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## Law, violence, and hegemony during the “war on drugs” on the Philippines

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### Abstract

The “war on drugs” in the Philippines has claimed thousands of people lives and has resulted in the detention of hundreds of thousands of drug users. Legal professionals working in criminal courts have adopted a “punitive paternalism” when dealing with these cases that presented plea bargaining, even in cases based on planted evidence, as helping defendants to change their life habits. The article argues that both the “war on drugs” and the “punitive paternalism” are rooted in the neoliberal policies imposed on the Philippines for decades responsible for reproducing gross income inequality and promoting a narrative blaming individuals for their own economic marginalisation. The analysis shows that the deployment of coercive strategies, such as the “war on drugs”, is still dependant on building consent, in the Gramscian sense. The article shows legal professionals’ contribution to the constitution of a hegemonic order in a context of widespread state-sponsored violence.

### Key words

War on drugs; hegemony; state violence; criminal courts; Philippines

### Resumen

La “guerra contra las drogas” en Filipinas se ha cobrado la vida de miles de personas y ha resultado en la detención de cientos de miles de consumidores de drogas. Los profesionales del derecho que trabajan en tribunales penales han adoptado un

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“paternalismo punitivo” al abordar estos casos en los que la negociación de culpabilidad, incluso en casos basados en pruebas plantadas, se presentaba como una ayuda a los acusados para cambiar sus hábitos de vida. El artículo sostiene que tanto la “guerra contra las drogas” como el “paternalismo punitivo” tienen sus raíces en las políticas neoliberales impuestas a Filipinas durante décadas, responsables de reproducir la enorme desigualdad de ingresos y promover una narrativa que culpa a los individuos por su propia marginación económica. El análisis muestra que el despliegue de estrategias coercitivas, como la “guerra contra las drogas”, todavía depende de la construcción del consentimiento, en el sentido gramsciano. El artículo evidencia la contribución de los profesionales del derecho a la constitución de un orden hegemónico en un contexto de violencia generalizada patrocinada por el Estado.

### **Palabras clave**

Guerra contra las drogas; hegemonía; violencia estatal; tribunales penales; Filipinas

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## 1. Introduction

In June 2016, Rodrigo Duterte was elected president of the Philippines with the promise to end the country's "drug problem." In the following months, he commanded a bloody campaign against drug users and dealers that resulted in the killing of thousands of people and the detention of hundreds of thousands more. Duterte's "war on drugs" has been a hybrid campaign, combining lawful and unlawful actions by state forces. The extra judicial killing (EJK) of thousands of drug sellers and users by police and paramilitary forces took place outside the law, although that violence was encouraged and implicitly condoned by statements made by the President himself. The killing spree occurred during a "legal" campaign that led to the detention of thousands of individuals; but even that "legal" dimension of the campaign was plagued by illegal police behaviours. Despite the level of violence and illegality, legal professionals (including judges, prosecutors and attorneys) working in criminal courts handled drug related cases as if they were the result of normal procedures. Only when they were overwhelmed by the number of cases did they take some extraordinary measures, namely, abrogating a prohibition to use plea bargaining in those cases to be able to deal with them swiftly. It has been argued by some scholars that the "war on drugs" was a political strategy to mobilise people's fear during a period of political crisis (Warburg and Jensen 2018). The "war on drugs" has also been described as not merely having diverted people's concerns away from political corruption and economic inequality, but rather pushing a narrative that blamed poor drug users for a national development failure (Thompson 2016). Despite the focus on the actions outside the law, notably EJK, legal professionals played an essential role in the "war on drugs." In handling the hundreds of thousands of drug related cases brought to court, they legitimated the campaign and its underpinning moral narrative of blaming the poor; this occurred not merely by decontextualising the cases from their social and political backgrounds – a basic feature of liberal criminal law – but also by ignoring and/or dismissing evidence of police misbehaviour.

This article is based on interviews conducted with legal professionals in Manila in 2017 and 2018. It scrutinises how legal professionals sought to produce "legality" in a situation of rampant state-sponsored violence. Previously, we have argued (Ciocchini and Lamchek 2022) that legal professionals in the Philippines developed a "punitive paternalism" which they used to justify the state's violent interventions. Through this punitive paternalism, those legal professionals were able to distance themselves from the more violent discourse of the "war on drugs," and presented themselves as protectors of the defendants by offering an alternative that softened the severity of the punishment. This ideological construct also allowed them to rationalise the condoning of illegal police practices that grounded the criminal cases upon which they were working. Thus, through a "punitive paternalism", instrumentalised through plea bargaining, legal professionals modulated state violence without obstructing it. In this way, they contributed to building *consent* around those violent state policies. In this article, I trace the roots of such "punitive paternalism" and the "war on drugs" to a control strategy that applied political limitations imposed by neoliberal economic policies that have been implemented for decades. I argue that coercive strategies are dialectically related to those strategies aimed at building consent, and that "punitive paternalism" is the concrete manifestation of this dialectical relation.

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The article starts by delving into the roots of the moral values underpinning the “war on drugs” and the “punitive paternalism” that has driven the conduct of legal professionals in the Philippines. The “war on drugs” has been explained as a populist strategy seeking to overcome a crisis of political legitimacy; nevertheless, this narrative leaves out the causes of the crisis of legitimacy and the reasons behind the decision to address it by unleashing a violent campaign. Following a literature review on the topic, I argue that the “war on drugs” is better understood as a result of neoliberal economic policies that both permeate the local culture while also severely restricting the government’s political manoeuvring. The first section describes these economic policies and their political, cultural, and social impacts. It reveals how the expansion of a newly emerged middle class in the last decades has paradoxically increased the urban social tensions with the marginalised sectors of society. Economic development aligned with neoliberal policies has not brought the promised improvement to the majority of the population. Frustration has led to a growing discontent with the political elite. This has further been fuelled by accusations of corruption. Neoliberal discourses have promoted the idea that economic failure is due to an individual’s moral flaws. It is under this perspective that both the poor and drug users are blamed as being responsible for the failures of development.

The second section explores the political strategy behind the “war on drugs”. It seeks to offer an answer on why the political crisis caused by economic inequality was responded to by deploying extreme violence. Drawing upon Gramscian and post-colonial theories, I argue this choice is better understood as the result of structural limitations imposed by neoliberal policies. Repressive policies emerge as the only tenable strategies to maintain order in contexts of externally imposed austerity. However, I distance myself from Guha (1997), and I argue that coercion and consent are dialectically related, so violence always contributes to the process of building consent. The relentless violence of the “war on drugs” not only mobilised support from those middle- and upper-class sectors of society that saw drug users as a potential threat, but it also had a performative effect that cemented the narrative of blaming poor drug users for the countries’ development failure even among those who are economically disadvantaged. Furthermore, the spectacle of violence diverted people’s frustrations from the political elites and helped them build consent around the need to continue with the neoliberal policies. The punitive paternalism driving legal professionals is a particular form in which violence is interpreted in order to manufacture consent for state’s policies.

The last section scrutinises this punitive paternalism based on interviews with legal professionals. The research demonstrates how punitive paternalism was embedded into the perceptions of the legal professionals and in this way, allowed them to reconcile their ideals about the rule of law and due process with the rampant police violence underpinning the criminal cases. It also elucidates the unconscious class bias in their discourse underpinning the justification of using illegal practices to achieve the official goal of Duterte’s campaign, i.e., to punish drug users. Lastly, punitive paternalism allows legal professionals to portray themselves as benevolent figures that work to diminish punishments by bargaining for the defendant’s case.

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I conclude by analysing the role the law and legal professionals have in the context in which neoliberal governmentality has led to the use of widespread state violence to maintain a social order.

## **2. The neoliberal economic inequality fuelling state violence**

Liberal narratives tend to dissociate the economic and political realms. Due to this divide, scholars have focused upon the “political” aspects of the campaign, i.e., Duterte’s rhetoric and the people’s approval despite the killings. However, little is said about the causes for the people’s anxiety and fear about how and why Duterte successfully mobilised and unleashed such an intense state-sponsored violence. While it is widely recognised that Duterte’s “war on drugs” targeted the poorest sector of the population (Kusaka 2017, Wells 2017, Aldama 2018, Warburg and Jensen 2018), there is less clarity around the reasons that the government accepted to unleash such violence, and even less so regarding a societal acceptance in the Philippines (Ranada 2018). Furthermore, it might seem puzzling then that this campaign was conducted while the government was actively promoting some of the most important redistributive policies in years, allegedly aimed at reducing poverty (Capuno 2022). However, a deeper analysis of the economic policies put in place by Duterte’s administration shows a notable continuation with decades of neoliberal policies responsible for the reproduction of a fundamentally unequal social order.

The neoliberal policies feeding that narrative can be traced back to monetary policies implemented in the Philippines since the American colonial period (Lumba 2022). The consequences of such monetary policies led the Philippines to enter the 1980s with a massive debt that soared rapidly. Under that economic emergency the IMF and the World Bank forced the country to adopt severe structural adjustments programmes (Thompson and Slayton 1985, Abocejo 2014, Chew 2022). The Philippines was forced to devalue its currency, remove trade barriers to improve its competitiveness and capture foreign investment, but the immediate consequence was to depress real wages (Montes and Cruz 2020). The neoliberal policies continued during the following decades, as did the heavy burden payment of the external debt imposed on the Filipino economy. Economic growth was slow in comparison with other countries in the region, but it has picked up pace in the last two decades. The Philippines’ gross income product has risen annually by an average of 6.4 per cent since 2010 (Mbuya *et al.* 2021). However, 1 per cent of the population capture 17 per cent of national income while the bottom 50 per cent of the population only gets 14 per cent of the total wealth (World Bank 2022).

An analysis of the economic policies implemented by the different Filipino governments over the last decades shows a remarkable continuity of the neoliberal policies. Thus, one of the most significant economic policies has been establishing special economic zones to attract foreign investment (Chew 2022). Foreign industries have taken advantage of those zones and they have established themselves in the Metro Manila region. However, the same measures that attracted those foreign companies have been responsible for a broader de-industrialisation of the country, since the free market forced local factories to compete with foreign products (Montes and Cruz 2020). As a result of years of following the policies suggested by the World Bank and other International Financial Institutions, the Philippines has suffered a severe reduction of its agriculture and industrial sectors while the rising service sector is sustained by the remittances of

overseas Filipino workers (OFWs) and earnings from offshored call-center business services (Ofreneo 2015). The total number OFWs was over 10% of the total resident population in 2011 and their remittances represented 10% of GDP in that same year (Ofreneo 2015). Meanwhile, industries located in special economic zones were responsible for over 73 percent of Filipino exports in 2011, but only for 2% of employed workers (Chew 2022). The outcome of those neoliberal policies has been that despite decades of economic growth, the situation of low-income households has not improved (Dodd *et al.* 2022). A large part of the population is either unemployed or precariously employed in the informal economy, which accounts for 70% of economic transactions (Porio 2015).

It was only after 2012, due to the implementation of redistributive policies, that poverty started to be reduced (Capuno 2022). The main social protection strategy, the Pantawid Pamilya Pilipino Program (4P), is a conditional cash transfer programme sponsored by the World Bank, which currently benefits three in every four poor households (Capuno 2022). The 4P has two goals: to provide social assistance to reduce poverty in the short-term, and to disrupt the intergenerational cycle of poverty by improving children's health and education (Dodd *et al.* 2022). The programme has continuously expanded since its early start in 2007 in both population coverage and budget allocation (Dodd *et al.* 2022). While many beneficiaries remained indigent, their cash transfer moved them closer to the poverty threshold (Capuno 2022). The programme has had some serious problems in its implementation, such as lack of transparency, poor communication of eligibility criteria, rigid monitoring of beneficiary compliance; delays in cash transfers; and an insufficient amount of money provided (Dodd *et al.* 2022). But more fundamentally, this programme and the rest of Duterte's policies targeting poverty, e.g., the expansion of public healthcare, are focused on granting access without necessarily ensuring the quality of the services (Ramos 2020). The problem with this approach is that it consolidates socio-economic stratification and further segmentation of public service delivery, with poor sectors relying on overwhelmed public services, while sectors of the population who can afford it choose to resort to private providers (Ramos 2020).

Even after a modest reduction of poverty was achieved with the redistributive policies, in 2015 almost a third of the Philippines' population (27 per cent) lived on less than USD3.20 a day, the national poverty line (World Bank 2022). Even in the comparative wealthy Manila – which accounted for over one-third of the nation's gross domestic product in 2014 (Porio *et al.* 2019) – one in every 10 residents lives in informal settlements (Ballesteros 2010). Poverty is compounded by the lack of basic services and infrastructure with 18 percent of Metro Manila's population living in settlements located in low coastal elevation zones where buildings are built on flood and danger zones (See and Porio 2015). While the poorest sectors live in precarious settlements, upper and middle classes live in walled enclaves next to them. This forces a daily experience of the extreme class inequality that shapes urban life in Manila, fuelling social tensions (Garrido 2019).

Kusaka (2017) offers a compelling analysis of the moral politics that have been set in the Philippines by the neoliberal policies implemented in the last decades. He argues that those policies have established a neoliberal governmentality based on an entrepreneurship narrative which has been internalised by the Filipino people (Kusaka

2020). Under this narrative the economic status of people is considered to be the result of people's individual choices. Drug users are seen a threat to "good citizens" who are sacrificing themselves to improve their economic position. The violence deployed in the war on drugs is justified as a means to "discipline" them (Kusaka 2020). Elsewhere, we argue that the "punitive paternalism" I observed in legal professionals' discourses and practices (Ciocchini and Lamchek 2022) is rooted in that neoliberal mentality that blames poor drug users for their life choices and justifies punishment as way to help them become "good citizens".

But the resentment of the population has not only been directed against "drug users" but also the ruling elite, which is perceived as corrupt and presented by the neoliberal narrative as responsible for the state's failure to provide efficient services (Kusaka 2020). This frustration against the elites has fed a persistent gross economic inequality despite years of economic growth (Abinales 2015). Furthermore, corruption scandals have plagued Filipino politics from the infamous Marcos' regime (1965-1986) to former president Joseph Estrada (1998-2001) (Quah 2018). It is in this context of discontent that Duterte has emerged as an alternative to the technocratic elites ruling the country (Curato 2017). Duterte and his campaign emerged amidst the ruins of structural adjustment policies (Mitchell and Sparke 2016). But while he promised to combat corruption and to improve poor's people life, his actual economic policies have been merely a continuation of previous governments' neoliberal agendas and his main political strategy has been to deploy state-sponsored violence against drug users and street peddlers. His redistributive policies are based on conditional cash transfer programmes developed by IFIs which fail to address poverty in the Philippines (Raquiza 2018). Furthermore, his two flagship policies - the Comprehensive Tax Reform Program and the removal of foreign investment barriers - have drastically reduced income and corporate tax (Capuno 2020) and the removed the requisite of at least 60% of the business to be owned by a Filipino citizen (Valenton and Garcia-Vigonte 2022), respectively. Mentioned above, similar policies were enacted in the past, resulting in the exacerbation of income inequality in the Philippines. Duterte has thus not changed the general orientation of the economic policies set by IFIs policies. Similarly, his "war on drugs" campaign was based on long-term repressive policies, though the intensity of the deployed violence rose to a level not previously seen. The political logic driving his campaign is discussed in the following section.

### **3. Hegemony forged through violence**

The extreme state-sponsored violence mobilised by the "war on drugs" raises questions about the political goals it was meant to achieve. The high level of approval by all sectors of society also poses questions about the impact of that violence. I draw upon Gramsci's (1971) concept of hegemony, to analyse these two apparently antagonistic aspects of the campaign: the resort to coercion and the manufacturing of consent. Gramsci famously argued that the ruling class governs by building hegemony, which consists in a combination of consent and coercion. Hegemony is achieved through a series of alliances with other fractions of the capitalist class and the domination of the subaltern class. The capacity of the ruling class to present its own interests - through political and moral leadership - to the other groups of society as the common good is essential for the production of consent (Joseph 2002). However, depending on the relations of force, the



subaltern classes might be able to extract concessions from the ruling class. The capacity of the ruling class to grant material concessions in these contexts, is crucial to ensure subaltern groups' consent (Jessop 1990).

This model has shown to be a powerful analytical framework to understand political dynamics in societies of the Global North, although Guha (1997) has argued it did not capture the reality of the Global South. He claimed that unlike in the metropolitan state in which persuasion outweighed coercion, dominance in the colonial state was sustained largely on coercion. His argument has two key aspects; firstly, local elites are incapable of granting concessions to obtain consent among subaltern classes due to the type of accumulation strategies established in the Global South. As a result of the international division of labour set by the world economy, business operating in the Global South are largely based in cheap labour or unregulated access to natural resources (Ciocchini and Greener 2023a). Any meaningful concession affects the conditions for such exploitation. But at the same time, these types of economic exploitations are socially harmful heightening social unrest. So, in the case of the Philippines, as it has been previously discussed, the implementation of structural adjustment programmes developed by the IFIs have resulted in a large part of the population facing the alternative of leaving the country to work overseas or surviving by working within the informal economy (Milgram 2018, Alipio 2019). Redistributive programmes, sponsored by IFIs, such as the 4P in the Philippines are the only strategies to alleviate poverty, but they do not address the conditions for the reproduction of income inequality (Raquiza 2018).

This takes us to the second aspect to explore which is the form that coercive strategies adopt. Neoliberal policies have defunded the state at the same time they fed social unrest, generating the paradox of requiring it to expand its repressive capabilities while facing financial shortage (Rashed 2016). This results in resorting to more brutal and less precise coercive strategies, and partially outsourcing such repressive responses, in many cases directly financed and directed by representatives of the capitalist class. Examples of this abound in the Global South: paramilitary organisations in Indonesia or Colombia; extreme police brutality against the poor in Brazil, Cambodia or Mexico; military and police campaigns targeting ethnic or religious minorities in Thailand, Myanmar, India, among many others. The Philippines has experienced these types of brutal coercive strategies implemented to address the social unrest, as illustrated by widespread police brutality (Colonel 2017, Kreuzer 2019) or the killing of hundreds of journalists and activists in the last decades by local and national state-sponsored groups (Aguilar *et al.* 2014, Chavez 2019).

Nevertheless, to simply rule out the construction of hegemony in the Global South would be misleading. Vishnupad (2020) has persuasively argued that in the case of India, social order was supported not by the colonial state's pure violence, as Mbembe's (2009) necropolitics suggests, but rather thanks to daily engagements of locals with the Indian state. Such engagement manifests less in a strict obedience of the law than in its inverted form: the constant circumvention of law's mandate. The Indian state and its laws are revealed to occupy a hegemonic position, despite their apparently general avoidance, since they are embedded in their negative form in people's social practices. Vishnupad's (2020) argument is that such a ubiquitous presence channels social relations away from widespread unrestrained violence. Similarly, though from a more structuralist

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perspective, Hesketh (2019) argues that every political regime requires some level of consent for its maintenance.

In Gramsci's original formulation, violence and consent are dialectically related. The law plays a key role legitimating authority and the use of public violence. Describing the role criminal courts and procedures played in Myanmar under the authoritarian regime, Nick Cheesman (2015) differentiated between the rule of law and law and order. While the former, according to Cheesman in whatever form it takes, i.e., thin or thicker, offers a limitation to government power, the latter, is a purely instrumental use of the law to justify state repression. But even in cases of purely law and order, the mere existence of the law manifests the need to build some consent around the imposition of domination by force. In the Philippines, the tension between rule of law and law and order is not resolved. The courts, and through them the law, still plays a significant role in restraining to some level police violence, however, such control is not consistent and mystifies the violence of the state by presenting it as an exception and not the rule. More importantly, the role of legal professionals never actually obstructed the continuation of Duterte's bloody campaign. Consent can be achieved by ideological alienation, visible in the unconscious acceptance by subaltern groups of values and ideas promoted by the ruling class – which may become common sense – by granting material concessions to subaltern classes, but also by mobilising fear (Simon 2007). As Curato (2017) has pointed out, Duterte's politics, are not only about fear but also about hope. The war on drugs was presented as an opportunity to drastically eradicate what was believed by many to be the main threat to Filipino society. Furthermore, my argument here is that the "punitive paternalism" observed in Filipino legal professionals is embedded in this hope for social change through the reedmen of drug users.

Wendy Brown's (2019) understanding of neoliberalism as a project of "markets-and-morals" can help us to understand Duterte's terror and the weaponization of morality against the drug users, especially those who are poor. Neoliberal reason has simultaneously promoted the submission of politics to economic goals (and consequently favoured authoritarian regimes) (Brown 2019) and the replacement of social justice mechanisms with the responsabilization of individuals for their own social improvement (Brown 2019). Furthermore, such responsabilization has been based on traditional reactionary values. This leads to the weaponization of morality against the drug users and the poor as the breakdown of social order is blamed on the poor's defective morality or failure to make the right choices to improve themselves. In the case of the Philippines, the neoliberal weaponization of morality against the poor is expressed in the embrace of the unrestricted use of state-led violence against drug peddlers and users as a method of imposing order in a highly unequal social context. Duterte's discourse that drug users and peddlers are sub-human and beyond the pale of the law is central to the justification of violence.

Legal professionals moralise drug enforcement and the brute violence of state repression. They do so through a narrative of "paternalistic punitiveness" that presents violence as protecting both society and those drug users from themselves. In the next section, I examine the testimonies of legal professionals working in criminal courts in Manila to explore how they accommodated the violence deployed under the "war on drugs" with their role of guarantors of due process and the rule law. The interviews shed

light on how legal professionals though apparently critical of Duterte, reproduced his narrative of the urgent need to use violence to neutralise the drug threat. It also highlights how through “punitive paternalism” legal professionals dialectically relate the coercive strategy and the consent based one, which manifests as the tension between punishment and rehabilitation and between severity and concessions and is legally instrumentalised in the plea-bargaining mechanism.

#### 4. Methodology

This article is based on interviews I conducted with legal professionals in the City of Manila. I first visited Manila in May 2017. On that occasion I interviewed two prosecutors and two judges from the Regional Trial Courts. Due to my previous interest on judicial reforms, my interviews were focused on a series of reforms sponsored by the American Bar Association to improve the courts’ efficiency, most notably through the introduction of continuous trials. This reform, as its name suggests, consisted in ensuring courts were conducting morning and afternoon hearings four days a week. During the interviews, issues related to the “war on drugs” emerged, as courts were facing the drastic increase of drug related cases and legal professionals were worried about the workload. At that time the Supreme Court of the Philippines had recently declared that the law banning plea bargaining in drug related cases was unconstitutional, but the State Department had not yet defined how to instruct public prosecutors on this matter.<sup>1</sup>

My next visit was the following year, once I had developed my research design, which was based on those exploratory interviews. I made three more trips to Manila, between May and November 2018, during which I interviewed 27 public prosecutors, 9 judges, 2 clerks of the courts, and 12 public attorneys working in Regional Trial Courts (total of 50 interviewees). The script of the interviews included questions related to judicial reforms recently implemented to reduce the courts’ backlog (e.g., continuous trial, judicial affidavit, plea bargaining for drug related cases), problems faced during the criminal procedure (e.g. non-appearance of witnesses, multiple hearings scheduled at the same time), and their working relationship with other agencies of the criminal justice system (e.g. police, prison service). Between the first trip in May and the last one in November, I could observe how legal professionals had significantly reduced the courts’ caseload and alleviated their backlog by resorting to plea bargaining. Interviews were semi-structured, which allowed me to explore their relationship with the police and their position regarding drug related cases from different perspectives. I audio-recorded the interviews, which lasted approximately one hour, though there were a few that were shorter due to previous work commitments. None of the interviews were shorter than 15 minutes, and I was able to ask questions related to drug related cases and plea bargaining in all of them. Half of the interviewees were female. Most of the interviews took place in the library of Manila City Hall, where the courts are located; and, the rest in the interviewees’ offices.

I had previously published the results of my research in two book chapters (Ciocchini 2019, Ciocchini and Lamchek 2022). This article building on these previous publications

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<sup>1</sup> I have published my key findings in this exploratory research in Ciocchini (2018).

and my work with Joe Greener (Ciocchini and Greener 2021, 2023a, 2023b) in which we explore the political economy of violence in Global South societies.

## 5. The legal form of violence

Anti-drug militaristic campaigns in the Philippines can be traced back to Marcos' days, when the United States Drug Enforcement Administration trained and financed Filipino police anti-narcotics units (Sales 2020). But the campaign took a new intensity under president Gloria Macapagal-Arroyo, when she launched a comprehensive campaign in 2001. In the Letter of Instruction No. 1 (Republic of the Philippines 2001), Macapagal-Arroyo's government established the National Anti-Drug Program of Action. The legal document stated that drug syndicates were "engaging in narco-politics of bankrolling with drug money the candidacies of many politicians who shall protect them, once installed in government." In light of this "institutionalised" distrust in the agencies of the criminal justice system the Congress passed the Comprehensive Dangerous Drugs Act of 2002 (RA 9165). The two most notable features of the legislation were: the drastic increment in prison sentences for offences involving illegal drugs, doubling from the previous law (RA 6425 of 1972); the introduction of life imprisonment and capital punishment for the possession of drugs depending on their quantity; and the banning of plea bargaining for drug related cases to prevent prosecutors from receiving bribes to fix a case.<sup>2</sup>

Despite Macapagal-Arroyo's legal reforms, anti-drug campaigns led to very few convictions. In 2010, President Aquino admitted there was a need to reform the judicial system because only 1 percent of the criminal cases involving drugs ended in convictions (Council on Foreign Relations 2010). Five years later, at the end of his presidency, police reports indicated that while the number of reported crimes was rising year on year, the percentage of solved crimes out of reported crimes was dropping (Ranada 2016). By 2014, 20 to 30 percent of the drug related cases were dismissed by prosecutors or courts due to technical problems (De Jesus 2014). In response, Aquino amended the law to allow police officers to do the physical inventory of the seized illegal drugs, which was a significant decision that took into consideration suspicions over police corrupt behaviour. Nevertheless, this change did not improve the conviction rate significantly, and two years later, in 2016, a judge in the running for an appointment at the Supreme Court, explained in a public hearing that "she has acquitted 7 out of 10 in the drug cases in her court" and the reasons for those acquittals were that "the search warrant is not effectively implemented or the chain of custody is broken, or many doubts to entertain" (Francisco 2016).

It was under this climax of failure of the State to deal with drug related cases that Duterte, originally a public prosecutor, made his name during his time as mayor of Davao City between 1988 to 1998 and 2001 to 2016. During his administration police operated beyond the law with death squads killing hundreds of alleged drug dealers in Davao (HRW 2014). His bloody campaign was presented as having successfully

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<sup>2</sup> It should be note that despite these changes many countries in the region have more severe legislations, with some using capital punishment regularly such as Singapore or Thailand (I thank the reviewer for making this point).

eradicated drug syndicates and propelled his presidential candidature in mid-2015 (Caduaya 2015).

In June 2016, six months after Duterte's launched his "war on drugs", the Public Attorney's Office (PAO) started a case of strategic litigation seeking to declare the banning of plea bargaining in drug related cases as unconstitutional. The whole case was grounded on three arguments. Firstly, a legal one, based on the constitutional right of the defendant to plead guilty; secondly, a public policy one that claimed that the excessive severity of the legislation went against the rehabilitative ideal that should prevail; and, finally a managerial one, which stated the drastic increase of the workload due to Duterte's campaign. The Supreme Court of Philippines ruled in favour of the petition in August 2017 and it declared unconstitutional the prohibition on plea bargaining and by April next year, after the Department of the State instructed public prosecutors how to proceed on these cases, the courts started massively disposing cases with this instrument.

In the aforementioned facts, there are two key elements about the role that legality plays in the context in which state-sponsored violence is openly used to maintain social order. Firstly, despite the frequency and intensity of the use of extra-legal violence by state agents, there is a constant invocation of the law, which was a similar tactic used by the courts under the authoritarian regime in Myanmar (Cheesman 2015), demonstrating that it remains important for governments to frame their interventions as within the law or carried out within its own legal framework. Furthermore, and a key point demonstrated by Vishnupad (2020), is that no matter how much legality is ignored or neglected in the concrete practices it is never renounced. This is exemplified in the case of the Philippines by the widespread use of plea bargaining to dispose cases, resulting in condemnatory sentences, even when planted evidence was a common practice by police (Colonel 2017). Secondly, distrust in government forces is embedded in the law, which is illustrated by strict requirements for the chain of custody of evidence or the previous banning of plea bargaining in drug related cases. This is not an exceptional feature of the Filipino legal order, but rather an essential element of liberal law. In a context of widespread illegality, law's restrictions can paradoxically justify the same illegal practices it was meant to avoid. However, this does not leave law useless or dead, but creates a dynamic grey space in which illegal practices are accepted. This grey zone does not neutralise law's general power to regulate state actions, it coexists with it. For example, some sectors of the state, including legal professionals, mobilise the law in drug related cases, thus indirectly regulating police behaviour while simultaneously accepting some illegal practices carried out by the police. The result is the legitimisation of some state-sponsored violent practices, which leads to a certain acceptability within society by creating a new "common sense" (Ciocchini and Khoury 2018, 2021).<sup>3</sup> Under this new "common sense" police abuses originated in coercive strategies such as the "war on drugs" are hidden or perceived as necessary leading society to consent them.

I argue that the building of a new "common sense" is a key role legal professional have played in the Philippines, not by attempting to protect polices forces, but neither completely unintentionally. A combination of bias against poor defendants and drug users, the acceptance of common illegal practices while maintaining a restrictive

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<sup>3</sup> I would like to thank to Stefanie Khoury for pointing this out.

interpretation of their legal duties, fear of reprisals against them if they were too critical of the government's actions, and personal and corporatist interest on reducing their workload have define their attitude towards drug related cases. The pressures from these forces and the values embedded within led them to develop a "punitive paternalism" which was legally instrumentalised as enabling and using plea bargaining in the drug related cases originated in Duterte's bloody campaign.

In the interviews I conducted, many legal professionals showed a bias against defendants which manifested as the assumption that all defendants caught for drug related cases were, regardless of the evidence, actually guilty of consuming drugs. This was even more striking because they claimed most of the cases were fabricated by police. A public prosecutor told me that "they know that they're actually using, it just so happens that at the time that they were arrested they were not maybe they were not actually doing this offence..." (Interview #11).

Similarly, a judge argued:

... cases that came in starting 2016 up to today 2018 I would even say more than 90% of the cases involves what we call in essence and just general essence planted evidence by the police. Although this doesn't necessarily mean that the accused were not selling that they were not drug addicts but as to whether they committed that offence the way the police said it that's a different matter. (Interview #31)

This bias was usually hidden behind good intentions, a paternalistic attitude towards poor litigants in drug related cases. The general position was that defendants needed to change their lifestyles and that the sentence was an opportunity for them to do that. It is through this moral discourse that plea bargaining was justified: "...there is still justice [in cases disposed by plea bargaining] because they (defendants) are in prison so before I will release them, I talk to them that that you must reform, do not use drugs anymore" (Interview #10). Thus, plea-bargaining is thought to preserve "justice" both for society, which demands some punishment, and the defendant, who is afforded the chance to rehabilitate. A lesser sentence is regarded in contrast with EJKs, as a more rights-respecting solution, but the problem is it reproduces the perception of the poor guilty, even when there is suspicious of the role of police constructing the case. Recently, Lasco and Yarcia (2022) have argued a similar point, claiming that compulsory rehabilitation has become to being seen as an acceptable alternative to EJK. Underpinning this attitude towards punishment and rehabilitation is a prejudice against poor defendants which are seeing as morally flawed.

However, it should be noted that the government has not shown real intention in promoting rehabilitation policies, as revealed by the lack of dedicated centres and programs.

... A rehabilitation centre (...) can house so many thousands of people. But they do not have the budget to maintain this (...) so those who are convicted are now supposed to undergo rehabilitation [but] have not been brought to the rehabilitation centre. (Interview #12)

Following neoliberal budget-cutting measures, the government failed to invest in community-based facilities, nevertheless, they did construct a huge rehabilitation centred in an isolated location which was described one year after its opening in 2017 by the chairman of the Dangerous Drugs Board as a "mistake" (Carbonell 2017). The lack

of places in rehabilitation facilities means that defendants remain in jails. To deal with this problem, some legal professionals interpret the time defendants spend in prison as time spent on rehabilitation, and accordingly release the defendants. However, others leave detainees waiting in jails until rehabilitation facilities have available beds, showing the limits of their stated interest in the defendants' well-being. Furthermore, this adds pressure to an already congested prison system due to the general lack of state investment, which was reported to be overcrowded by 367% in 2022 (Chi 2023).

Also significant in the interviews was how legal professionals reproduced the government's narrative that associated drug offences with poverty, which justified the police violence that targeted the most vulnerable sectors of the population. They described drug related cases in such a way that the defendants, victims, witnesses, and others involved were said to be corrupted by criminality by reason of their poverty. One prosecutor mentioned that "... misdemeanours, crimes, are usually committed by (...) persons below the poverty line ..." (Interview #1). Legal professionals often emphasized the social environment of the poor as determining what they referred to as a "defective morality". Legal professionals distinguished themselves from poor litigants through their differing morals, particularly relating to their sense of law and justice. In their accounts, poor complainants, and defendants valued justice less and were largely driven by their material needs. A public prosecutor claimed that poor litigants prioritized their material needs over the need for legal justice (Interview #3). Legal professionals interpreted the mentality of defendants from the lower classes as economically driven. This attitude was also expressed by some public attorneys:

Most of our clients in court are indigents and that their mentality is that when you lose the case (...) they will say that you are being paid, somebody bribed you for that (...). (Interview #2)

This shows that distrust goes both ways, poor defendants and their families are also suspicious on legal professionals' moral values. This can be partially attributed to Duterte's inflammatory statements against judges and prosecutors accusing them to collude with drug cartels (Associated Press 2016), but as it has been discussed above, distrust against legal professionals can be traced back to Macapagal-Arroyo's presidency and it was institutionalised in the banning of plea bargaining for drug related cases as a preventive measure.

As mentioned above, another significant finding was how the attitude of legal professionals to legality shifted to avoid confronting the government's actions. So, when speaking about drug related cases, no reference was made to the violence taking place outside the courtroom, the state-sponsored violence. Only two interviewees of the 50, commented upon the EJK taking place within the "war on drugs" in Manila at that time. This was notable since I was discussing the strengths and weaknesses of drug related cases and the role of the police. The majority of interviewees were critical of the violence of the police behaviour, however when explaining different illegal practices by police they omitted any mention to EJKs. This was also the case in the hearings I witnessed; legal professionals questioned police procedures but appeared blind to the context of widespread violence in which those cases had taken place. This attitude was understandable, since as one prosecutor admitted:

I think judges and prosecutors especially in drug cases are careful (not) to be branded that (...). They are afraid to be placed in the list of narco court prosecutors or narco judges (...). (Interview #19)

Another prosecutor confirmed the fear arguing that

...if you dismiss this case, we will be subjected to administrative cases, (they will be questioned): 'Why did you dismiss that? Do you know that the first goal of the Government is to eradicate drug cases and drug related crimes?' (...) And if you are very technical about it, and you dismiss it, then they will become suspicious and say: 'Oh you might be in the pockets of the drug', [So], you don't know where to stand, you know it's like damned if you do, damned if you don't. So, what do we do? we just transfer the problem to the courts. (Interview #13)

These interviews indicate that the fear of legal professionals could prevent some of them from dismissing cases due to irregularities in the police behaviour. Plea bargaining helped them to avoid that confrontation with police and consequently the government, but at the cost of defendants' freedom.

Nevertheless, their behaviour was not merely driven by fear as their comments on police violence showed. The interviewees seemed to be incapable of critically engaging with police abuse and instead consciously or unconsciously reproduced it, as "common sense". Thus, one prosecutor argued that

...the rules are very strict, and the procedures are not being followed by the police officers although we can say that it is not their fault because the rules are very strict and if they follow the rule (...) it will be difficult for them to run after the illegal dealers as well as the users. (Interview #26)

This idea that law and the amount of drug related cases are actually preventing police officers from doing their jobs was found in another prosecutor's comments:

... so many cases are dismissed because one of our police officers' witnesses are not smart enough in answering questions, they often say it has been a long time they forgot the details although as early as the first hearing if the police officers are around, we already tell them to go over the records of this case. (...) They say it is a long time when in fact it is just months since the arrest. But because of the numbers of accused arrested they are confused, they seem to mix up the facts from this case to this case, they are confused (...). (Interview #9)

However, at least some of the legal professionals interviewed were less inclined to justify police's behaviour during the trial:

...sometimes there are very disappointing police officers' witnesses which compel us to report them to their authorities. (...) [There are] very abusive officers and those who are put on witness stand and very clearly lie (...) despite their affidavits, despite the presence of the evidence. (...) [I]t is not uncommon that this police officer has traded their jobs into this (...). [W]e have big time drug pushers who can even pay the police officers the price that they want (...). (Interview #9)

Despite admitting police misbehaviour as the cause for the cases' weakness, what is notable in these comments, is that legal professionals' frustration is less about the situation of defendants whose rights have been violated by the police negligence or corruption (including in most cases the suffering of months in detention in overcrowded



jails) but rather with how such police misbehaviour prevents them to reach condemnatory sentences.

In this problematic context, prosecutors, public attorneys, and judges managed this deluge of drugs cases by embracing the device of plea bargaining, newly introduced by the Supreme Court to narcotics cases. Given the weakness in the police's construction of drug cases, conviction was often in serious tension with the duty and commitment of prosecutors, public attorneys, and judges as legal professionals to decide cases on the basis of law and evidence. At the same time, acquittals appeared anathema both to the government's aggressive anti-drugs campaign and legal professionals' own moral judgment of drug users. Plea bargaining allowed legal professionals to avoid these unwanted outcomes and satisfy their belief in rehabilitation. For public prosecutors and judges, it guaranteed convictions so they could satisfy the government's expectations whilst avoiding dealing with the weakness of the cases arising from problematic police work. As a public prosecutor stated:

[Plea bargaining] is [a] welcome move for us, as prosecutors, because it lessens the burden of prosecuting these cases. We do not have to present the police officers anymore; we do not have to present evidence anymore; and we are guaranteed with a conviction. It is a win for us (...) because getting a conviction with drug cases is very hard (...) because of the technicalities and well we all know the police officers are not as reliable as they should be (...) [police officers] are happy with it (...). (Interview #4)

It could be argued that plea bargaining, ubiquitously used in criminal justice systems around the world, is always problematic and has long before being object of criticisms due to its extorsive character (Langbein 1978). However, the point here is that plea bargaining was not legally allowed for this type of cases in the Philippines, and it was only enabled during the "war on drugs" when police abuse was rampant by the actions of legal professionals. Furthermore, it was presented by those legal professionals as serving the defendants' needs.

Legal professionals discursively constructed prison sentences, as well as the violence and illegality of police committed during the arrests and that was behind such sentence, as desirable outcomes for both society and the accused. Even public attorneys argued that convictions based on plea bargaining "would be considered as a favourable disposition (...) because we were able to secure a lesser penalty" (Interview #6). The argument among public attorneys was that plea bargaining benefits "both the defense and the prosecution (...), in a way we are also correcting the drug behavior of the person, so the conviction says a lot that you know you do not get to do it again" (Interview #5). So, whilst the penalty "is not proportionate" by pleading guilty they could even aspire to be released under probation: "every plea of guilty to a lesser offence I always file an application for probation" (Interview #5). The weakness of the cases was downplayed. This is seriously problematic for defendants, given that, as legal professionals all agreed, the irregularities and inadequacies of police work would normally result in their acquittal. Further, given that irregularities of police conduct were rampant, downplaying them results in systematically failing to challenge massive detentions and police abuse as a structural problem. There were serious flaws in the way police proceeded:

the problem is really with the, sadly, with the compliance and the performance of the police officers in their functions because (...) it affects the prosecution (...) if they were not really compliant with the requirements of the Comprehensive Drugs Act, then during the trial, the Public Attorney's Office will grill them on cross examination (...). (Interview #7)

According to legal professionals, it was not merely negligence which is the reason behind weak police work, but serious problems of police officers' integrity, a judge lamented: "most of my drug cases are for acquittal (...) sometimes [the cases] are just fabricated, they are just concocted by the police officers that's why..." (Interview #8). With plea-bargaining, legal professionals facilitated the abandonment of challenging the irregularities in police conduct, resulting in the legitimation of mass detentions and guaranteeing convictions.

## 6. Conclusions

This article has explored the role of legal professionals and the law during the "war on drugs" in the Philippines, a context of widespread state-sponsored violence. I have argued that legal professionals have developed a "punitive paternalism", which was legally instrumentalised through plea bargaining. It sought to modulate some of the violence of the state without seriously obstructing it. I have sought to demonstrate how this "punitive paternalism" is embedded in a neoliberal morality which normalises class inequality by blaming the poor for their economic position. Furthermore, that morality is used to justify a condescending attitude that in turn justifies the imposition of punishment against those perceived as morally flawed as means to help them improve their lives.

Neoliberal policies shaping Filipino society's values have been present since Marcos' regime. Although they have taken different forms, they have consistently promoted an individualistic morality that has associated economic success to personal choices. The poor and drug users, and particularly those at the intersection of these two groups, have been defined as morally corrupt and a burden for the rest of society. By blaming those groups, elites have managed to divert some of the frustration against the economic policies implemented in the last decades. However, persistent inequality has eroded support for the elites, which explains the success of Duterte's politically disruptive speech (Curato 2017). Furthermore, fuelling animosity towards drug users has set the conditions resulting in an unprecedented violence against them. Legal professionals' bias, evidenced in their depiction of the defendants, is an example of the consent building within the Filipino society around the symbolic and material violence directed against poor drug users.

Legal professionals' attitude towards police illegalities in drug related cases exemplify the constant dialectical tension between coercion and consent. They do not completely condone it, but neither do they always challenge it. This is a dynamic mobilisation of the law to legalise as much as possible the outcome of police violence. Plea bargaining is underpinned by an individualistic neoliberal logic; this logic sets the punishment in accordance with the view that the crime is the result of an individual choice of the very same person who is facing it. The outcome is that plea bargaining becomes the preferred instrument with which to provide a legal veil for the violence of the state. Thus, plea bargaining converts a case of police harassment into rehabilitation treatment, which

offers the audience – the rest of the society – the possibility not only to avoid facing the violence imposed on their behalf, but also a confirmation of the individuals' morally flawed character.

“Punitive paternalism” is a tactic among a more general strategy to impose social order in a context of persistent income inequality, in which material concessions to those who are economically disadvantaged are not granted, and consequently violence is used to forge consent – but not consensus (Ciocchini and Khoury 2021) –. In the plea bargaining procedures, the threshold of legality and illegality is constantly blurred by legal professionals decisions, which are ultimately driven by the need to give a certain legal form to otherwise violent state interventions.

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