Title: THE JANUS-FACED STATE: AN OBSTACLE TO HUMAN RIGHTS LAWYERING IN POST-COLONIAL ASIA-PACIFIC

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THE JANUS-FACED STATE: AN OBSTACLE TO HUMAN RIGHTS LAWYERING IN POST-COLONIAL ASIA-PACIFIC†

Shreyas Narla*

Human rights lawyers now constitute an emergent vulnerable class. This is largely on account of the various causes they represent which pits them in opposition to forces of oppression. Such a fault-line and the consequent fallouts can be traced to the historicity and prevalent patterns of governance and administration in a given State, particularly in the postcolonial states of the Asia Pacific. These states, with their shared colonial histories and legacies, have had many conflicting interests to balance and remedy, and yet are confronted with the realities of their multiple stories of oppression and human rights violations of the lawyers challenging them. Human rights lawyers belonging to these states assume a special role and responsibility as they endure much risk in order to course-correct such actions. While non-state actors and private citizens can be brought to book for violations under prevalent laws, the complexity lies where the State itself is the oppressor instead of being the facilitator. The legal impunity that guards such State-sponsored oppression plays a severe deterrent to their lawyering and requires attention, both in terms of data analyses and reformative policy.

I. INTRODUCTION

The modern State, meant to be a benign protector of the rights of its citizens, is also the harshest oppressor that uses several instrumentalities at its disposal to control and regulate their actions. This dichotomy lends the State its Janus complex,[1] which plays out with fascinating results in the postcolonial states, particularly those located within the Asia Pacific. The newly independent but fragile governments of such states have excessively intervened and regulated actions of its subjects in their quest for good

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[1] Janus is the Roman God of beginnings and endings: Donald L. Wasson 'Janus' *Ancient History Encyclopaedia*. The word Janus-faced, derived from the paradoxical nature of the god, means having two contrasting aspects.

governance and economic prosperity while clientalist[2] elites have sought gains.[3] The collateral violations of several of the freedoms guaranteed under their constitutions were but an eventuality. Penal laws, enacted both in colonial as well as the post-independent eras which facilitated such intervention, have often been feverishly used as instruments of subjugation against those who challenge the statist paradigm.

The lawyers and the legal system that act to promote or protect human rights of the victims bear the brunt as well. This consequently obstructs the work they do, foremost of which is to provide legal counsel. Such counsel is intrinsic to the right to a fair trial, as recognised in multiple international conventions[4] and set out in national laws. It encompasses the ability to challenge an accusation or prosecute the violation of rights. When the rights so defended are in the nature of basic human guarantees[5], lawyers assume a much more crucial role as guarantors in securing justice,[6] especially for those who are disenfranchised and vulnerable. So when lawyers themselves come under attack as part of their job, it is an affront to the independence of the justice delivery system and consequently to the rule of law and the human rights discourse. Falling under the

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[2] Clientalism is a political or social system based on the relation of client to patron with the client giving political or financial support to a patron (as in the form of votes) in exchange for some special privilege or benefit (used here in reference to the advantage being given to economic elites for their monetary assistance): 'Clientalism', Merriam Webster, https://www.merriam-webster.com/dictionary/clientelism (last visited 08 September 2019); Sergiu Gherghina and Clara Volintiru, 'A New Model Of Clientelism: Political Parties, Public Resources, And Private Contributors', *European Political Science Review* (2017) Vol. 9 (1), 115-137.

[3] Henry Carey, 'The Postcolonial State and the Protection of Human Rights" *Comparative Studies of South Asia, Africa and the Middle East* (2002) Vol. 22, 59-75; Mark Brown, 'Postcolonial Penality: Liberty and repression in the shadow of independence, India c. 1947' *Theoretical Criminology* (2017) Vol. 21 (2), 186–208; *See* V. Biju Kumar, 'Postcolonial State : An Overview', *The Indian Journal of Political Science* 66 (4) (Oct-Dec, 2005), 935-954.

[4] Article 11(1), *Universal Declaration of Human Rights* (hereinafter "UDHR"), 'Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence'; Article 14(3)(d), *International Covenant on Civil and Political Rights* (hereinafter "ICCPR"), ' "[…] to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it'; Principles 11(1) and 17, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, 'A detained person shall be entitled to have the assistance of a legal counsel.'; Principle 1, *United Nations Basic Principles on the Role of Lawyers* 'All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings.'

[5] 'Basic rights…are everyone's minimum reasonable demands upon the rest of humanity. They are the rational basis for justified demands the denial of which no self-respecting person can reasonably be expected to accept.' Henry Shue, *Basic Rights* (Princeton University Press 1980), 19.

[6] 'Lawyers will be necessary because, in their highest role, they are the healers of conflicts and they can provide the lubricants that permit the diverse parts of a social order to function with a minimum of friction.' Warren E. Burger, 'The Role of the Lawyer in Modern Society' 1975 *BYU Law Review* 581. See generally Susan Carle, 'Lawyers' Ethics and the Pursuit of Social Justice: A Critical Reader' (2005) *Articles in Law Reviews & Other Academic Journals* 334; Blake D. Morant, 'Lawyers As Conservators And Guardians: Justice, The Rule Of Law, And The Relevance Of Sir Thomas More' (2012) *Michigan State Law Review* 647.

subset of human rights defenders (HRDs)[7], such lawyers have come to form a vulnerable class of their own, akin to those they represent.

Across the globe, whether be it in emerging democracies or seasoned democratic setups, reportage on the plight of such lawyers has shown a consistent rise in the severity and scale of such violations being committed against them.[8] Acts like intimidation, death threats, disappearances, physical violence including murder and torture, restraints on their freedom of movement or expression and alike make for obvious, upfront cases of violations. A graver, perhaps far more harrowing form of obstruction in their work is when they are arbitrarily arrested, detained, unfairly and falsely accused, prosecuted and convicted, all under the garb of a statutorily backed legal process. The nature and extent of such a violation is often indeterminable and thus, difficult to resolve. It becomes even more arduous to challenge when it is the State itself initiating such processes against the lawyers.

In response to similar attacks around the world, a multi-level, multi-actor international protection regime for the rights of HRDs, including lawyers, has emerged. The 1990 *Basic Principles on the Role of Lawyers*[9] and 1998 *Declaration on Human Rights Defenders*[10] adopted by the General Assembly of the United Nations form the basis of this framework. This framework seeks to enjoin the member States to ensure that the lawyers, particularly those fighting for human rights, are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference.

However, instances of obstruction in human rights lawyering, particularly in the form of harassment by legal means, continue to carry on unabated. At the same time, the

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[7] The term 'human rights defender' has been used increasingly since the adoption of the Declaration on Human Rights Defenders, 1998, General Assembly Resolution A/RES/53/144. Human rights defenders have been defined as persons who "can act to address any human right (or rights) on behalf of individuals or groups… [they] seek the promotion and protection of civil and political rights as well as the promotion, protection and realization of economic, social and cultural rights": 'Who is a defender', *OHCHR at* https://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/Defender.aspx (last visited 08 September 2019).

[8] 'Challenges they face' *OHCHR at* https://perma.cc/TX23-TGBC (last visited 08 September 2019); 'In more than 80 countries across the world, fighting for the respect of human rights is now a high-risk activity, and groups and individuals who engage themselves on this road are the preferred targets of authorities and private groups…', *at* http://www.omct.org/human-rights-defenders/observatory/ (last visited 08 September 2019).

[9] *Basic Principles on the Role of Lawyers* (adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba 27 August to 7 September 1990).

[10] *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms* (adopted by General Assembly resolution 53/144 of 9 December 1998).

redressal mechanisms fail at providing adequate recourse to such lawyers, both in their capacity as defenders and victims. In order to truly understand the grave extent of the problem, this paper will seek to carry out an exploratory analysis of the State's duality when it comes to human rights, particularly in the context of lawyers defending such rights. The paper first looks at the State's role as an oppressor by analysing a range of laws prevalent in some of the formerly colonised states of the Asia-Pacific that are often used to obstruct human rights lawyering as well as elaborate on the various instances where this plays out, in Part II. In Part III, the above is contrasted with the State's role as a protector, whereby it provides for redressal mechanisms. However, despite the contrast, I proffer my contrarian observations based on findings which highlight the ineffectiveness that plagues these mechanisms in postcolonial regimes. While non-State actors are equally, if not more, complicit in causing obstructions to human rights lawyering, the paper will not delve into that aspect and restrict its focus on State's own actions and remedies, ineffective or not, available against it. Part IV asserts an inference that despite its *seemingly* contrasting roles, the State largely remains an obstacle in the path of human rights lawyering, particularly in the postcolonial states of the Asia Pacific.

II. The State Is A Law Unto Itself

With the Wars ending, the discourse on the State's duality has essentially focussed on the challenge the post-war international human rights order of 1948[11] posed to the Westphalian notion of state sovereignty established 300 years earlier.[12] For a sovereign State, the sanctity of its territorial control is the be-all and end-all.[13] Its say is the final word within its territory. In contrast, the international human rights standards hold the states accountable for the treatment they met out to those within their borders, in a way

[11] The *Universal Declaration of Human Rights* which was adopted by the UN General Assembly on 10 December 1948. 'History of the Document', *United Nations at* https://www.un.org/en/sections/universal-declaration/history-document/index.html (last visited 01 August 2019).

[12] Richard Coggins, 'Westphalian State System' *The Concise Oxford Dictionary of Politics at* https://www.oxfordreference.com/view/10.1093/oi/authority.20110803121924198 (last visited 01 August 2019); Derek Croxton, 'The Peace of Westphalia of 1648 and the Origins of Sovereignty', *The International History* Review, 21 (3) (September 1999), 569.

[13] Article 2, UN Charter.

universalising the concerns beyond the territories of the states.[14] The incorporation of these standards in their respective domestic constitutions throws up a challenge to their territorial pervasiveness and control. This challenge is inevitable for the very idea of demarcating boundaries of a political community through a nationalistic narrative and grant of citizenship, excludes a group from rights protection, and the concepts of foreigners, and outsiders evolve.[15] Subsequently, the economic, social and political "othering" within the domestic realm creates several other classes of "haves" and "have-nots", thus fuelling the face-off between the order of human rights and sovereign control.

This conflict is perhaps more pronounced in postcolonial states that came into their own in the post War era. To put it briefly, the new-found independence nudged these states on the path of self-preservation at all costs. They considered that 'human dignity and 'good governance' would secure their future and were best achieved by a political regime dedicated to social order and rapid economic growth.[16] At the same time, these states, specifically the ones in the Asia Pacific, also assimilated 'occidental' values in their system by incorporating the choicest of individual freedoms and guarantees in their constitutions. But these came with caveats, which are an extension of the norms prevalent during the colonial period. While the colonial rule favoured such caveats to keep the natives under control, the newer and independent regimes were more focussed on securing larger, communal benefits in order to remedy the colonial damage. Therefore, individual interests had to give way for sustaining national security and preserving *derived* social morality.

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[14] Sonia Cardenas, 'Human Rights and the State' *Oxford Research Encyclopaedia of International Studies* (November 2017). *See also* Sonia Cardenas, *Chains of Justice: The Global Rise of State Institutions for Human Rights* (University of Pennsylvania Press, 2014).

[15] Hannah Arendt, *The Origins of Totalitarianism*, (New York: Meridian Books 1966).

[16] Yash Ghai,'Human Rights And Asian Values' *Journal of the Indian Law Institute* 40 (1/4) Human Rights Special Issue (January-December 1998), 67-86; 'The so-called Asian values that are invoked to justify authoritarianism are not especially Asian in any significant sense. Nor is it easy to see how they could be made into an Asian cause against the West, by the mere force of rhetoric. The people whose rights are being disputed are Asians, and no matter what the West's guilt may be (there are many skeletons in many cupboards across the world), the rights of the Asians can scarcely be compromised on those grounds. The case for liberty and political rights turns ultimately on their basic importance and on their instrumental role.' Amartya Sen, 'Human Rights and Asian Values', *The New Republic*, 1997; '[W]hat is needed for generating faster economic growth is a friendlier economic climate rather than a harsher political system.' Amartya Sen, 'Democracy as a Universal Value' *Journal of Democracy* (1999) 10; *See also* Michael Freeman, 'Human rights, Democracy and 'Asian values'' *The Pacific Review* (1996) 9(3), 352-366.

The trade-off of such an approach is bound to be alarming: most obvious being the blatant disregard for the freedoms guaranteed. In such scenarios, it has often been seen that an independent judiciary and legal profession are able to fill such interstices, secure justice and hold the other two organs of the State accountable. This, they do, with visible and palpable risk.

This section will give a broad insight into how these states have fared on their human rights record in order to contextualise the human rights lawyering practiced and the consequences that entail. Of the several countries in the Asia Pacific, I have explored and written about such issues with respect to India, Malaysia, Singapore and Philippines. These countries, simplistically put, are united in their common experiences with the pre-colonial/historical, colonial and the postcolonial marginalisation of their weakest and most vulnerable, prolonged periods of one-party driven majority/coalition governments that have displayed varied shades of populism and authoritarianism,[17], and the sustained silencing of critics, and in the context of this paper, human rights lawyers. These nations are also distinguishable from Australia and New Zealand,[18] their contemporaries in the Asia Pacific region which too were originally home to native populations and colonially ruled. However, Australia and New Zealand were settlement colonies built on the complete decimation and relegation of the native population, establishing a *new world* altogether, vis-à-vis the Asian colonies which were merely the resource fodder and needed to be controlled in order to facilitate the resource drain.[19]

Albeit the above generalisation, I have sought to demonstrate through specific episodes in each of these states, the methods adopted to heckle, harass, intimidate and consequently obstruct the work of human rights lawyers by means of extant colonial laws and policies or post-independence measures that reflect the imperialist legacy.

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[17] *See* Paul D Kenny, 'Populist Leaders, Not Populist Parties, are Driving Asian Politics' *East Asia Forum* (26 June 2018) *at* https://www.eastasiaforum.org/2018/06/26/populist-leaders-not-populist-parties-are-driving-asian-politics/ (last visited 08 September 2019); Priya Chacko & Kanishka Jayasuriya, 'Asia's Conservative Moment: Understanding the Rise of the Right', *Journal of Contemporary Asia* (2018) 48(4) 529-540; *See also* Paul Kenny, *Populism in Southeast Asia (Elements in Politics and Society in Southeast Asia)* (Cambridge: Cambridge University Press. 2018).

[18] Upendra Baxi classifies them as Old Commonwealth states as opposed to postcolonial states. Upendra Baxi, 'Postcolonial Legality: A Postscript from India' *Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America*, (2012) 45 (2) 178-194.

[19] *Ibid*.

A. India

India, perhaps may be considered, the poster-child[20] of what constitutes a postcolonial state. The 1940s marked the end of a nearly century-old oppressive colonial rule that had relegated the vast South Asian subcontinent into abject poverty,[21] desolate industry, political and cultural instability;[22] amid the dichotomous euphoria of independence and tragedy of partition[23].[24] The Indian founding fathers hinged their hope and vision on the Constitution of India,[25] a 'social revolutionary statement' to undo all the wrongs of the *Raj*[26] by making way for socio-economic reforms. This was meant to be furthered by a series of aspirational freedoms, not recognised before but given as an extension of common law to the subcontinent under the British rule. These were akin to the Bill of Rights of the United States and the Universal Declaration of Human Rights ("UDHR"). As a result, an Indian in the newly independent country could speak or express freely, organise into peaceful assemblies, have equal opportunity and not be discriminated, live a life of dignity and respect. One would have imagined a utopia were underway, to set an example for the new world order.

But the reforms were to play out, not through a complete overhaul but through the laws, policies, institutions and bodies that were handed down as part of the colonial legacy or set up under its influence. At closer look, the newly independent life guaranteed under the Indian Constitution, much like in other postcolonial states, was qualified by concerns emerging from a fragile sense of national security, public morality (largely

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[20] *See* Ragini Tharoor Srinivasan, 'Introduction: South Asia from Postcolonial to World Anglophone', *Interventions* (2018) Vol. 20 (3), 309-316; *see also* Divya Carolyn McMillin, *Mediated Identities: Youth, Agency, & Globalization* (Peter Lang 2009), 5.

[21] Peter Robb, 'British Rule and Indian "Improvement"' *The Economic History Review* (1981) 34(4), 507–523; M. S. Rajan, 'The Impact of British Rule in India' *Journal of Contemporary History* 4 (1) 1969, 89–102.

[22] *See* Arun Banerji. 'White Man's Burden: India and Britain in the 19th Century' *Economic and Political Weekly* (2005) 40 (27), 2973–2978.

[23] Mushirul Hasan. 'Memories of a Fragmented Nation: Rewriting the Histories of India's Partition' *Economic and Political Weekly* (1998) 33(41), 2662–2668; *See also* Nisid Hajari, *Midnight's Furies: The Deadly Legacy of India's Partition* (Houghton Mifflin Harcourt 2015).

[24] India gained independence from British rule on 15 August 1947, adopted a national constitution on 26 November 1949 which came into force on 26 January 1950. *See* Ramchandra Guha, *India after Gandhi* (Pan Macmillan India 2017).

[25] Nalin Kant Jha, 'Realising The Constitutional Vision : Road Blocks And Road Ahead' *The Indian Journal of Political Science* (2005) 66 (1), 9–28.

[26] *Raj* in Hindi means rule. It is synonymously used to the refer to the British rule in the Indian subcontinent from 1858–1947, British imperial power, 1858–1947, *Britannica at* https://www.britannica.com/place/India/The-mutiny-and-great-revolt-of-1857-59#ref47032 (last visited 02 August 2019).

informed by a misplaced mix of Victorian[27] and the native sensibilities), and rapid economic development that was fully State monitored.

Further, it was a certain class of people that inherited the power to govern the state, who were the products of the very system they opposed in order to secure independence.[28] As a result, the colonial influence never really left the subcontinent. The violations of certain oppressed, marginalised classes that occurred in the past and thereafter during the colonial period, continued despite piecemeal claims to uplift them. Given the complexities of governing a new state, including the transference of power from one bourgeoise class to another, newer forms of othering and socio-political exclusion, and human rights violations occurred. These issues have been further exacerbated by a neo-liberal development paradigm.[29] The consequent endemic inequalities have spurred either armed rebellion or sustained activism over the years, both which have been met with despotic disregard by the Indian State.

This portion identifies those broad categories of the disenfranchised in India and how those who support their cause/defend them are no less subjected to the same kind of violence and persecution sanctioned and justified by the State. It would be relevant to take note of general laws, both colonial[30] and postcolonial that have aided the State in sanctioning against the work of defenders of rights in the Indian sub-continent.

Draconian laws and the tyrannical administration:

The law on sedition and the post independent counter insurgency/ national security laws are some of the choicest options at the disposal of the Indian Government. On one hand, the law on sedition is an inheritance of the colonial empire. While it has been removed as an offence from the statutes of the *metropole* itself,[31] independent India still retains

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[27] Punsara Amarasinghe, *Ghosts Of The Empire: Retrospection Of The Colonial Legacy Of Legal Systems In South Asia And Its Competence To Bring Justice* (GRIN Publishing 2017).

[28] 'Indian nationalism, at least the form in which it came to be enshrined in the Congress, was primarily a product of this discourse, a complex of dissatisfactions worked out by the modernist-rationalistic elite', Sudipta Kaviraj, *The Imaginary Institution of India: Politics and Ideas* (New York Columbia University Press 2010, See Mohan Jyoti Dutta, *Imagining India in Discourse: Meaning, Power, Structure* (Springer 2017), 6.

[29] *Nandini Sundar* v. *State of Chhattisgarh* (2011) 13 SCC 46.

[30] The word 'colonial' is being used in two of three senses considered by Arudra Burra in 'What is "Colonial" About Colonial Laws?', *American University International Law Review* (2016) 31(2) Article 1. He observes, '[…] The second involves the use of the term "colonial" in a purely temporal context – as designating a colonial-era law, with the implication that such laws are anachronistic. The third involves using the term "colonial" as a stand-in for "repressive" or "authoritarian"'

[31] Section 73 of the *Coroners and Justice Act 2009* abolished common law libel offences:

'The following offences under the common law of England and Wales and the common law of Northern Ireland are abolished—

it[32] on its books. It has been argued that while sedition was a misdemeanour, a minor offence, in the colonizer's own country, its application in pre and post-independent India has been more severe, more pervasive. For instance, while the British ruled India, it was a non-cognizable offence, i.e. a police officer required a warrant from the magistrate to arrest someone accused of sedition; in independent India it was made cognizable, i.e. a police officer no longer requires a warrant from a magistrate to arrest someone accused of sedition.[33]

On the other hand, independent India has enacted its own catena of security laws which aid the State to muzzle and incapacitate its dissidents. Surabhi Chopra argues that these security laws are designed to enhance the executive's powers in ways that facilitate human rights abuses, so much so that the Indian Supreme Court itself has failed to evaluate and place constitutional constraints, i.e. the constitutional rights and guarantees, when determining the potency of these laws.[34]

For instance, the *National Security Act, 1980* (NSA) allows the Central Government or the governments of the federal states to make an order to detain any person who may act in a manner prejudicial to the security of the State or the maintenance of public order,[35] for a maximum detention period of 12 months from the date of detention.[36] What is prejudicial, what is 'security of the State' and what is 'public order' remain undefined.

Then there is the *Unlawful Activities (Prevention) Act 1963*, (UAPA), which is the country's main[37] counter-terrorism legislation extending to the whole of India. It grants

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a) the offences of sedition and seditious libel;
b) the offence of defamatory libel;
c) the offence of obscene libel.'

Sedition by an alien is still an offence, *see* the *Aliens Restriction (Amendment) Act 1919*.

[32] Section 120-A, *Indian Penal Code, 1860*.

[33] Abhinav Chandrachud, *Republic of Rhetoric: Free Speech and the Constitution of India* (Penguin India 2017).

[34] Surabhi Chopra, National Security Laws in India: The Unraveling of Constitutional Constraints (May 31, 2012) *Oregon Review of International Law* (2015) 17(1).

[35] Section 3, sub-section 2, NSA. *See* Chopra, *ibid*.

[36] Section 13, NSA.

[37] *The Terrorist and Disruptive Activities (Prevention) Act, 1987* (TADA) was meant to originally address counter-terrorism procedures but it lapsed in 1995 and subsequently the *Prevention of Terrorism Act, 2002* was enacted, which was repealed in 2004. Both pieces of legislation were criticised for excessive *executivisation* of law. For instance, the abusive usage of TADA is evident from the data available: by mid-1994, 76,166 people had been arrested under TADA but only 2% were actually found guilty. 'Black Law and White Lies-A Report on TADA, 1985-1995', *Economic and Political Weekly* (1995) 30 (18-19). *See also* Jatinder Singh, 'Democracy and Anti-terrorism Laws' *Economic and Political Weekly* (2015) 50 (30). UAPA was thereafter amended to cover counter-terrorism procedures and penalties, thus making it the most

full discretion to the government to determine what an 'unlawful association' is and ban the same. It has been defined as a body that carries out or aids or has an objective to commit 'unlawful activities' which include actions seeking the 'cession of a part of the territory of India or the secession of a part of the territory of India from the Union'.[38] The scope of 'unlawful activities' is more vague as it includes 'disclaiming' or 'questioning' the territorial integrity of India, and causing 'disaffection' against India. The problem of vagueness seeps into those clauses which impugn membership of such associations,[39] without determining who would be considered a member or what would be the standard of proof for involvement in such an association. This ambiguity has played out in real where possessing literature or books about or even remotely suggestive of a banned organisation or expressing sympathy for 'banned' organisations have been labelled 'clinching pieces of evidence'.

Despite being creations of a newly independent India, these anti-insurgency/anti-subversive laws reflect the colonial pattern of promulgating, repealing, re-enacting of such problematic laws to quell opposition. Further they also rely upon the institutions created by the colonial rule– the police, the prosecution procedure, and the judiciary.[40] The systemic concerns that plague these institutions in prosecuting ordinary crimes,[41] are more likely to manifest in more harmful ways when applying the discussed draconian laws.

In addition to these national laws, a series of state/region specific security laws, as well as other regular laws that empower the executive to have unfettered powers, further aggravate these concerns. The following sub-parts elucidate two broad areas which showcase the Indian State's continuity of its colonial legacy of human rights violations:

1. Don't Go Native in Chhattisgarh

a. Background

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comprehensive anti-terror law in India. What's pertinent to note is that TADA and POTA had sunset clauses and were meant to end at some point. UAPA, on the other hand, is a permanent statute.

[38] Section 2(1)(o), UAPA.

[39] Section 20, UAPA.

[40] Anil Kalhan *et al*, 'Colonial Continuities: Human Rights, Terrorism, and Security Laws in India' (March 2007). *Columbia Journal of Asian Law* 20, 93.

[41] Custodial violence, no regulation on interrogative techniques, lack of sensitization of the police officials, complete impunity to their conduct in and off field, and perfunctory processes of the adversarial system.; Ministry of Home Affairs, 'Committee on Reforms of Criminal Justice System' Government of India (March 2003).

The disdain and disregard for the indigenous population of India, is perhaps the most loyally inherited legacy of the *Raj*. The *Raj* witnessed many a rebellion of the tribal population, in protest against the alienation of their lands, expropriation of the forests they dwelled in and from which they drew their natural and cultural rights, and the unforgiving trauma of displacement. A slew of forest and tenancy laws and policies cut right through the inalienable rights of the tribes over their lands and resources.[42] What lay at the root of this onslaught was the *resource curse*[43] that befell on the tribes, since they occupied the densest forest regions in India, thrived along the banks of the fastest-flowing rivers and atop the richest pockets of iron ore and bauxite. The period post-independence was imbued with hope and anticipation where the tribal people took the new government at its word that they were to be part of the collective dream of development, growth and emancipation. Instead, the new government carried forward the colonial belief that tribal people are lazy, improvident, suspicious of policy intervention, driven by superstitions, unscrupulously destroying the forests and the natural resources;[44] ergo their lives must be regulated. Much like the white man, the colonised brown *sahebs* lacked 'intimate knowledge' and general understanding of tribal development. This, the State said was ground enough to weed out the tribes and put the resources to better use, i.e. the economic development of the country, by building dams and carrying out mining operations. Dislodged by land acquisition proceedings and compensated with paltry sums or never at all, these tribes were either driven to death or compelled to migrate to urban areas where they joined the ranks of the urban poor, including landless labourers.[45]

This has been further compounded by prioritising other policy concerns including environment conservation. Instead of harmonising the rights of the tribal communities and the issues of environment protection, the laws seek to illegalise basic activities of the tribes that are concomitant to their dwelling in

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[42] *See* Chandan Kumar Sharma, 'Tribal Land Alienation: Government's Role' *Economic and Political Weekly* (2001) 36(52), 4791-795.

[43] Resource curse maybe defined as 'the perverse effects of a country's natural resource wealth on its economic, social, or political well-being, i.e., naturally resource rich regions, instead of heralding in growth and development, become hotbeds of conflict, exploitation and grave human and environmental rights concern. Michael L. Ross, 'What Have We Learned about the Resource Curse?' *Annual Review of Political Science* 2015 18:1, 239-259, *citing* Richard M. Auty, *Economic Development and the Resource Curse Thesis* (1995).

[44] Report of the Committee on Special Multipurpose Tribal Blocks (New Delhi: Manager of Publications, 1960), as cited in Ramachandra Guha, *Democrats and Dissenters* (Allen Lane Penguin India 2016).

[45] Guha, *ibid*.

the forests. They are threatened and penalised for entering the forest to access and utilise forest produce or for the grazing of cattle.[46] They live every day under the unpredictable threat of being evicted from their homes.

Multiple reports and studies commissioned by the State highlight the systemic failure in securing the lives and rights of the tribes. The end result of this policy paralysis has been a replication of the colonial rebellions in postcolonial India. Through the decades since independence, whenever the tribal people have protested against the State's oppression or raised their voices to demand their legal rights, the State has used force to suppress them to the extent of entrenching upon their liberties and blatantly violating their right to life.

The tribal districts in the state of Chhattisgarh[47] perhaps offer the best exemplification of this problem. Under the provisions of the *Forest (Conservation) Act, 1980*, which allows diversion of forest land for commercial/economic activity, widespread displacement of the indigenous people has taken place. Such sweeping expropriation has been met with resistance;[48] with an ongoing conflict between the State and its agencies and their opposing forces, primarily the armed guerrillas of the Communist Party of India (Maoist) ("CPI(M)"), espousing the cause of the tribal people.

Severe violence and violation of human rights has emanated from this conflict affecting the lives of the tribal people.[49] Those working in closer quarters to alleviate the situation also face the brunt. By colouring their rights' protests as a

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[46] Velayutham Saravanan, *Environmental History and Tribals in Modern India* (Springer 2018) 159-184; Abhijit Mohanty 'Tribal Communities Suffer When Evicted In The Name Of Conservation' *Down to Earth* (10 May 2019) *available at* https://www.downtoearth.org.in/blog/forests/tribal-communities-suffer-when-evicted-in-the-name-of-conservation-64376 (last seen 08 September 2019).

[47] The *Madhya Pradesh Reorganisation Act, 2000* created the new state of Chhattisgarh out of the 16 south-eastern districts of the original state. The Industrial Policy (2004-2009) identifies the state as the 21st one, 40 percent of which is under forest cover and possess large deposits of as many as 28 minerals making it a hotbed for exploitation. Sakarama Somayaji and Smrithi Talwar, *Development-induced Displacement, Rehabilitation and Resettlement in India: Current Issues and Challenges* (Routledge Mar-2011)

[48] A total of 171 lakh hectares of forest land was diverted from 1980 to 2003 of which 67.22% was for mining. IAPL Fact-finding Report: Attacks on Lawyers in Chhattisgarh, 26 January, 2017, *Sanhati* at http://sanhati.com/excerpted/18342/ (last visited 08 September 2019). In recent years, between 2015 to 2019, 3770.87 hectares of forest land has been diverted, Lok Sabha Unstarred Question No. 1098, answered on 08.02.2019, Government Of India, Ministry Of Environment, Forest And Climate Change.

[49] In 1960s, the State's unabated erosion of the tribal life led to the birth of the Naxalite movement, led by the armed guerrillas of the Communist Party of India (Maoist), often dubbed Maoists/Naxals. While the original movement was nearly crushed by the 70s, the splinters spread manifesting into systemic opposing forces to the State's intervention in these districts. Separation of the state of Chhattisgarh from the erstwhile Madhya Pradesh (formerly, Central Provinces), liberalisation of mine laws, the onslaught of the State sponsored vigilante group Salwa Judam, have tied the knots of the process of historic marginalisation of this region. *See* Nandini Sundar, *The Burning Forest: India's War in Bastar*, (Delhi: Juggernaut 2016).

law and order situation, the State legitimises the counterinsurgency operations against "Maoists"/*Naxals*[50]. By listing CPI(M) as a banned and unlawful organisation under the UAPA, the Indian State has succeeded in clouding the entire narrative around tribal-rights activism, whether backed by CPI(M) or not, as a security issue.[51] This kind of labelling, prosecuting under anti-insurgency laws, and the consequent othering of dissidents has become a means to justify the massacre/arbitrary arrests/legal harassment in the collective imagination of the country, all in the name of national security, and to safeguard the region for mining and *enterprising* activities.

b. Don't go about Lawyering in Chhattisgarh

The above scenario extends to the lawyers who defend the dissenters too. They get identified with their clients and treated likewise, i.e. being charged under the discussed draconian laws. Some of the prominent cases of such abuse of process against lawyers has been discussed in the following portions:

i. Jagdalpur Legal Aid[52]

The arrest, and subsequent sexual and custodial torture of Soni Sori,[53] an *adivasi* woman advocating the rights of the tribal people in Chhattisgarh, particularly her district Bastar, in 2011 in India's capital Delhi had renewed the focus on the crises in Chhattisgarh and brought it national attention.[54] One offshoot of this episode was the forming of the Jagdalpur Legal Aid Group, known as 'JagLAG', which came into existence in July 2013. It is the brainchild of three women lawyers, and later more, who sought to provide

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[50] Those who sympathise with the cause of the tribal people, are labelled Maoists (those who espouse Mao Communism)/Naxals (derived from the Naxalbari district, a hotbed of this strife) *See* Nandini Sundar, *The burning Forest: India's war in Bastar*, (Delhi: Juggernaut 2016).

[51] There is also the *Chhattisgarh Special Public Safety Act of 2005* which contains very broad definitions of 'unlawful activities', including showing a 'tendency' to 'pose an obstacle to the administration of law'. It permits administrative detention of individuals without judicial intervention for two to seven years without proof of intent or definite act to commit certain acts. It also empowers the Chhattisgarh government to ban and prosecute organisations committing 'unlawful activities'.

[52] The data in this portion is based on multiple journalistic writings that have emerged from the state of Chhattisgarh and naturally follows from the State's position on the situation there. Some of the narrative is also based on the data collected by the author by way of a questionnaire and interviews, which are on record with him.

[53] Divya Arya, 'Soni Sori: India's fearless tribal activist' *BBC Hindi* 22 March 2016 at https://www.bbc.com/news/world-asia-india-35811608.

[54] Pavan Dahat, 'In Bastar, a group of lawyers try to bring law to a lawless region', *The Hindu* (Jagdalpur (Bastar), 7 October 2015 *available at* https://www.thehindu.com/news/national/a-group-of-lawyers-trying-bring-law-to-lawless-bastar-region/article7735079.ece.

legal help to the people of Bastar district. Operating out of the eponymous headquarters of the Bastar district, Jagdalpur, the lawyers sought to voice the concerns of the people caught in the vicious conflict between the security forces and the Maoists.[55]

JagLAG set out first to assess the situation. They were faced with a district which was the hotbed of this conflict, with multiple cases of false prosecution of dissenting *adivasis* pending in different courts in Bastar. As part of this process, they first set out to document data by filing RTI[56] applications, liaising with other lawyers, etc to find out how long had the trials been going on with no redress. Fake encounters[57] a gruesome, yet common reality of Bastar, and disappearances of indigenous folks by dubbing them as state enemies/Naxalites also came to be documented by JagLAG. Through their research they found how local lawyers had poorly represented the undertrials, leaving them in a lurch for decades. They had made a living out of the money drawn from the misery of the undertrials and their families under the garb of multiple affidavits, applications and court appearances. Lawyers from the *adivasi* community themselves had failed their own people by exploiting their position as the lone conduits to voice the concerns of the *adivasis*.

The initial year or so when they were gathering this range of data, the group faced not much of a hindrance. They were able to access prisons and meet the detainees and undertrials, without having to suffer the rigour of bureaucratic permissions. Interestingly, this can be attributed to the inherent patriarchy prevalent, as the local police and legal system did not look at a bunch of women legal researchers as a possible threat. However, this was short-lived.

Gradually, the JagLAG lawyers had started to engage with the local communities more than they had set out to. The group started to also provide

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[55] Dahat, *ibid*; *see also* Disha Chaudhari, "The Conflict In Bastar Has Brought Women To The Forefront" – In Conversation With Isha Khandelwal Of Jagdalpur Legal Aid Group, *Feminism India* 19 December 2016 *at* https://feminisminindia.com/2016/12/19/interview-isha-khandelwal-jagdalpur-legal-aid-bastar/.

[56] Right to Information is a fundamental right enshrined in the freedom of speech and expression under the Constitution of India, and the Right to Information Act, 2005 by which any Indian citizen can seek information and view records, including documents, memos, opinions, emails and advice offered by public authorities, both in print and electronic versions. *See* Sujay Ghosh, 'Accountability, Democratisation and the Right to Information in India', *Asian Studies Review* (2018) Vol. 42 (4), 626.

[57] Encounter killing in South Asia, particularly India, is often a cover for premeditated State-sponsored murder of dissidents than an act of self-defence for the police/military forces, *See* Isabelle Clark-Deces (ed.) *Companion to the Anthropology of India* (John Wiley & Sons 2011).

legal counsel to the tribal people accused in criminal cases before the courts, mainly in Jagdalpur and Dantewada. Excessive police intervention in civic life had long vitiated the calm of the Bastar district. Hapless local people, especially those either arrested arbitrarily under the security laws or exposed to arbitrary, yet 'sanctioned' bodily harm found refuge in JagLAG and the lawyers who were assisting the group, including the well regarded trade unionist and advocate Sudha Bharadwaj[58]. This could be attributed to failure of the local judicial system, the independence of which had been marred either by the fear of State's retribution or by the money-making syndicates that have emerged. What perhaps is the worst of the realities prevalent there is that the system *does not understand the language* of the people it has been prosecuting, nor do the people, particularly *adivasis* have a clue what is being done to them, leaving them fully reliant on the very system that is pitted against them. (emphasis supplied)

Naturally, JagLAG's intervention put them under the scanner, not just amongst the police and State but also the lawyer-syndicate. A change of guard in 2014,[59] rather return of the old guard in the police force, brought about the concerted onslaught on this group. Senior Police officer SRP Kalluri, one of the infamous aggressors of the civil war in Chhattisgarh, with abhorrent antecedents including rape of an *adivasi* woman and unabated State-sponsored killings and disappearances,[60] was brought back with more powers as Inspector-General of Police in Bastar. While State impunity and accolades may have shielded Kalluri's previous (mis)handling of state resources and alleged abuse of powers, this time around he went about using alternate measures to make it difficult for JagLAG to continue their work. He used the mode of press conferences and seminars, implicitly threatening JagLAG, by

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[58] Infra *Lawyers Protecting Lawyers: Threat to A State*

[59] Also coincides with the beginning of a new political paradigm in India, with the Hindu-fundamentalist, Indian Right-wing Bharatiya Janata Party coming into power and forming a government with majority in the Union Government, while also holding the fort in the State Government of Chhattisgarh (until 2018), *See* Pradeep K. Chhibber and Rahul Verma, *Ideology and Identity: The Changing Party Systems of India* (Oxford University Press 2018); *see also* Peter Davies and Derek Lynch, *The Routledge Companion to Fascism and the Far Right* (Routledge 2005).

[60] *See* Vrinda Grover, 'The Adivasi Undertrial, A Prisoner Of War: A Study of Undertrial Detainees in South Chhattisgarh' in Deepak Mehta and Rahul Roy (eds.) *Violence and the Quest for Justice in South Asia* (Sage Publications 2018) and Nandini Sundar, *The Burning Forest: India's War Against the Maoists* (Verso Books 2019), p. 180.

warning 'NGOs[61] from Delhi' of strict action if they were found aiding Maoists.

Such state-enabled animosity subsequently led to the Bastar District Bar Association filing a complaint against the credentials of the lawyers of the group. Since they were registered with the Delhi Bar Association and not the Chhattisgarh Bar Council nor the District Council,[62] Kalluri and team found a way to make it difficult for the JagLAG lawyers from appearing before the courts. By practice, lawyers registered in other State bar councils could appear in the courts in Chhattisgarh if they were backed by a memo of appearance from local lawyers. Boycotting, intimidating, interrogating any lawyers who potentially could give JagLAG such memos or have given created a hostile environment for the team. A fact-finding committee set up by the Indian Association of People's Lawyers (IAPL) reported[63] instances where the judges and court officers too turned hostile. In one instance, a judge in the special court set up under the NIA Act refused to allow appearance or record presence or accept any application filed by one of the lawyers of the group and adjourn her matters without noting the reasons. Kalluri continued the smear campaign by putting the State's resources in press conferences, co-opting non-state organisations that organised seminars labelling the work of such lawyers, including those providing memos to them, as Maoist-backer, ergo anti-State.[64]

2015 saw the Bastar District Bar passing a resolution barring any non-local lawyer from practising before the courts without their permission based on some archaic provision on the books. Such a requirement made it far from possible for the group to effectively function. Eventually, the mounting pressures of hostility and threats forced the lawyers of JagLAG to vacate and leave Bastar.[65]

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[61] Non-governmental organisations.

[62] Hierarchy of Bar Councils under the Advocates Act.

[63] IAPL Fact-finding Report, *supra* n. 48.

[64] Aarefa Johari, 'Anarchy in Chhattisgarh: What a new fact-finding report says about police atrocities in the state' *Scroll* J27 January, 2017 *at* https://scroll.in/article/827699/anarchy-in-chhattisgarh-what-a-new-fact-finding-report-says-about-police-atrocities-in-the-state (last visited 08 September 2019).

[65]Krishn Kaushik And Atul Dev, '"This Kind Of Terror, We Have Not Seen Before": An Interview With the Lawyers Evicted From Bastar in Chhattisgarh' *The Caravan* 09 March 2016 *available at* https://caravanmagazine.in/vantage/interview-jaglag-lawyers-evicted-bastar (last visited 08 September 2019).

Ever since, they got enrolled with the State Bar, and got the resolution overturned by the State Bar Council.[66] They started working out of Bilaspur district where the High Court of the State of Chhattisgarh is also located. While pressures were not as intensive, the workload reduced by half for the lawyers, given the bulk of their work concerned with the disappearances, illegal detentions of the *adivasis* and people of Bastar district. Further it got difficult with the police threatening to prosecute them under false complaints being written against them. One such complaint accused a lawyer on the team of abducting the wife of a detainee. A *habeus corpus* petition had been filed on the behest of this woman against the arbitrary arrest of her husband. Unfortunately the petition seemed infructuous, as the detainee made claims that he had surrendered wilfully for being a *Naxalite*, the petition was unnecessary and that his wife had been restrained and compelled by JagLAG to pursue for his release. His brother-in-law went further and filed a complaint against this lawyer for abducting the wife.

With the workstream reducing overtime and rise in the instances of suppressing counterviews, including journalists being beaten up and ousted, the JagLAG lawyers have slowly moved out, with one remaining in Chhattisgarh, with the others making periodic visits. However, on one such visit, one of them was informed of the complaint discussed above, by the new Attorney General of the State whom she had gone to meet. She was told that were she to continue the kind of work she does by being back, this and several such 'complaints' would be converted to first information reports and she would be prosecuted.

ii. Independent Lawyers Branded and Prosecuted over the Years

IAPL's Report on the plights of human rights lawyers in Chhattisgarh underscored the fact that the lawyers who espoused the cause of the disenfranchised in Chhattisgarh were to be seen and treated just the way the people they were representing: branded as Naxals/Maoists/state enemies and prosecuted under the gamut of the national security and free speech laws. The

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[66] 'Women Win Fight for Lawyer's Rights to Practice In Chhattisgarh' *SabrangIndia* 22 March 2019 *at* https://www.sabrangindia.in/article/women-win-fight-lawyers-rights-practice-chhattisgarh (last visited 08 September 2019).

basis for such prosecution and branding is more often than not the case files of the *adivasis*/locals who were taking on the State for violations committed against them and had been branded as Naxalites and prosecuted under the aforesaid laws. When such files are found in the custody of the lawyers, as would be the case when lawyers represent their clients, it is enough to prosecute the lawyers too under the same laws. This, as will be seen from some of the instances cited below, has been compounded by societal and professional ostracism, especially after the falsified prosecution ends. The reasons range from suspicion to fear of being associated with formerly prosecuted state-enemies.

Advocate Satendrakumar Chaubey was branded a Naxalite for defending villagers accused of attacking a local police station.[67] In 1999, his house was raided by the police forces, based on an official complaint filed against him for "participating in Naxalite activities". Files and case papers of his clients were seized during the raid. The material was labelled *Naxal* material and marked to be have been in his possession. Though immediately arrested and placed in police custody, he remained behind the bars for three months with no charge-sheet filed within the prescribed period.[68] Consequently he had to be granted statutory bail. Eventually the chargesheet was filed, but till date no charges have been framed, leaving him stigmatised since. It is reported no one visits him.

In another case, an advocate wife was arrested after they raided her marital home subsequent to her husband's arrest by the NIA.[69] One Dipak Kumar was arrested from Kolkata in a *Naxal*-related case. When his one-room marital home was searched as part of the investigation, reportedly for nearly 7 to 8 hours, 'incriminating' evidence was found against his wife, Rekha Praganiya, who is an advocate and has established her practice in Durg district of Chhattisgarh. The said evidence included case papers of her client Malti, who was being prosecuted for *Naxal* activity. What stands out in utter absurdity is

[67] Bargaon police station in Ambikapur. IAPL Fact-finding Report, *supra* n. 48.
[68] IAPL Fact-finding Report, *supra* n. 48.
[69] IAPL Fact-finding Report, *supra* n. 48; Press Release, Indian Association of People's Lawyers, 'Condemn the Arrest of Advocate Upendra Nayak By Odisha Police' *Lokraj* (23 February 2018) *at* http://www.lokraj.org.in/node/2239 (last visited 08 September 2019).

how far the State went in identifying the lawyer with the cause of her client, for Rekha was shown as *absconding in the ongoing criminal case in which she had been representing* Malti. (emphasis supplied) This led to her arrest on 4 March 2012. While she was in custody for six days, it has been reported that she was interrogated for just six minutes. However, the police in cahoots with media is said to have fabricated the case and ascribed dramatic revelations about Rekha's subversiveness and sensationalised the arrest. Rekha was eventually charged for sedition. Getting her representation was also not easy. In prison, she is said to have been isolated from others in order to prevent her from talking to the inmates. Rekha was eventually acquitted and released in June, 2013, after having spent more than a year in jail. Yet, her return to court was resisted and barred by fellow lawyers.

iii. The Price One Pays in Chhattisgarh to Fulfil their Constitutional Duties: Case of a Harassed Judge

Prabhakar Gwal was serving as the Chief Judicial Magistrate, a lower court judge, of Sukma district. He previously had a run-in with the government in power when he convicted five people in a scam that unearthed the leakage of question papers of recruitment examinations conducted by the State. Thereon, he ordered a probe in the multi-crore 'land' scam[70] that has left 200 tribal families landless as 500 hectares of forest and tribal lands have been grabbed by land sharks, backed by those in positions of political power.[71] He had also questioned the arbitrary arrests of tribal people, and had granted bail in deserving cases. Gwal's action of granting bail to those accused of Naxalite activities was deemed to have adversely affected the morale of security forces. At the behest of the High Court of Chhattisgarh, Gwal was removed by the Government of Chhattisgarh 'in public interest with immediate effect'.

2. Lawyers Protecting Lawyers: Threat to A State

IAPL has been documenting and highlighting the piteous state of human rights lawyers in India. Nearly each of the cases of violations and false prosecutions against lawyers

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[70] Rabindranath Chaudhary, 'Rs 500 Crore Scam Leaves 200 Tribal Families Landless' *Asian Age at* https://www.asianage.com/india/rs-500-crore-scam-leaves-200-tribal-families-landless-462 (last visited 02 August, 2019).

[71] IAPL Fact-finding Report, *supra* n. 48.; *see also* Support A Fearless & Honest Judge Challenge His Dismissal, *Milaap at* https://milaap.org/fundraisers/prabhakar-gwal (last visited 02 August, 2019);

have been investigated, reported and pursued by this group. In many ways, IAPL alone seems to have carved this space out to voice and shed light on the plight of the lawyers and the marginalised.

It was only time before their work was going to earn them, particularly the office bearers of the organisation, the ire of the State. Three of its office bearers and advocates: Surendra Gadling, General Secretary of IAPL, Sudha Bharadwaj, the Vice-President and Advocate Arun Ferreira, Treasurer, were arrested in the year 2018 on the grounds of their alleged involvement with CPI (Maoist). It all emerged from clashes that occurred in early January, 2018.

The three lawyers were arrested subsequent to two consecutive police raids held between June to August, 2018. These raids were carried out in connection to the caste violence that occurred earlier that year, in Bhima Koregaon village in the state of Maharashtra. Lakhs of Dalits had congregated in this village to commemorate the bicentennial of the Battle of Koregaon, in which native Dalit Mahar soldiers fighting alongside the British colonial army defeated the native Brahmin Peshwa rulers of the Maratha empire.[72]

Surendra, an activist turned lawyer, has spent nearly 25 years representing those falsely prosecuted under anti-subversive laws in India, and is considered a point person for cases of State excesses, fakes cases and encounters, and atrocities committed against Dalits and *adivasis*. Prior to his arrest, Surendra was representing the case of GN Saibaba, a professor of University of Delhi and also a wheel-chair bound person with 90 per cent disability, who was arbitrarily abducted and incarcerated for having links with CPI(Maoist) and convicted under UAPA to life imprisonment in 2017.[73] Arun too was an activist, who was already falsely prosecuted and arbitrarily convicted and incarcerated for four years till his acquittal. He later went on to read law and represent

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[72] Shraddha Kumbhojkar argues: '[C]onflicting memories have been created around the Koregaon Bheema obelisk and represent the divergent interests of the groups involved in their creation. Those wishing to commemorate the greatness of Peshwa rule – a symbol of high-caste supremacy – either choose to ignore the Battle of Koregaon or create the pseudomnesia of a Peshwa victory. It is also an imperial site of memory that has been largely forgotten in Britain. However, the monument has undergone a metamorphosis of commemoration, as it no longer reminds the public of imperial power, except for the former untouchables whose forefathers shed their blood at Koregaon. It serves the purpose of providing "historical evidence" of the ability of the untouchables to overthrow high-caste oppression.' 'Contesting Power, Contesting Memories: The History of the Koregaon Memorial' *Economic and Political Weekly* (20 October 2012) 47(42).

[73] Debobrat Ghose, DU Professor's Life Sentence: Here's Why Many Disagree With The GN Saibaba Verdict, *Firstpost* (09 March 2017) *at* https://www.firstpost.com/india/du-professors-life-sentence-heres-why-many-disagree-with-the-gn-saibaba-verdict-3323552.html (last visited 08 September 2019).

political prisoners thereon. Sudha on the other hand is a trade unionist and civil rights activist, who took up a legal career to bolster her work against irregular land acquisition as well as rights of mine labourers, *adivasis* and Dalits.[74]

The three lawyers, among other activists were arrested in two phases, and on the basis of a nearly 7,500-paged chargesheet[75] that the violence in Bhima Koregaon was instigated with the complicity of those arrested and was part of a larger conspiracy of the banned CPI (M) to assassinate the incumbent Prime Minister Narendra Modi and destabilise India. This voluminous indictment, supposedly based on letters and documents found on electronic devices belonging to the accused, unsurprisingly carries no annexures with the evidence. There have been reportedly 60-odd hearings on their bail applications which have come to a stall with the court requiring the electronic evidence being relied on by the State. There are believed to be 23 hard disks' worth of evidence, and copies of the same need to be made for the judge and circulated among the nine accused, including the three lawyers. That's about 230 copies, with each copy taking six-seven hours to be made, which need to be transferred to the court in the presence of the custodian of the court property. This transference is scheduled every two weeks.[76] The math of these delay tactics is more than apparent, while the accused languish in under-trial prison as the newest victims of the UAPA.

To add to this, the President of IAPL, a former Judge of the Bombay High Court, Justice Hosbet Suresh (Retd.), known for his role in several fact finding committees and inquiry commissions that investigated violations during communal riots and revered for his

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[74] Ashwaq Masoodi, 'This Land Is Your Land' *LiveMint* (7 November 2015) *available at* https://www.livemint.com/Leisure/VNExP1mV0wdJ7Ha6UoKneK/This-land-is-your-land.html

[75] Sukanya Shantha, 'Bhima Koregaon: In 5,000-Page Chargesheet, Pune Police Say Activists Incited Violence' *The Wire* (16 November 2018) *at* https://thewire.in/rights/bhima-koregaon-case-pune-police-chargesheet (last visited 08 September 2019); Shruti Menon, 'Bhima-Koregaon Arrests: 5,600-Page Chargesheet Has Many Weak Links' *NDTV* (26 December 2018) *at* https://www.ndtv.com/india-news/bhima-koregaon-arrests-5-600-page-chargesheet-has-many-weak-links-1968335 (last visited 08 September 2019); PTI, 'Pune Police Charges Sudha Bharadwaj, Others in Bhima Koregaon Case', *The Wire* (21 February 2019) *at* https://thewire.in/rights/pune-police-charges-sudha-bharadwaj-others-in-bhima-koregaon-case (08 September 2019).

[76] Sukanya Shantha, 'Bhima Koregaon Case: Of 230 Required Copies of Evidence, Only 4 Made in 2 Months' *The Wire* (22 July 2019) *at* https://thewire.in/rights/bhima-koregaon-case-activists-bail-hearing-delay (last visited 08 September 2019).

work,[77] has received open threats of a possible arrest by the Assistant Commissioner of Police[78] of the State of Maharashtra.[79]

The Impact

Such false cases 'criminalises' the lawyer and subjects *them* to the criminal administration system, which given its red-tapism, would compel them to spend prolonged time periods attending hearings before criminal courts. If the cases happen to be filed in different parts of the state, or sometimes across different regions of the country, which often is done to aggravate the harassment, attendance at such courts would make it more exacting for the lawyer to travel to each of those places different from the one they reside in. Being absent from such hearings can sometimes, especially without a petition being filed by a defence lawyer to condone the absence of the victim-lawyer, result in the ordering of a bailable warrant against them. The costs of travel, partaking in the trial, and the like are likely to wear them down. Their otherwise regular and normal responsibilities as part of their work is bound to be hampered and their credibility affected.[80] Procedural rigmarole aside, prejudices and ideologies of the judicial mind in cases like this can also produce much more adverse, perhaps absurd effects. For instance, at one of the pressers organised by Kalluri in Chhattisgarh, a district court judge stated how the work of the police forces was commendable and needed to be supported and facilitated, as opposed to aligning with causes being represented by "certain" NGOs, alluding to the work of JagLag. A trial presided over by such a judge would in no way elicit any degree of trust and is likely to prejudice the case being represented by such a group even before the trial has commenced.

B. *Malaysia*

Much like its Indian counterpart, the Malaysian Constitution was a balancing act. It sought a middle ground among its multi-ethnic people, as well as between the systems

[77] Kaveri Riots (1991) in Bangalore and post-Babri Bombay riots (1992/1993) Godhra riots (March/ April 2002). Was part of the tribunal that investigated the Godhra riots, gathering 2,094 oral and written testimonies and meeting many senior police officers and government officials, published in their report 'Crime Against Humanity' .

[78] 10th in the pecking order of the Police Forces in the State of Maharashtra, *See* 'Police Ranks' *Maharashtra Police at* http://mahapolice.gov.in/files/policeRank.pdf (last visited 08 September 2019).

[79] Press Release: IAPL Condemns the Threat to Arrest Justice H Suresh, *Counter Currents* (22 October 2018) *at* https://countercurrents.org/2018/10/iapl-condemns-the-threat-to-arrest-justice-h-suresh (last visited 08 September 2019).

[80] Observations by Ms Khandelwal, Mr Tiphagne and Mr Ahmed. On record with the author.

of governance it sought to create by recognising the *sultans* as constitutional federal heads for nine of the thirteen territories, and the Westminster model of separation of powers, i.e. the executive being part of the legislature, and an independent judiciary.[81] It also bore testimony to the fact that the independence gained from the colonial rule was on account of the *Merdaka* compromise between the ruling, conservative[82] elite class and the colonizers, allowing the former to dominate Malaysia's political future.[83] The elites, mostly urban, eventually formed the dominating political class: the omnipresent United Malays National Organization (UMNO) which, until May 2018,[84] led the ruling coalition *Barisan Nasional* that shaped the course of independent Malaysia's (initially Federation of Malaya) history, right from the point of the drafting of its Constitution. This moment of departure in Malaysian history brought in the legal framework which recognised the rights to life, liberty, due process, of equal protection before the law, freedom of expression, assembly and association, free elections, and which sought to harmonise the work of the newly reorganised state functionaries, public institutions and bureaucracy. What UNMO also managed to achieve was the inclusion of Article 3,[85] which designates Islam as the state religion and Article 160,[86] which was

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[81] Tan Poh Ling, *Human Rights and the Malaysian Constitution Examined through the Lens of the Internal Security Act 1960*.

[82] Daniel S. Lev, *Legal Evolution and Political Authority in Indonesia: Selected Essays* (Martinus Nijhoff Publishers 2000), 330.

[83] *Ibid*.

[84] Joseph Sipalan, 'Explainer: How Malaysia's Once-Powerful Ruling Party Crashed', *Reuters* (10 May 2018) *at* https://www.reuters.com/article/us-malaysia-election-defeat/explainer-how-malaysias-once-powerful-ruling-party-crashed-idUSKBN1IB271 (last visited 08 September 2019).

[85] Article 3, *Federal Constitution of Malaysia* reads as under:

(1) Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation.
(2) In every State other than States not having a Ruler the position of the Ruler as the Head of the religion of Islam in his State in the manner and to the extent acknowledged and declared by the Constitution of that State, and, subject to that Constitution, all rights, privileges, prerogatives and powers enjoyed by him as Head of that religion, are unaffected and unimpaired; but in any acts, observances or ceremonies with respect to which the Conference of Rulers has agreed that they should extend to the Federation as a whole each of the other Rulers shall in his capacity of Head of the religion of Islam authorize the Yang di-Pertuan Agong to represent him.
(3) The Constitution of the States of Malacca, Penang, Sabah and Sarawak shall each make provision for conferring on the Yang di-Pertuan Agong the position of Head of the religion of Islam in that State.
(4) Nothing in this Article derogates from any other provision of this Constitution.
(5) Notwithstanding anything in this Constitution the Yang di-Pertuan Agong shall be the Head of the religion of Islam in the Federal Territories of Kuala Lumpur, Labuan and Putrajaya; and for this purpose Parliament may by law make provisions for regulating Islamic religious affairs and for constituting a Council to advise the Yang di-Pertuan Agong in matters relating to the religion of Islam.'

[86] Article 160, Federal Constitution of Malaysia reads as under:

later[87] amended to include, among other things, the professing of Islamic faith as an attribute of the 'Malay' people. One may say, in some sense, UNMO fell short of having Malaysia declared to be an Islamic state[88]. It went about appeasing the Malay population,[89] accentuated with its desire to align with the global Islamic resurgence in the latter half of 20th century. This led to the creation of a dual legal and policy system, one that includes both common law and *sharia* law. The entire Malay centric narrative which dominates the political, economic and social discourse of the nation can be attributed to UNMO.

A richly multi-ethnic nation such as this was bound to retaliate to this kind of Malay-washing of the life there. Here lies the point of fracture in Malaysian polity, where a series of laws and policies oppress and violate basic freedoms of the non-Malay, including aboriginal[90] population. A series of blasphemy and anti-subversive laws enabled the UNMO-led State to push its religious propaganda and silence the critics. The State used these in tandem with physical force, when protests or riots occurred to quell the opposition. Dissidents that emerged from these episodes dominate the narrative of human rights violations in Malaysia, including the human rights lawyers. It will become apparent, in this exercise that the UNMO-led Malaysian State too found it useful to retain and fall back on its colonial legacies/methods as well as promulgate far worse versions of the same or similarly placed laws. What makes the Malayan/Malaysian experience unique is how in the eyes of the administration an apostate, a political dissident and a defender of human rights are all the same. This will become apparent from the following overview of the repressive State measures and laws adopted which curb their freedom to speak and express their dissent.

1. To not speak is the only choice in Malaysia

a. Blasphemy laws

'Malay' means a person who professes the religion of Islam, habitually speaks the Malay language, conforms to Malay custom and—

(a) was before Merdeka Day born in the Federation or in Singapore or born of parents one of whom was born in the Federation or in Singapore, or is on that day domiciled in the Federation or in Singapore; or

(b) is the issue of such a person;"

[87] Act A354, section 45, in force from 27-08-1976.

[88] Patricia A. Martinez, "The Islamic State or the State of Islam in Malaysia" *Contemporary Southeast Asia* (2005) 23 (3), 474-503.

[89] *See* Khoo Bo Teik, 'Democracy and Authoritarianism in Malaysia since 1957' in Anek Laothamatas, (ed.). *Democratization in Southeast and East Asia* (Institute of Southeast Asian Studies 1997); *see also* Freedom House, *Policing Belief: The Impact of Blasphemy Laws on Human Rights - Malaysia*, 21 October 2010.

[90] 'Aborigine' means an aborigine of the Malay Peninsula, Article 160, *Federal Constitution of Malaysia*.

The Malaysian Penal Code, modelled on the same lines as the Indian Penal Code, is a colonial relic that provides penalties for several offences. Some of its provisions were meant to serve the interests of the imperial rule. For instance, Chapter XV stipulates penalties for offences against religion. The purpose behind the colonizer meddling with this subject, in *over-simplistic* terms, can be attributed to the express aim of the British to consolidate their rule by creating divisions among the multi-religious and multi-ethnic communities.[91] What distinguishes Malaysia is that its multi-ethnicity and multi-religious composition is largely a result of British commercial and colonial domination that began in the nineteenth century where Chinese and Indian labourers were transported to the Peninsula to build the empire there.[92] And akin to its problematic understanding of ethnicity and cultural practices, the British governed the population with different customary laws (Anglo-Hindu laws for the Hindu Indians, Chinese customary law for the Chinese and Anglo-Islamic laws in British Malaya; all departing from actual local practices and subsuming the nuances of the cultural and religious practices prevalent among the worker-migrants and the natives.[93]) The animosities that were triggered then were sought to be quelled by the provisions under Sections 295-298 which provide penalties for defiling a place of worship with the intent to insult a religious class,[94] disturbing a religious assembly,[95] trespassing on burial places,[96] and utterance of words, or sounds or gesturing with deliberate intent to wound the religious feelings of any person.[97]

[91] Gautam Bhatia, "Of Religious Offences And Legal Fictions—A Look At The Indian Judiciary's Interpretations Of Section 295-A" *Live Mint* (19 March 2016).

[92] Historians have also noted that the "Malay" Community was itself very diverse, further diversified by the significant Malay migration through the British period. It is asserted that by 1931, nearly half of the Malays in the former protectorates "were either first generation arrivals from the Netherlands East Indies or descendants of Indonesian migrants who had arrived after 1891." Cited from Barbara Andaya & Leonard Andaya, A History Of Malaysia 184 (2001) in Tamir Moustafa, The Politics of Religious Freedom in Malaysia, 29 Md. J. Int'l L. 481 (2014) *available at* http://digitalcommons.law.umaryland.edu/mjil/vol29/iss1/17 (last visited 08 September 2019).

[93] M.B. Hooker, *Legal Pluralism: An Introduction To Colonial And Neo-Colonial Laws* (1975) as cited in Tamir Moustafa, The Politics of Religious Freedom in Malaysia, 29 Md. J. Int'l L. 481 (2014). Available at: http://digitalcommons.law.umaryland.edu/mjil/vol29/iss1/17

[94] Section 295, where the penalty is imprisonment up to two years of imprisonment or a fine, or both.

[95] Section 296, where the penalty is imprisonment up to one year of imprisonment or a fine or both.

[96] Section 297, where the penalty is also up to one year of imprisonment or a fine or both.

[97] Section 298, where the penalty is imprisonment for a term which may extend to one year or with fine or with both

This merely set the stage for the newly independent State of Malaysia to take a cue from its predecessor. Not only did it carry forward the statist intervention in religious matters of the population, but also weaponised the same to curb free speech. Since a dominant political class led by UNMO then espoused the cause of one religious group, i.e. Sunni Muslim Malays, it ensured the intervention consolidated the position of the group to the exclusion of others. Besides Article 3 and thereafter the amended Article 160, the Constitution also included Article 121(1A) which stated that civil courts will not interfere with the jurisdiction conferred on *shariah* courts.[98] This further solidified the fissure in the dual-legal system wherein the Muslim Malays are governed by the Sunni influenced *sharia* legal system, in matters ranging from personal laws to criminal offences, while the civil courts have jurisdiction over other matters as well as those of non-Muslims.

b. Sedition

The above discussion on blasphemous laws becomes relevant in light of the UNMO coalition's amendment in 2015 to the *Sedition Act, 1948*,[99] a colonial law that quelled communist insurgency against the imperial rule.[100] This amendment has gone further as it deems an act of promoting feelings of ill will, hostility or hatred between persons or groups on the ground of religion to be an act bearing 'seditious tendency'.[101] This is punishable under the said Act with a term of imprisonment of between three and seven years. It wasn't long ago when in 1970, the same Act had been amended to make it an offence to question certain 'sensitive' matters concerning Malay privileges, citizenship, the national

[98] 'The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.'

[99] Section 3, *Sedition (Amendment) Act 2015* (Act A1485), inserted clause (ea) in Section 3(1) of the *Sedition Act 1948*, *available at* http://www.federalgazette.agc.gov.my/outputaktap/20150604_A1485_BI_Act%20A1485.pdf (last visited 08 September 2019).

[100] Tan Poh Ling, Human Rights and the Malaysian Constitution Examined through the Lens of the Internal Security Act 1960.

[101] Section 4 of the Sedition Act, 1948 punished the following:

(a) does or attempts to do, or makes any preparation to do, or conspires with any person to do, any act which has or which would, if done, have a seditious tendency;
(b) utters any seditious words;
(c) prints, publishes or causes to be published, sells, offers for sale, distributes or reproduces any seditious publication; or
(d) propagates any seditious publication.

language and sovereignty of the rulers.[102] This amendment was then incorporated in the Constitution, whereby, parliamentary privilege were not accorded to any person who was charged under the Sedition Act as amended in 1970.[103]

Thus, the sedition law in Malaysia was consciously expanded post-independence making the scope of the offence wider, covering just about any act, speech or publication with 'seditious tendency' which could 'excite disaffection' or 'bring into hatred or contempt' towards the government or the sultans or question the special privileges of the ethnic Malay majority. Further, *mens rea* needn't be established for conviction. The penalty is a jail term of up to three years' imprisonment and a fine of 5,000 Malaysian Ringgit (approximately 1200 US Dollars). It is now the most convenient instrument for the State to suppress any form of criticism, opposition, counter-view and protest.

2. Preventive detention under security laws

In addition to the *Sedition Act*, the colonial authorities also imposed *Emergency Regulations* to curb armed communist insurrection during the Malayan Emergency of 1948-60 which arose between the Commonwealth forces and the Anti-British, militant forces of the Malayan Communist Party of Malaya (MCP), dominated by the Chinese populace. The MCP sought to secure an independent and communist Malaya, as opposed to the consolidation of the territories as devised under the British rule along with granting of special guarantees of rights for Malays and recognising the sultans.[104] The *Emergency Regulations Ordinance, 1948* conferred vague, excessive powers on the executive, particularly the High Commissioner who had unfettered powers to make any regulation he deemed desirable in public interest and to prescribe penalties, including

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[102] *Emergency (Essential Powers) Ordinance 45 of 1970* amended Sections 2(1)f) and 3(2) of the Sedition Act 1948.

[103] Article 63 reads:

> '[…]
> (2) No person shall be liable to any proceedings in any court in respect of anything said or any vote given by him when taking part in any proceedings of either House of Parliament or any committee thereof.
> […]
> (4) Clause (2) shall not apply to any person charged with an offence under the law passed by Parliament under Clause (4) of Article 10 or with an offence under the Sedition Act 1948 [Act 15] as amended by the Emergency (Essential Powers) Ordinance No. 45, 1970 [P.U. (A) 282/1970].'

[104] Malayan Emergency, *Britannica at* https://www.britannica.com/event/Malayan-Emergency (last visited 08 September 2019).

the death penalty. The only restriction placed on the High Commissioner was that no regulation made by him could confer the right to punish by death, fine, or imprisonment without trial. The regulations made particularly in 1951 are of potent nature, according to which, the Chief Secretary could order *any person to be detained for a period not exceeding two years* and at the end of this period further detention of the same person could be ordered for a further period not exceeding two years.[105] (emphasis supplied) As the Emergency ended in 1960, independent Malayan government enacted the *Internal Security Act, 1960*, (ISA) with the aim to continue to suppress the insurgent militants whose activities remained active. It served its purpose in the run up to and post the second round of insurgency launched by the ethnic- Chinese dominated MCP riding on the blistering anger of the non-Malay ethnicities. However, the period thereafter still saw the continuity and relentless use of ISA. Instead of the usual 'suspects', i.e. the communists, it had come to be used against students, academics, *Shia* Muslims, human rights activists, including lawyers, journalists, trade unionists, political opponents, civil society leaders, and those accused of being 'terrorists', and just about anyone who simply differed from the UNMO led narrative and rule. Much like the colonial emergency regulations, the ISA's provisions facilitated executive overreach. Arrests were permitted without warrants. A police officer was granted full discretion to arrest a person, if he had the mere suspicion that the person was: 1) prejudicing security, 2) the maintenance of essential services, or 3) the economic life of Malaysia or any part of the country. If affirmed to his satisfaction, he could arrest *without a warrant* and if, subsequently authorised by the Deputy Superintendent and reported to the Inspector General of Police, then the person could be detained for 60 days without a detention order being issued by the Minister for Home Affairs himself.[106] Akin to Emergency Regulations, the Minister's detention order could extend up to two years.[107] In 2012, however, the ISA was repealed and replaced by the *Security Offences (Special Measures) Act, 2012* which is no less draconian.[108]

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[105] Emergency Regulations, 1951 {F. of M. No. 10 of 1948), R. 17 (1) (a) as cited in Rhoderick dhu Renick Jnr., 'The Emergency Regulations of Malaya: Causes and Effect' *Journal of Southeast Asian History* (September 1965) 6(2), 1-39.

[106] Section 74, ISA.

[107] Section 8, ISA.

[108] Saroja Dhanapal and Johan Shamsuddin Sabaruddin, 'Rule Of Law: An Initial Analysis Of Security Offences (Special Measures) Act (SOSMA) 2012' *IIUM Law Journal* (2015) 23, 1.

Lawyers' Ordeal

Political opponents, indigenous as well as non-Malay ethnic people and dissenters are the most vulnerable groups in the regime. By defending these groups against the State, Malaysian human rights lawyers put themselves in a precarious position as they are arbitrarily prosecuted under one or a combination of the laws discussed in the previous sections in consequence to their work.

The most prominent case has been the harassment of Mr. N Surendran, a lawyer who has been representing Mr Anwar Ibrahim, leader of the opposition in a case where the latter is being witch-hunted by the State by means of corruption and sodomy charges. Ibrahim, currently part of the ruling coalition which was in opposition when UNMO led coalition held the reigns, was himself originally a member of UNMO, and held ministerial positions in the 1990s. He ruffled more than just feathers with UNMO when he questioned issues of corruption, cronyism and nepotism, inciting a long tiff with the then Prime Minister. He was ousted, convicted for sodomy and corruption and relegated to solitary confinement till his appeals succeeded. However, his return to politics and successful consolidation of the opposition was yet again marred with a second round of sodomy trials.

His lawyer throughout this, N. Surendran, has no less suffered the brunt of representing the ruling party's opponent and ardent critic. Among other extrajudicial constraints, he was charged under the Sedition Act on two counts:

1) His press statement where he claimed the decision of the Court of Appeal in Ibrahim's case was 'flawed, defensive and insupportable' when his acquittal under the sedition charge was overturned,
2) Further comments on the court's decision in a video that was uploaded to YouTube. In appeals, the High Court of Kuala Lumpur upheld the constitutionality of sedition and that the sedition charges brought against N. Surendran are still valid.

In 2015, his colleague, Eric Paulsen, with whom they set up Lawyers for Liberty,[109] was also subjected to criminal proceedings under the Sedition Act. Eric had posted a tweet

[109] "A Malaysian human rights organisation that seeks to challenge unconstitutional and arbitrary decisions and acts perpetrated by the Malaysian government, its agencies and other public authorities. In order to achieve legal reform, it employs public campaigning, strategic litigation, lobbying, policy research and analysis, and

criticising and accusing the Malaysian Islamic Development Department, the main federal agency managing Islamic affairs, of promoting extremism in its Friday sermons. It has been reported that he was arrested by nearly 20 police officers. The offices of Lawyers for Liberty were searched in the process, and his gadgets were confiscated. He was also detained for two days before being released.

In another case, Arun Kasi, another lawyer whose articles on a news website critiquing court judgments brought him the judiciary's flak when he was slapped with contempt of court charges for scandalising the judiciary; a charge that is another colonial relic that seeks to fortify the courts from any public engagement and criticism.[110]

Siti Kasim is perhaps the most relentlessly harassed human rights lawyer in Malaysia for her activism and espousing of causes of indigenous people, women and the LGBTQ+ community. Her views on LGBTQ+ rights has earned her the ire of blasphemy accusations and religious ostracism. However, when she confronted religious officials who raided a transgender event, she was charged under the Penal Code for obstructing a public officer on duty[111] and sent death threats.

A parody video on a bill that sought to implement *hudud*[112] in the State of Kelantan landed a journalist in trouble with the authorities and was booked under the blasphemy provisions. A lawyer, Michelle Yesudas, who spoke in her defence and criticised, and got into an online spat with the Inspector General was called in at the police headquarters for interrogation under the Sedition Act.[113]

In 2004, in its monthly newsletter, the Malaysian Bar published an article that deliberated upon the all-pervading Muslim activities, including the call to prayer (*azan*) and the possible breach of the socio-cultural spaces of non-Muslims and how perhaps

human rights education." Case History: Eric Paulsen, *Frontline Defenders at* https://www.frontlinedefenders.org/en/case/case-history-eric-paulsen (last visited 08 September 2019).

[110] M Ravi, 'UN Must Intervene In Contempt Case Against Arun Kasi', *Malysiakini* (5 March 2019) *at* https://www.malaysiakini.com/news/466681 (last visited 08 September 2019).

[111] Section 186, *Malaysian Penal Code*.

[112] Hudud is the term given to punishments prescribed by Quran, which are rarely applied in modern States given the degree of violence involved. Punishments are fixed for theft (amputation of the hand), illicit sexual relations (death by stoning or one hundred lashes), making unproven accusations of illicit sex (eighty lashes), drinking intoxicants (eighty lashes), apostasy (death or banishment), and highway robbery (death): 'Hadd', *The Oxford Dictionary of Islam*, *at* http://www.oxfordislamicstudies.com/article/opr/t125/e757

[113] 'The perils of speaking out against Islamic law in Malaysia', *BBC Trending* (29 March 2015) at https://www.bbc.com/news/blogs-trending-32089787 (last visited 08 September 2019).

azan could be a source of noise pollution to them.[114] Wasn't long before a police report was filed against the organisation itself under the blasphemous laws for insulting Islam.

The Aftermath

In 2018, Malaysia witnessed an unprecedented change in its political regime with the moderate coalition of *Pakatan Harappan* (Alliance of Hope) ending the unbroken oppressive rule of *Barisan Nasional* in 2018. The new regime promised, as it assumed office, to end the sedition law and restore rule of law. It even placed a moratorium on the usage of the law as it was being readied for abolition and suspended prosecutions under the law in October, 2018. Prior to this, charges brought against Surendran and Eric had been already dropped as the prosecution withdrew the case in the course of the appeal proceedings.[115]

These visible policy actions reflected the positive change in the offing. However, this has been short lived as the government lifted the moratorium in response to religious disturbances concerning a Hindu Temple and critical comments on the Malaysian monarchy.[116] July 2019 saw the State filing cross-appeals to enhance the punishment in two pending cases, once again reigniting concerns about the misuse of the law by the State.[117] The silent, and continual reneging of its promise on abolishing the law once again places the Malaysian State under scanner for its self-serving tendencies, which places its own citizens and those defending their rights under peril.

C. *Singapore*

Singapore perhaps is credited for being the forebearer of the misconstrued yet oft cited Asian values vs. Western ideals conundrum,[118] i.e. individualism is not native to the Asian tradition as it prioritises larger group interests over that of individual liberties.

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[114] *Policing Belief: The Impact of Blasphemy Laws on Human Rights - Malaysia*, 21 October 2010.

[115] 'Sedition Charges Against Surendran And Activist Lawrence Jayaraj Withdrawn', *The Star* (27 August 2018) *at* https://www.thestar.com.my/news/nation/2018/08/27/sedition-charges-against-surendran-and-activist-lawrence-jayaraj-withdrawn/ (last visited 08 September 2019). 'Maizatul Nazlina, 'Eric Paulsen, PSM's Arutchelvan Acquitted of Sedition After Prosecution Withdraws Charge' (15 August 2018) *The Star* at https://www.thestar.com.my/news/nation/2018/08/15/eric-paulsen-psms-arutchelvan-acquitted-of-sedition-after-prosecution-withdraws-charge/ (last visited 08 September 2019).

[116] 'Malaysia: End Use of Sedition Act' *Human Rights Watch* (27 July 2019) *at* https://www.hrw.org/news/2019/07/17/malaysia-end-use-sedition-act (last visited 08 September 2019); Shannon Teoh, 'Malaysia's Continued Use Of Sedition Law Draws Flak After Preacher Jailed' *Straits Times at* www.straitstimes.com/asia/se-asia/malaysias-continued-use-of-sedition-law-draws-flak-after-preacher-jailed (last visited 08 September 2019).

[117] *Ibid.*

[118] Sen, *supra* n. 16.

One may call the nation a hardliner, for it hasn't deterred from its 'economic success above all' approach since its formation. When Singapore broke away from the Straits Settlements and thereafter Federation of Malaysia,[119] it wasn't any different given their shared history of law and governance under the British rule. It bore the colonial imprint, marred by ethnic and racial conflicts. But the country's future lay in the hands a group of highly competent, elitist Western-educated professionals comprising the Peoples' Action Party (PAP), led by Lee Kuon Yew. They were averse to the idea of mass, popular democratic processes, especially since they allowed space for debate and counter-voices, which at that time, were of the communist groups. Nation-building lay in the hands of a technocratic setup that was simply focussed on achieving 'economic goals in the shortest time',[120] and did not make any room for politicisation, ethnic/racial consideration or ideology and definitely none for dissent.

When independent Singapore significantly adopted and carried forward the Penal Code including the section on defamation, the Sedition Act and the offence of contempt of court enacted during the colonial rule, dissent in the new country was bound to be meted out the same treatment that the colonizer did. A significant departure that has been made is in the defamation law. While in most common law countries a defence of qualified privilege for statements made in the discharge of some public duty is accorded to incumbent members of the legislature, Singapore did not enact this exception, i.e. members of Parliament in Singapore can be prosecuted for defamation for statements made in discharge of their public duties.

This is further aggravated by linking defamation law with bankruptcy law,[121] where when the court grants damages to the complainant, if the convicted individual cannot pay up, a suit for declaring him bankrupt is filed. The most prominent case where this transpired is that of Mr JB Jeyaretnam, a lawyer and leader of the centre-left Workers' Party in the opposition. During the course of his early years as a lawyer critical of the government, he had faced several PAP-sponsored litigations that impugned his party's

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[119] 'Singapore Separates from Malaysia and Becomes Independent' *HistorySG*, Government of Singapore, *at* http://eresources.nlb.gov.sg/history/events/dc1efe7a-8159-40b2-9244-cdb078755013 (last visited 08 September 2019).

[120] Melanie Chew, 'Human Rights in Singapore: Perceptions and Problems', *Asian* Survey (November 1994) 34 (11), 933-948.

[121] Kelley Bryan and Howard Rubin, 'The Misuse of Bankruptcy Law in Singapore: An Analysis of the Matter of Re Joshua Benjamin Jeyaretnam, ex parte Indra Krishnan' *Lawyers' Rights Watch Canada at* https://www.lrwc.org/ws/wp-content/uploads/2012/03/MisuseOfBankruptcyLaw.pdf (last visited 08 September 2019).

work, funding and the like, eventually leading to his disbarment from the Law Society of Singapore. When he appealed to England's Privy Council, his disbarment was overturned and the Court expressed its displeasure at the treatment meted out to him.[122] In late 1990s, PAP affiliates had filed defamation suits against him and when held guilty, he was charged with damages to the tune of 715,000 Singapore dollars that he was unable to discharge. Two bankruptcy proceedings were initiated against him by the plaintiffs, which eventually led to his bankruptcy. He was consequently ousted from the Parliament as a declared insolvent/bankrupt could not be a sitting member of the Parliament as well as his disbarment from practicing law.

When Singapore was part of the Federation of Malaysia, between 1963 and 1965, the ISA was also extended to Singapore. Despite breaking away, it retained the applicability of the law till date. The arbitrariness of the detention procedure has been effectively used by the Singapore government against dissidents. T.T. Rajah and G. Raman, lawyers in Singapore, had championed the cause of left-wing trade unions and political detainees for a long time much to the chagrin of Government of Singapore under Lee Kuan Yew. They were accused of links with communist underground groups and put in preventive detention without trial. While they were subsequently released, restrictions were placed upon their legal practice that they were barred from representing or advising political detainees.[123]

Contempt of Court is used as an intimidating tool against dissidents in Singapore is indicative of the deference the judiciary pays to the executive in Singapore. Mr Eugene Thuraisingam, a prominent criminal and human rights lawyer, found himself slapped with contempt charges and a fine of 6,000 Singapore dollars for a poem. He had published his poem criticizing the *Misuse of Drugs Act* under which his client had been hanged, on his Facebook page a few hours before his client's execution.[124]

Impact

In their paper on cause laywering in Singapore, Rajah and Thiruvengadam observe how Lee Kuan Yew, the first Prime Minister, the founding father and a lawyer himself, was

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[122] *J. B. Jeyaretnam* v. *Law Society of Singapore*, [1989] A.C. 1.

[123] 1978 Amnesty International Report, as cited in Jothie Rajah and Arun K Thiruvengadam, Of Absences, Masks and Exceptions: Cause Lawyering in Singapore (2014) *Wisconsin International Law Journal*, 31(3).

[124] Cara Wong, 'Lawyer Eugene Thuraisingam Fined Again Over Poem That Was In Contempt Of Court' *The Straits Times* (29 October 2018) *at* https://www.straitstimes.com/singapore/courts-crime/lawyer-eugene-thuraisingam-fined-again-over-poem-that-was-in-contempt-of (last visited 08 September 2019).

alert to 'the role of courtroom advocate for the marginalized in challenging the colonial state' and was hence determined to 'dismantle the immunity and the autonomy of the legal profession' by considering such an autonomous legal profession as a means of 'destabilizing the nation'. The authors lament that this conditioning of the State against the work of lawyers, practically erased any scope for robust cause lawyering, if not complete decimation. They infer that the consequent 'muted or masked involvement of lawyers in causes as a problematic expression of compliance (if not complicity) with state determinations as to what lawyers (and other citizens) may and may not do in the civic, public domain.' This is visible in the far and few cases of breakthrough in the human rights jurisprudence in Singapore, and which happen to be the handiwork of a one odd lawyer espousing these causes,[125] in a country with a population of 5.64 million[126] of which 5336[127] are lawyers.

D. *Philippines*

The Philippine human rights trajectory is a bloodied one, that can be traced to its colonial past. 'Tamed' by the Spanish and the Americans consecutively,[128] the colonial period saw the consolidation of the Philippine archipelago into a singular political unit: the unified, independent state that it stands as today. However, it created two sets of citizens: the colonized and the indigenous. The former co-opted, collaborated, mingled, cross-bred with the colonizer and got accultured and Christianised in the process and upon independence, was able to reap the benefits of the colonial rule. The latter, on the other hand, remained politically and economically marginalised through it all, culturally insular, and consequently, impoverished and disenfranchised in the independent state.[129]

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[125] Rajah and Thiruvengadam, *supra* n. 123. The authors acknowledge the work of a few cause lawyers, however single out the work of M Ravi in the period 2000-2013 who is often solely credited for championing the cause of abolition of the death penalty, freedom of expression, LGBT rights and voting rights among others. It is worth noting that Ravi faced sanctions on his practice by the Law Society for his conduct which later was discovered to be a consequence of his diagnosis as a patient of bipolar disorder. Louisa Tang, 'M Ravi Returns To Law Practice After Reality Jolt Spurred By High-Profile Incidents' *Today Online* (07 July 2019) *at* https://www.todayonline.com/singapore/m-ravi-returns-law-practice-after-reality-jolt-spurred-high-profile-incidents (last visited 08 September 2019).

[126] Singapore Population, Department of Statistics, Government of Singapore, at https://www.singstat.gov.sg/modules/infographics/population (last visited 08 September 2019).

[127] General Statistics, *The Law Society at* https://www.lawsociety.org.sg/About-Us/General-Statistics (last visited 08 September 2019).

[128] *See* Daniel B. Schirmer' and Stephen Rosskamm Shalom (eds.), *The Philippines Reader: A History of Colonialism, Neocolonialism, Dictatorship, and Resistance* (South End Press USA 1987).

[129] Ben S. Malayang, 'Tenure Rights and Ancestral Domains in the Philippines: A Study of the Roots of Conflict' *Bijdragen Tot De Taal-, Land- En Volkenkunde*, (2001) 157(3), 661–676.

It is the latter group that remains the most disadvantaged. Much of the human rights violations concern this group.

Of particular note is the egregious disregard for the land and cultural rights of the indigenous group, which are compromised by the State to suit its economic concerns (mining projects established over their lands), only to further expose them to greater threat of environment pollution, displacement and health hazards. This inequitable demand fuels the communist insurgency, which has created yet another disenfranchised class that is at risk of being stifled. This fissure has essentially been at the root of the Philippine struggle to uphold human rights through the dictatorial era sanctioned under martial law,[130] and the subsequent elite controlled democracy,[131] right up to the present, when Philippines is in the clutches of populist authoritarianism[132].

What distinguishes the Philippine experience is the brazenness of the State-sanctioned violence and harassment of not just its own population, particularly the marginalised, but also of the HRDs, including the lawyers. Philippines is one of the countries with most killings of HRDs.[133] While the focus of this paper has been on false prosecution of human rights lawyers, a discussion on the situation in Philippines cannot be complete without highlighting the impunity the Philippine State has enjoyed when sanctioning the killings of its critics, particularly under the current regime headed by President Rodrigo Duterte.

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[130] M. D. Litonjua, 'The State in Development Theory: The Philippines Under Marcos' *Philippine Studies* (2001) 49(3), 368–398.

[131] '[M]any academic commentators on the Philippines have been highly critical of the post-Marcos political system, likewise viewing it as the major source of the country's economic malaise. For these writers the key problem was not too much democracy, but rather a return to the patronal or patrimonial system of inter-elite rivalry that passed for democracy before the declaration of martial law in 1972. Variously labelled "elite democracy" and "cacique democracy", this system is described as one revolving around a weak state in which rival oligarchs compete through elections for the spoils of political office, appealing to the electorate through promises of a share of these spoils rather than with reference to distinctive policy programs. According to this model, the Philippine political order operates as a particularistic system of interpersonal relations in which the key organisational element is the elite family, not the political party. In as much as parties exist they constitute "political machines" made up of relatively unstable family alliances geared to the mobilisation of votes and disbursement of patronal largesse, rather than the promotion of contending political philosophies.' *See* Michael Pinches, 'Elite democracy, development and people power: contending ideologies and changing practices in Philippine politics', *Asian Studies Review* (1997) 21(2-3), 104-120.

[132] Nicole Curato, 'Flirting with Authoritarian Fantasies? Rodrigo Duterte and the New Terms of Philippine Populism' *Journal of Contemporary Asia* (2017) 47(1), 142-153; *See* Richard Javad Heydarian, *The Rise of Duterte: A Populist Revolt against Elite Democracy* (Springer 2017).

[133] Philippines along with five other nations accounted for nearly 80 % of the killings of human rights defenders in the world, in 2018. In 2017, the figure was 85%. Report: 'Stop the Killings', *Front Line Defender*s (2018) *available at* https://www.frontlinedefenders.org/sites/default/files/stk_-_full_report.pdf (last visited 08 September 2019).

Prior to the current regime which took office in June 2016, Day of the Endangered Lawyer Foundation (DELF) has reported in 2015 that until 2001, 96% of the lawyers were murdered for their work in human rights cases and post 2001 nearly half of them were murdered. It also noted that where the perpetrators were known (which is less than half of the cases), 65% were military personnel and 20% were police personnel, highlighting the Philippine State's long standing tradition of using counter-insurgency operations against its critics. A delegation organized by the International Association of Democratic Lawyers, International Association of Lawyers and DELF that went on a fact-finding mission in Philippines has reported that at least 37 members of the legal profession have been killed in the exercise of their duties since the current administration took office in June 2016. They also noted that paralegals were not spared.[134] Since the report, 2 more lawyers have been murdered, bringing the tally to 39.[135] Since 1999, it is reported that nearly 30 judges have been murdered.[136]

The counter-insurgency approach of the Philippine State does not manifest only as physical acts of violence. In fact, the physicality of the aforesaid violence is often preceded by sustained persecution at the hands of the State authorities and the law who adopt insidious methods of harassment which 1) leads to State-sanctioned 'othering' of the lawyers 2) and consequently leads to some form of judicial or military/police intervention that in turn violate their human rights. The following are some of the state sanctioned methods used to obstruct human rights lawyering in Philippines.

1. *Druggie*-spotting

The Duterte administration has launched what is perhaps the most gruesome policy intervention on eradicating drug usage which in itself has given rise to gross human rights violations. The Philippine Drug Enforcement Agency has stated that 6,600[137] suspected drug users and dealers died during police operations since Duterte took over.

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[134] 'Preliminary Findings Of The Fact Finding Mission To The Philippines,' *Day of the Endangered Lawyer* (18 March 2019) *at* http://dayoftheendangeredlawyer.eu/preliminary-findings-philippines-2019/ (last visited 08 September 2019).

[135] 'The Philippines: 2 Lawyers Shot Dead In Pangasinan, Rizal' *Day of the Endangered Lawyer* (18 May , 2019) https://defendlawyers.wordpress.com/2019/05/18/the-philippines-2-lawyers-shot-dead-in-pangasinan-rizal/ (last visited 08 September 2019).

[136] Ted Regencia, 'They Are Now Killing Judges In The Philippines' *TRT World* (20 May 2019) *at* https://www.trtworld.com/magazine/they-are-now-killing-judges-in-the-philippines-26785 (last visited 08 September 2019).

[137] 'Philippines: Spate of Killings of Leftist Activists As of June, 2019' *Human Rights Watch* (18 June 2019) *at* https://www.hrw.org/news/2019/06/18/philippines-spate-killings-leftist-activists (last visited 08 September 2019).

The number of such deaths caused by third parties and unknown perpetrators is more staggering, however misclassified and under-quoted. The Philippine National Police pegs the number at 22,983 which have however been classified as "homicides under investigation." In contrast, the UN High Commissioner for Human Rights estimates the number to be at 27,000.[138]

This campaign against drug abuse, which would ideally be a cause of social reform, has taken an entirely extra-judicial route. In order to facilitate such brutality, the local governments (barangay) in Philippines have been empowered to compile lists of drug addicts and dealers based on mere suspicion.[139] These lists remain confidential and are then submitted to the police who thereon take 'action'. No check and balance or minimum operating standards have been incorporated into the system to verify these allegations.[140]

Critics, including HRDs and lawyers who are providing counsel and defence to suspects from prosecution or other such gross violations are also being falsely labelled and listed in them. This legitimises State action against them too, including prosecution and arrests. However, such operations have largely ended in extra-judicial killings, and appearing on such lists exposes the lawyers to such risks, besides being discredited.

This naturally is an interference with the work of lawyers. An environment like this disables them from providing unequivocal counsel to those who approach them for advice and legal help or take any risk upon themselves. Famed human rights crusader, Jose Manuel Diokno, observed that he explains and encourages his clients to consider all the legal remedies available to them. However, he finds it tough to encourage them to file a case, as there is real possibility that the client would be subject to extra-judicial

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[138] As quoted in March, 2019, Laila Matar, 'UN Needs to Act Now to End Philippines Killings Human Rights Council Should Launch Investigation into Murderous "War on Drugs"', *Human Rights Watch* (24 June 2019) *at* https://www.hrw.org/news/2019/06/24/un-needs-act-now-end-philippines-killings (last visited 08 September 2019).

[139] Philippine National Police Commission- Directorate for Investigation and Detective Management Camp Crame, Quezon City, Command Memorandum Circular 16-2016: PNP Anti-Illegal Drugs Campaign Plan - Project: "Double Barrel" *available at* https://perma.cc/YT5W-H6MG (last visited 08 September 2019).

[140] Johannes Icking and Robert Fahrenhorst, 'Human Rights Report: Philippines' *Aktionsbündnis Menschenrechte–Philippinen available at* https://www.asienhaus.de/archiv/user_upload/AMP_-_Human_Rights_Report_Philippines_2017_final.pdf (last visited 08 September 2019).

killing.[141] The fact that he himself doesn't pursue a legal course of action speaks of the degree of threat they are subjected to.

2. *Commies* are all One: a case of Red Tagging

The other mode which aids the Philippine State in suppressing its detractors, including the human rights lawyers is by what has been called 'red tagging' or 'red-baiting'. A dissenting Associate Justice of the Supreme Court of Philippines defined red-baiting as: "the act of labelling, branding, naming and accusing individuals and/ or organizations of being left-leaning, subversives, communists or terrorists (used as) a strategy…by State agents, particularly law enforcement agencies and the military, against those perceived to be 'threats' or 'enemies of the State'."[142] Consequences of red-tagging range from harassment at the hands of authorities, including the military to being placed under surveillance, and from loss of employment to being killed.

This campaign finds its genesis in the long standing conflict in the country's socio-political space which has involved the Philippine Government on one side and the communist organizations, primarily the Communist Party of the Philippines (CPP), its military arm, the New People's Army (NPA), and their uniting organization, National Democratic Front (NDF) on the other.[143] While the armed forces have been carrying out counter-insurgency operations against this front, specifically NPA (a perpetrator of human rights abuse of the civilian population itself)[144] there were attempts made in the intervening years of 1980s to 90s when peace agreements were brokered to end this

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[141] 'Chel Diokno: Human Rights Is Not The Problem, It Is The Solution', *Bantayog* (26 July 2017) *at* http://www.bantayog.org/human-rights-is-not-the-problem/ (last visited 08 September 2019).
[142] *Zarate* v. *Aquino III*.
[143] 'The Communist Insurgency In The Philippines: Tactics And Talks', Asia Report N°202, *International Crisis Group* (14 February 2011), *available at* https://www.refworld.org/pdfid/4d5a310e2.pdf (last visited 08 September 2019).
[144] Report Of The Special Rapporteur On Extrajudicial Summary Or Arbitrary Executions, Philip Alston, On His Mission To Philippines, A/HRC/8/3/Add.2; *See generally*, Peter Ritter, 'The Philippines' Disappearing Dissidents' (09 June 2008) *at* http://content.time.com/time/world/article/0,8599,1813070,00.html (last visited 08 September 2019).

conflict. However, the Arroyo[145] administration in the 2000s,[146] particularly in light of 9/11, labelled them as 'terrorists' and launched a state-sponsored 'clean-up' campaign against them.

The unabated arbitrariness and violence that drove this campaign aided the State in muzzling any criticism of the government in power. Specifically, those advocating the rights of peasants over the land rights and agrarian 'mis-reforms'[147] and rights of the indigenous people against the exploitative mining operations on their ancestral domains[148], two of Philippines' most contentious human rights concerns, were silenced through the extra-judicial killings pursued under the campaign. All critics: lawyers, judges, human rights activists, journalists, doctors, leaders or activists of labour movements, farmers, were also listed under the 'order of battle', i.e. target lists of the military which were used to label members of the communist front (specifically

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[145] 'Gloria Macapagal-Arroyo assumed presidency of the Philippines in 2001, after a corruption scandal forced her predecessor, Joseph Estrada, out from the post. Her move into Malacanang Palace, the presidential residence, served as a homecoming. Macapagal-Arroyo's father, Diosdado Macapagal, served as president of the Philippines in the 1960s, and Macapagal-Arroyo told reporters she looked forward to sleeping in her old bedroom. The Macapagal-Arroyo presidency has not been without its share of problems. The island nation is plagued by economic depression, the government has been involved in battles with militant rebels, and Macapagal-Arroyo's administration has faced its own charges of impropriety.' 'Gloria Macapagal-Arroyo' Encyclopedia *at* https://www.encyclopedia.com/people/history/philippines-history-biographies/gloria-macapagal-arroyo (last visited 08 September 2019).

[146] Noel M. Morada, The Philippines: Security Context and Challenges, Third Europe-Southeast Asia Forum (13-15 December 2004) *at* https://www.swp-berlin.org/fileadmin/contents/products/projekt_papiere/Morada_Philippines_ks.pdf (last visited 08 September 2019); There was a certain brazenness to the US-Philippine cooperation which emerged in light of 9/11 attacks. One such visible factor was the characterisation of certain groups, especially the ones in Philippines, as foreign terrorist bodies by the US. In 2002, the U.S. expanded its list of designated foreign terrorist organizations, by including the Communist Party Philippines/New People's Army (CPP/NPA) in it. Carl Baker, Philippines and the United States 2004–2005: Defining Maturity Asia-Pacific Center for Security Studies (2005) at https://apcss.org/Publications/SAS/APandtheUS/BakerPhilippines3.pdf (last visited 08 September 2019).

[147] Land has been Philippines' long standing problem given its sparsity and population density, and the policies of the Spanish era that advantaged a few landed gentry to the exclusion of others. Independent Philippines saw the government in power and the communist front at loggerheads about the kind of reform required in land distribution. This is further magnified by the lobbying pursued by the landowners. Peasants claiming land rights through the Government's agrarian reform program find themselves ensnared in the conflict among the Government, the CPP/NPA/NDF, and large landowners.

[148] *See* James F Eder, 'Indigenous Peoples, Ancestral Lands And Human Rights In The Philippines' *Cultural Survival Quarterly Magazine* (June 1994) *at* https://www.culturalsurvival.org/publications/cultural-survival-quarterly/indigenous-peoples-ancestral-lands-and-human-rights (last visited 08 September 2019); Rey Ty, 'Indigenous Peoples in the Philippines: Continuing Struggle' *FOCUS* (Asia Pacific Human Rights Center) (December 2010) 62 *at* https://www.hurights.or.jp/archives/focus/section2/2010/12/indigenous-peoples-in-the-philippines-continuing-struggle.html (last visited 08 September 2019). *See also* Faina C. Abaya-Ulindang, 'Land Resettlement Policies in Colonial and Post-Colonial Philippines: Key to Current Insurgencies and Climate Disasters in its Southern Mindanao Island' Chiang-Mai University Conference (5-6 June 2015) *available at* https://www.iss.nl/sites/corporate/files/CMCP_54-Abaya-Ulindang.pdf (last visited 08 September 2019).

NPA).[149] Despite this method being on the decline, the stigma the lists carry, given the violence involved, continue to haunt the HRDs, the lawyers and government critics.

The case of harassment experienced by the members of the National Union of People's Lawyers (NUPL), an organisation representing the collective voice of human rights lawyers, highlights the ramifications of red-tagging. In 2013, NUPL was branded as an 'enemy' by the Philippine Army. In 2014, NUPL's Vice President Attorney Catherine Salucon has alleged that she experienced heavy surveillance and harassment and that her paralegal, William Bugatti, was killed hours after they had parted ways after a court hearing. In 2018, NUPL-Negros' Secretary General Attorney Benjamin Ramos was killed in Kabankalan, Negros Occidental. Several other members of the group are under State surveillance and have faced incidents of threats, harassment and intimidation due to their work and advocacy.[150] Continual red-tagging of NUPL by military and state authorities led them to file a petition before the Supreme Court for the issuance of the writs of *amparo* and *habeas data* for the protection of their rights to life, liberty and security which have been violated through persistent red tagging done to prevent them from pursuing advocacy. As of date, the Court has issued the writs which have been vehemently opposed by the Duterte Government.[151]

3. False Prosecution

The Philippine State also uses the route of legal prosecution, albeit on the basis of trumped up or excessively fabricated charges, to quell its dissidents. What distinguishes the Philippine experience is that this fabricated yet legal process is commonly orchestrated by the military, which also exercises investigative powers for these crimes. The filing of charges is often preceded by a campaign to vilify and intimidate the victim by red-tagging them. The victims are also then subject to surveillance and threats, as well as sometimes members of their family too.

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[149] Report on Extrajudicial Killings and Enforced Disappearances in the Philippines, Fact Finding Mission of Human Rights Now to Philippines, *Human Rights Now*, http://hrn.or.jp/eng/The%20Philippines%20Final%20Report_EJK_HRN_2008.pdf (last visited 08 September 2019).

[150] 'The Philippines: SC Issues Writ of Amparo and Habeas Data in Favor of NUPL' *Defend Lawyers* (3 May 2019) *at* https://defendlawyers.wordpress.com/2019/05/03/the-philippines-sc-issues-writ-of-amparo-and-habeas-data-in-favor-of-nupl/ (last visited 08 September 2019).

[151] *Ibid*.

Usually, this process begins with the HRD/lawyer being accused of holding NPA's membership and for participating in armed conflict, resulting in charges of murder,[152] arson,[153] or the illegal possession of weapons[154] being filed against them. These are crimes where bail is also a matter of exceptional discretion.[155]

Remigio 'Ming' Saladero, a labour law specialist and chairman of the Pro Labour Legal Assistant Center has been incarcerated multiple times for his work which involves representing the labour unions. He was listed as a suspect in light of multiple killings in 2006. Subsequently, in 2008, he was arrested at his own office. He was dragged into a vehicle, interrogated and taken to the police headquarters. With Saladero's wife raising alarms and the media's hype, the police was compelled to admit he was in custody. He was consequently prosecuted and jailed for three months in 2008. He was also suspected of arson and destruction of property earlier in 2008. The charges were dismissed and he was released, but before he could go on with it, he was again doubly charged, including of murder, only to be subsequently dismissed.[156]

Considered to be Philippines' youngest human rights lawyer, Kathrina Castillo started her legal career as a counselor in *Katungod Sinirangan Bisayas*[157] and defended nearly all human rights cases including those of all political prisoners in the region. Her work has led to the release of several such arbitrarily arrested prisoners. She was consequently subjected to smear campaigns by the military, intimidation and death threats.[158]

Jobert Ilarde Pahilga, who provides free legal counsel to indigenous people, farmers and fisherfolk and represents them against landowners and agricultural companies, has

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[152] Article 248, Revised Penal Code, punishable with imprisonment for 12 years and 1 day to 20 years.

[153] Article 320, Revised Penal Code, punishable with imprisonment for 20 years to at least 30 years, thereafter the convict is eligible for pardon.

[154] Republic Act No. 8294, *an Act Amending The Provisions Of Presidential Decree No. 1866, As Amended, Entitled "Codifying The Laws on illegal/unlawful possession, manufacture, dealing in, acquisition or disposition of firearms, ammunition or explosives or instruments used in the manufacture of firearms, ammunition or explosives, and imposing stiffer penalties for certain violations thereof, and for relevant purposes."*

[155] Section 5, Rule 115, 1985 Rules On Criminal Procedure states:
"Bail, When Discretionary. – Upon conviction by the Regional Trial Court of an offense not punishable by death, reclusion *perpetua* or life imprisonment, the court, on application, may admit the accused to bail."

[156] 'Philippines Two years after IVFFM, L4L finally speaks to Saladero', *Lawyers for Lawyers* (25 October 2010) https://lawyersforlawyers.org/en/philippines-two-years-after-ivffm-l4l-finally-speaks-to-saladero/ (last visited 08 September 2019).

[157] Katungod-Sinirangan Bisayas is the regional formation of Karapatan, the alliance for the advancement of people's rights, in Eastern Visayas *at* https://katungodsiniranganbisayas.wordpress.com/ (last visited 08 September 2019).

[158] Profile: Kathrina Castillo, *Lawyers for Lawyers at* https://lawyersforlawyers.org/en/lawyers/kathrina-castillo/ (last visited 08 September 2019).

faced continued threats and intimidation at the hands of the military. His clients have been interrogated and threatened in order to deter them from seeking his help.[159]

Human rights lawyers also run the risk of facing libel charges for being critical of the State and its allies. The definition provided by article 353 of the Revised Penal Code (RPC), presumes that malice is present in every defamatory statement, i.e. truth is not defence for in libel proceedings. Prosecution, thereby, need not prove malice on the part of the accused, while the burden lies with the defendant to show there was 'good intention and justifiable motive' in making that statement. It is pertinent to note that libel, as a punishable offence, in Philippines can be traced back to both the Spanish and American colonial rule, more specifically the latter for the current law on libel was put in place during the American rule.[160] Philippines' law on libel persists despite having faced criticism including at the hands of the UN Human Rights Committee, which held that criminalisation of libel in Philippines is contrary to the commitments under ICCPR.[161] A clearer manifestation of the state's problematic take on libel, is the enactment of the Cybercrime Prevention Act[162] in 2012. This Act provides for penalties of up to 12 years of imprisonment for libel committed by disseminating information online. It wasn't too long after it got enacted, as early as February 2014, that the Supreme Court had to adjudicate upon its constitutionality,[163] wherein the petitioners contested that 21 sections in it were violative of human rights. While considering a few sections to be constitutional, the Court did not go beyond in relooking at the debate on decriminalising libel altogether. Instead it upheld the constitutionality of online libel as it was anchored in the criminalisation of libel under Article 353 of RPC.[164]

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[159] Profile: Jobert Ilarde Pahilga, *Lawyers for Lawyers at* https://lawyersforlawyers.org/en/lawyers/jobert-pahilga/(last visited 08 September 2019).

[160] The Revised Penal Code promulgated during the American rule replaced the applicability of the Spanish Penal Code.

[161] *Adonis* v. *The Philippines*, Communication No. 1815/2008 Views adopted by the Committee at its 103rd session, 17 October–4 November 2011, *available at* http://www.worldcourts.com/hrc/eng/decisions/2011.10.26_Adonis_v_Philippines.pdf (last visited 08 September 2019); *See* Disini v. The Secretary of Justice, Case Analysis, *Global Freedom of Expression, Columbia University at* https://globalfreedomofexpression.columbia.edu/cases/disini-v-the-secretary-of-justice/ (last visited 08 September 2019).

[162] Act No. 10175.

[163] Disni v. the Secretary of Justice, G.R. No. 203335, February 11, 2014.

[164] See, Tony La Viña, 'Ending Criminal Libel' March 04, 2014 *Manila Standard* at http://www.manilastandard.net/opinion/columns/eagle-eyes-by-tony-la-vina/141899/ending-criminal-libel.html (last visited 08 September 2019).

The above discourse on Philippine libel law was carried out in order to contextualise the law's usage in suppressing dissent. Lawyers, no less, are susceptible to being subjected to it. Further, with the prevalence of online libel many NGOs, most newspapers, blogs are put in a vulnerable position as they publish online statements and articles of HRDs, including lawyers.

III. THE OTHER, BUT INCHOATE FACE OF THE STATE: AS A PROTECTOR

The above sections outline the ways the State can be seen as an oppressor. But the modern State is also capable of being highly adaptive and capable of addressing the concerns when faced with pressing human rights demands, by assuring its citizens the protection of their rights and creating mechanisms to secure the same for them. In response to the global human rights discourse, the modern State has enacted specialised laws which seek to protect and promote human rights in the domestic sphere, which also provide for the creation of national human rights institutions (NHRIs)/offices of ombudsman[165]. While a range of educative and awareness-based initiatives comprise their role as promoters of human rights, regulatory activities like complaint redressal procedures, investigations and recommending remedies, compiling of annual reports on the State's compliance of human rights standards form a part of the protectionist role of these institutions. Yet, NHRIs or equivalent bodies rarely exercise substantial enforcement powers, thereby merely being reduced to recommendatory bodies whose interventions may not necessarily translate into actual reform or action. This at least has been the experience in postcolonial states of the Asia Pacific.[166]

While such weak enforcement agencies disadvantage the cause of victims of human rights violations, it certainly offers much less hope to the cause of lawyers relying on such institutions. As seen in the previous section, the four states have significantly failed in varying degrees to safeguard the lawyers. As far as offering a redressal option is concerned, thereto the record of these states has been inconsistent, less emphatic and does not inspire confidence. In this section, I argue that even in their dual role as a protector of rights, the attempts in protecting human rights made by the postcolonial

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[165] 'National Human Rights Institutions: An Overview Of The Asia Pacific Region', *International Journal on Minority and Group Rights* (2000) (7) 207-277.

[166] *Contra* Old Commonwealth nations of Asia Pacific, *supra* n. 18.

states in Asia-Pacific, particularly with regard to facilitating human rights lawyering is anything but supportive.

India

The *Protection of Human Rights Act, 1993* created the framework for the National Human Rights Commission (NHRC) that served as a human rights centric body that suffers from the 'paper tiger' syndrome. Despite statutory powers to inquire into complaints and intervene in court proceedings where violations have occurred during the course of the process, it lacks the power to enforce its recommendations to state authorities or its powers to take action against violators. However, NHRC has been a fairly active body in terms of its literacy and awareness initiatives and its reports have consistently assisted the Courts in adjudicating effectively on matters of human rights concerns, including right to food[167] or laws discriminating against lepers[168].

NHRC perhaps is also the most proactive among the NHRIs in postcolonial states in the Asia Pacific with regards safeguarding the interests of HRDs. In 2009, in light of the recommendations of the Workshop of Human Rights Defenders conducted by NHRC, the office of the Focal Point for HRDs was set up to specifically address the concerns of those who defend the rights of others. Since its inception, the Focal Point Officer has received 679 cases[169] in total. Based on the face of the records collected from the present Focal Point Officer, it is easily determinable that a significant number of them are filed by lawyers and civil activists.[170] However, the efficacy of this mechanism in safeguarding the interests of lawyers and HRDs requires due consideration.

The office of the Focal Point has been downgraded with time and made ineffective.[171] Further, the office in its conception is of not much consequence as it has not been

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[167] *Indian Council of Legal Aid and Advice and others* v. *State* Writ Petition (Civil) No 42/97 of 1996.

[168] *Vidhi Centre For Legal Policy* v. *Union Of India* Writ Petition (Civil) No.1151/2017.

[169] Based on the information gathered under the Right to Information Act. Response filed by NHRC dated 21 May 2019 is on record with the author. The number of cases filed reflects the position as on date of the response.

[170] An exact number could not be deciphered as the brief details of the case necessarily do not always reflect the occupation of the victim HRD. Further, only a case by case scenario would reveal whether the violation occurred as part of their work as a lawyer or civil activism, for legal practitioners do partake in out of court activism. Availability of such details, i.e. of each case, is left to the discretion of the concerned authorities and may not yield results for RTI requests made for each of the cases.

[171] Of the 679 cases, 208 of them were filed by Mr Henri Tiphagne, a lawyer and founder of People's Watch, an NGO that has been advocating the cause of people's movements and reporting on human rights violations. I sought Mr Tiphagne's observations on the efficacy of the institution given his rather robust pursuit of the cases of violations against HRDs before it. The same are available with the author on record

invested with enough responsibility or powers to execute the same. In 2010, the functionary who was appointed was at the rank of a Joint Secretary of NHRC. Joint Secretaries hold considerable power in the hierarchy of the bureaucratic setup.[172] The former Focal Point Officer, Mr. A. K. Parashar, despite the limitations of his office, actively sought to address the complaints that were received. He was accessible via telephone and even took actions based on telephonic complaints, by communicating to appropriate senior officials of the State and securing spontaneous, urgent and immediate remedies, be it in the nature of securing protection for HRDs under threat or getting them a release if there was some degree of arbitrariness involved in the arrest. However, since his retirement in 2016, the office has been down-graded with an officer of much lower rank, i.e. that of a Deputy Registrar of NHRC filling the vacancy. These junior officers have not been permitted to travel where necessary or even handle matters on their own. The Superior Officers have not facilitated nor given the Focal Point Officer the freedom to act on matters relating to HRDs.[173]

Therefore, for the functionaries of the NHRC focal point of HRDs to be successful, it is necessary that there is a written mandate providing independent responsibility to such a functionary and the matters on which and from whom he/she shall have to take orders for strict action.

Mr Khaleel Ahmed, the current Focal Point Officer, highlights the difficulties faced by him, especially given the nature of complaints received by him. While he asserted that he is accessible to those who reach out, more often than not, his concern is the difficulty in determining the authenticity of the complaint for there is no mechanism in place to verify the complaint received. Cases which involve false prosecutions, he noted, were the trickiest for what is being complained against is a regular legal process in action which can only be considered farcical if the court comes to such conclusion. Until that happens, it is difficult to possibly intervene and claim it to be harassment or a violation of human rights.

However this is not necessarily the case.[174] NHRC is vested with enough powers under Section 12B of the *Protection of Human Rights Act, 1993*. This provision empowers

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[172] Ramesh Kumar Arora and Rajni Goyal, *Indian Public Administration: Institutions and Issues* (Wishwa Prakashan 2005), 147.

[173] An observation made by Mr Henri Tiphagne that necessarily does not reflect on the capability of the persons.

[174] Mr Tiphagne makes this contrary observation and notes that NHRC can intervene in order to prevent further abuse of the process.

NHRC to 'intervene in any proceeding involving any allegation of violation of human rights pending before a court'. Ergo, in a false prosecution case, NHRC can take a stand that the prosecution is aimed at harassing human rights lawyers or HRDs for their work. However, this has rarely ever been invoked.[175] This inability of the NHRC to take a stand and defend is what makes the mechanism ineffective, although its very existence as a statutorily purposive body is an exception.

It would be pertinent to mention that in the Annual Reports published by NHRC, there is considerable acknowledgment of the State's excesses with respect to human rights defenders and lawyers, as evident from the following words:

> " The Commission is of the strong view that the human rights defenders are partners not only of the Commission but also of the Government, be it, at the level of local bodies, the State level or the Central level in the endeavour to ensure protection and promotion of human rights of the people. By raising various issues that thwart the Government's crusade to provide good governance to the citizens, human rights defenders, in fact, assist the Governments in taking remedial action in areas where needed. […]
>
> *Unfortunately, many a time, the State authorities miss this important point and view the human rights defenders and their raising various human rights concerns as irritants.* It is this approach that the Commission is striving to remove by sensitizing various stakeholders…" (emphasis supplied)

Malaysia

In contrast, the Malaysian National Human Rights Commission (SUHAKAM) was a result of international pressure in light of the ouster and prosecution of Anwar Ibrahim. It is not unusual that the bill to set up SUHAKAM was passed without public consultation. However, with regard the violations and the hapless situation of the muzzled human rights lawyers and defenders in Malaysia, the Malaysian State has maintained a standard position of complete compliance with the *Declaration on Human Rights Defenders.*[176] On the other hand, SUHAKAM too has not provided much to reflect on the situation prevalent or the actions being taken in its response to the

[175] *Ibid*.
[176] Response by the Government of Malaysia to the Questionnaire on the Situation of Human Rights Defenders, *OHCHR at* https://www.ohchr.org/Documents/Issues/Defenders/GA73/states/Malaysia.pdf (last visited 08 September 2019).

Questionnaire on the Situation of Human Rights Defenders in Malaysia.[177] It does acknowledge that at the 69th session of the Committee on the Elimination of Discrimination Against Women, when concerns were expressed over the State sponsored harassment, arbitrary arrests and prosecution of human rights defenders and lawyers advocating LGBTQ+ and women rights and sought a response on what measures were being taken in terms of remedying the damage, the Malaysian Government did not file any response.

The Malaysian Bar Association, on the other hand, can be credited for actively defending its ilk. It called out a former Cabinet Minister who, when in power, had called for blacklisting of lawyers and law firms that held contracts with the government and were supporting Bersih, a coalition of NGOs which works for the cause of reforming the electoral system in Malaysia.[178] In 2016, the Government sought to introduce amendments to the Legal Profession Act, 1976 which governs the Malaysian Bar and the profession. The amendment sought to:

1) grant power to the Minister in charge of Legal Affairs to appoint two members on the Bar Council;
2) increase the quorum for general meeting of the Bar from 500 to 4000 (out of nearly 17000 odd lawyers in Malaysia) thereby making it logistically difficult to arrange a meeting which could include such numbers,
3) vest powers in the Minister to determine the elections rules and regulations.

The amendments came under severe criticism nationally and internationally as they were a direct affront to the independence of the profession. Representations were made to the Government to drop the amendments and the Malaysian Bar rallied to stir up a

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[177] Response by SUHAKAM to the Questionnaire on the Situation of Human Rights Defenders, *OHCHR at* https://www.ohchr.org/Documents/Issues/Defenders/GA73/NIHR/Malaysia%20The%20Human%20Rights%20Commission%20SUHAKAM.pdf (last visited 08 September 2019).

[178] Bar: Threat To Blacklist Lawyers Shows Poor Legal Understanding', *Free Malaysia Today* (original) as published on *The Malaysia Bar* website with permission (26 October 2016) *at* http://www.malaysianbar.org.my/bar_news/berita_badan_peguam/bar_threat_to_blacklist_lawyers_shows_poor_legal_understanding.html (last visited 08 September 2019).

strong opposition to these proposed amendments. Subsequently, the amendments never came through.[179]

Philippines

Philippines too has set up a Focal Point for HRDs under its Commission on Human Rights of the Philippines (CHRP). However, no protection program has been conceptualised or implemented yet. There is also no policy for an early warning system. The opacity of operations is so stark that victims, as claimed by the Human Rights Lawyers Association, are not aware of what kind of action is pursued for the complaints filed.[180] To this end, CHRP also admits that there is no special policy beyond what has been done in addressing their grievances.[181] A grave concern flagged with regard CHRP is the appointment of its head by the President himself. The current head of CHRP is believed to be a close political ally of President Duterte.

Singapore has no designated/specialised NHRI. At present, an inter-ministerial Human Rights Committee oversees the human rights domain in Singapore.[182]

Lastly, a common concern among HRDs and lawyers is the State's involvement in the appointments of the office bearers of the NHRIs. This largely has instilled a sense of doubt and mistrust among them, especially when they need a remedy. Absence of a model blueprint on how focal points on HRDs must operate has also left much to be desired from the functioning of such entities.

IV. CONCERNS AND CONCLUSION

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[179] Malaysia: Reconsider Amendments to the Legal Profession Act | Joint Letter, *Lawyers' Watch Canada* (November 2016) *available at* https://www.lrwc.org/malaysia-reconsider-amendments-to-the-legal-profession-act-joint-letter/ (last visited 08 September 2019); CLA supports opposition to proposed changes to Malaysian Legal Profession Act', *Commonwealth Lawyers Association* (July 2016) *at* https://www.commonwealthlawyers.com/africa/cla-supports-opposition-to-proposed-changes-to-malaysian-legal-profession-act/ (last visited 08 September 2019).

[180] Questionnaire On National Human Rights Institution And Human Rights Defenders, submitted by the Philippine Alliance of Human Rights Advocates, *OHCHR at* https://www.ohchr.org/Documents/Issues/Defenders/AnswersNHRI/NGOs/Philippines-PAHRA.pdf (last visited 08 September 2019).

[181] Questionnaire on National Human Rights Institutions and Human Rights Defenders Response from the Commission on Human Rights of the Philippines https://www.ohchr.org/Documents/Issues/Defenders/AnswersNHRI/NHRIs/Philippines.pdf (last visited 08 September 2019).

[182] Singapore National Universal Periodic Review Report, 2015.

Rule of law enjoins States to secure to its citizens the right to fair trial and presumption of innocence. This invariably means that States are obliged to foster a facilitative and enabling environment to ensure that lawyers and the judiciary can fulfil their duties in securing justice, 'impartially, objectively and professionally'[183] and without any external pressure or intimidation. While Singapore may have never allowed a culture of cause-lawyering to thrive from its inception, India, Malaysia and Philippines, despite physical brutality and oppressive administrative machinations at work, have witnessed relentless opposition from their human rights lawyers. However, the challenges remain and are at large.

First and foremost is the identifying of lawyers with their clients or their clients' causes, which is in outright violation of Principle 18 of the *Basic Principles*.[184] All four states have identified their dissident human rights lawyers who represent either marginalised indigenous folks or political dissenters as state-enemies in more ways than one, just the way they do with the latter. They have also prosecuted them under anti-subversive laws. This kind of intimidation and harassment is something the states must protect the lawyers from, rather than inflict it on them. This problem has only escalated in the emergent 'post-truth' world.[185] The rise of the 'populist leader'[186] whose dogged pursuit to take advantage of growing public discontent, that has arisen on account of the failures of the post-independent regimes, in order to secure power, has further dismantled constitutional guarantees and diminished democratic accountability.[187] What's worse this time around is the *popular consent* backing such actions (emphasis supplied). In such cases, the discourse on liberties and accountability, either by dissidents or lawyers, is simply seen as a prickly thorn that needs to be done away with, not just by the State but the majority of the public. So even if the oppressive laws were to go, which is

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[183] Report of the Special Rapporteur on the independence of judges and lawyers, Human Rights Council, Thirty-fifth session (6-23 June 2017).

[184] 'Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.' Principle 18, *Basic Principles on the Role of Lawyers* (Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba 27 August to 7 September 1990).

[185] Chito Gascon, 'What the Philippines Tells Us About the Broken Promises of Human Rights' *Time* (30 May 2018) at https://time.com/5294301/what-the-philippines-tells-us-about-the-broken-promises-of-human-rights/ (last visited 08 September 2019).

[186] Malaysia perhaps is the exception to this. However, the concerns over the oppressive laws and policies that prevailed in the previous regime remain given the non-committal approach of the new, democratic regime in repealing them. 'Malaysia's Government Should Scrap Repressive Laws While It Still Can' *The Economist* (20 July 2019) *at* https://www.economist.com/leaders/2019/07/20/malaysias-government-should-scrap-repressive-laws-while-it-still-can (last visited 08 September 2019).

[187] *See* Fareed Zakaria, *The Future of Freedom: Illiberal Democracy at Home and Abroad* (Penguin India 2003).

unlikely given they strengthen the newer regimes,[188] the rising majoritarian consent backing the State's oppressive ways now acts as a more sinister hindrance for human rights lawyering by treating the practitioners of such lawyers as not just state, but public enemies.

Second is the absence of, or negligible protections available to, human rights lawyers. This violates Principle 17 which enjoins State authorities to adequately safeguard lawyers if their security is threatened as a result of discharging their functions.[189] India, Malaysia and Philippines have functioning NHRIs in place, with India and Philippines having a dedicated focal point system for addressing grievances of HRDs including human rights lawyers. However, as discussed, opacity in operations of the NHRIs, administrative inefficacy and statutory weakness have rendered them ineffective in securing safety and security to lawyers in their respective jurisdictions. Specialised laws that could guarantee protection to lawyers also do not exist. While reforms in law and improvement in administrative and adjudicatory operations of NHRIs may address this concern, what possible remedy could be formulated to secure lawyers from falsified prosecution, especially initiated by the State itself, offers greater dilemma.

Thirdly, the absence of effective international and regional monitoring systems in these States has diminished the *Basic Principles*. In 1994, the Commission on Human Rights appointed a Special Rapporteur with a mandate to oversee the standards set by member states to secure independence of judiciary and of the legal profession. The Rapporteur has been invested with the duties of making appeals to the respective states on complaints received from their jurisdiction and to record and publish such reported violations, producing annual reports, and make country visits either on an invitation or a request. Since 1996, the office of the Special Rapporteur has conducted fact-finding country visits to 41 states, of which only four belong to the Asia Pacific[190] and do not include any of the four states discussed in this paper. India and Malaysia received their requests from the Special Rapporteur in 2011 to schedule a country visit, with a follow

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[188] For instance, the Indian Legislature passed a bill amending UAPA in the first week of August, 2019 whereby not just an organisation but any individual could be designated as terrorist by the Union Government and the procedure to be followed in this regard will be by way of delegated legislation, thus securing to the Executive more powers in handling such cases. The *Unlawful Activities Prevention Amendment (UAPA) Act, 2019.* In Malaysia, as noted earlier, the new regime has backtracked on its promise to repeal the sedition law.

[189] Principle 17, *Basic Principles on the Role of Lawyers* (Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba 27 August to 7 September 1990).

[190] Indonesia (2002), Maldives (2007, 2013), Pakistan (May) and Sri Lanka (2016).

up reminder in 2014 for India. Philippines too had received such a request in 2006 as well as 2011, with follow up reminders in 2012 and 2014. However, this has not yielded any positive outcome. The Rapporteur, though, continues to receive complaints, makes appeals to the governments of the States, and publishes the details of the complaints and responses from time to time. Incompleteness of the information available on the actual scenario has been continually acknowledged. The other concern with this system is the nature of the recommendations for reform and redressal, which are generic and broad,[191] and tend to largely reiterate the *Basic Principles*.

At the regional level, the work of the Asia-Pacific Forum[192] can be seen as a nodal body coordinating the work of the NHRIs of the countries in the region. Membership is restricted to only those nations which have adopted the *Principles relating to the Status of National Institutions*.[193] Singapore, consequently, is not a part of it. However, the focus of its work includes broader reforms related to the functioning of the NHRIs than concerted efforts in securing the interests of emergent vulnerable classes like that of human rights lawyers. It is even worth noting that despite shared histories and unique experiences of governance and human rights administration, the Asia-Pacific does not have a region-specific inter-governmental system as there are no specialised treaties, courts or commissions to protect and promote human rights. This leaves a significant vacuum in the discourse of human rights protection in the region, including the protections that need to be accorded to human rights lawyers.

The situation in these postcolonial states can be best described in the words of Foucault who argued that the State and its relation with people was not to be understood in the context of people's allegiance to the State but through 'a study of the way in which populations are looked after, looked over, directed and shaped in the interests of the state's own self-legitimation, self-preservation and self-perpetuation'.[194] In order to challenge and check the power of such governmentality, Foucault saw potential in his

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[191] Report of the Special Rapporteur on the independence of judges and lawyers, A/71/348, United Nations, General Assembly.

[192] Julia Kreienkamp, 'Are National Human Rights Institutions Always the Answer? The Asia Pacific Experience' Global Governance Institute Keynote Lectures *at* https://www.ucl.ac.uk/global-governance/news/2016/oct/are-national-human-rights-institutions-always-answer-asia-pacific-experience (last visited 08 September 2019).

[193] The Paris Principles, Adopted by General Assembly resolution 48/134 of 20 December 1993.

[194] Terry Eyssens reads into Foucault's conception of 'governmentality' and asserts that the social contract forged between citizens and their State 'functions as a conceptual veneer, in the service of the state's self-preservation rather than as protection for citizens'. Terry Eyssens, 'Exception? What exception? Foucault's State of Convention', Conference on Foucault, University of South Australia.

exposition of *parrhesia*, a way of speaking truth to such power, as evident in the following words:

> '...parrhesia is a verbal activity in which a speaker expresses his personal relationship to truth, and risks his life because he recognizes truth-telling as a duty to improve or help other people (as well as himself). In parrhesia, the speaker uses his freedom and chooses frankness instead of persuasion, truth instead of falsehood or silence, the risk of death instead of life and security, criticism instead of flattery, and moral duty instead of self-interest and moral apathy.'[195]

Human rights lawyers, among other human rights defenders, take these risks. However, there is a tipping point to all this. Continued risks and threats, more so in the nature of punitive actions sponsored by the State itself, prevent them from leading a normal life. Rajah and Thiruvengadam observe that the consequent hardship of such hindrances on the lawyers and their families 'extracts a deeply personal price from lawyers ready to represent the state's antagonists and, by extension, to advocate for causes in opposition to dominant positions.'[196] Instead of treating them as *irritants*, the States must be impressed upon to recognise the work and role of such lawyers to be indispensable to the preservation of rule of law. Furthermore, the Asia Pacific Forum's role and greater collaborative effort in the Asia Pacific Region must be encouraged in order to:

1) create a regional and dedicated focal point for addressing grievances of human rights defenders and lawyers of the Asia Pacific region,
2) document, organise and publish data on the extent of violations committed against human rights defenders and lawyers,
3) impress upon the regional members to relook at their colonial laws, and create platforms for collaborative consideration of legislative reforms in their respective jurisdictions, and

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[195] Michel Foucault, The Meaning and Evolution of the Word "Parrhesia": Discourse & Truth, Problematization of Parrhesia, (Six lectures delivered at the University of California at Berkeley between Oct-Nov. 1983) *at* https://foucault.info/parrhesia/foucault.DT1.wordParrhesia.en/ (last visited 08 September 2019).

[196] Rajah and Thiruvengadam, *supra* n. 123.

4) create a regional level framework for lawyers of the Asia Pacific that could offer immediate help in terms of diplomatic intervention, funding support and general refuge.

Facilitating some of these administrative reforms could open up the conversation on safeguarding the interests of human rights lawyers at a multi-stakeholder level in the region and enable a region-specific reform model, which is the need of the hour rather than broad policy recommendations.