



# STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION:

Southeast Asia cases & recommendations for governments, businesses, & civil society

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# EXECUTIVE SUMMARY

International instruments protect the rights to freedom of expression, association, and peaceful assembly. However, attacks against those who exercise these rights are pervasive and destructive. One type of attack is judicial harassment which is on the rise globally. In 2019 alone, Business & Human Rights Resource Centre recorded 294 instances of judicial harassment around the world, compared to only 86 cases when in 2015. Southeast Asia is second only to Central America in the number of cases recorded, with approximately half of these cases exhibiting elements of a SLAPP (Strategic Lawsuit Against Public Participation).

## **A business-linked SLAPP has these characteristics:**

- | It is a civil, criminal, or administrative lawsuit;
- | It is filed against a human rights defender (HRD) exercising his/her freedoms of expression, association, and/or peaceful assembly to speak about and/or act on matters related to a business' operations;
- | It has the intention of silencing or intimidating the HRD from further engaging in criticism, opposition, public participation, and similar activities.

In Southeast Asia, only the Philippines has rules defining what a SLAPP is but limits its application to environment-related cases. Despite this, there are promising developments in the rulings of various courts in the region that should provide the necessary impetus for deeper legal reform against SLAPPs. Some courts have explicitly recognised the value of activists and protected their right to criticise prejudicial business operations. Other courts have extended protections to journalists and expert witnesses. Some courts upheld the right of the people to seek redress and remedy for harms caused by businesses. This Briefing Note highlights these cases as starting point for recommendations of deeper reform in policy and practice of governments, business, and civil society.

This Briefing Note recommends, among other things, the following:

- | For governments to enact laws that protect human rights defenders, prohibit SLAPPs, and penalise businesses that file these types of cases.
- | For businesses to adopt a strong policy of non-retaliation against HRDs and non-tolerance for attacks against HRDs and instead create grievance mechanisms based on engagement and dialogue with all stakeholders.
- | For civil society to continue documenting SLAPPs in order to understand the trends and develop both offensive and defensive strategies against it by expanding networks of support for HRDs to continue their work.

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# INTRODUCTION

From 2015-2019, the **Business, Civic Freedoms & Human Rights Defenders Portal** of Business & Human Rights Resource Centre (“Resource Centre”) has recorded 2155 business-linked attacks against human rights defenders (HRDs) around the world.<sup>1</sup>

ATTACKS RECORDED	
• Abduction	• Denial of freedom of association
• Arbitrary detention	• Beatings and violence
• Death threats	• Denial of freedom of expression
• Denial of freedom of movement	• Disappearances
• Injuries	• Intimidation and threats
• Killings	• Rape & sexual abuse
• Torture & ill-treatment	• Unfair trial
• Eviction	• Surveillance
• Lawsuits and regulatory action	

Based on our analysis of the cases that we have recorded in our portal and the observations of various organisations that are looking at Strategic Lawsuits against Public Participation (SLAPP) in various jurisdictions, we see a business-linked SLAPP as primarily having these characteristics:

- | It is a civil, criminal, or administrative lawsuit;
- | It is filed against a human rights defender (HRD) exercising his/her freedoms of expression, association, and/or peaceful assembly to speak about and/or act on matters related to a business’ operations;
- | It has the intention of silencing or intimidating the HRD from further engaging in criticism, opposition, public participation, and similar activities.

This Briefing Note focuses on SLAPPs in Southeast Asia and aims to amplify legal arguments and court decisions that have successfully upheld the freedoms of expression, association, and/or peaceful assembly of HRD.

By doing this, we hope to encourage governments, businesses, and civil society in the region to continue working on more comprehensive laws and policies that can protect the work of HRDs and extract accountability from businesses that abuse the laws in order to restrict the legitimate exercise of fundamental freedoms.

This Briefing Note has five sections:

1. SLAPPs in Southeast Asia and their impact on the work of HRDs
2. SLAPPS and the legal environment in Southeast Asia
3. Illustrative cases from Indonesia, Malaysia, and Thailand
4. Good practices against SLAPPs
5. Recommendations

IN  
SOUTHEAST  
ASIA:

284

attacks

131

acts of judicial harassment, with about  
**HALF** that can be classified as SLAPPs

# SLAPPS IN SOUTHEAST ASIA AND THEIR IMPACT ON THE WORK OF HRDS

We note that except for the Philippines, Southeast Asian countries have no laws defining SLAPPs but all countries, except for Brunei, protect the rights to freedom of expression, association, and peaceful assembly in their constitutions. The cases mentioned in this briefing note have the characteristics of lawsuits that violate these rights - or SLAPPs as they are commonly called in other jurisdictions. This section discusses some notable observations on how businesses use laws and the judicial system to increase the pressure against human rights defenders.

## Combining civil and criminal lawsuits against HRDs

In the past, SLAPPs were civil cases for companies to seek compensation for reputational damage. Now, we see companies filing civil and criminal cases for incidents arising from essentially the same facts. For example, the Thai company, Thammakaset, has filed 17 criminal and civil cases against 23 defendants and the causes of action include include theft/larceny, criminal defamation, violation of the computer crimes statute, and giving false information.<sup>2</sup> These cases came after 14 Myanmar migrants sued Thammakaset and alleged that they suffered serious abuses such as forced labour, restrictions on movement, passport confiscation, overtime work without extra pay, and unlawful salary deductions. The Labour Court has already ordered the company to compensate the workers for violating provisions on minimum wage, overtime payment, payment for working on holidays, and overtime payment, but the court also ruled that the company is not guilty of detention, confinement, trafficking, or forced labour. Various individuals and organisations supported the workers and as a result, cases were also filed against some of them. This tactic exhausts the resources of HRDs and those who support them. Financial resources are depleted to cover for lawyer's fees, bail (if needed), and even travel expenses incurred in attending court proceedings.

## Asserting exorbitant claims for damages

In Southeast Asia, the average minimum monthly wage in most sectors is only USD\$300.<sup>3</sup> However, some damage claims go beyond what an HRD can possibly pay in his/her lifetime. This briefing note includes cases with damage claims from USD\$1.6 million to USD\$3.3 million.

## Using anti-communism or anti-terrorism laws against HRDs (“red-tagging/red baiting”)

Red-tagging or red baiting accuses HRDs of being communists or terrorists in order to discredit their criticism and protests against prejudicial business operations. In Indonesia, the Supreme Court sentenced an environmental activist for violating an article on crimes against state security. He was arrested because the police accused him of displaying banners with emblems of communism during a protest.<sup>4</sup> Human Rights Watch's Andreas Harsono noted that, “Budiawan's prosecution is an ominous signal that environmental activists are now vulnerable to prosecution as communists if they dare challenge corporations implicated in pollution.”<sup>5</sup>

## Suing human rights attorneys, expert witnesses, and NGO workers

It is common for companies to sue protesting community residents and workers, but there are now many cases of suits against human rights attorneys, expert witnesses, and NGO workers who support the work of HRDs. Expert witnesses have been sued in Indonesia and these cases are discussed in this Briefing Note. A Philippine lawyer and an NGO leader face libel and slander cases, after they joined a workers' protest where allegations were made that the company is a labor-only contracting company in violation of Philippine law.<sup>6</sup> These cases are still pending in court. In Cambodia, the 2018 World Report on the Situation of Human Rights Defenders reported that activists working for environmental NGO, Mother Nature, were convicted for "violation of privacy" and "incitement to commit a felony" after they were caught filming two large vessels suspected of illegally carrying sand.<sup>7</sup>

## Targeting women human rights defenders

Business & Human Rights Resource Centre's data from 2015-2018 reveal that Asia is the most dangerous region for women human rights defenders (WHRDs).

**63 of the 240 recorded attacks against human rights defenders in Southeast Asia, were against WHRDs<sup>8</sup>**

Despite this, women continue to be at the forefront of protest actions,<sup>9</sup> often operating outside professional or employment-related roles. Indigenous WHRDs, in particular, operate in geographically dispersed and often rural areas, which make it difficult for them to connect with fellow women defenders or organisations that can support them.



# SLAPPS AND THE LEGAL ENVIRONMENT IN SOUTHEAST ASIA

## International legal framework for the protection of the rights to freedom of expression, association and peaceful assembly

SLAPPs are attacks against human rights defenders' rights to freedom of expression, peaceful assembly, and association - all of which are fundamental to all human rights, enshrined in various international instruments including the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the ASEAN Human Rights Declaration (AHRD).

Everyone has the right to freedom of expression and opinion, which they should be able to exercise without interference.  
**(Art. 19 of UDHR and ICCPR, Article 23 of ADHR)**

Everyone has the right to freedom of peaceful assembly and association.  
**(Article 20 of UDHR, Article 21 of ICCPR, Articles 23 and 27(2) of ADHR)**

Restrictions to the right of peaceful assembly must be limited to those which are necessary in a democratic society in the interest of the national security or public safety, public order (ordre public), the protection of public health or morals or the protections of the rights and freedoms of others.  
**(Article 21 of ICCPR)**

States must protect these rights so that its people and civil society are able to operate freely, without fear that they may be subjected to threats, acts of intimidation or violence.<sup>10</sup> In doing so, people have the freedom to respond to issues affecting society, such as those related to environment, sustainable development, crime prevention, human trafficking, empowering women, social justice, consumer protection and the realization of all human rights".<sup>11</sup> These freedoms are restricted when the legal environment does not clearly prohibit SLAPPs.

The UN Guiding Principles on Business and Human Rights require businesses to avoid infringing on the human rights of others and to provide remedies when their actions have adverse impacts.<sup>12</sup> General comment No. 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of Business Activities provides that "*the introduction by corporations of actions to discourage individuals or groups from exercising remedies, for instance by alleging damage to a corporation's reputation, should not be abused to create a chilling effect on the legitimate exercise of such remedies*".<sup>13</sup> SLAPPs are actions that effectively produce the chilling effect against legitimate criticisms and protest. Hence, States must enact domestic laws to protect these rights. Likewise, businesses must also implement policies that ensure respect and non-interference with the work of civil society and human rights defenders.<sup>14</sup>



## State constitutions and laws for the protection of the rights to freedom of expression, association and peaceful assembly

After looking at the international legal framework for the protection of the rights to freedoms of expression, association, and peaceful assembly, we now turn our attention to State constitutions and laws. In Southeast Asia, all countries except for Brunei, guarantee these rights in their constitutions.

COUNTRY	EXPRESSION	PEACEFUL ASSEMBLY	ASSOCIATION
<b>Brunei</b>	None <sup>15</sup>	None	None
<b>Cambodia</b>	Article 41	Article 41	Article 42
<b>Indonesia</b>	Article 28	Article 28	Article 28
<b>Laos</b>	Article 44	Article 44	Article 44
<b>Malaysia</b>	Article 10	Article 10	Article 10
<b>Myanmar</b>	Section 354	Section 354	Section 354
<b>Philippines</b>	Section 4 of Article 3	Section 4 of Article 3	Section 4 of Article 3
<b>Singapore</b>	Article 14	Article 14	Article 14
<b>Thailand</b>	Section 34	Section 44	Section 42
<b>Timor Leste</b>	Section 41	Sec. 42	Sec. 43
<b>Vietnam</b>	Article 25	Article 25	Article 25



However, only three have laws that guard against lawsuits that may restrict the work of HRDs and only the Philippines has rules defining what SLAPPs are and clearly prohibiting them.

**Philippines.** Applicable only to environment-related cases, the Supreme Court Rules of Procedure for Environmental Cases<sup>16</sup> allows a SLAPPs defense – here, an accused HRD can allege that the lawsuit is brought *“with the intent to harass, vex, exert undue pressure or stifle any legal recourse that one has taken or may take in the enforcement of environmental laws, protection of the environment or assertion of environmental rights.”* Before proceeding to trial, courts are required to hold a summary hearing and dismiss the case if it finds that it is a SLAPP suit.

**Thailand.** There are no laws defining SLAPPs in Thailand but Section 161/1 of the Criminal Procedure Code, which took effect on 20 March 2019, allows courts to dismiss criminal cases as soon as these are filed if it makes a determination that the case arises from *“ill intention (1) to harass (2) to take advantage over a person (3) to gain any unlawful benefits or (4) to achieve any corrupt underlying objectives”*.<sup>17</sup> In order to screen out frivolous or bad faith lawsuits, section 165/2 of the Criminal Procedure Code, which took effect on 20 February 2019, allows *“the accused to present legal and evidentiary arguments during a preliminary examination of the Court where they previously could not do so.”*<sup>18</sup> It also allows the Court *“to play a more active role by having the power to summon witnesses and evidence proposed by the accused as the Court’s witnesses.”*<sup>19</sup> Because these are fairly new provisions, their effectivity has not been fully tested. In fact, some groups like the Manushya Foundation, the Thai BHR Network, International Commission of Jurists, and Human Rights Lawyers Association have raised concerns<sup>20</sup> about these provisions, including the following: 1) the lack of a clear definition of bad faith, 2) the full discretion of the court to decide on the question of intent, and 3) the fact that Section 161/1 and Section 165/2 only apply to SLAPPs filed by private criminal complainants. It excludes other types of cases, such as civil cases or criminal cases filed by public prosecutors.<sup>21</sup>

**Indonesia.** There are also no laws defining SLAPPs in Indonesia but the Law on Environmental Protection and Management<sup>22</sup> provides in Article 66 – *“Everyone who fights for the right to a proper and healthy living environment cannot be charged with criminal or civil offense.”* The Prevention and Eradication of Forest Destruction Law<sup>23</sup> also protects other persons from being sued and states in Article 78 (1) - *“Reporters and informants cannot be sued legally, either by the penal code or civil code, for the reports and testimonies they will provide, are providing, or have provided”*.

*We recognize that defenders are important partners in identifying risks or problems in our business activities, encouraging due diligence in the provisions of remedy when harm occurs. When they are under attack, so are sustainable business practices. We strongly encourage governments to protect civic freedoms everywhere. This includes ensuring that civil society and human rights defenders are free from abuse, harassment, intimidation, physical attacks or from limitations on their rights to freedom of speech, assembly, association and movement individually and collectively.*

- **Business Network on Civic Freedoms and Human Rights Defenders**

# WHY SLAPPS ARE EFFECTIVE AGAINST THE WORK OF HRDS

Two factors are especially relevant to the effectivity of SLAPPs against the work of HRDs around the world: vague or absent legal frameworks that protect their rights and scare financial support for litigation.

## **SLAPPs are effective because legal frameworks are vague or inexistent.**

The lack of clear legal frameworks defining HRDs and prohibiting SLAPPs increases the pressure against human rights defenders because cases against them are analysed under the traditional interpretation of the elements of crimes/offenses, devoid of the context under which their actions were made. The right to protect the environment has been effectively raised in cases from Thailand and Indonesia, discussed in the next section, but current laws in the region do not extend to other types of human rights defenders and their cases.

When the law is unclear or absent, corporations will use it to their advantage whenever they can. Even before a SLAPP case goes to trial, it can already undermine the work of HRDs by exhausting their financial and human resources. Meanwhile, companies can claim that they are using legitimate venues like the courts to protect their reputation and their businesses against the claims of HRDs.

**Government legal aid is never enough, especially in regions like Southeast Asia where the total budget for legal aid is sometimes even smaller than the damage claims raised by corporations against human rights defenders.**

## **SLAPPs are especially consequential when support for litigation is scarce or absent and/or when financial legal aid resources are insufficient.**

SLAPP suits costs time and money, especially when human rights defenders face not just one suit but several, before various courts. Civil society organisations supporting HRDs have, through the years, experienced massive cuts in funding for litigation. Legal support has largely been limited to education, training, capacity-building, and emergency for defenders under attack (e.g. for relocation and physical security). Even when litigation funds exist, its lifetime depends on project periods of one to three years. Litigation in many Southeast Asian countries are seldom concluded in three years; some cases have taken up to ten (10) years to be resolved. Companies, on the other hand, have significant litigation resources available in most cases and they exploit the power imbalance between them and HRDs they are suing to maximise the impact of SLAPPs.

*Protect Defenders* observes that despite worsening conditions, HRD funding only grew by 1% between 2014 and 2016 – from USD\$97.6 to USD\$98.8 million.<sup>24</sup> There is no data to show how much of this substantially small funding is devoted to litigation. In fact, *Protect Defenders* noted that the “funding modalities are not always adapted to specific HRDs’ needs and situations.” It usually comes as project funding for training and capacity building initiatives, and not litigation.

Government legal aid is never enough, especially in regions like Southeast Asia where the total budget for legal aid is sometimes even smaller than the damage claims raised by corporations against human rights defenders. There are also often eligibility requirements that a defender cannot comply with. For example, many legal aid laws in the region require the aid beneficiary to be an indigent. This constraint automatically disqualifies workers facing SLAPP suits who may have livelihoods but not enough resources to combat SLAPPs filed against them. Other vulnerable groups often also refuse to access government legal aid especially when they face attacks and intimidation in their communities from both state and corporate actors.

Without adequate resources, the burden on human rights defenders are multiplied exponentially. They already suffer the economic, political, and environmental damage caused by the operations of businesses in their communities and then personally, they suffer more in order to continue protesting companies with often unlimited resources.



## ILLUSTRATIVE CASES

This section contains cases chosen by three lawyers from Malaysia, Indonesia, and Thailand. It must be noted again that these countries still have no laws defining what a SLAPP is but these are here because the cases filed against the respondents take on the characteristics of a SLAPP—those that are filed in response to their exercise of the rights to freedom of expressions, association, and peaceful assembly. Most of the respondents here won against the complainant-companies but the inclusion of these cases, however, should not be taken as proof that human rights defenders in these countries are already safe from SLAPP. These are chosen in order to highlight effective legal arguments against SLAPP and identify spaces for further reform that states and businesses must consider. The discussion in this section is based on judicial decisions to ensure the utmost level of accuracy.

### Malaysia

#### Raub Australian Gold Mining Sdn Bhd v. Hue Shieh Lee (13 February 2019)<sup>25</sup>

Raub Australian Gold Mining (“RAGM”) sued Hue Shieh Lee (the respondent) for libel and malicious falsehood because of statements allegedly made and published in two articles. The first article was a report of a survey conducted among residents of Bukit Koman, the site of the company’s operations. It stated that many residents started suffering from cancer, skin diseases, eye irritation, coughing, and lethargy when the gold mine started operating in the area. The second article included a quote from the respondent saying that RAGM employed less than 10 people but claimed that its operations generated over 1,000 jobs.

The Federal Court dismissed the cases because the company failed to prove that the results of the survey were false and that the respondent made these statements maliciously and without just cause. It also failed to prove that the respondent did, in fact, make those statements.

In ruling for the respondent, the Federal Court used the objective test – whether, under the circumstances in which the words were published, reasonable men to whom the publication was made, would be likely to understand it in a defamatory or libellous sense”.<sup>26</sup> The court concluded that it could not “see how those words had exposed the appellant to hatred, contempt or ridicule or lowered the appellant in the estimation of the society at large”.<sup>27</sup> It took note of the Court of Appeal observation that these statements were made by activists because of their concern for the health and safety of their community and that the work of these activists “have contributed much to the general well-being of the society at large”. The Federal Court ruled that there was nothing defamatory about the statements and these were made in the spirit of transparency and accountability.

#### Asahi Kosei Sdn Bhd v Charles Hector Fernandez (2011)<sup>28</sup>

In February 2011, Asahi Kosei (“plaintiff”) filed a libel suit against Charles Hector Fernandez (“defendant”), a human rights lawyer, for publishing six blog posts accusing the company of violating the rights of 31 Myanmar workers. The posts exposed the company for giving inadequate wages, wrongfully deducting fees, and refusing to grant medical leave.

Before publishing his posts, the defendant emailed the plaintiff to confirm whether the allegations of the workers were true. When he did not get a response from the company, he proceeded to publish the posts. The company then sent him a letter and there, denied the allegations contained in defendant’s posts<sup>29</sup>, and asked him to pay the company the sum of RM10,000,000.00 (approx. USD\$ 2,384,850.00) within seven (7) days; otherwise, a legal suit would be brought against him.

While the case was pending, a High Court judge granted the company an *ex-parte* interim injunction, ordering the defendant to delete all blog posts mentioning the company and to refrain from posting any statement about Myanmar workers associated with the company in the future. The defendant moved to set aside the injunction order by invoking his right to speech under the Federal Constitution of Malaysia<sup>30</sup> but the court dismissed this and noted that while it is true that he had the right to speech, the company should not be tried at the court of public opinion. The court noted potential business harm because of the defendant's postings and emphasised that in fact, 81 international and domestic organisations have already called on the company to respect the human rights of its workers and encouraged suppliers to refrain from doing business with Asahi.

The defendant lost at both the High Court and the Court of Appeal and was ordered to pay the amount of RM10,000.00 (approx. USD\$ 2346.32) as costs to the company.

In August 2011, both parties reached a settlement agreement and a consent judgment was recorded in Court. The terms of settlement included the withdrawal of suits filed in the High Court, payment of RM1 (approx. US\$0.23) in damages, and issuance of an apology to be published in 2 local newspapers. The defendant complied with the terms of the settlement.

### PDZ Holdings Berhad v The Edge Communications Sdn Bhd & Others (2018)

PDZ Holdings Berhad sued The Edge Communications Sdn Bhd and its senior journalists for defamation because of three articles published in 2017. These articles were: "Interesting manoeuvres at PDZ", 29 May 2017<sup>31</sup>; "Newsbreak: Undue preference in PDZ assets transfer," 19 June 2017<sup>32</sup>, and "Murky connection between Sanichi and PDZ", 10 July 2017.<sup>33</sup> The company alleged that the articles consisted of inaccurate and false statements and were premised on rumors and unverified sources.

The High Court Judge dismissed the company's case by accepting three defences raised by the defendant:

1. The impugned statements do not refer to the Plaintiff nor its trade reputation;
2. Defence of fair comment and;
3. Defence of qualified privilege.

**Trade reputation defence:** The Court ruled that the company failed to prove that the articles affected its trading reputation because it even noted that its share price remained stable. The defendant also could not have affected the trading reputation of a company that declared themselves as an "investment holding company" in their own submissions to the court.

**Defence of comment:** The court ruled that if a defendant can prove that the defamatory statement is an expression of opinion on a matter of public interest and not a statement of fact, he or she can rely on the defence of fair comment; provided that the comment is based on true facts."<sup>34</sup>

**Defence of qualified privilege:** The court ruled that the defendants were able to prove the in publishing those articles, they complied with the guidelines on responsible journalism by reporting on a serious allegation that was of public concern. Because the case involved matters of public interest, they had, as journalists, the duty to write a report about it. They also used reliable sources and took steps to verify the information. More importantly, the articles were fair accounts of facts that were later on proven to be true.

The Court also ordered the plaintiff to pay costs in the amount of RM50,000.00 (approx. USD\$ 11,924.75).

## Thailand

### **Tungkum Ltd. v Surapun Rujichaiyavat and five others (2015)<sup>35</sup>**

In May 2015, Tungkum filed a civil defamation complaint at the Loei Provincial Court against six members of Khon Rak Ban Kerd Group (KRBKG) (“respondents”), a community-based group actively protesting against the operations of the company. The suit was brought against the defendants in response to their actions of posting signs at the entrance gate of Na Nong Bong village and along the road in the village, calling for the closure of the gold mine and rehabilitation of the environment and expressing that the company was not welcome in their community. The company asked the defendants to pay 50 million Thai baht (approx. USD\$1,632,975.00) for allegedly damaging the company’s reputation and credibility, with negative implications for its valuations on the stock market.

The Loei Provincial Court dismissed the company’s case in March 2016 and ruled that the respondents’ actions were a legitimate exercise of their right of expression and opinion protected by the Thai Constitution. The Court upheld the respondents’ right to assert for the protection of their environment and their right to remedy against actions that may harm their communities. The Court noted that the signs posted by the respondents were not defamatory and there was no evidence to show that the respondents intended to harm the company. Finally, the Court ruled that the Thai constitution protects community rights over their resources and grants residents the power to ask for the rehabilitation of damaged environments.

The court ordered the company to pay compensation to the affected families and take full responsibility for cleaning up all contamination caused and restoring the environment to a livable condition. The Appeal Court upheld the provincial court’s decision and reminded the company that the rights to freedom of opinion are guaranteed under the law, provided that these are exercised in good faith.

Though the decision has become final, the company filed for bankruptcy and to date, the respondents have not yet been compensated.

### **Peerapol Mining Co. Ltd v Nine members of Khao Khuha Community Rights Network (KKCRN) (2013)<sup>36</sup>**

In June 2011, Peerapol Mining Co. filed defamation charges under the Tort Act against nine (9) members of Khao Khuha Community Rights Network and sought 64,000,000 Thai baht (approx. USD\$ 2,089,792.00) as compensation. The organisation protested against the company’s operations and alleged that their community sustained environmental harms as a result of these operations. They also alleged that the permit of Peerapol was unlawfully acquired because it did not fully comply with the requirements of a complete Environmental Impact Assessment Report. The respondents also wrote the prime minister to ask him for the suspension of the company’s permit and they filed cases against certain public officials who issued the permit to the company.

However, the company withdrew their case before it could go into trial.<sup>37</sup> The community members filed a countersuit against the company. They alleged that by filing the earlier case against them, the company destroyed their reputation and dignity. In this case, the Supreme Court ruled in favour of the members of the Khao Khuha Community Rights Network and ordered the company to compensate them for damages caused. The Court upheld their rights to protest and file official complaints against the company and it said that sending letters/complaints to the authorities is a right of the people. It also ruled that the company’s act of suing residents who were just exercising their rights was not an act in good faith and actually caused damage to them. The court ordered the company to pay for reputational injury caused, and to pay for health and mental damages but reports indicate that the company has not yet complied with the court’s order.

## Watson Co. vs Eight local villagers from Mae Sai District (2017)

Watson Co. sued eight (8) villagers from the Mae Sai district and alleged that their protest actions interrupted the operations of the company and caused it to fail in finishing a contracted project on time. The company used tort law and sought compensation for 58,772,597.48 Thai baht (approx. USD\$1,919,424.87).

Watson Co. won the contract to construct a waste water treatment facility but the villagers, along with many other members of the community who were part of the group Mae Sai Environment Protection, protested against the project. They alleged that legal procedures were not complied with in the bidding for the contract. They also publicly raised their concerns about pollution and damage to a local river that was vital for their daily water needs and for agriculture.

The Provincial Court ruled in favour of the villagers and ruled that the protest action was part of their right to freedom of expression – a right protected by section 4 of the 2014 interim constitution which states:

*Subject to the provisions of this Constitution, human dignity, rights, liberties, and equality previously enjoyed by the Thai people with the protection under Thailand's constitutional convention of the democratic regime of government with the King as Head of State and Thailand's international obligations, shall be protected in this Constitution.*

Furthermore, the Provincial Court noted that the company failed to prove that the protest caused harm to the company. In fact, the Court said that it was done peacefully and without any weapons, thus causing no harm to any of the company's officials or employees. According to the decision of the court, the villagers were protesting in good faith simple because of their fear that the project may cause damage to their environment and to their health. Because of these circumstances, the court did not find the local villagers to be guilty of any wrongful act. The company's appeal was later on dismissed because it failed to pay the filing fees on time.

## Indonesia

### Nur Alam v Basuki Wasis (2018)

Nur Alam, was a former governor who was convicted for illegally issuing a mining exploration permit to PT. Anugerah Harisma Barakah. In that case, Basuki Wasis, testified as an expert witness and he computed the value of environmental degradation caused by the operations of the company to the community. Nur Alam sued Basuki Wasis and alleged that the defendant had committed an illegal act by presenting inaccurate calculations. To challenge his credibility, the defendant presented other experts to contradict the defendant's calculations.

In his defense, the defendant cited articles 65, sections 4 and 66 of Law Number 32 Year 2009 on Environmental Protection and Management, which protects the right of the people to act for the sake of environmental protection and management and gives them immunity from civil or criminal charges. The defendant further argued that expert witnesses who are summoned by a Court to testify in a corruption case should be protected from potential retaliation or intimidation as stipulated in Article 32 section (1) of the United Nations Convention Against Corruption (UNCAC), which has been ratified by Indonesia with Law Number 7 Year 2006; Article 9 of Law Number 28 Year 1999 on State Administrators, Clean and Free of Corruption, Collusion, and Nepotism; and article 41 of Law Number 31 Year 1999 *jo.* Law No. 20 Year 2001 on the Eradication of Corruption Crimes.<sup>38</sup>



In December 2018, the case was dismissed and the court ruled that when expert testimonies are already used as basis for court rulings, the expert witness is already immune from civil or criminal charges. Otherwise, if those statements are later on classified as defamatory by another court, the integrity of the judicial process will be damaged. The protection is extended to all expert statements, including those given by environmental experts, medical experts, and experts in other scientific fields. It further ordered the plaintiff to pay IDR 2,431,000.00 (approx. USD\$171.69) to the defendant.

### **PT Bumi Sukses Indonesia (BSI) v. Heri Budiawan (“Budi Pego”) (2018)**

Budi Pego was charged for a crime against state security<sup>39</sup> for allegedly spreading the teachings of communism by leading a group of protesters that displayed banners containing prohibited symbols of the Indonesian Communist Party. Prior to his arrest, residents of several villages protested against gold mine operations of BSI company. They alleged that the operations were unauthorised and were harming the environment. Budi Pego visited the protesters to know more about their complaints. The day after, because of heavy rains, the protesters stopped at his house and there made protest banners against the company. The following day, Budi Pego was summoned by the police and he was informed that the “Palu Arit” picture was on one of the banners made at his house. Palu Arit is an emblem/symbol of the Indonesian Communist Party.

Among many other defences, Budi Pego invoked Law No. 32, Year 2009 on Environmental Protection and Management and cited Article 66 which states that every person who fights for his right to a good and healthy environment cannot be prosecuted in a criminal or civil suit. However, this defense was rejected because the Court pointed out that this immunity does not extend to protesters who conduct demonstrations in violation of Law Number 9 Year 1998 on Freedom to Express Opinion in Public – the law requiring written notification to the Indonesian National Police before such gatherings are conducted.

Budi Pego was convicted because the court found him to be the leader of the protesters. These circumstances were taken against him: a) the demonstrators made the banners in his house; b) records showed that he gave directions and instructions in relation to the protests, and c) he verbally informed the police about the protest action a day before it was planned to occur. His conviction was confirmed by the Supreme Court and he was sentenced to imprisonment for four years.

### **Prita Mulyasari vs Omni International Hospital (2012)**

Omni International Hospital sued Prita Mulyasari for criminal defamation and a violation of the law on electronic information and transaction. The defendant sent a few of her close friends an email that detailed a negative experience at the hospital. She warned others to avoid availing its services. She said that she went to the hospital because she had high fever and a headache. However, the medical personnel misdiagnosed her condition as dengue and proceeded to administer several drugs to no avail. The defendant experienced swelling in her body, which caused her to demand for a clear diagnosis. In her email, she narrated that their requests to see the doctor were ignored. Because of worsening conditions, she had to transfer to another hospital. The final diagnosis was mumps. The staff did not entertain her request to get a copy of her laboratory results. When they finally got a copy of the results, the management simply apologised for the inconvenience causes and did not even mention the fact that an incorrect laboratory result was given, hence resulting to the improper medical management of her condition.

The Supreme Court ruled that the defendant is not guilty of defamation. Her email was not meant to be published as it was simply a private expression of her negative opinion and disappointment with the services she received from the plaintiff. Because there was no intention to make the information known to the public, she cannot be declared guilty of defamation.

# COURT RULINGS IN DEFENSE OF HUMAN RIGHTS DEFENDERS

From the six cases that we included in this Briefing Note, we highlight notable decisions by the courts that can be used to protect human rights defenders and their work. These rulings should serve as encouragement for states, their legislature, and their courts to further create a legal environment that enables defenders to exercise their rights to freedom of expression, association, and peaceful assembly without abusive restrictions and free from judicial harassment.

- | Activists have contributed much to the general well-being of society and the values of transparency and accountability are better served when they are allowed to make statements against a company's operations and these statements are true. – **Raub case (Malaysia)**
- | Journalists have the right and obligation to report on matters of public interest, even if these include negative information about companies. They should not be liable for libel/defamation if their reports are based on verifiable and reliable sources. – **PDZ Berhad case (Malaysia)**
- | The right to protest against prejudicial company operations is part of the right to assert the need to protect the environment and community resources. – **Tungkum case (Thailand)**
- | Persons who fight for their right to a good and healthy environment are immune from suit. – **Budi Pego case (Indonesia)**
- | Expert witnesses who offer testimonies that are used by the court in arriving at its decision are immune from suits for libel and defamation. – **Basuri Wasis case (Indonesia)**
- | A private expression of a negative opinion on the services of a particular business entity is not defamatory even when released publicly but without the intention, consent, or participation of the person who made those statements. – **Mulyasari case (Indonesia)**



## GOOD PRACTICES AGAINST SLAPP

While legal strategies would have to differ depending on the laws of the countries where SLAPP suits are filed, there are good practices that are useful for the work of human rights defenders. These lessons come from our analyses of the cases included in this briefing note, our continuing documentation of attacks against HRDs, our work with several HRDs, and our personal experiences as HRDs ourselves.

- | Accurate documentation of the negative impact of a business operation helps courts decide that statements related to these documented impacts are made in good faith and with no intent to spread malicious falsehood.
- | While it is not a requirement in many jurisdictions, it is always prudent, especially for civil society, media personnel and public critics, to invite companies to respond to allegations of abuse before publicly exposing these to the public. This can strengthen the good faith defence against a SLAPP.
- | Journalists must always observe the rules for responsible journalism by ensuring that reports are objectively written and are based on verifiable sources. Courts often aim to strike a balance between companies' claim of reputational damage versus the right of the public to be informed about matters of public interest.
- | Domestic laws on freedom of expression, association, and peaceful assembly often protect HRDs when they make statements or protest against companies. However, HRDs should ensure that when making these statements or organising protest actions, they do so peacefully and in strict compliance with domestic laws. When facing SLAPPs, HRDs can invoke the laws protecting freedoms of expression, association, and peaceful assembly and also prove that they exercised these according to the requirements of domestic laws. CSOs, international organisations like the United Nations and its various offices, funders, governments, businesses, and HRDs must work alongside each other to build capacity and awareness on how to express these fundamental rights without unnecessarily exposing themselves to retaliatory actions.
- | HRDs and the networks that support them should continuously study the possibility of filing counter-suits against companies that use SLAPPs to stifle dissent. They can argue that their actions are legitimate exercises of fundamental rights. This strategic approach also helps organise communities and empower them to use other means, such as court action, to legitimately assert their rights.
- | Apart from alleging harm to health and environment, HRDs should also raise other grounds to question the operations of a company – for example, by proving that the company is operating without complying with the requirements of the law (e.g. conducting human rights due diligence, obtaining free and prior informed consent, submitting an environmental compliance certificate, etc). This further strengthens their case by showing to the court that their protests are not simply based on fear but also on a clear understanding of the law and the obligations of companies.
- | It is useful for HRDs to understand the profile of the company filing a SLAPP suit against them. It is helpful for courts to know if a company has filed similar suits in the past, how many cases they have filed, and if these companies have committed to protect and respect the work of human rights defenders, for example through public statements and company policies. This helps courts understand the motive of the company in suing HRDs and may help the judges conclude that its action is aimed at harassing HRDs.

# RECOMMENDATIONS

## Governments should:

Enact laws that:

define, recognise, and protect human rights defenders and their work. The definition should include various types of defenders, including among others, women HRDs, human rights lawyers, witnesses (experts and non-experts) and journalists;

prohibit SLAPPs and penalise businesses that are found to have filed these frivolous lawsuits;

have early dismissal mechanisms so that the case does not have to go through a full-blown trial before it can be dismissed;

provide objective criteria for determining the amount of damage claims.

Develop a National Action Plan on Business and Human Rights and ensure that, among other things, a national baseline assessment is done to determine what protections are available for HRDs against SLAPPs and proceed to recommend strong anti-SLAPP laws.

Strengthen legal aid mechanisms and make resources available all over the country to various types of human rights defenders, with financial capacity as only one of many possible eligibility criteria for one's qualification as a legal aid beneficiary;

Take steps to address both legal and non-legal barriers faced by victims who seek to access effective remedies, such as allowing and providing mechanisms for: a) victims' lawyers to finance complex litigation and; b) victims to pursue collective or class actions; and defending activists and human rights lawyers who face legal harassment, other forms of intimidation or violence.<sup>40</sup>

Organise opportunities for dialogue with judges, prosecutors, and legislators to review existing laws that are often used as basis for SLAPP suits filed against human rights defenders. This includes an extensive review and repeal of onerous, oppressive, and unpredictable defamation laws, national security legislations, and other such laws. This includes the establishment of objective criteria in determining damages and compensation that can be claimed by any party. These dialogue sessions should also lead to trainings of these key stakeholders on human rights in general, and freedom of expression, association, and peaceful assembly and SLAPPs in particular;

Create enabling environments for the work of HRDs, including by upholding their rights to solicit, receive, and utilise resources without unreasonable restrictions;

## Businesses, investors, and financial institutions should:

- | Publicly recognise that human rights defenders are critical partners in identifying risks or problems in business activities and avoid interfering in their legitimate actions.
- | Publicly acknowledge that the protection of civic freedoms and respect for the rule of law are important both for civil society and business;<sup>41</sup>
- | Establish multistakeholder working groups to create robust company grievance mechanisms based on engagement and dialogue with affected stakeholders, in order to address criticisms against business operations;<sup>42</sup>
- | Commit to a clear policy of non-retaliation against HRDs that criticise the company.<sup>43</sup> Several companies have released policies on HRDs, including Adidas, M&S, and Unilever. These companies publicly commit to a policy of non-tolerance for attacks, including legal attacks, against HRDs. Business & Human Rights Resource Centre continue to monitor the release of these kinds of policies;<sup>44</sup>
- | Undertake due diligence including human rights and environmental impact assessments across the supply chain with a focus on tensions with local civil society, communities, and HRDs that will inform companies of risks as well as opportunities to engage;<sup>45</sup>
- | Publicly advocate against laws that restrict civic space and violate fundamental human rights and freedoms.

## Civil society, including international organisations like the UN, must:

- | Continue documenting SLAPPs cases to increase the collective understanding of its nature and impact and to gather evidence to publicly advocate for effective solutions;
- | Advocate and structure a diverse range of support initiatives for HRDs, to equally prioritise resource mobilisation and maximisation for litigation on SLAPPs. This could include the establishment of legal aid clinics in partnership with bar/law associations and law schools in various universities around the country;
- | Build and/or expand networks of support to consist of campaigners, lawyers, expert witnesses, allies in governments and businesses, and other stakeholders. This network should continuously strive to diversify its resources so that it can operate sustainably and beyond the traditional system of extending help only on a pro-bono basis;
- | Train HRDs on their rights and defences against SLAPPs, while strongly advocating for anti-SLAPP legislations and championing efforts by business to adopt anti-SLAPP policies.

# REFERENCES

- <sup>1</sup> Data as of February 2020.
- <sup>2</sup> As tracked by various individuals and organisations. We also included the cases reported in Permanent Mission of Thailand in Geneva, Thailand's response to the joint communication from HRC Special Procedures No. AL THA 3/2018 dated 10 May 2018 and AL THA 1/2019 dated 30 January 2019, 23 May 2019.
- <sup>3</sup> ASEAN Briefing, Minimum Wage Levels Across ASEAN, 30 August 2018. Timor Leste is at USD115/month.
- <sup>4</sup> Kharishar Kahfi for The Jakarta Post, Activists call for postponement of environmentalist Budi Pego's imprisonment, 14 February 2019.
- <sup>5</sup> Hans Nicholas Jong for Mongabay, Indonesian ruling rings alarms over criminalization of environmental defenders, 26 January 2018.
- <sup>6</sup> The names of the lawyers and NGO leaders, and the company are not disclosed here. The cases are pending and due to sub judice rules, we are protecting them against possible contempt charges.
- <sup>7</sup> Page 304 of the report.
- <sup>8</sup> Business & Human Rights Resource Centre, HRD attacks database, as of 03 September 2019.
- <sup>9</sup> Report of the Special Rapporteur on the situation of human rights defenders, Situation of women human rights defenders, presented at the 40<sup>th</sup> Session of the Human Rights Council, A/HRC/40/60, 10 January 2019.
- <sup>10</sup> *Ibid.*, para. 63.
- <sup>11</sup> Human Rights Council, Resolution 24/5. The rights to freedom of peaceful assembly and of association, UN Doc. A/HRC/RES/24/5, 8 October 2013, para. 2.
- <sup>12</sup> Principles 11 and 12 of the UN Guiding Principle on Business and Human Rights.
- <sup>13</sup> Paragraph 44.
- <sup>14</sup> This was one of the calls of the Business Network on Civic Freedoms and Human Rights Defenders in their statement, Supporting Civic Freedoms, Human Rights Defenders, and the Rule of Law.
- <sup>15</sup> Freedom of expression and the press is mainly governed by the Sedition Act.
- <sup>16</sup> A.M. No. 09-6-8-SC, 13 April 2010.
- <sup>17</sup> *Id.*
- <sup>18</sup> *Id.*
- <sup>19</sup> *Id.*
- <sup>20</sup> Manushya Foundation & The Thai BHR Network share these concerns as they assert in their comments to the latest draft of the Thailand National Action Plan on Business and Human Rights (NAP) that these laws are ineffective in protecting HRDs from judicial harassment through SLAPPs. Thai BHR Network and Manushya Foundation, Summary of Joint Comments on the Final Draft National Action Plan on Business and Human Rights in Thailand (NAP-BHR, March 2019).
- <sup>21</sup> International Commission of Jurists and Human Rights Lawyers Association, Re: Recommendations on draft National Action Plan on Business and Human Rights (Dated 14 February 2019), 15 March 2019.
- <sup>22</sup> Law No. 32/2009, 03 October 2009.
- <sup>23</sup> Law No. 18/2013, 06 August 2013.
- <sup>24</sup> Funding Available for Human Rights Defenders, 2017.
- <sup>25</sup> Civil Appeal No. 02(f)-125-11/2017(W)
- <sup>26</sup> The Court noted that this was the same case used in *Allied Physics Sdn Bhd v. Ketua Audit Negara (Malaysia) & Anor and Another Appeals* [2016] 7 CLJ 347.
- <sup>27</sup> Paragraph 51 of the Judgment.
- <sup>28</sup> Case No. 22 NCVC-173-2011.
- <sup>29</sup> The letter reads "Your said postings clearly referred to our clients. Our clients categorically deny any of the above allegations. Those Myanmar workers were supplied by the outsourcing agent and all payment of salaries were duly paid to the said agent as per their agreement. Hostel was provided by the agent, and like wise cooking material and electricity appliances. There was no salary unpaid, deducted by our client at all material time. Our clients have no knowledge whatever in relation to issue of "deportation" as claimed. Those workers are not under direct payroll of our client, why would our client get involved in "deporting" them? You are simply, to put it crudely, barking up the wrong tree"
- <sup>30</sup> Article 10(1) of the Federal Constitution of Malaysia reads: subject to clauses in (2), (3) and (4), every citizen has the right to freedom of speech and expression.
- <sup>31</sup> <https://www.theedgemarkets.com/article/interesting-manoeuvres-pdz>.
- <sup>32</sup> <https://www.theedgemarkets.com/article/newsbreak-undue-preference-pdz-assets-transfer>.
- <sup>33</sup> <https://www.theedgemarkets.com/article/murky-connection-between-sanichi-and-pdz>.
- <sup>34</sup> Dato' Sri Dr. Mohamad Salleh bin Ismail & 1 Anor v Nurul Izzah binti Anwar & 1 Anor [2018] 1 LNS 171
- <sup>35</sup> Civil Case 574/2558.
- <sup>36</sup> Black Civil Case No. 664/2554
- <sup>37</sup> Black Case No. 1349/2012 and Red Case No. 922/2013.
- <sup>38</sup> See also articles 179 and 180 of Law Number 8 Year 1981 on Criminal Procedure Law.
- <sup>39</sup> Article 107a of Law No. 27 Year 1999 on the Revisions of the Criminal Code in relation to Crimes against State Security: *Anyone who violates the law in public by oral, written, and/or through any media, disseminates or develops the teachings of Communism/Marxism-Leninism in all forms and embodiments, is sentenced to a maximum imprisonment of twelve (12) years*.
- <sup>40</sup> Business & Human Rights Resource Centre, Corporate Legal Accountability Annual Briefing, January.2015.
- <sup>41</sup> In 2018, the Business Network on Civic Freedoms and Human Rights Defenders released the statement, Supporting Civic Freedoms, Human Rights Defenders and the Rule of Law. It was signed by Anglo-American, Adidas, Unilever, ABN-AMRO, Investor Alliance for Human Rights, Leber Jeweler, Domini, and Primark. The Business Network is an informal network of companies, convened and facilitated by Business & Human Rights Resource Centre, the B Team, and the International Service for Human Rights.
- <sup>42</sup> Business & Human Rights Resource Centre, Corporate Legal Accountability Annual Briefing, January.2015.
- <sup>43</sup> Business & Human Rights Resource Centre & International Service for Human Rights, Shared Space Under Pressure: Business Support for Civic Freedoms and Human Rights Defenders: Guidance for Companies, September 2018.
- <sup>44</sup> Policies & Statements on Human Rights Defenders & Civic Freedoms by companies and investors.
- <sup>45</sup> *Id.*