

Defending Defenders

Challenging Malicious Lawsuits in Southeast Asia



Executive Summary

The work of human rights defenders (HRDs) to expose harm by companies around the world has never been more important. In the face of the existential challenges of a global pandemic such as COVID-19, climate crisis, shifts in the future of work, and increased migration, HRDs speak up for fairness and sustainability in business operations and global markets.

Tragically, some companies think otherwise. Rather than listen and act on the information HRDs share, a growing number of unscrupulous companies turn to the courts to bring lawsuits meant to harass and silence [HRDs](#) who criticize them. Over the last five years we have tracked an average increase of 48% per year in judicial harassment of HRDs looking at business activities.

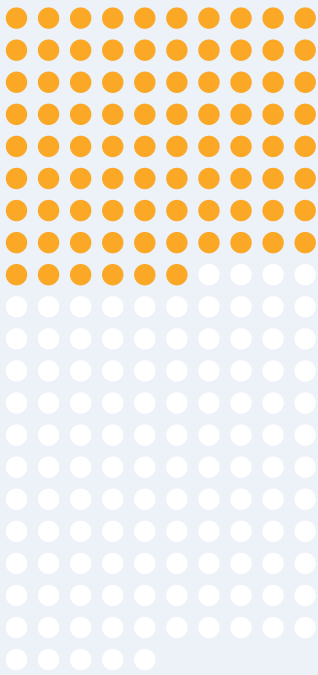
Strategic Lawsuits Against Public Participation (SLAPPs) are frequently deployed by companies. SLAPPs seek to manipulate the judicial system by masquerading as legitimate legal claims, abusing laws (e.g. on libel / defamation) to target valid and protected speech or protest. SLAPPs can be effective in gagging critics: they take advantage of the prohibitive costs and time that it takes to litigate a case, and can result in prison sentences and other harmful physical, financial and psychological impacts on defenders. As importantly, they have a chilling effect on free expression, disrupt legitimate collective action to defend the rights of workers and communities. SLAPPs summarised in this briefing include:

- A community member who faced criminal charges over a Facebook post questioning the legality of a company's mining operation
- A journalist arrested for hate speech after writing about a dispute between a local community and a company developing a palm oil plantation.
- A labour rights leader fined USD 2.4 million after publishing blog posts about working conditions for migrant workers.

These retaliatory lawsuits take place in a broader context of judicial harassment by both companies and governments including criminalisation, abusive subpoenas, arbitrary detention and arrest, and unfair trials. Roughly 40% of the 2,152 attacks against HRDs around the globe Business & Human Rights Resource Centre [recorded](#) between 2015 and 2019 constitute judicial harassment.

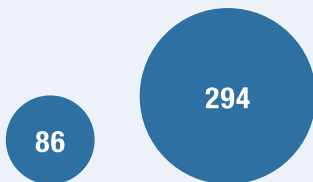
40% (857/2,152)

attacks committed against HRDs globally constitute judicial harassment



44% (127/290)

attack perpetrated in Southeast Asia constitute judicial harassment



294 instances of judicial harassment around the globe in 2019, compared to 86 in 2015, reflecting an annual average **growth rate of 48%**

This [Annual Briefing](#) focuses on **Southeast Asia**. The region has become a global hotspot for SLAPPs and other judicial harassment against HRDs. There is much to learn globally from the strategies of harassment and defense of HRDs here. We recorded 127 cases of judicial harassment against HRDs in Southeast Asia between 2015 and 2019. Of all attacks on HRDs in Southeast Asia that we tracked in this period (290), nearly half (44%) involved judicial harassment. Judicial harassment appears to be the tactic of choice deployed by businesses operating in Southeast Asia to punish or silence defenders. At least 30 of these instances involved filing a SLAPP suit, in some cases “[for as little as one social media post](#)”.

The COVID-19 pandemic has seen governments in Southeast Asia move to control the flow of information, and protests by workers fired without compensation or not given personal protective equipment. This is creating a situation ripe for further judicial harassment of HRDs in the region. Meanwhile, trials and hearings have been suspended and courts closed, leaving HRDs in legal limbo. These developments suggest COVID-19 means protection of HRDs from judicial harassment is more important than ever.

Lawyers have built different legal defenses to protect HRDs against SLAPPs, with some notable successes in courtrooms around Southeast Asia. For example, lawyers successfully invoked constitutional norms to assert the defendants’ rights to freedom of expression; and to freedom of speech, as a legal defence against SLAPPs brought in Thailand and Malaysia respectively. Counter-claims against companies to expose the frivolous nature of SLAPPs and to seek damages for the harm suffered has also proven effective; and in cases brought against journalists, lawyers have invoked fair comment and *qualified privilege* as a successful defence against SLAPPs. Courts in the region have played a critical role in protecting HRDs from SLAPPs by affirming their constitutional rights and acknowledging the importance of their work for the public interest; and in some cases, by criticizing the companies involved.

Despite encouraging legal developments in the region to protect against SLAPPs, such as in Thailand, the Philippines and Indonesia, lawyers have made only limited use of these laws and procedures. The lack of anti-SLAPP legal frameworks around the world and the restricted use of these laws where they do exist, means that lawyers have limited tools at their disposal to fight SLAPPs in the courts. This undermines their ability to get SLAPPs dismissed in their own right, to highlight their frivolous nature, and to expose companies’ judicial harassment. Meanwhile, most courts have few avenues to dismiss SLAPPs before proceeding to a full-fledged trial, which is typically lengthy and costly. The high costs imposed on the defendant to litigate the case for years, the stress of being in litigation and the invasiveness of having to go through discovery can be enough to silence HRDs, even if the case against them is ultimately dismissed.

In order to effectively fight SLAPPs – both in Southeast Asia and globally – we need robust legal frameworks and policies that prevent companies from filing SLAPPs in the first place and allow courts to identify, call out and dismiss them as soon as they are filed. To make this happen governments, businesses and investors, alongside defenders and civil society (and the lawyers who defend them) need to act decisively for the protection of civic freedoms and HRDs in the face of this growing threat.

Recommendations

Legal Advocates & Civil Society should use constitutional norms on freedom of expression, association, and peaceful assembly to defend against SLAPPs where anti-SLAPP provisions don't exist. They should also consider filing counter-lawsuits against companies to redress harm and carry out training and awareness building for lawyers and judges to inform them about SLAPPs tactics. Finally, they should raise awareness about SLAPPs at the local, regional and international levels and work together in coalitions to amplify advocacy efforts.

Governments should enact anti-SLAPPs legislation, which defines SLAPPs, allows for an early dismissal (with an award of costs) of such suits and penalises abuse. They should protect and facilitate the rights to freedom of expression, assembly and association of HRDs and provide them with support and ensure that the judiciary is aware of SLAPPs and empowered to take action to dismiss them.

Bar Associations should update ethics codes to ensure that SLAPPs are a sanctionable offence, and sanction/ penalize lawyers who use these abusive tactics.

Companies should refrain from and commit to not using SLAPPs or other forms of judicial harassment to shut down public participation and critical advocacy, and commit to a clear policy of non-retaliation against HRDs and adopt a zero-tolerance approach on reprisals and attacks on HRDs. They should also implement due diligence procedures for the prevention of harm and human rights abuse of individuals, communities and the environment, which explicitly recognises the risks to HRDs. Global brands and national companies can also act collectively to press rogue companies to drop their abusive SLAPPs that bring their whole sector into international disrepute.

Investors should undertake rigorous due diligence. They should review companies' history of SLAPPs and avoid investment in companies with a track record of SLAPPs; and communicate that they expect investee companies will not bring lawsuits with the intention of silencing critics, continuously monitor their use, and act consistently on their findings. They should also encourage companies not to be part of organisations that target or otherwise undermine civil society organisations and individual defenders.