioned above, the case against the police officers had been dropped four times, and *Fedepaz* had managed to win the appeal against this decision four times, which, however, took much time. The NGO lawyers then decided, for strategic reasons, to leave the issue of corporate responsibility out of the proceedings for the moment and to move forward with the accusation against the police. *Fedepaz*' strategy was to bring forth the case against the police officers directly involved and against their superiors and to ensure that a trial would finally take place to discuss these actors' responsibility. Within or after the trial, it would then be possible to bring up the "indications of the company's responsibility" again and to request further investigation into this issue, as David told me. Thus, his strategy was "to leave something behind in order to achieve more in the end." In the torture case, the issue of corporate responsibility was abandoned in order to allow for a trial against the police. In this sense, the case was one of many cases of human rights violations in Peru in which the corporate actors – and, until the time of writing, also the state actors – have remained unpunished.

Addressing the civilly liable third party

If we take a step back and consider Peru's human rights litigation dealing with corporate and state actors' abuses as a whole and over a longer period of time, it is clear that the strategies of legal NGOs follow a kind of trial-and-error principle. Approaches that worked well in one case have been applied in other proceedings. The exchange in networks, such as within the *Coordinadora* – where NGO lawyers from different areas meet and discuss their cases – serves as an important platform for

sharing and passing on experiences. This exchange in turn gives rise to new strategic approaches. Based on the cases that I have analyzed for this research, I see the approach of relying on the figure of the *tercero civilmente responsable*, the so-called "civilly liable third party," as the judicial approach that currently seems most promising to hold corporate and state actors liable.

According to the new Peruvian Code of Criminal Procedure, a *tercero civilmente responsable*, or a civilly liable third party, is a person who "together with the accused, bears responsibility for the consequences of the crime" and who can therefore be incorporated into the criminal proceeding.[26] Thus, it describes "not those who committed the crime, but rather those who, by virtue of a legal mandate, will be civilly responsible together with the accused" (de las Casas 2015, 222, own translation). This can be, for example, a contractor, a state institution, or an employer, such as a company. The idea behind this doctrine is that the legal subject with whom the perpetrator was in a dependent relationship – i.e. who exercised control over the perpetrator or on whose behalf the perpetrator was acting – bears a civil responsibility, as well. Within the criminal proceedings, the inclusion of a party under this legal figure occurs at the request of the prosecutor or the civil party and is decided on by a judge.[27]

The figure of the civilly liable third party represents an innovation in Peruvian criminal law, which was introduced with the new Code of Criminal Procedure. As Mar, a lawyer with the *Coordinadora*, noted, the use of this figure allows one to complement criminal law with civil proceedings and to take action against the authorities or a private party who gave instructions that led to rights abuses. Roberto Pérez-Prieto de las Casas (2015, 222) noted, from the perspective of legal theory, that, although the figure of the civilly liable third party is laid out in criminal law, the character of this figure is much more influenced by the idea of civil law. In principle, it is a figure used to secure a compensation payment, which is part of civil law. Consequently, with this figure, the complainants have the possibility of claiming civil compensation from a third party, but within the same criminal proceedings in which the criminal liability of the direct perpetrator is being discussed. As I will now illustrate with two examples, this approach serves as a valuable instrument to litigate against both state and corporate actors.

The torture case from Piura is one of these cases where the figure of the civilly liable third party was used. The case had begun under the old procedural order but was then transferred to the new regulations due to the long duration of the proceedings. This transfer allowed *Fedepaz* to file a request in 2011 to include the Ministry of the Interior as a civilly liable third party in the case (Fedepaz 2018b). The request was justified on the grounds that the ministry is responsible for the police and thus for

26 Article 111, new Peruvian Criminal Procedure Code, own translation (see also: de las Casas 2015, 218).

27 Article 111 and 112, New Peruvian Criminal Procedure Code.

the officers and their superiors who were prosecuted in the torture case. The intention of this judicial action was to urge the judiciary to deal, in the proceedings, not only with the responsibility of the individual police officers but also with that of the institution to which the police force is accountable.

It took the judicial authorities several years to respond to the request to include the Ministry of the Interior. In May 2017, during my stay in *Fedepaz*' office, the corresponding court ruled on the basis of a procedural, formalistic argument that the application was inadmissible and dismissed it. *Fedepaz* appealed and succeeded a year later when the Court of Appeal decided to admit the request and to include the ministry as a civilly liable third party in the proceedings (Fedepaz 2018b). This was a great success, as David told me, from a legal point of view, on the one hand, as it was the first time under the new Code of Criminal Procedure that the Ministry of the Interior was involved as a civilly liable third party in a case concerning human rights violations. On the other hand, and more importantly, it was also a success from a political point of view. According to David, it makes a large difference whether only the responsibility of the police officers and their superiors is addressed, or whether a lawsuit also negotiates the responsibility of the corresponding state institution for the abuses. Thus, if the trial in the torture case eventually begins, the authorities will also have to face responsibility, which is fully in line with the aims of the human rights lawyers to hold state institutions to account in order to impose a social change (see Chapter 2).

The second case in which the figure of the civilly liable third person was used in a promising way was the criminal proceeding in favor of Elmer Campos, a *campesino* from the Cajamarca region. During the Conga protests in November 2011, Elmer was shot and seriously injured by the police. Along with other *campesinos* who were wounded in the same protest march, he became a complainant in a criminal proceeding against the police forces. Mar, the *Coordinadora* lawyer, assumed the representation of the aggrieved party. Within the proceedings, the complainants' side requested that the judicial authorities include, as civilly liable third parties, the Ministry of the Interior and the company Minera Yanacocha, which had had a contract for extraordinary services with the police at the time the incident occurred (Ordoñez 2017).[28]

As in other similar cases, the complainants' lawyers faced the difficulty of proving that there was a causal link between the contract for extraordinary services and the committed abuses, thus the difficulty of proving that the mining company had control over the police forces who shot the *campesinos*. In this case, however, the human rights movement found a way to overcome the existing obstacles. As I discuss

28 *Convenio de prestación de servicios extraordinarios complementarios a la función policial entre la Policía Nacional del Perú XIV-Dirección Territorial de la Policía-Cajamarca y Minera Yanacocha SRL*, issued in March 2011. Document on file with author.

in Chapter 6, the international NGO EarthRights International used a legal mechanism in the United States that made it possible to obtain internal corporate documents from the U.S. parent company Newmont Mining. These documents contained detailed information about the coordination between the mining company and the police forces involved in suppressing the protest march.

The documents obtained abroad allowed the Peruvian human rights lawyers to introduce evidence into the proceedings about the police's subordination to the mining company. Within the proceedings, Minera Yanacocha argued that there was no such relationship of subordination because, first, the contract with the police stated that there was no employment relationship between the police officers and the company. Second, the company argued that the Peruvian Constitution does not allow the police to be subject to the orders of third parties. The company claimed that it did not give any orders but merely had a general contract that mandated the police to ensure security around the mining camp. In December 2017, however, a court in Cajamarca decided to involve Minera Yanacocha in the proceedings as a civilly liable third party. At the time of writing, the case was still in the phase of the *control de acusació*n, i.e. in the last phase before the start of the actual trial, which would then lead to the judgment. Therefore, it remains to be seen whether Minera Yanacocha will actually be convicted and will have to pay compensation. However, the fact that the company was included in the process already represents a major political success for the involved NGOs.

The advantage of the strategy of using the figure of the civilly liable third party is, according to Mar, that more "emphasis is placed on the institutions rather than only on the individuals." This means that the responsibility of the mining company or the Ministry of the Interior is at stake instead of just the responsibility of an individual police officer.[29] David added that police violence in Peru is often structural in nature, so it is important to question the structures and processes within state institutions rather than just punishing individual perpetrators. The use of this judicial figure thus allows legal NGOs to raise the issue of the institutional responsibility of the state in these criminal proceedings.

In addition, Elmer's case illustrated the attempts to enforce moral responsibility, which the local communities ascribe to Minera Yanacocha, in the legal field. The use of the civilly liable third party makes it possible to negotiate the shared responsibility of Minera Yanacocha and the Ministry of the Interior. If only the company's criminal responsibility were being addressed, the case would be more likely to be dropped because there is no evidence that the company was directly involved in the crime. It was members of the police who fired at the demonstrators. The figure of the civilly liable third party reduced the complainants' burden to prove the causal link between

29 Eckert (2016, 252) also noted this focus in the attribution of responsibility to the "*Befehlsverantwortlichen*," i.e. the commanders, in her research on India.

the corporations' behavior and the police. Thus, by relying on this judicial figure, the human rights lawyers use a different narrative of causal responsibility and thereby attempt to overcome the obstacles that exist in criminal proceedings in Peru. To hold Minera Yanacocha responsible as a civilly liable third party, it must only be proven that there was a relationship of subordination between the police and the company, which is easier to demonstrate than the *direct* involvement of corporate actors in the abuses.

Conclusion

The examples of legal mobilization from below discussed in this chapter illustrate the obstacles faced by the legal NGOs. Litigating cases of human rights violations that involve transnational mining companies and in which the perpetrators have acted on behalf of the state is additionally challenging. Corruption, the alleged lack of political will on the part of the authorities to take action against powerful actors, difficulties in gathering evidence, and structural reasons, such as the poor functioning of the judicial administration, lead to court cases being dismissed, delayed, or protracted.

In the majority of cases, the door to justice remains closed for those people who live on the margins of Peruvian society. In order to be able to take it up with the doorkeepers of the law – the public prosecutors – and the enforcers of the law – the judges – these people need very specific knowledge of the legal process so that they can take advantage of the law and use it as an emancipatory tool. However, because those affected by human rights violations do not have this knowledge, as they are not experts, but rather "one-shotters" in law (Galanter 1974, 97), they depend on the legal NGOs' support.

The Comaroffs wrote that "it is neither the weak nor the meek nor the marginal who predominate in [legal processes]" (2006, 31). In legal proceedings, those who are able to utilize the means offered by the law prevail. I agree with the Comaroffs that it is often those who have the greatest financial resources and technical expertise who exercise the greatest power over the decision-makers in the law. However, this is at the same time a pattern rather than a fixed rule. Attempts to change the opportunity structures of legal mobilization and to use the existing legal basis strategically *from below* can, in certain circumstances, enable those who have fewer resources to succeed. This illustrates that the law is, in most cases, not a "weapon of the weak" (Scott 1985), but it may serve as an emancipatory means for those who try to empower the weak. In this sense, I follow Ewick and Silbey, who wrote that using the law in a strategic way means to "[incorporate] not only a pragmatic account of social practice, but also a normative aspiration" (1998, 227). The approach of strategic human rights litigation is based not only on the idea that it is possible to use the law to

strive for social change, but also on the wish or the normative aim that this may be possible.

In her presentation to law students at the *Universidad Católica* in Lima, in which she said that "justice is slow, and justice is not always just," Juliana upheld the use of the legal system *despite* all the prevailing difficulties. She argued that the various mechanisms of the law must be used, for example, by adopting the approach of strategic litigation or by using political mechanisms that lie outside the legal system and thus beyond the law. I discuss these different mechanisms in the following chapters.