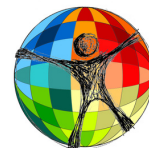


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The Rule of Law or the Rule of (Corporate) Power? The Criminalization of Environmental Defenders in Iran, the United States, and India

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ABSTRACT

The persecution and prosecution of environmental defenders is on the rise across the world. Indeed, the alarming murder rates of environmental defenders are documented in semi-annual reports by the civil society organization (CSO) Global Witness. However, little reporting has been done on the criminalization of environmental defenders. This paper argues that criminal law is getting abused to deter and target environmental defenders in countries with diverse governance structures and relationships to the rule of law. Here, I develop a thin definition of the rule of law focused on legality, which I then apply to the prosecution of the staff of the Persian Wildlife Foundation in Iran; Enbridge Line 3 pipeline protesters in the US; and opponents of Vedanta Mining in Odisha, India. Focusing specifically on the abuse of pre-existing criminal laws, I argue that the case studies raise questions relating to the level of specificity required of law to satisfy legality; the relationship between the rule of law and the courts; and between the rule of law and dissent. In the hopes of providing guidance to CSOs seeking to monitor this problem, I draw seven conclusions about the relationship between the rule of law, politics and the criminalization of environmental defenders, including that this pattern of abuse sometimes intersects with patterns of abuse towards human rights defenders in the country, as in Iran, and in other contexts intersects with abuses of law specifically related to environmental disputes, as in the US. Additionally, persecution is more common where defenders are Indigenous and commonly occurs surrounding projects undertaken by large extractive industries. Finally, I make a series of recommendations which include increased monitoring by CSOs worldwide, measures that can be deployed to protect the defenders already targeted and changes that perpetrating corporations and governments can make to address this problem.

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I. Introduction

Environmental defenders face dangerous persecution and prosecution across the world. In 2021, 200 people were murdered while fighting to protect their land.¹ Up until 2021, which saw a decrease in killings from 2020, these numbers had climbed every year since the NGO Global Witness started tracking them in 2012.² The defenders killed were disproportionately Indigenous.³ Environmental defenders also face more a more insidious threat: state criminalization. While criminalization is not well-documented,⁴ a global review of 2743 environmental conflicts found that defenders faced criminalization in 20% of cases.⁵ And it is happening across the globe. There are reports from the US,⁶ Brazil,⁷ Iran,⁸ Vietnam,⁹ India,¹⁰ and Russia.¹¹ Diverse countries with diverse governance structures, cultures, and relationships to the concepts of the rule of law and human rights. Furthermore, it affects a wide array of actors, from scientists¹² to journalists¹³ to lawyers.¹⁴

State criminalization of environmental defenders matters for a few reasons. First, it deters environmental defense by showing people that there are penalties for standing up for their land. This

¹ See Global Witness, “Decade of Defiance” (September 2022), online: <globalwitness.org/en/campaigns/environmental-activists/decade-defiance/> [Global Witness, “Defiance”].

² See Global Witness, “Last Line of Defence” (September 2021), online: <globalwitness.org/en/campaigns/environmental-activists/last-line-defence/>.

³ See Global Witness, “Defiance”, *supra* note 1.

⁴ See Global Witness, “Enemies of the State?” (July 2019), online: <globalwitness.org/en/campaigns/environmental-activists/enemies-state/>.

⁵ See Arnim Scheidel et al, “Environmental conflicts and defenders: a global overview” (2020) 63:102104 Global Env'tl Change 1.

⁶ See John H Knox, “Environmental human rights defenders: a global crisis” (2017), online (pdf): *Universal Rights Group* <universal-rights.org/wp-content/uploads/2017/03/EHRDs-spread.pdf>; UNWGAD, *Opinions adopted by the Working Group on Arbitrary Detention at its ninety-first session, 6–10 September 2021: Opinion concerning Stephen Donziger (United States of America)* (1 October 2021), A/HRC/WGAD/2021/24, online (pdf): <ohchr.org/sites/default/files/Documents/Issues/Detention/Opinions/Session91/A_HRC_WGAD_2021_24_AdvanceEditedVersion.pdf>.

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is concerning in an era of rising environmental destruction.¹⁵ Second, it often co-occurs with violations of civil and political rights, such as freedom of assembly.¹⁶ Third, it often co-occurs with violations of other human rights, such as the right to be free from torture and cruel and unusual punishment or from extra-judicial killing.¹⁷ Fourth, it is racially discriminatory. Criminalization is disproportionately higher for Indigenous environmental defenders.¹⁸ Lastly, the criminalization is often arbitrary, violating core principles of criminal law derived from the rule of law principle.¹⁹ It is on this last risk that the paper will focus, though

⁷ See “Jose Vargas Sobrinho Junior responds to criminal charges in freedom” (updated 17 February 2022), online: *Front Line Defenders* <frontlinedefenders.org/en/case/human-rights-lawyer-jose-vargas-sobrinho-junior-detained>.

⁸ See Kayleigh Long, “Iran upholds heavy sentences for conservationists convicted of spying”, *Mongabay* (21 February 2020), online: <news.mongabay.com/2020/02/iran-upholds-heavy-sentences-for-conservationists-convicted-of-spying/>.

⁹ See Chris Humphrey, “Award-winning Vietnamese environmentalist arrested as rights groups fear ‘clamp down’”, *The Guardian* (9 February 2022), online: <theguardian.com/global-development/2022/feb/09/award-winning-vietnamese-environmentalist-arrested-as-rights-groups-fear-clamp-down>.

¹⁰ See Henri Tiphagne, “Urgent Appeal regarding intimidation, abduction and wrongful confinement of Adivasi leaders and members of Niyamgiri Suraksha Samiti” (15 June 2017) online (pdf): *Human Rights Defenders Alert – India* <hrdaindia.org/assets/upload/6006439962017-06-15-HRDA-UA-EAST-Odisha-Niyamgiri%20Suraksha%20Samiti.pdf>.

¹¹ See Scheidel et al, *supra* note 5.

¹² See *ibid*.

¹³ See *ibid*.

¹⁴ See UNWGAD, *supra* note 6.

¹⁵ See Scheidel et al, *supra* note 5.

¹⁶ See UNEP, “Environmental Rule of Law: First Global Report” (2019) at 147, online: <unep.org/resources/assessment/environmental-rule-law-first-global-report>.

¹⁷ See Global Witness, “Defiance”, *supra* note 1.

¹⁸ See *ibid*; Scheidel et al, *supra* note 5.

¹⁹ See rest of paper.

where it co-occurs with these other risks, they will be highlighted to better show the scope of the problem.

Therefore, this paper will look at three case studies where law was instrumentalized to criminalize environmental defenders through a rule of law framework to try to better understand the problem and identify strategies to address it. The paper argues that the criminalization of environmental defenders is evidence that the law gets bent and abused often in the context of natural resource management and conservation disputes between citizens and governments. In the hopes of providing guidance to civil society organizations (CSOs) seeking to monitor this problem, I identify that this pattern of abuse sometimes intersects with patterns of abuse towards human rights defenders in the country, and in other contexts intersects with abuses of law specifically related to environmental disputes. I also identify that it often intersects with discrimination towards Indigenous peoples and with projects undertaken by large extractive industries. Finally, I make a series of recommendations which include increased monitoring by CSOs worldwide, measures that can be deployed to protect the defenders already targeted, and changes that perpetrating corporations and governments can make to address this problem. But I begin by developing a working definition of the rule of law for the purpose of this paper, laying out the case studies and engaging in a critical discussion of the tensions the case studies raise with the definition.

II. Coming to a (Thin) Definition of the Rule of the Law

Carefully defining the rule of law for the purposes of this paper is important. First, because the concept has recently been described in legal circles as “essentially contested.” Second, because it has been deployed for and against harsh government enforcement of laws against environmental defenders,²⁰ an

²⁰ See Alexander Agnello, *The Rule of Law in mainstream development: an inflated concept?* (Master of Laws Thesis, McGill University Faculty of Law, 2022) [unpublished] at 10, discussing Wet’suwet’en resource protests in BC, during which police enforcement of a provincial court injunction through forcible

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example of ideological hostage-taking that the concept has been subject to both within Western countries and in the way that Western countries have narrated their “development” agendas abroad during and after the Cold War.²¹ The concept’s essential contestation relates to the idea that there can be “thick” and “thin” conceptions of the rule of law. “Thick” definitions are critiqued for playing fast and loose with the rule of law, rolling into it “everything good,”²² such as consistency with human rights and democracy, whereas “thin” definitions focus on the law’s formal characteristics.²³ In the wake of the debate about whether the rule of law includes requirements about the values-based substance of laws, i.e. human rights, settling on a core of the concept has proved difficult,²⁴ leading scholars to describe it as essentially contested.²⁵ However, despite this, many scholars have come to agree that the concept serves a key purpose, namely ensuring that society is “ruled by laws, not men,”²⁶ and that it continues to have value because of this.²⁷ Thus, the important thing is to be precise about what one means by the rule of law.

While a “thick” definition of the environmental rule of law has been proposed by the UN recently,²⁸ a thin definition focused

removal of Wet’suwet’en blockades was both critiqued as a violation of the rule of the law and lauded as the necessary measure to uphold it.

²¹ See Jeremy Waldron, “Is the rule of law an essentially contested concept (in Florida)?” (2002) 21:2 L & Phil 137.

²² Joseph Raz, “The Rule of Law and its Virtue” in *The authority of law: Essays on law and morality* (Oxford: Oxford University Press, 1979).

²³ See Jørgen Møller, “The advantages of a thin view” in Christopher May & Adam Winchester, eds, *Handbook on the rule of law* (Northampton, Mass: Edward Elgar, 2018) at 21; Rachel Kleinfeld Belton, “Competing definitions of the rule of law: implications for practitioners” (2005) Carnegie Endowment for International Peace Working Paper No 55.

²⁴ See Waldron, *supra* note 21.

²⁵ See *ibid.*

²⁶ *Ibid.*

²⁷ See Agnello, *supra* note 20; Møller, *supra* note 23.

²⁸ A recent UN report on the “environmental rule of law” provided this definition: “1. law should be consistent with fundamental rights; 2. law should be inclusively developed and fairly effectuated; 3. Law should bring forth accountability not just on paper, but in practice, such that the law becomes operative through

on the idea of “legality” and procedural guarantees will be preferred for this paper. “Legality” is the idea that law should serve as observed, enforced rules that provides the limits on power.²⁹ This too can be debated in terms of its components,³⁰ but the political theorist Fuller set out some principles several decades ago that have generally been accepted. Namely, he stated that law should be general, public, prospective, certain, and consistently applied. He also required that there be equality before and under the law. Generally, these rules seek to make the exercise of power predictable in order to prevent it from being arbitrary and to give citizens the chance to successfully stay within it.³¹

A thin definition is more appropriate for this analysis, given the risk of conceptual slippage between the rule of law, human rights, democracy, and other concepts at issue in these case studies posed by a thick definition. A thin definition of the rule of law offers a unique explanatory power for examining abuses of power, one that the concepts of human rights and democracy do not offer by themselves. Legality, particularly, provides a way of examining uses of power based on whether or not they are consistent with the rules that govern them and based off of the clarity and predictability of those rules. Human rights frameworks, on the other hand, ask whether those rules and their exercise are consistent with another set of rules, based on values, and democracy, a specific process for the creation of rules. Each of these is useful in their own way as a manner of limiting power, but simply because that has been the rule of law’s primary goal does not mean that we should fold every concept that can serve that end into it. Indeed, the effort to curb abuses of power may be best served by keeping these concepts separate, to allow for a clearer examination of the conditions that led to the problem.

The rule of law has generally stayed thin in its application to criminal justice. Legality is a core principle of modern criminal law, and it has a specific definition in the field. It requires that there

observance of, or compliance with, the law.” Of these three prongs, perhaps only the last is consistent with a “thin” definition: see UNEP, *supra* note 16.

²⁹ See *ibid*; Møller, *supra* note 23.

³⁰ See Waldron, *supra* note 21.

³¹ See Møller, *supra* note 23.

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should be no punishment without statutory grounds. The legality principle is described in Latin as two concepts: *nullum crime, nulla poena sine lege*. The first concept is that there should be no legal criminalization without a clear statutory basis and the second is that there should be no punishment without a clear statutory basis.³² These ideas seek to protect against abuses of criminal law in a few ways. First, the principle states that no one should be punished without statutory grounds. Second, it implies a requirement for strict interpretation of penal statutes. Third, it prohibits retroactive convictions, when someone is convicted for a crime that was not legally defined as a crime at the time they took the action.³³ These principles describe formal requirements of legal rules and how they must bind the exercise of power by the state, and are therefore consistent with the thin definition of formal legality. They also reflect the goals of creating predictability and consistency in application.

Because this paper deals with case studies across the world, it is worth looking at the legality principle in criminal law in an international context. It is widely accepted. According to the Comparative Constitutions Project, it exists in 60% of the constitutions in the world.³⁴ In its current form, this principle has occurred in the modern, post-Enlightenment world.³⁵ It has often been enacted in response to abuses of power by monarchs or authoritarian governments.³⁶ It takes different forms in different countries. However, some countries do not have this principle. For example, in Iran, while judges are bound to make decisions based off of codified criminal law, they are also bound to rule in cases

³² See Andrei Emil Moise, "The 'Nullum Crimen, Nulla Poena Sine Lege' Principle and Foreseeability of the Criminal Law in the Jurisprudence of European Court of Human Rights" (2020) 3:7 *Scholars Intl JL Crime & Justice* 240.

³³ See Jerome Hall, "Nulla Poena Sine Lege" (1937) 47:2 *Yale LJ* 165.

³⁴ See Comparative Constitutions Project, "Nulla Poena Sine Lege" (4 August 2008), online (pdf): *Comparative Constitutions Project* <comparativeconstitutionsproject.org/files/cm_archives/nulla_poena_sine_leg_e.pdf?6c8912>.

³⁵ See Moise, *supra* note 32.

³⁶ See Hall, *supra* note 33; Michelle Pifferi, "Nulla Poena Sine Lege and Sentencing Discretion" in *Reinventing punishment: a comparative history of criminology and penology in the 19th and 20th centuries* (Oxford: Oxford University Press, 2016).

where there is no codified law and to consider Islamic law in these cases, allowing people to be condemned for actions that were not a crime at the time they took them.³⁷ In the US, the principle does not show up in the constitution explicitly, but is generally associated with the constitutional amendments requiring due process of law and therefore with criminal procedure.³⁸ It has given rise to strict separation between trial processes and sentencing and to requirements that sentencing be decided in an extremely administrative manner to avoid arbitrariness.³⁹ In India, it is written into the constitution as two rules. One is that you cannot be convicted of a crime unless it was legally a crime at the time you did the act. The second is that the penalty must also be limited by the laws at the time you did the act.⁴⁰ Thus, it seems that of the three countries, the principle is offered the greatest formal guarantees in India, though the realities on the ground could of course be different.

Four types of criminalization of environmental defenders have been identified, and while almost all of them violate legality, I particularly focus on one which I argue poses unique risks to environmental defenders. The four types of criminalization are: (1) "the creation of... ambiguous... criminal codes;" (2) "the creation of new laws" that limit freedom of expression or assembly; (3) criminalization via counterterrorism legislation; and (4) "the use of the justice system against human rights defenders."⁴¹ The

³⁷ See "Iran (Islamic Republic of)'s Constitution of 1979 with Amendments through 1989" (last visited 14 December 2022), online (pdf): *Constitute Project* <constituteproject.org/constitution/Iran_1989.pdf>.

³⁸ See Pifferi, *supra* note 36 at 179; "Fourteenth amendment: Citizenship, Equal Protection and other Rights of Citizens" (last visited 14 December 2022), online: *Constitution Annotated: Analysis and Interpretation of the U.S. Constitution* <[constitution.congress.gov/browse/amendment-14/#:~:text=No%20State%20shall%20make%20or,equal%20protection%20of%20the%20laws](https://constitution.congress.gov/browse/amendment-14/#:~:text=No%20State%20shall%20make%20or,equal%20protection%20of%20the%20laws;)>; "Fifth amendment" (last visited 14 December 2022), online: *Constitution Annotated: Analysis and Interpretation of the U.S. Constitution* <constitution.congress.gov/constitution/amendment-5/#:~:text=No%20person%20shall%20be%20held,the%20same%20offence%20to%20be>.

³⁹ See Pifferi, *supra* note 36 at 179.

⁴⁰ See Comparative Constitutions Project, *supra* note 34.

⁴¹ International Service for Human Rights, "The role of businesses and States in violations against human rights defenders of the rights to land, territory and the environment" (2015) at 48, online (pdf):

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second is a violation of fundamental rights, but all the others violate legality. The first, because it involves the creation of laws that are not certain and are often not consistently applied. The third, because counterterrorism legislation often gives governments broad, unlimited powers that may not be predictably or consistently applied. The fourth because, as I will show, it requires inconsistent use of laws. This last form, where environmental defenders are charged with crimes that have been codified for a while, the definitions of which their actions do not meet, is particularly dangerous. It does not require the effort of law reform, unlike some of the others, but is immediately available to local police and prosecutors should an environmental conflict arise. It simply requires a willingness to abuse discretion. The paper will therefore focus on the abuse of criminal justice as a means of political sanction against environmental defenders.

It will be important to keep both the general definition of legality and the specific one for criminal law in mind for the review of the case studies, given that I will be examining the general context of the rule of law as well, including as it pertains to environmental laws.

III. Case Studies

I will review three cases where criminal law was abused against environmental defenders from Iran, the US, and India. The countries have diverse governance structures: India is a parliamentary democracy, the US a presidential one, both secular, while Iran's system has been described as "clerical authoritarianism."⁴² The countries also have diverse relationships to the rule of law, with the United States ranking 26th, India 77th, and Iran 119th out of 140 countries in the World Justice Project's

<[ohchr.org/sites/default/files/Documents/Issues/Environment/Implementation Report/Civil_society_organization_joint_reopr EN.pdf](http://ohchr.org/sites/default/files/Documents/Issues/Environment/Implementation%20Report/Civil_society_organization_joint_reopr EN.pdf)>.

⁴² According to Iranian-American scholar, Abbas Milani, "The authoritarian resurgence: Iran's paradoxical regime" (2015) 26:2 J Democracy 52.

(WJP) Rule of Law Index.⁴³ Here, the political and legal context in each country will be examined in further depth, using the WJP's Index as a comparative measure to identify contextual factors that explain the abuse of law. Where the context raises tensions with the rule of law, they will be noted and discussed more fully in the subsequent section.

A. Iran

The Islamic Republic of Iran's theocratic regime is filled by leaders who hold themselves accountable neither to the majority of their citizens nor to a system of public, specific, clear, consistently applied laws.⁴⁴ It is a good example of how an authoritarian country can score highly on particular measures of the rule of law, specifically order and security, for which the WJP Index ranked it above the median for its income bracket (lower middle). However, its overall WJP Index rank is quite low, 7th out of 8 in its region (MENA) and 25th out of 37 in its income bracket. And, as one might expect for an authoritarian nation, its lowest scores are for open government, fundamental rights, and constraints on government powers. Its scores on regulatory enforcement, criminal justice, and absence of corruption are also fairly low.⁴⁵ Iran has received particular attention for the jailing of eight environmentalists in 2018,⁴⁶ which will be the focus of this case study. I argue that it shows how violations of the rule of law related to environmentalists can, at times, occur as an extension of violations against other human rights defenders, in that these jailings were arguably similarly motivated and perpetrated to arbitrary detentions in the cases of other defenders.

In 2018, nine conservationists, all employees of the Persian Wildlife Heritage Foundation (PWHF), were arrested in Iran on charges of espionage. The head of their conservation

⁴³ "World Justice Project Rule of Law Index: About" (last visited 14 December 2022), online: World Justice Project <worldjusticeproject.org/rule-of-law-index/about>.

⁴⁴ See generally *ibid*; Milani, *supra* note 42.

⁴⁵ See "World Justice Project Rule of Law Index: Iran, Islamic Rep." (2022), online: World Justice Project <worldjusticeproject.org/rule-of-law-index/country/2022/Iran%2C%20Islamic%20Rep.>.

⁴⁶ See Long, *supra* note 8.

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organization died shortly after their arrest in 2018 in suspicious circumstances.⁴⁷ In November 2019, the remaining eight were convicted of espionage and handed sentences from four to ten years. In February 2020, their convictions were upheld on appeal.⁴⁸ This case is unusual among the others canvassed in this paper in that it occurred outside the context of any active environmental conflict. These conservationists were scientists trying to protect a critically endangered species of cheetah in Iran. They mostly did this through independent monitoring and were not actively involved in lobbying the government for anything.⁴⁹ By all accounts, these individuals committed no crime. Even high-level officials have said that there is no evidence for their convictions.⁵⁰ But the Iranian government appears to have become concerned that they were spying due to their use of camera traps, standard equipment for wildlife biologists to help them monitor the activities of the animals they study.⁵¹

The crime they were charged with, espionage, is often used by the Iranian regime to sanction activities they do not agree with, especially when they are perpetrated by foreign or dual nationals. The crime does not have a clear definition in the penal code. There is disagreement among lawyers about which articles in the Code apply to this crime, and those considered never state a precise definition, but just list possible examples, leaving room for other possibilities to be inserted.⁵² And there is evidence the crime has been used for political purposes in the past. Multiple prisoners held under this crime say that they were told by prison authorities or interrogators that their detention was politically motivated, one specifically in relation to negotiations between the US and Iran

⁴⁷ See *ibid.*

⁴⁸ See *ibid.*

⁴⁹ See *ibid.*

⁵⁰ See Ostanwire, "Academics and Ex-Officials call for Re-Examination of Jailed Environmentalists' Case in 2,780-Strong Statement", *IranWire* (12 July 2022), online: <iranwire.com/en/prisoners/105651-academics-and-ex-officials-call-for-re-examination-of-jailed-environmentalists-case-in-2780-strong-statement/>.

⁵¹ See Long, *supra* note 8.

⁵² See Nargess Tavasolian, "Danger and confusion: the crime of espionage in Iran", *IranWire* (6 May 2016), online: <iranwire.com/en/politics/61795/>.

about the Iranian nuclear program.⁵³ This is particularly relevant to these cases, as Iran's former Deputy Head of the Department of the Environment has argued that the arrest of the activists was due to the fact that the conservationists were using camera traps that they bought from a company owned by Thomas Kaplan, who is an outspoken critic of Iran's nuclear program.⁵⁴ Kaplan is a funder of the American non-profit United Against Nuclear Iran, and at a summit hosted by it in 2017, he made rude comments about Iran's role in Iraq that caused PWHF to sever ties with him. However, this may not have been enough to assuage any paranoia that the government had about their connection.⁵⁵

The allegation that it was due to paranoia of this connection that the government charged the conservationists seems credible. It is almost certain that they were being charged with spying due to their use of these camera traps, and that part of the problem was that the government did not understand that the traps are a common tool of conservationists, used to monitor the activities and numbers of wildlife.⁵⁶ Given that to the extent that there is a pattern to espionage charges, it is that they usually have something to do with foreign governments, it would make sense that this paranoia about Kaplan partly motivated the charges.⁵⁷ The government's concern may also have been exacerbated by the fact that one of them had worked with the UN Environment Programme, as evidenced by the fact that they asked her to repay 'illicit income' and the amount required for repayment seemed to match her salary at the UNEP.⁵⁸

⁵³ See *ibid.*

⁵⁴ See Kaveh Madani, "Why is Iran so paranoid about environmentalism?", *Medium* (14 November 2019), online: <kavehmadani.medium.com/why-is-iran-so-paranoid-about-environmentalism-ace0c9617478>.

⁵⁵ See Long, *supra* note 8.

⁵⁶ See Madani, *supra* note 54.

⁵⁷ See Tavasolian, *supra* note 52.

⁵⁸ See Long, *supra* note 8.

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Their charges intersect with criminalization of other defenders in the country. As mentioned, espionage is a charge that is often used as a political sanction by the government. Its vagueness is useful to the government, in allowing them to apply it to a wide range of cases. Their being charged under the offense of espionage is significant because it indicates that their charges were not just arbitrary, but politically motivated and in line with other political abuses of the judiciary in Iran. The environmentalists have also allegedly been subject to other rights violations, including torture and forced confessions. There is suspicion around Kavous Seyed-Emami's death as well, which could indicate possible extra-judicial killing.⁵⁹

B. Minnesota, USA

The United States is a democracy where the rule of law is strong, though it has faced threats in recent years. It is indeed more highly ranked than Iran, though recent years have seen the US backslide each year in terms of the strength of the rule of law as measured by the WJP Index. The year 2022 was the first time since 2016 that the score has climbed, meaning that 2020 and 2021, when the events of this case study took place, were recent lows. In that time, the sub-scores for which the US was most lowly ranked were criminal justice, constraints on government powers and fundamental rights, while their highest scores were for order and security, open government, and regulatory enforcement.⁶⁰ This means that their biggest points of divergence with Iran, in terms of the WJP Index, are on open government and regulatory enforcement. However, the US also has a far stronger space for free speech and government accountability,⁶¹ a free press,⁶² and a vibrant civil society,⁶³ as well as strong institutions and an independent judiciary.⁶⁴ However, small threats to many of these qualities have been noted in recent years, such as misinformation, which threatens freedom of the press;⁶⁵ small state-by-state laws banning certain books or works of art, which threaten freedom of expression; and, most relevantly to this analysis, politicization of the judiciary, which threatens judicial independence.

The US is also a place where the meaning of the "rule of law" is often made hostage by different sides in political debates in the broader context of politicization of the courts. Courts, as constitutional enforcers and judicial reviewers of legislative and

administrative actions, are recognized as guardians of the rule of law in the US.⁶⁶ As former Supreme Court Justice Ruth Bader Ginsburg has noted, the courts have largely succeeded in remaining independent of the other branches of government in

⁵⁹ See *ibid.*

⁶⁰ See “World Justice Project Rule of Law Index: United States” (2022), online: World Justice Project <worldjusticeproject.org/rule-of-law-index/country/2022/United%20States/>.

⁶¹ While there are increasing concerns that free speech is being attacked in the US after decades of stability (see Rebecca Boone, “Experts say attacks on free speech across the US are rising”, *Associated Press* (15 March 2023), online: <apnews.com/article/first-amendment-free-speech-censorship-mccarthyism-815865bafa52bb821400be15fdf76119>), the attacks on free speech in the US have been scattershot, taking different forms in different jurisdictions. In Iran, however, free speech oppression is systematic and targets even protests for fundamental rights such as those in response to the death of Mahsa Amini in the fall, which the government attacked with media blackouts, and the criminalization of journalists, advocates and scholars: see Kouroush Ziabari, “Iranian protests and the crisis of free speech” (23 February 2023), online (blog): *Arab Center Washington DC* <arabcenterdc.org/resource/iranian-protests-and-the-crisis-of-free-speech/>.

⁶² The US is ranked at 45 in the 2023 World Press Freedom Index, while Iran is ranked at 177; see “World Press Freedom Index 2023” (last visited 7 May 2023), online: *Reporters Without Borders* <<https://rsf.org/en/index>>.

⁶³ Indeed, some commentators have noted that US civil society has played a stronger role than ever in recent years: see David Wong, “An Increased Role for Civil Society in the United States” (7 December 2020), online: *Carnegie Foundation for International Peace* <carnegieendowment.org/2020/12/07/increased-role-for-civil-society-in-united-states-pub-83149>; in contrast, Iranian civil society often faces violent crackdowns by the state: see UN Office of the High Commissioner for Human Rights, News Release, “Iran: UN experts alarmed by civil society crackdown” (15 June 2022), online: <ohchr.org/en/press-releases/2022/06/iran-un-experts-alarmed-civil-society-crackdown>.

⁶⁴ For a well-balanced review of the independence of the US judiciary, that notes threats it faces while also putting it in global context as generally quite securely independent, see Ruth Bader Ginsburg, “Judicial Independence: The Situation of the U.S. Federal Judiciary” (2006) 85:1 *Nebraska L Rev* 1.

⁶⁵ See “2023 World Press Freedom Index – journalism threatened by fake content industry” (last visited 7 May 2023), online: *Reporters Without Borders* <rsf.org/en/2023-world-press-freedom-index-journalism-threatened-fake-content-industry>.

⁶⁶ See Sanford Levinson, “On the Judiciary (and Supreme Court) as Guardian of the Constitution” in *Framed: America’s 51 Constitutions and the Crisis in Governance* (New York: Oxford University Press, 2012).

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order to fulfill this role, but politicization of the judiciary is a brewing threat.⁶⁷ The *Bush v. Gore* case in 2000 serves as an example. This case went all the way to the Supreme Court following the contested presidential election vote count in Florida, with the majority deciding to overturn a state court's ruling on the matter,⁶⁸ which was only allowed by the constitution in exceptional circumstances.⁶⁹ Both sides claimed the rule of law as belonging to their side throughout. Indeed, former Justice John Paul Stevens closed his dissent by describing the majority's opinion as an injury to the rule of law because it suggested a lack of trust in state judges that undermined confidence in judicial institutions.⁷⁰ The issue of politicization of the courts, as well as questions of discrimination and corporate interests, are all at issue in this case study.

The replacement and repair of the Minnesota section of the Enbridge Energy Line 3 pipeline in winter 2020–21 was heavily contested.⁷¹ The pipeline had faced resistance from environmental and Indigenous groups since it was proposed in 2014.⁷² Critics were concerned about impacts on wetlands and groundwater supplies, particularly given that the pipeline's new route would run largely through Indigenous territories. Enbridge argued that the repair project was necessary to prevent bad environmental effects given that the pipeline was initially built in the 1960s and in disrepair.⁷³ Enbridge went ahead with building while outstanding legal challenges still remained against its permit, so environmental civil society groups fought the battle against the

⁶⁷ See Ginsburg, *supra* note 64.

⁶⁸ See Waldron, *supra* note 21.

⁶⁹ See *ibid*; *Bush v Gore*, 531 US 98 (2000) [*Bush*].

⁷⁰ See *Bush*, *ibid*; Waldron, *supra* note 21.

⁷¹ See MPR News Staff, "The Line 3 oil pipeline project: what you need to know", *Minnesota Public Radio News* (16 July 2021), online: <mprnews.org/story/2021/07/16/the-line-3-oil-pipeline-project-what-you-need-to-know>.

⁷² See Nia Williams, "Enbridge's long-delayed Line 3 oil pipeline project to start up Oct. 1", *Reuters* (29 September 2021), online: <reuters.com/business/energy/enbridge-completes-line-3-oil-pipeline-replacement-project-starts-linefill-2021-09-29/> [Williams, "Long-delayed"].

⁷³ See MPR News Staff, *supra* note 71.

pipeline on the ground as well, by protesting, blocking traffic, and chaining themselves to equipment.⁷⁴

By August 2021, more than 600 protesters had been arrested and many of them are facing charges that do not match their actions.⁷⁵ Trespass charges were the ones most commonly faced by the protesters. However, many are facing charges of felony theft, which carries a penalty of five years in jail, and two people are facing charges of felony “aiding attempting suicide” and a potential penalty of seven years in prison. The charges are, according to defense attorneys, extremely unusual for the acts committed.⁷⁶ And indeed, their definitions do not seem to match the actions of these protesters. For example, the protesters facing felony suicide charges crawled inside a pipeline together; the crime consists of “advise[ing], encourage[ing] or assist[ing]” someone else in suicide. One protester facing a felony theft charge locked themselves to a truck in the road.⁷⁷ This raises concerns about how the law is being applied against Line 3 protesters.

Those concerns are exacerbated by evidence that the trumped-up charges may have been politically motivated. The police’s bills related to the pipeline have been entirely covered by Enbridge, as part of the building agreement for the pipeline

⁷⁴ See Kristoffer Tigue, “Line 3 drew thousands of protesters to Minnesota this summer. Last week, Enbridge declared the pipeline almost finished”, *Inside Climate News* (11 August 2021), online: <insideclimatenews.org/news/11082021/line-3-protests-minnesota-enbridge-pipeline-2/>; Hiroko Tabuchi, Matt Furber & Carol Davenport, “Police make mass arrests at protest against oil pipeline”, *The New York Times* (updated 9 June 2021), online: <nytimes.com/2021/06/07/climate/line-3-pipeline-protest-native-americans.html>.

⁷⁵ See Michael Sainato, “Protesters against Line 3 tar sands oil pipeline face arrests and rubber bullets”, *The Guardian* (10 August 2021), online: <theguardian.com/environment/2021/aug/10/protesters-line-3-minnesota-oil-gas-pipeline>; Alexandra Herr, “‘They criminalize us’: how felony charges are weaponized against pipeline protesters”, *The Guardian* (10 February 2022), online: <theguardian.com/us-news/2022/feb/10/felony-charges-pipeline-protesters-line-3#:~:text=The%20charge%20is%20for%20someone,by%20remaining%20inside%20the%20pipeline.>>.

⁷⁶ See Herr, *ibid*.

⁷⁷ See *ibid*.

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between the company and the Minnesota government.⁷⁸ This is an entirely new type of arrangement in Minnesota and the US, and it raises serious concerns about how law enforcement understood their role at these protests. More importantly to these charges, the local prosecutor also sought reimbursement from Enbridge for charging the protesters. Though his request was denied,⁷⁹ this suggests that he had the mentality that he was working for the company as he was filing charges, which is extremely troubling, especially given the nature of the charges filed.

This abuse of criminal law also intersected with other human rights violations and Indigenous discrimination. Arrestees reported ill treatment including lack of proper food, solitary confinement, and denial of medications.⁸⁰ At protest sites, there have been reports of rubber bullets, tear gas, less-lethal munitions, and the use of sonic devices to disperse protesters.⁸¹ As mentioned in section II, this may constitute a human rights violation.⁸² The protests were also largely led by Indigenous communities,⁸³ suggesting that there may be discrimination in both the abuse of criminal law and the human rights violations.

It is also in relation to the Black Lives Matter protests that a potential pattern of abuse of criminal law towards human rights defenders can be detected in the US. While there is a paucity of information on the situation of human rights defenders in the US,

⁷⁸ See Hilary Beaumont, "Revealed: pipeline company paid Minnesota police for arresting and surveilling protesters", *The Guardian* (5 October 2021), online: <theguardian.com/uk-news/2021/oct/05/line-3-pipeline-enbridge-paid-police-arrest-protesters>.

⁷⁹ See copies of the Hubbard County Prosecutor's letters to Enbridge and Enbridge's response at "Minnesota Prosecutor sought Enbridge funding to prosecute Water Protectors at Line 3" (5 January 2022), online: *The Center for Protest Law and Litigation* <protestlaw.org/news/minnesota-prosecutor-sought-enbridge-funding-to-prosecute-at-line-3?fbclid=IwAR2Yw8C4URFRNjZDqv3DU-NzdJnfWRGKJaZGdsUk8k8DBmCklq67nAl385g>.

⁸⁰ See Sainato, *supra* note 75.

⁸¹ See *ibid.*

⁸² See Agnes Callamard, "Opinion: Police in the US are abusing tear gas and rubber bullets in possible violations of international law", *The Washington Post* (1 June 2020), online: <washingtonpost.com/opinions/2020/06/01/police-us-are-abusing-tear-gas-rubber-bullets-possible-violations-international-law/>.

⁸³ See Tabuchi, Furber & Davenport, *supra* note 74.

there have been reports that Black Lives Matter protesters also faced trumped-up charges.⁸⁴ These cases were extremely similar to the ones here. The charges were levelled using clearly defined laws that were already on the books, the requirements of which had at best a tenuous connection with the actions of the person charged. One particularly illuminating example from Florida: a man was charged with unlawful interstate commerce, an offense that typically relates to illegally moving weapons across state lines, for possessing a Molotov cocktail that had been made with an imported tequila bottle. It was on the basis that the tequila was imported that the prosecutors justified the charge.⁸⁵

Lastly, the abuses also intersected with disregard for environmental laws. Enbridge went ahead with building while outstanding legal challenges still remained against its permit, including one brought by a state agency alleging that the agency that had issued Enbridge's permit had improperly interpreted state law.⁸⁶ The dissenting judge on this case, when it was ultimately dismissed, expressed concern that the majority was mainly basing their opinion on deference to the state agency that had issued the permit. He argued that that deference should stop when the

⁸⁴ See Kelly McLaughlin, "2 Black Lives Matter demonstrators are facing life in prison. Experts say the 'deeply disturbing' potential sentences are an 'unprecedented' form of government overreach", *Insider* (24 September 2020), online: <insider.com/black-lives-matter-demonstrators-facing-charges-protests-2020-9>.

⁸⁵ See analysis in *ibid*; see also Eric Halliday, "The Federal Government's Aggressive Prosecution of Protestors" (13 July 2020), online (blog): *Lawfare* <lawfareblog.com/federal-governments-aggressive-prosecution-protestors>; and very clearly stated in the following criminal complaint: *United States of America v Zeher*, "United States District Court for the Middle District of Florida", Criminal Complaint (May 2020) at para 15, online: <justice.gov/usao-mdfl/press-release/file/1283586/download>.

⁸⁶ See Nia Williams, "Enbridge oil line scores a key win as Minnesota court affirms approval", *Reuters* (14 June 2021), online: <reuters.com/business/energy/minnesota-court-affirms-regulator-approval-enbridge-line-3-oil-pipeline-2021-06-14/>; Williams, "Long-delayed", *supra* note 72; Associated Press, "Minnesota court deals yet another setback to pipeline foes", *Minnesota Public Radio News* (30 August 2021), online: <mprnews.org/story/2021/08/30/minnesota-court-deals-yet-another-setback-to-pipeline-foes>; Rilyn Eischens, "Court issues win for Enbridge Line 3 pipeline appeal", *Minnesota Reformer* (14 June 2021), online: <minnesotareformer.com/briefs/court-issues-win-for-enbridge-in-line-3-pipeline-appeal/>.

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agency had clearly misinterpreted state law. Judges repeatedly denied injunction requests on other filings on the grounds that asking Enbridge to halt building represented a greater harm to the public interest, typically based on economic grounds, than the environmental harms of building.⁸⁷ There have been some efforts to hold Enbridge accountable to local environmental laws, however. They are facing a misdemeanor charge for puncturing an aquifer, which is now hemorrhaging water, and failing to report it.⁸⁸ This was brought by the Attorney General. And a state agency leveraged an administrative penalty order for \$3 million for puncturing that aquifer.⁸⁹

C. Odisha, India

India is a democracy with middling scores on the rule of law. It is, along with the US, one of the world's largest democracies. But, also like the US, recent years have seen its democracy threatened. With the rise of the Bharatiya Janata Party (BJP) and Narendra Modi's leadership since 2014 has come renewed religious tensions between the country's Hindu majority, favored by the party, and its religious minorities, especially the Muslim population. The BJP has also increasingly criminalized dissenters and journalists.⁹⁰ However, its scores on the WJP Index have not shifted much since 2015. In 2022, India was ranked 77 out of 140 states on the WJP Index. It was middling within its region as well (3rd of 6 in South Asia), but is actually highly ranked in its

⁸⁷ See Dan Kraker, "Another court blocks attempt to stop Line 3 construction", *Minnesota Public Radio News* (8 February 2021), online: <mprnews.org/story/2021/02/08/judge-blocks-another-bid-to-shut-down-line-3-construction>.

⁸⁸ See Kirsti Marohn, "Enbridge faces criminal charge, more fines over Line 3 construction", *Minnesota Public Radio News* (17 October 2022), online: <mprnews.org/story/2022/10/17/enbridge-faces-criminal-charge-more-fines-over-line-3-construction>.

⁸⁹ See Kirsti Marohn, "Enbridge ordered to pay \$3.3 million for an aquifer breach", *Minnesota Public Radio News* (16 September 2021), online: <mprnews.org/story/2021/09/16/enbridge-ordered-to-pay-33-million-for-aquifer-breach>.

⁹⁰ See Jonah Blank, "India's democracy is the world's problem", *The Atlantic* (10 June 2010), online: <theatlantic.com/international/archive/2021/06/g7-india-narendra-modi-democracy/619144/>.

income bracket (9th of 37 in Lower Middle). Its highest scores were for constraints on government powers, open government, and order and security. Its lowest scores were on fundamental rights, civil justice, criminal justice, regulatory enforcement, and absence of corruption. It was above the global average for constraints on government powers and open government, and above the regional average for every other category. Of the three case studies, India is the only one that did well on constraints on government powers relative to the other measures.

The conflict at the core of this case is between the Adivasis of the Niyamgiri Hill Range of India in the eastern state of Odisha and the UK-based multinational Vedanta Resources Ltd. It has been ongoing for over a decade. Vedanta is trying to mine bauxite in the region. The Adivasis do not want them to. The Adivasis of Niyamgiri won an internationally hailed and historic victory in this case in 2013, when the Supreme Court of India ruled that they had final say on the mine.⁹¹ In 2015, Vedanta formally cancelled its plans to mine in the region.⁹² However, Vedanta has maintained its presence in the region. In 2014, it sought clearance to expand the capacity of its refinery, which is located right in Niyamgiri, making it clear the Supreme Court decision would not drive it out. Just recently, they bid on two coal mines. Though these are a ten-hour drive from Niyamgiri, the coal will be refined there.⁹³

Recently, a number of opponents to mining in Niyamgiri have faced arbitrary arrest and detention. Some have also

⁹¹ See Amnesty International, News Release, "India: Landmark Supreme Court ruling a great victory for Indigenous rights" (18 April 2013), online: <[amnesty.org/en/latest/news/2013/04/india-landmark-supreme-court-ruling-great-victory-indigenous-rights/](https://www.amnesty.org/en/latest/news/2013/04/india-landmark-supreme-court-ruling-great-victory-indigenous-rights/)>.

⁹² See Chitrangada Choudhury, "Mining at any cost: the Odisha government's continued dismissal of Adivasi rights", *The Wire* (16 May 2016), online: <thewire.in/rights/mining-at-any-cost-the-odisha-governments-continued-dismissal-of-ativasi-rights> [Choudhury, "Any cost"].

⁹³ See "Commercial mines auction: Vedanta emerges as highest bidder for 2 coal blocks in Odisha", *The Economic Times* (14 September 2022), online: <economictimes.indiatimes.com/industry/indl-goods/svs/metals-mining/commercial-mines-auction-vedanta-emerges-as-highest-bidder-for-2-coal-blocks-in-odisha/articleshow/94207612.cms>; OB Bureau, "Vedanta Limited to start mining operation of coal block in Odisha's Sundargarh", *Odisha Bytes* (13 August 2022), online: <odishabytes.com/vedanta-limited-to-start-mining-operation-of-coal-block-in-odishas-sundargarh/>.

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reported beatings and there are stories of killings by police as well. In 2017, the organization Human Rights Defenders Alert – India (HRDA), sent an urgent appeal⁹⁴ on the issue to India’s National Human Rights Commission. They particularly noted two cases of arbitrary detention. In May 2017, 20-year-old Kuni Sikkaka, an activist herself and the daughter of a leader of the resistance movement to Vedanta, was “illegally arrested.” The police raided her village at midnight, took her from her home, and brought her to the police station. When her family came to fetch her, they forced them all to sign false confessions to Maoism and to make similar statements to the media. Local complaints secured her release not long after, but HRDA reports that since then, the police have reportedly been filing false charges on, torturing and threatening other villagers affiliated with the resistance.⁹⁵ In the case of Dasar Kadraka, HRDA sent a complaint regarding his arbitrary detention to the NHRC that the NHRC closed “completely based on [a] report submitted by Superintendent of Police, Rayagada” and thus arbitrarily, according to HRDA.⁹⁶

The unlawful arrests and harassment have continued since then. In 2019, Lingaraj Azad was arrested on charges of unlawful assembly, criminal conspiracy, rioting with armed weapons, bearing arms, obscenity, and criminal intimidation.⁹⁷ He was released not long after due to public protest.⁹⁸ All of these charges seem to stem from an accusation by the police that Azad was part of a group of people armed with bows and arrows who tried to attack a security camp. While it is not disputed that Azad approached the camp in this group, the lawyer who litigated the 2013 Supreme Court case, Prafulla Samantara, said that most tribal people will show up to a meeting with bows and arrows,

⁹⁴ See Tiphagne, *supra* note 10.

⁹⁵ See *ibid.*

⁹⁶ *Ibid.*

⁹⁷ See Aruna Chandrasekhar, “Activist jailed for joining protest by tribals ‘armed with bows and arrows’”, *The Wire* (7 March 2019), online: <thewire.in/rights/activist-jailed-for-joining-tribal-protest-armed-with-bows-and-arrows>.

⁹⁸ See Ranjana Padhi, “In Niyamgiri, corporate greed and state power continue to coerce locals”, *The Wire* (3 May 2019), online: <thewire.in/rights/niyamgiri-vedanta-dongria-kondhs-environment>.

that this is common knowledge, and they never harm anyone with them. Azad himself reportedly does not carry these weapons and identifies as non-violent.⁹⁹ Samantara also described how another activist, Laddo Sikkaka, was forced to sign a promise to cease his protest activities after being beaten by police.¹⁰⁰

Many of the resistance leaders who have faced arrest and arbitrary detention have been accused of Maoism, including Kuni Sikkaka and Azad.¹⁰¹ While this would seem to be an open admission of political motivations for their arrests, it is meant to delegitimize Sikkaka and Azad's activism, given the political context. In the rural parts of the mineral-rich eastern and central states, a Maoist group known as the Naxalite has been growing. Described as India's biggest "internal security threat," they have made it clear that their goal is to overthrow the government and institute communism.¹⁰² The Naxalite's history is steeped in land defense. The movement takes its name from the village where the first armed communist uprising occurred in India, after the government stopped a farmer from tilling his own land.¹⁰³ In recent decades, the Naxalite have helped organize the Indigenous people of India or Adivasis in conflicts with the government over land rights issues, including mining.¹⁰⁴ Much of their support comes from Adivasis who became implicated in their work through land defense. However, this does not mean that all land rights defenders are part of the movement.¹⁰⁵ But the context raises a question about the forms of dissent that are compatible with the rule of law.

These arbitrary arrests are also occurring in a context of government discrimination against the Adivasis, sometimes perpetrated by security forces. The government often takes away

⁹⁹ See Chandrasekhar, *supra* note 97.

¹⁰⁰ See *ibid.*

¹⁰¹ See *ibid.*

¹⁰² See "India's Maoist rebels: an explainer", *Aljazeera* (26 April 2017), online: <aljazeera.com/features/2017/4/26/indias-maoist-rebels-an-explainer>.

¹⁰³ See *ibid.*

¹⁰⁴ See *ibid.*

¹⁰⁵ See *ibid.*

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Adivasi land and jails them for minor forestry offences.¹⁰⁶ One analyst has said that the government's resource extraction campaigns have become "increasingly hegemonic" under Modi, worsening the tensions that already exist.¹⁰⁷ Security forces often sexually assault and coerce money from Adivasis.¹⁰⁸ More recently, the government has begun putting Adivasi children into schools that some are comparing to the Canadian residential schools for Indigenous children, recently declared part of a cultural genocide in Canada.¹⁰⁹

As in Minnesota, the criminalization has co-occurred with disrespect for environmental laws as well. The lines between the state government and the corporation have been blurry throughout the whole affair. The initial mining agreement was a joint venture of Vedanta and the Odisha Mining Corporation (OMC), a public organization. In 2016, the Odisha state government filed a motion with the Supreme Court asking it to annul its 2013 decision so that the OMC could mine. The Supreme Court refused, but the motion indicates ongoing cooperation between the state and the corporation.¹¹⁰ And that cooperation has often violated local laws. In 2010, a commission created by the Ministry of Environment, Forest and Climate Change released a report where they detailed the "contempt" that Vedanta corporation had repeatedly shown to the "laws of the land" and the Indigenous peoples of the Niyamgiri region, and the

¹⁰⁶ See "The 'Gravest Threat' to Internal Security: India's Maoist Insurgency" (last visited 14 December 2022), online: [Wilson Center](http://wilsoncenter.org/event/the-gravest-threat-to-internal-security-indias-maoist-insurgency) <wilsoncenter.org/event/the-gravest-threat-to-internal-security-indias-maoist-insurgency> [Wilson Center].

¹⁰⁷ Syed Mohammad Ali, "Hindutva is turning India into an autocracy. It can get worse", *New Lines Institute* (30 August 2022), online: <newlinesinstitute.org/india/hindutva-is-turning-india-into-an-autocracy-it-can-get-worse/>.

¹⁰⁸ See Wilson Center, *supra* note 106.

¹⁰⁹ See Raghu Karnad, "The diverging paths of two young women foretell the fate of a tribe", *The New Yorker* (7 September 2018), online: <newyorker.com/culture/photo-booth/the-diverging-paths-of-two-young-women-foretell-the-fate-of-a-tribe-in-india>; Government of Canada, "Summary of the Final Report of the Truth and Reconciliation Commission" (2015), online (pdf): <publications.gc.ca/collections/collection_2015/trc/IR4-7-2015-eng.pdf>.

¹¹⁰ See Choudhury, "Any cost", *supra* note 92.

“collusion” of local officials in those acts of contempt. For example, to obtain their lease for the refinery, Vedanta claimed that the relevant land was not forested when they clearly knew that it was.¹¹¹ In 2013, a further report on illegal mining in Odisha was released by the Justice B. Shaw Commission, which concluded that “...there is no rule of law, but the law is what the mighty mining companies decide, with the connivance of the concerned department.”¹¹²

IV. Navigating the Tensions in the Rule of Law Raised by These Studies

Even with some kind of core definition, possible contestations of the rule of law remain and these case studies raise three important ones. The Iran case raises the question of what characteristics law must have to be consistent with the rule of law, for example, must it describe all possible circumstances of its application? The case in the US raises a question of how the rule of law should be implemented procedurally, namely whether the law binds the courts, or whether the courts pronounce the law. It also raises a question with regard to public prosecutors. To what extent are they bound by the law? Is it just up to the courts to prevent them from abusing the law, or is there some level of responsibility that they themselves bear for their actions? The case in India raises perhaps the trickiest question of all: at what point does criminalizing dissent become against the rule of law, and when it is permissible for a government to do this in order to ensure its survival? These three areas of contestation might be characterized as questions about (i) the fundamental characteristics law needs to have to be consistent with this principle (ii) “the different ways there are... of trying to solve... the problem of designing a political system where the laws rule

¹¹¹ See NC Saxena et al, “Report of the four member committee for investigation into the proposal submitted by the Orissa Mining Company for Bauxite mining in Niyamgiri” (16 August 2010), online (pdf): *Ministry of Environment & Forests, Government of India* <cdn.cseindia.org/userfiles/Report_Vedanta.pdf>.

¹¹² Chitrangada Choudhury, “Old problems mar a new solution”, *The Wire* (11 September 2015), online: <thehindu.com/opinion/op-ed/on-protecting-advansi-communities-from-mining/article7637951.ece>.

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rather than men” and (iii) “the several values which arguably might be served by the rule of law.”¹¹³

The Iran question may be the easiest one to parse, if we have already settled on Fuller’s characteristics of formal legality as the characteristics required for law to be consistent with the rule of law.¹¹⁴ The definition of the rule of law as formal legality would indeed protect against vague rules such as the law against espionage in Iran, on the grounds that they are uncertain.

Parsing the US question may be more challenging. One proposed way of designing a legal system where the laws rule rather than men is through the principle of constitutionalism.¹¹⁵ This is the idea that the rule of law can be ensured by placing the constitution at the top of the legal order, as a piece of law that is out of reach of politics and that sets out checks and balances on power.¹¹⁶ This idea certainly grounds the US constitutional order. It emphasizes the role of the courts as reviewers of administrative and legislative action, but it also places checks and balances on the courts themselves, allowing the legislature to change the law in response to their decisions, or superior courts to overturn their decisions, though there are further rules that bind those processes.¹¹⁷ This concept does not entirely decide the question, however.

The problem is that this principle of corrective checks and balances can at times find itself in tension with the value of certainty that the rule of law tries to protect.¹¹⁸ The appeal on the permit case in this case study is an example of how courts can sometimes choose to protect certainty over serving their function as a check on incorrect applications of the law by the lower courts.

¹¹³ Waldron, *supra* note 21.

¹¹⁴ See Lon Fuller, *The Morality of Law*, revised ed (New Haven: Yale University Press, 1969) at 38–39.

¹¹⁵ See Møller, *supra* note 23.

¹¹⁶ See *ibid.*

¹¹⁷ See Levinson, *supra* note 66.

¹¹⁸ See Geoff Callaghan, “Emergencies Act inquiry: How to balance protest rights with the rule of law?”, *The Conversation* (1 November 2022), online: <theconversation.com/emergencies-act-inquiry-how-to-balance-protest-rights-with-the-rule-of-law-193002>.

This tension was at the heart of *Bush v. Gore* too, a case where the US Supreme Court had to decide whether to overturn a Florida court's decision about how to interpret a Florida election law. The majority voted to overturn, so this was a case where there was interference with a previous court's decision. But their justification, for this decision that the minority thought so harmful to the rule of law, was that they did not want to leave the public in uncertainty about the results for too long, as they felt this would undermine the validity of the elections and public confidence in institutions.¹¹⁹ Protests too create uncertainty, and one could argue that stopping them, especially once protesters have started climbing into pipelines, upholds the rule of law by maintaining order, whatever it requires.¹²⁰ But these examples show a serious danger in prioritizing certainty over following the laws as written. To do so clearly abrogates other characteristics of legality, the main one highlighted here being consistency of application. It allows for exceptions to be made in certain cases and then prevents the correction of those exceptions for the sake of certainty. In other words, prioritizing certainty allows for arbitrariness. And so really, it does not guarantee certainty at all.

The case study suggests that the risk of protecting or making arbitrary decisions for the sake of certainty may be especially high where powerful corporate interests are involved. It is just one data-point, but it seems wise to strengthen the checks and balances where there is more power involved and to subject the exercise of those checks and balances to increased scrutiny. It is worth noting that this seems to be a greater risk for the environmental law than the criminal law, though time will tell for certain whether these charges hold up at trial or appeal.

The India case raises further tensions between maintaining order and certainty and the rule of law, particularly in the context of protest. The violations of the environmental laws here seem fairly straightforward as violations of legality, and it seems very likely that the criminal law is being applied in an arbitrary manner as well. But the security force's justification of their use of the criminal law by calling the protesters Maoist begs the question of whether their use would be more justified if that were really true,

¹¹⁹ See *Bush*, *supra* note 69.

¹²⁰ See Callaghan, *supra* note 118.

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if the people they were arresting were armed revolutionaries who want to take down the state. There may be some who would describe even the criminalization of these Maoists as a form of tyranny, such as Montesquieu.¹²¹ However, those people are prioritizing the right to protest over the rule of law. Say, however, that the rule of law ought to be prioritized over the right to protest, and thus that protest ought to operate within the boundaries of the law. Then, if the people accused are really Maoists, the question of whether or not the government's actions violated the rule of law may become a toss-up. In Azad's case, for example, the state may have levelled some charges that did not match his actions, but if he is a Maoist, he may also be breaking the law;¹²² certainly, he poses a threat to order. However, Azad is not a Maoist, according to reporting. Not all Adivasis protesting mining are. Yet, the government seems to level this accusation in every case. So where does this leave us?

It leaves us with a government that is using the veneer of the rule of law to delegitimize legitimate democratic protest. These accusations of Maoism are likely directed at other citizens, given their attempts to force Kuni Sikkaka and her family to confess to Maoism to the media. It seems that they are betting that their citizens would prioritize the rule of law over the right to protest, but that they would respect protest that occurred within the limits of the law. And therefore, they are trying to delegitimize legitimate critics by painting them as lawbreakers. Iran is doing something similar, in painting the conservationists as spies. They are painting environmentalists as disloyal to the country, as lawbreakers deserving of sanction. In Iran, the US, and India, the relationship between the rule of law, the environment, and environmental defenders will therefore bear continued close scrutiny, to ensure that States do not deploy the rule of law and associated concepts as a veneer to justify actions that are in fact

¹²¹ See *ibid.*

¹²² Given that India's criminal code lists "waging war... against the government" as a punishable offense, which the activities of the Maoists may meet: see "Section 121: Waging, or attempting to wage war, or abetting waging of war, against the government of India" (last visited 15 December 2022), online: *India Code: Digital Repository of all Central and State Acts* <indiacode.nic.in/show-data?actid=AC_CEN_5_23_00037_186045_1523266765688&orderno=128>.

violations of this key limit on their power either in the courts or in the courts of public opinion.

V. Conclusions

To help CSOs, states, and other actors ensure accountability to the rule of law and prevent its appropriation in the cases of environmental defenders, key conclusions that may guide monitoring efforts follow.

1. Criminalization may occur through the use of overbroad laws or the abuse of narrow laws. CSOs need to be attentive to both patterns. Iran is an excellent example of the former, of how overbroad laws can open up options for abuse. However, the case studies in the US and India show that narrow laws can be abused as well. These cases are more insidious as they are less easy to identify. CSOs therefore need to be especially attentive to the latter.

2. Both types of criminalization violate the legality principle and thus constitute arbitrary exercises of power. In all three of these cases, it has been demonstrated with little doubt that the charges that were levelled did not match the facts, suggesting that these constitute arbitrary exercises of power.

3. However, the rule of law and affiliated concepts may sometimes be used to justify these abuses. In all three case studies, the government sought to justify their actions by arguing that the defenders either posed a threat to the government, and therefore were lawbreakers and not legitimate democratic protesters or by arguing that their actions best maintained certainty, another value associated with the rule of law.

4. The violations also intersect with discrimination against Indigenous peoples, as criminalization is more common when defenders are Indigenous. This has been shown through statistics.¹²³ There was Indigenous leadership in two of the three case studies here, supporting the numbers. The India case study in particular shows how histories of discrimination may underly

¹²³ See Global Witness, “Defiance”, *supra* note 1; Scheidel et al, *supra* note 5.

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the abuse of criminal law that Indigenous environmental defenders face today.

5. The violations may also intersect with other particular political pathologies in a nation. In Iran, it was hard to pinpoint any conflict between the government's interests and the organization's interests related to their environmental work. The criminalization seemed to be more related to the State's paranoia about relations with foreigners, particularly those with ties to the anti-nuclear Iran movement and to intersect with the criminalization of other political opponents of the State. In the US, too, there was evidence that the criminalization intersected with criminalization of other rights defenders. This suggests that in some countries, it may be useful to monitor environmental defenders in tangent with other rights defenders. Those who are interested in monitoring rights defenders ought to be interested in monitoring environmental defenders as well. According to an analysis from 2021, more than 50% of the human rights defenders murdered were defending "land, environmental and Indigenous peoples' rights."¹²⁴

6. These violations of the rule of law sometimes arise through particular political patterns related to environmental issues. In the case studies in Minnesota and India, the criminalization occurred in the context of abuse of environmental laws as well, and the latter seemed to presage the former. These case studies suggest that there may be a need to monitor law enforcement activities closely where there are environmental conflicts between the state and environmental defenders. And, to be more specific: there is reason to believe that abuses of narrow criminal laws occur when the interests of big extractive industries are at play.

7. Lastly, keeping the rule of law strong is key to protect the environment. These case studies show that weaknesses in the rule of law may be exploited to criminalize environmental defenders. The rule of law is on the decline globally.¹²⁵ Thus, it

¹²⁴ "Front Line Defenders 2021 Global Analysis" (2021) at 6, online (pdf): <frontlinedefenders.org/sites/default/files/2021_global_analysis_-_final.pdf>.

¹²⁵ See World Justice Project, Press Release, "Global Rule of Law recession enters 5th year" (26 October 2022), online: <worldjusticeproject.org/news/wjp-rule-law-index-2022-global-press-release>.

will be doubly important to strengthen it in order to protect environmental defenders, the environment, and Indigenous peoples.

VI. Recommendations and Legal Tools

A. *Recommendations to States*

- 1) Conduct independent investigations into the criminalization of environmental defenders.
- 2) Conduct independent investigations into relationships between extractive industries and state governments, both in terms of environmental and criminal law.
- 3) Ensure that these investigations do not end in impunity, like those in India, by holding corporations and local officials accountable.
- 4) Provide defenders who were arbitrarily arrested or detained with compensation or some other form of redress, and release any who are still held.
- 5) Pay particular attention to the situation of Indigenous defenders.
- 6) Ban corporations from picking up law enforcement bills.
- 7) In the US, monitor places where certainty is used to justify a lack of judicial review to ensure that this is not devolving into serving the interests of the powerful.
- 8) In India, monitor accusations of Maoism to ensure that they are being made accurately.
- 9) In Iran, eliminate OR make specific the espionage law.

B. *Recommendations to Civil Society*

- 1) Better monitor the situations of environmental defenders, particularly Indigenous defenders.
- 2) Better monitor relationships between the government and extractive industries, particularly between state governments, extractive industries, and local police.

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- 3) File reports on these cases with the UN Working Group on Arbitrary Detention if defenders are not speedily released and acquitted when arrested under false charges.
- 4) Help defenders seek domestic redress through lawsuits for unlawful arrest and/or violation of due process rights in countries where this is possible.

C. Recommendations to Corporations

- 1) Stay independent of government law enforcement activities.
- 2) Respect local environmental laws.
- 3) Make it clear that bending local laws will lose state governments your business, not help them keep it.
- 4) Be aware of what your state government partners are doing for you.
- 5) Add oversight mechanisms, such as independent boards housed within the company, to monitor company activities.

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