



# Solving SLAPPs: Identifying and addressing gaps in Thailand's anti-SLAPP framework

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**TrialWatch** is an initiative of the **Clooney Foundation for Justice**. Its mission is to expose injustice, help to free those unjustly detained and promote the rule of law around the world. TrialWatch monitors criminal trials globally against those who are most vulnerable — including journalists, protesters, women, LGBTQ+ persons and minorities — and advocates for the rights of the unfairly convicted. Over time, TrialWatch will use the data it gathers to publish a Global Justice Index evaluating countries' justice systems.

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# PREFACE



Across the world, the law is being weaponized to silence human rights defenders, activists, and media workers – Thailand is no exception. The spectre of Strategic Lawsuits Against Public Participation (SLAPPs) looms large in Thailand. SLAPPs are abusive lawsuits or threats of legal action that have the purpose or effect of undermining public participation on matters of public interest. In Thailand, SLAPPs most commonly take the form of criminal defamation claims brought by private actors to silence their critics. Such uses of the law present a threat to human rights, the rule of law and democracy by reframing public debate as a matter of private dispute.

In recognition of the danger SLAPPs pose to Thailand’s political and legal systems, the Thai government has committed to tackling SLAPPs, and has already amended the Criminal Procedure Code in 2019. However, these interventions have failed to effectively curb SLAPPs and criminal defamation laws remain vulnerable to abuse. Of the 36 criminal defamation SLAPPs identified in this report, none were filtered out by recently introduced anti-SLAPP measures or, indeed, by pre-existing screening processes. While none of the lawsuits identified in this report resulted in convictions, defendants were forced to spend time, money, and energy on defending themselves against abusive litigation. Thai law is, therefore, presently failing to prevent judicial process from being turned against freedom of expression and assembly.

As such, Thailand finds itself at a crossroads – the government can either take a strong stance against SLAPPs or allow private actors to exploit lacunas in the law. This report sets out a roadmap to the former and is intended to assist the Ministry of Justice as it develops and advances a new anti-SLAPP law. The findings contained in this report are data driven, using detailed analyses of case studies to identify how private actors continue to abuse criminal defamation laws with impunity. Private actors are not only circumventing existing anti-SLAPP provisions by filing complaints with public prosecutors, but judges and prosecutors are also failing to screen out SLAPP suits. The recommendations in this study point to the need to draft clear and workable anti-SLAPP provisions that provide judges and prosecutors with the procedural tools and guidance needed to effectively identify and dismiss SLAPPs at an early stage in proceedings. These recommendations are based on international best practice and are oriented towards empowering judges and prosecutors to protect human rights defenders and prevent judicial process from being misused.

The Clooney Foundation for Justice remains committed to working with stakeholders and supporting the translation of these recommendations into concrete action.

# INTRODUCTION



Thai journalists, activists, human rights defenders, and opposition politicians exercising their civil and political rights are often targeted by Strategic Lawsuits Against Public Participation (“SLAPPs”). SLAPPs are abusive lawsuits or threats of legal action that have the purpose or effect of undermining public participation on matters of public interest. Criminal defamation SLAPPs are the most common type of SLAPP in Thailand.<sup>1</sup> Section 326 of Thailand’s Criminal Code establishes the crime of defamation, which is punishable by up to one year’s imprisonment, a fine of up to 20,000 Thai baht, or both. For defamation through publication, the penalty can be up to two years’ imprisonment or a fine of up to 200,000 Thai baht.<sup>2</sup> In addition, private complainants may, during the course of criminal proceedings, make claims for civil penalties.

In Thailand, private individuals may either report the case to the police or file a complaint directly with the court, giving private parties great power to initiate criminal proceedings against those speaking out on public interest matters. There are limited exceptions and defenses to criminal defamation. Section 329 states that a “fair comment on any person or thing subjected to public criticism” made in good faith shall not be considered defamatory. While Section 330 provides a truth defense if the statement benefits the public, this defense is limited in scope and comes too late in proceedings to undo the harm caused to the defendant during the process of defending proceedings.

Recognizing the prevalence of SLAPPs, and their deleterious effects, the Thai Government has explicitly committed to addressing this issue in successive National Action Plans on Business and Human Rights.<sup>3</sup> Further, in 2019 the National Assembly specifically added “anti-SLAPP” provisions to the Thai Criminal Procedure Code (“*Criminal Procedure Code*” or “*CPC*”), which authorize courts to dismiss SLAPPs at an

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<sup>1</sup> United Nations Development Programme in Thailand, *Laws and Measures Addressing Strategic Lawsuits Against Public Participation (SLAPPs) in the Context of Business and Human Rights*, (2023), pgs. 28, 43, (“Criminal defamation charges are the most common charges exploited by corporations to prosecute SLAPP targets.”).

<sup>2</sup> Thailand Criminal Code, Sections 328

<sup>3</sup> See Ministry of Justice, Rights and Liberties Protection Department, *Thailand’s 1st National Action Plan on Business and Human Rights (2019-2022)*, (2019), pgs. 21, 102, 119, <https://www.undp.org/thailand/publications/thailands-1st-national-action-plan-business-and-human-rights>. See also Ministry of Justice, Rights and Liberties Protection Department, (*Unofficial Translation*) *Thailand’s 2nd National Action Plan on Business and Human Rights (2023-2027)*, (2023), pg. 51.

early stage on two potential grounds (Section 161/1 and Section 165/2).<sup>4</sup> These provisions have been criticized for their limited scope and for the lack of guidance provided to the courts on their operation.<sup>5</sup> Recognizing the deficiencies in the current framework, the Ministry of Justice is developing a follow-on anti-SLAPP law.

This report sought, in the first instance, to assess whether the anti-SLAPP amendments have succeeded in curtailing SLAPPs, and if not, why not. To this end, researchers analyzed criminal defamation cases brought between 2019 and 2023 to determine how many cases qualified as SLAPPs, and to what extent the amendments had been utilized by SLAPPs targets and how effective Sections 161/1 and 165/2 were at countering SLAPPs.

The dataset revealed that not only have the anti-SLAPP amendments not been effective, but also that other pre-existing screening processes have widely failed to filter out or curtail the use of SLAPPs. This report, therefore, goes beyond the question of the effectiveness—or not—of the anti-SLAPP amendments to examine the entire anti-SLAPP framework and why it is not working.

## Summary of Findings

The report is based on a dataset comprising 36 criminal defamation SLAPPs. All 36 cases bore clear hallmarks of SLAPPs: for example, they targeted constitutionally protected activity; concerned matters of public interest; the filer had a history of filing meritless lawsuits (i.e., lawsuits that had been withdrawn or resulted in acquittals); the filer had in fact filed lawsuits against the defendant in multiple jurisdictions for the same speech; the filer had filed in an improper jurisdiction; the claim had no legal basis; the

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<sup>4</sup> See International Commission of Jurists, Re: Concerns on the existing legal frameworks that are designated to prevent strategic lawsuit against public participation (SLAPP lawsuits), (March 20, 2020), pg. 4, (Section 161/1 provides: “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 produce 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 again. 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 criminal case without providing any appropriate reason.” Section 165/2 provides: “During the preliminary hearing, the defendant may submit to the court a significant fact or law which may bring the court to the conclusion that the case before it lacks merit, and may include the submission as persons, documents or materials to substantiate the defendant’s claims provided in the submission. In such case, the court may call such persons, documents or materials to provide evidence in its deliberation of the case as necessary and appropriate, and the complainant and the defendant may examine this evidence with the consent of the court.”).

<sup>5</sup> *Id.*

claim was not factually substantiated; the filer made disproportionate claims; the filer used intimidation tactics, and/or there was a significant impower imbalance.

While the anti-SLAPP provision that permits dismissal of cases brought by private parties in bad faith (Section 161/1) was invoked in 32 percent of eligible cases, in not a single case did a court grant a 161/1 petition and dismiss the complaint on that basis. Indeed, courts not only did not grant petitions, they simply did not respond to petitions at all in 100 percent of applicable cases in the dataset.

Based on interviews and reporting and as detailed below in the body of the report, one reason for Section 161/1's failings is that it lacks any specific criteria or procedure that courts can use in dismissing cases. Absent such guidelines, courts would rather proceed to the preliminary hearing.

Almost half of the cases in the dataset were brought not by private parties themselves, but by public prosecutors, at the behest of potentially more powerful actors such as businesses, politicians, or state officials acting to protect their private interests. As private complainants may lodge a complaint with the prosecutor and later join as a co-plaintiff, it is quite easy for private actors to circumvent the scope of application of Section 161/1. As such, publicly prosecuted SLAPPs are a significant part of the problem in Thailand. Section 161/1 does not apply to these cases and the screening processes that do apply, such as review by inquiry officers and prosecutors, also fell far short.

Specifically, under the general powers provided by Sections 141-143 of the Criminal Procedure Code, inquiry officers can recommend against prosecution where a case is meritless and public prosecutors can issue non-prosecution orders for the same reasons. However, at present there is no anti-SLAPP specific provision applicable to inquiry officers and public prosecutors, meaning that there are no concrete criteria under which they are empowered to evaluate and reject cases as SLAPPs. Further, interviews and reporting indicated that some inquiry officers and public prosecutors fear retaliatory litigation by the SLAPP filer if they terminate prosecutions. In light of the above, only four cases in the entire dataset were subject to non-prosecution orders<sup>6</sup> and no cases were subject to recommendations of non-prosecution by inquiry officers.

Taken together, the courts' refusal to entertain Section 161/1 petitions, and the lack of screening by inquiry officers and public prosecutors, meant that the vast majority of SLAPPs slid through the preliminary screening process and proceeded to trial.

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<sup>6</sup> Out of the four, three non-prosecution orders were issued in the cases against Chutima Sidasathian, only after the defense counsel made written submissions to prosecutors - a process which is neither typical nor should be necessary, as will be discussed in detail below.

Under Section 165/2 (the second anti-SLAPP amendment), defense lawyers are able to put forth evidence and arguments at preliminary hearings, where courts decide whether the case has sufficient merit to proceed to trial—prior to adoption of this provision, only plaintiffs could present evidence and arguments at preliminary hearings (defendants could not introduce evidence except when cross-examining a plaintiff’s witness). However, courts are only *required* to hold preliminary hearings in cases brought by private parties and can use their discretion to determine whether a preliminary hearing is necessary in a case brought by public prosecutors. In practice, courts rarely exercise this discretion, on the assumption that public prosecutors will have conducted a robust screening—a mistaken assumption given that the present screening process is not functioning.

This loophole (along with the inapplicability of Section 161/1 to cases brought by public prosecutors) allows private parties to circumvent the anti-SLAPP amendments, all the while continuing to exert control over the prosecution by joining the case as co-plaintiffs. These cases leapfrog crucial judicial screening benchmarks to proceed to trial, imposing a significant burden on SLAPP targets, who are up against not only the resources of private parties but also the resources of the State.

On the substance, the introduction of Section 165/2 does not appear to have improved defendants’ chances at securing dismissal. In none of the cases where Section 165/2 was invoked did the court respond to the petition and indeed, in only one of these cases did the court dismiss the lawsuit at a preliminary stage (though not on the basis of Section 165/2). More broadly, the preliminary hearing process does not appear to be functioning: only two cases overall were dismissed at the preliminary hearing stage.<sup>7</sup>

Notably, that the cases in our dataset where in fact SLAPPs was often borne out by the verdicts. Almost 40 percent of the cases in the dataset proceeded to trial: others were either withdrawn, settled out of court, are still pending before the prosecutor, ended with non-prosecution orders, or as mentioned above, were dismissed after preliminary hearing. All of the cases that went to trial and were decided by the court have ended in acquittals, often on the basis that the claim did not on its face meet the elements of defamation (a determination that could have been made far earlier in the proceedings) or that the defendant had acted in good faith to comment on a matter of public interest, an exception to defamation laid out in Sections 329-330 of the Criminal Code<sup>8</sup> (this

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<sup>7</sup> In both these cases, the court did not rely on Section 161/1 while dismissing the case, despite the provision being invoked by the defence lawyer. Indeed, the court did not even respond to the Section 161/1 petitions submitted by defence counsel.

<sup>8</sup> Thailand Criminal Code, Sections 326-333, <https://library.siam-legal.com/thai-law/criminal-code-defamation-sections-326-333/>.

determination likewise could have been made earlier in the proceedings, by inquiry officers, prosecutors, or courts at the preliminary hearing stage). In many cases, courts acquitting SLAPP targets echoed (perhaps unwittingly) the very arguments that had been made in Section 161/1 and Section 165/2 petitions by defendants years earlier. In the entire dataset, not a single case ended in conviction.<sup>9</sup> Nonetheless, SLAPP targets spent an average of almost two years battling abusive legal proceedings before they came to a conclusion, diverting their resources and time, imposing financial and emotional costs, and engendering a chilling effect.

## Summary of Recommendations

The report comes against the backdrop of clear international and regional standards that recommend the decriminalization of defamation<sup>10</sup>—and require, at a minimum, that defamation cases not give rise to custodial sentences.<sup>11</sup>

The recommendations proposed in this report are tailored narrowly to the findings arising from the analysis of the 36 criminal defamation SLAPPs, and to the current moment in Thailand, with the Ministry of Justice considering further reforms. Nevertheless, in line with international human rights law, the most appropriate response would be for Thailand to decriminalize defamation or introduce substantive amendments to its criminal defamation law such as a) providing a clear, well-defined exception for public interest speech, b) providing clear and separate defenses for public interest speech and truth, and/or c) eliminating the possibility of custodial sentences, at a minimum in cases dealing with those engaging in public interest speech.

However, notwithstanding the importance of the above and given that the scope of potential change under consideration at the moment is more limited, the report makes recommendations in light of best practices across diverse jurisdictions, as well as documented gaps in and challenges facing Thailand's existing anti-SLAPP framework. These recommendations are formulated in the hopes that they might assist the Ministry

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<sup>9</sup> In one case, the trial court convicted the defendant. However, the conviction was overturned on appeal and the acquittal was confirmed by the Supreme Court.

<sup>10</sup> See, e.g., UN Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34 (September 12, 2011), para. 47.

<sup>11</sup> See, e.g., African Court on Human and Peoples' Rights, *Lohé Issa Konaté v. The Republic of Burkina Faso*, App. No. 004/2013 (December 5, 2014), para. 165.

of Justice as it develops and advances a new anti-SLAPP law.<sup>12</sup> These recommendations are geared toward empowering judges to dispose of abusive and meritless cases, allowing them to preserve the integrity of the judicial system and ensure that judicial resources are not expended on abusive litigation.

Anti-SLAPP provisions should, in general and at a minimum:

- a. not apply solely to cases brought by private complainants but also cases brought by public prosecutors;
- b. provide a clear definition of “public interest,” “public participation” and “abusive proceedings” (further detail set out in Section titled Recommendations for Thailand);
- c. empower courts to dismiss abusive proceedings at an early stage and through an accelerated hearing on application of the defendant or on their own initiative;
- d. empower courts to order a stay of the main proceedings while a motion to dismiss is being heard;
- e. establish clear timelines for preliminary hearings on the possibility of dismissal, within three months of filing of the case, unless a 30-day extension is deemed necessary, and for deciding on dismissal, within a maximum of six months of filing, unless a three-month extension is deemed necessary;
- f. place the burden on the claimant to prove that the case is likely to proceed at trial and does not constitute an abusive proceeding (as clearly defined in the legislation);
- g. require courts to provide reasoned decisions and publicize their decision on the question of dismissal; and
- h. provide for cost shifting mechanisms including damages, costs, and, where appropriate, dissuasive penalties (details set out further in the section on Costs and Damages below);

Specifically, for Thailand, in order to minimize plaintiffs’ ability to circumvent anti-SLAPP protections and strengthen the effectiveness of these provisions, the Criminal Procedure Code should be amended to establish a single set of consistent criteria for inquiry

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<sup>12</sup> The current draft of the anti-SLAPP law entails amendments to the Criminal Code and Criminal Procedure Code as opposed to a new, stand-alone piece of legislation; in turn, the recommendations follow this model.

officers, public prosecutors, and courts to identify and dismiss at an early stage and through an accelerated process, Strategic Lawsuits Against Public Participation across all stages of legal proceedings.

Second, courts and prosecutors should be provided with clear definitions of public interest, public participation, and abusive proceedings, including a non-exhaustive list of indicators of abuse. In particular, public interest should be defined broadly to encompass any matter that affects the public to such an extent that the public may legitimately take an interest in it.

Third, the burden of proof should rest on the complainant to satisfy the court that the proceedings do not constitute an abusive proceeding and that they are likely to prevail at trial. Common indicators of abuse in SLAPP cases include: the disproportionate, excessive or unreasonable nature of the claim or part thereof, including the excessive sanctions sought; the existence of multiple proceedings initiated by the claimant or associated parties in relation to similar matters; intimidation, harassment or threats on the part of the claimant or the claimant's representatives, before or during the proceedings, as well as similar conduct by the claimant in similar or concurrent cases; and the use of bad faith procedural tactics, such as delaying proceedings, fraudulent or abusive forum shopping or the discontinuation of cases at a later stage of the proceedings in bad faith.

Fourth, any new provisions should lay out a clear procedure with timelines so as to ensure that anti-SLAPP motions are dealt with in an expedited manner, thereby avoiding the serious harms that can befall a SLAPP target with prolonged proceedings. Among other things, courts should be required and empowered to rule on anti-SLAPP motions within a specified time period, thus addressing the issue that many anti-SLAPP motions do not receive any response, let alone a timely one.

Finally, as SLAPP cases typically involve an imbalance of power between the complainant and the defendant, courts should be empowered to remedy any harm done to the defendant and to impose proportionate and dissuasive penalties on the complainant. At all times, it is important to remember that the financial and psychological cost of defending an action can be enough to silence the immediate SLAPP target and also to have broader chilling effect on public participation; the complainant does not need a favorable judgment in order to achieve their purpose of suppressing public interest speech. It is for this precise reason that early dismissal is one of the most important mechanisms for countering SLAPPs.

Beyond these overarching suggestions, the report includes recommendations tailored specifically at addressing unique characteristics and challenges facing inquiry officers, public prosecutors and courts, as well as a proposal for the introduction of deterrence mechanisms.

# BACKGROUND



## A. OVERVIEW OF SLAPPS

While there is no universally-agreed upon definition, SLAPPs are generally defined as civil<sup>13</sup> or criminal<sup>14</sup> lawsuits or threats of legal action that have the aim or effect of suppressing or discouraging public participation on matters of public concern, often brought by the entity or individual whose activities are the subject of criticism or opposition.<sup>15</sup> The UN Special Rapporteur on the rights to freedom of peaceful assembly and of association (the “*UN Special Rapporteur on Freedom of Assembly*”), for example, has described SLAPPs as attempts to “shut down critical speech by intimidating critics into silence and draining their resources, [which in the process] distract and deflect discussions on corporate social responsibility[.]”<sup>16</sup> As noted in a report drafted by a number of civil society organizations in the European Union, SLAPP “cases are brought

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<sup>13</sup> See Council of Europe Platform to Promote the Protection of Journalism and Safety of Journalists, *Wanted! Real action for media freedom in Europe*, (2021), pg. 30, <https://edoc.coe.int/en/media/9624-wanted-real-action-for-media-freedom-in-europe.html>, (“SLAPPs refer to (typically civil) lawsuits brought by powerful individuals or companies that have little legal merit and are designed to intimidate and harass the target.”).

<sup>14</sup> See The OSCE Representative on Freedom of the Media, *Special Report: Legal Harassment and Abuse of the Judicial System Against the Media*, (November 23, 2021), pgs. 3, 8-9, [https://www.osce.org/files/f/documents/c/f/505075\\_0.pdf](https://www.osce.org/files/f/documents/c/f/505075_0.pdf), (according to the Organization for Security and Co-operation in Europe, a SLAPP may come in “many forms, [such as] criminal prosecution . . . [that] can pose a serious threat to the safety of media and the economic basis of outlets and, hence, has a strong chilling effect on media pluralism, undermining journalistic freedom.”).

<sup>15</sup> Jurisprudence from the Philippines is informative. See Supreme Court of the Philippines, *The 2010 Rules of Procedure for Environmental Cases*, AM No. 09-6-8-SC, (April 13, 2010), [https://lawphil.net/courts/supreme/am/am\\_09-6-8-sc\\_2010.html](https://lawphil.net/courts/supreme/am/am_09-6-8-sc_2010.html), (in jurisprudence from the Philippines concerning environmental cases, a SLAPP “refers to an action whether civil, criminal or administrative, brought against any person, institution or any government agency or local government unit or its officials and employees, with the intent to harass, vex, exert undue pressure or stifle any legal recourse that such person, institution or government agency has taken or may take in the enforcement of environmental laws, protection of the environment or assertion of environmental rights.”).

<sup>16</sup> UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, *SLAPPs and FoAA Rights: Info Note*, UN Office of the High Commissioner for Human Rights, <https://www.ohchr.org/Documents/Issues/FAssociation/InfoNoteSLAPPsFoAA.docx>.

by private individuals and entities but also by public officials, public bodies and publicly controlled entities.”<sup>17</sup>

Much like the UN Special Rapporteur on Freedom of Assembly, the European Court of Human Rights (the “*ECtHR*”) has referred to SLAPPs as “groundless legal actions by powerful individuals or companies that seek to intimidate journalists [and others] into abandoning their investigations ... [with the aim of] divert[ing] time and energy, as a tactic to stifle legitimate criticism.”<sup>18</sup> Similarly, the Inter-American Court of Human Rights (the “*IACtHR*”) has stated that “a SLAPP ... constitutes an abusive use of judicial mechanisms that must be regulated and controlled by the States, with the aim of allowing effective exercise of freedom of expression.”<sup>19</sup>

With respect to criminal suits, SLAPPs can be based on a number of different offenses, including defamation, libel, slander, violation of local land ordinances, and cybercrimes.<sup>20</sup> Of the various criminal charges that can be brought as a SLAPP, defamation cases are most common in Thailand and in the global south more generally.<sup>21</sup>

The UN Human Rights Committee has urged “States parties [to] consider ... decriminalization” of defamation.<sup>22</sup> According to the Committee, “the application of the

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<sup>17</sup> Media Defense, *Protecting Public Watchdogs Across the EU: A Proposal for an EU Anti-SLAPP Law*, (2021), pg. 9, [https://www.mediadefence.org/wp-content/uploads/2021/12/Anti\\_SLAPP\\_Model\\_Directive-2-1.pdf](https://www.mediadefence.org/wp-content/uploads/2021/12/Anti_SLAPP_Model_Directive-2-1.pdf).

<sup>18</sup> Council of Europe Commissioner for Human Rights, Human Rights Comment, *Time to take action against SLAPPs*, (October 27, 2020). See also European Court of Human Rights, *OOO Memo v. Russia*, Application No. 2840/10, (June 15, 2022), para. 23, (referring to the Council of Europe Commissioner for Human Rights’s definition of a SLAPP).

<sup>19</sup> Inter-American Court of Human Rights, *Palacio Urrutia et al. v. Ecuador*, Series C. No. 446 (November 24, 2021), para. 95; see also para. 13 in the concurring opinion written by Judge Eduardo Ferrer MacGregor Poisot and Judge Ricardo C. Pérez Manrique.

<sup>20</sup> See International Center for Not-For-Profit Law, *Protecting Activists from Abusive Litigation: SLAPPS in the Global South and How to Respond*, (July 2020).

<sup>21</sup> See International Center for Not-For-Profit Law, *Protecting Activists from Abusive Litigation: SLAPPS in the Global South and How to Respond*, (July 2020), pg. 18-19, (“of the 75 cases in which causes of action were reported: 66 [were] defamation.”). See also United Nations Development Programme in Thailand, *Laws and Measures Addressing Strategic Lawsuits Against Public Participation (SLAPPs) in the Context of Business and Human Rights*, (2023), pgs. 28, 43.

<sup>22</sup> UN Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34 (September 12, 2011), para. 47; see also UN General Assembly, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, U.N. Doc. A/HRC/20/17 (June 4, 2012), para. 84.

criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty.”<sup>23</sup> Regional human rights courts broadly agree: the European Court of Human Rights has often held that imprisonment is a disproportionate penalty for defamation claims,<sup>24</sup> and the African Court on Human and Peoples’ Rights has noted that “[a]part from serious and very exceptional circumstances for example, incitement to international crimes,” freedom of expression and speech “cannot be sanctioned” by custodial penalties.<sup>25</sup> The Inter-American Court has likewise held that where speech criticizes a public official, criminal penalties are not generally appropriate.<sup>26</sup> The UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (the “*UN Special Rapporteur on Freedom of Expression*”) and the Rapporteur’s counterparts in the Organization of American States (“OAS”) and Organization for Security and Cooperation in Europe (“OSCE”) have stated “criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.”<sup>27</sup> Recently, in the specific context of SLAPPs, the Office of the High Commissioner for Human Rights (“OHCHR”) has reminded states that “the criminalization of defamation and blasphemy constitute disproportionate restrictions of freedom of expression and other human rights.”<sup>28</sup>

While defamation cases are therefore the focus of this report, other SLAPP claims can be equally as insidious. SLAPP filers in Thailand, for example, have frequently employed

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<sup>23</sup> UN Human Rights Committee, *General Comment No. 34*, U.N. Doc. CCPR/C/GC/34 (September 12, 2011), para. 47.

<sup>24</sup> European Court of Human Rights, *Belpietro v. Italy*, App. No. 43612/10 (Sept. 24, 2013). *See also* European Court of Human Rights, *Raichinov v. Bulgaria*, App. No. 47579/99 (Apr. 20, 2006), para. 50 (in finding a speech restriction disproportionate, one “factor on which the Court places particular reliance is that the applicant was not subjected to a civil or disciplinary sanction, but instead to a criminal one”).

<sup>25</sup> African Court of Human and People’s Rights, *Lohé Issa Konaté v. The Republic of Burkina Faso*, App. No. 004/2013 (December 5, 2014), para. 165.

<sup>26</sup> *See* Inter-American Court of Human Rights, *Álvarez Ramos v. Venezuela*, Series C No. 380, (August 30, 2019), para. 129.

<sup>27</sup> OSCE Representative on Freedom of the Media, and OAS Special Rapporteur on Freedom of Expression, *Joint Declaration by UN Special Rapporteur on Freedom Of Opinion And Expression*, (2002), <https://www.oas.org/en/iachr/expression/showarticle.asp?artID=87&IID=1#:~:text=Criminal%20defamation%20is%20not%20a,with%20appropriate%20civil%20defamation%20laws>.

<sup>28</sup> United Nations Human Rights Office of High Commissioner, *The Impact of SLAPPs on Human Rights and How to Respond*, pg. 3, <https://www.ohchr.org/sites/default/files/documents/publications/briefer-the-impact-slapps-hr-how-resond.pdf>.

Sections 14(1), 15, and 16<sup>29</sup> of the country’s Computer Crime Act, which has long attracted international concern and condemnation for “criminaliz[ing] and censor[ing] online speech” and “restrict[ing] the peaceful exercise of the right to freedom of expression.”<sup>30</sup>

## **B. SLAPP LANDSCAPE IN THAILAND**

Despite efforts to curtail the prevalence of SLAPPs in Thailand, the incidence of SLAPPs has, according to a recent United Nations Development Program (“UNDP”) report, “increased significantly” since 2013.<sup>31</sup> In a 2023 report about SLAPPs brought against women and human rights defenders in Thailand, the NGO Protection International concluded that “even though [SLAPPs are] happening globally, the situation in Thailand stands out.”<sup>32</sup> Similarly, in its cross-regional survey of SLAPPs in the Global South, the International Center for Not-For-Profit-Law (“ICNL”) identified Thailand as one of “the most fertile fields for Southern SLAPPs.”<sup>33</sup>

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<sup>29</sup> Historically, many “cases were prosecuted for defamation and for charges under section 14 of the Computer-Related Crime Act B.E. 2550 (2007) (Computer Crime Act). However, there is no record of such prosecutions since the promulgation of an amendment in 2017 — the Computer-Related Crime Act B.E. 2560 (2017) (No. 2) — which stipulated that section 14 (1) does not apply to defamation offences under the Criminal Code.” United Nations Development Programme in Thailand, *Laws and Measures Addressing Strategic Lawsuits Against Public Participation (SLAPPs) in the Context of Business and Human Rights*, (2023), pg. 25; See also Article 19, *TRUTH BE TOLD: Criminal Defamation in Thai Law and the Case for Reform*, (March 2021), pgs. 7-8, [https://www.article19.org/wp-content/uploads/2021/03/Thailand\\_Truth\\_be\\_told\\_decriminalise\\_defamation-1.pdf](https://www.article19.org/wp-content/uploads/2021/03/Thailand_Truth_be_told_decriminalise_defamation-1.pdf).

<sup>30</sup> Amnesty International, *Urgent Action: Grave Concern Over Thai Computer Crimes Act*, (October 7, 2016), pg. 1, <https://www.amnesty.org/en/wp-content/uploads/2021/05/ASA3949442016ENGLISH.pdf#:~:text=For%20the%20past%20decade%2C%20authorities%20in%20Thailand%20have,exercise%20of%20the%20right%20to%20freedom%20of%20expression.>

<sup>31</sup> United Nations Development Programme in Thailand, *Laws and Measures Addressing Strategic Lawsuits Against Public Participation (SLAPPs) in the Context of Business and Human Rights*, (2023), pg. 20.

<sup>32</sup> Protection International, *Silencing Justice: Battling Systematic SLAPP Attacks on Women and Human Rights Defenders in Thailand*, (August 2023), pg. 3. While this report specifically focused on the heightened risks women and human rights defenders face with respect to SLAPPs, its findings align with those of other organizations that have more broadly assessed the prevalence and nature of SLAPPs in Thailand. See International Center for Not-For-Profit Law, *Protecting Activists from Abusive Litigation: SLAPPs in the Global South and How to Respond*, (July 2020), pg. 18.

<sup>33</sup> ICNL Press Release, *Protecting Activists from Abusive Litigation*, (July 2020), pg. 5, <https://www.icnl.org/post/report/slapps-in-the-global-south-report>.

According to an analysis conducted by the UNDP— which was limited to prosecutions that resulted from charges initiated by the business sector and state-owned enterprises—a total of 109 SLAPPs were filed by Thai businesses and state-owned enterprises between 1997 and June 2022.<sup>34</sup> Of the claims UNDP identified as SLAPPs, 74 percent were criminal proceedings and 26 percent were civil proceedings.<sup>35</sup> Importantly, the study found that the

actions most frequently targeted [were] the dissemination of information and expression of views online, including broadcasting evidence of human rights violations in the media (28 percent); followed by participation in rallies or assemblies (21 percent); engagement in media interviews (15 percent); performance of media duties (10 percent); and submission of complaints to authorities (9 percent).<sup>36</sup>

Concerned by the systematic use of SLAPP cases against civil society in Thailand, UN experts from the Working Group on Business and Human Rights recently “urged the Thai government to take action against businesses using the legal system to silence academics, human rights defenders, journalists and other civil society actors.”<sup>37</sup>

### **Criminal Defamation SLAPPs in Thailand**

Thailand’s legal system provides for both civil defamation (Section 423 of the Thai Civil and Commercial Code) and criminal defamation (Sections 326-333 of Thailand’s Criminal Code).<sup>38</sup> Section 326 of Thailand’s Criminal Code establishes the crime of defamation, which is punishable by up to one year imprisonment, a fine of up to 20,000

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<sup>34</sup> United Nations Development Programme in Thailand, *Laws and Measures Addressing Strategic Lawsuits Against Public Participation (SLAPPs) in the Context of Business and Human Rights*, (2023), pg. 19-20.

<sup>35</sup> *Id.*, pg. 23.

<sup>36</sup> *Id.*, pg. 22.

<sup>37</sup> UN Press Release, *UN experts concerned by systematic use of SLAPP cases against human rights defenders by businesses*, (December 16, 2022), <https://www.ohchr.org/en/press-releases/2022/12/un-experts-concerned-systematic-use-slapp-cases-against-human-rights>.

<sup>38</sup> Article 19, *TRUTH BE TOLD: Criminal Defamation in Thai Law and the Case for Reform*, (March 2021), pg. 6, [https://www.article19.org/wp-content/uploads/2021/03/Thailand\\_Truth\\_be\\_told\\_decriminalise\\_defamation-1.pdf](https://www.article19.org/wp-content/uploads/2021/03/Thailand_Truth_be_told_decriminalise_defamation-1.pdf).

Thai Baht, or both.<sup>39</sup> Under Section 328, defamation by publication carries a penalty of up to two years' imprisonment and a fine of up to 200,000 Thai Baht. In addition, private complainants may, during criminal proceedings, make claims for civil penalties. Section 329 lays down four "good-faith" exceptions to defamation: where the statement or opinion has been made by way of justification, self-defense or safeguarding the defendant's legitimate interests; where the statement or opinion was expressed in the exercise of official duty; where the statement or expression is made by way of fair comment on any person or anything which shall be deemed as common public criticism; or where the statement or expression has been made by way of fair report of the open proceedings of any Court or meeting, shall not be guilty of defamation."<sup>40</sup> Under Section 330, truth is a defense to a charge of defamation, but only when the statement does not concern "personal matters" and proof of truth will "benefit" the public. The law does not offer any clarification on the meaning of these terms.

In several important respects, Thailand's criminal defamation law is inconsistent with international standards. First, it provides for the possibility of custodial sentences. Second, the defense of truth is not available in all cases, as stipulated by the UN Human Rights Committee. The UN Human Rights Committee has held that the defense of truth should be available in all cases under penal defamation laws.<sup>41</sup> However, Section 330 does not permit the defense of truth if the "imputation concerns personal matters, and such proof will not be benefit to the public." Indeed, the Committee has found a violation of Article 19 when a journalist was convicted under a defamation law that permitted proof of truth only under restricted conditions.<sup>42</sup> The Committee likewise "noted with concern" that South Korea's defamation law allowed for criminal prosecution for true statements, except when such statements are made solely for the public interest,<sup>43</sup> similar to the law in Thailand. Third, Thailand's law does not adequately distinguish between statements of fact and value judgments, the latter of which are not susceptible of proof. The Human

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<sup>39</sup> Section 326 defines defamation as "Whoever, imputes anything to the other person before a third person in a manner likely to impair the reputation of such other person or to expose such other person to be hated or scorned, is said to commit defamation".

<sup>40</sup> Thailand Criminal Code, Section 329, <https://library.siam-legal.com/thai-law/criminal-code-defamation-sections-326-333/>.

<sup>41</sup> UN Human Rights Committee, *General Comment No. 34*, U.N. Doc. CCPR/C/GC/34 (September 12, 2011), para. 47; Amal Clooney and David Neuberger, *Freedom of Speech in International Law*, Oxford University Press (2024), p. 114.

<sup>42</sup> UN Human Rights Committee, *Adonis v. Phillipines*, Comm. No. 1815/2008, para 4.2.

<sup>43</sup> UN Human Rights Committee, *Concluding Observations, Republic of Korea*, UN Doc CCPR/C/KOR?CO/4, para 46; see also Amal Clooney and David Neuberger, *Freedom of Speech in International Law*, Oxford University Press (2024), p. 114.

Rights Committee has held that defamation laws “should not be applied with regard to those forms of expression that are not, of their nature, subject to verification.”<sup>44</sup> The European Court of Human Rights has likewise concluded that “[w]hile the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. The requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself.”<sup>45</sup> Fourth and finally, it is not clear that Section 329(3) provides a sufficient ‘public interest speech’ defense. The UN Human Rights Committee has explicitly stressed that “a public interest in the subject matter . . . should be recognized as a defense.”<sup>46</sup>

With respect to procedure, Section 28 of the Criminal Procedure Code allows private parties to prosecute criminal offenses without the involvement of a public prosecutor.<sup>47</sup> The Criminal Procedure Code outlines two main channels through which private parties can initiate criminal cases: (1) a private party can lodge a complaint or accusation with inquiry officers, the police officers who investigate criminal complaints (the inquiry officer then submits a report of their investigation and a recommendation to the public prosecutor about whether to take the case forward); or (2) a private party can file a lawsuit directly with the court, acting as a private prosecutor (typically referred to as a “plaintiff”).<sup>48</sup> Accordingly, defamation SLAPP suits in Thailand can be brought by private complainants—e.g. an individual or private entity—in either civil or criminal cases, and by public prosecutors also in criminal cases. Reporting from various civil society

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<sup>44</sup> UN Human Rights Committee, *General Comment No. 34*, U.N. Doc. CCPR/C/GC/34 (September 12, 2011), para. 47.

<sup>45</sup> European Court of Human Rights, *Fedchenko v. Russia (No. 5)*, App. No. 17229/13 (Oct. 2, 2018), para 44.

<sup>46</sup> UN Human Rights Committee, *General Comment No. 34*, U.N. Doc. CCPR/C/GC/34 (September 12, 2011), para. 47.

<sup>47</sup> Section 28 of the Thai Code of Criminal Procedure states that criminal prosecutions can be instituted by the public prosecutor or the alleged victim. It is not confined to particular criminal offenses. Since defamation is a criminal offense under Sections 326-333 of the Thai Criminal Code, defamation prosecutions can be instituted by public prosecutors or alleged victims. See Thailand Criminal Procedure Code, Section 28, <https://www.icj.org/wp-content/uploads/2012/12/Thailand-Criminal-Procedure-Code-1934-2008-eng.pdf>; See also Article 19, *TRUTH BE TOLD: Criminal Defamation in Thai Law and the Case for Reform*, (March 2021), pg. 12, [https://www.article19.org/wp-content/uploads/2021/03/Thailand\\_Truth\\_be\\_told\\_decriminalise\\_defamation-1.pdf](https://www.article19.org/wp-content/uploads/2021/03/Thailand_Truth_be_told_decriminalise_defamation-1.pdf).

<sup>48</sup> United Nations Development Programme in Thailand, *Laws and Measures Addressing Strategic Lawsuits Against Public Participation (SLAPPs) in the Context of Business and Human Rights*, (2023), pgs. 34-36.

organizations indicates that up to 90 percent of SLAPPs in Thailand are brought as criminal cases.<sup>49</sup>

During an official visit to Thailand in April 2018, the UN Working Group on Business and Human Rights called on the Thai government to “ensure that defamation cases are not used by businesses as a tool to undermine legitimate rights and freedoms of affected rights holders, CSOs [civil society organizations] and HRDs [human rights defenders].”<sup>50</sup> And in its 2021 report on Thailand’s human rights record, issued as part of Thailand’s third Universal Periodic Review (“UPR”) cycle, the UN High Commissioner for Human Rights “expressed concern about criminal proceedings, especially criminal defamation charges, brought against human rights defenders, activists, journalists and other individuals under the [Criminal Code].”<sup>51</sup> Likewise, according to the NGO Article 19, Thailand has “seen a deluge of criminal defamation cases against individuals raising concerns about human rights abuses, labour rights violations, corruption, or government or corporate failures.”<sup>52</sup> Indeed, statistics from Thailand’s Office of the Judiciary indicate “that the combined number of criminal defamation cases filed at the court by the public

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<sup>49</sup> See HRLA (Human Rights Lawyers Association) and iLAW, *What is a SLAPP and Why You Should Care*, (2019), pg. 3; See also Protection International, *Silencing Justice: Battling Systematic SLAPP Attacks on Women and Human Rights Defenders in Thailand*, (August 2023), pg. 4.

<sup>50</sup> The Working Group further recommended “enacting anti-SLAPP legislation to ensure that human rights defenders are not subjected to civil liability for their activities.” See United Nations Working Group on Business and Human Rights, *Statement at the end of visit to Thailand by the United Nations Working Group on Business and Human Rights*, (April 4, 2018), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22915&LangID=E>; See also International Commission of Jurists, *Re: Concerns on the existing legal frameworks that are designated to prevent strategic lawsuit against public participation (SLAPP lawsuits)*, (March 20, 2020), pg. 3.

<sup>51</sup> UN Human Rights Council Working Group on the Universal Periodic Reviews, *Compilation on Thailand: Report of the Office of the United Nations High Commissioner for Human Rights*, (August 19, 2021), para. 24, [https://www.upr-info.org/sites/default/files/documents/2021-10/a\\_hrc\\_wg.6\\_39\\_tha\\_2\\_e.pdf](https://www.upr-info.org/sites/default/files/documents/2021-10/a_hrc_wg.6_39_tha_2_e.pdf). Additionally, in its 2017 review of Thailand’s periodic report on compliance with the International Covenant on Civil and Political Rights, the UN Human Rights Committee expressed concern about Thailand’s “criminal proceedings, especially criminal defamation charges, brought against human rights defenders, activists, journalists and other individuals” for merely exercising their fundamental freedoms and recommended that Thailand “should take all measures necessary to guarantee the enjoyment of freedom of opinion and expression in all their forms, in accordance with article 19 of the Covenant.” See United Nations Human Rights Committee, *Concluding Observations on the Second Periodic Report of Thailand*, (April 2017), paras. 35-36, [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Download.aspx?symbolNo=CCPR%2fC%2fTHA%2fCO%2f2&Lang=en](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Download.aspx?symbolNo=CCPR%2fC%2fTHA%2fCO%2f2&Lang=en).

<sup>52</sup> Article 19, *TRUTH BE TOLD: Criminal Defamation in Thai Law and the Case for Reform*, (March 2021), pg. 16, [https://www.article19.org/wp-content/uploads/2021/03/Thailand\\_Truth\\_be\\_told\\_decriminalise\\_defamation-1.pdf](https://www.article19.org/wp-content/uploads/2021/03/Thailand_Truth_be_told_decriminalise_defamation-1.pdf).

prosecutor and directly by complainants have risen steadily” in recent years;<sup>53</sup> based on this data, Article 19 calculated a 50 percent increase in the number of criminal defamation cases filed from 2015 to 2020.<sup>54</sup>

There are several screening mechanisms in Thai law that pre-date the introduction of anti-SLAPP provisions—albeit these screening mechanisms are not tailored to identifying or countering SLAPP suits. For example, under Sections 141 and 142 of Thailand’s Criminal Procedure Code, inquiry officers have the authority to submit a recommendation of non-prosecution to public prosecutors if they determine the accused is not an offender or that the accused’s actions do not constitute an offense.<sup>55</sup> Section 143 of the Criminal Procedure Code establishes that public prosecutors have the authority to decide, based on findings of fact and law and a review of the inquiry officer’s investigation report and recommendation, to issue an order of non-prosecution for the same reasons.<sup>56</sup> However, as detailed by UNDP, actual use of these powers by inquiry officers and prosecutors has been rare:

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<sup>53</sup> *Id.*, pg. 14.

<sup>54</sup> *Id.*, (“Statistics provided to ARTICLE 19 by the Office of the Judiciary reveal that the combined number of criminal defamation cases filed at the court by the public prosecutor and directly by complainants have risen steadily for the past five years. 1,730 more cases were filed in 2020 than 2015, a 50% increase.”).

<sup>55</sup> United Nations Development Programme in Thailand, *Laws and Measures Addressing Strategic Lawsuits Against Public Participation (SLAPPs) in the Context of Business and Human Rights*, (2023), pg. 34, (“The Criminal Procedure Code provides that inquiry officers shall, insofar as possible, collect every kind of evidence for the purpose of ascertaining all facts and circumstances in respect of the alleged offence, identifying the offender and proving the guilt or innocence of the accused. Therefore, inquiry officers play a vital role in acquiring facts and evidence to establish the truth, and not merely to prove the innocence or guilt of the accused. If inquiry officers prove that the accused is not an offender, or that the accused’s actions do not constitute an offence, they can submit a recommendation of non-prosecution to the prosecutor.”). *See also*, Thailand Criminal Procedure Code, Sections 141 and 142, <https://www.icj.org/wp-content/uploads/2012/12/Thailand-Criminal-Procedure-Code-1934-2008-eng.pdf>.

<sup>56</sup> Thailand Criminal Procedure Code, Section 143, <https://www.icj.org/wp-content/uploads/2012/12/Thailand-Criminal-Procedure-Code-1934-2008-eng.pdf>, (“Section 143.- Upon receipt of the opinion and file from the inquiry official as mentioned in the foregoing Section, the Public Prosecutor shall act as follows: (1) In case of the opinion submitted is for a non-prosecution order: issue a non-prosecution order; if he disagrees, issue a prosecution order and direct the inquiry official to send him the alleged offender to be prosecuted.”). *See also*, Somjai Kesornsiricharoen, *The Role and Function of Public Prosecutors in Thailand*, [https://www.unafei.or.jp/publications/pdf/RS\\_No53/No53\\_28PA\\_Kesornsiricharoen.pdf](https://www.unafei.or.jp/publications/pdf/RS_No53/No53_28PA_Kesornsiricharoen.pdf), (noting that under Section 145, a Section 143 order, “if not issued by the Attorney General himself, is not final unless concurred by the Director-General of Police Department for cases occurring in Bangkok, or by the Provincial Governor for cases occurring outside Bangkok. If they disagree with the order, the case will finally be reviewed by the Attorney General and, therefore, his order, whether or not to prosecute, will be

although the inquiry officers have the authority to recommend a non-prosecution order [...] the process remains complicated. Additionally, such a recommendation may place the inquiry officers at risk of a complaint or even a lawsuit against them by the filer, who could accuse them of misconduct or negligence, jeopardizing their subsequent career advancement. In some cases, inquiry officers were pressured by their superiors to advise that prosecution be undertaken, despite their own views to the contrary. This reflects a severe limitation in the ability of inquiry officers to exercise their independent judgement.<sup>57</sup>

Because of such obstacles to the issuance of recommendations against prosecution and non-prosecution orders under, respectively, Sections 141-142 and 143, the International Commission of Jurists has recommended that the Ministry of Justice “adopt measures necessary to ensure that public prosecutors and inquiry officers are able to exercise their ordinary powers to dismiss cases which fall under the scope of SLAPP lawsuits at the outset to minimize undue and negative effect of SLAPP lawsuits.”<sup>58</sup>

Even if the accused is found to be an offender and their actions to constitute an offence, Section 21 of the Public Prosecutor Organization and Public Prosecutors Act B.E. 2553 (2010) grants public prosecutors<sup>59</sup> the authority to recommend an order of non-prosecution to the Office of the Attorney General where the prosecution “will be of no use to the general public, will affect the national safety or security, or will impair

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final. The final non-prosecution order usually prevents further investigation against the offender on account of the same offense unless there is fresh evidence material to case that would likely lead to the conviction of the alleged offender.”).

<sup>57</sup> United Nations Development Programme in Thailand, *Laws and Measures Addressing Strategic Lawsuits Against Public Participation (SLAPPs) in the Context of Business and Human Rights*, (2023), pg. 35.

<sup>58</sup> International Commission of Jurists, *Re: Concerns on the existing legal frameworks that are designated to prevent strategic lawsuit against public participation (SLAPP lawsuits)*, (March 20, 2020).

<sup>59</sup> There are also provisions that allow an inquiry officer to submit a recommendation to their superiors for non-prosecution for the same reasons. See United Nations Development Programme in Thailand, *Laws and Measures Addressing Strategic Lawsuits Against Public Participation (SLAPPs) in the Context of Business and Human Rights*, (2023), pg. 35, (“If inquiry officers see that the facts and evidence presented are in line with the Regulation of the Office of the Attorney General on criminal cases that do not serve the public interest or will affect the security, safety or other significant interests of the country B.E. 2554 (2011), and amendment, they may find that the accused should not be prosecuted. They would therefore submit a recommendation, together with a report of the investigation, to their supervisors or the head of the agency who directly reports to the headquarters or a government agency equivalent to the headquarters, to consider a non-prosecution order.”).

significant interest of the State.”<sup>60</sup> According to the 2019 National Action Plan on Business and Human Rights, which references Section 21 as a measure to prevent SLAPP lawsuits, Section 21 has helped “empower[] the public prosecutor to consider the case and practice their duties in accordance with the constitution and the law in good faith and justice.”<sup>61</sup> As discussed further below, Section 21 has rarely been applied—to SLAPPs or more broadly—in part because the term ‘public interest’ lacks a clear definition in the regulation.<sup>62</sup>

Beyond the general non-prosecution authority articulated in Sections 141-143 of the Criminal Procedure Code and the special non-prosecution authority articulated in Section 21, Section 329 of the Thai Criminal Code also provides an avenue for responding to criminal defamation SLAPPs. Section 329 is technically an exception to the offense of defamation—i.e., it states what does not constitute defamation rather than providing for a defense, meaning that inquiry officers and prosecutors could rely on it when considering whether a non-prosecution order based on insufficient evidence of defamation is warranted.<sup>63</sup> However, the authorities have tended to treat Section 329 more like a defense, using it to acquit the accused at trial. Given that SLAPP targets relying on the provision thus have to “fight[] ... the case until the end” of the proceedings,<sup>64</sup> Section 329 (as presently used and as discussed further below) does not

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<sup>60</sup> Public Prosecutor Organization and Public Prosecutors Act B.E. 2553, (2010), Article 21.

<sup>61</sup> Ministry of Justice, Rights and Liberties Protection Department, *Thailand’s 1st National Action Plan on Business and Human Rights (2019-2022)*, (2019), pg. 106, <https://www.undp.org/thailand/publications/thailands-1st-national-action-plan-business-and-human-rights>. See also, International Commission of Jurists, *Re: Concerns on the existing legal frameworks that are designated to prevent strategic lawsuit against public participation (SLAPP lawsuits)*, (March 20, 2020), pg. 8, (adding that, “We note that NAP also refers to Article 21 of the Public Prosecution Organ and Public Prosecutors Act B.E. 2553 (2010) as another measure to prevent SLAPP lawsuits.”).

<sup>62</sup> United Nations Development Programme in Thailand, *Laws and Measures Addressing Strategic Lawsuits Against Public Participation (SLAPPs) in the Context of Business and Human Rights*, (2023), pg. 37. See International Commission of Jurists, *Re: Concerns on the existing legal frameworks that are designated to prevent strategic lawsuit against public participation (SLAPP lawsuits)*, (March 20, 2020), pg. 8.

<sup>63</sup> Notably, while Section 329 is titled “Good Faith Statement”, Section 330 of the Criminal Code is specifically titled “Truth as a Defense”. See Thailand Criminal Code, Sections 329-330, <https://library.siam-legal.com/thai-law/criminal-code-defamation-sections-326-333/>.

<sup>64</sup> United Nations Development Programme in Thailand, *Laws and Measures Addressing Strategic Lawsuits Against Public Participation (SLAPPs) in the Context of Business and Human Rights*, (2023), pg. 25.

mitigate key harms faced by SLAPP targets, such as the costs of legal defense and travelling to court, the time investment, the psychological impact, and the chilling effect.<sup>65</sup>

Prior to the introduction of the anti-SLAPP amendments in 2019, the preliminary hearing process also offered an avenue for SLAPPs to be screened and dismissed early in the proceedings. Under Sections 162-167 of the Thai Criminal Procedure Code, preliminary hearings are conducted to determine whether the accusation has enough merit to be accepted by the presiding court, meaning that a case is only allowed to proceed if “there is a prima facie case for trial[.]”<sup>66</sup> Section 162 provides that preliminary hearings are required in cases filed directly with the court by private complainants, but are only to be held in publicly prosecuted cases where the court, exercising its discretion, “thinks [it] fit.”<sup>67</sup>

While courts had the authority to dismiss claims at the preliminary hearing stage pre-2019, there were significant challenges. First, as explained by UNDP, “[A]lthough the law allows the court to exercise discretion in the preliminary hearing [in cases brought by a public prosecutor], the court often does not undertake investigation of the lawsuit [via a preliminary hearing], because this would duplicate the prosecutor’s earlier work in investigating and issuing an order on the case[.]”<sup>68</sup> Second, under Section 165, “the accused [was] not entitled to adduce evidence in the course of the preliminary examination,” but could only “cross-examine the witnesses for the prosecution.”<sup>69</sup> Thus, prior to the enactment of Section 165/2, the details of which are discussed further below, courts conducted preliminary hearings solely based on consideration of the plaintiff’s evidence—defendants were allowed to introduce evidence and make arguments only in

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<sup>65</sup> *Id.*

<sup>66</sup> Thailand Criminal Procedure Code, Section 167, <https://www.icj.org/wp-content/uploads/2012/12/Thailand-Criminal-Procedure-Code-1934-2008-eng.pdf>.

<sup>67</sup> Thailand Criminal Procedure Code, Section 162, <https://www.icj.org/wp-content/uploads/2012/12/Thailand-Criminal-Procedure-Code-1934-2008-eng.pdf>, (“Section 162.- Where the charge is found to conform with the law, the Court shall act as follows: (1) In the case where a private person is the prosecutor, the court shall make a preliminary examination, but, if the Public prosecutor has also instituted a criminal prosecution with the same charge, sub-section (2) shall apply; (2) In the case entered by the Public Prosecutor, the Court need not hold a preliminary examination, but it may do so if it thinks fit. In case of there is a preliminary examination as aforesaid, if the accused pleads guilty, the Court shall accept the charge for trial.”).

<sup>68</sup> United Nations Development Programme in Thailand, *Laws and Measures Addressing Strategic Lawsuits Against Public Participation (SLAPPs) in the Context of Business and Human Rights*, (2023), pg. 39.

<sup>69</sup> Thailand Criminal Procedure Code, Section 165, <https://www.icj.org/wp-content/uploads/2012/12/Thailand-Criminal-Procedure-Code-1934-2008-eng.pdf>.

response to the plaintiff's presentation.<sup>70</sup> Third, as conveyed by lawyers and civil society and as borne out by the data gathered for this report (also discussed below), courts have generally been uncomfortable with dismissing cases early, preferring to give a full hearing to evidence from both parties at trial.

## Government Response

UNDP has described the prevalence of SLAPPs in Thailand as “worrying, but not hopeless” in part because “key stakeholders, including policymakers, are becoming more aware of the problem.”<sup>71</sup> In fact, as noted above, Thailand's First National Action Plan on Business and Human Rights (“NAP”) identified “human rights defenders” as one of “four key priority areas” and explicitly called for initiatives aimed at “protecting human rights defenders” and “the development of laws, regulations, or measures to prevent Strategic Litigation Against Public Participation: (SLAPP).”<sup>72</sup>

In conjunction with the National Action Plan, various members of Thailand's National Legislative Assembly have explicitly recognized the threat of SLAPP suits. Speaking out on the issue, one Assembly member stated:

[I]n many instances, persons exercised their right to sue another in bad faith or distorts the 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, for example, by submitting cases to a distantly located court so that the defendant would face difficulties in travelling to defend themselves at trials, by seeking prosecution of a defendant for an offence with more severe penalties to intimidate defendants and cause them to self-censor or avoid certain work, or by instigating lawsuits, during which

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<sup>70</sup> United Nations Development Programme in Thailand, *Laws and Measures Addressing Strategic Lawsuits Against Public Participation (SLAPPs) in the Context of Business and Human Rights*, (2023), pg. 29. See also Piyawat Vitooraporn and Anyamani Yimsaard, *An Overview Of Criminal Litigation In Thailand*, (August 30, 2022), <https://www.mondaq.com/trials-appeals-compensation/1225342/an-overview-of-criminal-litigation-in-thailand#:~:text=To%20determine%20whether%20to%20accept%20the%20case%2C%20the,public%20prosecutors%20without%20holding%20investigative%20or%20preliminary%20hearings.%29>, (noting that at the preliminary hearing, plaintiffs are required “to present at least one witness to show that the case has a basis to continue to a full trial”).

<sup>71</sup> *Id.*, pg. iii.

<sup>72</sup> Ministry of Justice, Rights and Liberties Protection Department, *Thailand's 1st National Action Plan on Business and Human Rights (2019-2022)*, (2019), pgs. 21, 102, 119, [https://www.undp.org/thailand/publications/thailands-1st-national-action-plan-business-and-human-rights\\_](https://www.undp.org/thailand/publications/thailands-1st-national-action-plan-business-and-human-rights_)

the alleged victim will not present themselves at court, causing difficulties for the defense in the preparation of their arguments.<sup>73</sup>

Pursuant to the 2019 NAP, the National Legislative Assembly incorporated two new provisions into the Criminal Procedure Code, Sections 161/1 and 165/2, with the aim of curtailing SLAPP lawsuits.<sup>74</sup> Specifically, as described in Thailand's response to a joint communication from various UN Special Procedures, Section 161/1, which took effect on March 20, 2019, grants courts the authority to "dismiss any criminal case at the filing stage of the lawsuit if it appears to the court that the cause of action stems from (1) ill intention to harass (2) to take advantage over a person (3) to gain any unlawful benefits or (4) to achieve any corrupt underlying objectives."<sup>75</sup> Furthermore, Section 165/2, which came into effect on February 20, 2019, was introduced "to allow the accused to present legal and evidentiary arguments during the preliminary examination of the Court where they previously could not do so. Section 165/2 also enables the Court to play a more active role by having the power to summon witnesses and evidence proposed by the accused as the Court's witnesses" during the preliminary hearing stage.<sup>76</sup>

While both Sections have been characterized as "anti-SLAPP amendments," only Section 161/1 directly addresses the unique characteristics of a SLAPP suit and, unlike Section 165/2, provides an avenue for defendants to try to dismiss SLAPPs in the initial stage of the proceedings.

More specifically, **Section 161/1** 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

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<sup>73</sup> International Commission of Jurists, *Re: Concerns on the existing legal frameworks that are designated to prevent strategic lawsuit against public participation (SLAPP lawsuits)*, (March 20, 2020), pg. 4. See also Mahannop Dejvitak et al., *Rationales and Principles attached to Draft Amending Criminal Procedure Act, submitted to the Chair of the National Legislative Assembly*, (June 22, 2017); Ministry of Justice, Rights and Liberties Protection Department, *Thailand's 1st National Action Plan on Business and Human Rights (2019-2022)*, (2019), pg. 105, <https://www.undp.org/thailand/publications/thailands-1st-national-action-plan-business-and-human-rights>.

<sup>74</sup> Ministry of Justice, Rights and Liberties Protection Department, *Thailand's 1st National Action Plan on Business and Human Rights (2019-2022)*, (2019), pgs. 105-106, <https://www.undp.org/thailand/publications/thailands-1st-national-action-plan-business-and-human-rights>.

<sup>75</sup> Permanent Mission of Thailand in Geneva, *Thailand's response to the joint communication of the UN Human Rights Council's Special Procedures*, (February 21, 2019), pg. 6, <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=34635>.

<sup>76</sup> *Id.*

undue advantage of a defendant, or to produce 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 again. 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 judgements in another criminal case without providing any appropriate reason.<sup>77</sup>

As explained by UNDP, “since the law does not specify clear criteria or procedures, it is generally understood that determining whether a lawsuit has been brought in good faith depends solely on the court’s discretion.”<sup>78</sup> Namely, the provision “lacks specificity with regard to when and how [it] can be invoked[,]” and there are no guidelines regarding the criteria, procedure, or timeline for deciding such claims.<sup>79</sup> Section 161/1 sets just one specific limitation—that it is only applicable in cases filed by a private complainant directly with courts and not those brought by a public prosecutor.

Meanwhile, **Section 165/2** of the Criminal Procedure Code states:

During the preliminary hearing, the defendant may submit to the court a significant fact or law which may bring the court to the conclusion that the case before it lacks merit, and may include the submission as persons, documents or materials to substantiate the defendant’s claims provided in the submission. In such case, the court may call such persons, documents or materials to provide evidence in its deliberation of the case as necessary

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<sup>77</sup> International Commission of Jurists, *Re: Concerns on the existing legal frameworks that are designated to prevent strategic lawsuit against public participation (SLAPP lawsuits)*, (March 20, 2020), pg. 4. See also United Nations Development Programme in Thailand, *Laws and Measures Addressing Strategic Lawsuits Against Public Participation (SLAPPs) in the Context of Business and Human Rights*, (2023), pg. 38, (noting that, according to the memorandum accompanying the draft Amendment, one of the main objectives of the provision is to prevent SLAPPs: “It appears that the right to prosecute criminal cases is exercised in bad faith or by misrepresentation of facts to persecute or take advantage of the defendant in many cases or file lawsuits with the expectation of other benefits than ordinary benefits, such as filing a lawsuit in courts in remote areas to make the defendant have difficulty in travelling to fight the case; or suing the defendant on charges that are heavier than reality so that the defendant must agree to act or not act in a wrong way, especially suing to threaten the defendant’s exercise of fundamental rights and liberties in self-defence or public interest. Therefore, it is necessary to amend section 161/1 of the Criminal Procedure Code to require that the criminal prosecution be done in good faith.”).

<sup>78</sup> United Nations Development Programme in Thailand, *Laws and Measures Addressing Strategic Lawsuits Against Public Participation (SLAPPs) in the Context of Business and Human Rights*, (2023), pg. 38.

<sup>79</sup> *Id.*, pg. 17.

and appropriate, and the complainant and the defendant may examine this evidence with the consent of the court.”<sup>80</sup>

As described above, Section 162 of Thailand’s Criminal Procedure Code provides that preliminary hearings are required in cases filed directly with the court by private complainants.<sup>81</sup> Furthermore, as also described above, prior to the enactment of Section 165/2 defendants were only allowed to raise arguments and introduce evidence in response to the plaintiff’s presentation, including by cross-examining the plaintiff’s witnesses.<sup>82</sup> In contrast, Section 165/2 allows defendants to introduce their own evidence at the preliminary stage so courts have more comprehensive facts when determining whether to dismiss or accept the case for trial.<sup>83</sup> Notably, because (as discussed above) courts rarely exercise their discretion in holding preliminary hearings in cases brought by public prosecutors, Section 165/2 is functionally inapplicable to such cases.<sup>84</sup>

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<sup>80</sup> International Commission of Jurists, *Re: Concerns on the existing legal frameworks that are designated to prevent strategic lawsuit against public participation (SLAPP lawsuits)*, (March 20, 2020), pg. 4.

<sup>81</sup> While there are no statutory time limits, preliminary hearings generally take place approximately three months after a case is filed. Approximately one month after the preliminary hearing, a court decides whether to accept or dismiss the case. *See Ake & Associates, Guide to Criminal Prosecution in Thailand*, <https://www.golawphuket.com/penal-en/prosecution/>.

<sup>82</sup> At the preliminary hearing, plaintiffs are required to present at least one witness to show that the case has a basis to continue to a full trial. *See Piyawat Vitooraporn and Anyamani Yimsaard, An Overview Of Criminal Litigation In Thailand*, (August 30, 2022), <https://www.mondaq.com/trials-appeals-compensation/1225342/an-overview-of-criminal-litigation-in-thailand#:~:text=To%20determine%20whether%20to%20accept%20the%20case%2C%20the,public%20prosecutors%20without%20holding%20investigative%20or%20preliminary%20hearings.%29>.

<sup>83</sup> United Nations Development Programme in Thailand, *Laws and Measures Addressing Strategic Lawsuits Against Public Participation (SLAPPs) in the Context of Business and Human Rights*, (2023), pg. 39. *See also* Ministry of Justice, Rights and Liberties Protection Department, *Thailand’s 1<sup>st</sup> National Action Plan on Business and Human Rights (2019-2022)*, (2019), pg. 106, <https://www.undp.org/thailand/publications/thailands-1st-national-action-plan-business-and-human-rights>, (“originally under Section 165, paragraph 2, [the Criminal Procedure Code] stated that ‘The defendant has no authority to bring witnesses at the preliminary hearing.’ But the newly drafted Section 165/2 specifies that the defendant may state facts to the court, or an important issue that the court should order the case to be unfounded and to specify in the statement to the person, document or material that will support the facts according to the declaration of the defendant, in which case, the court may call such persons, documents, or objects to be a court witness for consideration of the case as necessary and appropriate. The plaintiff and the defendant may ask the court witness when allowed by the court. So, the law amendment on the issue will be another measure to help protecting human rights defenders from being falsely prosecuted.”).

<sup>84</sup> *Id.*, (“The preliminary hearing still has some limitations, especially in cases where the prosecutor is the plaintiff. Although the law allows the court to exercise discretion in the preliminary hearing, the court often does not undertake investigation of the lawsuit, because this would duplicate the prosecutor’s

## METHODOLOGY



As discussed above, this report seeks to assess whether the “anti-SLAPP” amendments as well as other anti-SLAPP protections have been effective in curtailing SLAPPs, and if not, why not, and to then provide recommendations for improving the effectiveness of anti-SLAPP protections. To this end, researchers gathered data on criminal defamation cases brought since the anti-SLAPP amendments were introduced in 2019 to determine how many cases qualified as SLAPPs and to what extent the amendments had been utilized in these cases.

Through analysis of public reporting<sup>85</sup> and case documents,<sup>86</sup> as well as interviews with defense lawyers, researchers identified 36 criminal defamation SLAPPs<sup>87</sup> that targeted protected expression in Thailand, all of them initiated between 2019, after passage of the anti-SLAPP amendments, and 2023. This number is almost certainly less than the number of criminal defamation SLAPPs actually filed during this time period, but is based on information accessible to the researchers. Researchers gathered data with the goal of identifying: the date of filing, profile of the filer, profile of the accused, factual allegations and charges brought, whether Sections 141-143 of the Code of Criminal Procedure or Section 21 of the Public Prosecutor Organization and Public Prosecution Act B.E. 2553 (2010) were applied, whether Section 161/1 of the Criminal Procedure

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earlier work in investigating and issuing an order on the case. As a result, a SLAPP that comes to court through this channel may not undergo an additional tier of screening (i.e. by the court) to bring the case to an end during the preliminary hearing. The court is more likely to rely on the screening that the prosecutor already conducted, and thus would regrettably skip this step where the defendant is asked to present facts and evidence during the preliminary hearing.”).

<sup>85</sup> This entailed analysis of news articles, social media posts, reports from human rights organizations, and reports from government bodies.

<sup>86</sup> Court documents analyzed included: complaints to inquiry officers, letters acknowledging accusations, court proceeding memorandums, prosecution appointment letters, summons, Section 161/1 petitions, Section 165/2 petitions, court of first instance judgments, appeal court judgments, Supreme Court judgments, and apology letters.

<sup>87</sup> As described above, SLAPPs are generally understood to refer to civil or criminal lawsuits that aim to curb or discourage speech on matters of public concern, often brought by the entity or individual whose activities are the subject of criticism or opposition. Cases considered for potential inclusion in this dataset were evaluated against various indicia of SLAPPs, as recognized by international and regional standards, including: whether they involved constitutionally protected activity, whether they entailed speech on matters of public interest or public importance, whether they were an expression of opinion, whether multiple causes of action were launched against the accused, whether the accuser’s claims were disproportionate (the seeking of exaggerated damages or relief that appears out of proportion to the alleged harm), whether the plaintiff employed harassing or delaying tactics, and whether there was a power imbalance between the accuser and accused.

Code was invoked or applied, whether Section 165/2 of the Criminal Procedure Code was invoked or applied, the outcome of the case at the preliminary hearing stage, the court of first instance's judgment and reasoning, the current status of the case, and the length of the proceedings. The status of the cases was last updated on August 27, 2024 based on information available to the researchers at that time.

# CRIMINAL DEFAMATION SLAPPS BETWEEN 2019 AND 2023



## A. OVERVIEW OF CASES

The data findings discussed below cover 36 criminal defamation cases that the researchers identified as SLAPPs between 2019, after the passage of the anti-SLAPP amendments, and 2023.

While 61 percent of cases analyzed for this report were filed directly with the court, 39 percent were initiated by complaints filed with an inquiry officer (with most cases then taken forward by public prosecutors). Approximately 58 percent of the complaints were filed by government officials or politicians,<sup>88</sup> 36 percent were filed by businesses, 3 percent by NGOs, and 3 percent by journalists. In contrast, 41 percent of cases targeted human rights defenders and political activists, 28 percent targeted journalists, 19 percent targeted politicians or political parties, and 11 percent targeted private individuals, including villagers and students. Of the cases that reached a final outcome, 35 percent ended in acquittal,<sup>89</sup> 32 percent were withdrawn by the plaintiff without a known settlement, 10 percent were withdrawn after a settlement was reached, 14 percent received an order of non-prosecution and 7 percent were dismissed after a preliminary hearing. None ended in a conviction. On average, proceedings lasted nearly two years before conclusion. In 32 percent of cases filed by private parties directly with the court, defense counsel filed Section 161/1 petitions (as mentioned above, cases filed by inquiry officers and taken forward by public prosecutors are not eligible for Section 161/1 petitions). In 100 percent of these cases, courts ignored or rejected Section 161/1 petitions. In 27 percent of cases filed by private parties with the court, defense counsel also filed Section 165/2 petitions arguing that courts should dismiss cases at the preliminary hearing due to complaints being meritless and SLAPPs. In none of these cases did courts subpoena additional evidence or witnesses on the basis of the Section 165/2 petitions, as is permitted by the provision.

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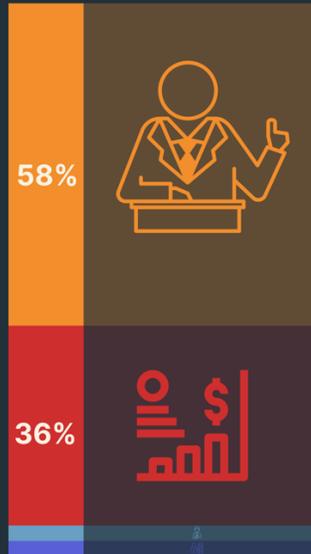
<sup>88</sup> This figure includes individuals employed by government agencies or institutions.

<sup>89</sup> Appeals against three of the ten cases that ended in acquittal were pending before the Court of Appeal as of August, 2024.

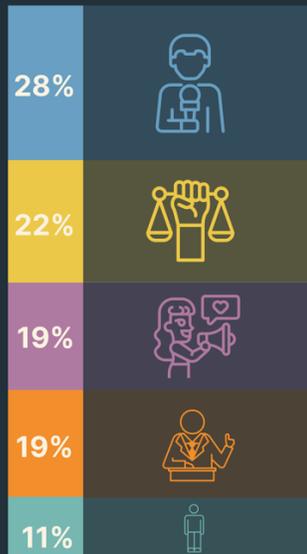
# 36 SLAPP CASES

2019-2023

## FILED BY



## FILED AGAINST



- Government Officials, Politicians, Parties
- Journalists
- Human Rights Defenders
- Political Activists
- Businesses
- NGOs
- Private Individuals  
e.g. Villagers, Community Members

**36**  
CASES

## PROCESS AND OUTCOMES

**0**  
CONVICTIONS



## FAILED PETITIONS

S. 161/1 and 165/2 of the Thai Criminal Procedure Code invoked only in cases filed directly with the court

32% FILED 161/1 PETITIONS



### 100% IGNORED OR REJECTED

161/1 permits dismissal of cases brought by private parties in bad faith - Courts ignored or rejected all petitions filed.

27% FILED 165/2 PETITIONS



### 100% FAILED TO SUBPOENA

165/2 permits defense to put forth evidence at an early stage - Courts failed to subpoena witnesses or evidence for any petition filed.

## B. OVERVIEW OF INDIVIDUAL CASES

In order to evaluate why the anti-SLAPP amendments introduced pursuant to the 2019 NAP—primarily Section 161/1—as well as other anti-SLAPP protections have failed to help curtail SLAPPs targeting the exercise of civil and political rights in Thailand, it is necessary to understand the key features of applicable cases and how they move through the Thai legal system in practice. While 36 criminal defamation cases were examined and analyzed for this report, the following section provides high-level summaries of a subset of the total 36 cases. The cases were selected with the aim of providing a picture of the types of plaintiffs, defendants, claims, and outcomes in the criminal defamation cases analyzed. Where possible, the summaries were based on a review of available case documents and interviews conducted with defense counsel. Some summaries, however, rely on publicly available information, and thus may not reflect the current status of the case or be entirely complete.

### *Sereepisuth Temeeyaves vs. Ticha Nanakorn*

On September 26, 2023, Sereepisuth Temeeyaves (“*Mr. Temeeyaves*”), a former Police General Commissioner, then member of Parliament, and current leader of the Sereerumthai Party, filed a criminal defamation complaint against Ticha Nanakorn (“*Ms. Nanakorn*”), the director of Ban Kanchanaphisek Children and Youth Training Center.<sup>90</sup> He filed the complaint as a private party, directly with the court. In early August 2023, Ms. Nanakorn had posted about Mr. Temeeyaves on her public Facebook page in what he alleged was “a deliberate and dishonest act to libel and discredit [him], exposing him to scorn and hatred, and defaming and insulting him in order to make the content known among the presses and the public.”<sup>91</sup> The posts in question included a picture of the plaintiff alongside the following text:

On 3 August 2023, Pol. Gen. Sereepisuth Temeeyaves has publicly commented on the case of a young activist, Yok, where, in one part, he said ‘if Yok were my daughter, I would kill her. A child like that is no good. I would not want her as mine.’ No matter what the status the adult speaker has, such words are too mean and rude to be acceptable. This is especially depressing for the people given the speaker is a former acting commissioner general. However, as a member of the parliament, uttering those words equals disrespecting, abusing, depreciating, and insulting the people in an unapologetic way. That said, I probably won’t respond to you

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<sup>90</sup> Writ for the scheduling of a preliminary examination, *Police General Sereepisuth Temeeyaves vs. Ms. Ticha Nanakorn*, (September 26, 2023).

<sup>91</sup> *Id.*

in the same way as you anticipated because it would be totally disgusting and uncivil.<sup>92</sup>

Ms. Nanakorn also posted copies of letters she had submitted to the President of the House of Representatives and the National Human Rights Commission of Thailand, which included the following text: “What I think the [your institution] should do to establish a credible and trustworthy norm in society is to ‘examine the... Code of Conduct ...’ of Pol. Gen. Sereepisuth Temeeyaves ...in this case and openly inform the public of the examination result as it concerns a public figure.”<sup>93</sup>

Notably, Mr. Temeeyaves’s criminal defamation complaint acknowledged that he had in fact made the statement in question:

The truth is that the Plaintiff’s words, ‘*if Yok were my daughter, I would kill her. A child like that is no good. I would not want her as mine*’, were meant to remind and reprimand ‘Yok’, not the Defendant. The reason is merely to criticize and comment on her in good faith. The Plaintiff talked about if Yok were his own daughter, but not about killing Yok. No part in the Plaintiff’s speech suggests that the Plaintiff would do so. The meaning of the Plaintiff’s said words was along the line of how parents would scold their child, e.g., ‘if you don’t listen, I will beat you to death’. It is aimed to remind her with love. In reality, no parent would kill their own child. The purpose of the Plaintiff’s words is to teach, but not to seriously execute them. Moreover, the Plaintiff was referring to his own children. He has never threatened to kill Yok whatsoever. The reason the Plaintiff has spoken to reprimand Yok was because the young person had shown an aggressive behavior and that no other children or youth should look at her as a role model.<sup>94</sup>

In addition to seeking criminal penalties under Sections 326 and 328 of the Criminal Code, Mr. Temeeyaves requested that the court order Ms. Nanakorn to “publish a statement of apology along with the court judgment on her own Facebook account for 15 consecutive days and [to] bear the publication and other costs.”<sup>95</sup>

On February 12, 2024, defense counsel filed a request for the court to dismiss the case under Section 161/1, also invoking 165/2. The petition emphasized that “the Plaintiff

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

made a speech about Yok during a press interview, in a press conference area of the parliament” and “the Defendant had a straightforward intention which is to criticize the Plaintiff and commence a complaint on the Plaintiff’s ethic[s] so that he is accountable for his own statement.”<sup>96</sup> The petition further argued that although Mr. Temeeyaves brought

this lawsuit against the Defendant, alleging the Defendant of causing damage against him, that he was detested and defamed [i]n fact, any detesting or defamatory view against the Plaintiff would not be caused by the Defendant’s post but rather from the Plaintiff’s own wording and action.<sup>97</sup>

However, the court never responded to the request. Though a preliminary hearing was held on April 29, 2024, the court accepted the case for trial. The presentation of witnesses for the trial is scheduled for 2025.

### ***Nakhon Pathom Provincial Public Prosecutor et. al vs. Pratch Rujivanarom***

In January 2020, Pratch Rujivanarom (“Mr. Rujivanarom”), a then editor at environmental news outlet GreenNews, made a post on the GreenNews Facebook page that resulted in the initiation of a criminal defamation case by a Public Prosecutor in Nakhon Pathom Province.<sup>98</sup> The lawsuit was based on a complaint that private mining company Myanmar Pongpipat Co., Ltd. (“*Myanmar Pongpipat*”) filed in December 2021 with an inquiry officer in response to Mr. Rujivanarom’s Facebook post.<sup>99</sup> The post in question included pictures of a mine the company owned and operated and a link to an article on the GreenNews website titled “Myanmar court ordered a Thai mining company to compensate Dawei villagers for 2.4 million Baht because the tin mine ruined

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<sup>96</sup> Petition seeking the dismissal of claim per Section 161/1 and 165/2 of the Criminal Procedure Code, *Police General Sereepisuth Temeeyaves vs. Ms. Ticha Nanakorn*, (February 12, 2024).

<sup>97</sup> *Id.*

<sup>98</sup> Judgment, *Nakhon Pathom Provincial Public Prosecutor et. al, vs. Mr. Pratch Rujivanarom*, (August 11, 2023).

<sup>99</sup> *Id.*

environment.”<sup>100</sup> (Myanmar Pongpipat reportedly also filed a separate civil defamation complaint directly with the court.<sup>101</sup>)

Even though the case was initially filed with an inquiry officer—which precluded the application of the anti-SLAPP provisions—the court accepted Myanmar Pongpipat’s application to join the lawsuit as a co-plaintiff.<sup>102</sup> Once a co-plaintiff, the company filed a motion requesting the court to compel the defendant to pay compensation in the amount of “135 million Baht [\$3,678,750] with interest of 5% per annum of the principle, calculating from 13 January 2020 until such amount was paid to the Co-Plaintiff in full.”<sup>103</sup> The company also requested that the court compel “the Defendant to publish correct and truthful information as per the Co-Plaintiff’s request in at least 3 daily newspapers and the Facebook pages of the Defendant and GreenNews.”<sup>104</sup> After certain witnesses for the prosecution were cross-examined at trial, the co-plaintiff withdrew the request for compensation.<sup>105</sup> No preliminary hearing was held—as mentioned above, where a public prosecutor brings the case before the court, it is within the court’s discretion to decide whether or not to conduct a preliminary hearing.

583 days after the complaint was initiated, the court of first instance issued a judgment acquitting Mr. Rujivanarom, reasoning that

the Defendant’s publication of the judgment of Dawei Provincial Court was the publication of the judgment according to facts. It can be deemed that the Defendant informed the news by way of fair report of the open proceeding of any court or meeting and by way of fair comment on any person or thing subjected to public criticism according to Section 329 (3) and (4) of the Criminal Code.<sup>106</sup>

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<sup>100</sup> *Id.*

<sup>101</sup> Defense counsel interviews. The company reportedly withdrew the civil complaint after the court of first instance acquitted Mr. Rujivanarom in the criminal case (discussed further below).

<sup>102</sup> Judgment, *Nakorn Pathom Provincial Public Prosecutor et. al, vs. Mr. Pratch Rujivanarom*, (August 11, 2023).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* The judgment did find that the article slightly distorted the facts of the court case against the company. Nevertheless, the defendant was acquitted of all charges. See Judgment, *Nakorn Pathom Provincial Public Prosecutor et. al, vs. Mr. Pratch Rujivanarom*, (August 11, 2023).

Myanmar Pongpipat was no stranger to SLAPP suits. According to EarthRights International, the company “has repeatedly attempted to silence journalists who talk about it by filing lawsuits, which were either dismissed or withdrawn.”<sup>107</sup> Indeed, this was not even Myanmar Pongpipat’s first criminal defamation case against Mr. Rujivanarom: in 2017, the company filed defamation cases in two different courts in Roi Et and Nakhon Pathom against Mr. Rujivanarom and the news outlet he worked with at the time, The Nation, for writing an article on the alleged negative impact of the company’s mine operations on water sources.<sup>108</sup>

### ***Claims Filed by the Mayor of Banlang sub-district***

#### ***Public Prosecutor of Nakhon Ratchasima Province et. al vs. Chutima Sidasathian***

In 2021, independent Thai journalist Chutima Sidasathian (“Ms. Sidasthian”) began investigating events in the Nakhon Ratchasima province of Thailand, where a bank had taken legal action against the residents of several villages to recoup money for loans that many villagers denied having ever received.<sup>109</sup> Facing lawsuits brought by the bank, some villagers were reportedly driven to suicide, while others faced financial ruin.<sup>110</sup> Ms. Sidasathian uncovered allegations of misappropriation of funds and other irregularities on the part of bank officers and public officials, including Thanonthorn Kaweekitrattan (“Mr. Kaweekitrattan” or “the Mayor”). Mr. Kaweekitrattan is the Mayor of Banlang sub-district, where the villages are located, and had previously been one of the individuals responsible for managing the village funds.<sup>111</sup> In July 2022, after Ms. Sidasthian shared

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<sup>107</sup> EarthRights International, *Environmental Journalist Prevails as Thai Court Dismisses Defamation Case: A Blow to Corporate Intimidation Tactics*, (July 20, 2023), [https://earthrights.org/media\\_release/environmental-journalist-prevails-as-thai-court-dismisses-defamation-case-a-blow-to-corporate-intimidation-tactics/](https://earthrights.org/media_release/environmental-journalist-prevails-as-thai-court-dismisses-defamation-case-a-blow-to-corporate-intimidation-tactics/).

<sup>108</sup> See EarthRights International, *Environmental Journalist Prevails as Thai Court Dismisses Defamation Case: A Blow to Corporate Intimidation Tactics*, (July 20, 2023), [https://earthrights.org/media\\_release/environmental-journalist-prevails-as-thai-court-dismisses-defamation-case-a-blow-to-corporate-intimidation-tactics/](https://earthrights.org/media_release/environmental-journalist-prevails-as-thai-court-dismisses-defamation-case-a-blow-to-corporate-intimidation-tactics/), (“The Roi Et provincial court eventually ruled that the case was a duplicate of the one filed in Nakhon Pathom, leading to its dismissal on June 12, 2017. The legal proceedings continued in the Nakhon Pathom provincial court. The case was eventually withdrawn after a settlement agreement was reached, requiring The Nation to publish MPC’s explanation on its website.”).

<sup>109</sup> See Bangkok Post, *Journalist prevails in another ‘Slapp’ case*, (March 6, 2024), <https://www.bangkokpost.com/thailand/general/2754188/journalist-prevails-in-another-slapp-case>.

<sup>110</sup> See Alan Morison, *Is a Thai national bank covering up robbery of its own money?*, Asia Times (January 3, 2024), [https://asiatimes.com/2024/01/is-a-thai-national-bank-covering-up-robbery-of-its-own-money/?fbclid=IwAR0\\_pH3\\_\\_NXgGSJ8RldpQgfViSOSwbtbMWe3WwcoBszhvYodspBnblFrKV8](https://asiatimes.com/2024/01/is-a-thai-national-bank-covering-up-robbery-of-its-own-money/?fbclid=IwAR0_pH3__NXgGSJ8RldpQgfViSOSwbtbMWe3WwcoBszhvYodspBnblFrKV8).

<sup>111</sup> See Judgment, *Public Prosecutor of Nakhon Ratchasima Province et. al vs. Chutima Sidasthian*, (March 6, 2024), (“Co-plaintiff, as witness of this case, testified that he was elected as mayor of Banlang

some of her findings in a series of posts on Facebook, bemoaning the loan situation, criticizing the local government (including the Mayor's father, who had preceded his son as Mayor), and calling on voters to elect different representatives,<sup>112</sup> the Mayor filed a criminal defamation complaint against her with an inquiry officer.<sup>113</sup> Public prosecutors took the case forward in December 2022, charging Ms. Sidasthian with three counts of criminal defamation under Sections 326 and 328, each of which carried a sentence of two years' imprisonment.<sup>114</sup> Even though the Mayor eventually joined the public prosecutor as a co-plaintiff, defense counsel could not request application of Section 161/1 because the complaint was initially filed with an inquiry officer.<sup>115</sup> Notably, after becoming co-plaintiff, the Mayor requested financial damages against Ms. Sidasthian in the amount of 100,000 Baht [\$2,725].<sup>116</sup> No preliminary hearing was held—as mentioned

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sub-district in March 2013 and completed his eight-year term in 2021. Subsequently, he was re-elected in 2021 and stays in his term to present. During the time that defendant posted messages in dispute, he serve[d] as mayor of Banlang sub-district.... co-plaintiff served as the first president of financial institution of community village funds during the period between October 2011-December 2012"). See also Criminal Proceeding Complaint, *Public Prosecutor of Nakhon Ratchasima Province vs. Chutima Sidasthian*, (December 21, 2022); Bangkok Post, *Journalist prevails in another 'Slapp' case*, (March 6, 2024), <https://www.bangkokpost.com/thailand/general/2754188/journalist-prevails-in-another-slapp-case>.

<sup>112</sup> For example, in one post, shared on February 20, 2022, Ms. Sidasthian wrote: "the Mayor of Banlang sub-district (2012) ran the administration of Banlang sub-district catastrophically. Villagers ha[ve] ... suffer[ed]...Educational system, bureaucratic, patronage, economic and merit systems have been destroyed. ... Next time, Banlang citizens, at least vote for people who truly have public conscience and are knowledgeable. Don't put those incompetent cronies on the job, be it the prime minister, deputy prime minister, etc. Temporary employee against vote buying." This post actually referred to the present Mayor's father, who had preceded his son as Mayor. Further, in a post shared on April 21, 2022, Ms. Sidasthian stated that "the [Government Savings Bank] has been focusing on boosting the [number of] loan[s], they have seized any opportunit[y] they can ... to do evil things. The Governmental Savings Bank and the financial institution of community village funds know th[is] well but it seems that they divert and put all burdens upon the villagers." See Judgment, *Public Prosecutor of Nakhon Ratchasima Province et. al vs. Chutima Sidasthian*, (March 6, 2024). See also Criminal Proceeding Complaint, *Public Prosecutor of Nakhon Ratchasima Province vs. Chutima Sidasthian*, (December 21, 2022).

<sup>113</sup> Criminal Proceeding Complaint, *Public Prosecutor of Nakhon Ratchasima Province vs. Chutima Sidasthian*, (December 21, 2022).

<sup>114</sup> Judgment, *Public Prosecutor of Nakhon Ratchasima Province et. al vs. Chutima Sidasthian*, (March 6, 2024). See also Bangkok Post, *Journalist prevails in another 'Slapp' case*, (March 6, 2024), <https://www.bangkokpost.com/thailand/general/2754188/journalist-prevails-in-another-slapp-case>.

<sup>115</sup> Judgment, *Public Prosecutor of Nakhon Ratchasima Province et. al vs. Chutima Sidasthian*, (March 6, 2024).

<sup>116</sup> According to the court's judgment, "During the adjudication process, [the Mayor] joined as co-plaintiff. Court accepted his request. Co-plaintiff submitted a motion to demand the compensation of 100,000 THB [\$2,725] from defendant." In dismissing the case, the court held that "pertaining a civil aspect of this case, in adjudicating civil matter in connection with criminal offence, court has to rely upon the judgment

above, where a public prosecutor brings the case before the court it is within the court's discretion to decide whether or not to conduct a preliminary hearing. On March 6, 2024, after approximately one and a half years of criminal proceedings, Ms. Sidasthian was acquitted.<sup>117</sup>

The court found that Ms. Sidasthian's first Facebook post, which concerned the impact of poor leadership by the Mayor's father (the previous mayor) and called on voters to elect different representatives, was a

general message that only criticized the performance of governmental authorities at national and local levels which caused the adverse effects to bureaucratic system and caused damages to general public. Despite the fact that co-plaintiff served as the Mayor of Ban lang sub-district at that time [of the Facebook post], the posted message did not accuse the co-plaintiff of involvement in corruption or acting in an immoral manner. Neither did it contain any message that could be reasonably regarded as an accusation. With regard to the second part of the posted message, it contained a general message to encourage the general public in Ban lang sub-district to vote for a knowledgeable person and refuse to sell their votes in the future election. Defendant did not specify that co-plaintiff or any person bought votes from general public.<sup>118</sup>

Similarly, the court found that Ms. Sidasthian's second post, which criticized the Mayor for a Facebook post he had made about building infrastructure "with the blood of the working people," was "only written in accordance with defendant's ideas and opinions" and "did not refer to and accuse co-plaintiff in a way that could result in defamation."<sup>119</sup> Finally, the court found that Ms. Sidasthian's third post, which concerned her investigation into the mismanagement of the community village funds, including the Mayor's alleged role, "was written with an opinion that the first t[w]o presidents of the financial institution of community village funds of Banlang sub-district mismanaged the community village funds in a way that it caused major damage to villagers, ... it intended only to criticize general management which caused failures and demand the co-plaintiff to address the occurred problems with the community village funds."<sup>120</sup> Thus, even

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of criminal aspect, in accordance with section 46 of the Criminal Procedure Code." See Judgment, *Public Prosecutor of Nakhon Ratchasima Province et. al vs. Chutima Sidasthian*, (March 6, 2024).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

though her third post referred “specifically to the co-plaintiff, as the first chairman of the village fund, ... [i]t did not contain any message which could be reasonably regarded as an accusation that co-plaintiff is a bad person, as co-plaintiff argued. As a result, it is not an accusation that cause defamation, insult and hatred towards co-plaintiff.”<sup>121</sup>

This is one of five complaints that the Mayor filed against Ms. Sidasthian, all of which were based on Facebook posts criticizing the local government. Even after Ms. Sidasthian was acquitted in the first case, the remaining four cases against her were not dismissed. It was only after Ms. Sidasthian’s lawyer filed written submissions before the prosecutors explaining that the remaining four cases were without any basis and ought not to proceed that the prosecutors finally issued non-prosecution orders in three of the four remaining cases. As of the writing of this report, the fifth and final case is still pending a decision by the public prosecutor. While this is an encouraging development, Section 143 of the Criminal Procedure Code does not require defense lawyer’s intervention and in most cases, defendants will not be in a position to intervene at this stage or deem it strategically ineffective to do so, underscoring the need for prosecutors to arrive at such decisions more frequently based on their own analysis.

### ***Pasinee Kemmalung***

In addition to the five complaints filed against Ms. Sidasthian, the Mayor of Banlang also filed a complaint against Pasinee Kemmalung (“*Ms. Kemmalung*”), a villager who called for an investigation into the missing village funds and posted a copy of an “Acknowledgement of Debt Agreement” signed by the Mayor on Facebook, which appeared to be documentary evidence of his misappropriation of funds.<sup>122</sup> In the complaint, which was filed with an inquiry officer on July 12, 2023, the Mayor claimed that Ms. Kemmalung’s Facebook post

publicly condemn[ed] the accuser and is considered a dishonest exercise of rights. Also, as the accuser is holding the position of the Mayor of [Banlang] sub-district, the post has caused damages and humiliation to the accuser, undermined his reputation and credibility, and exposed him to public scorn and hatred.<sup>123</sup>

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<sup>121</sup> *Id.*

<sup>122</sup> Record of Surrender/Accusation, *Pol. Maj. Surat Sangkarat (Inquiry Officer) to Ms. Pasinee Kemmalung*, (July 16, 2023). While this “agreement” appears to acknowledge that the Mayor will pay back the debt to the village fund, it does not explicitly state that he misappropriated the funds.

<sup>123</sup> *Id.*

The text that accompanied the image posted by Ms. Kemmalung, however, did not include any additional commentary about the Mayor, or explicitly name him: instead, it stated

[u]pdates on the financial issue of the Banlang sub-district Financial Institute. Currently, two people have acknowledged the debt of 18,440,000 Baht [\$502,490] and have signed the documents, so the Committee can feel relieved. We will continue to follow up with those who have not acknowledged their debts. If you have taken the money, you have got to acknowledge your debt and get it over with. Thank you, all relevant parties, who have provided support to the Committee, even with just words of encouragement.<sup>124</sup>

Since the complaint was filed with an inquiry officer, Section 161/1 was not applicable. However, on January 24, 2024, nearly six months after the complaint was first filed, the public prosecutor considering the complaint issued an order of non-prosecution.<sup>125</sup> The public prosecutor’s “reason for non-indictment” was based on a finding that “the alleged texts are a confirmation of facts” that

do not contain words considered as defamation in a way that would, through acknowledgement of debt, damage the reputation of the accused or expose him to hatred and scorn whatsoever. As such, the case lacks adequate evidence as per its allegation for indictment.<sup>126</sup>

Notably, the order of non-prosecution invoked Section 143 of Thailand’s Criminal Procedure Code relating to inadequate evidence supporting the criminal complaint.

### ***Public Prosecutor et. al vs. Wut Boonlert and Suracha Boonyeim***

On June 22, 2014, human rights defenders Wut Boonlert (“*Mr. Boonlert*”) and Suracha Boonyeim (“*Mr. Boonyeim*”) made posts on their public Facebook pages alleging that Surapon Naknakorn (“*Mr. Naknakorn*”), a local reporter who worked for the Thairath news outlet, was not impartial in his coverage of deforestation activities because of a conflict of interest.<sup>127</sup> More specifically, the post in question, which was first posted by Mr. Boonlert and then re-shared by Mr. Boonyeim, stated: “Thairath is a biased media

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<sup>124</sup> *Id.*

<sup>125</sup> Notification of non-indictment order, *Ref: The investigation report of the case no. 202/2566 dated 1 December 2023*, (January 24, 2024).

<sup>126</sup> *Id.*

<sup>127</sup> Indictment, *Phetchaburi Public Prosecutor vs. Mr. Wut Boonlert et. al*, (September 5, 2022).

outlet. Its local correspondent in Petchaburi, Surapon Naknakorn, is also a lecturer at Phetchaburi Rajabhat University. He has mutual interests with the Head of Kaeeng Krachan National Park, for example, he is sitting in the committee in the project to plant crops for elephants within the national park.”<sup>128</sup>

On September 24, 2020, Mr. Naknakorn filed a criminal defamation complaint with an inquiry officer alleging that he had been defamed by the human rights defenders’ posts.<sup>129</sup> Even though Mr. Naknakorn eventually joined the public prosecutor as a co-plaintiff,<sup>130</sup> defense counsel could not request application of Section 161/1 because the complaint was initially filed with an inquiry officer and then taken forward by a public prosecutor. Similarly, no preliminary hearing was held because, as mentioned above, it is within the court’s discretion to decide whether or not to conduct a preliminary hearing when a case is brought before the court by a public prosecutor.

On September 26, 2023, three years after the complaint was first filed, and nearly nine years after the speech in question had been posted, the case was settled. The defendants reportedly accepted the settlement proposed by the plaintiffs during the negotiation process “because they no longer wished to proceed to court.”<sup>131</sup> The co-plaintiffs agreed to withdraw the civil and criminal claims against the defendants in exchange for an “apolog[y] [to] the Co-plaintiff as well as paid compensation of 100,000 Baht [\$2,725] for the damages to him.”<sup>132</sup> The defendants also agreed to “post their apologies to the Co-plaintiff on both of their Facebook accounts and forward the said texts to Transborder News, Cross-culture News, and the editorial desk of Thairath Newspaper within three days.”<sup>133</sup>

### ***Siam International Food Co. Ltd. vs. Wanchai Pudtong***

On August 17, 2021, Siam International Food Co. Ltd. (“*Siam International*”), a Thai corporation that manufactures and exports canned tuna and other seafood products, filed a criminal defamation claim under Sections 326 and 328 of the Criminal Code against Wanchai Pudtong (“*Mr. Pudtong*”), a Thai journalist and founder of the

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<sup>128</sup> Wut Boonlert and Suracha Boonyeim, *Announcement (Apology Letter)*, (September 29, 2023).

<sup>129</sup> Indictment, *Phetchaburi Public Prosecutor vs. Mr. Wut Boonlert et. al.*, (September 5, 2022).

<sup>130</sup> Proceeding Memorandum, *Phetchaburi Public Prosecutor vs. Mr. Wut Boonlert et. al.*, (September 26, 2023).

<sup>131</sup> Defense counsel interviews.

<sup>132</sup> Proceeding Memorandum, *Phetchaburi Public Prosecutor et. al. vs. Mr. Wut Boonlert et. al.*, (September 26, 2023).

<sup>133</sup> *Id.*

“Suethuean Khao” Facebook news page.<sup>134</sup> The claim was based on text and images posted on June 13 and August 1, 2021 on the “Suethuean Khao” page about the death of a Burmese employee of Siam International from Covid-19. Summarizing the findings of an unnamed “news reporter,” Mr. Pudtong’s post stated, among other things, that “the Myanmar factory workers shared that they had not received adequate medical care. The Covid-19 testing was not arranged properly among them, which led to death. The factory applied a double standard because almost all Thai people had been tested.”<sup>135</sup>

Since the plaintiff submitted the lawsuit directly to the court, prior to the preliminary hearing Mr. Pudtong’s lawyers were able to request that the case be dismissed under Section 161/1. Specifically, on October 11, 2021 defense counsel submitted a Section 161/1 petition, “asking the court not to accept the complaint for consideration and stating facts in support of a Court decision to render the case baseless.”<sup>136</sup> The petition also invoked Section 165/2, asking that the court consider the facts and evidence submitted in the petition as part of the court’s preliminary evaluation and dismiss the case prior to or at the preliminary hearing (if it was not dismissed earlier under Section 161/1).<sup>137</sup>

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<sup>134</sup> “Suethuean Khao” was a Facebook news page where approximately 2,460 followers exchanged information about Songkhla province. See Judgment, *Siam International Food Company Limited vs. Mr. Wanchai Pudtong*, (March 20, 2023); Petition/Statement Accompanying the Request for Section 161/1 and 165/2 of the Criminal Procedure Code, *Siam International Food Company Limited vs. Mr. Wanchai Pudtong*, (December 28, 2021).

<sup>135</sup> One of the posts in question stated: “*Songkhla – an employee at Siam Inter factory died of Covid-19. 13 June, Songkhla – it has been reported that a 51-year-old female Myanmar employee of Siam Inter factory who was quarantined in a workers’ camp fell sick on 9 June. On 10 June, she developed fatigue and experienced difficulties breathing and was brought to Sikarin Hospital. On 11 June, the patient’s breathing failed. She received CPR before she was transferred to Hat Yai hospital, where she later passed away. The body underwent a cremation ceremony at Hat Yai temple on 12 June, attended by a small number of relatives. This caused great sorrow for the family as well as over 1,000 Myanmar workers at the factory. The news reporter reported that, from the said incident, the Myanmar factory workers shared that they had not received adequate medical care. The Covid-19 testing was not arranged properly among them, which led to death. The factory applied a double standard because almost all Thai people had been tested. The reporter also added that a high-level source in Songkhla Provincial Hall observed that the responsible agencies, including Songkhla governor, Provincial Health Office, and Chana Hospital might not have had adequate response to the case because the factory was owned by a family with a member who was a minister. As a result, it was not possible to fully enforce Covid-19 measures, such as testing Myanmar workers for Covid-19. A large number of them were left untested as a result of cost or some unknown reason. If cost was the issue, why didn’t the factory provide it for free or cover the cost itself? In this, the responsible agencies must have some clarity, or the ministry must give clear specific guidelines, because there has been a death incident, and it remains unclear how many of those quarantined within the factory have contracted Covid-19.*” See Judgment, *Siam International Food Company Limited vs. Mr. Wanchai Pudtong*, (March 20, 2023).

<sup>136</sup> Petition asking the Court to not accept the complaint for consideration and stating key facts in support of the Court’s decision to render the case baseless, *Siam International Food Company Limited vs. Mr. Wanchai Pudtong*, (October 11, 2021).

<sup>137</sup> *Id.*

In the petition, defense counsel argued that the complaint was “based on distorted facts” and brought in “bad faith” because the plaintiff is

aware that the Defendant is a media [professional] carrying out the duty to report news on the issue of human rights and community rights violation[s] result[ing] from the development projects by the public and private sector that impact the communities and local people in a province in Southern Thailand.<sup>138</sup>

The petition also highlighted that while it “would be more convenient for the Defendant to travel to court” if the complaint was filed “at the place of the incident” where “the evidence and witnesses presented in the case are also found[,] ... the fact that the Plaintiff has filed this case with the Criminal Court in Bangkok claiming that the Defendant’s act took place all over the Kingdom is considered a harassment, whereby the lawsuit is filed in a faraway location in a way that has led to disproportionate difficulties to him in terms of logistics.”<sup>139</sup>

Indeed, the petition explicitly stated that the case was a SLAPP:

the Plaintiff has exercised his right to prosecution in bad faith, one that could potentially give rise to a Strategic Lawsuit Against Public Participation of SLAPP, whose true, unlawful aims are to stifle the expression of opinions or facts in good faith on matters of public interest through the justice system. The Plaintiff has intended to use a criminal defamation accusation to harass and prevent those expressing opinions or facts in good faith from doing so. The case concerns a lawsuit that is brought in response to a report of undesirable information, in order to protect the image of the individual that is the subject of criticism, or with other intentions beyond legally punishing the speaker or demanding compensation for the damages incurred on the accuser’s part. Such a lawsuit creates difficulties for those expressing facts or opinions in good faith, as well as others related to or who likely suffered because of the public issue at hand. As a result, the relevant rights are not protected by the law and the affected person may also be prosecuted, costing him/her a large amount of time and money in the process, or, worse, imprisonment, provided that he/she lacks the means for bail. More importantly, SLAPPs

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<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

can overwhelm the justice system rendering it ineffective to administer justice to those genuinely in need in a timely fashion.<sup>140</sup>

The court received the motion but did not respond and proceeded to conduct a preliminary hearing on December 8, 2021.<sup>141</sup> After the preliminary hearing was completed but before official determination was made as to whether the case should proceed, the court “allowed the Defendant to submit a statement accompanying the request submitted to the Court regarding Section 161/1 and 165/2 of the Criminal Procedure Act [on] 11 October 2021.”<sup>142</sup> Defense counsel noted that the second petition was submitted to “address facts and legal provisions” in support of the October 11 request submitted “pursuant to Section 161/1 and 165/2[.]”<sup>143</sup> Specifically, in the second petition, which largely responded to assertions and evidence presented during the preliminary hearing by the plaintiff, defense counsel argued that the plaintiff brought the case in bad faith because he “filed [the] lawsuit with [the Bangkok Criminal Court], even though no third person in its jurisdiction has seen the alleged defamatory statements.”<sup>144</sup>

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<sup>140</sup> *Id.*

<sup>141</sup> Petition/Statement Accompanying the Request for Section 161/1 and 165/2 of the Criminal Procedure Code, *Siam International Food Company Limited vs. Mr. Wanchai Putdtong*, (December 28, 2021).

<sup>142</sup> According to the petition, “the Court has conducted a preliminary hearing on 8 December 2021 and scheduled a date for the hearing of the order or judgment on 18 January 2022 at 9 AM. The Court allowed the Defendant to submit a statement accompanying the request submitted to the Court regarding Section 161/1 and 165/2 of the Criminal Procedure Code dated 11 October 2021 within 20 days after the completion of the preliminary hearing.” The Defendant submitted the petition on December 28, 2021—the “last date for the said period”—to “address[] facts and legal provisions” in support of the October 11, 2021 request for application of Sections 161/1 and 165/2. See Petition/Statement Accompanying the Request for Section 161/1 and 165/2 of the Criminal Procedure Code, *Siam International Food Company Limited vs. Mr. Wanchai Putdtong*, (December 28, 2021). It is unclear why defense counsel submitted this request at the conclusion of the preliminary hearing as opposed to prior or during the preliminary hearing, particularly given that Section 161/1 is intended to be invoked prior to a preliminary hearing.

<sup>143</sup> *Id.*

<sup>144</sup> Petition/Statement Accompanying the Request for Section 161/1 and 165/2 of the Criminal Procedure Code, *Siam International Food Company Limited vs. Mr. Wanchai Putdtong*, (December 28, 2021) (emphasizing that “[t]his case concerns an allegation of defamation by means of publication, which requires a third person to see the alleged statement as an important element of crime. Since the Plaintiff attested that such a third person is Mr. Piya Haotawanit, [Plaintiff’s witness and employee, who said that he had examined the alleged statements in question while he was working in Songkhla], it is clear that the Plaintiff has been aware since the beginning of the fact that the offence in the complaint has been committed in Songkhla, and not Chom Phon Sub-district, Chatuchak District, Bangkok, the jurisdiction of the Criminal Court. Although the Plaintiff claimed that the statements were published on the internet, if no person testified to confirm that a third person has actually seen the alleged statements/offence in that particular location, it could not be deemed that the offence has been committed there. Since this case concerns an offence of defamation before a third person, it is the Plaintiff’s duty to prove that the alleged statements were seen by a third person in the location in which the lawsuit was brought. However, the

The petition deemed “[t]he explanation by the Plaintiff that the incident took place all over the Kingdom, including in the jurisdiction of the Criminal Court, Chom Phon Sub-district, Chatuchak District, Bangkok” as “simply an excuse[,]” and noted that “[d]uring the preliminary hearing, the Plaintiff failed to prove that a third person or any person had found the alleged statements in the jurisdiction of the Criminal Court, whatsoever.”<sup>145</sup> Defense counsel further argued that the subject matter in the post in question “is news that has also been reported by other media outlets...the government agencies announced measures closing down the business of the Plaintiff.”<sup>146</sup> According to the petition, two of the posts in question “neither specif[ied] the name of the Plaintiff, nor contain[ed] any defamatory texts against the Plaintiff” and the third was “a news report for the public benefit intended to solve and prevent the ongoing transmission.”<sup>147</sup> On this basis, the petition stated that the posts in question were not defamatory, “as they are published in good faith for the public benefit. It is not considered an offence according to Section 329 of the Criminal Code.”<sup>148</sup>

However, the court reportedly again did not respond to defense counsel’s petition, instead accepting the case and proceeding to trial.<sup>149</sup>

On March 20, 2023, 580 days after the defamation complaint was filed, the court of first instance acquitted Mr. Pudtong. In doing so, the court explicitly recognized that “[t]he overall content was accurate” and noted that “during that time, media platforms, including television, newspaper, etc., were all reporting about the outbreak at the Plaintiff’s factory. At the same time, the Defendant reported about Covid-19 transmission in other provinces as well.”<sup>150</sup> This reasoning echoed the defense’s petitions from nearly two years prior that Mr. Pudtong’s posts constituted news reporting in good faith and that others were reporting on the subject as well. The court ultimately concluded that “[t]he Defendant’s acts are considered not harboring the intention to defame the Plaintiff to impair its reputation and exposing it to scorn and hatred, but a fair comment, which the

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Plaintiff has filed a lawsuit with this Court, even though no third person in its jurisdiction has seen the alleged defamatory statements.”).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> Defense counsel interviews.

<sup>150</sup> Judgment, *Siam International Food Company Limited vs. Mr. Wanchai Pudtong*, (March 20, 2023).

Defendant has the right to exercise according to Section 329 (3) of the Penal Code.”<sup>151</sup> The plaintiff appealed the acquittal and, as of this writing, the case is awaiting consideration by the Appeals Court.

## ***Cases Brought by Thammakaset Company Limited***

### ***Thammakaset Company Limited vs. Suchanee Cloitre***

A Thai journalist and news presenter at *Voice TV 21*, Suchanee Cloitre (“*Ms. Cloitre*”) regularly reported on various social, economic, and political developments in Thailand on TV and on her social media channels. In 2017, one such development was a labor rights case brought by 14 workers from Myanmar employed at a poultry farm owned by Thammakaset Company Limited (“*Thammakaset*”).<sup>152</sup> In July 2016, the workers filed a complaint with the National Human Rights Commission (“*NHRC*”)<sup>153</sup> alleging “forced overtime, being paid less than the minimum wage, confiscation of passports, and limited freedom of movement.”<sup>154</sup> The NHRC found that Thammakaset had breached employment contracts and engaged in labor rights violations, according to Human Rights Watch, Article 19, and Amnesty International.<sup>155</sup> In 2016 the Thai Department of Labor Protection and Welfare ordered Thammakaset to pay 1.7 million Baht [\$46,325] in back wages to the 14 migrant workers, a penalty that was later upheld by the Supreme Court.<sup>156</sup>

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<sup>151</sup> *Id.*

<sup>152</sup> Alisa Tang, *Facebook post inspires landmark case for migrant workers in Thailand*, Reuters (September 14, 2019), <https://www.reuters.com/article/us-thailand-labour-rights-idUSKCN11L00F>.

<sup>153</sup> Penchan Charoensuthipan, *Commission to probe poultry industry labour ‘abuses’*, Bangkok Post, (July 8, 2016), <https://www.bangkokpost.com/thailand/general/1030273/commission-to-probe-poultry-industry-labour-abuses>.

<sup>154</sup> Bangkok Post, *Landmark ruling compensates Myanmar workers*, (January 16, 2019), <https://www.bangkokpost.com/thailand/general/1611934/landmark-ruling-compensates-myanmar-workers>.

<sup>155</sup> Human Rights Watch, *Thailand: Drop Defamation Charges Against Burmese Workers*, (June 6, 2017), <https://www.hrw.org/news/2017/06/07/thailand-drop-defamation-charges-against-burmese-workers>; Article 19, *Thailand: Open letter on lawsuits brought by Thammakaset Company against human rights defenders*, (February 14, 2019), <https://www.article19.org/resources/thailand-open-letter-on-lawsuits-brought-by-thammakaset-company-against-human-rights-defenders>; Amnesty International, *Thailand: New lawsuits brought by Thammakaset Company Limited against human rights defenders*, (February 14, 2019), <https://www.amnesty.org/en/documents/asa39/9867/2019/en>.

<sup>156</sup> iLaw, *Poultry Farm bring charges against migrant workers and HRDs after publication of 20-Hour Working Time*, (August 5, 2019), <https://oldfreedom.ilaw.or.th/en/blog/epic-poultry-farm-bring-charges-against-migrant-workers-and-hrds-after-publication-20-hour-work>; Human Rights Watch et. al, *Thailand:*

On September 14, 2017, Ms. Cloitre re-Tweeted links to relevant news articles about the judgment in the case and wrote: “The Supreme Court orders the poultry farm owner in Lopburi Province, one of the former poultry suppliers for Betagro, to pay 1.7 million Baht [\$46,325] in compensation to 14 Myanmar workers for labor slavery.”<sup>157</sup> The Tweet included a photograph of the judgment in the civil proceeding against Thammakaset, which had been re-Tweeted from a post by another human rights defender, Andy Hall.<sup>158</sup>

In November 2017, Thammakaset filed a criminal complaint with an inquiry officer, alleging that Ms. Cloitre’s use of the word “slavery” in her Tweet had violated Sections 326 and 328 of the Criminal Code, as well as the Computer Crimes Act.<sup>159</sup> After Ms. Cloitre gave a pretrial statement to the police on May 1, 2018, the Lopburi Public Prosecutor’s Office issued an order of non-prosecution under Section 143 of the Code of Criminal Procedure (on October 16, 2018).<sup>160</sup>

Undeterred, in March 2019 Thammakaset responded by filing a new criminal defamation claim under Sections 326 and 328 against Ms. Cloitre for the same Tweet, this time doing so directly with the court.<sup>161</sup> In filing the case, Thammakaset also requested that the court

issue an order having the defamatory statement removed from the internet or computer system. The relevant cost shall be borne by the Defendant. The Defendant shall be ordered to publish the apologies on The Nation, The Bangkok Post, Thairath, Dailynews, and her own Twitter account for

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*End Harassment of Suchanee Cloitre*, Joint Letter (October 26, 2020), <https://www.hrw.org/news/2020/10/26/thailand-end-harassment-suchanee-cloitre>, (“In 2016, the Lopburi Department of Labor Protection and Welfare ordered Thammakaset to pay THB 1.7 million in compensation to the workers, a penalty that was later upheld by Thailand’s Supreme Court.”).

<sup>157</sup> Defense Counsel Closing Argument, *Thammakaset Company Limited vs. Ms. Suchanee Cloitre*.

<sup>158</sup> Notably, Thammakaset had previously brought criminal defamation charges against activist and researcher Andy Hall. See International Federation for Human Rights, *Thammakaset vs. human rights defenders and workers in Thailand*, (March 28, 2023), <https://www.fidh.org/en/issues/human-rights-defenders/thailand-thammakaset-watch>. See also United Nations Development Programme in Thailand, *Laws and Measures Addressing Strategic Lawsuits Against Public Participation (SLAPPs) in the Context of Business and Human Rights*, (2023).

<sup>159</sup> International Federation for Human Rights, *Thammakaset vs. human rights defenders and workers in Thailand*, (March 28, 2023), <https://www.fidh.org/en/issues/human-rights-defenders/thailand-thammakaset-watch>, (“On November 16, 2017, Thammakaset filed a criminal complaint for alleged ‘defamation’ (Article 326 of the Criminal Code) and ‘libel’ (Article 328), and violation of Article 14(1) of the Computer Crimes Act, with the Lopburi police against Ms. Suchanee Cloitre.”).

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

at least 30 consecutive days. The relevant cost shall also be borne by the Defendant.<sup>162</sup>

As required for a case brought by a private party, the court held a preliminary hearing to determine whether the claim had merit on June 3, 2019.<sup>163</sup> On June 17, 2019, defense counsel submitted a Section 165/2 motion arguing that the complaint was meritless.<sup>164</sup> The 165/2 petition asserted that the “criminal complaint lacked merit because it amounted to judicial harassment against a human rights defender.”<sup>165</sup> The court reportedly did not respond to the motion.<sup>166</sup> Notably, defense counsel did not submit an official Section 161/1 request when the complaint was first filed (likely because the anti-SLAPP amendments had only just been passed); however, defense counsel referenced Section 161/1 at closing arguments. Specifically, defense counsel stated that the plaintiff failed “to attest during the preliminary examination how [the Tweet in question] was untrue or was a defamatory statement impairing its reputation or exposing it to scorn and hatred” and that the lawsuit was a “SLAPP with the aim to deter the Defendant from reporting or publishing information relating to the violation of labor rights and freedom of expression” that was brought “in bad faith in line with Section 161/1 of the Criminal Procedure Code.”<sup>167</sup>

On December 24, 2019, the Lopburi Provincial Court found Ms. Cloitre guilty under Section 328 of the Criminal Code and sentenced her to a two-year prison term.<sup>168</sup> The court’s judgment did not respond to the Section 161/1 reference in the defendant’s closing argument.<sup>169</sup> Instead, the court reasoned that Ms. Cloitre’s Tweet was “false because the judgments of the [case against Thammakaset] do not contain the issue of labor slavery” and because it was made “without considering the damages on the

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<sup>162</sup> Judgment, *Thammakaset Company Limited vs. Ms. Suchanee Cloitre*, (December 24, 2019).

<sup>163</sup> International Federation for Human Rights, *Thammakaset vs. human rights defenders and workers in Thailand*, (March 28, 2023), <https://www.fidh.org/en/issues/human-rights-defenders/thailand-thammakaset-watch>.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> Defense Counsel Closing Argument, *Thammakaset Company Limited vs. Ms. Suchanee Cloitre*.

<sup>168</sup> The court of first instance dismissed the other two defamation claims brought against Ms. Cloitre based on Sections 329 and 330 of the Criminal Code. See Judgment, *Thammakaset Company Limited vs. Ms. Suchanee Cloitre*, (December 24, 2019).

<sup>169</sup> *Id.*

Plaintiff's part.”<sup>170</sup> According to the court, “the [T]weet referring to the Plaintiff and accusing it of labor slavery is considered a defamation against the Plaintiff before a third person in a way that impairs its reputation and exposes it to scorn or hatred.”<sup>171</sup> The court further concluded that the Tweet was made “in bad faith” because of its use of the term “labor slavery.”<sup>172</sup> Ms. Cloitre appealed the court of first instance’s judgment while out on bail.<sup>173</sup> On September 1, 2020, an appellate court overturned the lower court’s decision and issued an order of acquittal, reasoning that Ms. Cloitre “fairly criticized the Plaintiff, which is considered a fair comment on any person or thing subject to public criticism” and that she was “entitled to the protection for the offence of defamation under Section 329(3).”<sup>174</sup> In response, Thammakaset filed an appeal with the Supreme Court, which was accepted on October 27, 2021. On March 9, 2022, 1,104 days after the claim was first filed, the Supreme Court affirmed the appellate court judgment and dismissed all claims against Ms. Cloitre.<sup>175</sup>

### ***Thammakaset Company Limited vs. Angkhana Neelapaijit et. al***

Between 2019 and 2020, Thammakaset Company Limited also brought a total of 30 criminal defamation counts under Sections 326 and 328 against three female human rights defenders<sup>176</sup>—Thai human rights defender and former Commissioner on the National Human Rights Commission of Thailand, Angkhana Neelapaijit (“Ms. Neelapaijit”), and human rights defenders Puttanee Kangkun (“Ms. Kangkun”) and

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<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*, (“And the fact that the Defendant has posted a statement on Twitter accusing the Plaintiff without considering the damages on the Plaintiff’s part, even though the Defendant had time to peruse the judgment of the Court of Appeal for Special Cases or even Andy Hall’s statement, which was the source of information, beforehand. The Defendant failed to do so. Thus, the Defendant’s tweet concerns a statement displayed by the Defendant in bad faith.”).

<sup>173</sup> International Federation for Human Rights, *Thammakaset vs. human rights defenders and workers in Thailand*, (March 28, 2023), <https://www.fidh.org/en/issues/human-rights-defenders/thailand-thammakaset-watch>.

<sup>174</sup> Judgment, Supreme Court, *Thammakaset Company Limited vs. Ms. Suchanee Cloitre*, (March 9, 2022).

<sup>175</sup> *Id.*

<sup>176</sup> Thammakaset filed multiple, separate complaints before the Bangkok South Criminal Court. However, the criminal cases against the three women were consolidated into a single case for trial under Case No. 2492/2562. Accordingly, these claims are treated as one case for the purposes of this report. See, Judgment, *Thammakaset Company Limited vs. Ms. Angkhana Neelapaijit et. al*, (August 29, 2023). See also International Federation for Human Rights, *Thammakaset vs. human rights defenders and workers in Thailand*, (March 28, 2023), <https://www.fidh.org/en/issues/human-rights-defenders/thailand-thammakaset-watch>.

Thanaporn Saleephol (“Ms. Saleephol”)—for posts they made on social media supporting other human rights defenders targeted by Thammakaset and calling for an end to SLAPPs.<sup>177</sup> Specifically, the defendants’ posts were primarily re-Tweets of other posts or articles about human rights defenders against whom Thammakaset had filed lawsuits, some of which linked to materials through which a social media user could ultimately reach a short film produced by the NGO Fortify Rights about Thammakaset.<sup>178</sup> The Fortify Rights film highlighted the plight of migrant workers employed by Thammakaset, including Thammakaset’s alleged “unlawfully low wages, failure to pay overtime wages, and confiscation of [the migrant workers’] identity documents.”<sup>179</sup> Prior to filing complaints against Ms. Neelapaijit, Ms. Kangkun, and Ms. Saleephol, Thammakaset had already filed criminal defamation complaints against a migrant worker who gave an interview to Fortify Rights for the allegedly defamatory video as well as against a former Human Rights Specialist at Fortify Rights, Sutharee Wannasiri, for posting about the video.<sup>180</sup> Notably, these accused were acquitted in the first instance before the case against Ms. Neelapaijit, Ms. Kangkun, and Ms. Saleephol even went to

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<sup>177</sup> Across all of the complaints, Ms. Neelapaijit faced an eight year prison sentence and/or a fine of 800,000 Baht [\$21,832] (four counts—two in an October 2019 complaint and two in a March 2020 complaint); Ms. Saleephol faced a 10 year prison sentence and/or a fine of 1,000,000 Baht [\$27,290] (five counts in a March 2020 complaint); and Ms. Kangkun faced a 42 year prison sentence and/or a fine of 4,200,000 Baht [\$114,618] (21 counts—14 in a December 2019 complaint and seven in a March 2020 complaint). Under Article 91 of the Criminal Code, however, the maximum “total punishment” where individuals are facing criminal charges for multiple offenses that carry potential penalties under three years is 10 years imprisonment. See International Federation for Human Rights, *Thammakaset vs. human rights defenders and workers in Thailand*, (March 28, 2023), <https://www.fidh.org/en/issues/human-rights-defenders/thailand-thammakaset-watch>. See also Judgment, *Thammakaset Company Limited vs. Ms. Angkhana Neelapaijit et. al*, (August 29, 2023).

<sup>178</sup> Judgment, *Thammakaset Company Limited vs. Ms. Angkhana Neelapaijit et. al*, (August 29, 2023).

<sup>179</sup> Human Rights Watch, *Joint Statement on Strategic Litigation Against Public Participation (SLAPP)*, (December 3, 2018), <https://www.hrw.org/news/2018/12/03/joint-statement-strategic-litigation-against-public-participation-slapp>. See also International Federation for Human Rights, *Thailand: Judicial harassment of Ms. Sutharee Wannasiri and Mr. Nan Win*, (November 27, 2018), <https://www.fidh.org/en/issues/human-rights-defenders/thailand-judicial-harassment-of-ms-sutharee-wannasiri-and-mr-nan-win>.

<sup>180</sup> In the criminal case involving charges under Articles 326 and 328 of the Criminal Code, the trial court acquitted Ms. Wannasiri, and an appellate court upheld the trial court’s decision. Thammakaset chose to drop a separate civil complaint against Ms. Wannasiri following an agreement between the parties, which entailed Ms. Wannasiri expressing regret about certain information in Fortify Rights’ short film that might have been misleading and could potentially cause harm to Thammakaset. See International Federation for Human Rights, *Thammakaset vs. human rights defenders and workers in Thailand*, (March 28, 2023), <https://www.fidh.org/en/issues/human-rights-defenders/thailand-thammakaset-watch>.

trial<sup>181</sup> (although Thammakaset initially filed the complaints against the three women separately, the claims were consolidated into one case for trial).

While the following analysis of the proceedings focuses on the allegations against Ms. Neelapaijit, it equally applies to her co-defendants, Ms. Kangkun and Ms. Saleephol, who were prosecuted for what was largely the same conduct.

One of the Tweets at issue, which was posted in English by Ms. Neelapaijit, stated: “Stand by Kratik @SuthareeW #DropDefamation #NonReprisal SLAPP @BizHRs” and linked to a Tweet by another Twitter user named “Kingsley Abbot” or “@AbbotKingsley,” formerly Director of Global Accountability and International Justice with the International Commission of Jurists (ICJ). @AbbotKingsley’s Tweet linked to a page on the ICJ website,<sup>182</sup> which described various defamation lawsuits Thammakaset had brought against human rights defenders. Embedded in this information was a hyperlink to the Fortify Rights video.<sup>183</sup>

In October 2019, Thammakaset filed a criminal defamation claim against Ms. Neelapaijit for her Tweets, submitting the complaint directly to a court. Specifically, Thammakaset argued that, in reposting information that ultimately linked to the Fortify Rights video, Ms. Neelapaijit caused the Company “tremendous damages” because “it caused misunderstanding that the Plaintiff had committed labor abuse” and the “Film prevented the Plaintiff from exporting its chicken abroad.”<sup>184</sup>

Since the claims were filed directly with the court, Ms. Neelapaijit’s counsel requested that the court use its discretion to apply Section 161/1 or to dismiss it at the preliminary stage based on arguments set forth under Section 165/2 (this was a combined Section 161/1 and Section 165/2 petition). Arguing that the plaintiff’s claim “relied on

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<sup>181</sup> See International Federation for Human Rights, *Thammakaset vs. human rights defenders and workers in Thailand*, (March 28, 2023), <https://www.fidh.org/en/issues/human-rights-defenders/thailand-thammakaset-watch>. See also United Nations Business & Human Rights Resource Center, *Thammakaset lawsuits against former workers (re defamation on labour conditions, Thailand)*, (June 4, 2020), <https://www.business-humanrights.org/en/latest-news/thammakaset-lawsuits-against-former-workers-re-defamation-on-labour-conditions-thailand/?companies=4962972>.

<sup>182</sup> Petition/Statement for the Court to not accept the case by virtue of Section 161/1 and 165/2 of the Criminal Procedure Code, *Thammakaset Company Limited vs. Ms. Angkhana Neelapaijit*, (February 20, 2020).

<sup>183</sup> *Id.*

<sup>184</sup> See Judgment, *Thammakaset Company Limited vs. Ms. Angkhana Neelapaijit et. al*, (August 29, 2023).

misinformation,” the petition explained that the link between Ms. Neelapaijit’s Tweets and the Fortify Rights video was highly attenuated.<sup>185</sup>

The petition further argued that the “plaintiff exercised the right to prosecute in bad faith” because Thammakaset was aware that the speech in question “contained neither any false texts, whatsoever, nor any alleged defamatory statements against the Plaintiff” and instead “concerned a sharing of comments or statements in good faith and a fair criticism against a person or an object subjected to public criticism with the aim to address the issue of the unfair prosecution mentioned.”<sup>186</sup> The petition further highlighted that the allegedly defamatory Tweets were made while Ms. Neelapaijit was

holding the position of a Human Rights Commissioner in the National Human Rights Commission of Thailand, which entailed duties and mandates according to the Constitution to investigate and report actions or omission of actions considered human rights violations or breaching Thailand’s international human rights obligations, and to propose appropriate measures to solve the said problems or amend the laws, rules, regulations, or orders accordingly. Therefore, the Defendant’s tweets are an expression of opinions in good faith as part of her duty to safeguard human rights as a National Human Rights Commissioner according to the Constitution. ... [Thus,] the Plaintiff has intended to use a criminal defamation accusation to harass and prevent those expressing opinions or facts in good faith from doing so. It concerns a lawsuit that is brought in response to a report of undesirable information, in order to protect the image of the individual that is the subject of criticism, or with other

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<sup>185</sup> Petition/Statement for the Court to not accept the case by virtue of Section 161/1 and 165/2 of the Criminal Procedure Code, *Thammakaset Company Limited vs. Ms. Angkhana Neelapaijit*, (February 20, 2020), (noting “that the way through which the Plaintiff claimed that the Defendant had defamed it by providing the access to the alleged video clip requires five steps, as follows: (1) The third person must first see the Defendant’s personal Twitter account ‘Angkhana Neelapaijit’ or ‘@AngkhanaNee’. Then, he/she must click on... (2) The tweet of the Twitter user ‘Kingsley Abbot’ or ‘@AbbotKingsleyW’, which contains a link to an article. The third person must click on the said link to read... (3) The foreign-language article by ICJ (International Commission of Jurists) ([www.icj.org/thailand-drop-defamation-complaints-against-human-rights-defenders-nan-win-and-sutharee-wannasiris/](http://www.icj.org/thailand-drop-defamation-complaints-against-human-rights-defenders-nan-win-and-sutharee-wannasiris/)), which contains a link to the same article in Thai. (4) The Thai-language version of this article ‘แถลงการณ์ร่วม ประเทศไทย: ชุดกิจการฟ้องคดีหมิ่นประมาทต่อนักปกป้องสิทธิมนุษยชน’ contains the word ‘movie’. The third person must click on it one more time in order to find the video clip. (5) The video clip of an interview with workers by Fortify Rights on Youtube ([www.youtube.com](http://www.youtube.com)) contains the alleged statement showing the Plaintiff’s employees giving confirmed facts with false and defamatory statements about the Plaintiff.”).

<sup>186</sup> *Id.*

intentions beyond legally punishing the speaker or demanding compensation for the damages incurred on the accuser's part.<sup>187</sup>

However, the lawyers reportedly never received an answer from the court. The court then proceeded to conduct a preliminary hearing on February 24, 2020, after which the court accepted the case for trial.

The other two defendants, Ms. Kangkun and Ms. Saleephol, who were initially separately charged but whose cases were ultimately consolidated with Ms. Neelapaijit's case for trial, had also posted Tweets supporting other human rights defenders involved in criminal defamation cases filed by Thammakaset. They too filed Section 161/1 and 165/2 petitions along similar lines, with the court failing to respond.<sup>188</sup> Since all of the lawsuits were brought by a private party, the court was required to conduct preliminary hearings on the merits of the case. Accordingly, a preliminary hearing was held in Ms. Kangkun's case on March 2, 2020, with the court accepting the case for trial, and a preliminary hearing was held in Ms. Saleephol's case on September 14, 2020 (after which the court decided to combine the cases of Ms. Thanaporn, Ms. Kangkun, and Ms. Neelapaijit and proceed to trial).<sup>189</sup>

On August 29, 2023, the Bangkok South Criminal Court acquitted Ms. Neelapaijit, Ms. Kangkun and Ms. Saleephol, finding that the elements of the offense of defamation were not proven:

the defendants' posts did not mention anything about the Plaintiff's workers. The defendants' posts [] only deal with the lawsuit where the Plaintiff filed against human rights defenders and its employees, as well as to show support among the defendants themselves following the Plaintiff's lawsuit against them. None of the defendants' posts mentioned ... the alleged defamatory video.<sup>190</sup>

In fact, in an echo of the argument made in defense counsel's 161/1 request, the court noted that a user would have to click through four or five hyperlinks to access the

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<sup>187</sup> *Id.*

<sup>188</sup> International Federation for Human Rights, *Thammakaset vs. human rights defenders and workers in Thailand*, (March 28, 2023), <https://www.fidh.org/en/issues/human-rights-defenders/thailand-thammakaset-watch>.

<sup>189</sup> *Id.*

<sup>190</sup> Judgment, *Thammakaset Company Limited vs. Ms. Angkhana Neelapaijit et. al.*, (August 29, 2023).

allegedly defamatory video from any of the defendants' Tweets.<sup>191</sup> As such, the court concluded:

none of the defendants['] post[s] are defamatory against the Plaintiff. All defendants could not expect nor foresee if a user would ultimately access the alleged defamatory Film. All defendants' actions were made in good faith, were not made to defame or to take advantage against the Plaintiff. The posts were not made in defamatory manner. The defendants are not guilty in the alleged defamation via advertisement offence.<sup>192</sup>

In total, Thammakaset has reportedly initiated 39 criminal and civil cases, most of which allege defamation, relating to allegations about its labor practices as well as expressions of support for individuals targeted by its lawsuits.<sup>193</sup> Apart from the case of Ms. Cloitre, discussed above, none of the cases have ended in convictions (and in Ms. Cloitre's case her conviction at trial was ultimately overturned by appellate courts).

### ***Public Prosecutor vs. Parit Chiwarak and Sirawit Seritiwat***

Following Thailand's general election in March 2019—the first to take place since the military seized power in a coup in May 2014—students, activists, academics, and social media users publicly called on the Election Commission of Thailand (“ECT”) to publish official election results.<sup>194</sup> On March 31, 2019, Parit Chiwarak (“Mr. Chiwarak”), a prominent student activist and President of the Student Union of Thailand, and Sirawit Seritiwat (“Mr. Seritiwat”), a student at Thammasat University and a pro-democracy activist, gathered with others on a skywalk at a metro station in Bangkok to call for the impeachment of the election commissioners on the grounds that they had failed to release results in a timely fashion, had not acted in a transparent manner, and oversaw voting that was allegedly ripe with irregularities, among other issues.<sup>195</sup> During the

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<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> International Federation for Human Rights, *Thammakaset vs. human rights defenders and workers in Thailand*, (March 28, 2023), <https://www.fidh.org/en/issues/human-rights-defenders/thailand-thammakaset-watch>.

<sup>194</sup> See Punchada Sirivunnabood, *Thailand's Puzzling 2019 Election: How the NCPO Junta has Embedded itself in Thai Politics*, ISEAS Yusof Ishak Institute (May 29, 2019), [https://www.iseas.edu.sg/wp-content/uploads/pdfs/ISEAS\\_Perspective\\_2019\\_44.pdf](https://www.iseas.edu.sg/wp-content/uploads/pdfs/ISEAS_Perspective_2019_44.pdf).

<sup>195</sup> Amnesty International, *DEFAMATION CHARGES USED TO SILENCE DISSENT*, (May 22, 2019), <https://www.amnesty.org/en/wp-content/uploads/2021/05/ASA3904222019ENGLISH.pdf#:~:text=Police%20have%20charged%20prominent%20activists%20Parit%20%E2%80%98Penguin%E2%80%99%20Chiwarak%2C,a%20maximum%2>

protest, Mr. Chiwarak and Mr. Seritiwat gave speeches requesting that the Commission disclose full election results (the breakdown between results for individual provinces and districts had not been released).<sup>196</sup> In response, Phinit Chanchay (“*Mr. Chanchay*”), an election commissioner for the ECT, filed a criminal defamation complaint with an inquiry officer on April 25, 2019. In the five years since the complaint was filed, the case, which has remained under review at the Office of the Attorney General, has yet to be presented in court (as per available information).

Notably, the Election Commission also brought criminal defamation charges against an additional seven individuals involved in an online public campaign calling for the impeachment of the commissioners that collected more than 850,000 signatures.<sup>197</sup>

### ***Gulf Energy Development Public Co., Ltd. vs. Thai Sang Thai Party et al***

On June 7, 2023, Gulf Energy Development Co., Ltd. (“*Gulf Energy*”) filed a criminal defamation lawsuit directly with a court against the Deputy Secretary-General of the Thai Sang Thai Party Treerat Sirichantaropas (“*Mr. Sirichantaropas*”), the Thai Sang Thai Party itself, and party member Ronnakad Chinsamran (“*Mr. Chinsamran*”). The claim arose out of a 2022 press conference in which Mr. Sirichantaropas and Mr. Chinsamran discussed rising electricity costs and a government contract with Gulf Energy, raising allegations that the government had signed a contract to produce far more energy than was actually used.<sup>198</sup> During the press conference, they noted that although the Thailand Consumers Council (“*TCC*”) had previously warned the government that a high electricity reserve would mean higher household electricity bills, the government continued to reserve 40% more power than typically required.<sup>199</sup> They speculated that this, combined

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0sentence%20of%20two%20years%20in%20jail. See also Punchada Sirivunnabood, *Thailand’s Puzzling 2019 Election: How the NCPO Junta has Embedded itself in Thai Politics*, ISEAS Yusof Ishak Institute (May 29, 2019), [https://www.iseas.edu.sg/wp-content/uploads/pdfs/ISEAS\\_Perspective\\_2019\\_44.pdf](https://www.iseas.edu.sg/wp-content/uploads/pdfs/ISEAS_Perspective_2019_44.pdf).

<sup>196</sup> Amnesty International, *DEFAMATION CHARGES USED TO SILENCE DISSENT*, (May 22, 2019), <https://www.amnesty.org/en/wp-content/uploads/2021/05/ASA3904222019ENGLISH.pdf#:~:text=Police%20have%20charged%20prominent%20activists%20Parit%20%E2%80%98Penguin%E2%80%99%20Chiwarak%2C,a%20maximum%20sentence%20of%20two%20years%20in%20jail>.

<sup>197</sup> *Id.*

<sup>198</sup> Prachatai, *Gulf Energy sues Thai Sang Thai party members over press conference*, (June 8, 2023), <https://prachataienglish.com/node/10415>.

<sup>199</sup> *Id.* See also, Prachathai, ‘*Thailand Builds Thailand’ Urges the Government to Favor Capitalists, Signing Electricity Generation Contracts More Than Actual Use 57%*, (October 21, 2022), <https://prachatai.com/journal/2022/10/101089>.

with rising natural gas prices, had led to higher electricity costs.<sup>200</sup> Gulf Energy also filed a civil defamation lawsuit, demanding compensation of 1 billion Baht [\$27,250,000].<sup>201</sup>

Defense lawyers do not appear to have filed a Section 161/1 request to the court before the preliminary hearing, which was conducted on July 31, 2023—as described above, preliminary hearings are required in cases filed directly with the court.<sup>202</sup> The court accepted the case for trial. In November 2023, the defendants took to Facebook to issue an apology for their statements:

Today, I had the chance to engage in a discussion with energy experts regarding the electricity pricing issue that I addressed in a press conference on November 12, 2022. During our conversation, it became evident that there were factual inaccuracies in various aspects of the information I had presented.

The case was subsequently withdrawn. This is one of at least eight criminal defamation cases Gulf Energy has brought against various politicians, political parties, individuals, and academics since 2021.<sup>203</sup>

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<sup>200</sup> Prachatai, *Gulf Energy sues Thai Sang Thai party members over press conference*, (June 8, 2023), <https://prachataienglish.com/node/10415>.

<sup>201</sup> *Id.*

<sup>202</sup> Defense counsel interviews.

<sup>203</sup> Prachatai, *Gulf Energy sues Thai Sang Thai party members over press conference*, (June 8, 2023), <https://prachataienglish.com/node/10415>, (“Treerat and Ronnakad are now among 7 people sued for defamation by Gulf Energy. In November 2021, the company sued Move Forward Party MP Rangsiman Rome over a September 2021 censure debate speech about a satellite concession, questioning the influence of Chaiwut Thanakamanusorn, Minister of Digital Economy and Society, in the energy company’s dramatic growth. It also sued the Party for publishing the content of the debate. [In September 2021, Gulf Energy Company sued the Move Forward Party for sharing photos, messages, and videos related to Mr. Rome’s speech during the censure debate on Youtube and Facebook.] In December 2022, the South Bangkok Criminal Court accepted a lawsuit the company filed against Bencha Saengchantra, another Move Forward MP, over a February 2021 censure debate speech about the government’s energy policy and how it grants concessions. Warong Dechgitvigrom, leader of the far-right Thai Pakdee Party, was also sued by the company in November 2021 over a Facebook live broadcast in which he said that Gulf Energy is trying to gain a monopoly in telecommunication and internet businesses through buying shares in the telecommunication companies Intouch Holdings and Advanced Info Service (AIS). He also alleged that Gulf Energy was going to bid for a satellite concession. In December 2021, Gulf Energy also sued Same Sky Books editor and co-founder Thanapol Eawsakul for sharing a Facebook post Rangsiman made about being sued by the company. The company demanded that Thanapol pay 50 million baht [\$1,362,500] compensation with 5 percent interest, publish the full version of the court’s ruling in 15 newspapers, both online and offline, delete the post and pay court costs. [Thanapol Eawsakul was also sued in May 2023 for criticizing the company and sharing posts regarding Bencha Saengchantra’s participation in the aforementioned debate.] In late May 2023, academic Sarinee Achavanuntakul said she was sued by the company over a post she made

## ***Upakit Pachariyangkun vs. Rangisman Rome***

During a general parliamentary debate in February 2023, Move Forward Party Parliamentarian Rangisman Rome (“*Mr. Rome*”) alleged that Senator Upkit Pachariyangkun (“*Senator*” or “*Senator Pachariyangkun*”) was a long-time business partner of Myanmar businessman Tun Min Latt, who had been arrested in September 2022 on charges of drug trafficking and money laundering.<sup>204</sup> During the debate, Mr. Rome also presented a court order from October 3, 2022, which apparently overturned a Criminal Court’s decision to issue an arrest warrant for the Senator in connection with the prosecution of Tun Min Latt.<sup>205</sup> Mr. Rome alleged the arrest warrant was retracted because of the Senator’s status as an “important person.”<sup>206</sup> Mr. Rome then posted a video of the debate on his social media account.<sup>207</sup>

Senator Pachariyangkun responded by filing criminal and civil defamation suits against Mr. Rome that entailed a 100 million Baht [\$2,725,000] claim.<sup>208</sup> Mr. Rome did not invoke Section 161/1 or Section 165/2. At the preliminary hearing in July 2023, which was required because the case was filed directly with the court, the court determined that although disclosing a video clip from a parliamentary debate is a right protected by parliamentary privilege, Mr. Rome had released the clip on his private online account,

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in April about power plant monopolies and the rise in electricity costs, in which she wrote about an independent power producer bid, where Gulf Energy was the sole winner, and the lawsuit resulting from a complaint filed by the Labour Union of the Electricity Generating Authority of Thailand to the State Sector Budget Expenditure Monitoring and Audit Committee that the bid may have been fraudulent. Gulf Energy is demanding compensation of 100 million baht [\$2,725,000] in each lawsuit, with the exception of Thanapol, who is being sued for 50 million baht [\$1,362,500]. If it wins every lawsuit, the company could be paid as much as 550 million baht [\$14,987,500]).

<sup>204</sup> Bangkok Post, *MP casts doubts over Upakit's assets*, (February 21, 2023), <https://www.bangkokpost.com/thailand/politics/2511046/mp-casts-doubts-over-upakits-assets>.

<sup>205</sup> Prachatai, *Court accepts defamation lawsuit against MFP MP*, (July 12, 2023), <https://prachataienglish.com/node/10470>. See also Prachatai, *Senator files another defamation lawsuit against MP*, (June 23, 2023), <https://prachataienglish.com/node/10438>.

<sup>206</sup> Prachatai, *Senator files another defamation lawsuit against MP*, (June 23, 2023), <https://prachataienglish.com/node/10438>.

<sup>207</sup> Prachatai, *Court accepts defamation lawsuit against MFP MP*, (July 12, 2023), <https://prachataienglish.com/node/10470>.

<sup>208</sup> Bangkok Post, *MP casts doubts over Upakit's assets*, (February 21, 2023), <https://www.bangkokpost.com/thailand/politics/2511046/mp-casts-doubts-over-upakits-assets>.

which could provide grounds for defamation by publication. The court found that was sufficient evidence for the lawsuit and scheduled hearings for August 2023.<sup>209</sup>

The case is next listed for plaintiff's evidence in October 2024. However, months after bringing the case, Senator Pachariyangkun was indicted by the Attorney General for multiple offenses related to his alleged involvement in the illicit transnational drug trade.<sup>210</sup> Notably, the case against Mr. Rome is one of four criminal defamation cases Senator Pachariyangkun filed in 2023 against opposition politicians, activists, and members of the media who commented on or reported about his alleged involvement in illicit activities.<sup>211</sup> In fact, when Mr. Rome continued to speak out about the Senator's alleged involvement in illegal activities, Senator Pachariyangkun responded by filing another criminal and civil defamation lawsuit, this time demanding 20 million Baht [\$545,000] in damages against him.<sup>212</sup>

### ***Weed Science Society of Thailand vs. Witoon Lianchamroon***

In 2019, the Weed Science Society of Thailand ("*the Society*"), an NGO funded by the State, and the organization's President filed a criminal defamation lawsuit against Witoon Lianchamroon ("*Mr. Lianchamroon*"), President of BIOTHA Foundation, a non-profit entity that conducts research and publishes public policy proposals relating to the management of natural resources, the economy, and community rights. Among other claims,<sup>213</sup> the Society alleged that Mr. Lianchamroon violated Sections 326 and 328 of

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<sup>209</sup> Prachatai, *Court accepts defamation lawsuit against MFP MP*, (July 12, 2023), <https://prachataienglish.com/node/10470>.

<sup>210</sup> Bangkok Post, *Upakit faces narcotics, money laundering raps*, (December 15, 2023), <https://www.bangkokpost.com/thailand/general/2705883/upakit-faces-narcotics-money-laundering-raps>.

<sup>211</sup> In addition to the case filed against Mr. Rome, the Senator filed defamation lawsuits against Danai Akemahasawat and Amornrat Mahitthirook, hosts of the Inside Thailand television news programme, seeking 50 million baht [\$1,362,500] in damages, for insinuating he was involved in illegal activities, and another against Atchariya Ruangrattanapong, chairman of the Crime Victims Assistance Club. See Bangkok Post, *MP casts doubts over Upakit's assets*, (February 21, 2023), <https://www.bangkokpost.com/thailand/politics/2511046/mp-casts-doubts-over-upakits-assets>.

<sup>212</sup> Prachatai, *Senator files another defamation lawsuit against MP*, (June 23, 2023), <https://prachataienglish.com/node/10438>.

<sup>213</sup> According to the Weed Science Society, Mr. Lianchamroon also violated Section 14 of the Computer Crimes Act by disseminating allegedly false information in connection with a Facebook post in which he criticized a suggestion the Society made on Facebook about which chemicals the government should ban and which they should promote. See Petition for Application of 161/1, *Weed Science Society of Thailand et. al vs. Mr. Witoon Lianchamroon*, (October 26, 2021). See also Protection International, *Criminal Court of Thailand Dismissed Case Against Environmental Rights Defender[W]itoon Lianchamroon*, (December 20, 2021), <https://www.protectioninternational.org/news/criminal-court-of-thailand-dismissed-case-against-environmental-rights-defender-witoon-lianjamroon/>.

the Criminal Code by defaming the group during a televised interview in which he criticized an unnamed “academic association” for pushing the government to backtrack on existing chemical bans.<sup>214</sup>

Since the case was filed directly with the court, the defendant’s lawyers requested application of Section 161/1. The petition argued the allegedly defamatory statements should be

regarded as an expression of any opinion or statement in good faith and are subject to the protection under Section 329 of the Penal Code. Moreover, they are intended for the benefits of the public, the environment, and the health of farmers and consumers who may be seriously harmed by harsh chemical pesticides that are highly hazardous for health and environment.<sup>215</sup>

The petition further emphasized that the plaintiffs filed the suit while “already aware” that the allegedly defamatory speech

by no means specifies their names and that they have not been harmed in any other ways ... This is considered a Strategic Lawsuit Against Public Participation or SLAPP in order to generate fear to the Defendant and make him cease his role in presenting academic data related to the hazards of chemical pesticides towards the health of farmers and consumers and the environment, especially on the issues related to the interests and networks of agricultural chemicals trade businesses and industries.<sup>216</sup>

The court, however, reportedly, did not respond to this application. On November 1, 2021, the court conducted a preliminary hearing, as is required in cases filed directly by plaintiffs, and dismissed the case thereafter. The trial court found Mr. Lianchamroon’s interview was not defamatory since he did not mention the Weed Science Society or its

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<sup>214</sup> Petition for Application of 161/1, *Weed Science Society of Thailand et. al vs. Mr. Witoon Lianchamroon*, (October 26, 2021). See also Protection International, *Criminal Court of Thailand Dismissed Case Against Environmental Rights Defender[W]itoon Lianchamroon*, (December 20, 2021), <https://www.protectioninternational.org/news/criminal-court-of-thailand-dismissed-case-against-environmental-rights-defender-vitoon-lianjamroon/>.

<sup>215</sup> Petition for Application of 161/1, *Weed Science Society of Thailand et. al vs. Mr. Witoon Lianchamroon*, (October 26, 2021).

<sup>216</sup> *Id.*

President by name.<sup>217</sup> The Society appealed the dismissal. In February 2023, nearly four years after the complaint was initially filed, the appeals court also ruled in Mr. Lianchamroon's favor, reasoning that his speech was not defamatory because he did not specifically mention any entity by name or intend to launch a personal attack against an individual or entity.<sup>218</sup>

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<sup>217</sup> The judge also dismissed charges brought under the Computer Crime Act, finding that the post about the danger of chemicals published on BIOTHAI's Facebook Page was an academic opinion meant to promote public safety. See Protection International, *Criminal Court of Thailand Dismissed Case Against Environmental Rights Defender [W]itoon Lianchamroon*, (December 20, 2021), <https://www.protectioninternational.org/news/criminal-court-of-thailand-dismissed-case-against-environmental-rights-defender-vitoon-lianjamroon/>.

<sup>218</sup> *Id.*

# LEGAL ANALYSIS



## A. CHALLENGES AND GAPS IN COMBATING SLAPPS

### Rejection of or Failure to Respond to 161/1 Petitions

While the introduction of Section 161/1 of the Criminal Procedure Code allows courts to dismiss lawsuits filed directly with courts by private persons who do so in bad faith or by misrepresenting facts, the data collected indicates that Section 161/1 requests have been limited in number. One reason is because, as discussed further below, Section 161/1 only applies to cases filed directly with a court and not to cases filed by a public prosecutor, limiting its effectiveness. Since 61 percent of the cases analyzed were filed directly with a court, 61 percent of defendants were able to submit a 161/1 request after the complaint was filed. Defendants in the remaining 39 percent of cases that originated with an inquiry officer, however, were ineligible to do so.

Notably, where Section 161/1 was available to defendants, counsel often did not file petitions (also discussed further below): only in 32 percent of eligible cases did defendants submit 161/1 requests. Of the Section 161/1 requests that were submitted, however, 100 percent were either ignored or rejected by the court.

For example, shortly after Siam International Food Co., Ltd. sued Wanchai Pudtong, the journalist who had reported on the death of a Burmese factory worker employed by the company from COVID-19, for criminal defamation, his lawyers filed a petition invoking Sections 161/1 and 165/2<sup>219</sup> and specifically arguing that the plaintiff had brought the lawsuit in bad faith as retaliation against the defendant's critical reporting about the company.<sup>220</sup>

As articulated in the petition, the lawsuit had numerous indicia of a SLAPP suit from the outset, including: an imbalance of power, an allegation against speech concerning a matter of public importance, and an improper choice of jurisdiction. Even though defense counsel submitted two detailed petitions requesting that the court apply Section 161/1 — one prior to the preliminary hearing and another after the preliminary hearing was

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<sup>219</sup> Petition asking the Court to not accept the complaint for consideration and stating key facts in support of the Court's decision to render the case baseless, *Siam International Food Company Limited vs. Mr. Wanchai Pudtong*, (October 11, 2021). See also Petition/Statement Accompanying the Request for Section 161/1 and 165/2 of the Criminal Procedure Code, *Siam International Food Company Limited vs. Mr. Wanchai Pudtong*, (December 28, 2021).

<sup>220</sup> Petition asking the Court to not accept the complaint for consideration and stating key facts in support of the Court's decision to render the case baseless, *Siam International Food Company Limited vs. Mr. Wanchai Pudtong*, (October 11, 2021).

complete, but before the court ruled on whether the case should proceed to trial—the court reportedly never responded to either petition, or the arguments they raised.<sup>221</sup>

While the court ultimately acquitted the defendant 580 days after the claim was first filed in a judgment that echoed the defense petitions’ argument, the plaintiff appealed the acquittal and, as of this writing, the case is currently still awaiting consideration by the appeals court. Accordingly, the case, which has yet to be resolved nearly four years after the filing of the complaint, continues to proceed through the legal system, “caus[ing] great difficulties and burdens for the Defendant and his witnesses, who are outside of the jurisdiction of [the Court].”<sup>222</sup> (This phenomenon, in which courts take years to try patent SLAPP cases that could have been dismissed from the outset is further discussed in the subsequent section.)

One reason for courts’ dismissal of Section 161/1 petitions, as identified by UNDP and discussed at more length below, may be that the provision lacks specificity as to what criteria should be used to determine whether a case has been brought in “bad faith” or “misrepresents the facts.”<sup>223</sup>

Defense lawyers further relayed that, given the ambiguity about what criteria to apply to Section 161/1, courts err on the side of a full hearing of all the evidence. The UNDP report likewise noted that

courts have often refused to exercise [their powers to dismiss under Section 161/1], stating that preliminary hearings are necessary in order to permit the filer and the target to present evidence to fully prove their respective rights. In addition, it is difficult to determine which cases are

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<sup>221</sup> Petition/Statement Accompanying the Request for Section 161/1 and 165/2 of the Criminal Procedure Code, *Siam International Food Company Limited vs. Mr. Wanchai Putdtong*, (December 28, 2021). See also Petition asking the Court to not accept the complaint for consideration and stating key facts in support of the Court’s decision to render the case baseless, *Siam International Food Company Limited vs. Mr. Wanchai Putdtong*, (October 11, 2021).

<sup>222</sup> Petition asking the Court to not accept the complaint for consideration and stating key facts in support of the Court’s decision to render the case baseless, *Siam International Food Company Limited vs. Mr. Wanchai Putdtong*, (October 11, 2021).

<sup>223</sup> United Nations Development Programme in Thailand, *Laws and Measures Addressing Strategic Lawsuits Against Public Participation (SLAPPs) in the Context of Business and Human Rights*, (2023), pg. 38.

brought in bad faith or misrepresent the facts, [as] sufficient facts and evidence are required for this determination.<sup>224</sup>

According to the UNDP, these “existing ambiguities may be one reason that courts tend to avoid exercising their jurisdiction [regarding 161/1 dismissals].”<sup>225</sup>

As evidenced by the multiple cases in which courts simply did not respond to Section 161/1 requests, courts have also extended their discretion beyond assessing whether the case was brought in bad faith to whether to even answer defense petitions at all. Some defense counsel interviewed for this study have relayed that, given the unlikelihood of receiving a response from the courts, they have stopped filing separate motions under Section 161/1 entirely and instead put 161/1 arguments in Section 165/2 petitions submitted at the preliminary hearing stage.<sup>226</sup>

Strikingly, in the nearly five years since Section 161/1 was adopted, no court has actually applied it to dismiss a SLAPP case brought in bad faith or that misrepresented the facts, despite the fact that, as demonstrated by the cases summarized throughout this report, courts often ultimately acquit defendants on the same grounds as the arguments articulated in Section 161/1 petitions.

## Preliminary Hearings

Preliminary hearings, which take place after an indictment or charges have been filed but before the initiation of a full trial, provide courts the opportunity to conduct an early assessment of whether a claim brought by a private plaintiff has merit.<sup>227</sup> Section 167 provides that, “if it appears there is a prima facie case [after the preliminary hearing] the Court shall accept the charge ... if the case is not prima facie case, the lawsuit shall be dismissed” at the preliminary hearing stage.<sup>228</sup> As noted above, Section 162 of the Thai

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<sup>224</sup> United Nations Development Programme in Thailand, *Laws and Measures Addressing Strategic Lawsuits Against Public Participation (SLAPPs) in the Context of Business and Human Rights*, (2023), pg. 38.

<sup>225</sup> *Id.*

<sup>226</sup> Defense counsel interviews.

<sup>227</sup> United Nations Development Programme in Thailand, *Laws and Measures Addressing Strategic Lawsuits Against Public Participation (SLAPPs) in the Context of Business and Human Rights*, (2023), pg. 38.

<sup>228</sup> Thailand Criminal Procedure Code, Section 167, <https://www.icj.org/wp-content/uploads/2012/12/Thailand-Criminal-Procedure-Code-1934-2008-eng.pdf>, (“If it appears that there is a prima facie case, the Court shall accept the charge ... for the trial, if the case is not a prima facie case, the lawsuit shall be dismissed.”).

Criminal Code requires courts to conduct a preliminary examination in cases filed directly by private plaintiffs, and grants courts the discretion to conduct such hearings in cases brought by public prosecutors when they “think[ it] fit.”<sup>229</sup>

As also described above, prior to the introduction of Section 165/2, courts only considered a plaintiff’s arguments, witnesses, and evidence during preliminary hearings, meaning that the defense could not present arguments and evidence except during cross-examination of the plaintiff’s witnesses.<sup>230</sup> As explained by UNDP, Section 165/2 was designed to improve the fairness of the preliminary hearing process:

Prior to the enactment of [S]ection 165/2, the court heard the plaintiff’s evidence unilaterally, and there was little that the defendant could do. Therefore, the addition of this procedure has increased the efficiency of the entire process — particularly in verifying the truth from the beginning — and may enable a SLAPP to be terminated quickly.<sup>231</sup>

Analysis of the criminal defamation SLAPPs identified since the introduction of Section 165/2 indicate that in practice, Section 165/2 has not been an effective mechanism to combat SLAPPs early in the proceedings. One reason for this is the limited scope of the provision. Specifically, Section 165/2 is limited in applicability because, as described above, preliminary hearings are only required in cases brought by a private complainant directly with the court. While courts can conduct preliminary hearings in cases brought

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<sup>229</sup> Thailand Criminal Procedure Code, Section 162, <https://www.icj.org/wp-content/uploads/2012/12/Thailand-Criminal-Procedure-Code-1934-2008-eng.pdf>. See also United Nations Development Programme in Thailand, *Laws and Measures Addressing Strategic Lawsuits Against Public Participation (SLAPPs) in the Context of Business and Human Rights*, (2023), pg. 38.

<sup>230</sup> Ministry of Justice, Rights and Liberties Protection Department, *Thailand’s 1st National Action Plan on Business and Human Rights (2019-2022)*, (2019), pg. 106, <https://www.undp.org/thailand/publications/thailands-1st-national-action-plan-business-and-human-rights>. See Thailand Criminal Procedure Code, Section 165, <https://www.icj.org/wp-content/uploads/2012/12/Thailand-Criminal-Procedure-Code-1934-2008-eng.pdf>, (“In the case where the charge is entered by the Public Prosecutor, the accused shall, on the day fixed for holding the preliminary examination, appear or be brought before the Court...The accused is not entitled to adduce evidence in the course of the preliminary examination, but this shall not debar him from having the assistance of a counsel. In the case where the charge is entered by a private prosecutor... the Court shall serve on each accused a copy of the charge and notify him of the date fixed for the preliminary examination. The accused may attend the examination with or without a counsel to cross-examine the witnesses for the prosecution. If he will not attend, he may appoint a counsel to cross-examine the witnesses for the prosecution. The accused shall not be asked by the Court to make a statement.”).

<sup>231</sup> United Nations Development Programme in Thailand, *Laws and Measures Addressing Strategic Lawsuits Against Public Participation (SLAPPs) in the Context of Business and Human Rights*, (2023), pg. 39.

by the public prosecutor if they deem it necessary, not a single case in the dataset brought by a public prosecutor was subject to additional judicial screening via a preliminary hearing.

However, case data indicates that Section 165/2 has not been an effective mechanism to combat SLAPPs even in cases where preliminary hearings are required. 27 percent of defendants in these cases submitted Section 165/2 petitions articulating arguments and detailing evidence warranting dismissal of the case. In none of these cases, however, did courts call additional witnesses or subpoena evidence based on Section 165/2 requests—as is permitted under the provision. Thus, although UNDP has described Section 165/2 as allowing “the court to have more comprehensive facts when determining whether to issue a dismissal order[.]”<sup>232</sup> case data indicates that even when courts have received “more comprehensive facts,” this has not substantially increased their willingness to dismiss charges at the preliminary hearing stage.

Indeed, only two cases in the dataset was dismissed at the preliminary hearing stage. Thus, apart from 165/2, even the normal screening process does not appear to be working. Of the cases where the outcome is known, 100 percent of cases accepted by courts at the preliminary hearing stage resulted in acquittals on the ground that there was not a legal basis for the defamation claim or that the speech in question was made in good faith under Section 329 (which, as discussed above, while primarily used as a defense to defamation is technically an exception, meaning that it is excluded from the definition of defamation). This is the sort of claim that could have been resolved at the preliminary hearing stage on the basis of the plaintiff’s evidence alone. Thus, not only is Section 165/2 not operating to combat SLAPPs, the baseline preliminary hearing process is failing to filter out meritless cases.

### **Inconsistent Application**

Analysis of case documents and interviews with defense counsel also indicates a lack of clarity about the procedures and timelines for invoking the anti-SLAPP provisions, in turn reflecting the lack of clarity in the provisions themselves.

Specifically, analysis of aggregated data indicates that there is no standard timeline or procedure by which 161/1 and 165/2 petitions are submitted: defense counsel in the case of Animal Food Company vs. Dr. Phet Manopawit, for example, filed a 161/1 and 165/2 petition on November 20, 2023, the same day as the preliminary hearing in that case was conducted; a petition raising Sections 161/1 and 165/2 was also filed on the same day as the preliminary hearing in Thammakaset’s case against Angkhana Neelapaijit. Meanwhile, defense counsel in the case of Sereepisuth Temeeyaves vs.

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<sup>232</sup> *Id.*

Ticha Nanakorn filed a joint Section 161/1 and 165/2 petition nearly two months before the preliminary hearing, while in *Siam International Food Company Limited vs. Wanchai Pudtong*, defense counsel submitted a joint 161/1 and 165/2 petition two months before the preliminary hearing and a second petition, also raising both 161/1 and 165/2, 20 days after the hearing concluded but before a determination had been made.

In the case of *Weed Science Society vs. Mr. Witoon Lianchmaroon*, defense counsel submitted a 161/1 petition on October 26, 2021, six days before the November 1, 2021 preliminary hearing. And although defense counsel in *Thammakaset's* criminal defamation case against *Suchanee Cloitre* submitted a 165/2 petition 15 days after the preliminary hearing was completed, they waited to raise Section 161/1 in their closing arguments before the court at trial. Specifically, defense counsel asserted at closing that the lawsuit was a “SLAPP with the aim to deter the Defendant from reporting or publishing information relating to the violation of labor rights and freedom of expression” that was brought “in bad faith in line with Section 161/1 of the Criminal Procedure Code.”<sup>233</sup>

And as reflected in the data and case summaries above, in some cases defense counsel submitted separate Section 161/1 and Section 165/2 petitions, while in other cases these petitions were combined and submitted during the preliminary hearing—even though Section 161/1 was intended as a vehicle to dismiss cases prior to the preliminary hearing process.

## **Eventual Dismissal**

Thailand’s anti-SLAPP provisions—Section 161/1 and Section 165/2—were designed to provide judges an avenue to dismiss abusive and wasteful SLAPPs before the trial stage. As discussed above, one of the key purposes of SLAPPs is the draining of the target’s time and resources: as such, it is not necessary for a verdict to ultimately fall in the plaintiff’s favor in order for a SLAPP to have the desired effect. According to the NGO Article 19,

[t]he burden of lengthy criminal defamation cases is felt most acutely by the accused. In recent years, many journalists, activists, and human rights defenders have endured years of investigation and legal proceedings only to be acquitted of all charges. Expenses associated with these proceedings have often been paid out of the pocket of the accused. Long and exhausting legal battles based on criminal defamation accusations create

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<sup>233</sup> Defense Counsel Closing Argument, *Thammakaset Company Limited vs. Ms. Suchanee Cloitre*.

an atmosphere of fear and self-censorship, severely inhibiting journalism and weakening civil society.<sup>234</sup>

The longer a SLAPP is allowed to move through the legal system, the more damaging the effects on the SLAPP target. Interviews with members of civil society and the public sector conducted by UNDP, for example, highlighted that “the more extended a trial, especially for criminal cases that are punishable by imprisonment, the weightier the pressures and fears faced by the targets and others striving to safeguard their rights, their communities’ rights, and other public interests.”<sup>235</sup> The Human Rights Committee has likewise held that it is “impermissible for a State party to indict a person for criminal defamation but then not to proceed to trial expeditiously – such a practice has a chilling effect that may unduly restrict the exercise of freedom of expression of the person concerned and others.”<sup>236</sup>

Section 161/1 was meant to address these documented harms early in the legal process, immediately after the filing of a complaint. Instead, courts’ refusal to apply it has meant that SLAPPs have taken significant time to conclude, even where they have resulted in a positive outcome for the defendant. Similarly, Section 165/2 was meant to provide defendants with a better chance at dismissal at the preliminary hearing, thereby avoiding a full trial. Again, in none of the cases in the dataset did courts dismiss hearings at the preliminary stage on the basis of Section 165/2 filings.

Of the cases that reached a final outcome, 35 percent ended in acquittal,<sup>237</sup> 32 percent were withdrawn by the plaintiff without a known settlement, 10 percent were withdrawn after a settlement was reached, 14 percent received an order of non-prosecution and 7 percent were dismissed after a preliminary hearing. In other words, there is not one case on record in which the court ultimately ruled in favor of the complainant.<sup>238</sup> And yet, on average, proceedings lasted nearly two years before these cases were concluded. Thus,

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<sup>234</sup> Article 19, *TRUTH BE TOLD: Criminal Defamation in Thai Law and the Case for Reform*, (March 2021), pg. 15, [https://www.article19.org/wp-content/uploads/2021/03/Thailand\\_Truth\\_be\\_told\\_decriminalise\\_defamation-1.pdf](https://www.article19.org/wp-content/uploads/2021/03/Thailand_Truth_be_told_decriminalise_defamation-1.pdf).

<sup>235</sup> United Nations Development Programme in Thailand, *Laws and Measures Addressing Strategic Lawsuits Against Public Participation (SLAPPs) in the Context of Business and Human Rights*, (2023), pg. 43.

<sup>236</sup> UN Human Rights Committee, *General Comment No. 34*, U.N. Doc. CCPR/C/GC/34 (September 12, 2011), para para 47

<sup>237</sup> Appeals against three of the ten cases that ended in acquittal were pending before the Court of Appeal as of August, 2024.

<sup>238</sup> As mentioned above, in *Thammakaset Company Limited vs. Ms. Suchanee Cloitre* the trial court convicted the defendant which was overturned on appeal.

SLAPP targets were subjected to prolonged, expensive, and emotionally taxing legal proceedings only to have the case dismissed for reasons that were apparent at the beginning.

For example, in the case brought by Thammakaset Company Limited against Angkhana Neelapaijit, defense counsel submitted a petition during the first preliminary hearing arguing that the court should dismiss the case “according to Section 161/1 and/or 165/2,” including because a Twitter user would have to click a number of successive links after engaging with Ms. Neelapaijit’s Tweets before reaching the Fortify Rights video that Thammakaset alleged was defamatory.<sup>239</sup> The court reportedly did not respond to defense counsel’s petition. Accordingly, rather than being dismissed prior to trial, this case progressed through the judicial system—at great financial and emotional cost to the defendant—until Ms. Neelapaijit and her co-defendants were ultimately acquitted in August 2023.<sup>240</sup>

Even though the court refused to exercise its discretion and dismiss the case before trial, the same arguments from defense counsel’s 161/1 and 165/2 petition were echoed in the court’s judgment dismissing the case, which was issued nearly 1,000 days after the 161/1 and 165/2 petition was submitted.<sup>241</sup>

Further, in direct parallel with the 161/1 and 165/2 petition, which outlined the step by step break down required for users to reach the allegedly defamatory video, the court concluded that none of the posts “mentioned ... the alleged defamatory video. It was the Plaintiff’s own argument that such posts contained a link to the defamatory video. To access the said video, a user is required to click around 4 to 5 times away until they can reach the alleged defamatory Film.”<sup>242</sup>

As explained above, in addition to acquitting defendants because of insufficient evidence of the offense of defamation, some courts have acquitted defendants under Section 329, which articulates an exception to the offense of defamation. In such cases, after conducting a full trial, courts have found that the SLAPP target had, in good faith, expressed an opinion for the purpose of self-justification or self-defense; for the protection of legitimate and relevant interests; and/or as fair comment on any person or

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<sup>239</sup> Petition/Statement for the Court to not accept the case by virtue of Section 161/1 and 165/2 of the Criminal Procedure Code, *Thammakaset Company Limited vs. Ms. Angkhana Neelapaijit*, (February 20, 2020). See also Judgment, *Thammakaset Company Limited vs. Ms. Angkhana Neelapaijit et. al*, (August 29, 2023).

<sup>240</sup> Judgment, *Thammakaset Company Limited vs. Ms. Angkhana Neelapaijit et. al*, (August 29, 2023).

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

thing subject to public criticism.<sup>243</sup> For example, two years after Myanmar Pongpipat filed a complaint with an inquiry officer against journalist Pratch Rujivanarom, the court of first instance acquitted him on Section 329 grounds, holding that the

Defendant’s publication of the judgment ...[was] according to facts. It can be deemed that the Defendant informed the news by way of fair report of the open proceeding of any court or meeting and by way of fair comment on any person or thing subjected to public criticism according to section 329 (3) (4) of the Criminal Code.<sup>244</sup>

However, as will be discussed below, Section 329 could have been applied from the outset by the inquiry officer or public prosecutor. Instead, 583 days passed between the filing of the complaint and Rujivanarom’s acquittal—a period during which his time and energy were diverted from his journalistic work.

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<sup>243</sup> See United Nations Development Programme in Thailand, *Laws and Measures Addressing Strategic Lawsuits Against Public Participation (SLAPPs) in the Context of Business and Human Rights*, (2023), pg. 38.

<sup>244</sup> Judgment, *Nakhon Pathom Provincial Public Prosecutor et. al, vs. Mr. Pratch Rujivanarom*, (August 11, 2023).

# ACQUITTED CASES

CASE	LANGUAGE FROM DEFENDANT'S 161/1 AND/OR 165/2 PETITION	LANGUAGE IN COURT'S JUDGEMENT	TIME BETWEEN SUBMISSION OF ANTI-SLAPP PETITION AND ACQUITTAL
Thammakaset Company Limited vs. Angkhana Neelapaijit et. al	"The Plaintiff relied on its imagination in identifying the linkages to the video clip with alleged defamatory content, which requires five and/or four steps to access it." <sup>245</sup>	"None of the defendants' post mentioned about the alleged defamatory video. It was the Plaintiff's own argument that such posts contained a link to the defamatory video. To access the said video, a user is required to click around 4 to 5 times away until they can reach the alleged defamatory Film."	1,286 Days
	"In order to become aware of the alleged information mentioned [about the plaintiffs workers], the readers must click on the hyperlink in the statement by Fortify Rights, which only calls the government to drop the defamation charges filed by the Plaintiff against Ms. Suthanee Wannasiri, human rights defender, and Ms. Ngamsuk Rattanasathian, lecturer at the Institute of Human Rights and Peace, Mahidol University, for sharing an article about the rights of the workers who were employees working at the Plaintiff's poultry farms." <sup>246</sup>	"[A]ll the text in the defendant's posts did not mention anything about the Plaintiff's workers. The defendants' posts are only deal with the lawsuit where the Plaintiff filed against human rights defender and its employee, as well as to show support among the defendants themselves following the Plaintiff's lawsuit against them." <sup>247</sup>	
Siam International Food Company Limited vs. Wanchai Pudtong	"The Defendant would like to state that [the allegedly defamatory post was about] news that has also been reported by other media outlets. [I]t appears that the Plaintiff's witness himself has admitted that many media outlets reported on the same story." <sup>248</sup>	"It can be seen that the reports covered actual events without any added information. [D]uring that time, media platforms, including television, newspaper, etc., were all reporting about the outbreak at the Plaintiff's factory." <sup>249</sup>	1,024 Days <sup>250</sup>
	"Sue Thuean Khao Facebook Page is a news agency working as a media that report news about events in the society in general according to the usual duties of [news media]. ...The Plaintiff in this case is aware that the Defendant is a media carrying out the duty to report news on the issue of human rights and community rights violation resulted from the development project by the public and private sector that impact the communities and local people in a province in Southern Thailand." <sup>251</sup>  "Therefore, the texts in the above documents only concern a general news report... for the public benefits intended to solve and prevent the ongoing transmission." <sup>252</sup>	"Therefore, the texts and images [shared by the defendant were] news report[s], which were part of the duties of journalists and press members in general to inform their followers and the public and to encourage them to help control and curb the spread of the disease, which was for the society's benefits." <sup>253</sup>	

<sup>245</sup> Petition/Statement for the Court to not accept the case by virtue of Section 161/1 and 165/2 of the Criminal Procedure Code, *Thammakaset Company Limited vs. Ms. Angkhana Neelapaijit*, (February 20, 2020).

<sup>246</sup> Petition/Statement for the Court to not accept the case by virtue of Section 161/1 and 165/2 of the Criminal Procedure Code, *Thammakaset Company Limited vs. Ms. Angkhana Neelapaijit*, (February 20, 2020).

<sup>247</sup> Judgment, *Thammakaset Company Limited vs. Ms. Angkhana Neelapaijit et. al.*, (August 29, 2023).

<sup>248</sup> Petition/Statement Accompanying the Request for Section 161/1 and 165/2 of the Criminal Procedure Code, *Siam International Food Company Limited vs. Mr. Wanchai Pudtong*, (December 28, 2021).

<sup>249</sup> Judgment, *Siam International Food Company Limited vs. Mr. Wanchai Pudtong*, (March 20, 2023).

<sup>250</sup> This number is calculated using the date of the first petition that was submitted by defense counsel on October 11, 2021. A secondary petition was submitted, also invoking 161/1 and 165/2 and raising parallel arguments quoted in the chart above, after the preliminary hearing on December 28, 2021.

<sup>251</sup> Petition asking the Court to not accept the complaint for consideration and stating key facts in support of the Court's decision to render the case baseless, *Siam International Food Company Limited vs. Mr. Wanchai Pudtong*, (October 11, 2021).

<sup>252</sup> Petition/Statement Accompanying the Request for Section 161/1 and 165/2 of the Criminal Procedure Code, *Siam International Food Company Limited vs. Mr. Wanchai Pudtong*, (December 28, 2021).

<sup>253</sup> Judgment, *Siam International Food Company Limited vs. Mr. Wanchai Pudtong*, (March 20, 2023).

## The Inquiry Officer/Public Prosecutor Work Around

The applicability of the anti-SLAPP provisions depends on how the case comes before the court. As discussed above, Thailand’s Criminal Procedure Code specifically states that a criminal case can be initiated in one of two ways: (1) a private plaintiff can lodge a complaint or accusation with an inquiry officer, who can elevate the case to the public prosecutor; or (2) a private plaintiff can file the suit directly with a court.<sup>254</sup> Section 161/1 only applies to criminal cases filed by private plaintiffs, meaning that a court cannot dismiss cases brought by public prosecutors before the preliminary hearing, even where they are a vehicle for private party SLAPPs.<sup>255</sup>

Similarly, as discussed above, courts rarely exercise their discretion to hold preliminary hearings where cases are brought by public prosecutors, rendering Section 165/2 functionally inapplicable to these cases.

This bifurcated process for criminal complaints—in which there is one set of rules for cases directly filed with the court and another for those initiated with inquiry officers (and taken forward by public prosecutors)—lends itself to abuse: namely, individuals who wish to bypass anti-SLAPP provisions can do so by filing their complaints with an inquiry officer, rather than directly with the court. Because 39 percent of the cases analyzed were filed with an inquiry officer, Section 161/1 and, in practice, Section 165/2 were not available options. This is true even where the complaint was initiated by a powerful local figure or business, whose complaint inquiry officers might well be reluctant to ignore: 57 percent of the cases filed with an inquiry officer were initiated by a politician and 29 percent were initiated by state officials. Notably, such complainants also do not have to bear any of the legal fees associated with a defamation suit. Indeed, in externalizing the cost of litigation with a public prosecutor, SLAPP plaintiffs are able to further leverage the power imbalance in their favor at the expense of the accused, who often pay expenses associated with proceedings out of pocket.<sup>256</sup> And, as discussed by UNDP,

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<sup>254</sup> See United Nations Development Programme in Thailand, *Laws and Measures Addressing Strategic Lawsuits Against Public Participation (SLAPPs) in the Context of Business and Human Rights*, (2023), pg. 17.

<sup>255</sup> See International Commission of Jurists, *Re: Concerns on the existing legal frameworks that are designated to prevent strategic lawsuit against public participation (SLAPP lawsuits)*, (March 20, 2020), pg. 34.

<sup>256</sup> *Id.*, pg. 37, (“filers who lodge a complaint or accusation with an inquiry officer that is subsequently prosecuted by the prosecutor, have a much lighter burden to bear because they can rely on these legal processes within the system of administration of justice, as opposed to filers who commence a case directly with the court. The target, on the other hand, often has to bear several burdens, such as travelling to report to the prosecutor regularly, facing pressure from the risk of arrest or detention, and seeking guarantees of release during interrogation.”).

the lack of a preliminary hearing in cases brought by public prosecutors means that these cases do “not undergo an additional tier of screening (i.e. by the court) to bring the case to an end during the preliminary hearing,” and instead proceed straight to trial.<sup>257</sup> This is particularly problematic given that the screening conducted by inquiry officers and prosecutors does not, as discussed below, appear to be working to filter out abusive or meritless claims.

What’s more, as evidenced in cases like *Public Prosecutor et al. vs. Mr. Wut Boonlert and Mr. Suracha Boonyeim* and *Nakhon Pathom Provincial Public Prosecutor et al. vs. Pratch Rujivanarom*, even where private parties file a case with an inquiry officer, they can maintain some level of control by joining the case as a co-plaintiff. For example, in *Nakhon Pathom Provincial Public Prosecutor et al. vs. Pratch Rujivanarom*, Section 161/1 was not available because the complainant, mining company Myanmar Pongipat, initially filed a complaint with an inquiry officer. After the court granted the company’s motion to join as a co-plaintiff, Myanmar Pongipat filed another motion requesting the court compel the defendant to pay compensation in the amount of

135 million Baht [\$3,542,500] with interest of 5 [percent] per annum of the principle, calculating from 13 January 2020 until such amount was paid to the Co-Plaintiff in full. The court was also requested to compel the Defendant to publish correct and truthful information as per the Co-Plaintiff’s request in at least 3 daily newspapers and [the] Facebook [pages] of the Defendant and GreenNews.<sup>258</sup>

Thus, in filing the case with an inquiry officer and later joining as a co-plaintiff, the company was able to ensure that it would not face challenges with the anti-SLAPP provisions, whether through early dismissal or the preliminary hearing, and would not bear the costs of the proceedings, while continuing to exert control over the direction of the prosecution.

This tactic was likewise evident in the multiple complaints filed by the Mayor of Banlang sub-district against Thai investigative journalist Chutima Sidasthian (“*Ms. Sidasthian*”). After Ms. Sidasathian shared findings on social media from her investigation into the misappropriation of village funds and alleged corruption, including the conduct of the local Mayor, he responded by filing a total of five criminal defamation complaints against

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<sup>257</sup> *Id.*, pg. 39.

<sup>258</sup> Judgment, *Nakhon Pathom Provincial Public Prosecutor et. al, vs. Mr. Pratch Rujiiyanarom*, (August 11, 2023).

her with local inquiry officers.<sup>259</sup> Even though there was ample evidence at the time of filing that the Mayor’s defamation complaints were based on a misrepresentation of facts and made in bad faith—as explained further below, Ms. Sidasthian’s findings gave rise to an official investigation into the Mayor’s conduct and the Mayor was ultimately criminally indicted for misappropriating funds— Ms. Sidasthian was not able to submit a petition to the court requesting dismissal of the case prior to trial because the Mayor filed a complaint with an inquiry officer instead of bringing his claim directly to the court.

The Mayor’s multiple lawsuits against Ms. Sidasthian further illustrate how the public prosecutor work around can facilitate a SLAPP filer’s ability to bring more than one lawsuit against targets: The Mayor was able to inundate Ms. Sidasthian with multiple lawsuits without bearing any of the costs typically associated with lengthy litigation. Indeed, he was able to do so without forsaking his influence over the case: after the court accepted his motion to join the prosecutor as co-plaintiff, the Mayor submitted a new motion to demand additional compensation of 100,000 Baht [\$2,725] from Ms. Sidasthian.<sup>260</sup>

The inquiry officer/public prosecutor loophole thus poses a significant limitation to the effectiveness of existing anti-SLAPP provisions as tools against frivolous or abusive criminal defamation claims.

### **Misalignment with Non-Prosecution Procedures**

While there are distinct procedures under Thai law providing for the early screening of cases filed with an inquiry officer, the practical utility of these mechanisms is limited because, among other reasons, they are vague and misaligned with not only the anti-SLAPP amendments—specifically Section 161/1—but also with Section 329.

While inquiry officers and public prosecutors can greatly expedite resolution of a SLAPP by recommending or issuing a non-prosecution order, according to UNDP “the process remains complicated.”<sup>261</sup> In particular, and consistent with findings by UNDP discussed above, defense lawyers and justice sector actors told researchers that inquiry officers and prosecutors may fear that the SLAPP filer will take action against them under Section 157 of the Criminal Code. Section 157 states that any official who “wrongfully exercises

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<sup>259</sup> One case was taken forward by public prosecutors, who charged Ms. Sidasathian with three counts of criminal defamation. Four cases are pending.

<sup>260</sup> Judgment, *Public Prosecutor of Nakhon Ratchasima Province et. al vs. Chutima Sidasthian*, (March 6, 2024).

<sup>261</sup> See United Nations Development Programme in Thailand, *Laws and Measures Addressing Strategic Lawsuits Against Public Participation (SLAPPs) in the Context of Business and Human Rights*, (2023), pg. 35.

or does not exercise any of his functions to the injury of any person ... shall be punished with imprisonment of one to ten years or fined two thousand [\$54.58] to twenty thousand Baht [\$545.80], or both.”<sup>262</sup>

Shifting from the general powers afforded inquiry officers and prosecutors to Section 21, which permits non-prosecution in the public interest, the provision is not specific to SLAPP suits and has rarely been applied in such cases in part because “the scope of the term ‘public interest,’ ... is not clearly defined in the relevant regulations,” making it difficult for inquiry officers and prosecutors to recommend/issue non-prosecution orders on this basis prior to trial.<sup>263</sup> According to UNDP, the vagueness of the provision may be “why a prosecutor in charge of a case would be reluctant to offer recommendations in criminal cases that are not in the public interest, as they may face questions from the chief prosecutor and other high-ranking officials, including the Attorney General.”<sup>264</sup> Further, a public prosecutor that recommends non-prosecution under Section 21 may be faced with “questions and grievances from those filing the complaints or accusations, or from the public.”<sup>265</sup> And according to interviews with public prosecutors conducted by the International Commission of Jurists, Section 21 “is in reality difficult to apply because the non-prosecution decision must be rendered only by the Attorney-General, making it a time-consuming process, which does not in any way help minimize undue and negative effect of SLAPP lawsuits.”<sup>266</sup> In country, defense lawyers and justice sector actors conveyed that Section 21 was not relevant to SLAPP suits—as it is only applicable where the accused has indeed committed an offense and SLAPP suits are by their definition meritless— and instead is germane to cases such as where there are compelling personal circumstances warranting the termination of a case against an offender.

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<sup>262</sup> Thailand Criminal Code, Section 157, <https://library.siam-legal.com/thai-law/criminal-code-malfeasance-in-office-sections-151-157/#:~:text=Section%20157.%20Wrongful%20Exercise%20of%20Duties%20Whoever%2C%20being,two%20thousand%20to%20twenty%20thousand%20Baht%2C%20or%20both.>

<sup>263</sup> United Nations Development Programme in Thailand, *Laws and Measures Addressing Strategic Lawsuits Against Public Participation (SLAPPs) in the Context of Business and Human Rights*, (2023), pg. 37.

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> International Commission of Jurists, *Re: Concerns on the existing legal frameworks that are designated to prevent strategic lawsuit against public participation (SLAPP lawsuits)*, (March 20, 2020), pg. 8.

The data reflects this: of the criminal defamation cases analyzed that were filed with an inquiry officer, not a single one was subject to a non-prosecution order under Section 21 on the basis that prosecution was not in the public interest.

Notably, only four cases were subject to non-prosecution orders. Namely, the complaint filed by the Mayor of Banlang sub-district against Pasinee Kemmalung, a local villager (for posting a copy of the Mayor’s acknowledgment of debt owed), resulted in an order of non-prosecution under Section 143 of the Code of Criminal Procedure, on the basis that the acts at issue did not constitute an offense.<sup>267</sup> The remaining three cases were against Chutima Sidasthian—notably these non-prosecution orders were only issued after she was acquitted in one case and her lawyer made submissions before the prosecutors.

In *Public Prosecutor of Nakhon Ratchasima Province vs. Chutima Sidasthian*—the complaint that went to trial—public prosecutors charged Ms. Sidasthian with three counts of criminal defamation (for, respectively, three Facebook posts) despite the fact that two of her allegedly defamatory posts did not even clearly reference the Mayor of Banlang sub-district—who had filed the criminal complaint and then joined the case as co-plaintiff. Indeed, the court’s judgment itself acknowledged that the text of two of the posts were, on their face, an insufficient basis for a defamation charge. Of the first post, the court noted that it was “a general message that only criticized the performance of governmental authorities at national and local levels” and that “Defendant did not specify that co-plaintiff or any person bought votes from general public.”<sup>268</sup> Of the second post, the court noted that it “did not refer to and accuse co-plaintiff in a way that could result in defamation.”<sup>269</sup>

Given that these conclusions were based on the text of the posts alone, such a determination could have—and in fact, should have—been made by inquiry officers and public prosecutors under Sections 141-143 of the Code of Criminal Procedure at the investigation stage. As articulated by ICJ, such

lawsuits should be determined per se as meritless and be dismissed by public prosecutors at the very inception of any such lawsuit. Prosecutors, as well as inquiry officers, should be competent to simply exercise their

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<sup>267</sup> As explained above, Thammakaset’s initial complaint against Ms. Cloitre did result in an order of non-prosecution. However, because it was initiated and dismissed in 2018—prior to the introduction of the anti-SLAPP amendments analyzed in this report—only Thammakaset’s 2019 case against Ms. Cloitre, which was filed directly with the court, is included in the dataset.

<sup>268</sup> Judgment, *Office of Attorney General Nakhon Ratchasima Province et. al vs. Chutima Sidasthian*, (March 6, 2024).

<sup>269</sup> *Id.*

general power as set out under ... the Criminal Procedure Code to render a non-prosecution order in order to strike any such lawsuit out from the justice system in accordance with Thai law and Thailand's international legal obligations.<sup>270</sup>

Rather than doing so, however, public prosecutors took the case forward and Ms. Sidasthian was charged with three counts of criminal defamation under Sections 326 and 328, each of which carried a sentence of two years' imprisonment.<sup>271</sup> Because Section 161/1 and, functionally, a preliminary hearing were inapplicable since the case was brought by a public prosecutor, the case proceeded to trial. Thus, even though public prosecutors could have issued an order of non-prosecution for at least two of the three counts—finding, under Section 143 that the accused did not commit the offense in question—Ms. Sidasthian was embroiled in legal proceedings for one and a half years before she was acquitted of all charges on the same grounds.<sup>272</sup> In light of this and numerous other similar cases in the dataset, it appears that inquiry officers and prosecutors are not appropriately exercising their general powers to recommend/issue non-prosecution orders where the complaint is meritless.

It is worth noting that although SLAPP targets must rely on prosecutors' power to issue non-prosecution orders under Section 143 where cases are publicly prosecuted, as opposed to courts' Section 161/1 power to dismiss complaints where abusive cases are brought by a private plaintiff, there is no consistent standard articulated across the provisions. Namely, there is no anti-SLAPP provision for inquiry officers/public prosecutors that is comparable to Section 161/1's proscription of "bad faith" prosecutions: Section 143 only broadly references the power to issue non-prosecution orders where the accused did not commit the offense, without specific mention of SLAPP criteria. This is even though Section 161/1 is unavailable and a preliminary hearing not required in cases brought by a public prosecutor precisely because public prosecutors are meant to have conducted the same screening at the outset of the case that the court would conduct at the preliminary stage.

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<sup>270</sup> International Commission of Jurists, *Re: Concerns on the existing legal frameworks that are designated to prevent strategic lawsuit against public participation (SLAPP lawsuits)*, (March 20, 2020), pg. 8.

<sup>271</sup> See Judgment, *Public Prosecutor of Nakhon Ratchasima Province et. al vs. Chutima Sidasthian*, (March 6, 2024). See also Bangkok Post, *Journalist prevails in another 'Slapp' case*, (March 6, 2024), <https://www.bangkokpost.com/thailand/general/2754188/journalist-prevails-in-another-slapp-case>.

<sup>272</sup> *Id.*

Complicating the situation, Section 329 outlines exceptions to defamation, including statements made in good faith and that constitute routine public criticism.<sup>273</sup> Thus Section 329—while not specifically intended as an anti-SLAPP provision—applies in practice to many SLAPPs. And theoretically, inquiry officers and prosecutors conducting their initial screenings could invoke Section 329 when recommending dismissal or issuing an order of non-prosecution, respectively, based on insufficient evidence of defamation under Sections 141-143 of the Criminal Code. However, as evidenced by the dataset, it appears that this provision is typically only used by courts at trial, and treated more like a defense. As such, although Section 329 could be an effective means of countering SLAPPs early in the process, its application is currently limited to the end of lengthy criminal proceedings, cutting off another avenue of redress for SLAPP targets.

## B. INDICIA OF SLAPPS

The ineffectiveness of existing anti-SLAPP protections, as detailed above, cannot be attributed to the cases themselves being less than clear-cut SLAPPs. Instead, the cases in the dataset bore key indicators of SLAPPs, as recognized under international standards, meaning that they could and should have been identified as such early on and dismissed. As mentioned throughout, SLAPPs are lawsuits or threats of legal action that target public participation on matters of public interest. They are of grave concern because they target (a) constitutionally protected activities and (b) remove information from the public domain. In doing so, SLAPPs undermine the target's rights and have a broader chilling effect on public discourse. While these factors are always present in a SLAPP, SLAPPs are also characterized by the use of abusive litigation tactics, including (but not limited to):<sup>274</sup>

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<sup>273</sup> Thailand Criminal Code, Section 329, <https://library.siam-legal.com/thai-law/criminal-code-defamation-sections-326-333/>.

<sup>274</sup> See Media Defence, *Protecting Public Watchdogs across the EU: A Proposal for an EU Anti-SLAPP Law*, (2021), pgs. 35-36, [https://www.mediadefence.org/wp-content/uploads/2021/12/Anti\\_SLAPP\\_Model\\_Directive-2-1.pdf](https://www.mediadefence.org/wp-content/uploads/2021/12/Anti_SLAPP_Model_Directive-2-1.pdf). See also Dennis Hetzel and Brandi Snow, *SLAPP Suits*, Free Speech Center (September 11, 2023), <https://firstamendment.mtsu.edu/Section/slapp-suits>; GOV.UK, *Factsheet: strategic lawsuits against public participation (SLAPPs)*, (June 20, 2023), <https://www.gov.uk/government/publications/economic-crime-and-corporate-transparency-bill-2022-factsheets/factsheet-strategic-lawsuits-against-public-participation-slapps>; Chris Greenberg, *How corporate SLAPP lawsuits endanger our rights and the planet*, Greenpeace (April 25, 2023), <https://www.greenpeace.org/international/story/59478/slapp-lawsuits-corporate-bullies-vs-free-speech>; European Court of Human Rights, *Guide on Section 18 of the European Convention on Human Rights*, (August 31, 2022), pgs. 12-22, [https://www.echr.coe.int/documents/d/echr/Guide\\_Art\\_18\\_ENG](https://www.echr.coe.int/documents/d/echr/Guide_Art_18_ENG); Shannon Jankowski and Charles Hogle, *SLAPP-ing Back: Recent Legal Challenges to the Application of State Anti-SLAPP Laws*, American Bar Association (March 16, 2022),

- **Chilling Effect:** SLAPPs aim to have a chilling effect on public participation. They discourage individuals or organizations from expressing their views or engaging in activism by making them fear legal consequences.<sup>275</sup>
- **Multiple Targets and Multiple Claims:** SLAPP plaintiffs often target multiple defendants, typically individuals, and/or take multiple proceedings against the same or related parties.<sup>276</sup>
- **Disproportionate Claims:** SLAPP plaintiffs typically seek exaggerated damages or relief that appears out of proportion to the alleged harm. These inflated claims can be a sign of an improper motive behind the lawsuit.<sup>277</sup>
- **Diversion of Resources:** SLAPPs are sometimes filed to divert the defendant's resources and time away from their public participation activities, thereby hindering their ability to engage in advocacy.<sup>278</sup>
- **Delaying Tactics:** Some SLAPP filers use delaying tactics within the legal process to prolong the lawsuit, causing additional stress and financial strain on the defendants.<sup>279</sup>
- **Third-Party Financing:** In some cases, SLAPP filers may receive financial backing from third parties or organizations with interests in stifling public participation.<sup>280</sup>
- **Harassing Tactics:** SLAPP filers may bring multiple causes of action against a target or strategically file lawsuits in different jurisdictions that are unrelated to the

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[https://www.americanbar.org/groups/communications\\_law/publications/communications\\_lawyer/2022-winter/slapping-back-recent-legal-challenges-the-application-state-antislapp-laws](https://www.americanbar.org/groups/communications_law/publications/communications_lawyer/2022-winter/slapping-back-recent-legal-challenges-the-application-state-antislapp-laws); U.S. Chamber Institute for Legal Reform, *Third Party Financing*, (October 2020), [https://instituteforlegalreform.com/wp-content/uploads/2020/10/Third\\_Party\\_Financing.pdf](https://instituteforlegalreform.com/wp-content/uploads/2020/10/Third_Party_Financing.pdf).

<sup>275</sup> See Media Defence, *Protecting Public Watchdogs across the EU: A Proposal for an EU Anti-SLAPP Law*, (2021), pgs. 35-36, [https://www.mediadefence.org/wp-content/uploads/2021/12/Anti\\_SLAPP\\_Model\\_Directive-2-1.pdf](https://www.mediadefence.org/wp-content/uploads/2021/12/Anti_SLAPP_Model_Directive-2-1.pdf).

<sup>276</sup> Justin Borg-Barthet and Francesca Farrington, *Open SLAPP Cases in 2022 and 2023: The Incidence of Strategic Lawsuit against Public Participation, and Regulatory Responses in the European Union*, European Parliament (November 2023), [https://www.europarl.europa.eu/RegData/etudes/STUD/2023/756468/IPOL\\_STU\(2023\)756468\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2023/756468/IPOL_STU(2023)756468_EN.pdf)

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> *Id.*, pg. 9.

<sup>280</sup> U.S. Chamber Institute for Legal Reform, *Third Party Financing*, (October 2020), [https://instituteforlegalreform.com/wp-content/uploads/2020/10/Third\\_Party\\_Financing.pdf](https://instituteforlegalreform.com/wp-content/uploads/2020/10/Third_Party_Financing.pdf).

parties or events, making it burdensome and costly for the defendants to defend themselves.<sup>281</sup>

- **Lack of Legal Merit:** SLAPPs often lack a legitimate legal basis or are manifestly unfounded. They may involve frivolous claims.<sup>282</sup>
- **Factual Evidence:** SLAPP plaintiffs may fail to provide factual evidence supporting their claims or may rely on weak or unsubstantiated arguments.<sup>283</sup>
- **History of SLAPP Filings:** Some individuals or entities have a history of filing similar lawsuits against critics or activists, which can indicate a pattern of using the legal system to silence opposition.<sup>284</sup>
- **Scope of the Claim:** In addition to seeking financial or punitive damages, SLAPP filers may also request additional remedies such as removing the allegedly defamatory post, mandating a public apology, or seeking a measure of prior restraint.<sup>285</sup>
- **Power Imbalance:** SLAPP filers often enjoy greater resources—financial, legal, and otherwise—than the individual or entity they are targeting. This imbalance facilitates various other SLAPP characteristics, such as filing in strategic jurisdictions, bringing multiple lawsuits, diverting resources, and utilizing delaying tactics.<sup>286</sup>

Though the factors mentioned above often intersect, not all need to be present for a lawsuit to be classified as a SLAPP. Through a discussion of six of the factors most frequently identified in the cases analyzed for this report, the following section shows how Thailand’s current legal framework fails to identify and dismiss cases expeditiously despite the presence of easily identifiable SLAPP indicators.

## Public Interest Speech

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<sup>281</sup> Media Defence, *Protecting Public Watchdogs across the EU: A Proposal for an EU Anti-SLAPP Law*, (2021), pgs. 35-36, [https://www.mediadefence.org/wp-content/uploads/2021/12/Anti\\_SLAPP\\_Model\\_Directive-2-1.pdf](https://www.mediadefence.org/wp-content/uploads/2021/12/Anti_SLAPP_Model_Directive-2-1.pdf).

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*, pg. 27.

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

SLAPPs, by definition, relate to a public interest matter:<sup>287</sup> the targeting of public interest speech can point to an improper motive or bad faith. As defined in UNDP’s report on SLAPPs, the term ‘public interest’ “pertains to any issue or concern—whether political, social, economic or environmental—relating to the public interest, such as the protection of human rights, community rights, and investigations of corrupt practices; and promotion of transparency and good governance.”<sup>288</sup>

One hundred percent of the criminal defamation lawsuits in this report involved matters of public interest—including but not limited to lawsuits targeting speech about environmental issues, investigations into the alleged illicit activities and corruption of elected officials, protests against tuition fees, and reports on human rights abuses.

For example, in *Public Prosecutor of Buriram et. al vs. Jatuporn Saeoueng et. al*, Malinee Jutopama (“Ms. Jutopama” or “the Chancellor”), the acting Chancellor of Buriram Rajabhat University, filed a criminal defamation complaint against five students<sup>289</sup> who allegedly launched and/or participated in a campaign to oust her from her position. The complaint was filed in response to an act of “student protest” in which unidentified individuals “jointly display[ed] 4 canvas banners showing ... statements [like] ‘We want a transparent chancellor[,]’ ‘Embezzled student’s tuition fee,’ [and]... ‘Get out Malinee’” across fences on the university campus.<sup>290</sup> Later, photos of the banners were posted on “Free for Buriram,” a Facebook page dedicated to student advocacy, with the following text:

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<sup>287</sup> International law is likewise protective of public interest speech, particularly as it relates to open political debate and the right to criticize public officials. As stated by the UN Human Rights Committee, Article 19 of the ICCPR protects the right to engage in “political discourse, commentary on one’s own and on public affairs ... discussion of human rights, [and] journalism.” See UN Human Rights Committee, *General Comment No. 34*, U.N. Doc. CCPR/C/GC/34 (September 12, 2011), para. 11. Relatedly, the Committee has stressed that free expression in the political sphere is an important element of upholding a democratic form of government. In *General Comment No. 34*, the Committee noted, “[t]he free communication of information and ideas about public and political issues between citizens, candidates, and elected representatives is essential. This implies a free press and other media able to comment on public issues and to inform public opinion without censorship or restraint[.]” See UN Human Rights Committee, *General Comment No. 34*, U.N. Doc. CCPR/C/GC/34 (September 12, 2011), para 13.

<sup>288</sup> United Nations Development Programme in Thailand, *Laws and Measures Addressing Strategic Lawsuits Against Public Participation (SLAPPs) in the Context of Business and Human Rights*, (2023), pg. 8.

<sup>289</sup> During the preliminary hearing, the Chancellor submitted a motion to become a co-plaintiff, which was permitted by the Court. The Chancellor later withdrew her complaints against three of the five defendants for unknown reasons, and the court dismissed the case against defendants No.1, No.2 and No.5 accordingly. See Judgment, *Public Prosecutor of Buriram et. al, vs. Jatuporn Saeoueng et. al*, (September 28, 2022).

<sup>290</sup> Judgment, *Public Prosecutor of Buriram et. al, vs. Jatuporn Saeoueng et. al*, (September 28, 2022).

This post is dedicated to the students of Buriram Rajabhat University, all of you junior students who have previously protested in Buriram Rajabhat University and joined the movement to attack and banish the acting chancellor of Buriram Rajabhat University, who unlawfully became the chancellor as she has retired for over 6 years but yet maintained her position as the chancellor. This has caused dissatisfaction among the faculty and students whose wages and tuition fees were embezzled for many years.<sup>291</sup>

Despite the fact that the protest in question was about the leader of a public university's handling of tuition fees and alleged corruption—clearly a matter of public interest entitled to heightened protection under international law—the complaint was taken up by the public prosecutor and proceeded to a full trial. The students underwent criminal proceedings for nearly two years before the court of first instance dismissed the case (even then, the court did not discuss the fact that the protest was about a matter of public concern or that the lawsuit was aimed at stifling activism, but stated that there was not enough evidence to conclude that the defendants had “jointly committed the offense as claimed in the complaint”).<sup>292</sup>

Tellingly, in as many as 34 percent of the cases analyzed, the allegedly defamatory speech actually gave rise to a separate civil or criminal investigation into the plaintiff for the very wrongdoing that the defendant had alleged. For example, after Thai investigative journalist Chutima Sidasthian posted on social media about her investigation into the reported misappropriation of village funds, the local Mayor responded by filing five criminal defamation complaints against her. Public prosecutors took one complaint and charged Ms. Sidasthian with three counts of criminal defamation. Ms. Sidasthian's allegedly defamatory speech clearly related to the public interest: she had advocated for community rights, investigated corrupt practices, and promoted transparency and good governance.<sup>293</sup> At the same time, the Mayor has been criminally

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<sup>291</sup> *Id.*

<sup>292</sup> *Id.* The court dismissed the case under Section 227 of the Code of Criminal Procedure, which states: “The Court shall exercise its discretion in considering and weighing all the evidence taken. No judgment of conviction shall be delivered unless and until the Court is fully satisfied that an offence has actually been perpetrated and that the accused has committed that offence.” See Thailand Criminal Procedure Code, Section 227, <https://www.icj.org/wp-content/uploads/2012/12/Thailand-Criminal-Procedure-Code-1934-2008-eng.pdf>.

<sup>293</sup> See Judgment, *Public Prosecutor of Nakhon Ratchasima Province et. al vs. Chutima Sidasthian*, (March 6, 2024); Bangkok Post, *Journalist prevails in another ‘Slapp’ case*, (March 6, 2024), <https://www.bangkokpost.com/thailand/general/2754188/journalist-prevails-in-another-slapp-case>.

charged with misappropriation of funds based on the allegations that Ms. Sidasthian posted and for which she was prosecuted.<sup>294</sup> Their cases proceeded in parallel.

Notably, 22 percent of cases in the dataset were filed against elected officials, a state officer, or political parties for remarks made during the performance of their political duties, striking at the core of public interest speech. One example is Gulf Energy filing a criminal defamation suit against Move Forward Party MP Rangsiman Rome as well as the Move Forward Party itself for statements Mr. Rome made during a debate of no-confidence concerning the Minister of Digital Economy and Society, in which Mr. Rome alleged that the Minister had leveraged his position to benefit the Gulf Company.<sup>295</sup> After a preliminary hearing to determine whether the claim had legal merit, the court accepted the case and it proceeded through the judicial system<sup>296</sup> until the plaintiff withdrew the suit for unknown reasons.

Also striking, 8 percent of suits were filed *by* elected officials *against* opposition politicians. Gulf's lawsuit against Mr. Rome was not the only time he was sued for criminal defamation on the basis of statements made during a parliamentary debate. After Mr. Rome alleged that another politician, Senator Upkit Pachariyangkun, had links to illicit business and was involved in money laundering during a February 2023 parliamentary debate, Senator Pachariyangkun responded by filing two criminal defamation cases against Mr. Rome.<sup>297</sup> In total, Senator Pachariyangkun privately filed at least four separate criminal defamation lawsuits targeting various individuals and

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<sup>294</sup> *Id.*

<sup>295</sup> Prachatai, *Gulf Energy sues Thai Sang Thai party members over press conference*, (June 8, 2023), <https://prachataienglish.com/node/10415>, ("In November 2021, [Gulf Energy] sued Move Forward Party MP Rangsiman Rome over a September 2021 censure debate speech about a satellite concession, questioning the influence of Chaiwut Thanakamanusorn, Minister of Digital Economy and Society, in the energy company's dramatic growth. It also sued the Party for publishing the content of the debate.").

<sup>296</sup> Defense counsel reportedly did not submit a 161/1 petition, despite being eligible to do so.

<sup>297</sup> See Prachatai, *Senator files another defamation lawsuit against MP*, (June 23, 2023), <https://prachataienglish.com/node/10438>.

entities<sup>298</sup>—including opposition politicians, political parties, activists, and journalists—who had commented on or reported about his alleged involvement in illicit activities.<sup>299</sup>

Like Ms. Sidasathian’s case, the criminal defamation charges against Mr. Rome proceeded in parallel with investigations into Senator Pachariyangkun for the very misconduct Mr. Rome and others alleged: in March 2023, Thailand’s Office of the Attorney General launched an investigation into Senator Pachariyangkun’s involvement in criminal schemes,<sup>300</sup> and in May 2023, prosecutors in the Office of the Attorney General recommended that the Senator be indicted.<sup>301</sup> This means that the court accepted the two cases against Mr. Rome *during* the office of the Attorney General’s

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<sup>298</sup> In addition to the case filed against Mr. Rome, the Senator filed defamation lawsuits against Danai Akemahasawat and Amornrat Mahitthirook, hosts of the Inside Thailand television news programme, seeking 50 million baht [\$1,362,500] in damages, for insinuating he was involved in illegal activities, and another against Atchariya Ruangrattanapong, chairman of the Crime Victims Assistance Club. See Bangkok Post, *MP casts doubts over Upakit’s assets*, (February 21, 2023), <https://www.bangkokpost.com/thailand/politics/2511046/mp-casts-doubts-over-upakits-assets>. He also filed a second case against Mr. Rome.

<sup>299</sup> In a case involving an Angolan journalist, the UN Human Rights Committee stressed “the paramount importance, in a democratic society, of the right to freedom of expression and of a free and uncensored press or other media” and held that criminal penalties could not “be considered as a proportionate measure to protect public order or the honour and the reputation of [a public figure].” See UN Human Rights Committee, *Marques de Morais v. Angola*, UN Doc. No. CCPR/C/83/D/1128/2002, (March 25, 2005). Correspondingly, the UN Office of the High Commissioner for Human Rights has stated that “States are... required to ensure that journalists, media workers and any other individuals are protected from any acts by private persons or entities that would impair their enjoyment of the freedoms of opinion and expression,” and “should put in place effective measures to protect against attacks aimed at silencing those who are exercising their right to freedom of expression.” UN High Commissioner for Human Rights, *Report of the High Commissioner for Human Rights on the Safety of Journalists*, UN Doc. A/HRC/49/40, (February 28, 2022), para. 6.

<sup>300</sup> See Thai Examiner, *Attorney General to have final say on prosecution in court for money laundering of Senator Upakit*, (May 21, 2023), <https://www.thaiexaminer.com/thai-news-foreigners/2023/05/21/attorney-general-to-decide-on-senator-upakit-indictment-money-laundering/>. See also Bangkok Post, *Probe into revoked drug arrest warrant for senator*, (March 13, 2023), <https://www.bangkokpost.com/thailand/general/2526836/probe-into-revoked-drug-arrest-warrant-for-senator>.

<sup>301</sup> Thai Examiner, *Attorney General to have final say on prosecution in court for money laundering of Senator Upakit*, (May 21, 2023), <https://www.thaiexaminer.com/thai-news-foreigners/2023/05/21/attorney-general-to-decide-on-senator-upakit-indictment-money-laundering/> (“Prosecutors at the Office of the Attorney-General (OAG) have decided to indict a sitting Thai senator whose son-in-law was arrested in September last year accused of drug and money laundering offences, also on money laundering charges and other crimes, it was revealed on Friday. A decision must be made to go ahead with the prosecution by the Office of the Attorney-General (OAG).”).

ongoing investigation into the Senator. And by December of 2023,<sup>302</sup> Thai authorities had indicted the Senator for six offenses, including colluding in illicit drugs, illegal possession of drugs, money laundering, involvement in a transnational crime organization, and related offenses.<sup>303</sup>

The criminalization of public interest speech also points to the limitations in Thailand's criminal defamation law, which does not have a clear public interest defence, as discussed above. Section 329 states that a "fair comment on any person or thing subjected to public criticism" made in good faith shall not be considered defamatory. However, as Article 19 has noted, this provision "places the burden on defendants to prove that opinions or statements on matters of public concern were made in good faith."<sup>304</sup>

As articulated by UNDP, the failure to expel such clear SLAPPs from the system "not only directly threaten[s] targets and their communities, but also indirectly threaten[s] democratic society through their chilling effect. When people are apprehensive about speaking up, the space for public debate, which is essential in a democratic society, is inevitably undermined."<sup>305</sup>

## Disproportionate Claims

As discussed above, SLAPP plaintiffs typically seek exaggerated damages or relief that appears out of proportion to the alleged harm. These inflated claims can be a sign of an improper motive behind the lawsuit.

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<sup>302</sup> By the time charges were officially brought in December 2023, the Office of the Narcotics Control Board had confiscated over 6.5 million Baht [\$177,385] in Senator Pachariyangkun's assets in connection with his alleged involvement in a drug ring and money laundering. See Bangkok Post, *Upakit faces narcotics, money laundering raps*, (December 15, 2023), <https://www.bangkokpost.com/thailand/general/2705883/upakit-faces-narcotics-money-laundering-raps>.

<sup>303</sup> See *id.* ("Public prosecutors yesterday filed a suit with the Criminal Court against Senator Upakit Pachariyangkun, accusing him of colluding in money laundering and assisting a transnational criminal organisation. The suit was filed after the Office of the Attorney-General (OAG) resolved to indict Mr Upakit on charges of money laundering, involvement in a transnational criminal organisation, and supporting or colluding in an illicit drug network.").

<sup>304</sup> Article 19, *TRUTH BE TOLD: Criminal Defamation in Thai Law and the Case for Reform*, (March 2021), [https://www.article19.org/wp-content/uploads/2021/03/Thailand\\_Truth\\_be\\_told\\_decriminalise\\_defamation-1.pdf](https://www.article19.org/wp-content/uploads/2021/03/Thailand_Truth_be_told_decriminalise_defamation-1.pdf)

<sup>305</sup> United Nations Development Programme in Thailand, *Laws and Measures Addressing Strategic Lawsuits Against Public Participation (SLAPPs) in the Context of Business and Human Rights*, (2023), pg. 43.

The dataset showed evidence of disproportionate claims in approximately 36 percent of cases. More specifically, in addition to imprisonment, plaintiffs in 36 percent of cases also requested exorbitant civil penalties<sup>306</sup> and/or tried to force the defendant to make public statements or retract their comments.<sup>307</sup> Gulf Energy, for example, demanded compensation between 50 million Baht [\$1,364,500] and 1 billion Baht [\$27,290,000] in each of the eight criminal defamation lawsuits it filed against politicians, political parties, journalists, and academics who spoke critically about the company or shared posts about the company's contracts with the government and SLAPP suits against critics.<sup>308</sup> In one of these cases, *Gulf Energy Development Public Co., Ltd. vs. Thai Sang Thai Party et. al*, Gulf Energy not only filed a criminal defamation suit against the Thai Sang Thai party and two-party officials for statements made about rising energy prices during a press conference, but also filed a civil defamation suit against them demanding compensation of 1 billion Baht [\$27,290,000].<sup>309</sup> Only after the defendants posted an apology on his

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<sup>306</sup> Penalties sought by plaintiffs in the cases analyzed ranged between 50 thousand Baht [\$1,352] to 1 billion Baht [\$27,290,000].

<sup>307</sup> Unlike the practice described here, in which the plaintiff filed a defamation claim seeking a court order mandating specific speech as a form of damages, in some international jurisdictions, plaintiffs are required to request retraction before they are allowed to file a defamation lawsuit. In U.S. defamation cases, for example, damages are typically monetary, so a retraction statement is an outcome that can only be achieved through out of court negotiation with the other party. While there are other legal claims in the U.S., such as injunctions, that can be used to prohibit speech, they do not equate to mandating or forcing speech. See Buckingham, "Can I Get a Retraction of a Defamatory Statement?", (December 14, 2023), <https://www.bdblaw.com/can-i-get-a-defamation-retraction/> ("It is important to remember that a retraction statement is only a remedy that you can achieve through negotiation with the other party. In almost every case, a Judge cannot, and will not, order a Defendant to publish a retraction."). In contrast, the apologies sought in a number of the Thai cases go far beyond that standard. For example, charges brought by a public prosecutor/co-plaintiff in the Myanmar case sought to force the defendant to publish an apology not just in the newspaper where the article was published/online, but also in various other publications. See also Alexandra L. Arko, "How Anti-SLAPP Statutes & Retraction Demand Laws Affect Defamation Lawsuits", KJ+K (June 24, 2021), <https://kjk.com/2021/06/24/how-anti-slapp-retraction-demands-affect-defamation-lawsuits/#:~:text=Demanding%20retraction%20of%20a%20defamatory%20statement%20is%20a,retraction%20can%20include%20removing%20or%20correcting%20inaccurate%20information>; Charles Crain, "Privileges and Defenses in Defamation Cases", NOLO (March 16, 2023), <https://www.nolo.com/legal-encyclopedia/privileges-defenses-defamation-cases.html>; PBS Standards, "Defamation", <https://www.pbs.org/standards/media-law-101/defamation/>.

<sup>308</sup> See Prachatai, *Gulf Energy sues Thai Sang Thai party members over press conference*, (June 8, 2023), <https://prachataienglish.com/node/10415>.

<sup>309</sup> *Id.*

Facebook—in which he admitted to having shared factually inaccurate information during the press conference—did the company withdraw the suit.<sup>310</sup>

While it is not clear if the defendants in this *Gulf Energy* case were pressured into giving a public apology because of the disproportionate claim, or if it was an explicit precondition to the plaintiff withdrawing the case, other plaintiffs have explicitly asked for such penalties to be imposed in their filings with the court. For example, even though the plaintiff in *Sereepisuth Temeeyaves vs. Ticha Nanakorn*, Mr. Temeeyaves, acknowledged that he had in fact made the statement quoted by Ms. Nanakorn in her allegedly defamatory Tweet, he nevertheless requested that the court order Ms. Nanakorn to “publish a statement of apology along with the court judgment on her own Facebook account for 15 consecutive days and [to] bear the publication and other costs.”<sup>311</sup> Similarly, once the court granted Myanmar Pongipat Co., Ltd.’s petition to join as co-plaintiff the public prosecutor’s criminal defamation case against GreenNews editor Pratch Rujivanarom, a case that itself was based on a complaint the Company had filed with an inquiry officer,<sup>312</sup> the company filed a motion requesting the court to compel the defendant to publish correct and truthful information as per the Co-Plaintiff’s request in at least 3 daily newspapers and the Facebook pages of the Defendant and GreenNews.<sup>313</sup>

And in Thammakaset Company Limited’s case against journalist Suchanee Cloitre, the company not only asked the court to “issue an order having the [allegedly] defamatory statements removed from the internet and computer system,” but also sought an order requiring the defendant “publish ... apologies on The Nation, The Bangkok Post, Thairath, Dailynews, and her own Twitter account for at least 30 consecutive days. The relevant cost shall also be borne by the Defendant.”<sup>314</sup>

## History of SLAPP Filings

As stated above, another key indicator of a SLAPP suit is whether the allegedly defamed individual or entity (who may have filed the case directly with the court or via a complaint with an inquiry officer) has a history of filing similar lawsuits against critics or activists, as

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<sup>310</sup> Defense counsel interviews.

<sup>311</sup> Writ for the scheduling of a preliminary examination, *Police General Sereepisuth Temeeyaves vs. Ms. Ticha Nanakorn*, (September 26, 2023).

<sup>312</sup> See Judgment, *Nakhon Pathom Provincial Public Prosecutor et. al, vs. Mr. Pratch Rujivanarom*, (August 11, 2023).

<sup>313</sup> *Id.*

<sup>314</sup> See Judgment, *Thammakaset Company Limited vs. Ms. Suchanee Cloitre*, (December 24, 2019).

this can indicate a pattern of using the legal system to silence opposition. Perhaps the most notorious repeat SLAPP filer in Thailand is Thammakaset Company Limited, which has reportedly filed a total of 39 civil or criminal defamation cases against migrant workers, human rights defenders, and journalists since 2016, all targeting individuals who supported 14 Burmese factory workers in their initial case against the company, who subsequently reported on the workers' accusations, or who commented on the company's abusive lawsuits against critics.<sup>315</sup> In fact, the UN Working Group on Business and Human Rights has specifically referred to the Thammakaset cases "as a clear example of businesses abusing the legal system in order to censor, intimidate, and silence criticism through SLAPPs as a method of judicial harassment."<sup>316</sup> Notably, despite Thammakaset's demonstrated history of weaponizing the system to harass critics—as stated above, only one of the 39 cases they have filed has led to a conviction, which was eventually overturned—none of the lawsuits were dismissed on the basis of Section 161/1, and the two Thammakaset cases assessed for the dataset went to trial, passing the preliminary hearing "screening."

And Thammakaset is not the only SLAPP filer that has repeatedly brought such suits against critics. In fact, of the 36 cases analyzed for this report, 67 percent were initiated by filers with a history of doing so, most prominently: Gulf Energy Development Public Co., Ltd.; the Mayor of Banlang sub-district; Senator Upakit Pachariyangkun; and Thammakaset Company Limited. For example, as discussed above, between 2021 and 2023 alone, Gulf Energy filed eight separate criminal and civil defamation lawsuits against politicians, political parties, activists, and academics who had spoken critically about the government's energy policy and purchasing record as related to the company.<sup>317</sup> Similarly, Myanmar Pongipat Co., Ltd.'s 2020 complaint against then editor at GreenNews, Pratch Rujivanarom, was not the company's first time targeting the environmental journalist: in 2017, the company filed defamation cases in two different courts against Mr. Rujivanarom and his then employer, a news outlet called The Nation, for reporting on the negative impact of the company's mine operations on water

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<sup>315</sup> See Article 19, *TRUTH BE TOLD: Criminal Defamation in Thai Law and the Case for Reform*, (March 2021), [https://www.article19.org/wp-content/uploads/2021/03/Thailand\\_Truth\\_be\\_told\\_decriminalise\\_defamation-1.pdf](https://www.article19.org/wp-content/uploads/2021/03/Thailand_Truth_be_told_decriminalise_defamation-1.pdf); See also International Federation for Human Rights, *Thammakaset vs. human rights defenders and workers in Thailand*, (March 28, 2023), <https://www.fidh.org/en/issues/human-rights-defenders/thailand-thammakaset-watch>.

<sup>316</sup> UN Press Release, *UN experts concerned by systematic use of SLAPP cases against human rights defenders by businesses*, (December 16, 2022), <https://www.ohchr.org/en/press-releases/2022/12/un-experts-concerned-systematic-use-slapp-cases-against-human-rights>.

<sup>317</sup> Prachatai, *Gulf Energy sues Thai Sang Thai party members over press conference*, (June 8, 2023), <https://prachataienglish.com/node/10415>.

sources.<sup>318</sup> Notably, Myanmar Pongpipat’s 2017 lawsuits against Mr. Rujivanarom also had key indicia of SLAPPs, including harassing tactics, a power imbalance, public interest speech, repeat filings, and disproportionate claims. While one of the cases was dismissed as being a duplicate of the other, legal proceedings continued in the second court until the parties reached a settlement agreement requiring the Nation to publish the mining company’s explanation on its website.<sup>319</sup>

## Harassing Tactics

SLAPP filers often rely on harassing tactics to make it burdensome and costly for targets to defend themselves. One of the harassing tactics frequently employed by SLAPP plaintiffs is evident from the moment of filing: filing the suit in an improper or inconvenient jurisdiction. Defamation lawsuits involving speech shared on the internet are especially vulnerable to being brought in an improper jurisdiction, as plaintiffs can claim the harm occurred wherever the information was consumed by the public.

For example, in March 2023, the Spokesman of the Ministry of Public Health, Rungrueng Kijphati (“*Mr. Kijphati*”), filed a criminal complaint against a doctor in a state hospital, Dr. Supat Hakitsuwan (“*Dr. Hakitsuwan*”). The criminal complaint, which included an allegation of criminal defamation, among other offenses, was based on a post Dr. Hakitsuwan had shared on a Facebook page called “Rural Doctor Club” accusing Mr. Kijphati of being dishonest during the Covid-19 pandemic. The case, which was filed with an inquiry officer, contained one indicator of being a SLAPP from the outset: even though Dr. Hakitsuwan resides and is employed in Songkhla province, the complaint was filed nearly 1,000 kilometers away at the Nonthaburi police station. Nevertheless, more than one year later, the case is still open, with the decision about whether the public prosecutor will pursue the charges having been postponed several times.

Similarly, when Siam International Food Co. Ltd. (“*Siam International*”) sued journalist Wanchai Pudtong (“*Mr. Pudtong*”) for an allegedly defamatory post he shared on a Facebook news page, the company filed the criminal defamation case “with the Criminal Court in Bangkok claiming that the Defendant’s act took place all over the Kingdom” despite the fact that it “would be more convenient for the Defendant to travel to the court ... especially during the currently ongoing Covid-19 pandemic” if the complaint was filed “at the place of the incident” where “the evidence and witnesses presented in the case

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<sup>318</sup> See EarthRights International, *Environmental Journalist Prevails as Thai Court Dismisses Defamation Case: A Blow to Corporate Intimidation Tactics*, (July 20, 2023), [https://earthrights.org/media\\_release/environmental-journalist-prevails-as-thai-court-dismisses-defamation-case-a-blow-to-corporate-intimidation-tactics/](https://earthrights.org/media_release/environmental-journalist-prevails-as-thai-court-dismisses-defamation-case-a-blow-to-corporate-intimidation-tactics/).

<sup>319</sup> See *id.*

are also found”—in Songkhla province.<sup>320</sup> Mr. Pudtong’s Section 161/1 petition explicitly drew a connection between the improper jurisdiction of the suit and the plaintiff’s allegedly improper motives, deeming the plaintiff’s decision to file the suit “in a faraway location in a way that has led to disproportionate difficulties to [the Defendant] in terms of logistics” as a form of “harassment.”<sup>321</sup> The petition further stated that the choice of jurisdiction, among other tactics, showed that the plaintiff had filed the prosecution in bad faith as a SLAPP.<sup>322</sup>

However, rather than recognizing the various indicia of a SLAPP evident from the moment of filing, the court did not respond to the petition and allowed the case to proceed to a full trial, which is still ongoing—although the court of first instance acquitted the defendant 580 days after the charges were filed, the plaintiff appealed the decision and it is currently pending consideration at the Appeals Court.<sup>323</sup>

Another common harassing tactic utilized by SLAPP filers is bringing multiple causes of action against a single target. The Mayor of Banlang sub-district’s barrage of lawsuits against Thai investigative journalist Chutima Sidasthian exemplifies this trend. As discussed above, the Mayor filed five criminal defamation complaints against Ms. Sidasthian, all of which were based on investigations or opinions she posted on her public Facebook account and which included allegations that the Mayor had mismanaged village funds.<sup>324</sup>

Furthermore, as evidenced by the multiple lawsuits filed by Senator Upakit Pachariyangkun (“*Senator Pachariyangkun*”) against opposition MP Rangisman Rome (“*Mr. Rome*”), SLAPP filers can bring successive lawsuits against individuals who continue to speak out. As discussed above, Senator Pachariyangkun first filed criminal and civil defamation suits, demanding 100 million Baht [\$2,725,000] in damages, against Mr. Rome in February 2023 after he alleged the Senator was involved in drug trafficking

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<sup>320</sup> Petition asking the Court to not accept the complaint for consideration and stating key facts in support of the Court’s decision to render the case baseless, *Siam International Food Company Limited vs. Mr. Wanchai Pudtong*, (October 11, 2021).

<sup>321</sup> *Id.*

<sup>322</sup> *Id.* See also Petition/Statement Accompanying the Request for Section 161/1 and 165/2 of the Criminal Procedure Act, *Siam International Food Company Limited vs. Mr. Wanchai Pudtong*, (December 28, 2021).

<sup>323</sup> Defense counsel interviews.

<sup>324</sup> See Bangkok Post, *Journalist prevails in another ‘Slapp’ case*, (March 6, 2024), <https://www.bangkokpost.com/thailand/general/2754188/journalist-prevails-in-another-slapp-case>.

and money laundering schemes during a parliamentary censure debate.<sup>325</sup> Following the debate, more information about Senator Pachariyangkun’s reported misconduct emerged. Despite having already been sued for criminal defamation by the Senator, Mr. Rome persisted in raising the allegations of misconduct in order to “keep raising awareness and maintain the public attention on the situation.”<sup>326</sup> Mr. Rome’s actions did not go unnoticed: while waiting for the court to conduct a preliminary hearing on the February 2023 defamation charges, Mr. Rome learned that Senator Pachariyangkun had filed another criminal defamation lawsuit against him, as well as a civil lawsuit demanding 20 million Baht [\$544,000] in damages.<sup>327</sup> In a Facebook post on the matter, Mr. Rome shared that the second lawsuit was brought because he refused to stop criticizing the Senator’s alleged misconduct even after being sued.<sup>328</sup>

## Power Imbalance

Another key indicator of a SLAPP is the presence of a power imbalance between the parties such that the SLAPP filer has significantly greater influence and access to resources than the target.<sup>329</sup> In 81 percent of cases analyzed for this report, there was an imbalance of power between the socioeconomic status, resources, and/or influence of the parties. Notably, a combined 94 percent of cases were filed by businesses, politicians, or state officials.<sup>330</sup>

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<sup>325</sup> See Bangkok Post, *MP casts doubts over Upakit's assets*, (February 21, 2023), <https://www.bangkokpost.com/thailand/politics/2511046/mp-casts-doubts-over-upakits-assets>.

<sup>326</sup> See Prachatai, *Senator files another defamation lawsuit against MP*, (June 23, 2023), <https://prachataienglish.com/node/10438>.

<sup>327</sup> See *id.*

<sup>328</sup> See *id.*

<sup>329</sup> European Parliament and Council of the European Union, *Directive (EU) 2024/1069 of the European Parliament and of the Council of 11 April 2024 on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings* (“Strategic lawsuits against public participation”), (April 11, 2024), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32024L1069> (“SLAPPs are typically initiated by powerful entities, for example individuals, lobby groups, corporations, politicians, and state organs in an attempt to silence public debate. They often involve an imbalance of power between the parties, with the claimant having a more powerful financial or political position than the defendant”).

<sup>330</sup> The downstream consequences of this type of power imbalance were highlighted in a 2024 Directive on SLAPPs issued by the European Parliament and Council of the European Union. Specifically, the Directive stated: “an imbalance of power, where present, significantly increases the harmful effects as well as the chilling effect of court proceedings against public participation. Where present, the misuse of economic advantage or political influence by the claimant against the defendant, along with the lack of legal merit, gives rise to particular concern if the abusive court proceedings in question are funded directly or indirectly from state budgets and are combined with other direct or indirect state measures

For example, in the case of *Public Prosecutor of Nakhon Ratchasima Province vs. Pasinee Kemmalung*, the Mayor of Banlang sub-district filed a complaint against a local villager, Pasinee Kemmalung, who had Tweeted reported documentary evidence of his financial debts. Even though the Mayor, as a senior elected official, had far more influence and resources than Ms. Kemmalung, he nevertheless claimed that Ms. Kemmalung’s Tweet “caused damages and humiliation ... undermined his reputation and credibility, and exposed him to public scorn and hatred.”<sup>331</sup> The Mayor further exacerbated the power imbalance at issue when he filed his complaint with an inquiry officer instead of directly with the court, harnessing the power of the state and externalizing the financial, emotional, and administrative burden inherent in bringing such a lawsuit.

Similarly, as described above, in *Public Prosecutor of Buriram et. al vs. Jatuporn Saeoueng et. al*, Malinee Jutopama (“Ms. Jutopama” or “the Chancellor”), the acting Chancellor of Buriram Rajabhat University filed a criminal defamation complaint against five students who allegedly launched and/or participated in a campaign to oust her from her position. Even though the Chancellor, a State official and the most powerful individual at the University, had substantially greater resources, influence, and leverage over the students protesting against her, she further exacerbated the power imbalance by filing a criminal defamation complaint with an inquiry officer and then joining the case as Co-Plaintiff.<sup>332</sup> Indeed, because those responsible for the protest were initially unidentified, the Chancellor harnessed the power and resources of the state “to find the persons who had put up the banners and posted the Statement on [the] Free for Buriram page.”<sup>333</sup> Specifically, as witnesses for the prosecution, the local Police Captain and Vice Chancellor of the University gave testimonies detailing the substantial State resources expended in support of the Co-Plaintiff’s claim, including: the Captain “and the teachers of Buriram Rajabhat University ... jointly checked the CCTV footage and found [the offenders]”; the police confirmed the identity of the persons in the CCTV footage “by comparing the photos with the characteristics of [the defendant] in the Open Government Data presented by the Police Captain”; and the police identified and analyzed “previous

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against independent media organisations, independent journalism and civil society.” See European Parliament and Council of the European Union, *Directive (EU) 2024/1069 of the European Parliament and of the Council of 11 April 2024 on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings (‘Strategic lawsuits against public participation’)*, (April 11, 2024), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32024L1069>.

<sup>331</sup> Record of Surrender/Accusation, *Pol. Maj. Surat Sangkarat (Inquiry Officer) to. Ms. Pasinee Kemmalung*, (July 16, 2023).

<sup>332</sup> *Id.*

<sup>333</sup> *Id.*

posted ... statements and a video clip” shared on the Free for Buriram page, and even “sen[t] a request to buy a t-shirt from the Free for Buriram page.”<sup>334</sup>

Nearly two years after the complaint was first filed, the court of first instance dismissed the case on the grounds that there was not enough evidence to conclude that the defendants charged had “jointly committed the offense as claimed in the complaint.” Nevertheless, the public prosecutor and Chancellor, as Co-Plaintiff—still able to externalize the financial, emotional, and administrative burden inherent in bringing such a lawsuit—filed an appeal, which was finally dismissed on November 14, 2023, almost three years after the complaint was filed.

### Meritless Claims

One indicator of SLAPPs brought in bad faith or with improper intent is where the underlying claim is meritless. In many of the cases in the data set, the underlying claim could have immediately been identified as meritless from the outset. For example, in *Sereepisuth Temeeyaves vs. Ticha Nanakorn*, Sereepisuth Temeeyaves (“Mr. Temeeyaves”), a former Police General Commissioner, member of Parliament, and current leader of the Sereeruamthai Party, filed a criminal defamation claim against Ticha Nanakorn (“Ms. Nanakorn”), the director of Ban Kanchanaphisek Children and Youth Training Center, for posting a picture of him alongside the criticism of his statement that if an activist ‘were his daughter, he would kill her.’<sup>335</sup>

In his complaint, Mr. Temeeyaves did not allege that he had been defamed because Ms. Nanakorn fabricated his statements against Ms. Yok. Rather, Mr. Temeeyaves’s complaint explicitly acknowledged that he had made the statement in question, and thus the underlying claim should have been dismissed as spurious and without legal basis early in the process, without requiring any presentation of evidence, because the complaint itself acknowledges that Ms. Nanakorn had re-posted his own words.

In the case mentioned above, even if the underlying claim were based Ms. Nanakorn’s comments on Mr. Temeeyaves’s remarks—such as her statement that “a member of parliament, uttering those words, equals disrespecting, abusing, deprecating, and insulting the people in an unapologetic way,” or that she “think[s] the ‘National Human Rights Commission’ should ... ‘examine the Code of Conduct and human rights violation’ of Pol. Gen. Sereepisuth Temeeyaves” —the claim should still have been identified as meritless from the outset because the speech at issue was Ms. Nanakorn’s personal

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<sup>334</sup> *Id.*

<sup>335</sup> Writ for the scheduling of a preliminary examination, *Police General Sereepisuth Temeeyaves vs. Ms. Ticha Nanakorn*, (September 26, 2023).

value judgment: a mere expression of opinion.<sup>336</sup> Nonetheless, the presiding court ignored defense counsel's request to apply Section 161/1. A preliminary hearing was held on February 12, 2024, with the court accepting the case. The presentation of witnesses for the trial is scheduled for 2025.

Notably, the speech at issue in 19 percent of criminal defamation cases analyzed for this report was speech that constituted an expression of opinion rather than a statement of fact<sup>337</sup>—of this 19 percent, 14 percent were based on value judgments about public figures or government agencies,<sup>338</sup> and 5 percent were based on value judgments about companies or their conduct. Although the expression of opinion—as opposed to factual allegations—can never form the basis for a defamation complaint and the targeting of

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<sup>336</sup> *Id.* By their nature, value judgments may be insulting. Nevertheless, it is a well-established principle of international law that such judgments are protected speech. In 2005, for example, the European Court heard a case where the criticism “No shame and no scruples!” was at issue, the applicant having used the phrase to publicly describe the Governor of Ulyanovsk Region (Oblast) in Russia. See European Court of Human Rights, *Grinberg v. Russia*, App. No. 23472/03, (2005), para. 9. Despite the phrase's unpleasant connotations, the European Court held that the contested statement was “a quintessential example of a value judgment that represented the applicant's subjective appraisal of the moral dimension” of the Governor's behavior. The Court further underscored that “the limit of acceptable criticism is wider with regard to a politician acting in his public capacity than in relation to a private individual, as the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must display a greater degree of tolerance.” See European Court of Human Rights, *Grinberg v. Russia*, App. No. 23472/03, (2005), para. 25.

<sup>337</sup> The UN Human Rights Committee has said that defamation laws “should not be applied with regard to those forms of expression that are not, of their nature, subject to verification.” See UN Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34 (September 12, 2011), para. 47. The European Court has likewise stressed the difference “between statements of fact and value judgments. While the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. The requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right to [freedom of expression].” See European Court of Human Rights, *Fedchenko v. Russia* (No. 5), App. No. 17229/13 (October 2, 2018), para. 44. National legislation that fails to draw this distinction between value judgments and statements of fact thus reflects an “indiscriminate approach to the assessment of speech” that is “per se incompatible with freedom of opinion.” See European Court of Human Rights, *Gorelishvili v. Georgia*, App. No. 12979/04 (2007), para. 38.

<sup>338</sup> Established international standards have further made clear that the distinction between facts and value judgments is all the more important when assessing statements made about public figures. As the Organization of American States' Special Rapporteur for Freedom of Expression has stated: “[p]olitical criticism often involves value judgments.” See Organization of American States, *Background and Interpretation of the Declaration of Principles*, <https://www.oas.org/en/iachr/expression/showarticle.asp?artID=132&IID=1>. The European Court has reasoned that an individual “knowingly lays himself open to close scrutiny” by assuming a public position. See European Court of Human Rights, *Grinberg v. Russia*, App. No. 23472/03 (2005), para. 25. See also European Court of Human Rights, *Gorelishvili v. Georgia*, para. 35; European Court of Human Rights, *Fedchenko v. Russia* (No. 5), App. No. 17229/13 (2018), para. 49. In this public position, “he should have a higher degree of tolerance for criticism.” European Court of Human Rights, *Karman v. Russia*, App. No. 29372/02 (2006), para. 35.

opinions is indicative of a SLAPP, existing screening processes failed to filter out these meritless claims.

## RECOMMENDATIONS



The Thai Ministry of Justice released its Second National Action Plan on Business and Human Rights (“NAP”) (2023-2027) in 2023. The NAP acknowledges that “a large number of representatives of civil society and human rights defenders consider the enforcement of” recently enacted anti-SLAPP provisions as “insufficient to terminate” SLAPPs.<sup>339</sup> In particular, it notes that existing laws “do not specifically guarantee the exercise of fundamental liberties and human rights”; “use ambiguous and vague terms”; “lack ... defined operational standards mak[ing]. authorities wary of using their legislative authority”; do “not include any options for authorities to oppose a prosecution order” when litigation is considered a SLAPP; and have “no screening procedures in place ... to stop-bad faith” [SLAPPs].<sup>340</sup>

Recognizing that further changes are needed, the government is currently considering measures that will better prevent SLAPPs and more meaningfully enhance protection for SLAPP targets,<sup>341</sup> including the drafting of a follow up anti-SLAPP law by the Thai Ministry of Justice.

### A. BEST PRACTICES

Having outlined how SLAPPs are brought and handled in Thailand, the following section addresses how SLAPPs are handled internationally to identify best practices that can inform how Thailand approaches this challenge.

#### Balancing Tests

Addressing SLAPPs requires ensuring the protection of free expression while maintaining the right to seek redress for legitimate claims. Various jurisdictions have established balancing tests in statutory frameworks to meet these objectives. The Model EU Anti-SLAPP Directive, for example, drafted by a coalition of NGOs from across

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<sup>339</sup> Ministry of Justice, Rights and Liberties Department, (*Unofficial Translation*) *Thailand’s 2<sup>nd</sup> National Action Plan on Business and Human Rights (2023-2027)*, (2023), pg. 151-152. See also Rights and Liberties Protection Department and the National Institute of Development Administration, (*Draft*) *Second National Action Plan on Business and Human Rights (2023-2027)*, (July 2022), pg. 122-123. [https://icj2.wpenginepowered.com/wp-content/uploads/2022/08/The-Second-NAP-on-BHR\\_July-2022-EN.pdf](https://icj2.wpenginepowered.com/wp-content/uploads/2022/08/The-Second-NAP-on-BHR_July-2022-EN.pdf).

<sup>340</sup> *Id.*

<sup>341</sup> United Nations Development Programme in Thailand, *Laws and Measures Addressing Strategic Lawsuits Against Public Participation (SLAPPs) in the Context of Business and Human Rights* (2023), pg. iii.

Europe, proposes a detailed framework to facilitate the assessment of whether a claim<sup>342</sup> contains “elements indicative of an abuse of rights or of process laws.”<sup>343</sup> The Model Directive outlines concrete factors for courts to consider in deciding whether to dismiss cases at an early stage, including:<sup>344</sup>

- **Reasonable Prospects of Success:** Evaluation of the claim’s chances of success, also considering compliance with applicable ethics rules and standards of conduct.
- **Disproportionate, Excessive, or Unreasonable Nature of Claims:** Assessment of the nature of the claim, including the quantum of damages claimed.
- **Scope of the Claim:** Including whether the claim seeks a measure of prior restraint.
- **Nature and Seriousness of Harm:** Evaluation of the harm likely to be or that has been suffered by the claimant.
- **Litigation Tactics:** Assessment of the claimant’s litigation strategies, including choice of jurisdiction and use of dilatory tactics.
- **Envisageable Costs of Proceedings:** Estimating the anticipated costs of the legal proceedings.
- **Existence of Multiple Claims:** Identifying multiple claims by the claimant against the same defendant on similar matters.

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<sup>342</sup> While the Model Directive was drafted specifically for civil and commercial cases, the criteria articulated reflects the consensus reached about SLAPPs more generally—including in criminal cases—across international jurisprudence and amongst civil society organizations.

<sup>343</sup> The European Parliament and Council of the European Union issued a Directive on SLAPPs in April 2024, which primarily addresses cross-border cases. While Media Defence’s *Protecting Public Watchdogs across the EU: A Proposal for an EU Anti-SLAPP Law* overlaps with the Directive, the Proposal is more robust and was the product of extensive collaboration between a number of civil society organizations. Thus, the report text focuses on the Proposal. See Media Defence, *Protecting Public Watchdogs across the EU: A Proposal for an EU Anti-SLAPP Law*, (2021), [https://www.mediadefence.org/wp-content/uploads/2021/12/Anti\\_SLAPP\\_Model\\_Directive-2-1.pdf](https://www.mediadefence.org/wp-content/uploads/2021/12/Anti_SLAPP_Model_Directive-2-1.pdf); European Parliament and the Council of the European Union, *Directive (EU) 2024/1069 of the European Parliament and of the Council of 11 April 2024 on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings (‘Strategic lawsuits against public participation’)*, (April 11, 2024), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32024L1069>.

<sup>344</sup> Media Defence, *Protecting Public Watchdogs across the EU: A Proposal for an EU Anti-SLAPP Law*, pgs. 35-36, [https://www.mediadefence.org/wp-content/uploads/2021/12/Anti\\_SLAPP\\_Model\\_Directive-2-1.pdf](https://www.mediadefence.org/wp-content/uploads/2021/12/Anti_SLAPP_Model_Directive-2-1.pdf).

- **Imbalance of Power:** Evaluation of the power dynamics between the claimant and defendant.
- **Financing of Litigation by Third Parties:** Identifying third-party financing of the litigation.
- **Intimidation, Harassment, or Threats:** Assessing any forms of intimidation, harassment, or threats faced by the defendant from the claimant.
- **Chilling Effect on Public Participation:** Determining the actual or potential chilling effect on public participation regarding the matter of public interest.

This framework provides courts with specific criteria to identify SLAPPs, on the basis of which an improperly motivated claim can be dismissed. The Model Directive states that a defendant can file a motion to dismiss stipulating that the claim arises from the defendant’s public participation in a matter of public interest<sup>345</sup> as soon as proceedings have commenced, and recommends that, unless a 30-day extension is deemed necessary, preliminary hearings on dismissal should occur within three months of filing.<sup>346</sup> Similarly, a motion to dismiss should be decided within a maximum six months of filing, unless a three-month extension is deemed necessary.<sup>347</sup>

In deciding the motion, the court should take into account the aforementioned indicators of abuse and whether the claims qualify as frivolous or vexatious under national law or practice.<sup>348</sup> The Model Directive further states that all discovery should be halted from the moment the motion to dismiss is filed to when it is decided, thereby ensuring that the defendant does not bear the costs of litigation during this time. The Model Directive does not provide an explicit timeline for appeals but states that a decision on a motion should always be appealable to a high court or tribunal, emphasizing the “underlying importance of procedural expediency” during the appeal stage.<sup>349</sup> The Council of Europe’s recommendation on countering SLAPPs provide similar guidance, and is particularly

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<sup>345</sup> Media Defense, *Protecting Public Watchdogs across the EU: A Proposal for an EU Anti-SLAPP Law*, pg. 27, [https://www.mediadefence.org/wp-content/uploads/2021/12/Anti\\_SLAPP\\_Model\\_Directive-2-1.pdf\\_](https://www.mediadefence.org/wp-content/uploads/2021/12/Anti_SLAPP_Model_Directive-2-1.pdf_) (“The possibility to file a motion to dismiss shall always be available to defendants against whom a claim is asserted that relates to the exercise of public scrutiny and public information, such as journalistic communications, publications or works, including editorial content, communications, publications or works of a political, scientific, academic, artistic, commentary or satirical nature, or communications, publications, works or actions of organizations or groups with a not-for-profit purpose lawfully operating in a Member State.”).

<sup>346</sup> *Id.*, pg. 37.

<sup>347</sup> *Id.*, pg. 38.

<sup>348</sup> *Id.*, pg. 37.

<sup>349</sup> *Id.*, pg. 19.

instructive as it illustrates the appropriate weight to be afforded to public interest speech during early dismissal proceedings.<sup>350</sup>

## Burden-Shifting

Alongside balancing tests, the concept of burden-shifting in SLAPP lawsuits is likewise designed to protect individuals or entities from lawsuits intended to silence or suppress free speech and other protected activities while ensuring that legitimate claimants are able to obtain redress.<sup>351</sup> The following demonstrates how burden-shifting generally works in the context of SLAPPs:

- **Prima Facie Showing:** The defendant is required to make a *prima facie* showing that the lawsuit has some aspect of a SLAPP suit (e.g., that the claim relates to the defendant’s public participation on a matter of public interest).<sup>352</sup>
- **Shifting the Onus:** Upon the defendant’s successful demonstration that the lawsuit bears characteristics of a SLAPP suit, the burden of proof shifts to the plaintiff. In this phase, the plaintiff must establish that the claim has a legitimate legal foundation, which in some jurisdictions can be demonstrated by showing “minimal merit,”<sup>353</sup> and in some jurisdictions requires a demonstration that the claim has a “substantial basis in law.”<sup>354</sup> Commentators have suggested that the judiciary should be empowered to dismiss the proceedings unless the claimant can satisfy the court that the claim is likely to prevail at trial and that the proceedings are not abusive.<sup>355</sup>

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<sup>350</sup> Committee of Ministers Council of Europe, *Recommendation CM/Rec (2024) 2 of the Committee of the Ministers to member States on Countering the Use of Strategic Lawsuits against Public Participation (SLAPPs)*, (2024), <https://rm.coe.int/0900001680af2805>.

<sup>351</sup> See Quinn Emanuel, *Lead Section: Application of State Anti-SLAPP Laws in Federal Court*, (June 14, 2022), <https://www.quinnemanuel.com/the-firm/publications/lead-article-application-of-state-anti-slapp-laws-in-federal-court/>.

<sup>352</sup> *Id.*

<sup>353</sup> *Id.*, (“If the defendant establishes that a claim arises out of protected activity, then the burden shifts to the plaintiff to demonstrate the claim contains minimal merit. If the plaintiff does not, the claim will be dismissed”).

<sup>354</sup> See Theresa House, *New York’s New and Improved Anti-SLAPP Law Effective Immediately*, Arnold & Porter (November 17, 2020), <https://www.arnoldporter.com/en/perspectives/advisories/2020/11/new-yorks-new-anti-slapp-law>.

<sup>355</sup> UK Anti-SLAPP Coalition, *Model Anti SLAPP Law*, <https://antislapp.uk/wp-content/uploads/2023/05/Model-UK-Anti-SLAPP-Law-Final-Version.docx.pdf>; Justin Borg-Barthet and

- **Balancing Interests:** Courts then balance the interests of both parties, aiming to uphold the right to petition the courts while preserving the rights to free expression and public involvement in civic matters and ensuring that court process is not abused and only genuine disputes proceed to trial.

Burden-shifting in SLAPP cases provide defendants with a mechanism to petition for quick dismissal of lawsuits filed against them for exercising their protected rights.<sup>356</sup> These laws, albeit varying in effectiveness,<sup>357</sup> generally attempt to shift some of the costs and burdens of litigation from the defendant to the individual or entity filing the SLAPP suit, thus acting as a deterrent against abusive lawsuits that could otherwise serve as tools of intimidation and harassment.<sup>358</sup> By facilitating the prompt dismissal of SLAPP suits, burden-shifting also fosters the prudent allocation of judicial resources, allowing courts to expeditiously adjudicate abusive cases and redirect their focus towards issues of higher societal significance.<sup>359</sup>

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Francesca Farrington, *Open SLAPP Cases in 2022 and 2023: The Incidence of Strategic Lawsuit against Public Participation, and Regulatory Responses in the European Union*, European Parliament (November 2023), [https://www.europarl.europa.eu/RegData/etudes/STUD/2023/756468/IPOL\\_STU\(2023\)756468\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2023/756468/IPOL_STU(2023)756468_EN.pdf);  
Francesca Farrington & Magdalena Zabrocka, *Punishment by Process: The Development of Anti-SLAPP Legislation in the European Union*, *Journal of the Academy of European Law*, (2023), <https://link.springer.com/article/10.1007/s12027-023-00774-5>.

<sup>356</sup> See Reporters Committee for Freedom of the Press, *Overview of Anti-SLAPP Laws*, <https://www.rcfp.org/introduction-anti-slapp-guide>.

<sup>357</sup> Where a burden-shifting mechanism requires a SLAPP target to prove the improper purpose of a SLAPP filer early on in the litigation process, before the SLAPP target has been able to undertake extensive information gathering, it may be challenging to generate the requisite showing. In addition, SLAPP targets may be hesitant to disclose their arguments or case details prematurely, which further complicates anti-SLAPP proceedings. Another concern revolves around the chilling effect that the prospect of burden-shifting might generate: namely, the daunting task of bearing the burden of proof may dissuade legitimate plaintiffs from seeking legal redress. See Digital Media Law Project, *Responding to Strategic Lawsuits Against Public Participation (SLAPPs)*, (September 10, 2023), <https://www.dmlp.org/legal-guide/responding-strategic-lawsuits-against-public-participation-slapps>.

<sup>358</sup> See Digital Media Law Project, *Responding to Strategic Lawsuits Against Public Participation (SLAPPs)*, (September 10, 2023), <https://www.dmlp.org/legal-guide/responding-strategic-lawsuits-against-public-participation-slapps>.

<sup>359</sup> See Shannon Jankowski and Charles Hogle, *SLAPP-ing Back: Recent Challenges to the Application of Anti-SLAPP Laws*, American Bar Association (March 16, 2022), [https://www.americanbar.org/groups/communications\\_law/publications/communications\\_lawyer/2022-winter/slapping-back-recent-legal-challenges-the-application-state-antislapp-laws](https://www.americanbar.org/groups/communications_law/publications/communications_lawyer/2022-winter/slapping-back-recent-legal-challenges-the-application-state-antislapp-laws); Reporters Committee for Freedom of the Press, *Overview of Anti-SLAPP Laws*, <https://www.rcfp.org/introduction-anti-slapp-guide>; Nik Williams, Laurens Hueting and Paulina Milewska, *The increasing rise, and impact, of SLAPPs: Strategic Lawsuits Against Public Participation*, Foreign Policy Centre (December 9, 2020), <https://fpc.org.uk/the-increasing-rise-and-impact-of-slapps-strategic-lawsuits-against-public-participation>.

## ***Examples of Burden-Shifting***

In the Philippines, the burden of proof in SLAPP lawsuits is structured according to the 2010 Rules of Procedure for Environmental Cases, the anti-SLAPP provisions of which were originally designed to prevent environmental SLAPPs but which the Philippines Supreme Court has ruled can cover other types of SLAPPs.<sup>360</sup> According to the Rules, the party seeking dismissal of the case must provide substantial evidence demonstrating that their actions are genuine efforts toward safeguarding, conserving, and rehabilitating the environment.<sup>361</sup> Subsequently, the party initiating the legal action—alleged to be a SLAPP—has a non-extendable period of five days to file an opposition motion. The court must hold a summary hearing on the issue within 15 days of the filer’s response, during which the party initiating the legal action must establish by a preponderance of evidence that their claim is valid and not a SLAPP.<sup>362</sup> The court must then resolve the issue within 30 days of the summary hearing.

According to the International Center for Not-for-Profit Law,

[i]n the years since the Rules of Procedure were issued, there does not appear to have been a review of [their] efficacy in combatting SLAPPs. However, given the significant number of SLAPPs reported in the Philippines in 2006-07 and the smaller number of reported SLAPPs

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<sup>360</sup> Supreme Court of the Philippines, *The 2010 Rules of Procedure for Environmental Cases*, AM No. 09-6-8-SC (April 13, 2010), [https://lawphil.net/courts/supreme/am/am\\_09-6-8-sc\\_2010.html](https://lawphil.net/courts/supreme/am/am_09-6-8-sc_2010.html). Although the Rules are drafted to specifically cover environmental SLAPPs, the provisions may also cover other civil, criminal and administrative lawsuits not necessarily based on environmental laws or containing environmental provisions. See Supreme Court of the Philippines, *Annotation to the Rules of Procedure for Environmental Cases*, pgs. 100-101, [https://philja.judiciary.gov.ph/files/learning\\_materials/A.m.No.09-6-8-SC\\_annotation.pdf](https://philja.judiciary.gov.ph/files/learning_materials/A.m.No.09-6-8-SC_annotation.pdf). See also International Center for Not-For-Profit Law, *Protecting Activists from Abusive Litigation: SLAPPS in the Global South and How to Respond*, (June 2020), pg. 34, (“[T]hese Rules may apply in other suits not necessarily based on environmental laws or laws containing environmental provisions. Specifically, for example, if a defendant in a civil damages or defamation suit (the case of which is governed by the regular rules of civil/criminal procedure) invokes a SLAPP defense ... then these Rules shall apply insofar as the SLAPP defense is concerned. The courts referred to in this section are those designated as special courts to hear, try and decide environmental cases under Administrative Order No. 23-20081 and those that may be designated as such thereafter.”).

<sup>361</sup> According to the rules, “SLAPP as an affirmative defense should be raised in an answer along with other defenses that may be raised in the case alleged to be a SLAPP.” Supreme Court of the Philippines, *Annotation to the Rules of Procedure for Environmental Cases*, pg. 131, [https://philja.judiciary.gov.ph/files/learning\\_materials/A.m.No.09-6-8-SC\\_annotation.pdf](https://philja.judiciary.gov.ph/files/learning_materials/A.m.No.09-6-8-SC_annotation.pdf).

<sup>362</sup> *Id.*, pg. 132, (“If the court finds a SLAPP defense valid, the plaintiff is required to prove the following: (1) that the case is not a SLAPP; and (2) the merits of the case. The quantum of evidence, preponderance of evidence, in proving the two abovementioned remains the same as in other civil cases.”).

uncovered by our survey after 2010, it is at least plausible that the Rules have been effective in discouraging the filing of SLAPPs.<sup>363</sup>

Turning to Québec, Canada, if the defendant “summarily establishes”<sup>364</sup> that an action or pleading might be an “improper use of [the legal] procedure,” such as when the claim or pleading is “clearly unfounded, frivolous or dilatory,” is brought in “bad faith,” is “excessive or unreasonable[,] ... causes prejudice to another person, or i[s] an attempt to defeat the ends of justice, in particular if it restricts freedom of expression in public debate,” it falls upon the initiator to prove that their action or pleading is neither excessive nor unreasonable, and is justified by law.<sup>365</sup> Notably, Québec empowers courts to dismiss abusive proceedings on their own, without requiring the defendant to submit an anti-SLAPP motion, although the defendant may choose to do so if the court does not act on its own initiative.<sup>366</sup>

Courts can exercise their discretion to suspend proceedings and dismiss a case where “there has been an abuse of procedure” at any time after charges are filed.<sup>367</sup> Under

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<sup>363</sup> International Center for Not-For-Profit Law, *Protecting Activists from Abusive Litigation: SLAPPS in the Global South and How to Respond*, (June 2020), pg. 34.

<sup>364</sup> The term “summarily establishes” in the context of anti-SLAPP cases pertains to a party’s ability to initially show that a lawsuit may be abusive or improper, which in turn reverses the burden of proof. See Hilary Young, *Anti-SLAPP laws help keep frivolous lawsuits out of the courts, but not every province has them*, *The Conversation* (June 20, 2021), <https://theconversation.com/anti-slapp-laws-help-keep-frivolous-lawsuits-out-of-the-courts-but-not-every-province-has-them-162579>. See also Luis Millán, *Anti-SLAPP – A look at Québec developments*, *Law in Québec* (February 11, 2011), <https://lawnquebec.com/anti-slapp-part-i-a-look-at-quebec-developments>.

<sup>365</sup> National Assembly of Québec, *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*, Sections 54.1-54, (June 4, 2009), <https://www.canlii.org/en/qc/laws/astat/sq-2009-c-12/latest/sq-2009-c-12.html>.

<sup>366</sup> See PATFOX, *An Anti-SLAPP Curriculum for Lawyers in the European Union*, pgs. 8-10, <https://www.antislapp.eu/curriculum-hub/anti-slapp-curriculum>, (“The Québec legislation provides an especially clear systematization of the circumstances in which a court may apply anti-SLAPP measures. Article 51 of the Québec Code of Civil Procedure now provides as follows: ‘The courts may, at any time, on an application and even on their own initiative, declare that a judicial application or a pleading is abusive.’ It is especially noteworthy that the Québec code confers ex officio power to dismiss abusive proceedings. It is not necessary for the respondent to raise an anti-SLAPP motion, although they may do so if the court does not act of its own initiative.”).

<sup>367</sup> *Id.*, Sec. 53 (“If there has been an abuse of procedure, the court may dismiss the judicial application or reject a pleading, strike out a conclusion or require that it be amended, terminate or refuse to allow an examination, or cancel a subpoena. If there has been or if there appears to have been an abuse of procedure, the court, if it considers it appropriate, may do one or more of the following: (1) impose conditions on any further steps in the judicial application or on the pleading; (2) require undertakings from the party concerned with respect to the orderly conduct of the proceeding; (3) stay the proceeding for the period it determines; (4) recommend that the chief justice or chief judge order special case

Section 30 of Title III of the Code of Civil Procedure, “judgements dismissing a judicial application because of its abusive nature” can be “appealed only with leave.”<sup>368</sup>

In Ontario, Canada, under Section 137.1 of the Courts of Justice Act,<sup>369</sup> courts employ a three-part test to evaluate SLAPP suits by examining the following factors in sequential order: (1) Is the lawsuit about an expression that relates to a matter of public interest,<sup>370</sup> to be proven by the defendant, with the burden then shifting to the plaintiff to satisfy the judge that there are “grounds to believe” that; (2) the proceedings have “substantial merit” and the defendant has “no valid defense”<sup>371</sup>; before the court weighs (3) whether the harm suffered, or likely to be suffered, by the plaintiff is serious enough to justify stopping public expression.<sup>372</sup> Based on the outcome of this analysis, the case can be

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management; or (5) order the party that initiated the judicial application or presented the pleading to pay the other party, under pain of dismissal of the application or rejection of the pleading, a provision for costs, if the circumstances so warrant and if the court notes that, without such assistance, that other party’s financial situation would likely prevent it from effectively conducting its case.”).

<sup>368</sup> *Québec Code of Civil Procedure*, Title III.I, Div. I, Para. 30, <https://www.legisquebec.gouv.qc.ca/en/document/cs/c-25.01>.

<sup>369</sup> See Kevin O’Brien and Graham Buitenhuis, *Ontario Court of Appeal provides corrective guidance on anti-SLAPP motions*, Osler (March 15, 2023), <https://www.osler.com/en/blogs/risk/march-2023/ontario-court-of-appeal-provides-corrective-guidance-on-anti-slapp-motions>, (noting that, “In 2015, in an effort to address the growing number of these types of suits, the Ontario Legislature enacted the Protection of Public Participation Act, 2015, which in turn introduced sections 137.1 to 137.5 to Ontario’s Courts of Justice Act (the CJA). Section 137.1 provides an expedited, summary mechanism for defendants of SLAPP suits to seek to have those actions dismissed in a relatively expedient and less expensive manner.”). See also Kevin O’Brien, Karin Sachar and Graham Buitenhuis, *Supreme Court rearticulates test under Ontario ‘anti-SLAPP’ legislation*, Osler (September 14, 2020), <https://www.osler.com/en/resources/critical-situations/2020/supreme-court-rearticulates-test-under-ontario-anti-slapp-legislation>; Ontario Newsroom, *Protection of Public Participation Act*, (October 28, 2015), <https://news.ontario.ca/en/backgrounder/34678/protection-of-public-participation-act>.

<sup>370</sup> See Rebecca Shoom, *Sections 137.1-137.5 (Prevention of Proceedings That Limit Freedom of Expression on Matters of Public Interest [Gag Proceedings]*, 2021 Canadian Legal Docs (May 31, 2021), (noting that: “The relates to a matter of public interest’ requirement is interpreted broadly and involves an analysis of what the expression is really about, without reference to the motive, merit, and manner of the expression. The expression need not actually further the public interest to satisfy this element of the test. The question is whether some segment of the community would have a genuine interest in the subject matter.”).

<sup>371</sup> See *id.* See also, Kevin O’Brien and Graham Buitenhuis, *Ontario Court of Appeal provides corrective guidance on anti-SLAPP motions*, Osler, (March 15, 2023), [osler.com/en/blogs/risk/march-2023/ontario-court-of-appeal-provides-corrective-guidance-on-anti-slapp-motions](https://www.osler.com/en/blogs/risk/march-2023/ontario-court-of-appeal-provides-corrective-guidance-on-anti-slapp-motions), (noting that, regarding the second inquiry, the plaintiff must satisfy the judge that there are “grounds to believe” that the proceeding has substantial merit and the defendant has no valid defense in the proceeding).

<sup>372</sup> See Rebecca Shoom, *Sections 137.1-137.5 (Prevention of Proceedings That Limit Freedom of Expression on Matters of Public Interest [Gag Proceedings]*, 2021 Canadian Legal Docs (May 31, 2021).

dismissed early with minimal time and expense for the parties, thereby conserving valuable court and public resources.<sup>373</sup> A defendant can move for an order to dismiss a proceeding under Section 137.1 at any time once a proceeding has commenced (though such motions are usually brought at the outset of proceedings). A court must hear a 137.1 motion within 60 days after notice of the motion is filed with the court (or, more typically, set a date for the hearing within that 60-day window).<sup>374</sup> All proceedings are automatically stayed once a motion to dismiss has been filed. Section 137.3 explicitly states that “an appeal of an order under Section 137.1”—such as a motion requesting removal of a stay, or an appeal of the early dismissal decision—“shall be heard as soon as practicable[.]”<sup>375</sup>

Moving to the U.S., anti-SLAPP statutes have been drafted to provide various procedural safeguards for SLAPP targets. These typically include providing defendants with specific channels for filing motions to dismiss or strike lawsuits early in the litigation process, mandating expedited hearings on such motions, and enforcing a stay or limitation of discovery until motions are addressed; additionally, they often require the plaintiff to furnish evidence demonstrating the merit of the case.<sup>376</sup>

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Ontario Newsroom, *Protection of Public Participation Act*, (October 28, 2015), <https://news.ontario.ca/en/backgrounder/34678/protection-of-public-participation-act>.

<sup>373</sup> See Kevin O’Brien and Graham Buitenhuis, *Ontario Court of Appeal provides corrective guidance on anti-SLAPP motions*, Osler (March 15, 2023), <https://www.osler.com/en/blogs/risk/march-2023/ontario-court-of-appeal-provides-corrective-guidance-on-anti-slapp-motions>, See also Kevin O’Brien, Karin Sachar and Graham Buitenhuis, *Supreme Court rearticulates test under Ontario ‘anti-SLAPP’ legislation*, Osler (September 14, 2020), <https://www.osler.com/en/resources/critical-situations/2020/supreme-court-rearticulates-test-under-ontario-anti-slapp-legislation>; Ontario Newsroom, *Protection of Public Participation Act*, (October 28, 2015), <https://news.ontario.ca/en/backgrounder/34678/protection-of-public-participation-act>.

<sup>374</sup> See Kevin O’Brien and Graham Buitenhuis, *Ontario Court of Appeal provides corrective guidance on anti-SLAPP motions*, Osler (March 15, 2023), <https://www.osler.com/en/blogs/risk/march-2023/ontario-court-of-appeal-provides-corrective-guidance-on-anti-slapp-motions>. See also Kevin O’Brien, *Court of Appeal clarifies application of 60 day time limit for hearing Anti-SLAPP motion*, Osler (April 24, 2020), <https://www.osler.com/en/blogs/risk/april-2020/court-of-appeal-clarifies-application-of-60-day-time-limit-for-hearing-anti-slapp-motions#:~:text=Section%20137.2%20%28%29%20provides%20that%20a%20%E2%80%9Cmotion%20under,of%20the%20motion%20is%20filed%20with%20the%20court%22>.

<sup>375</sup> Rebecca Shoom, *Sections 137.1-137.5 (Prevention of Proceedings That Limit Freedom of Expression on Matters of Public Interest [Gag Proceedings]*, 2021 Canadian Legal Docs (May 31, 2021).

<sup>376</sup> See Robert Sherwin, *Evidence? We Don’t Need No Stinkin’ Evidence!: How Ambiguity in Some States’ Anti-SLAPP Laws Threatens to De-Fang a Popular and Powerful Weapon Against Frivolous Litigation*, 40 Columbia Journal of Law and the Arts (2017), pgs. 431-437, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2826103](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2826103); Dan Greenberg and David Keating, *Anti-SLAPP Statutes: A Report Card*, Free Speech Institute (February 2022), pgs. 30-32, [https://www.ifs.org/wp-content/uploads/2022/02/Anti-SLAPP-Scorecard\\_FINAL-Interactive.pdf](https://www.ifs.org/wp-content/uploads/2022/02/Anti-SLAPP-Scorecard_FINAL-Interactive.pdf).

Several U.S. states have instituted burden-shifting mechanisms within their anti-SLAPP laws.<sup>377</sup>

For instance, in New York, a defendant in a defamation suit can make an initial demonstration regarding the nature of the lawsuit—i.e., that the lawsuit is to stifle the defendant’s public communications or free speech conduct.<sup>378</sup> Once this is established, the burden shifts to the plaintiff, to show their claim has a “substantial basis” in law.<sup>379</sup>

Under California’s anti-SLAPP statute, defendants can bring what is called a “special motion to strike” up to 60 days after a complaint has been filed and the defendant served, unless the court grants an exception. A hearing on the “special motion to strike” must be scheduled within 30 days of it being filed.<sup>380</sup> California’s anti-SLAPP statute provides for a two-step process to determine the merit of a SLAPP suit during such a hearing. First, after filing a so-called “special motion to strike,” the defendant must make a *prima facie* showing that the plaintiff’s claim arises from an act in furtherance of the defendant’s rights of petition or free speech.<sup>381</sup> Second, if the defendant succeeds in step one, the

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<sup>377</sup> Although the concept of anti-SLAPP protections has existed for a considerable period in New York, it was not until 2008 that the state officially introduced anti-SLAPP legislation, which was amended in 2020 to provide additional protections. See Gibson Dunn, *Recent Developments in New York’s Amended Anti-SLAPP Law*, (June 1, 2022), <https://www.gibsondunn.com/recent-developments-in-new-yorks-amended-anti-slapp-law>.

<sup>378</sup> See Tal Dickstein and Brandon Zamudio, *Upping the Ante: New York Expands Anti-SLAPP Protections*, Loeb & Loeb LLP (December 2020), <https://www.loeb.com/en/insights/publications/2020/12/upping-the-ante-new-york-expands-antislapp-protections> (noting that “broadens the definition of public petition and participation, the conduct that triggers the law’s protections, to include ‘any communication in a place open to the public or a public forum in connection with an issue of public interest’ as well as ‘any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest, or in furtherance of the exercise of the constitutional right of petition... Defendant’s speech must still relate to an issue of public interest, but the revised law directs that that term is to be “construed broadly” and will encompass “any subject other than a purely private matter”); Theresa House, *New York’s New and Improved Anti-SLAPP Law Effective Immediately*, Arnold & Porter (November 17, 2020), <https://www.arnoldporter.com/en/perspectives/advisories/2020/11/new-yorks-new-anti-slapp-law>.

<sup>379</sup> See Theresa House, *New York’s New and Improved Anti-SLAPP Law Effective Immediately*, Arnold & Porter (November 17, 2020), <https://www.arnoldporter.com/en/perspectives/advisories/2020/11/new-yorks-new-anti-slapp-law>; Tal Dickstein and Brandon Zamudio, *Upping the Ante: New York Expands Anti-SLAPP Protections*, Loeb & Loeb LLP (December 2020), <https://www.loeb.com/en/insights/publications/2020/12/upping-the-ante-new-york-expands-antislapp-protections>; Gibson Dunn, *Recent Developments in New York’s Amended Anti-SLAPP Law*, (June 1, 2022), <https://www.gibsondunn.com/recent-developments-in-new-yorks-amended-anti-slapp-law>.

<sup>380</sup> California Code, *Code of Civil Procedure - CCP § 425.16(f)*, <https://codes.findlaw.com/ca/code-of-civil-procedure/ccp-sect-425-16/>.

<sup>381</sup> Aaron Morris, *California SLAPP Law: Anti-SLAPP Motions and SLAPP-back Actions*, Morris & Stone, LLP,

burden shifts to the plaintiff to demonstrate a probability of prevailing on the claim. If the defendant succeeds in both steps of the process, the court should grant the motion, leading to the dismissal of the complaint.<sup>382</sup> The statute also provides that an order granting or denying a special motion to strike is appealable.<sup>383</sup> Notably, unless a judge orders otherwise, all proceedings are stayed while the court considers the motion.

In summary, the mechanisms for burden shifting and procedural safeguards within anti-SLAPP laws differ across jurisdictions, albeit all with the aim of facilitating the expeditious resolution of lawsuits and thereby mitigating the harms of stifling public participation and speech.

## Costs and Damages

A frequent feature of anti-SLAPP laws is the shifting of the financial costs of litigation from SLAPP targets to filers, primarily through the awarding of costs and fees. For instance, the 2024 EU Directive on SLAPPs states that

[w]here the court has found the proceedings to be abusive, costs should include all types of costs of the proceedings that can be awarded under national law, including the full costs of legal representation incurred by the defendant unless such costs are excessive.<sup>384</sup>

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[https://californiaslapplaw.com/#:~:text=When%20a%20defendant%20is%20served%20with%20a%20lawsuit,consider%20anti-SLAPP%20motions%20filed%20beyond%20the%2060-day%20deadline%29,\(noting that, "There are three important anti-SLAPP statutes, but the heart of legislation is contained in subpart \(e\) of Code of Civil Procedure section 425.16, which provides: \(e\) As used in this section, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: \(1\) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; \(2\) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; \(3\) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; \(4\) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest."](https://californiaslapplaw.com/#:~:text=When%20a%20defendant%20is%20served%20with%20a%20lawsuit,consider%20anti-SLAPP%20motions%20filed%20beyond%20the%2060-day%20deadline%29,(noting that, )

<sup>382</sup> See John West, *The Anti-SLAPP Statute In 2020*, Advocate (May 2020), <https://www.advocatemagazine.com/Section/2020-may/the-anti-slapplaw-statute-in-2020>.

<sup>383</sup> FindLaw, California Code, Code of Civil Procedure – CCP, Section 425.16(i), <https://codes.findlaw.com/ca/code-of-civil-procedure/ccp-sect-425-16/>.

<sup>384</sup> European Parliament and the Council of the European Union, *Directive (EU) 2024/1069 of the European Parliament and of the Council of 11 April 2024 on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings* ('Strategic lawsuits against

Analysis of fee-shifting provisions across jurisdictions reveals two prevailing methods of allocating litigation costs and fees: some jurisdictions grant courts the discretion to award costs associated with a spurious suit, while other jurisdictions require indemnification as a matter of law in certain circumstances. For example, the District of Columbia’s anti-SLAPP law provides that “[t]he court may award a moving party who prevails, in whole or in part, on a[n anti-SLAPP] motion...the costs of litigation, including reasonable attorney fees.”<sup>385</sup> The law additionally states that “[t]he court may award reasonable attorney fees and costs to the responding party only if the court finds that” the anti-SLAPP motion was “frivolous or is solely intended to cause unnecessary delay.”<sup>386</sup> In contrast, California’s anti-SLAPP provision provides for the mandatory awarding of attorney’s fees and costs to a defendant who prevails on a special motion to strike—California’s anti-SLAPP provision for early dismissal, described above—although it also provides for the mandatory award of fees and costs to a plaintiff who survives such a motion if the court finds the motion “is frivolous or is solely intended to cause unnecessary delay.”<sup>387</sup>

Some anti-SLAPP laws have aimed to deter the filing of SLAPPs by permitting SLAPP targets to recover compensatory and punitive damages from filers, generally as part of the ruling that the lawsuit was abusive (without the need for the SLAPP target to file a separate claim). As articulated in the 2024 EU Directive,

[t]he main objective of giving courts...the possibility of imposing penalties or [payment of compensation for damage] is to deter potential claimants from initiating abusive court proceedings against public participation...Where the court has found the proceedings to be abusive, such penalties or other equally effective appropriate measures should be determined on a case by case basis, should be proportionate to the nature

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*public participation*’), (April 11, 2024), para. 41, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32024L1069>.

<sup>385</sup> Council of the District of Columbia, *Code of the District of Columbia Section 16—5504(a)*, (March 31, 2011), <https://code.dccouncil.gov/us/dc/council/code/sections/16-5504>. See also Dan Greenberg and David Keating, *Anti-SLAPP Statutes: A Report Card*, Free Speech Institute (February 2022), pgs. 30-32, [https://www.ifs.org/wp-content/uploads/2022/02/Anti-SLAPP-Scorecard\\_FINAL-Interactive.pdf](https://www.ifs.org/wp-content/uploads/2022/02/Anti-SLAPP-Scorecard_FINAL-Interactive.pdf).

<sup>386</sup> Council of the District of Columbia, *Code of the District of Columbia Section 16—5504(b)*, (March 31, 2011), <https://code.dccouncil.gov/us/dc/council/code/sections/16-5504>. See also Dan Greenberg and David Keating, *Anti-SLAPP Statutes: A Report Card*, Free Speech Institute (February 2022), pgs. 30-32, [https://www.ifs.org/wp-content/uploads/2022/02/Anti-SLAPP-Scorecard\\_FINAL-Interactive.pdf](https://www.ifs.org/wp-content/uploads/2022/02/Anti-SLAPP-Scorecard_FINAL-Interactive.pdf).

<sup>387</sup> California Code of Civil Procedure, Sec. 425.16(c)(1). See also, International Center for Not-For-Profit Law, *Protecting Activists from Abusive Litigation: SLAPPS in the Global South and How to Respond*, (June 2020), pg. 24.

of, and to the elements indicating, the abuse identified and should take into account the potential for a harmful or chilling effect of those proceedings on public participation or the economic situation of the claimant that has exploited the imbalance of power.<sup>388</sup>

For example, Québec’s anti-SLAPP law provides that

[o]n ruling on whether an action or pleading is improper, the court may order a provision for costs to be reimbursed, condemn a party to pay, in addition to costs, damages in reparation for the prejudice suffered by another party, including the fees and extrajudicial costs incurred by that party, and, if justified by the circumstances, award punitive damages.<sup>389</sup>

Similarly, British Columbia’s current anti-SLAPP law empowers a court to, “on its own motion or on application by the applicant, award the damages it considers appropriate against a respondent if it finds that the respondent brought the proceeding in bad faith or for an improper purpose.”<sup>390</sup> And while New York’s anti-SLAPP law requires courts to award costs and attorney fees to a defendant who successfully brings an anti-SLAPP

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<sup>388</sup> European Parliament and the Council of the European Union, *Directive (EU) 2024/1069 of the European Parliament and of the Council of 11 April 2024 on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings* (*‘Strategic lawsuits against public participation’*), (April 11, 2024), para. 42, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32024L1069>.

<sup>389</sup> National Assembly, *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, SQ 2009*, (2009), Sec. 54.4. See also International Center for Not-For-Profit Law, *Protecting Activists from Abusive Litigation: SLAPPS in the Global South and How to Respond* (June 2020), pg. 23, (The report further notes that, “In an apparently unique refinement of this approach, Québec’s law specifically provides for corporate veil-piercing in the award of these damages: ‘If a legal person or an administrator of the property of another resorts to an improper use of procedure, the directors and officers of the legal person who took part in the decision or the administrator may be ordered personally to pay damages’”).

<sup>390</sup> British Columbia, *Protection of Public Participation Act*, (March 25, 2019), Sec. 8, <https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/19003#section8>. A 2001 version of the law, which was repealed shortly after passage due to a change in government, went even further. As described by the Protection of International Center for Not-For-Profit Law’s report on SLAPPS in the Global South, the 2001 legislation authorized a court, “on its own motion or on the application of the defendant, [to] award punitive or exemplary damages against the plaintiff’ where a defendant satisfied the court that the conduct targeted by the suit constituted public participation and the suit had been brought for an improper purpose.” International Center for Not-For-Profit Law, *Protecting Activists from Abusive Litigation: SLAPPS in the Global South and How to Respond*, (June 2020), citing Protection of Public Participation Act, 2001 (British Columbia), Sec. 5(1)-(2). See also Douglas Eyford KC, *B.C.’s Anti-SLAPP Legislation Put to the Test*, Eyford Partners, (March 19, 2021), <https://eyfordpartners.com/b-c-s-anti-slapp-legislation-put-to-the-test/>.

motion, the law also grants courts the discretion to award other compensatory and punitive damages when additional aggravating circumstances are found.<sup>391</sup>

Such provisions have also been included in some of the anti-SLAPP laws introduced in the global south. For example, under the Philippines' anti-SLAPP law, a court that dismisses an action as a SLAPP after a summary hearing "may award damages, attorney's fees and costs of suit under a counterclaim if such has been filed."<sup>392</sup>

Lastly, some jurisdictions provide an avenue to impose costs on SLAPP filers not only through monetary damages, but also through the imposition of sanctions and penalties. Under Québec's law, "if the improper use of procedure results from a party's quarrelsomeness, the court may, in addition, prohibit the party from instituting legal proceedings except with the authorization of and subject to the conditions determined by the chief judge or chief justice."<sup>393</sup> As explained by the International Center for Not-for-Profit Law in a report on SLAPP protections, "the prospect of losing the ability to file suits generally would seem likely to concentrate the mind of a would-be SLAPP filer, and could also serve as a valuable tool for courts dealing with repeat filers of SLAPPs."<sup>394</sup>

## **B. RECOMMENDATIONS FOR THAILAND**

In light of the best practices laid out above as well as documented gaps in and challenges facing Thailand's existing anti-SLAPP protections, this section lays out specific recommendations for the Ministry of Justice as it develops and advances a new anti-SLAPP law.

### **Overarching Recommendations**

Ideally, Thailand should, in line with international human rights law, either decriminalize defamation or amend its criminal defamation law to provide a clear exception/defense

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<sup>391</sup> See Dan Greenberg and David Keating, *Anti-SLAPP Statutes: A Report Card*, Free Speech Institute (February 2022), pgs. 31, [https://www.ifs.org/wp-content/uploads/2022/02/Anti-SLAPP-Scorecard\\_FINAL-Interactive.pdf](https://www.ifs.org/wp-content/uploads/2022/02/Anti-SLAPP-Scorecard_FINAL-Interactive.pdf).

<sup>392</sup> Supreme Court Manila, *Rules of Procedure for Environmental Cases*, Republic of the Philippines (April 13, 2010), Part II, Sec. 3-4, [https://lawphil.net/courts/supreme/am/am\\_09-6-8-sc\\_2010.html](https://lawphil.net/courts/supreme/am/am_09-6-8-sc_2010.html).

<sup>393</sup> National Assembly, *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, SQ 2009*, (2009), Sec. 54.5.

<sup>394</sup> International Center for Not-For-Profit Law, *Protecting Activists from Abusive Litigation: SLAPPS in the Global South and How to Respond*, (June 2020), pg. 27.

for public interest speech,<sup>395</sup> provide clear and separate defenses for public interest speech and truth, or at a minimum not subject defendants to custodial sentences, in particular those engaging in public interest speech.

Nevertheless, in light of the findings of this report, and in light of the scope of the current reform discussion in Thailand, the following recommendations are made:

1. Introduce robust anti-SLAPP measures<sup>396</sup> that apply to cases brought by both private parties and public prosecutors. These should:
  - a) Be broad in scope and of general application. In particular, they should apply to cases brought by both private parties and public prosecutors. This will ensure there is there is judicial screening for SLAPPs initiated by powerful private parties but taken forward by public prosecutors (often with private parties as co-plaintiffs). While this could initially be limited to criminal defamation, SLAPPs may migrate to other claims if further action is not taken;
  - b) Provide clear definitions of “public interest,” “public participation” and “abusive proceedings”. Definitions that are illustrative of best practices are provided in footnotes.<sup>397</sup> Given that the vagueness of Section 161/1’s reference to bad faith

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<sup>395</sup> Whether for reforms such as these, or the more narrow reforms discussed below, a clear definition of public interest must be laid out, with one such definition showcasing best practices here: “Any matter which affects the public to such an extent that the public may legitimately take an interest in it, in areas including (but not limited to): (a) fundamental rights, public health, safety, the environment or the climate; (b) activities of a natural or legal person that is a public figure in the public or private sector; (c) matters under consideration by a legislative, executive, or judicial body, or any other official proceedings; (d) allegations of corruption, fraud, or of any other criminal offence, or of administrative offences in relation to such matters.”

<sup>396</sup> See *supra* (noting that the Ministry of Justice is currently considering amendments to the Criminal Code and Criminal Procedure Code as opposed to a true stand-alone law).

<sup>397</sup> An “act of public participation” means any expression or expressive act carried out on a matter of public interest, and any preparatory, supporting or assisting action directly linked thereto. This includes but is not limited to complaints, petitions, participation in public hearings, academic research, journalism and whistleblowing activities concerned with matters of societal importance, administrative or judicial claims, protests, and demonstrations.

“Abusive proceedings” means court proceedings brought in relation to an act of public participation that have some features of an abuse of process. Such features may include but are not limited to: The scope of the claim, including whether there is a real risk it will deter acts of public participation beyond the issues in dispute; the excessive or unreasonable nature of the claim, or part of it, including but not limited to the remedies sought by the claimant; any disproportion between the resources deployed by the claimant and the likely legitimate benefit of the proceedings to the claimant if the claim succeeds; the claimant’s litigation conduct, including but not limited to the choice of jurisdiction, the use of dilatory strategies, excessive disclosure requests, or the use of aggressive pre-action legal threats; any failure to provide answers to

and harassment appears to have undercut its effectiveness in combatting SLAPPs, these definitions are of paramount importance;

- c) Empower courts to dismiss “abusive proceedings” at an early stage and through an accelerated preliminary hearing on application of the defendant or on their own initiative<sup>398</sup>;
- d) Empower courts to order a stay of the main proceedings while the question of dismissal is being heard;
- e) Require preliminary hearings on dismissal to occur within three months of filing, unless a 30-day extension is deemed necessary. Similarly, the question of dismissal should be decided within a maximum six months of filing, unless a three-month extension is deemed necessary;
- f) Place the burden on the claimant to prove during the preliminary hearing that the case is likely to proceed at trial and does not constitute an abusive court proceeding (as clearly defined in the legislation);
- g) Provide for cost shifting mechanisms including damages, costs, and, where appropriate, dissuasive penalties (details set out further in recommendations 7 and 8);
- h) Require courts to provide reasons for and publicize their decision on the motion. This responds to the common feature of cases assessed in the dataset – that courts have overwhelmingly chosen to not respond at all to anti-SLAPP motions.

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good faith requests for pre-publication comment or clarification; the seriousness of the alleged wrong, and extent of previous publication; the history of litigation between the parties and previous actions filed by the claimant against this party or others against acts of public participation; any refusal without reasonable excuse to resolve the claim through alternative dispute resolution: tangential or simultaneous acts in other forums to silence or intimidate the defendant or related parties; and any feature that suggests the lawsuit has been brought with the purpose of intimidating, harassing, or otherwise forcing the defendant into silence

A “matter of public interest” is defined as an issue that affects the public to such an extent that it may legitimately take an interest in it. See UK Anti-SLAPP Coalition, *Model Anti-SLAPP Law*, <https://antislapp.uk/wp-content/uploads/2023/05/Model-UK-Anti-SLAPP-Law-Final-Version.docx.pdf>; Council of Europe, Recommendation CM/Rec(2024)2 of the Committee of Ministers to Member States on Countering the use of Strategic Lawsuits against Public Participation (SLAPPs), (April 4, 2024) <https://rm.coe.int/0900001680af2805>.

<sup>398</sup> This may require an amendment to the Criminal Procedure Code to require courts to hold preliminary hearings not only in cases involving private parties but also cases involving public prosecutors.

2. Amend the Criminal Procedure Code to make the same standards and criteria for dismissal available across the board: to inquiry officers, public prosecutors, and courts. In particular, public prosecutors must be empowered to dismiss complaints that appear to be “abusive proceedings” as defined above. At present there are different standards for inquiry officers and public prosecutors endeavoring to screen out SLAPPs under Sections 141-143 of the Criminal Procedure Code, as compared to courts endeavoring to screen out SLAPPs under Section 161/1.
3. These standards should clearly empower inquiry officers, prosecutors, and courts to consider the applicability of Section 329 at the earliest stage possible to dismiss proceedings.
4. Provide clear guidance to inquiry officers, public prosecutors and courts on their power to screen out or dismiss proceedings that constitute abusive proceedings.
5. Establish training programs for judges and prosecutors following the new amendments, with a focus on making clear that anti-SLAPP provisions are a way to protect the judicial system from abusive proceedings.

### **Further Recommendations Applicable to Inquiry Officers and Public Prosecutors**

6. Given that one reason that inquiry officers and public prosecutors appear reluctant to screen out SLAPPs is potential retaliatory litigation by the SLAPP filer, amend the Criminal Procedure Code’s section on SLAPPs to make clear that inquiry officers and public prosecutors exercising their discretion in, respectively, recommending against prosecution and issuing orders of non-prosecution on the basis that a case is a SLAPP should be immune from criminal proceedings. This would fall in line with Section 22 of the Public Prosecutor Organization and Public Prosecutors Act B.E. 2553, (2010), which states that “the justified discretion of public prosecutors for the case decisions and performance of duties ... shall be immune.” Since there appears to be particular concern in this regard regarding the non-prosecution of meritless cases, this protection should be explicitly laid out in any anti-SLAPP amendments to the Criminal Procedure Code.

### **Further Recommendations Aimed at Deterrence**

There is currently no effective means of deterring SLAPP filers from initiating abusive prosecutions. This is borne out by the fact that the vast majority of SLAPP filers in the dataset were repeat SLAPP filers. The following measures aim to impose costs for such abuse of the criminal justice system.

7. Amend the Criminal Procedure Code to create a new default, by which filers are required to indemnify SLAPP targets for total litigation and other associated costs

where a case is dismissed by a court as a SLAPP. The benefits of establishing such an indemnification provision, which would not require targets to file a separate lawsuit, would be twofold: (1) adverse consequences will deter filers from filing SLAPPs; and (2) indemnification will help alleviate some of the burdens on targets. Where the dismissed suit is filed by public prosecutors, compensation must come from the State, potentially from a specific fund developed for this purpose.

8. Amend the Criminal Procedure Code so that courts can award punitive damages when dismissing cases as SLAPPs. In line with practices in other jurisdictions, this should not require the filing of a separate claim, so as to alleviate the burden on SLAPP filers, and would be within the court's discretion as part of its decision dismissing the case.
9. Amend the Criminal Procedure Code to create a higher threshold, such as the approval of the chief justice of the applicable regional court, for SLAPP filers to file a suit once they have already had a case dismissed as a SLAPP by a court. This would greatly assist in tackling the issue of repeat SLAPP filers and would be in line with the spirit of Section 161/1, which as written currently prohibits the SLAPP filer from filing the same case again if dismissed by the court as a SLAPP.