Challenges to the Presumption of Innocence in Southeast Asia.

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Though the presumption of innocence (PoI) is an essential element to a fair trial to the level of being called a fundamental and undoubted right, customary law, and the "golden thread" running through criminal law (Duff 2012), it is surprising to find that the Human Rights Committee, in General Comment 13 (on Article 14 of the ICCPR) complained that it is "expressed in very ambiguous terms or entails conditions which render it ineffective" (para 7). Though many aspects of PoI can be clearly identified, such as how the suspect is presented in court, in unbiased statements of State officials, or the fair use of pre-trial detention or bail, the cause of these challenges can be difficult to identify. Primarily, this is because some elements of PoI can be defined as an attitudes or opinions: it is what the State Officers should perceive or think about the suspect. There is difficulty proving an outcome of a trial was caused by the opinions or prejudices of court officials because that requires proving the judge possesses these discriminatory views (unless they are captured somewhere on print or media), and then proving this prejudice caused the trial to be unfair. Furthermore, as the paper will detail, if these prejudices are widespread in the community, it is difficult isolate, or to blame, the court decision on the judge alone. But in addition to this it, under a more expansive view of PoI, which I will discuss next, there are many other challenges to proving a suspect was not assumed innocent or given the benefit of doubt. It is not the judges alone, but also the police, media, and State authorities that should carry an attitude that suspect is presumed innocent, and given the benefit of doubt. This paper will examine these challenges as they arise in Southeast Asia countries, to show that an 'ambiguous' and 'ineffective' human right is challenged even further in political and cultural systems with serious problems of inequality and discrimination.

There is a long history to PoI in jurisprudence and in the court systems, though it has perhaps incorrectly been branded as a creation of the European legal tradition (Quintard-Morénas 2010: 110). While this is clearly not the case now as it has been accepted by all States as a universal right since the *Universal Declaration of Human Rights*, and also appears in numerous constitutions and court systems around the world (Ferguson 2016: 132), it is still relevant to ask how this principle fits into the practice of non-western countries, in particular the legal and political systems in Southeast Asia. The key elements of the PoI themselves appear to be blind to political, cultural, or economic discrimination. The burden of proof on the prosecution assumes the suspect should be given the benefit of doubt, and there should be a lack of prejudice by State officials, especially in how the suspect is represented in speech, in media, and in person themselves - in their clothes, their personal freedom (by not being shackled,), and how they appear in the dock (Fair Trials 2020). Regardless, PoI seems not to be accepted as a 'golden thread,' in the region with some judicial systems appearing to rely on the presumption of guilt, or to not give the suspect the benefit of doubt. This can be seen in criticisms of the Japanese court systems, where the extremely high conviction rates, which in Japan is up to 99.9% according to some reports (Toshikuni & Keiichi 2019), means court systems are exclusively used to determine sanctions and not to ascertain innocence or guilt. Similar examples can be found across the region where ruling governments always win their

cases, for example courts in Cambodian ruling over land disputes (Tang & Thul 2017), or the more recent case on *Rappler* media in the Philippines.. There is also the criticism that the principles in the court system are based on the presumption of guilt, for example in studies of the Chinese legal system (Chen & Yu 2015; Lin & Watters 2017). A question here is if the failure to ensure PoI is a result of cultural values which are foreign to the European tradition. It is important to dismiss this view of PoI as particularly from the European regional not traditionally found in Asian countries. As this paper will discuss, this view is primarily one given to excuse non-democratic States from expressing their power in a court process to justify inequality in the law. It is also to claim that human rights are foreign and should not be incorporated into native legal systems. Though historically there may have been some very unequal political and legal systems in the region (such as absolute monarchies or political dictatorships), this does not justified the continued use of legal inequality. However, this history of inherent inequalities and bias in society can assist in locating the prejudice which challenges the PoI in Southeast Asia, and may be found in discriminations based on gender, ethnicity, political opinions, or other social categories.

As Manfred Novak notes "allegations of a violation of the right to be proved innocent are … difficult to prove in practice" (Novak 2005: 331). Perhaps as a result the jurisprudence on PoI has tended to focus on rights with the trial itself. Yet a number of legal scholars have called for a more expansive understanding of this right. PoI can be understood as a "practical attitude" or "a mind-set", as detailed by Pamela Ferguson, where "presumption reflects the relationship which ought to exist between citizen and State when a citizen is suspected of breaching the criminal law" (Ferguson 2016: 132). According to Anthony Duff there should be:

> more expansive presumptions: all concern the practical attitudes that the state should take towards its citizens and that citizens should take towards each other, the kind of trust that should structure those attitudes, and the conditions under which such trust may be qualified or suspended. (Duff 52)

Here PoI is more ideological. A person's presumption of innocence is not just found in the more positivistic elements of how a person is dressed or what comments are made about a suspect, but also in the attitude of the State towards that person. While this may seem to be excessively liberal in its politics, there is a strong rationalism to why this is important. Again, as Duff argues:

> What gives the PoI its normative power is that we owe it to our fellow citizens to see each other, not as suspicious strangers and potential enemies who must prove their bona fides before we grant them the most minimal civic trust, but as citizens living under the law. (Duff 57)

This approach gives a different avenue through which to understand PoI. Rather than examine the court process and procedures and more positivistic indicators of PoI like clothes and media statements, which is a more common, this paper will take the route of examining PoI through where this 'practical attitude' or sense of trust has failed. That is, identify where discrimination and bias inherent in the judicial system (and likely reflected in society) can challenge to PoI. This may not lead to answers on how to respond in practical ways to these

challenges. However, it may lead to possible topics for further research to uncover where PoI has failed because of inherent inequality.

When contextualising the expansive approach of PoI within the court systems of Southeast Asia, it is necessary to comment on the relationship of power between the State and the person. The concept of burden of proof and the benefit of the doubt assumes a relative equity between the suspect and the government: it is the State's task to prove guilt, and both the State and the person are equal before the law. The belief assumes a relative equity in power between the State and the person, which is a longstanding value in liberalism: the importance of the Social Contract in assigning duties to both State and citizen; the recognition that human rights are inherent and inalienable and are not earned from obeying the State; and the basis of the government is "the will of the people," as found in UDHR article 21. However, these views have been contested in Asian countries through the Asian values debates for many decades. While it may appear the Asian values debate, which reached its height in the 1990s, has long since been resolved through statements found in the *Vienna Declaration and Plan of Action* (1993), and that fact that no Asian government now declares their support for Asian values, some of its core issues, especially around governance, have persisted (Connors 2012). In particular some governments in the region, especially the more authoritarian ones, take a political view more in line with Asian Values: the government is not there to serve the people, rather it is the obedient citizen who has duties towards the government. In meeting their duties people should not criticize the government. For the political systems should be run to promote harmony, discipline, and hard work. The priority of the State is the collective project of national development, and this will take precedence over any individual's human rights (Barr 2002). To simplify, it asserts that the State knows best. The Chinese Government, with its clearly articulated "Human Rights with Chinese characteristics" (Piccone 2018: 2) is the strongest supporter of this version of human rights with numerous white papers and publics statements detailing this version of human rights (Pisano 2018). In addition, it is not uncommon for Southeast Asian countries to espouse these views. There are ramifications for the PoI. A system of governance which assumes an inherent inequality between the person and government counters the principle of the government's duty of proof. It assumes that the justice system, which has investigated and arrested someone for a crime, could not be wrong. To argue against a government in court contradicts the notion that the political system is based on harmony and discipline. Governance in those States sympathetic to the Asian values view of rights does not allow for the presumption of innocence.

There should be a few limitation made to this argument on the influence of a residual Asian values in the court system. Asian values are not widespread in the region. It is also not a cultural or traditional belief in governance, but rather the philosophy of the more authoritarian governments and leaders. Further, Asian values' basis in a Confucian Asian culture is tenuous, as many critics have noted (Barr 2002; Kim 1994; Sen 1997). The practice of these values is more closely linked to strategies to consolidate power than to express a so-called 'Asian' culture. This is why it is more accurate to understand the implementation of these values in a court system through a relationship of power which disempowers the suspect rather than a cultural reality. This paper will examine briefly five areas where PoI is

challenged in the region using an expansive view of PoI in the context of unequal relationship of power between the judicial system and the suspect. The objective is to understand the variety of ways where the application of this principle fails. The areas are in blaspheme laws, in political cases, in the non-diversity of the judicial system, in high profile cases involving non-citizens, and in immigration law.

The first example is that of laws which, because of their strong traditional or cultural basis (which also makes them politically charged), makes PoI nearly impossible to attain. These are the laws of blaspheme and *Lese Majeste*. Within Southeast Asia, Indonesia is known for its misuse of blaspheme laws. However, it is worth noting the impact of this law in Pakistan to highlight the challenges it gives PoI. In a detailed study of blaspheme laws in Pakistan the ICJ notes a number of areas where innocence is not presumed. They note that "courts hearing [cases] on Blaspheme have not required proof of intent beyond a reasonable doubt" (ICJ 2015: 3). In cases the judgements often solely rely on the statement of the accuser: "With blasphemy, there is no real proof needed. It's clearly his word against yours, and based on that little thing you are killing someone. The burden to prove is so easy and open" (Hashim 2014). In this situation, according to the U.S. Commission on International Religious Freedom:

> The burden of proof required in these cases is minimal. Unsubstantiated, wildly implausible, or outright false accusations stemming from personal or domestic disputes are fairly common, especially against religious minorities. (Akins 2019)

Further, the crime of blaspheme is not bail able (ICJ 2015: 44), cases can take 2-3 years to appear before court (ICJ 2015: 47), and many people accused of Blaspheme are killed before they are tried (USCIRF 2019). Within Southeast Asia, these concerns are found in Indonesia where Blaspheme laws are undergoing a redrafting. While the problems in Indonesia are not to the extent and severity in Pakistan, there is little PoI in cases involving Blaspheme. Two of the more famous cases, such as the conviction against the Mayor of Jakarta, or the conviction of a Buddhist women who privately asked a mosque to turn down its speakers, were politicized and their guilt magnified in an unbalanced media. The role of religions groups and the media in these types of cases make PoI difficult to enforce. The responsibility of the media is crucial. As the European Court of Human Rights has detailed "a virulent press campaign can… adversely affect the fairness of a trial by influencing public opinion and affect an applicant's presumption of innocence" (ECtHr Qtd. in Fair Trial 2020: 8). The use of *Lese Majeste* laws in Thailand to silence government critics has many similar effects. The law is like blaspheme in that it is also vague and it gives power to the accusers to define the crime. In Thailand the law has put around 550 people in jail from 2010 till 2018, and has a conviction rate of around 94% (*Business Insider* 2016). Because the laws of Blaspheme and *Lese Majeste* are intended to defend pillars of the nation (such as the religion or the monarchy), they give almost complete power to the State. Suspects are not given the benefit of the doubt, nor do the supporters of State religion or the monarchy concede any (in Duff's words) civic trust to the accused. The very act of accusation is treated as a verdict, so the suspect is denied the PoI meaning the result of the trial rarely goes in their favour.

The second examples shows how PoI is missing in cases involving political opponents to the State. While laws of *Lese majeste* and blaspheme are about the foundations of a nation, it may not be appropriate for the ruling powers to invoke these laws when protecting its powers. Rather, by using their political position, and by politicising the judicial system itself, a fair trial is denied and no PoI allowed to government opponents. A recent court in Thailand where the popular Future Forward party was disbanded by the courts shows how political influence in the court system can deny the PoI. One avenue to explore these cases is by examining the role of political bias and prejudice As stated in General Comment 32, "it is a duty of all public authorities to refrain from prejudging the outcome of a trail." Though there is difficulty in identifying the prejudice, as the views and values held by a public authority is a "purely private matter, belonging to the realm of the mind" (Novak 2005: 441). The challenge to identify prejudice is also one which is now being addressed, for example by Anna Bradley (2019) in the context of Black Lives Matter, through attempts to eliminate not just racial discrimination (which is an act) but also racism, which is the underpinning views and values. While it may be difficult to prove prejudice within the mind of the public authority, it can be clearly established through the action in the criminal procedure if PoI is not given. As the case of the Future Forward party shows, the nature and amount of cases, the shifting definition of the crime, and history of judicial systems show there was no Presumption of innocence.

The Future Forward party was established in early 2018 by young Thai businessman Thanathorn Juangroongruangkit on a policy of progressive politics such as reducing the influence of the military in politics and improve social and economic equality. In the 2019 elections, the first elections held after the military coup in 2014, the party came in a surprising third place, much to the concern of the established powers. Senior military figures in the coup had transformed themselves from soldiers to politicians to form the Palang Pracharath (PPRP), and were the second strongest party in terms of seats (though they received the most votes among the parties, but this was only about 23% of the total votes). The PPRP were able to form government partially as a result of a creative interpretation of the results by the election commission which distributed more seats to their alliance partners (Sirivunnabood 2019), and also aligning with some regional strongholds once under the Phue Thai party who were previously linked to the now exiled ex-Prime Minister Thaksin Shintawat (*Bangkok Post* 2018). However, during this election process, in the barely two years of its existence, the Future Forward party faced around 28 court cases from the military government and conservative critics. These include charges against its leader and senior party members of:

- sedition,
- abetting the escape of a suspect,
- organizing an assembly of more than ten people
- spreading false information online
- instigating public disorder for a Facebook Live broadcast
- Facebook posts critical of the government
- Thanathorn entering false information in his biography

- undermining the monarchy
- cybercrimes for anti monarchy speech
- criticising the banning of Thai Raksa Chart
- violated election law by holding shares in a media company
- undue outside influence
- receiving support from Thai Raksa Chart

The majority of these cases were ill-founded and were lost in court. However, it demonstrates what James Ockey has call the “tactic of legal harassment … frequently advanced against progressive parties” (Ockey 2020 372). As most political commentators have noted, senior court officials, particularly in the highest courts (such as the constitutional Court), are strong supporters of the military. They have disbanded four anti-military parties but not one military party. Kevin Hewison, in an interview with ABC News (United States) notes that the Constitutional Court has become highly politicized: "its decisions over more than a decade have repeatedly been directed to weakening opposition political parties and to strengthen regimes that represent military-backed interests” (Peck 2020). However, even though there is a pre-existing bias in these courts which can be interpreted as a prejudice, it may be difficult to interpret this alone as against the principles of PoI. But when examined alongside the decision of the Constitutional Court to disband the party in February 2020 there are serious questions about the PoI of the party.

The case against Future Forward was based on the law which does not allow parties to accept donations above 10 million baht. Thanathorn had lent a large amount of money (191 million baht) to the party to run its campaign. This was raised as a concern by the Election Commission which initiated the case, though they have dismissed similar cases against other parties. According to the court, the loan was actually a donation, and it was suspicious because of the low interest rate on it. This interpretation conflicts with what has been seen as regular political practice “where parties are typically funded by donations from key members and supporters” (Techakitteranun 2019). Responding to this judgement, a prominent group of Thai law professors implored that “the jurists perform their duty without bias” (Thai PBS World 2020). Proving prejudice in minds of the judges may be challenging, but the many concerns of this case show how PoI was denied. While the judges were not appointed by the military, the Election Commissioners, who initiated the case were themselves elected by the military government (New Mandala 2020).The existence of judicial harassment (in this case 28 cases in under two years), the history of judgements, and the creative interpretation which transforms a loan into a donation, show little evidence for the benefit of doubt.

It may seem that political prejudice will be difficult to eliminate from a court system, yet some advancements have been made in other areas of prejudice such as gender. The developments include addressing gender imbalance in law schools and court systems. While across the region many law faculties report improving gender balance, the courts across Asia, especially in South Asia have significant lack of female judges (Munusamy 2019). Further, international bodies such as the OHCHR and UN Women have initiated programs to address this (OHCHR 2014). Gender bias can be identified in the percentage of female court officers,

or identifying laws, policies and procedures that have gender stereotyping. This is a problem which is reported, discussed, and with some measures put in place. A more difficult problem, especially for PoI, is judicial diversity. In probably all Southeast Asian countries there are few, if any representatives from minority groups in the court system, and perhaps in law school. The first challenge is the lack of any data on the representation of minority groups in the judiciary. Initial research has shown that no judicial system in the region collects data on their diversity. It is only in South Asia where diversity is discussed and measured, though in a very limited way. India acknowledges they have few low caste judges sitting in courts (Jain & Tripathy 2020). The only country with some data is Nepal, which notes that the dominant caste (Pahadi Bahun-Chhetri) make up about 15% of the population of Nepal but are 85% of the judges (Harijan 2019). Across the world one of the few attempts to address this is the UK's Judicial Diversity Taskforce. The lack of diversity in the court system starts in law schools where most students come from dominant sections of society, whether this is the ethnic majority, or those wealthy enough to afford private education. It goes through to the selection of judges which is criticised in most Southeast Asia countries as politically bias, though there are not many voices of concern about socio-economic and ethnic diversity of the judges. A lack of diversity is a crucial challenge to PoI because, as Anthony Duff outlined above, the reasons why 'fellow citizens' see each other 'as suspicious strangers' can be as much the result of ethic or cultural difference, as it is of political opinion, or a lack of human rights values.

The biases from political and ethnic values are seen clearly in the next case study of an international high profile media case, in the context of a rampant social media, in a country where racism is close to the surface. This is the case of the double murder of two British Backpackers on the Island of Koh Tao in Sept 2014. As detailed by Cohen (2016), two Burmese migrant workers, Zaw Lin and Wai Phyo, were found guilty and sentenced to death in an investigation and trial which has received much criticism. A British tourist couple were found murdered (with the woman raped) on a beach on Koh Tao, one of the more famous destination stops for backpackers. There is a historic tension between Burma and Thailand which leads to discrimination towards Burmese migrant workers. As discussed by Harkins and Ali (2016), it appears in the news, soap operas and textbooks. Xenophobic bias in the police investigation was immediate: As Jonathan Head reports for the BBC: "On arriving the day after the murders, the senior police officer on the island assured us the culprit could not have been a Thai person. No Thai could possibly commit such a crime, he said" (Head 2014). After the case, and in response to numerous criticisms of the investigation, a Royal Thai Police spokesperson gave the reason that their guilt was most likely because there were 126 previous murder convictions for Burmese migrants in Thailand (*Bangkok Post* 2015). In the Koh Tao investigation Police immediately suspected fellow travellers (with one was questioned, but released when it was found he left the island the day before the murder). They then turned to the migrant workers. Koh Tao uses a large migrant labour force for the numerous resorts and other tourist spots. The two suspects were arrest and then charged based on DNA evidence and a confession, which was later retracted with claims of being made under torture (Amnesty International 2015). During the criminal investigation there was a forced reconstruction of the crime by the two suspects (see fig. 1.)

Fig 1: The two suspects, named only as Saw (left) and Win (right) take part in a reconstruction of their alleged crime. Photograph: Bangkok Post/Barcroft Media

There is a long history of the Thai police force using crime reconstructing as part of evidence gathering (VOA 2015), and was the case for the re-enactment on Koh Tao which was broadcast live on Thai television. Re-enactments of a crime are a violation of the right to PoI because it gives the public the perception of guilt even before the court case had started. It also feeds the 'virulent press.' However, it was not only the Thai government who were complicit in denying PoI, as the victim's family put out a statement saying the saying the evidence against the two was "powerful and convincing," an act which a Journalist Charlie Campbell notes "was facilitated by the U.K. Foreign Office despite being prejudicial toward the possibility of a fair trial" (Campbell 2015). The role of the British embassy is complex as they did state they did not want to prejudge the investigation, though they did provide of their own detectives to assist the investigation but they did not comment on the strength of the case (Cohen 2016). The statements made by the police showing a pre-existing prejudice against Burmese migrant workers demonstrates that there was no PoI, if taken in the broader context. While it should be noted that DNA evidence did convince the court of their guilt, there was little chance for the suspects to have a fair trial given the pre-existing prejudice. The international community, and especially the Burmese government, would always question a guilty verdict because of the lack to trust in a system with these biases. It can be seen that judiciaries which have a strong PoI are not going to face the doubt created in these high profile cases. Without the 'mindset' of innocence, people will always question the process and verdict.

Finally, an important related issue is how easily the principle of PoI is lost in the grey area of legal powers outside of the court itself, in particular, with the powers through immigration law. While strictly speaking, PoI is only for criminal cases, and immigration law may be a separate category of laws, though there is currently much debate on this distinction of immigration and criminal law (Hernández 2015). The effects of both laws are similar; immigration law has the same sanctions as criminal laws: they result in of imprisonment and the additional sanction of deportation. It could be debated that people facing sanctions as a result of immigration law should receive the same PoI as a suspect. However, even in

guidelines and studies of the legal rights of migrants for example in the work of Allinson *et al* (2017), the UNHCR Guideline 7 on Detention, or the Council of Europe's Twenty Guidelines on Forced Return (4 May 2005), presumption is rarely mentioned: only once in the Council of Europe's Guidelines about monitoring deportation, though this is mainly addressing media coverage (Council of Europe 57). This is also the case in Thailand. The number of people who are deported daily from Thailand is unknown, though it is a significant number likely in the thousands. Mainly Burmese and Cambodian are deported, primarily as unregistered migrant workers. In Thailand a person found without proper documentation is considered an illegal alien under the immigration law and can be immediately deported. While there should be a legal process here, in almost all cases people suspected of not having documentation (or cannot show it) are detained and deported without having access to justice. There is little, if any, PoI in this process, raising a number of concerns. Firstly, it challenges the ability to respond to trafficking victims. In one of the largest studies in Thailand of a trafficked population of deported Cambodians, it was found that though around 20% of trafficking victims reported their case to the authorities, but no action was taken by the authorities (UNIAP 2010). Undocumented migrants are assumed to be illegal immigrants and not victims of trafficking and immediately deported. Secondly, refugees can sometimes not claim their status as a refugee as they are immediately categorised as illegal migrants, as was the famous case of the Saudi female teenager escaping her abusive family and was trapped at Bangkok's main airport as the Saudi embassy tried to repatriate her to Saudi Arabia. There are also numerous cases where refugees who have their status recognized by UNHCR, and holding a Person of Concern card, were deported by Thai authorities in clear breach of international standards of refugee protection. There is little space in the process of identification and detention of an undocumented person to be presumed innocent, resulting in a violation of their rights.

In conclusion, these case studies demonstrate the numerous ways in which there is a lack of PoI in the procedure procedures of the criminal system in Southeast Asia. This has the result of questioning the ability of the courts to deliver verdicts which are trusted in the broader community. The failure to presume innocence is perhaps the result of inequalities and bias existing in society being reflected in the procedure and outcomes of the court system. Established relationships of power in society are reflected in courtroom practice. The response to the failure to presume innocence can be to address these discriminations in the media, in law school, and in judicial practice.

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