

ARTICLE

## The Dark Side of Judicialization: Criminalizing Mining Protests in Peru

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### Abstract

Social conflicts stemming from industrial mining projects in Peru have increasingly been fought in court cases in recent years. This article analyzes the dark side of this judicialization of mining conflicts, a process through which state authorities criminalize participation in social protests and attempt to prevent the mobilization of social movements. This use of the law by public authorities is an example of the so-called shrinking space in which the scope of action of civil society actors is increasingly restricted and constrained worldwide. This article presents an in-depth analysis of a specific court case against a group of mining opponents in the Cajamarca region of Peru. Based on ethnographic field research conducted in Peru, the article discusses three different modalities of the law's domination, exploring the various ways the law rules those who oppose large-scale extractive projects.

**Keywords:** criminalization; legal mobilization; shrinking space for civil society; mining conflicts; Peru

### Resumen

En los últimos años los conflictos sociales provocados por los proyectos mineros industriales en Perú se han judicializado cada vez más. Este artículo analiza el lado oscuro de la judicialización de estos conflictos mineros, un proceso a través del cual las autoridades estatales criminalizan la participación en las protestas sociales e intentan impedir la movilización de la gente que se opone a la minería industrial. Este uso de la ley por parte de las autoridades es un ejemplo del llamado espacio reducido en el que el campo de acción de los actores de la sociedad civil está cada vez más restringido y limitado en todo el mundo. Este trabajo presenta un análisis profundo de un caso judicial específico contra un grupo de opositores a la minería en la región de Cajamarca. Basándose en una investigación de campo etnográfica realizada sobre el terreno, el artículo analiza tres modalidades diferentes de dominio de la ley, explorando las diversas formas en las que esta gobierna a quienes se oponen a los proyectos extractivos a gran escala.

**Palabras clave:** criminalización; movilización legal; reducción del espacio para la sociedad civil; conflictos mineros; Perú

## Notes from the field

A few days before the trial began, we sat on the small veranda of the house where the activists in Celendín usually met and had coffee together. It was raining cats and dogs; Milton looked tired and was unusually silent that day. We had talked about the trial several times before. He had told me about the protests in Sorochuco in which he had participated four years earlier. I knew that the then governors of Sorochuco and Celendín had been urged to resign during the protests because of their support for the Conga mining project. Milton had also previously told me about the charges that the governors subsequently filed against him and other activists and about the resultant criminal investigation.

That day, however, we talked for the first time about what the consequences might be were he and his *compañeras* and *compañeros* to be convicted by the court, how difficult it would be to evade arrest, in which prison he would have to serve a sentence, which books he could finally read, and with which other activities he would kill time in prison. To be sure, it was rather unlikely that the court would follow the prosecution's request for a thirty-three-year prison sentence. However, in a similar case a few months earlier, two activists had been sentenced to an unconditional prison term of one year. Milton had always been aware that he would pay a personal price for his political commitment against one of the largest planned gold mines in the world. For several years, he had led the principal grassroots organization against the Conga mining project in his hometown, Celendín. Now, however, it was no longer just the threat of a criminal complaint being filed or the start of legal proceedings that would probably be dropped some months or years later due to a lack of evidence. An actual trial was pending, and the threat of law was therefore tangibly close.

Social conflicts over industrial mining projects in Peru's Andean highlands have not only been fought through political mobilization in recent years; they are increasingly dealt with by means of criminal lawsuits before the courts. This "judicialization" (Sieder 2010, 161) is driven by both parties to the conflict. On the one hand, social movements, grassroots activists, and nongovernmental organizations (NGOs) are mobilizing the law to demand justice in cases of human rights violations committed by state and corporate actors in the context of the mining conflicts. This legal activism "from below"—as various authors have referred to it (Sieder, Schjolden, and Angell 2005; Eckert 2006)—corresponds to a globally observed strategy in which marginalized groups strategically use the "emancipatory" (Santos 2002, 495) forces of the law to demand social change (see also Sieder, Montoya, and Bravo-Espinosa 2022; Sieder 2020). In Peru, activists and NGOs mobilize the law primarily to put an end to human rights abuses being committed with impunity in the context of socioenvironmental conflict (Velazco Rondón and Quedena Zambrano 2015).

On the other hand, state and corporate actors also actively use the law and attempt to impede the activities of protest movements through legal mobilization *from above*. To this end, these actors file criminal complaints and initiate legal proceedings in which participation in social protests is criminally investigated and prosecuted. As Jean Comaroff and John Comaroff (2006, 30) famously argued, this form of legal mobilization turns political conflicts into so-called lawfares. They claimed that through this "judicialization of politics"—that is, the shifting of political conflicts into the sphere of law—legal mechanisms serve as hegemonic instruments of elites to consolidate their power (Comaroff and Comaroff 2006, 27–29; Comaroff and Comaroff 2009, 36–37). As Susan F. Hirsch and Mindie Lazarus-Black (2012, 9) have pointed out, the law thus serves not only as a "means of resistance" but also as a "maker of hegemony."

This article provides insights into this "darker side of judicialization" (Huneus, Couso, and Sieder 2010, 11), when state representatives rely on legal mechanisms to prosecute protest movement activists. Drawing on ethnographic research conducted in Peru in

2017 and 2018, I argue that the criminalization of social protest is a form of governing dissent groups that oppose large-scale extractive projects. These restrictions on the scope of action of civil society organizations have been observed in various regions of the world in recent years and have been referred to in terms of the concept of a shrinking space for civil society (Della Porta and Steinhilper 2021; Popplewell 2018; Special Rapporteur on the Situation of Human Rights Defenders 2016). In the context of resource extractivism, in particular, governments tend to constrain grassroots movements and activists by limiting civic participation and restricting political rights (Terwindt and Schliemann 2017a, 2017b). Taking legal action and criminalizing protesters is only one of the ways the shrinking space works: stigmatization, physical harassment and intimidation, administrative restrictions, and limitations on public dialogue are other ways civil society actors are put under pressure (Borgh and Terwindt 2012, 1070).

I contend that the use of laws is particularly effective in restricting dissenting groups in their actions. Through legal mobilization, the state apparatus itself and its institutions are activated and put into play; the authorities thus act through their established channels and mechanisms. Even if the criminalization of social protest is carried out through an abuse of state power, it thereby acquires a certain legitimacy and hegemony. This phenomenon has been observed worldwide and in very different social and geographical contexts but in terms of different concepts. In the context of restricting civic space in the Global North, this form of legal mobilization has been referred to as strategic lawsuits against public participation (SLAPPs), a concept that evolved in the 1980s (Canan and Pring 1988; Pring and Canan 1996). In contrast, with respect to activists in the Global South, reference is commonly made to the concept of the criminalization of social protest (Sieder 2017, 2019; Vásquez 2013; Terwindt 2012; Svampa and Pandolfi 2004). In both cases, it has been observed that the strategic use of (criminal) law hinders and restricts protest movements and NGOs in their activities.

From a legal anthropological perspective, such criminalization or SLAPP cases are particularly revealing about the social functioning of law in our societies. By examining a specific court case brought against a group of activists in one of Peru's most important mining regions, this article discusses different modalities of the law's domination and analyzes how the activists experience these modalities. The goal is to categorize these various modalities and to examine the threat that a criminal trial poses to the activists involved, to their political engagement, and to their personal lives. Consequently, I describe what it means for activists to stand "before the law" (Ewick and Silbey 1998). In addition, I discuss the strategies that the activists used to defend themselves during the trial. Although this may seem contradictory at first glance, I demonstrate that even in the face of a criminal trial, invoking the rule of law and mobilizing existing legal mechanisms can be a promising strategy for marginalized groups, thereby turning law into a "means of resistance" (Hirsch and Lazarus-Black 2012, 9) again. The shrinking of civic space can thus be halted to a certain extent with the aid of legal mobilization.

Empirically, this article sheds light on the Conga mining conflict in the Cajamarca region, in the northern highlands of Peru. The Conga mine is an expansion project designed to extend the activities of Minera Yanacocha, an open-pit gold mine that has been operating since the early 1990s. Minera Yanacocha is a joint venture company currently involving the US corporation Newmont, the Peruvian company Buenaventura, and the Japanese Sumitomo Corporation. The company has a long history of social conflicts in the region (Bury 2004; Bebbington et al. 2008; Li 2015). When Minera Yanacocha proposed the Conga project, large sectors of the population feared its negative impact on the local water supply and opposed the expansion plans (Paredes Peñafiel 2019). Massive protests and several regional strikes, primarily in 2011 and 2012, led to the project's suspension (Arellano-Yanguas 2013; Jaskoski 2014). Even after its suspension, the Conga mine project led to social tensions between supporters and opponents at the

local level. These social conflicts were also increasingly settled through court cases, which led to the judicialization of the social conflict.

The dispute over the Conga mine is exemplary of many other mining conflicts that Peru has experienced in the past twenty years. Since the autocratic president Alberto Fujimori took office in the early 1990s, successive Peruvian national governments have pursued a strictly neoliberal economic policy that focuses on the promotion of foreign direct investment and, in particular, on resource extractivism. In this context, industrial mining projects have penetrated further and further into the territories of peasant and indigenous communities. The negative impact on the environment, water supply, and livelihood and health of the population, as well as disputes over land ownership, led to the emergence of social movements in various regions to defend their territories against industrial mining projects. Along with the protests against the Las Bambas mine in Apurímac and against mining company Glencore in Espinar, Cusco, the movement in Cajamarca has been one of the most significant social movements against industrial mining in Peru in recent years.

This article traces one of the most emblematic criminal lawsuits that occurred in the context of the Conga conflict. A group of sixteen grassroots activists was alleged to have detained two former governors during a protest event in April 2013 in the *comunidad campesina* of Sorochuco. The responsible prosecutor's office interpreted the incident as aggravated abduction of the two state representatives and demanded a prison sentence of up to thirty-three years for the activists and payment of financial compensation to the alleged injured parties. Criminal investigations into opponents of the Conga project were not unusual during that phase of the social conflict. As many as fifty charges had been filed against certain leaders of the social movement (Guzmán Solano 2016). However, most of the charges filed or criminal cases initiated were dropped or dismissed in the course of the proceedings because there was no evidence that the activists had committed a crime. In the specific lawsuit examined in this article, however, the case was dealt with in a trial in 2017 before the Supra-Provincial Criminal Court of Cajamarca. Therefore, this case emblematically illustrated the whole spectrum of the threat posed to activists by the law—from the filing of the complaint to the reading of the judgment.

### Domination of and by the law

On the morning of the first day of the trial, we met in Cajamarca at the office of the NGO whose lawyer represented the activists in court. One by one, the defendants arrived in the anteroom of the office. Some of them were from Celendín, a small town about three hours from Cajamarca, but the majority had come from Sorochuco, the peasant community in the immediate vicinity of the planned gold mine where the protest event that led to the court case had occurred. Among the sixteen people were five women; the youngest of the accused was around thirty years old, the oldest around sixty. Many were dressed simply—the men wore football shirts and baseball caps—others had dressed up as if they were attending Sunday mass. Among the accused were several teachers and farmers (*agricultores*), a carpenter, a single mother, an accountant, and a grandmother. Their faces were serious and the mood was tense.

Mirtha, the NGO's lawyer assigned to the case, explained to the defendants what to expect at the court. She said that they would be called by the judges one by one and would each have the right to make a statement or remain silent. She also said that the situation had become complicated because the panel of judges who would decide the case had changed. The three judges in charge were unpredictable, Mirtha said; some of them were said to be corrupt, and one of them was the son of a well-known former consultant to the mining company. In an earlier conversation, Mirtha had told me that she feared that the

judges wanted to make an example of her, her NGO, and the social movement in this specific case. For this reason, she had requested assistance from national NGOs from Lima, which sent representatives to accompany them to court. In this way, the lawyer tried to give the judges the impression that the case was being observed from the outside.

My presence in court was also intended to serve this purpose. Mirtha and the activists were convinced that having a foreigner in the courtroom would benefit their case. They asked me to introduce myself to the judges and tell them that I was conducting research on the functioning of the Peruvian justice system in the context of social conflicts. I had been accompanying the activists in Celendín for only a few weeks when the court hearings began. Some of the activists had been skeptical at first when yet another foreign researcher knocked on their door. Too often in previous years they had been visited by researchers who “took their stories, but gave nothing in return,” as the activists related. Accompanying the activists to the court hearing and supporting them through my mere presence allowed me to approach the kind of engaged anthropology that Stuart Kirsch (2018) described in the context of his experience on the judicialization of mining conflicts. Thereby, I was able to “give something back” to the activists, which facilitated their welcoming of my presence and research.

At the beginning of the first day of the trial, the defendants were called individually in the courtroom. They had to provide their personal details: name, ID number, date of birth, place of residence, profession, and monthly income. For most of the defendants, it was the first time they had faced a court, although some had received other criminal charges in relation to the Conga conflict. The courthouse was simple, and the furnishings worn and somewhat shabby, but the atmosphere in the narrow courtroom was tense, and the judges’ demeanor seemed intimidating. All three were smartly dressed, wearing suits and ties, typing occasionally on their smartphones, and emphasizing their position in the room by their appearance and choice of words.

Later on during this first day of the trial, the indictment was read, and the prosecutor and the defense were given the opportunity to speak. The judges questioned the two alleged injured parties and interrogated the defendants. Some of the defendants made statements and described their view of things, but several also invoked their right to remain silent. When asked whether they considered themselves guilty or innocent in the matter, however, all the defendants asserted their innocence. Those who made statements confirmed that they had participated in the protest event in Sorochuco. A meeting of state representatives had taken place that day, and the activists had gathered with approximately two hundred other people to demonstrate against the then governors of Sorochuco and Celendín, who participated in the official meeting. Both governors were known for their support of the Conga project. The defendants described how the protesting crowd had demanded the governors’ resignation but stressed that the two had at no time been abducted or held captive against their will.

The defense attorney supported this reasoning in her opening statement and backed it up with legal arguments. Mirtha acknowledged that freedom is a fundamental good whose protection is of the utmost importance. At the same time, however, she also stressed that the rights of the two governors had not been violated in any way and that there was no evidence that an abduction had occurred. Rather, she claimed that the defendants had exercised their right to political participation in their community, as well as their rights of assembly and expression. She said that the activists had participated in a political meeting during which the governors had been able to leave the scene at any time. The defense thus asserted that the event in question had been a permissible form of social protest while the prosecutor and the complainants claimed that a serious breach of the law had taken place. They accused the activists of having held the governors captive for two hours and of having kidnapped them as a result. On the basis of the criminal code, the prosecution demanded a prison sentence of up to thirty-three years and the payment

of a civil reparation of 10,000 *nuevo soles* (approximately US\$3,000). Mirtha, in contrast, demanded an acquittal. In the defense's opinion, the prosecutor, together with the two former state officials, had abused the penal code to impede the activists' political mobilization and to criminalize their social protest.

Social movements and grassroots organizations in Peru have, for some time, criticized the increasing criminalization of their opposition to mining projects and have complained that state authorities are thereby restricting them in their right to protest. They criticized this shrinking of civic space as a violation of their legitimate right to protest. The criminal charges filed against activists involved in Peru's socioenvironmental conflicts are often for riots (*disturbios*), disruption of public transport, disobedience and resistance of authority, encroachment (*usurpación*), damage to property, crimes against public order or against public safety, rebellion, coercion, or abduction (*secuestro*). Simply participating in a demonstration can lead to criminal proceedings, which is why Peru's social movements speak of their protest being criminalized.

As mentioned earlier, Peru is no exception regarding this development. The Inter-American Commission on Human Rights (IACHR 2015), as well as the UN Special Rapporteur on the situation of human rights defenders (2016), have criticized the fact that human rights defenders in various Latin American countries face criminal prosecution when they exercise their right to defend, protect, and promote human rights (see also Doran 2017; Rasch 2017). According to the IACHR (2015, 18), the criminalization of social protest is an "abuse of criminal law" by state authorities, with the goal "to control, punish, or impede the exercise of the right to defend human rights" (all translations are mine unless otherwise noted). The manipulation or the misuse of criminal law thus represents one modality in which the law's domination becomes effective in this type of court cases. In addition, we can observe two further modalities of the law's domination in these lawsuits against mining opponents in Peru: domination of the law, which is related to the law's specific mechanisms and institutions, its language, architecture, and materiality; and domination by the law, which involves the written norms, paragraphs, and legislative texts that constitute the codes of the law. These three modalities of law are not disconnected but rather work in combination with one another.

### **Domination of the law**

The court in which the case against the sixteen activists was heard was located in a simple three-story building in the middle of a residential neighborhood not far from Cajamarca's *Plaza de Armas*. The actual courtroom was narrow and stuffy, with barely enough room for all the people who had to or wanted to attend the trial. As described earlier, the courthouse as a whole was sparsely furnished, and the interior poor and worn, clearly reflecting the Peruvian state's lack of financial resources. Still, each time I accompanied the group of activists to another hearing and entered the building, I was gripped by a sense of awe. I explain this authority emanating from the legal institutions with the domination of law, and this form of domination consists of various aspects.

First, the formality with which the court hearings proceeded was fundamental to this form of law's domination. The course of the trial followed fixed rules and a clearly prescribed order with which the legal experts—that is, the judges, the prosecutor, and the lawyers—were familiar. The defendants and trial visitors or attendees, in contrast, were ignorant of these procedural rules; we had to rely on the experts' instructions to help us navigate the process. Part of this formality was also the formalized language and the coded expressions the lawyers used to make motions; how the judges responded to them, rejected them, or allowed them; and how the opposing side then intervened again. Mirtha kept explaining to the defendants what the next steps would be; she instructed them when to speak and translated for them the cryptic formulations of the

judges and the prosecution. Various authors have described these formalities inherent to the judicial sphere. Elizabeth Mertz (1992, 2007), for example, explored the importance of the language of law and the resulting complex dynamics that arise from linguistic realities in court proceedings. In a more general manner, Pierre Bourdieu (1987) described the “force of the law” and analyzed in detail how the power of judicial authorities and of judges, in particular, is socially manifested and reproduced. The judges in Cajamarca met many of the criteria described by Bourdieu in their outward appearance, their proximity to the economic elite, their level of education, and their mode of expression. All these aspects clearly distinguished the magistrates from the common people they were judging in this case.

Second, court hearings are characterized not only by their formality but also by their theatricality. This theatricality is shaped both by the formalized procedures of the criminal process and by its actual materiality. An example of this was the golden bell with which the chair of the judges’ panel opened and closed each court hearing, or the insignia of the state that stood in the form of a flag in the corner behind the judges’ desk. The architecture of the law also plays an important role in this regard. As mentioned, the courthouse in Cajamarca was characterized by its simplicity and plainness. However, in larger cities such as Lima, for example, but also in other (North and South) American or European towns, courthouses are imposing buildings, created from marble or stone, with wide staircases and broad columns. Patricia Ewick and Susan S. Silbey (1998, 106) described courthouses as monumental buildings “aspiring towards grandeur and permanence,” thereby laying the foundations for the authority of judicial institutions. Thus, the domination of law consists of the language of the law, the architecture and theatricality of the law, and the way it is expressed and embodied, which instill respect in those who “stand before the law” (Ewick and Silbey 1998). All these aspects emphasize the authority of the law and its institutions.

### ***Domination by the law***

The second way law governs and rules people is through its codes and written texts. The law’s codes determine which conduct is considered inadmissible and punishable in a society, its legislative norms define who is a criminal, and the articles and paragraphs of its codes and guidelines decide the severity of the punishment imposed for unlawful actions.

Despite the liberal principle that everyone is equal before the law, it is largely undisputed that certain social groups are at greater risk of violating the norms of a society. Anatole France famously described this as “majestic equality of the laws, which prohibit the rich and the poor alike from sleeping under bridges, begging in the streets and stealing bread” (cited in Brinks and Gauri 2014, 375). Marginalized groups are often at particularly high risk of violating the law. This is due, first, to their very marginality and, second, to the existence of specific laws tailored to those living on the margins of the state, as various anthropologists have observed (Das and Poole 2004, 9). Johanna Mugler (2019, 26, 28), for example, wrote that the apartheid regime in South Africa created an “illegal population” through racially discriminatory laws, leading to a “criminalisation of Black everyday life.” In a similar vein, Julia Eckert (2014, 295) used the example of India to explain how poverty and illegalization are often “intricately connected,” as the urban poor repeatedly come into conflict with the law because of their informal way of working and living.

With regard to the mining conflicts in Peru, there is a risk of criminal prosecution for social movements because the legal texts relating to participation in protests have been increasingly tightened. On the one hand, as part of this tightening, various protest-related activities have been additionally typified as criminal offenses. On the other hand, the penalties for a series of offenses that were already listed in the penal code and that

are frequently used for social unrest have also been increased, in some cases massively. This development began during the era of the former autocratic president Alberto Fujimori but has been largely continued by the subsequent democratically elected presidents. Under the pretext of fighting terrorism, organized crime, or drug trafficking, various articles of the Peruvian Criminal Code have been modified, and participation in social protests has been increasingly criminalized. As various Peruvian human rights lawyers have argued, this has led to an “overpenalization” (*sobrepenalización*; Velazco Rondón and Quedena Zambrano 2015, 12; Vásquez 2016, 14) of offenses that may be related to social protests.

An example of the classification as new crimes is the article that regulates the offense of “extortion,” which was modified in 2007 to make protest-related activities punishable.<sup>1</sup> With the modification, the article was expanded to include the criminal prosecution of anyone “who, through violence or threats, takes possession of buildings, blocks lines of communication or impedes the free movement of citizens, or disrupts the normal functioning of public services.”<sup>2</sup> The explanatory statement (*exposición de motivos*) issued to modify the article is particularly illuminating regarding the intentions of the modification: it refers to criminal conduct that is said to occur “under the guise of strikes, protests or claims” and provides for the regulation of “claims for supposed rights,” which are said to be “superimposed on the rights of the majority, attacking public and private property, freedom of work, public security and internal order, including socioeconomic development” (Consejo de Ministros 2008). The intention to criminalize certain protest-related activities with the modification of the article becomes evident in these explanations. I argue that this is an example of how the threat of criminalization arises from the domination by law.

In the case of the activists from Cajamarca, the threat emanating from the written law was linked primarily to the fact that they were charged with aggravated abduction. According to the Peruvian Criminal Code, abduction is a serious crime punishable by a sentence of no fewer than twenty years’ imprisonment. The criminal code defines the offense as aggravated in cases not limited to instances in which the abductee is a state official or a civil servant, or the victim is kidnapped because of his or her activity in the private sector. In cases of aggravated abduction, the sentence shall be no fewer than thirty years.<sup>3</sup> The extremely lengthy prison sentence of up to thirty-three years faced by the activists in this case was therefore rooted in the fact that they were accused of having violated the rights of state officials. This demonstrates how the domination by law in this specific case was rooted in the law itself, that is, in the articles that constitute the basis of criminal law.

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

However, another modality of the law’s domination is observed in the Cajamarca criminalization case, a modality that is related to the written law but finely differentiated from the domination by law. This third modality involves the misappropriation of legislative norms and their use as a pretext to impose criminal sanctions on specific conduct. Peruvian human rights lawyers (see, e.g., Vásquez 2013, 423) as well as the IACHR (2015, 18) referred to this as a misuse or manipulation of criminal law.

The prosecution and the two former governors accused the group of activists of having committed the crime of abduction, and the defense argued that the two state officials had not been deprived of their liberty or had their rights violated in any way. Mirtha argued

<sup>1</sup> Article 200, Peruvian Criminal Code (see also Kamphuis 2012, 236).

<sup>2</sup> Article 200, Peruvian Criminal Code.

<sup>3</sup> Article 152, Peruvian Criminal Code.

that there was no evidence to support the prosecution's allegations. Various witnesses were called in the course of the trial, including a police officer and a journalist, both of whom had been in Sorochuco on the day of the event and had observed the incidents. Neither of them, however, could testify to having seen the governors being kidnapped by the activists. For Mirtha, this illustrated how the prosecution used the crime of kidnapping as a pretext to seek a court case against the activists.

Moreover, she and the defendants argued that the very selection of the people who had been charged was arbitrary and indicated an abuse of the criminal process. Although approximately two hundred people had participated in the demonstration, only sixteen had been charged, presumably those who had taken a leading role within the social movement. In this way, the defendants argued, the former governors wanted to stop these leaders' participating in the resistance to the Conga project. According to the activists, this was an attempt to hinder their political mobilization; they said that the criminal investigations would have prevented or made it more difficult, for example, for individual activists to stand as candidates in local elections and thus carry their struggle from the streets into official politics. In an election campaign, involvement in criminal proceedings would have an extremely negative impact on candidates. The activists regarded the criminal proceedings as an attempt to silence the leaders of the movement.

The activists and their defense therefore criticized the fact that the crime of abduction was used as a pretext to initiate judicial proceedings and to threaten them with a lengthy prison sentence. In their eyes, the criminal prosecution had turned into a judicial persecution. In addition to the state authorities manipulating the categorization of the events as a crime and thereby abusing the criminal code, the activists further complained that these authorities had manipulated several procedural rules. They argued that during the pretrial phase of the case, the investigations had been closed because there was no evidence to prove the crime and thus justify the criminal proceedings. However, the case was then reopened, according to the activists' allegations, under pressure from the two former governors. Thus, there had been a presumed abuse of the criminal code and of the code of criminal procedure.

The Cajamarca court case illustrates why this third modality of the law's domination—the manipulation or misuse of law—was particularly severe for the criminalized individuals, making the judicial proceedings unpredictable and arbitrary. Regarding the domination of and by law, the threat emanating from the court case can be more easily assessed and thus easier to control. For example, with the help of an experienced lawyer, the activists managed to navigate the judicial sphere. With regard to the modality that manipulated or misused the law and its mechanisms, however, the defense lawyer and the accused activists were exposed to the arbitrariness of the prosecutorial and judicial authorities. This arbitrariness had a particularly serious impact on the criminalized activists.

### **Effects of criminalization on everyday life**

After the first hearing, Mirtha and the defendants returned to the NGO's office to discuss further proceedings. Mirtha was satisfied with how the first day at court had gone and told the defendants that the prosecution still could not present any evidence that would confirm their charge of abduction. "Theoretically," she said, "an acquittal should result." However, she went on to remind the activists that the preliminary investigations of the case and the filing of the indictment had already indicated that the prosecutorial and judicial authorities did not always act according to the established rules. Even during the preliminary investigation, she said, there had been no legal basis even to bring charges and begin a trial, and yet that had happened. It was therefore uncertain how the case would proceed, Mirtha said.

Next, there was time for questions from the defendants. Manuel, a teacher from Celendín, asked whether he should seek permission from his employer to stay away from work during the following trial days. Some of the other defendants laughed at him, saying that if there were a conviction, he could forget his job anyway. Emperatriz, a woman from Sorochuco, expressed concerns about how she would be informed about the further proceedings. Having received repeated threatening phone calls from advocates of the mining project, she no longer owned a cell phone and was therefore difficult to contact. She said that she was increasingly isolated and shunned both in her community and by her own family because of her opposition to the mining project. Moreover, she recounted that unknown persons had killed her dog, and as a result of the social tensions, she could no longer live with her relatives and was staying with her children in the market, where she also earned her living.

Cecilia, another woman from Sorochuco, told her story and said that her daughter had reproached her because of the ongoing criminal process. Cecilia's daughter lived and worked mostly in Lima, and Cecilia took care of her granddaughter during her daughter's absence. Because of the court hearings, she was unable to fulfill this duty. And if there were a conviction, who would take care of the grandchild?

The stories of Cecilia, Emperatriz, and Manuel reveal how criminalization permeates the everyday lives of the affected people. The scene described in the introduction—of Milton's uncertainty on the eve of the start of the trial and his worry in the face of the lengthy prison sentence—also illustrate the influence on the everyday life of the criminalized activists. This is linked primarily to the social defamation and the public condemnation that can result from criminal prosecution.

The accusation of being criminals weighed heavily on many of the activists. Although they were used to being labeled troublemakers, radicals, or even terrorists by mine advocates, as well as by certain journalists and politicians, the court case provided official support for such accusations. The possibility of a conviction by the judicial authorities meant that the activists' protest was at risk of being publicly discredited and officially declared inadmissible. This illustrates how judicial proceedings manifest and consolidate hegemonic positions within a society, thereby affecting the political struggles of social movements. In this way, the law becomes a "maker of hegemony" (Hirsch and Lazarus-Black 2012, 9), and through their judicialization, political struggles are turned into "lawfares" (Comaroff and Comaroff 2006, 30).

Furthermore, legal proceedings also represent a great psychological burden for the individuals directly affected. In the Cajamarca case, the uncertainty emanating from the threatened lengthy prison sentences weighed very heavily on both the activists and their families. The defendants worried not only about their own futures but also about those of their spouses, children, and grandchildren, for whom they were responsible and for whom they cared. "I can't go to jail; I am both mother and father to my son," said one of the activists, a single mother from Celendín. The stories of the criminalized activists thus illustrate the social element of the law's domination.

In addition to these psychological consequences, court hearings also result in a number of practical disadvantages for the defendants. On the second day of the trial, the hearing was adjourned after only fifteen minutes and postponed to another date ten days later because the public defender was not present. The defendants had therefore traveled in vain from their community to the court and had absented themselves from their duties at work and at home. Such postponements of court hearings are common in Peru's justice system. Court hearings are frequently postponed because prosecutors, judges, or public defenders are absent; because the judicial panels have changed and the new persons in charge have not yet had time to read the files; because the judicial authorities are on vacation for a month, as they are every year in February or March; or because the judicial authorities are paralyzed by a strike. On the one hand, these delays mean that court

proceedings generally move very slowly and that court cases are usually dealt with and concluded only after a long period. With regard to the Latin American context in general, the IACHR (2015, 96–97) has described this as a strategy to keep criminalization cases open for extended periods of time, thereby maintaining pressure on defendants for as long as possible.

On the other hand, these delays often lead to great consternation among defendants because they result in a considerable loss of time and money. For people living on the margins of the state, this loss is often especially severe, which is related to the locality of the law. Courthouses are usually located in urban centers. The activists from Sorochuco and Celendín, for example, had to travel several hours to attend the hearings. This resulted in transportation costs and lost income for those who stayed away from their paid jobs, especially for those working in agriculture or in the informal sector. In addition, Manuel's example reveals how defendants fear negative consequences from their employers when staying away from work to attend court hearings. Finally, the case of Cecilia illustrates that the loss of time may also result in tensions in the family when care duties are left unfulfilled. As Ewick and Silbey (1998) pointed out in their study on legal consciousness in the United States, for many people involved in court cases, legality is at odds with their everyday social lives. Court hearings interrupt everyday life. The case study from Cajamarca confirms this finding in many ways.

### Deconstructing the criminal subject

How, then, does one deal with this immense threat posed by the law; by its institutions, processes, and mechanisms; by its representatives and language; but above all, by its abuse and manipulation? Mirtha's answer to this question was, first, that of a legal expert who knew the processes and the legal mechanisms, who spoke the language of legality, and who was able to stand eye to eye with the representatives of the law. In her role as a lawyer, she attempted to mobilize the law and to obtain an acquittal for the activists.

In her closing argument before the court, Mirtha did not repeat what had happened in Sorochuco on the day in question but focused her remarks on the trial itself and on the evidence that the prosecution had attempted to present to support the charge of kidnapping. In doing so, she resorted exclusively to procedural arguments and stated: "If there is not sufficient and adequate evidence in a given process, we cannot declare the guilt of any person. This would violate fundamental principles." She declared that insufficient evidence had been presented and that the testimony of the witnesses interviewed had not confirmed the prosecution's accusations. Thus, only the statements of the complainants remained, and the question was whether a conviction could be made on the basis of those statements. "The doctrine, the jurisprudence, says yes," Mirtha admitted; however, she went on to explain in detail that in such cases jurisprudence provides clear "guarantees of certainty," which were not fulfilled in the present case. By arguing that these jurisprudential requirements had not been met, she again demanded that the defendants be acquitted.

After Mirtha completed her statement, everything proceeded rapidly. The judges asked us to leave the room, and we waited in the small patio of the courthouse. The tension among the defendants was incredibly high. After a few minutes, we were invited back inside for the pronouncement of the judgment. The spokesman for the panel of judges explained that the court considered that "the prosecutor had not complied with his constitutional function of providing evidence" to support the conviction of the activists. The judges concurred with Mirtha's reasoning, stating that the testimony of the two former governors was insufficient to prove that the defendants had committed a crime in the absence of other evidence. Given these considerations, the activists were acquitted.

Mirtha was thus successful with her strategy of mobilizing the law in defense of the group of activists to prevent the prosecution's alleged misuse of the criminal proceedings. This strategy was based on her conviction that "technically" the court case should result in an acquittal, as she had told the defendants after the first day of the trial. This is an argument that Peruvian human rights lawyers often employ in criminalization cases: according to the law there was no crime, the demonstration was a constitutionally protected act of social protest, the protests were therefore legally legitimate, and the law was thus on the side of the activists. In her legal arguments, Mirtha appealed to the judges to respect the rule of law and to thereby fulfill their own constitutional function. Furthermore, she used the language of the law itself and adhered closely to the legal texts and the prevailing jurisprudence in her argumentation. This strategy also included her request to the defendants always to follow the instructions of the judges, always to arrive on time for the hearings, and so follow the rules of the law. Mirtha's approach was therefore representative of what others have called legal activism "from below" (Sieder, Schjolden, and Angell 2005; Eckert 2006).

In retrospect, one might wonder how appropriate it is to speak of legal mobilization "from below" in the context of someone like Mirtha. Mirtha Vásquez gained national prominence in 2020 when she was elected to Congress to represent the Cajamarca region, which she presided over for a brief period, and especially later when she temporarily served as the country's prime minister under president Pedro Castillo between October 2021 and January 2022. Within a very short time, she had thus achieved an influential political position in the country. At the time the court hearing described took place in Cajamarca, however, Mirtha was hardly known beyond the region. At the time, she was the senior lawyer and director of one of the most important local NGOs, and in the conflict over the Conga mine she had assumed an important role in that capacity in defending criminalized activists and victims of human rights violations. Mirtha had succeeded several times in securing acquittals for criminalized activists; her success in prosecuting state or corporate actors, however, was much more limited. The political influence exerted by the mining company and its allies in the region was too great for these lawsuits to result in a trial, let alone a conviction of the perpetrators.

In addition, Mirtha, as well as many of the activists involved in the movement against Conga, was publicly defamed by mining advocates, local politicians, and journalists for her commitment. They accused her of hampering the development and prosperity of the region. The defamation was accompanied by anonymous threats. As a result, Mirtha was under police protection for a considerable period of time. Even if the concept of (legal) activism "from below" in the case of Mirtha must thus be somewhat relativized in the long run, it applied very accurately to the situation and circumstances at the time of the court proceedings. More important, the description of fighting against a powerful opponent "from below" also reflected the situation as described by Mirtha and the activists themselves and thus represented, above all, an emic perspective. At the same time, the example illustrates that "from above" and "from below" used in these debates on legal activism are not rigid categories but are socially transformative and can change over time.

To ensure the success of her legal activism, Mirtha drew not only on her expertise as a lawyer but also on her experience as an activist and a member of the Peruvian human rights movement. In this role, she attempted to exert political pressure on the judges to make them realize that they were being closely observed from the outside in their decision-making. This included calling on representatives of national NGOs as trial observers. With the same intention, Mirtha also asked me to introduce myself to the judges and tell them about my research on this specific court case. In addition, the activists also attempted to draw attention to their case through social media, thus creating an attentive public that followed the court proceedings. Through their social media channels, the activists provided ongoing and detailed information about each court hearing; they shared

photographs from inside and outside the courtroom, presenting their perspective; moreover, they published letters of support from domestic and foreign partner organizations that accompanied the trial. The goal of this strategy was to put the spotlight on the judges and prevent them from turning what was in Mirtha's view a "technically" unequivocal acquittal into a conviction by abusing the law. By relying on both legal and political instruments, Mirtha and the activists succeeded in mobilizing the law as a counterhegemonic means, "from below," as they perceived it and in defense of their right to social protest. In this way, Mirtha managed to deconstruct the prosecution's argument that the activists should be regarded as criminal subjects.

## Conclusion

The dark side of the judicialization of mining conflicts in Peru reveals the various facets that characterize the sphere of legality, and it illustrates the threat and the domination that emanates from the law, its institutions, its representatives, and its proceedings. In more specific terms, this article has discussed how the law rules and governs both through its written texts and through its material manifestations and language. Although both these modalities can be found in most other criminal proceedings, the Cajamarca criminalization case revealed an additional, third, modality of the law's domination, namely the manipulation or misuse of legal mechanisms.

In the discussion of these three modalities, it has become clear that the greatest risk the activists faced was the abuse or manipulation of the law, as this form of domination is characterized by a high degree of arbitrariness and uncertainty. At the same time, the third modality was the only one that could actually be challenged and ultimately overcome by the activists and their defense. It was beyond their power to overcome the domination of law and to break the authority of legal institutions; nor could they challenge or change the written law in the judicial process. However, by invoking the formality of law, respecting its institutions and mechanisms, and following the judicial instructions and the rule of law, Mirtha and the activists were able to expose and successfully overcome the misuse of legality and of criminal proceedings. Consequently, the law itself ultimately served the activists as a "means of resistance" (Hirsch and Lazarus-Black 2012, 9) and as an instrument to defend themselves.

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