

Recommendations on the Protection of Those who Exercise Their Rights and Freedoms from Strategic Lawsuits Against Public Participations

A large, stylized red silhouette of a person's head and shoulders, holding a document. The silhouette is composed of several overlapping, torn-edge-like shapes. A hand is visible on the left side, holding the edge of the document.

Written by
Human Rights Lawyers Association
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Written by
Human Rights Lawyers Association

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Table of Contents

Introduction	1
Report Methodology	2
Chapter 1 Definitions and general concepts concerning SLAPPs	5
Chapter 2 The SLAPPs situation in Thailand	9
Chapter 3 Principles and approaches and dealing with SLAPPs and related human rights law	23
Chapter 4 Legal Mechanisms for the Prevention of SLAPPs in Thailand	34
Chapter 5 Summary and recommendations	38

Introduction

Public participation is held to be a political principle and practice that forms an important basis of democratic society. The constitutions of Thailand, especially the 1997 Constitution, have guaranteed various rights and freedoms to create an opportunity for the public participation of the people, such as the freedom to express opinions, freedom of assembly, freedom of association, the right to petition, community rights and the right to participate in the management of resources.

However, people who use the rights and freedoms under the constitution to participate in public life may always face threats in many forms, including defamation, accusations, visits to their homes, physical assaults, the use of military or police suppression, assassination and enforced disappearance. Another form which is often seen today are **threats using the law and the judicial process**.

Threats using the law and the judicial process in the form of lawsuits against individuals who participate on related issues are frequently called Strategic Lawsuits Against Public Participation or SLAPPs. Sometimes they may be called “gagging writs” but this report will use the term SLAPPs throughout.

SLAPPs are often introduced by explaining the phenomenon where a private company and the state files a case against people who exercise freedom of expression, expressing opinions, petitioning, rallying or participating in other ways which affect or obstruct the activities of private companies or implementation of development policies of the government, or investigate the use of state power or participate in various public policy issues. These lawsuits create obstacles, diminished resources, create an atmosphere of fear and restrain the people from exercising their rights under the constitution in petitioning the government and speaking on public issues.

The Human Rights Lawyers Association, which is working to create legal standards that conform to judicial principles, human rights principles and social justice, believes that the problem of SLAPPs, which is the use of the law and the judicial process as it all to threaten people who exercise their rights and freedoms to participate in public matters, is an issue that should be pushed forward for an urgent solution. It has therefore conducted a study and produced this report in the hope that it will lead to a discussion that will systematically solve the problem.

Report Methodology

The objective of this study is an overall survey of the SLAPPs problem both inside and outside the country followed by an analysis with a view to making recommendations appropriate to the situation in Thailand to prevent SLAPPs cases. In the section studying the problem situation, this report compiled data on cases between 1997 and May 2019 since this period follows the promulgation of the 1997 Constitution of Thailand which established and guaranteed many rights related to participation, especially the right to receive information, community rights and the rights to participate in the management of resources. The 1997 Constitution is therefore an important turning point in extending the wave of participation at different levels.

The criterion for identifying a case as a SLAPP case takes into consideration the definition of a **'lawsuit brought in order to threaten the exercise of constitutional rights related to public issues or any other action to support the exercise of constitutional rights related to public issues'**. SLAPPs in this report therefore do not include the following cases:

1. The use of the law to restrict freedom which is not used to prosecute a case.
2. Cases in which it is not clear that the accused has committed the offence as charged, such as prosecutions against the wrong person.
3. Prosecutions under certain charges and offences under certain laws for 2 reasons

The first are restrictions on the distribution of information. Some kinds of cases have restrictions on access to details of the case, making it difficult to categorize the case as SLAPPs or not, especially under

Article 112 of the Criminal Code where the content of the case is not disclosed in the judicial process. In order to avoid statistical errors, only some cases that are clearly SLAPPs are cited in sections of this report.

4. Cases related to special security laws (the 1914 Martial Law Act; the 2005 Emergency Decree on Public Administration in Emergency Situation; and the 2008 Internal Security Act) because of special circumstances and some circumstances have a large number of cases that are difficult to categorize.

The sources of information for this report are: 1) human rights organizations whose work concerns cases like SLAPPs such as the Freedom of Expression Documentation Center of iLaw, Thai Lawyers for Human Rights and the Community Resource Centre Foundation; 2) interviews with relevant persons such as lawyers and those accused; 3) seminars and small group meetings including an academic meeting on the development of laws and mechanisms to prevent “gagging writs” restricting public participation on 30 May 2018 at the Thai Journalists Association, a seminar on “Gagging writs, the case of the power plant and solutions” on 30 June 2018 at the Bangkok Art and Culture Centre, arranged by the EnLAW Foundation, the Human Rights Lawyers Association, the Community Resource Centre Foundation, EIA/EHIA Watch Thailand and Greenpeace, and a focus group meeting to receive information, opinions and recommendations on approach is to develop laws to oppose SLAPPs in Thailand on 30 January 2019 at the Thai Volunteer Service building arranged by the Human Rights Lawyers Association, and information from credible mass media outlets.

Statistical information in this report is presented under restrictions in access to information and other restrictions referred to above. However, the information obtained is considered sufficient to demonstrate the phenomenon and characteristics of SLAPPs cases in Thailand and is useful for analysis in order to present appropriate recommendations.

Chapter 1

Definitions and general concepts concerning SLAPPs

Strategic Lawsuits Against Public Participation or SLAPPs constitute a form of harassment in which the judicial system is employed as a means of judicial harassment to target people involved in public participation or exercising their political rights so as to cause damage or to obstruct their freedom of expression of opinion or constructive arguments.¹

Penelope Canan, Assistant Professor of Sociology, and George Pring, Professor of Law, at the University of Denver, USA, who conducted a systematic study of this practice, explain in their 1996 book 'SLAPPs: Getting Sued for Speaking Out' that the majority of SLAPPs cases are aimed at posing a threat to, or retaliating against specific actions or speech, or opposing political activities. Many of the cases were strategic, not just tactical.²

SLAPPs result in three key transformations ³ :

- 1. Dispute transformation** from political disputes to legal disputes by transforming the exercise of constitutional rights into violations of the law. For example, the expression of opinion is turned into libel, and political rallies into trespassing or disruption of peace and order.
- 2. Forum transformation** from the public, where problems can be resolved by political decisions, to the judiciary, where legal techniques are employed in court to resolve disputes.
- 3. Issue transformation** from damage to the public to merely personal damage to the plaintiff.

¹ Multinational Monitor, SLAPPing back for democracy, May98, Vol. 19, Issue 5

² George W. Pring and Penelope Canan, SLAPPs. Getting sued for speaking out, page 8

³ George W. Pring and Penelope Canan, SLAPPs. Getting sued for speaking out, pages 10-11.

SLAPPs cases are consequently different from ordinary lawsuits due to their political nature. The plaintiffs in such cases do not seek justice nor expect to win the case; their aim is to intimidate, to silence or to bully their opponents by siphoning off their resources, forcing them to pay to fight groundless court cases, reducing the efficiency of their work, the level of their activities, time and morale, and putting emotional pressure on their opponents to weaken them so that eventually they will stop their activities. SLAPPs cases not only disrupt our ongoing public participation activities, but also create a chilling effect on future public participation activities,⁴ as well as spreading an intimidating message to the general public as a whole.⁵

The environmental conditions that enable SLAPPs to appear depend on several factors, such as high legal costs, including the mechanisms for legal aid, by flexibility of the laws on speech and expression

⁴ George W. Pring, *SLAPPs: Strategic Lawsuits against Public Participation*, 7 *Pace Env'tl. L. Rev.* 3 (1989) Available at: <http://digitalcommons.pace.edu/pelr/vol7/iss1/11>, page 8.

⁵ Report of the Special Rapporteur on the situation of human rights defenders, UN Doc. A/HRC/25/55, 23 December 2013, para 59.

(particularly on what constitutes libel), and existing preventive measures (such as rules against SLAPPs or the specification of responsibility for costs incurred in inappropriate processes).⁶

Criteria for identifying SLAPPs

In their original research, Canan and Pring employed 4 criteria for screening lawsuits to identify SLAPPs:⁷

1. They are civil lawsuits, including countersuits or cross-claims (for damages in monetary terms and/or court injunctions).
2. They are filed against non-governmental individuals or groups.
3. They involve communication made to influence a government action or outcome.
4. They concern substantive issues of some public interest/concern or social significance.

However, as the SLAPPs concept was further developed into anti-SLAPPs legislation in many states of the US and in other countries, its scope has expanded to include other kinds of lawsuits as well. In the Philippines, for example, SLAPPs cover civil, criminal and administrative lawsuits.⁸ The determination of the scope and definition of SLAPPs therefore depends on the context of each jurisdiction. Some have adopted the criteria proposed by Canan and Pring, while others have broadened the scope to cover proceedings related to all public issues, not limited only to communications on government procedures, decisions and outcomes.⁹ (See legal details in Chapter 3.)

⁶ SLAPPs and FoAA rights, Info Note of the UN Special Rapporteur on the Rights to Freedom Assembly and of Association (Mr. Annalisa Ciampi), <https://www.ohchr.org/Documents/Issues/FAssociation/InfoNoteSLAPPsFoAA.docx>.

⁷ George W. Pring and Penelope Canan, SLAPPs. Getting sued for speaking out, page 209; George W. Pring, SLAPPs: Strategic Lawsuits against Public Participation, 7 Pace Envtl. L. Rev. 3 (1989) Available at: <http://digitalcommons.pace.edu/pelr/vol7/iss1/11>, page 8

⁸ A.M. No. 09-6-8-SC , Part I Rule 1 General provisions Section 4. Rules of Procedure for Environmental Cases (A.M. No.09-6-8-SC) the Philippines, https://www.lawphil.net/courts/supreme/am/am_09-6-8-sc_2010.html

⁹ See the laws of the states of Rhode Island, California, Washington D.C., Vermont, Indiana, Connecticut, Illinois, Kansas, Louisiana, Maine, Maryland, Oregon and Texas. Details can be found in the Appendix

Therefore in order to facilitate the selection of SLAPPs case studies, this report defines SLAPPs as **lawsuits that threaten the exercise of constitutional rights in relation to public concerns or actions in support of the exercise of constitutional rights in relation to public concerns.**

In general, however, SLAPPs litigants do not state their intentions outright, but will hide the true public nature of the cases under personal and legal matters. The statements of claim or complaints typically cite some form of legal culpability, such as defamation, incitement, contempt of court, theft, trespass, or wrongful interference with property.

Therefore in order to separate SLAPPs from legitimate lawsuits that represent the bona fide exercise of legal rights, a basic set of considerations can be used.¹⁰ Is the action in question protected by the constitution? Is the accused a member of a group of people who are active in political and public

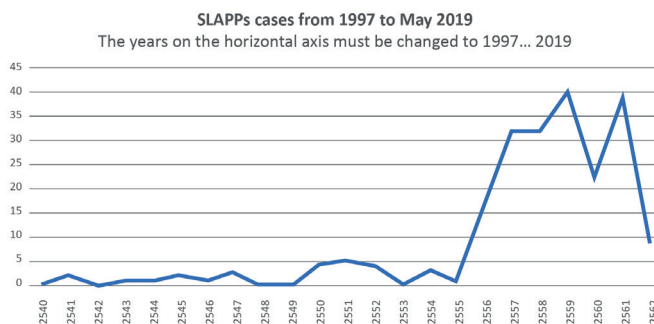
participation? Have efforts been made to exploit economic advantage or state authority to pressure the accused? Does the plaintiff have a history of using litigation to threaten critics or activists? Is the amount of the claim unusually high and disproportionate to the actual damage? Has the plaintiff provided authentic evidence that the accused actually participated in committing the offence? Has the plaintiff had tried to prolong the case as much as possible?

¹⁰ George W. Pring and Penelope Canan, SLAPPs. Getting sued for speaking out, page 150 – 151 and Protect the Protest, <https://www.protecttheprotest.org/category/resource-categories/what-is-slapp/>

Chapter 2

The SLAPPs situation in Thailand

From investigation and the compilation of data from different sources, it is found that from 1997 to the present (31 May 2019), there have been 212 cases that qualify as SLAPPs. If we count only 2013, we find a significantly greater number of SLAPPs cases than in previous years. This results from many cases that a gold mining company brought against a villager group that opposed their activities. Since then, after the coup d'état on 22 May 2014, the military junta used the law as an important tool to block the exercise of the right to freedom of expression of the people. The result of this was that after 2014, cases that qualify as SLAPPs increased in number.



Source: Human Rights Lawyers Association

However, although this report collected data beginning in 1997, this does not mean that there were no SLAPPs cases at all before that. The investigation of the data found many cases from long before that qualified as SLAPPs, such as cases where the police sued the editors of newspapers that carried news of police officers accepting bribes, with the claim that the reputation of the police was damaged. Such cases occurred during the reign of Rama 6¹¹ (1910-1925).

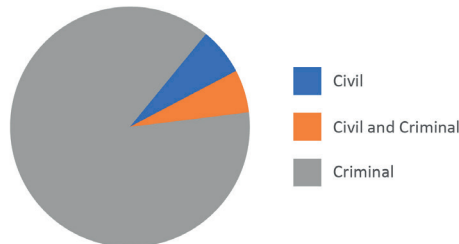
Earlier SLAPPs were found to arise from state activities, especially during authoritarian regimes. For example, the government of Field Marshal Sarit Thanarat used the Anti- Communist Law as a tool to deal with politicians, former ministers, newspaper reporters and writers, lawyers, teachers, students, intellectuals

¹¹ Saichol Sattayanurak, Final Research Report, Research Project to Construct New Knowledge of Thai Social History, supported by the Thailand Research Fund (TRF), 2017, p 718 [in Thai].

and labour union leaders.¹² There is information that after the promulgation of the Anti-Communist Act of 1952, 190 people were arrested on this charge.¹³ And in the period after the October 6 1976 incident, legal proceedings were taken against a large number of students and members of the public; no less than 3,094 were arrested¹⁴ and a total of 106 were the subject of litigation on various charges including the Anti-Communist Act, rebellion, illegal assembly of 10 or more people, conspiracy to assemble in groups of 5 or more people and criminal association.¹⁵

After the 1997 Constitution was promulgated, a way was opened enabling the people to have greater participation in politics. Many rights were guaranteed. When the people became aware of this and started to participate in development projects which would have a greater effect on their communities or society, this often became an obstacle to the operations of private companies or state agencies. This resulted in threats and litigation against the people to come to participate. There was an interesting case in 1998 which was a result of a network of 30 anti-corruption organizations who were working on corruption concerning medicines at that time. They used the right of the people under the 1997 Constitution to collect signatures to recall political office holders. There were many other movements in different forms, such as submitting open letters to the relevant agencies. The result was that the core members of the network were sued by the Permanent Secretary of the Ministry of Public Health for defamation.¹⁶

Overview of SLAPPs cases collected
from 1997 to 31 May 2019



Of the total 212 cases, it was found that 9 were civil, 7 were civil and criminal and 196 were criminal.

¹² Kritsana Sophi, Communist Suppression in the era of Field Marshal Sarit Thanarat 1958-1963, Art and Culture, https://www.silpa-mag.com/club/art-and-culture/article_7717 accessed 10 September 2018 [iThai].

¹³ Saichol Sattayanurak, op. cit. p 793, quoted in Kasian Tejapira, *Commodifying Marxism : The Formation of Modern Thai Radical Culture, 1927-1958*, p.130 [in Thai].

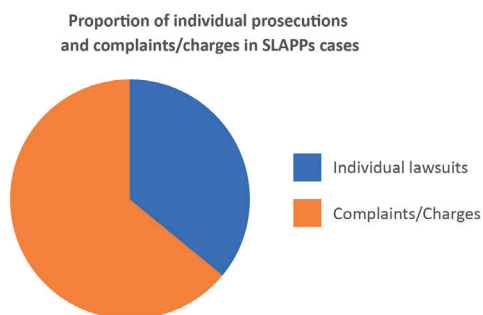
¹⁴ Documentation of Oct 6 website https://doct6.com/archives/2205#_ftn12 ๓๖๖๖๖๖ quoted in Suthachai Yimprasert, *Historical Flow of Thai Democracy*, Bangkok: P Press, 2008, p 165 [in Thai].

¹⁵ Documentation of Oct 6 website <https://doct6.com/archives/2205> [in Thai].

¹⁶ Nualnoi Treerat and Chaiyos Jiraprerkpinyo, *Social Movements and Opposition to Corruption: Case Study of Corruption in the Purchase of Medicines and Medical Supplies by the Ministry of Public Health*, p 26, in Pasuk Phongpaichit et al., *Stand Up and Fight: Contemporary People's Movements*, Thailand Research Fund (TRF), 2000 [in Thai].

Plaintiffs

The Code of Criminal Procedure specifies that cases can enter the judicial process through 2 channels: the public prosecutor and the injured party.¹⁷ The data shows that in Thailand SLAPPs cases are brought both by prosecutors and as a result of suits by the injured parties themselves. Of the 212 cases collected, it is found that 59 were brought to court by the injured parties and 153 were brought by complaints or charges by investigation officers.



Of the 59 cases brought by individual prosecutions, 9 are civil cases, all brought by private companies, and 7 are civil and criminal cases, mostly brought by private companies and one brought by a state official. Of the remaining 43 criminal cases, most were brought by private companies followed by individuals in various positions such as government officials, executives of state enterprises, doctors, etc. 2 such cases were brought by state agencies, i.e. the cases brought by the Ministry of Energy against energy reform activists¹⁸ and by the Office of The National Broadcasting and Telecommunications Commission (NBTC) against academics and the media¹⁹ and 2 cases were brought by a state enterprise, i.e. 2 prosecutions by the PTT pcl against energy activists.²⁰

Regarding the 153 cases where complaints or charges were brought by investigation officers, most were litigated in the form of proceedings where the state was the injured party, especially in charges

¹⁷ See Code of Criminal Procedure, Article 28.

¹⁸ Freedom of Expression Documentation Center, iLaw <https://freedom.ilaw.or.th/case/629> accessed 7 January 2019 [in Thai].

¹⁹ Freedom of Expression Documentation Center, iLaw <https://freedom.ilaw.or.th/case/488> accessed 7 January 2019 [in Thai].

²⁰ Freedom of Expression Documentation Center, iLaw <https://freedom.ilaw.or.th/case/607> and <https://mgronline.com/online/section/detail/9580000137306> accessed 7 January 2019 [in Thai].

made by the NCPO for offences related to NCPO Head Order No. 3/2558 and Article 116 of the Criminal Code and charges made by the Technology Crime Suppression Division (TCSD) for offences related to the Computer Crime Act. There are also 14 complaints and charges by other state agencies such as the Royal Thai Navy, military agencies, Internal Security Operations Command Region 4 Forward Command, the Department of Special Investigation, the Office of the Election Commission of Thailand, etc. Private companies have brought only 11 complaints; some cases are criminal complaints but plaintiffs eventually bring lawsuits themselves such as the case of the gold mining company.²¹

Persons at Risk of being a Target for Lawsuits

Most of those who become targets of lawsuits are political activists (27.06%), most of whom were sued after the military coup d'état on 22 May 2014. The next biggest group are communities or people who mobilize to oppose development projects affecting those communities (22.93%), with both leaders and members of the groups or communities being sued. Some groups or communities have been repeatedly sued in many cases. For example, the Rak Ban Koet group in Loei Province opposing a gold mine have been sued by the gold mine company in 20 cases.²² The remaining targets are human rights defenders/NGO workers (in women's rights, labour, anti-corruption, energy, the environment, and ethnic minorities (15.59%); people interested in politics representing groups interested in and participating in political activities but not at the level of leaders (11.92%); media (8.25%); others (temple spokesperson, lawyer, page admin) (5.50%); victims of violations or family members calling for justice (5.04%); academics/university teachers (3.66%). Many of those sued may fall into more than one category but the above classification is in line with the primary affiliation or role that was the cause of the lawsuits.

Actions at Risk of Lawsuits

The action that became a target for lawsuits the most was disseminating information or expressing ideas through online channels (25.47%), followed by public rallies (15.09%), organizing symbolic events (parodies, music, plays, stickers, marches, etc.) (12.73%), writing appeals against agencies (5.66%), disseminating news or articles in online news sources (3.77%), distributing documents (3.77%), reporting news or statements (3.30%), entering project areas to make inspections (3.30%), supporting the organization of activities (handing out flowers for moral support, providing accommodation, legal assistance, observing activities, etc.) (2.83%), carrying out mass media responsibilities (2.35%), other activities (bringing evidence to show to officials or the public, not completing a meeting agenda) (1.88%), speaking in a seminar (1.41%), and publishing research results or rights violations (0.94%).

²¹ Freedom of Expression Documentation Center, iLaw <https://freedom.ilaw.or.th/case/694> accessed 7 January 2019 [in Thai].

²² The case of the Loei mine vs. Ban Rak Koet group, Citizen Reporter <https://www.citizenhaijps.net/node/5529> [in Thai].

Issues that are at risk of lawsuits

The issues that are prosecuted the most are those related to administration (legitimacy of the government, elections, the constitution and legislation) (39.13%), followed by environmental and development issues (mining, industrial factories, power plants) (32.07%), the conduct of state officials, the judicial process, and court verdicts (12.26%), corruption (5.66%), labour issues (5.18%), public health and medical issues (2.35%), energy issues (2.35%) and other issues (0.94%).

Laws used in litigation

In talking of SLAPPs, many people may think of defamation cases, but in reality, many other legal charges are used in litigation. It is certain that most are laws that carry criminal penalties. From the information on 212 cases, it is found that legal charges are divided between normal criminal law cases, special criminal law cases and civil cases in the order of most cases to least.

1. Criminal Cases (Normal Laws)

1.1 Defamation charges under Articles 326 and 328 of the Criminal Code are the most used (26.23%) both by individuals and state agencies. Among these cases are single defamation charges, charges brought jointly under civil defamation and many cases when charges are also brought under Article 14 under the 2007 Computer Crime Act in force at that time. If it is a case where there is the expression of opinion or dissemination of information through online channels, defamation charges will be used together with Article 14 (1) of the 2007 Computer Crime Act. But since an amended version of the Computer Crime Act was passed in 2017, which revised Article 14 (1), the tendency to use defamation charges together with Article 14 (1) declined.

1.2 Charges under the 2007 Computer Crime Act (25.41%). Offences under the 2007 Computer Crime Act, especially Article 14,²³ are generally charged in the case of expressions of opinion through online channels and in tandem with other laws. There are 2 dimensions to this. One is the security dimension, especially criticism of the government. Article 14 (2) and (3) is used together with Article 116 of the Criminal Code. The other dimension concerns cases that affect personal reputation, such as criticism of state agencies or officials or private companies. Article 14 (1) will be used together with charges of defamation through publication under Article 328 of the Criminal Code. But at present the use of Article 14 (1) together with defamation charges is declining because the 2017 Computer Crime Act (No. 2) has amended Article 14 (1) so that it cannot be used with offences based on defamation under the Criminal Code. However at present, plaintiffs tend to turn more to Article 14 (2) with those who express opinions online.²⁴

²³ Further amended in the 2017 Computer Crime Act (No. 2)

²⁴ Please see the case of criticism by the leadership of the Pheu Thai Party of the National Strategy, Freedom of Expression Documentation Center, iLaw <https://freedom.ilaw.or.th/case/805>, together with the case of Pravit Rojanaphruk who posted on Facebook questions for Gen Prayut and criticized the activities of the government; the case of the spokesperson for the Pheu Thai Party who posted on Facebook criticisms of the NCPO; the case of Charnvit Kasetsiri, who shared an image and message about the handbag of the wife of the head of the NCPO,

1.3 Charges related to security and public order (15.57%). For example, charges under Articles 116, 215 and 216 of the Criminal Code together with Article 112.

Article 116 of the Criminal Code, where violations are referred to as ‘sedition offences’, has been used to prosecute people exercising freedom of expression of opinion. If the opinions are expressed online, the charge will be coupled with an offence under Article 14 (2) and (3) of the Computer Crime Act.

After the NCPO staged the coup d’état, the number of allegations and indictments under Article 116 have increased significantly. According to data gathered by iLaw (as of May 2019), 117 people have been indicted under this Act.²⁵ Thai Lawyers for Human Rights have identified 14 cases involving criticism of government office holders, including, for example, the issue of corruption in the construction of Rajabhakti Park.²⁶ The majority are the targets are political activists and politicians opposing the NCPO. It was found that this Article has been applied to activities that were not large-scale assemblies,²⁷ as well as to the expression of opinion unconnected to any rallies, particularly opinions posted on Facebook critical of the government,²⁸ and those with a negative impact on government officials or agencies.²⁹

Offences against public order under Articles 215 and 216 of the Criminal Code (unlawful gatherings causing public disorder) are charges that have been filed against the exercise of freedom of assembly from the past until the present, such as the protest against the Thai-Malaysian gas pipeline or the rally of Triumph workers demanding progress in solving the problem of unfair dismissal.³⁰

Article 112 of the Criminal Code, or the offence of defaming, insulting or threatening the King, the Queen, the Heir Apparent or the Regent, has been much criticised for being exploited as a tool to silence the opposition or activists who mobilize against those holding state power. This has included academic discussions of the institute of the monarchy, such as the case of Jatupat or Pai Dao Din for sharing a BBC Thai article on the biography of King Rama X, Sulak Sivaraksa discussing the history of the reign of King Naresuan, and Somsak Jeamteerasakul writing an open letter on Facebook criticising a television interview of a member of the royal family.³³

Prachatai <https://prachatai.com/journal/2018/01/75203>; the case of the Facebook post of the Future First Party on Giving Friday Back to the People, about pulling in MPs.

²⁵ Freedom of Expression Documentation Center, iLaw, <https://freedom.ilaw.or.th/node/209> accessed 4 January 2019 [in Thai].

²⁶ Thai Lawyers for Human Rights <https://www.thr2014.com/?p=11636> [in Thai]

²⁷ See the case of the Citizens’ March, Freedom of Expression Documentation Center, iLaw, <https://freedom.ilaw.or.th/case/662> and <https://freedom.ilaw.or.th/case/692> accessed 4 May 2019 [in Thai].

²⁸ See the case of Chaturon Chaisang, Freedom of Expression Documentation Center, iLaw, <https://freedom.ilaw.or.th/case/600> accessed 7 January 2019 [in Thai].

²⁹ See the case of the Dhammakaya Monks, Freedom of Expression Documentation Center, iLaw, <https://freedom.ilaw.or.th/case/780> and <https://freedom.ilaw.or.th/case/771> accessed 7 January 2019 [in Thai].

³⁰ Freedom of Expression Documentation Center, iLaw, <https://freedom.ilaw.or.th/case/376> accessed 4 January 2019 [in Thai].

³¹ Freedom of Expression Documentation Center, iLaw, <https://freedom.ilaw.or.th/case/756> accessed 7 January 2019 [in Thai].

³² Freedom of Expression Documentation Center, iLaw, <https://freedom.ilaw.or.th/case/806> accessed 7 January 2019 [in Thai].

³³ Freedom of Expression Documentation Center, iLaw, <https://freedom.ilaw.or.th/case/141> accessed 7 January 2019 [in Thai].

1.4 Offences under the 2015 Public Assembly Act (9.43%), a law which was passed after the NCPO coup. Since the law came into effect in August 2015, no fewer than 218 people have been prosecuted for exercising the freedom of assembly addressing various public issues including those dealing with the environment, livelihoods, politics etc. (Data as of 20 November 2018.)³⁴

Those exercising freedom of assembly risk, apart from prosecution under the 2015 Public Assembly Act, being prosecuted for other charges such as offences under Article 309 of the Criminal Code (coercion by means of the threat or the use of force), which has often occurred lately, under Articles 215 and 216 of the Criminal Code (unlawful gatherings disrupting public order), under Articles 135 and 140 of the Criminal Code (resisting or obstructing officials), under the 1979 Land Transport Act, and under the 1992 Highway Act, such as in the case of the protest against the Thai-Malaysian gas pipeline in 2002, and the case of the March for Thepha to submit a petition to the Prime Minister in 2017. During the period when NCPO Head Order No. 3/2558 was in force, the Public Assembly Act was also used in tandem with it.

1.5 Offences relating to property (7.37%) comprise those under Article 334 (theft), Article 352 (embezzlement), Articles 358 and 360 (causing damage to property) and Articles 362, 364 and 365 (trespassing) of the Criminal Code. Trespassing was the most prevalent among the charges and is usually accompanied by charges of property damage, particularly in cases involving demonstrations or activities that involve entering the property of an opponent or the project implementation site of a private company,³⁸ including the premises of government agencies.³⁹

1.6 Charges related to public administration and the judicial process (5.73%) comprise those under Article 137 (false report), Articles 172 and 173 (false report involving criminal offences) and Article 198 (defaming a court or judge) of the Criminal Code, together with the offence of contempt of court which is specified in Articles 30 and 31 of the Criminal Procedure Code. The charges involving Article 137 (false report) and Article 172 (false report involving criminal offences) were found in cases concerning the exercise of the right to petition public agencies such as the case of 14 migrant workers who submitted a petition to the National Human Rights Commission about labour rights violations by a private company

³⁴ Freedom of Expression Documentation Center, iLaw, <https://ilaw.or.th/node/5030> accessed 7 January 2019 [in Thai].

³⁵ See the case of the Rak Ban Koet Group of Loei Province, Freedom of Expression Documentation Center, iLaw, <https://freedom.ilaw.or.th/case/797>; TPBS Citizen Reporter <https://www.citizenthaipbs.net/node/9806>; Thai Lawyers for Human Rights <https://www.tlhr2014.com/?p=6877> and the case of the rally of the Rak Wanon Niwat Group, Sakon Nakhon Province, Human Rights Lawyers Association, <http://thai-anti-slapp.com/article/article/> accessed 7 January 2019 [in Thai].

³⁶ Enlaw Foundation, https://enlawfoundation.org/newweb/wp-content/uploads/decision_appealcourt_chumnum1.pdf accessed 7 January 2019; Prachatai <https://prachatai.com/journal/2015/10/62065> accessed 7 January 2019 [in Thai].

³⁷ Human Rights Lawyers Association <http://naksit.net/2018/08/article-4/> accessed 7 January 2019, and TPBS Citizen Reporter <https://www.citizenthaipbs.net/node/25194> accessed 7 January 2019 [in Thai].

³⁸ See the case of the Mueang Loei Mine by TPBS Citizen Reporter <https://www.citizenthaipbs.net/node/5529> accessed 7 January 2019 and Thai Publica <https://thaipublica.org/2014/02/phu-thap-fah-hit-cyanide-6/> and <https://thaipublica.org/2014/01/phu-thap-fah-hit-cyanide-5/> [in Thai].

³⁹ See the case of the rally climbing the fence of parliament, op. cit.

resulting in the employer filing charges against them of defamation and making a false report to officers. The court later dismissed the case giving the opinion that the defendants' action was legitimate.⁴⁰

Offences related to the judicial process comprise Article 198 (contempt of court) and the offence of violating court authority which is specified in Articles 30 and 31 of the Criminal Procedure Code. Both charges have been used against people who express their opinions in a context where judicial agencies are questioned about how they execute their duty. Since the 2014 coup, contempt of court charges have been used to prosecute politicians and activists who expressed criticism of the role of the judiciary, such as the case of human rights lawyer Anon Nampha, charged for criticising the verdict of Khon Kaen Provincial Court on Facebook, and the more recent case of the Secretary-General of the Future Forward Party, Piyabutr Saengkanokkul, who criticized the involvement of the Constitutional Court in adjudicating a political dispute.⁴¹

The charge of violating court authority has been used to accuse and prosecute activists or academics who have questioned the role of the courts in the era of the NCPO Administration, such as the case of the 7 students who conducted a symbolic protest activity outside court premises.⁴²

1.7 Offences relating to the person and freedom (2.45%) have often been used in the case of those exercising freedom of assembly. The offences relating to life and person under Articles 295 and 296 of the Criminal Code were filed in the case of the Thai-Malaysia gas pipeline protest, which was dismissed by all the courts, including the Court of First Instance, the Appeal Court and the Supreme Court, citing the peaceful nature of the demonstrations in accordance with the Constitution. Similarly, the court also dismissed the case against the March for Thepha. There has been increasing use of offences against freedom under Articles 309 and 310 of the Criminal Code (coercion through threat or use of force) against demonstrators during the same period.

2. Criminal Cases (Special Laws)

These are offences specified for a period of time such as NCPO Announcement No. 7/2557 and NCPO Head Order No. 3/2558 Clause 12, and the Draft Constitution Public Referendum Act, or issued by the National Council for Peace and Order (NCPO) in order to restrict the people's freedoms of assembly and expression. These

⁴⁰ Freedom of Expression Documentation Center, iLaw, <https://freedom.ilaw.or.th/case/821> accessed 7 January 2019 [in Thai].

⁴¹ Thai Lawyers for Human Rights <https://www.tlhr2014.com/?p=11904> accessed 20 January 2019 [in Thai].

⁴² Freedom of Expression Documentation Center, iLaw, <https://www.tlhr2014.com/?p=10427> accessed 20 January 2019 [in Thai].

Announcements and Orders were broadly enforced to create a burden for and intimidate activists demonstrating against the government or the NCPO, or carrying out activities that undermined NCPO policies. NCPO Head Order No. 3/2558 contained mechanisms that forced suspects to agreeing to join training and accept the condition of ceasing their activities in return for not being prosecuted in court, especially in Military Courts, which are less likely to be located near the locality of the accused. Clear examples are the cases of the Centres to Suppress Referendum Cheating where lawsuits were brought under NCPO Head Order No. 3/2558 against villagers in many provinces. A number of those charged with violating NCPO Head Order No. 3/2558 confessed and accepted the conditions of participating in training and signing agreements not to be involved in any future political activities in return for the termination of their cases in order to avoid the burden of cost, long distance travel and time away from their livelihoods.⁴³

3. Civil Cases

From the 212 cases compiled, there were only 16 civil lawsuits, or 7.54% of the total. 9 were defamation cases (Article 423 of the Civil and Commercial Code) and 7 were tort cases (Article 420 of the Civil and Commercial Code). Civil defamation/libel lawsuits based on Article 423 of the Civil and Commercial Code have been filed against villagers and human rights defenders, with damage claims as high as 360 million baht in some cases. Examples include the case of a private energy company suing alternative energy activists for criticising the energy policy and high level bureaucrats of the Ministry of Energy in a public forum,⁴⁴ the case of a private company suing Andy Hall, researcher and human rights activist, for disseminating a report on the company's labour rights violations,⁴⁵ and the case of the Rak Ban Koet Group of villagers in Loei Province been sued by the mining company in their efforts to oppose a gold mining in their area, with claims totalling 320 million baht.⁴⁶

Forms of Imposing Burdens

SLAPP cases impose burdens and difficulties on the accused particularly in criminal cases that infringe on their rights and freedoms. The defendants in criminal cases face pressure and fear is also created by the strict and complicated procedures in criminal cases. Defendants have to travel to report to investigating officers and prosecutors on appointed dates, generally once a month. Every postponement in the steps of the procedure will aggravate the burden on the accused, particularly if they have to travel long distances to the office of the prosecutor in charge.

⁴³ Freedom of Expression Documentation Center, iLaw, <https://www.tlhr2014.com/?p=3642> accessed 7 January 2019 [in Thai].

⁴⁴ Freedom of Expression Documentation Center, iLaw, <https://freedom.ilaw.or.th/case/15> accessed 7 January 2019 [in Thai].

⁴⁵ Freedom of Expression Documentation Center, iLaw, <https://freedom.ilaw.or.th/case/469> accessed 7 January 2019 [in Thai].

⁴⁶ Citizen Reporter TPBS <https://www.citizenthaipbs.net/node/5529> accessed 7 January 2019 [in Thai].

SLAPP cases often arise under unequal circumstances with regard to power and resources between the accuser and the accused. Private companies have more resources and state agencies have more power and supporting mechanisms and resources than the majority of defendants, who are activists or rural villagers who normally lack resources to fight their cases. In many cases, they rely on NGOs or legal aid organisations to assist them pro bono. Even with legal aid, there are other costs that they have to bear. For example, in the case of the March for Thepha, most of the defendants were fishers whose livelihoods depend on going out daily on the boats to fish. The need to go to court often meant loss of income and for some, loss of employment, while their travel and meal expenses increased.⁴⁷

Consequently, when faced with SLAPP cases, particularly criminal cases, defendants are at a disadvantage and that the pressure, so much so that they sometimes choose to confess in order to relieve the burden. It was found that many cases ended with confessions for this reason. In such cases, the court case ended with suspended sentences often with conditions of probation. During the period of the suspended sentence, the defendants are prohibited from any further public activity, or if they wish, they have to take special care as in the case of the anti-gold mine group in Phichit Province.⁴⁸

The pressure on defendants in civil cases is no less than in criminal cases. The possibility of having to pay millions of baht in compensation can cause as much fear as in criminal cases. A young defendant in Wanon Niwat District, Sakon Nakhon Province, who faced a 20 million baht defamation claim by a potash exploration company, finally agreed to accept settlement conditions of an apology and silence in order to end the case.⁴⁹ From the total number of case studies, it is found that SLAPP charges have created burdens in the following ways.

⁴⁷ Informal interview with nine defendants on 19 September 2018 at Songkhla Provincial Court.

⁴⁸ Freedom of Expression Documentation Center, iLaw, <https://freedom.ilaw.or.th/case/782> accessed 7 January 2019, and Thai Lawyers for Human Rights <https://www.tlhr2014.com/?p=5152> accessed 7 January 2019 [in Thai].

⁴⁹ Human Rights Lawyers Association <http://thai-anti-slapp.com/article/article/> accessed 7 January 2019 [in Thai].

1. Use of the method of filing complaints and lawsuits in the jurisdiction of courts far from the homes of the defendants

Article 22 of the Criminal Procedure Code requires a case to be processed in the jurisdiction of the court where the offence is alleged or believed to have occurred, or in the jurisdiction where the defendant resides or was arrested, or if officers investigate the case in an area outside the jurisdiction of such court, the case can also be prosecuted in the court for that jurisdiction. The problem lies with offences that occur online or on television. It has been interpreted that such an offence occurs wherever the defaming message appears. If the message is found in any one jurisdiction, a complaint or lawsuit can be filed in that jurisdiction. Thus the phenomenon occurs of complaints or lawsuits being filed far away from where the defendant lives. For example, the case of a gold mining company vs the Ban Rak Koet Group of Loei Province was filed in Phuket Provincial Court and Mae Sot Provincial Court,⁵⁰ while the report against the Ban Rak Koet Youth Group was filed in Bangkok,⁵¹ and the Office of the Judiciary reported to Phahonyothin Police Station in Bangkok to file charges against two people in Chiang Mai. All three cases involved plaintiffs filing charges in jurisdictions distant from the domicile of the defendants, imposing on them the burden of travel to answer the charges, particularly in criminal cases in which there are more strict procedures to follow involving monthly appointments with investigating officers and prosecutors, requiring higher costs and more time.

2. Filing multiple cases over a single incident

In the case of the March for Thepha in which the Songkhla and Pattani Communities Network opposing coal-fired power plants marched together on foot to submit a petition to the Prime Minister but were dispersed by state officials, 17 villagers were prosecuted under several charges. After court witness hearings were completed and the case was awaiting the verdict, officials pressed further charges on fight villagers in another case over the same incident, with three of the defendants in the second case being defendants in the first case.

⁵⁰ Freedom of Expression Documentation Center, iLaw, <https://freedom.ilaw.or.th/case/631> accessed 7 January 2019 [in Thai].

⁵¹ Freedom of Expression Documentation Center, iLaw, <https://freedom.ilaw.or.th/case/706> accessed 7 January 2019 [in Thai].

In another interesting case, after the general election in March 2019 revealed the rising popularity of the Future Forward Party with a clear position of promoting democracy, a rally of the New Democracy Movement in June 2015 against the NCPO coup was used as the grounds for prosecuting Thanathorn Juangroongruangkit, leader of the Future Forward Party, and other students and ex-activists in the movement, totalling 15 people, on a charge of sedition under Article 116 of the Criminal Code.⁵²

3. Spreading fear by prosecuting supporters on serious charges. There were a number of cases in which people who were not directly involved in an activity were also charged with offences. In the case of the New Democracy Movement, for example, the owner of the place where the activists stayed while organizing their activity and the lawyer providing legal aid were also charged with offences under Article 116 of the Criminal Code.⁵³ Also in the case of the 2015 march of the Resistant Citizens group to demand that civilians not be tried in military courts, or people who came to present flowers to the defendants⁵⁴ for moral support were also charged with offences under Article 116. In the case of the seminar on ‘Speaking for freedom, the draft constitution and the Isan people’, an observer from Thai Lawyers for Human Rights was also charged.⁵⁵

4. Charging a large number. In many cases, it seems that the number of defendants had to be as great as possible to instil fear, particularly those involving political activities. Lately it has been found that apart from the leaders, a large number of participants have also been charged. Examples include the Group of People Who Want Elections, who organized many rallies in Bangkok and other provinces in 2018, for example in front of the Bangkok Art and Culture Centre,⁵⁶ on Ratchadamnoen Avenue,⁵⁷ in front of the Royal Thai Army Headquarters,⁵⁸ and in front of Thammasat University and the UN Building.⁵⁹ The large number of people prosecuted in these cases would have a deterrent effect on people wishing to exercise their rights and freedoms.

⁵² Thai Lawyers for Human Rights <https://www.tlhr2014.com/?p=12429> accessed 7 January 2019 [in Thai].

⁵³ Thai Lawyers for Human Rights <https://www.tlhr2014.com/?p=12429> accessed 7 January 2019 [in Thai].

⁵⁴ Freedom of Expression Documentation Center, iLaw, <https://freedom.ilaw.or.th/case/662> and <https://freedom.ilaw.or.th/case/692> accessed 4 January 2019 [in Thai].

⁵⁵ Freedom of Expression Documentation Center, iLaw, <https://freedom.ilaw.or.th/case/662> and <https://freedom.ilaw.or.th/case/692> accessed 4 January 2019 [in Thai].

⁵⁶ Freedom of Expression Documentation Center, iLaw, <https://freedom.ilaw.or.th/case/738> accessed 4 January 2019 [in Thai].

⁵⁷ Freedom of Expression Documentation Center, iLaw, <https://freedom.ilaw.or.th/case/817> accessed 4 January 2019, <https://freedom.ilaw.or.th/case/815> accessed 4 January 2019 and Thai Lawyers for Human Rights <https://www.tlhr2014.com/?p=9412> accessed 4 January 2019 [in Thai].

⁵⁸ Freedom of Expression Documentation Center, iLaw, <https://freedom.ilaw.or.th/case/822> accessed 4 January 2019 and Thai Lawyers for Human Rights <https://www.tlhr2014.com/?p=8945> accessed 4 January 2019 [in Thai].

⁵⁹ Freedom of Expression Documentation Center, iLaw, <https://freedom.ilaw.or.th/case/828> accessed 4 January 2019 and <https://freedom.ilaw.or.th/case/830> accessed 4 January 2019 and Thai Lawyers for Human Rights <https://www.tlhr2014.com/?p=9944> accessed 4 January 2019 [in Thai].

5. Criminal justice procedures exacerbate the situation of those prosecuted

5.1 Access to provisional release. The amount of bail determined by the courts for provisional release of the accused or defendants is high for offences that are considered serious. For offences under Article 116, bail could be hundreds of thousands of baht. In the case of Bo Ko Laijut, who posted an anticoup message in violation of an NCPO order, the court granted bail to the amount of 600,000 baht⁶⁰ and persons giving flowers to the group of Marching Citizens, who were charged with offences under Article 116 and violation of NCPO Order No. 7/2557, had to post bail of 150,000 baht set by the Bangkok Military Court.⁶¹

In cases other than those concerning political activism, such as defamation, if the plaintiff is a private company, no bail is needed for provisional release. But if the defamation charge is accompanied by offences under Article 14 of the Computer Crime Act, security may be required, as in the case of Andy Hall for publishing a report on labour rights violations, whose bail was set at 300,000 baht,⁶² the case of an ethnic Lahu activist accused of disseminating a video clip defaming the military whose bail was set at 50,000 baht in cash,⁶³ the lawsuit brought by a gold mine in Phichit Province against environmental activists whose bail was set at 100,000 baht each,⁶⁴ and the lawsuit brought by the Medical Council against Preeyanant Lorsermwatthana in which a bail application was made with 150,000 baht security.⁶⁵

The bail security requirement is a key obstacle to access to justice. The accused who are not well off will face difficulty in posting bail to secure their temporary release. The amount of bail set by the court in the case of the March for Thepha was 90,000 baht for each of the 15 accused, totalling 1,350,000 baht. Since they were not able to produce the money readily, they had to spend one night in jail before a lawyer filed another application for provisional release with university government officials standing as guarantors, instead of cash security.⁶⁶

⁶⁰ Freedom of Expression Documentation Center, iLaw, <https://freedom.ilaw.or.th/case/604> accessed 4 January 2019 [in Thai].

⁶¹ Freedom of Expression Documentation Center, iLaw, <https://freedom.ilaw.or.th/case/692> accessed 7 January 2019 [in Thai].

⁶² Freedom of Expression Documentation Center, iLaw, <https://freedom.ilaw.or.th/case/469> accessed 7 January 2019 [in Thai].

⁶³ Freedom of Expression Documentation Center, iLaw, <https://freedom.ilaw.or.th/case/669> accessed 7 January 2019 [in Thai].

⁶⁴ Freedom of Expression Documentation Center, iLaw, <https://freedom.ilaw.or.th/case/744> accessed 7 January 2019 [in Thai].

⁶⁵ Freedom of Expression Documentation Center, iLaw, <https://freedom.ilaw.or.th/case/804> accessed 7 January 2019 [in Thai].

⁶⁶ Interviews with lawyers in the Southern Region Network of Human Rights Lawyers, 3 September 2018.

5.2 Obstacles to accessing the Justice Fund. The Justice Fund was established by the government for the purpose of providing assistance to poor people involved in litigation and to protect people's rights and liberties in an inclusive, equal and fair manner. In practice the Justice Fund Committee rejected an application for bail money from the defendants in the Phuketwan case, giving as reasons that the prosecutor had recommended the indictment to the court and the accused were mass media professionals who had published information damaging to the reputation of the Royal Thai Navy and the application was therefore deemed not compliant with Justice Fund regulations. In another case, the leader of the Pak Mun Dam chapter of the Assembly of the Poor, who was sued for defamation by the Provincial Governor for expressing his opinion online about the opening and closing schedule of the dam, repeatedly applied for assistance from the Justice Fund, but his applications were rejected by the Provincial Assistance Subcommittee chaired by the Governor.⁶⁷

⁶⁷ Information from a fact-finding inquiry by the Human Rights Lawyers Association.

Chapter 3

Principles and approaches and dealing with SLAPPs and related human rights law

SLAPP cases constitute a threat to the right to freedom of expression of opinion and freedom of peaceful assembly, which are fundamental human rights enshrined in Articles 19, 21 and 22 of the International Covenant on Civil and Political Rights (ICCPR)⁶⁸ and Sections 34, 42 and 44 of the 2017 Constitution of the Kingdom of Thailand, including the right to petition, and community rights enshrined in Sections 41 and 43 of the 2017 Constitution of the Kingdom of Thailand.

Freedom of expression is considered an essential foundation for a free and democratic society and a key factor in the realization of good public administration principles that result in the promotion and protection of human rights.⁶⁹

Although limits can be imposed on the freedom of expression, these must not be the arbitrary exercise of state authority by those in power, but only as a necessary last resort provided by the law regarding due respect of the rights and reputations of others and the maintenance of national security, public order, public health or morals. The laws that limit freedom of expression ‘must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly’, must be able to prove the restriction of rights is necessary and legitimate and that the measure is the least restrictive and proportionate to the purpose, must not have a harmful effect in prohibiting the expression of opinion, and must be in accordance with the principles of necessity and proportionality.⁷⁰

With regard to freedom of assembly, while restrictions are permissible, they can be implemented only as far as is stipulated by law and necessary for a democratic society, for the sake of national security, public order, public health or morals, or in the protection of the rights and freedoms of others. However, these conditions can not be used to support any ambiguous or arbitrary measures and can only be cited when sufficient safeguarding and effective remedial measures are in place to prevent the abuse of power.⁷¹

⁶⁸ Thailand became a state party by ratification on 29 October 1996 with entry into force on 29 January 1997.

⁶⁹ Human Rights Committee, International Covenant on Civil and Political Rights, General Comment No.34, 12 September 2011, para. 2

⁷⁰ Human Rights Committee, International Covenant on Civil and Political Rights, General Comment No.34, 12 September 2011, paras. 30-36.

⁷¹ United Nations, Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, U.N. Doc.E/CN.4/1985/4, Annex (1985), Article I (B).

The Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms affirms ‘Everyone has the right, individually and in association with others, to have effective access, on a non-discriminatory basis, to participation in the government of his or her country and in the conduct of public affairs’. This includes the right to submit criticisms to government bodies and agencies for the purpose of improving their public work, including pointing out any of this work that may obstruct or curtail the promotion or protection of fundamental human rights and freedoms. The Declaration also affirms the rights of individuals or groups ‘to participate in peaceful activities against violations of human rights and fundamental freedoms’ and the duty of the state to take all necessary measures to ensure that they are protected ‘against any violence, threats, retaliation, de facto or de jure adverse discrimination, pressure or any other arbitrary action as a consequence’ of their activities.⁷²

However, in order to ensure a balance between the promotion and protection of the constitutional right of individuals to public participation and the protection of the rights of the litigants who in good faith seek remedies for damage, human rights principles taken into consideration in the issue of opposing SLAPPs have to be considered from the perspective of both the party that is sued, which is protected on the basis of the political rights mentioned above, and of the party bringing the suit, which in the same way is protected on the basis of the right to file complaints and petitions and the right to access the courts,⁷³ and the rights to dignity, reputation and property,⁷⁴ which are all enshrined in the International Covenant on Civil and Political Rights as well as the 2017 Constitution of the Kingdom of Thailand

⁷² Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms Article 8, 12 Adopted by General Assembly resolution 53/144 of 9 December 1998.

⁷³ Articles 2 (3) and 14 of the International Covenant on Civil and Political Rights.

⁷⁴ Section 32 of 2017 Constitution of the Kingdom of Thailand and Article 17 (1) of the International Covenant on Civil and Political Rights.

Anti-SLAPPs Laws in Other Countries

Anti SLAPPs laws, often called a Citizens Participation Act or Public Speech Protection Act or Protection of Public Participation Act, were developed in the United States, Canada and Australia mostly in the context of the environment. In Europe, however, SLAPPs has not yet been recognized. Some academics are of the opinion that the difference lies in how to freedom of expression is considered in each country's constitution. While freedom of speech is almost an absolute right in the U.S. constitution, Europe refers to maintain a necessary balance between fundamental rights and other interests, such as the right to reputation which is recognized in European national and regional laws.⁷⁵ The challenge in the drafting of anti-SLAPPs laws, therefore, is to create a balance between the protection of political rights by dismissing the case, and the protection of the right to seek remedy or justice in court and of the right to reputation.

In 1989, the same year that Pring and Canan published their research report, Washington State became the first state to pass a law called "Anti-SLAPPs". Since then 32 other states and Washington, DC (District of Columbia) have passed various forms of legislation to deal with SLAPPs; in the states of Colorado and West Virginia, this is in the form of case law.⁷⁶

Details of the laws vary from state to state. Some are broad in scope while some are narrow. But the overall objective of laws opposing SLAPPs is to eliminate and terminate groundless cases that are used as tools to threaten or penalize people exercising their political rights to public participation before legal costs escalate, and to protect the accused from being forced to defend many cases at the same time, while maintaining a balance by protecting the litigants' legitimate claims for damage incurred.⁷⁷

⁷⁵ Columbia Global Freedom of Expression, <https://globalfreedomofexpression.columbia.edu/publications/slapps-5-ws-back-ground-strategic-lawsuits-public-participation/> accessed 5 December 2018.

⁷⁶ The 32 states with Anti SLAPPs laws are Nevada, California, Oregon, Washington DC, Texas, Oklahoma, Rhode Island, Indiana, Louisiana, Vermont, Illinois, Kansas, Georgia, Connecticut, Massachusetts, Florida, Hawaii, Missouri, Arkansas, Arizona, Virginia, Delaware, Nebraska, Minnesota, Maine, Tennessee, Pennsylvania, New Mexico, Utah, Maryland, New York and Washington. Source: Public Participation Project, <https://anti-slapp.org/your-states-free-speech-protection/> accessed 5 December 2018. (See list of laws in the Appendix.)

⁷⁷ George W. Pring and Penelope Canan, "SLAPPs: Getting Sued for Speaking Out" (1996), pages 201-205 and see Illinois, Nebraska, Texas, Kansas and the Philippines.

The following key criteria are specified in the content of the laws.

1) The scope of legal protection

The laws define public participation under protection in different ways. Some laws provide protection only to specific actions or persons; others provide protection for all actions undertaken in the exercise of the right to freedom of speech on all public matters. The scope of legal protection falls into three main categories: narrow, medium and broad.

A 'narrow' scope covers only certain cases as specified in the law.⁷⁸ Specifying a scope as narrow may use a method where the scope is considered in terms of acts, such as covering only acts that relate to speech and petitions, or specifying the scope in terms of public issues, or specifying the scope in terms of the time of an action, such as covering only speech that occurs during investigation proceedings or meetings.

A 'medium' scope covers participation in government procedures or communication especially with the purpose of opposing the actions, decisions or results of the government in both the legislative and executive branches. Many states also include judicial proceedings.⁸⁰

A 'broad' scope covers proceedings related to all public issues and covers proceedings in all forums. It is not restricted to communications alone, especially those with the objective of opposing the actions decisions or results of the government.⁸¹

With respect to the issue of what constitutes 'procedures or results of the government', this is likely to depend on how far the laws of each locality specify the scope. But in general, the meaning tends to include the legislative branch, the executive branch⁸² and the administrative branch. In some places, the meaning also includes procedures of the judicial branch.⁸³

2) Permission for a defendant to have a specific path to submitting a motion to dismiss the lawsuit from the beginning of case proceedings.

The laws almost everywhere specify that the accused in a case within the scope of SLAPPs can submit a motion to stop proceedings quickly (this may be called a motion to strike/a special motion to strike/motion to dismiss/a special motion to dismiss) because this is considered to be an important part of anti-SLAPPs laws.

⁷⁸ There are approximately 12 states in America with narrow specifications: Delaware, Florida, Hawaii, Missouri, Nebraska, New Mexico, New York, Oklahoma, Pennsylvania, Tennessee, Utah and Washington

⁷⁹ See the laws of Arizona available in the list of laws in the Appendix.

⁸⁰ See the laws of Arkansas and Massachusetts available in the list of laws in the Appendix.

⁸¹ See the laws of Rhode Island, California, Washington DC, Vermont, Indiana, Connecticut, Illinois, Kansas, Louisiana, Maine, Maryland, Oregon and Texas available in the list of laws in the Appendix.

⁸² See the laws of Utah and Arizona available in the list of laws in the Appendix.

⁸³ See the laws of Arkansas, Maine, Massachusetts and Rhode Island available in the list of laws in the Appendix.

In Quebec Province, Canada, it is specified that the court itself can start the procedure.⁸⁴

The laws of each locality specify different timeframes for submitting a motion: 30 days,⁸⁵ 45 days,⁸⁶ 60 days,⁸⁷ or 90 days from the date of filing the lawsuit.⁸⁸ This period of time may however be extended if the litigant who submits the motion can show sufficient cause⁸⁹ or at the discretion of the court at any time according to conditions that the court sees fit.⁹⁰

3) Specifying the need for an inquiry into urgent motions together with suspension or limitation of proceedings until the inquiry is complete

In general, motions to stop a case should be subject to an inquiry as urgently as possible.⁹¹ Some states specify a clear time frame for investigating motions, such as 30 days,⁹² 60 days,⁹³ 90 days,⁹⁴ or no more than 180 days from submission of the motion,⁹⁵ except in cases where the court orders a later investigation when good cause has been shown, or with the agreement of the litigants,⁹⁶ or where there are reasonable grounds for an extension.⁹⁷

In the consideration of cases, other motions or investigations will be suspended as soon as there is an urgent motion to stop the case. The suspension will be in effect until there is an order with regard to the urgent motion to stop the case. However, if there is a motion and good cause is shown, the court may order that specific considerations proceed, or that investigation of the motion proceed, or other matters that are still to be considered.⁹⁸

If the court denies the motion, or fails to consider the motion urgently, or does not give a final verdict on the motion within the specified period, the motion is denied by force of law. The litigant who has submitted the motion has the right to appeal the order,⁹⁹ or some states specify that a motion may

⁸⁴ Bill 9: An Act to amend the Code of Civil Procedure to prevent improper use of the courts and promote freedom of expression and citizen participation in public debate (2009) <http://www.assnat.qc.ca/en/travaux-parlementaires/projets-loi/projet-loi-9-39-1.html>.

⁸⁵ See the laws of Connecticut available in the list of laws in the Appendix.

⁸⁶ See the laws of Washington DC available in the list of laws in the Appendix.

⁸⁷ See the laws of California and Nevada available in the list of laws in the Appendix.

⁸⁸ See the laws of Louisiana and Arizona available in the list of laws in the Appendix.

⁸⁹ See the laws of Oklahoma, Texas, Nevada, Connecticut, and Vermont available in the list of laws in the Appendix.

⁹⁰ See the laws of Kansas, Maine, Massachusetts, Oregon, and California available in the list of laws in the Appendix.

⁹¹ See the laws of Massachusetts, Maine, Utah, and Washington available in the list of laws in the Appendix.

⁹² See the laws of Arkansas, California, Georgia, Oregon, Louisiana, Arkansas, and Texas available in the list of laws in the Appendix.

⁹³ See the laws of Oklahoma and Connecticut available in the list of laws in the Appendix.

⁹⁴ See the laws of Illinois available in the list of laws in the Appendix.

⁹⁵ See the laws of Indiana available in the list of laws in the Appendix.

⁹⁶ See the laws of Arkansas, California, Georgia, Oregon, Louisiana, Arkansas, Texas, Oklahoma, and Connecticut available in the list of laws in the Appendix.

⁹⁷ See the laws of Vermont available in the list of laws in the Appendix.

⁹⁸ See the laws of Georgia, Arkansas, California, Connecticut, Louisiana, Maine, Massachusetts, Minnesota, Missouri, Oregon, Rhode Island, Washington, Indiana, Pennsylvania, Hawaii, Utah, Washington DC, Illinois, Oklahoma, Texas, Nevada, Vermont, and Kansas available in the list of laws in the Appendix.

⁹⁹ See the laws of Pennsylvania, Utah, Oklahoma, Indiana, and California available in the list of laws in the Appendix.

be submitted requesting a writ of mandamus.¹⁰⁰ In general, the right of appeal lies with the litigant who submitted the motion, but there are some states which specify that all litigants have the right of appeal.¹⁰¹ The appeal court must urgently consider the appeal or other orders from the court of first instance related to the motion to stop the case or the failure of the court of first instance to make a final decision on the motion within a period of time specified by law,¹⁰² and some states specify that the appeal court has the authority to press a court of first instance which refuses to or does not give a decision on the motion within the time specified or which cannot make a decision.¹⁰³

4) Specifying the burden of proof and standard of proof of the defendant who submits a motion to stop the case and the main plaintiff

The burden of proof for the person submitting the motion (the defendant in the main case). The law will specify that the litigant who submits a motion has the initial burden of making a prima facie case or show a preponderance of the evidence¹⁰⁴ that the case that generates the motion relates to actions that represent public participation or that exercise constitutional rights on issues that relate to public issues. If the litigant who submits the motion can prove this, the burden of proof is moved to the litigant on the other side, i.e. the plaintiff in the main case.

The laws of some states specify that proof must be shown that the lawsuit has an improper purpose, which is held to be an important condition the court considers for dismissing the suit. Improper purpose is when the lawsuit interferes with, suppresses or prevents the litigant who submits the motion in the exercise of constitutional rights or public participation and constitutes a threat, penalty or damage to the dependent resulting from public participation, or creates an unnecessary delay, or diverts assets of the dependent away from public participation, or unnecessarily increases the costs of litigating the case,¹⁰⁵ which are the very objectives of bringing SLAPPs cases.

¹⁰⁰ See the laws of Missouri, New Mexico, Hawaii, and Kansas available in the list of laws in the Appendix.

¹⁰¹ See the laws of Washington available in the list of laws in the Appendix.

¹⁰² See the laws of Texas available in the list of laws in the Appendix.

¹⁰³ See the laws of Illinois available in the list of laws in the Appendix.

¹⁰⁴ See the laws of Oklahoma available in the list of laws in the Appendix.

¹⁰⁵ See the laws of Texas, Oklahoma, and Arizona available in the list of laws in the Appendix and the Protection of Public Participation Act 2008 of Australian Capital Territory <https://www.legislation.act.gov.au/a/2008-48/>.

The burden of proof for the person responding to the motion (the plaintiff in the main case). When the burden of proof shifts to the plaintiff in the main case, the plaintiff must prove the possibility of winning the case, by presenting substantial evidence to support a prima facie case.¹⁰⁶ Some states specify the need to prove that the exercise of rights of the person submitting the motion is without supporting facts or appropriate basic legal arguments and the actions of the litigant who submits the motion are the cause of substantial damages to the plaintiff.¹⁰⁷ Some states specify the need to prove to the court that the motive for litigating the case has a substantial basis in law or is supported by substantial arguments for extending, amending or overturning existing jurisprudence.¹⁰⁸

If the court decides that the plaintiff has proved the possibility of winning the case, the facts that the court uses in its decision and the substance of the decision may not later be accepted as evidence in the case than the decision has no effect on the burden or measures of proof in considering the case. However, some states specify that the facts can be used in any later stage of litigating the case.¹¹⁰

¹⁰⁶ George W. Pring and Penelope Canan, *ibid.*, and see the laws of Arkansas, Georgia, Kansas, Oregon, Washington, Nevada, Texas, and Oklahoma available in the list of laws in the Appendix.

¹⁰⁷ See the laws of Arizona, Maine, Massachusetts, and Vermont available in the list of laws in the Appendix.

¹⁰⁸ See the laws of Nebraska, New York, and Delaware available in the list of laws in the Appendix.

¹⁰⁹ See the laws of Connecticut, Nevada, Kansas, Oregon and Washington available in the list of laws in the Appendix.

¹¹⁰ See the laws of Vermont and Louisiana available in the list of laws in the Appendix.

5) Specifying the penalties for litigants, comprising court costs, lawyers' fees and other expenses. Some states also specify punitive damages for the plaintiff when the plaintiff is unable to meet the initial burden of proof.

In general, most states will specify the following criteria : ¹¹¹

Award of compensation to the accused/the person submitting the motion to stop the case. The court will compensate the costs of the person submitting the motion to stop the case immediately (the accused in the main case) when the court rules to dismiss the lawsuit according to the motion as follows:

- (1) Reasonable costs of litigating the case, including filing costs, costs of preparing and copying documents, costs of expert witnesses, etc.
- (2) Reasonable legal costs
- (3) Actual costs of damages caused. Some states specify a fixed amount such as the actual costs of damages caused or 5,000 dollars, whichever is the greater.¹¹²
- (4) Sanctions. There are stipulations regarding punitive damages and other sanctions for the litigant who brings the lawsuit, together with the lawyer and legal company of the litigant who brings the lawsuit, to the degree that the court considers sufficient to restrain plaintiffs from repeating this behaviour and to restrain others from similar actions.

Some states stipulate that the court may order compensatory damages and punitive damages when the litigant who submits an urgent motion to stop the case shows the court that the claim, counterclaim or intervention of the other litigant is frivolous or the litigation has the objective of improperly violating, intimidating, punishing or otherwise threatening, in order to restrain the exercise of the constitutional freedom of speech, petition or assembly.¹¹³

¹¹¹ See the laws of California, Washington DC, Connecticut, Kansas, Illinois, Indiana, Missouri, New Mexico, Oregon, Vermont, Louisiana, Maine, Massachusetts, Minnesota, Texas, Oklahoma, Pennsylvania, and Washington available in the list of laws in the Appendix, and the laws of Quebec Province, Canada, Bill 9: An Act to amend the Code of Civil Procedure to prevent improper use of the courts and promote freedom of expression and citizen participation in public debate (2009).

¹¹² See the laws of Hawaii available in the list of laws in the Appendix.

¹¹³ See the laws of Rhode Island, Utah, Nebraska, New York, and Delaware available in the list of laws in the Appendix.

Some states stipulate that an agency that intervenes and contests the case and wins has the right to receive appropriate costs and legal fees that arise from contesting the case. But if the agency loses in contesting the case, the plaintiff bringing the suit shall have the right to be compensated for appropriate costs and legal fees than arise in proving that the defence from the state agency is inappropriate or incorrect.¹¹⁴

The law of Quebec Province, Canada, stipulates that in cases where a juristic person or manager of the assets of another person uses an inappropriate procedure, the director and officials of the juristic person who participate in the decision or the manager may be ordered to pay damages personally.¹¹⁵

Alternative awards to compensate plaintiffs/those who submit motions to dismiss. If the court believes that the urgent motion to stop case proceedings is inappropriate or intended to cause delay, the court may decide to award the plaintiff costs related to the motion to dismiss.

6) Other Matters

Provisions for the Attorney-General or state agency to intervene in the case for the accused.

Many states stipulate that a state agency or the Attorney-General of the locality directly involved with the actions of the litigant who submits the motion may intervene to defend the case or support in other ways the litigation for the litigant submitting the motion,¹¹⁶ such as by submitting a motion to intervene or participate with the status of advisor to the court or *amicus curiae*.¹¹⁷ Some states stipulate that if the Attorney-General or chief law official has a conflict of interest or lacks the qualifications to defend the case or assist the defendant in any other way the Attorney-General or chief law official can employ a lawyer or special counsel to assist in defending the case or provide other forms of support.¹¹⁸

¹¹⁴ See the laws of Washington and Tennessee available in the list of laws in the Appendix.

¹¹⁵ Bill 9: An Act to amend the Code of Civil Procedure to prevent improper use of the courts and promote freedom of expression and citizen participation in public debate (2009) <http://www.assnat.qc.ca/en/travaux-parlementaires/projets-loi/projet-loi-9-39-1.html>.

¹¹⁶ See the laws of Maine, Massachusetts, Rhode Island, Utah, Washington, Hawaii, and Tennessee available in the list of laws in the Appendix.

¹¹⁷ See the laws of Pennsylvania available in the list of laws in the Appendix.

¹¹⁸ See the laws of Nevada available in the list of laws in the Appendix.

Reporting

In cases where a contractor with the government files charges, if the court finds that this is SLAPP, the court will send its decision to the head of the relevant state agency that conducts business with government contractors.¹¹⁹

In a case filed by a state agency which the court decides is SLAPP, that state agency must report the results of the decision and send copies of the court order to the Attorney-General within 30 days of the final order. The Attorney-General will report the violation to the cabinet, the president of the senate and a president of the house of representatives.¹²⁰

Examples of Anti-SLAPPs laws in Asia

Rules of Procedure for Environmental Cases (A.M. No. 09-6-8-SC) of the Philippines¹²¹

This law against SLAPPs deals with the enforcement of environmental laws, protection of the environment or affirmation of environmental rights, and covers civil, criminal and administrative cases. But the mechanisms and procedures of the law have the same principles as the anti-SLAPP laws of US states, i.e. it specifies channels by which the accused can have the case quickly stopped, stipulates the burden of proof of the litigants, stipulates speedy investigation and stipulates the award of appropriate damages, legal costs and costs of litigating the case to the accused in cases where a court dismisses the charges.

Also in around 2009, the Philippines made efforts to enact an anti-SLAPPs law called the Act Defining Strategic Lawsuits Against Public Participation, Prohibiting the Filing Thereof, Providing Measures for Dismissal, and for Other Purposes, or in short, the Anti-Strategic Lawsuits Against Public Participation Act of 2011 (Anti-SLAPP Act of 2011), with the objective of supporting and strengthening the participation of individuals in matters of public concern, preventing any improper use of the judicial process that will obstruct such participation, and forbid the filing of SLAPP lawsuits. With regard to compensation for damages, costs of litigating the case, legal costs and other remedies for the defendant or accused according to the case, when the case ends in dismissal, the defendant or accused according to the case is given the right to request separate compensation for damages, costs of litigating the case, legal costs and other remedies by filing a SLAPP back case against the plaintiff when the case ends with the dismissal of the SLAPPs case.

¹¹⁹ See the laws of Kansas available in the list of laws in the Appendix.

¹²⁰ See the laws of Florida available in the list of laws in the Appendix

¹²¹ See the Rules of Procedure for Environmental Cases (A.M. No. 09-6-8-SC) Philippines https://www.lawphil.net/courts/su-preme/am/am_09-6-8-sc_2010.html.

This draft law has not yet extended its coverage to include other public issues not specifically dealing with the environment alone, such as labour, peasants, leaders, communities, ethnic groups, etc. Apart from having a mechanism for filing a motion to dismiss, the draft law stipulates that it is the duty of the court, prosecution officials and public or private officials, depending on the case, to consider and judge reports or accusations, whether civil, criminal or administrative, depending on the case, and to order the immediate termination of cases which have been identified as SLAPPs. Another interesting point is that in criminal cases it is also stipulated that if investigating prosecutors are unsure whether a complaint is SLAPPs or not but there is the possibility that it may be SLAPPs, when the detainee shows good cause during the investigation process, the investigating prosecutors are to order additional investigation and immediately release the detainee. However, this draft law passed the House of Representatives and was submitted to the Senate in 2010 in its 15th meeting, but at present the law has not yet passed.¹²²

¹²² https://www.senate.gov.ph/lis/bill_res.aspx?congress=15&q=SBN-3080

Chapter 4

Legal Mechanisms for the Prevention of SLAPPs in Thailand

The key objective of anti-SLAPPs law is to maintain a balance between the promotion and protection of the exercise of constitutional rights on public issues, and the protection of the right of individuals to litigate in good faith to obtain remedy for loss or damage. The approach to opposing SLAPPs under an anti-SLAPPs law is based on two important principles: 1) the burden of proof and a timely dismissal of the case; and 2) the stipulation of penalties for plaintiffs who cannot meet the burden of proof.

In comparing this approach with existing mechanisms under Thai law, the findings are as follows.

Criminal Cases

1. Examination of proof and timely dismissal of cases

During the investigation phase, the law requires that investigating officers gather all evidence to learn the facts and circumstances relating to the alleged offences, to identify the offenders and to prove their guilt or innocence.¹²³ This is in accordance with the Examiner Principle. The investigating officers therefore have a key role in gathering facts and evidence to prove the guilt or innocence of the accused, and have the authority to decide not to prosecute.

Issuance of Prosecution Order (Public Prosecutors)

Indictment is the responsibility of public prosecutors. In general, they begin to operate after receiving the report and recommendations of the investigating officers. Their role is to examine the report and make a decision on how to proceed with the case. There are three possible outcomes of this process: a prosecution order; a non-prosecution order; or an order requiring additional investigation due to insufficient evidence.

There are 2 cases for non-prosecution orders.

1) The accused is not the offender. Consideration of the facts and the points of law shows that the accused is not the offender or that the act of the accused is not an offence under the law.

2) Prosecution is not in the public interest. When consideration of the investigation report shows facts and evidence that the accused is the offender and that the act of the accused is an offence under the law, if the prosecutor in charge sees that criminal prosecution of this case does not serve the public interest or will have an impact on national safety or security or on important interests of the country, they can make a recommendation to the Attorney-General to consider issuing a non-prosecution order or withdrawing the case (when the case has already been filed with the court) according to the case.¹²⁴

Even though non-prosecution orders in the public interest are important tools for filtering unnecessary cases out of the criminal justice process, cases of a SLAPP nature may not be clearly defined in the Regulations of the Attorney-General's Office on prosecutions that are not in the public interest, making it difficult to apply these regulations to SLAPP cases relating to the exercise of rights and freedoms under the Constitution. However, there are some cases where such conditions have been applied in the non-prosecution order. In the We Walk case, for example, a petition for justice was made to the Thanyaburi Provincial Prosecutor for further investigation of witnesses and another to the Office of the Attorney-General for the issuance of a non-prosecution order in a case not in the public interest. The prosecutor issued a non-prosecution order for the reason that the demonstration was peaceful and without weapons and was protected under the 2017 Constitution.

Nonetheless, the submission of several petitions for justice means more delay in the procedure and increases the burden on the accused in travelling to meet the prosecutor at appointed times.

Acceptance of the charge (by the court)

In general, cases are brought to the court of first instance in two ways: by the public prosecutor and by the injured party.¹²⁵ Once the cases are filed in court, the Criminal Procedure Code stipulates two important steps forward.

¹²³ Article 131 of the Criminal Procedure Code.

¹²⁴ Article 21 of the 2010 Public Prosecution Organ and Public Prosecutors Act together with Clauses 5 and 9 of the 2011 Regulation of the Attorney-General's Office on Issuing Orders on Criminal Cases that do not Serve the Public Interest or will have an Impact on

National Safety or Security or on Important Interests of the Country and Clause 4 of the 2018 Regulation of the Attorney-General's Office on Issuing Orders on Criminal Cases that do not Serve the Public Interest or will have an Impact on National Safety or Security or on Important Interests of the Country (No. 2).

¹²⁵ See Article 28, Criminal Procedure Code

1) Examination of the charge

Article 161/1 of the recently amended Criminal Procedure Code states ‘In a case filed by a private complainant, if it appears to the court – or through examination of evidence called at trial – that the complainant has filed the lawsuit in bad faith or distorted facts in order to harass or take undue advantage of a defendant, or to procure any advantage to which the complainant is not rightfully entitled to, the court shall order dismissal of the case, and forbid the complainant to refile such case.

‘The filing of a lawsuit in bad faith as stated in paragraph one includes incidents where the complainant intentionally violated a final court’s orders or judgments in another case without providing any appropriate reason.’

Article 161/1 is a new mechanism proposed by the Court of Justice itself, claiming that the objective is to prevent the filing of lawsuits in bad faith, or with distorted facts, or in order to harass or take undue advantage of the defendant, or to procure undue benefits, including SLAPPs. At present, the effectiveness of this law is not yet apparent since it came into force only in March 2019.

2) Preliminary hearing. If the charge is found to be in accordance with the law, the court will proceed as follows.

- In a case filed by a private complainant, the court will conduct a preliminary hearing, but if the prosecutor also brings the case to court for the same offence, then a preliminary hearing is not necessary and it is up to the discretion of the court whether a preliminary hearing is deemed appropriate or not.
- In a case filed by the public prosecutor, the court does not need to hold a preliminary hearing but can so order. In practice the court does not order a preliminary hearing as it is considered that screening has already been done by the state.

In the preliminary examination process, a new Article 165/2 has been added to the Criminal Procedure Code stipulating ‘In a preliminary examination, the accused may present to the court important facts or legal provisions that support the court in ordering the case to be groundless, and may also state the persons, documents or materials that support such facts as presented by the defendant. In such a case, the court may summon such persons, documents or materials as court evidence and witnesses for the court’s ruling as necessary and appropriate. And the accusers and the accused may question court witnesses with the permission of the court.’

¹²⁶ Article 162, Criminal Procedure Code.

The addition of Article 165/2 opens opportunities for the accused to bring evidence to rebut the accuser's evidence, resulting in protection of their right to defend themselves in court at the preliminary hearing stage. This is a significant process that contributes to the speedy end of SLAPP cases and also maintains a balance between the protection of the political rights of the accused and the rights of the accuser. There are still limitations however, particularly in cases filed by public prosecutors. Even though the court is allowed by law to exercise discretion in the preliminary hearing, in practice the court often chooses not to hold preliminary hearings, reasoning that public prosecutors have already scrutinised cases. This means that SLAPP cases that come through the channel of public prosecutors cannot be terminated at the beginning.

Moreover, in comparison with the guiding principles of anti-SLAPPs law, the effectiveness of the additional laws may not be sufficient to deal with SLAPP cases, because there is no clear stipulation regarding the burden of proof and the standards of proof for both parties.

2. Provisions on penalties, compensation and remedies

In criminal cases, there is no legal provision for the court to order payment of legal costs, lawyers' fees, compensation for damage or any other penalties for the parties involved.

Civil Cases

1. Requirements for proof entirely dismissal of cases

There is no clear mechanism.

2. Stipulation of penalties, compensation for damages and remedies

In civil cases, the party that loses the case is ordered by the court to pay the legal costs and lawyers' fees of the party that wins the case. If the plaintiff wins, the defendant has to pay the legal costs and lawyers' fees of the plaintiff. If the defendant wins, the plaintiff has to pay the legal costs and lawyers' fees of the defendant. These costs do not cover the expenses involved in attending the trial, such as travel costs and opportunity costs. Defendants who want plaintiffs to compensate them for such costs have to file a separate civil lawsuit to claim such compensation, which inevitably creates an additional burden on them.

Chapter 5

Summary and recommendations

Summary and important observations

1. Organizations or agencies of the state, state enterprises, and agencies that use administrative power have an important role in dealing with SLAPP cases.

It is found that state agencies, state enterprises and agencies that use administrative power file many complaints and accusations including SLAPP cases. Examples are: the case of the complaint by the Navy to bring a defamation case and an offence under the Computer Crime Law against the Phuketwan news agency that published an article which claimed that the Navy was involved in human trafficking; the case where ISOC filed a lawsuit against human rights defenders over the production and publication of a report on torture; the case where the Office of the Judiciary filed a defamation lawsuit against the movement to oppose the construction of housing for judges on Doi Suthep; cases involving state enterprises such as the Electricity Generating Authority of Thailand which filed a defamation lawsuit against protesters opposing the construction of a coal-fired power plant, or involving professional organizations such as the Medical Council which filed a defamation lawsuit against the movement calling for accountability for damage caused by medical treatment. The fact that agencies of the state become involved in lawsuits against the people creates a challenge as to whether and how far state agencies have the right and legitimacy to bring cases against the people.

2. SLAPP cases in Thailand are mostly criminal cases which create a bigger burden than civil cases. SLAPP cases in Thailand are mostly criminal cases.

There are very few civil cases partly because of Thai laws which can be used as a tool to restrict political rights. Most are laws that carry criminal penalties, and plaintiffs who file criminal lawsuits have lower costs than if they file civil suits because criminal law uses the mechanisms of the state in its principal functions; these are investigating officials, prosecution officials and the courts. This is different from civil cases where the plaintiffs must conduct almost all the litigation themselves and in criminal cases, the plaintiff does not have as many costs in going to court as in civil cases. So in criminal cases the costs fall mostly on the defendant. The defendant must shoulder various burdens and pressures such as the need for frequent travel to contact investigating officials and prosecutors, requiring them to take leave from work causing loss of income, and the need to prepare money for bail. Criminal cases are also cases where the punishment affects the freedom of the individual so that the accused or defendant is afraid of being detained and of having a criminal record.

Criminal litigation therefore has the effect of intimidating and coercing the defendant and helps to give the plaintiff bargaining power over the defendant in cases where there is negotiation to reach a compromise.

3. Most cases are initiated by the prosecution service. SLAPP cases in

Thailand are mostly initiated through a complaint to investigating officers, which means that most cases come before the courts through the prosecution service, with many charges litigated as offences relating to security and public order (Articles 112, 116, 215 and 216 of the Criminal Code). Cases under laws related to public assembly, where the state is the injured party, must be brought and litigated by the state. For example, the NCPO or military officers will bring charges, or in cases of offences under the Computer Crime Act, the Technology Crime Suppression Division (TCSD) will have the role of bringing charges. This is the reason why many charges are initiated by the prosecution service.

In many defamation offences affecting state agencies or state enterprises, it is found that these agencies channel prosecutions through investigation officials, such as the litigation by the Navy against Phuketwan news agency, the litigation by Internal Security Operations Command Region 4 (ISOC 4) Forward Command against human rights activists who published a report on torture in the southern border region, the lawsuit filed by the Office of the Judiciary against people opposing the construction of housing for judges on Doi Suthep, or litigation by the Electricity Generating Authority of Thailand against activists and academics opposing the construction of coal-fired power plants.

In defamation cases affecting private companies, the companies are likely to bring charges themselves rather than report a complaint to investigating officials. There are only some cases where private companies chose to make a complaint to investigating officials. For example, Natural Fruit Co Ltd filed a complaint against Andy Hall over an Al-Jazeera interview.¹²⁷ Thung Kham Co Ltd filed a complaint with investigating officials at Mae Sot Police Station. In the case of Suraphan, who posted an appeal letter of the Rak Ban Koet group to the Loei Provincial Governor on the Facebook page named 'Loei Mine', prosecutors ordered no prosecution and the company eventually had to bring the case themselves.¹²⁸

From the information above it is seen that a great number of SLAPP cases are litigated through public prosecutors. The development of laws or mechanisms to prevent SLAPP prosecutions therefore must take this issue into account in order to find a comprehensive solution to the problem.

¹²⁷ Freedom of Expression Documentation Center, iLaw, <https://freedom.ilaw.or.th/case/623> accessed 7 January 2019 [in Thai].

¹²⁸ Freedom of Expression Documentation Center, iLaw, <https://freedom.ilaw.or.th/case/694> accessed 7 January 2019 [in Thai].

Recommendations

The rights to freedom of expression, thought and peaceful assembly and association are basic human rights that are guaranteed under Articles 19, 21 and 22 of the International Covenant on Civil and Political Rights (ICCPR) and Sections 34, 44 and 42 the 2017 Constitution of the Kingdom of Thailand.

SLAPP cases are forms of strategic litigation with the objective of stopping, penalising or opposing the exercise of political rights, whether this is freedom of speech, appeals, freedom of expression, peaceful assembly and association on matters of public interest, where the plaintiff aims not to win but to exhaust the resources of the defendants and intimidate them into giving up their role.

Even though in a SLAPP case, the defendant will have the ability to contest the case and the court will eventually dismiss the suit, by then the defendant or accused will have had to pay expenses and face threats and emotional and other pressure, making them stop their public participation. This is the reason why SLAPP cases should be quickly stopped at the first stage.

In order to deal with the problem of SLAPPs, which at present has the tendency to grow, this report wishes to present to the relevant parties the following recommendations for solving the problem.

Practical recommendations

1. The state or agencies of the state, including state enterprises, should stop prosecuting people who exercise their rights and freedoms in accordance with the Constitution to participate in public affairs. It has been found that a number of cases have been filed by state agencies or state enterprises, particularly on defamation charges, against people who criticise them or called for accountability or express their opinion on public issues. State agencies are hypothetical persons so they can have no right to reputation that can be damaged. Their role is to provide public services and they must be transparent and open to criticism. When criticized by the public, they should respond by providing information on the facts related to the issues under criticism or the allegations instead of taking their critics to court for saying something that they deem contrary to fact.

2. In the litigation of criminal cases in particular, the responsible officials at every stage should proceed with awareness of the threat of SLAPPs and screen these out so that they can be quickly stopped. The system of justice should not add to the injury or increase the burden on the accused such as by setting bail at a higher rate than necessary. At each stage, officials should carry out the following:

2.1 Investigating officers and prosecutors should jointly investigate and seek the truth and apply the principles of people's rights and freedoms as protected by the Constitution, together with the laws and regulations of their agencies in order to screen out and stop SLAPP cases at the outset. Prosecutors in particular should apply Article 21 of the 2010 Public Prosecution Organ and Public Prosecutors Act together with the 2011 Regulation of the Attorney-General's Office on Issuing Orders on Criminal Cases that do not Serve the Public Interest or will have an Impact on National Safety or Security or on Important Interests of the Country and the 2018 amended version of the Regulation (No. 2). This mechanism has in the past been used effectively in some cases.

2.2 In criminal cases, Article 161/1 of the Criminal Procedure Code and the preliminary hearing are important mechanisms for the courts to screen out SLAPPs. As there are still limitations in the application of Article 161/1 to cases filed by private persons, excluding those filed by the public prosecutor, and the courts in general will not hold preliminary hearings in cases filed by the public prosecutor, this report recommends to the courts that in order for the prevention of SLAPPs to be more effective, the courts should make use of the preliminary hearing mechanism in cases filed by both private persons and the public prosecutor if the accused submits a petition to the court that the case qualifies as SLAPPs. Even though the prosecutor has already screened the case, mistakes may happen in the judicial process. Therefore another examination by the court is warranted in order to stop SLAPPs without delay.

This report has considerable concern regarding the enforcement of Article 161/1. Since the law does not clearly stipulate the steps and procedures, the court should establish clear guidelines for the exercise of authority under Article 161/1 to ensure transparency, accountability and the protection of the rights and liberties of both parties.

3. The accused should be given sufficient support. The Justice Fund should give special consideration to SLAPP cases because they are different from other cases. They involve violations of the rights and freedoms under the Constitution. The Justice Fund should allow for the selection of defence lawyers with an understanding of the issue to help in such cases. Lack of understanding on the part of the defence may lead to a negative impact on the accused and their community.

Legislative Recommendations

1. Legal amendments or decriminalization of some offences

The data studied shows that many SLAPP cases in Thailand are criminal cases which cause more fear, burden and costs on the accused than civil cases, as well as incurring costs to the public sector for the administration of the cases. For this reason, some of the laws that have been used in SLAPPs, i.e. criminal defamation offences or public assembly offences, should be reviewed, as well as offences relating to security which constitute obstacles to the exercise of freedom of expression and freedom of assembly, such as offences under Articles 116, 215 and 216 of the Criminal Code.

There are many reasons, based on both economics and human rights, **to derogate criminal defamation law**, leaving only civil defamation.

In terms of economics, the research team of the Economic Analysis of Criminal Laws project estimates that decriminalization in defamation offences will reduce costs to the state by approximately 7,995 baht per case.

In terms of human rights, there are many recommendations in support of the decriminalization of defamation. For example, General Comment No 34 of the Human Rights Committee believes that public benefit should be a defence against many defamation charges and a statement relating to a public figure which is made for public benefit should receive the highest protection. Defamation law must not be used as a tool to restrain freedom of expression, at least in cases that relate to the expression of opinion toward a public figure. The state sector should consider not asking for criminal penalties in defamation cases.

Civil defamation should be amended by adding a provision to Article 423 of the Civil and Commercial Code to exonerate actions undertaken honestly in public affairs. This recommendation is consistent with that of Associate Professor Dr. Pokpong Srisan it.

2. Procedural Law

In order to stipulate unambiguous assurance, the anti-SLAPPs guidelines should be taken into consideration for the purpose of amending and improving existing law or passing a law to protect people who exercise their rights and freedoms under the constitution in public participation from being sued in SLAPPs.

The study of Thai laws and legal mechanisms that could be used to prevent SLAPPs as mentioned in the previous chapter shows that those in existence are not yet in line with the guidelines and are inadequate in addressing existing SLAPP cases. In criminal cases, the addition of Articles 161/1 and 165/2 have limited scope of enforcement. Article 161/1 does not apply to cases filed by public prosecutors, whereas in reality, many SLAPPs have been filed by them. The provision also does not specify clear criteria for implementation and therefore cannot provide assurances of a balance between the protection of the political rights to public participation of the accused and the rights to reputation and to access justice of the accuser. With regard to preliminary hearings, in cases filed by public prosecutors, the law stipulates that it is at the court's discretion whether to order a public hearing, whereas in fact the courts have never ordered preliminary hearings for cases filed by public prosecutors on the assumption that such cases have already undergone screening by the prosecutors. In civil cases, there is no clear mechanism for stopping cases without delay.

In addition, Thai laws do not have provisions on remedies and penalties for litigants in SLAPP cases and the accused have to resort to filing separate civil cases for damage claims. If litigants who file lawsuits in bad faith are not liable to penalties and bear no costs, they are likely to continue to file more cases to harass their opponents as has been the case with several private companies.

For this reason, it is necessary to strengthen the law so that it is more effective in addressing SLAPPs both by amending the existing laws and by passing new laws in both civil and criminal cases. In so doing, anti SLAPP guidelines should be adopted for consideration and the content of the laws should include the following key criteria.

¹²⁹ Somkiat Tangkitvanich et al, Final Report, Volume 1, Legal Economics of the Thai Criminal Justice System (Economic Analysis of Criminal Laws project), Thai Research Fund, 2011 [in Thai].

¹³⁰ Human Rights Committee, General Comment No 34, Freedoms of Opinion and Expression (Article19), CCPR/C/GC/34, 12 September 2011 para 47.

¹³¹ Anti-Corruption Organization of Thailand <http://www.anticorruption.in.th/2016/th/detail/152/5/Anti-SLAPP%20Law>, accessed 29 January 2018 [in Thai].

1) Scope of legal protection The scope of protection should be broad and the legal definition should include prosecutions based on the exercise of constitutional rights in public issues or any other action in support of the exercise of constitutional rights in all public issues.

2) Specific channels for the accused to submit a motion for case dismissal from the beginning of legal proceedings. Thai law has no provision allowing the accused in SLAPP cases to petition for legal proceedings to be halted. Such a provision should be stipulated for both criminal and civil cases with a clear timeframe to prevent delay.

3) Examination of complaints. The examination of complaints should be stipulated as urgent or within a timeframe for examination to prevent delay.

4) Burden of proof and standard of proof. There should be a clear stipulation of the burden of proof of the plaintiff (defendant in the main case) and the burden of proof of the party that has to answer the complaint (accuser in the main case).

5) Penalties for litigants. There should be a stipulation of compensation for the accused who submitted a motion for dismissal of the case/complaint once the court has ruled that the case be dismissed. The court may order compensation for costs including the following:

5.1) Reasonable legal costs including court fees, and document preparation and copying fees, fees for expert witnesses, etc.

5.2) Reasonable lawyers' fees.

5.3) Other damage claims and sanctions. The court may determine that punitive damages and other sanctions be made in favour of the accused as the court considers necessary to deter the litigant from repeating the action and sufficient to deter similar action by others. Ordering compensation for punitive damages may be conditional on providing convincing proof that the litigation is frivolous or is aimed as an undue violation, threat, punishment or other form of harassment in order to prevent the exercise of freedoms under the constitution.¹³²

In this regard the law may determine that for juristic persons, such as private companies, which have filed SLAPPs, when the case is later dismissed by the court following

¹³² See the laws of Rhode Island, Utah, Nebraska, New York and Delaware available in the list of laws in the Appendix.

a motion to dismiss the case, the directors and staff of the juristic person who participated in decision-making or who are managers may also be ordered personally to pay damage compensation.¹³³ This is to prevent companies from avoiding responsibility or difficulty in recovery in the case of company bankruptcy.

In addition, compensation should be stipulated for legal costs as mentioned above for the plaintiff of the main case if the court rejects the motion of the accused and considers it inappropriate or intended to cause delay.

6) Other matters

Specification of assistance mechanisms and for public prosecutors or state agencies to intervene with assistance for the accused.

The accused in SLAPP cases are those who exercise the rights and freedoms under the constitution and for the public good. For this reason, it is appropriate to consider a stipulation for state agencies or public prosecutors to intervene in the case or provide other support to the accused as the case proceeds.

Reporting

There should be a stipulation in cases where the plaintiff is a government contractor, if it is proved that the case is a SLAPPs case and the court dismisses the case, that the court should also give a verdict on the head of the relevant government agency doing business with that government contractor.

In a case brought by a state agency which the court decides is SLAPPs, that state agency must report that decision to the Cabinet, the President of the Senate and the President of the House of Representatives.

7) Additional recommendations on criminal cases

Amendments to the law to determine the role of investigating officers and prosecutors should stipulate that when any complaint or accusation is received or investigation of the case of an individual who has been detained is in process, it is the duty of investigating officers and/or prosecutors who are conducting the investigation to consider immediately whether the complaint is SLAPPs or not. If it is found to be the same as a SLAPP case, an order should be made to stop the case. There should therefore be a clear stipulation of the right to appeal for a case to be stopped and of the steps to be taken by prosecutors.

This issue may use as an example for a draft anti-SLAPPs law the Act Defining Strategic Lawsuits Against Public Participation, Prohibiting the Filing Thereof, Providing Measures for Dismissal, and for

Other Purposes, known in short as the Anti-Strategic Lawsuits Against Public Participation Act of 2011 (Anti-SLAPP Act of 2011) of the Philippines.¹³⁴

¹³³ Bill 9: An Act to amend the Code of Civil Procedure to prevent improper use of the courts and promote freedom of expression and citizen participation in public debate (2009) <http://www.assnat.qc.ca/en/travaux-parlementaires/projets-loi/projet-loi-9-39-1.html>

¹³⁴ https://www.senate.gov.ph/lis/bill_res.aspx?congress=15&q=SBN-3080



