

Use of The Law and
**Strategic Lawsuits Against
Public Participation (SLAPP)**
in Malaysia to Silence Critics

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Executive Summary

Strategic Lawsuits Against Public Participation (SLAPP) refers to lawsuits threatened with or filed to silence public participation. SLAPP targets are often human rights defenders, journalists, civil society organisations, whistle-blowers, academics, and trade union leaders and members. Its perpetrators range from corporations and businesspersons to top public officials. The goal of SLAPP is to discourage and silence public participation—and Malaysia has felt such chilling effect for decades. SLAPP thus constitutes a serious threat to the exercise of human rights and fundamental freedoms, such as freedom of expression, freedom of information, freedom of association and the right to protest.

SLAPP is on the rise in Malaysia. Our research shows that out of the 15 cases studied, the issues most related to SLAPP are the environment (40% or 6 cases), followed by corruption/abuse of power among government servants/bodies (27% or 4 cases), corporate wrongdoing (20% or 3 cases) and labour (13% or 2 cases).¹ Activists (33% or 5 cases) and journalists/ media organisations (33% or 5 cases) form the bulk of the targets, followed by opposition politicians (20% or 3 cases) and lawyers (13% or 2 cases) being targeted by SLAPP. SLAPP perpetrators are mostly companies (53% or 8 cases) and high-ranking public servants (20% or 3 cases), followed by government bodies and leaders of the ruling party.

SLAPP in Malaysia is also developing in various nefarious ways. There are instances where civil proceedings may be augmented by the lodging of police reports, and criminal investigations against activists and journalists.

Our research further reveals Malaysia's entrenched state-business ties in several instances where the names and data of complainants of pressing public interest matters, who wished to remain anonymous, were made known to the corporations that were complained about.² The use of criminal defamation laws against critics of companies and businesspersons also suggest close ties between the authorities and big business.

We recommend the following steps for combatting SLAPP in Malaysia:

- Enact an anti-SLAPP law as a long-term initiative.
- Strengthen whistle-blower protection laws.
- Repeal laws that criminalise defamation and speech.
- Training for judges and public prosecutors on SLAPP.
- Legal aid for SLAPP targets.
- Foster a culture of non-retaliation and respect for human rights within business organisations.
- Relook at professional standards governing lawyers, particularly on whether lawyers ought to accept briefs representing plaintiffs in SLAPP.

¹ Based on the cases reviewed for the purpose of this research.

² Interview with the lawyer representing the said community leader in Banting, Selangor, on 11 February 2022.

1. Introduction

From the crackdown on civil society activists under the Internal Security Act 1960 in the 1980s to the use of the Sedition Act 1948 to silence cartoonists in 2016 at the height of the 1MDB scandal,³ Malaysia is no stranger to state abuse of criminal law provisions and enforcement agencies against human rights defenders (HRDs) and critics of the government.

However, what is less brought to the spotlight—but no less pernicious—is how corporations, businesspersons, top public officials and even governments have exploited the legal system, in particular through civil proceedings such as defamation, to silence their critics.

Such tactics have come to be known in the academic and legal circles as Strategic Lawsuit Against Public Participation (better known by its acronym, SLAPP).

In a country such as Malaysia, where the lines between big business and state apparatus are increasingly blurred, SLAPP poses an even greater threat to HRDs.

In general, SLAPP is deployed against individuals or organisations in a multitude of public interest issues, such as the environment, labour and human rights, abuse of power and corruption. The targets of SLAPP are often:

- HRDs
- Journalists, especially investigative reporters
- Civil society organisations, especially campaigning organisations
- Whistle-blowers
- Academics
- Trade union leaders and members

These individuals and organisations play a critical role in disseminating knowledge, ideas and opinions on issues of public interest. They are often the catalyst for societal resistance against the misdeeds and omissions of powerful subjects.

In practice, SLAPP materialises in a variety of legal actions, from the issuance of letter of demands to the commencement of civil proceedings in court. SLAPP is often premised on meritless, frivolous or exaggerated claims that are deliberately initiated with the intent to intimidate, drain the financial resources of their targets and inflict psychological as well as emotional stress, rather than genuinely exercising or vindicating a right or obtaining a redress for a certain wrong.

The goal of SLAPP is to discourage and silence public participation—and Malaysia has felt such chilling effect for decades. SLAPP thus constitutes a serious threat to the exercise of human rights and fundamental freedoms, such as freedom of expression, freedom of information, freedom of association and the right to protest.

³ The 1MDB scandal refers to an embezzlement and money-laundering scheme amounting to US\$4.5 billion, involving state-owned investment vehicle 1Malaysia Development Berhad (1MDB). The trials against the various actors are ongoing and has thus far resulted in the jailing of the prime minister who was heading the government then, Datuk Seri Najib Abdul Razak.



This paper aims to dive in greater detail the phenomenon of SLAPP in Malaysia, and seeks answers to the following questions:

1. How is SLAPP orchestrated in the Malaysian context, and how does it affect HRDs with regard to public participation?
2. What are the weaknesses in Malaysia's legal framework and systems that allow entities to initiate and continue to rely on SLAPP to silence critics?
3. What are the legal and policy reforms that need to be implemented to prevent SLAPP in Malaysia?

For the purpose of this paper, the analysis on SLAPP is largely confined to how civil proceedings such as defamation have been used against HRDs and journalists, but also touches on how criminal investigations and prosecutions are at times used in conjunction with these civil proceedings by the same perpetrators to mount pressure on their targets to silence them.

This paper does not cover instances of the state abusing the criminal justice system or criminal statutes such as the Sedition Act 1948 and Section 233 of the Communications and Multimedia Act 1998 in general to silence HRDs, as that requires a wholly different and wide-ranging discussion.

2. Methodology

We conducted a desk review on Malaysian legislation and research on case law that contains elements of SLAPP. We interviewed seven HRDs, activists and journalists to further appreciate the impact of SLAPP. To better understand the consequences of and legal strategies in defending against SLAPP, we also interviewed nine lawyers who have a record of representing SLAPP targets.

3. The Normative Framework on SLAPP

Several international instruments protect individuals from SLAPP.

In 2013, the United Nations (UN) Special Rapporteur on the Situation of Human Rights Defenders expressed concerns about the “consolidation of more sophisticated forms of silencing their voices and impeding their work, including the application of legal and administrative provisions or the misuse of the judicial system to criminalize and stigmatise their activities. These patterns not only endanger the physical integrity and undermine the work of human rights defenders, but also impose a climate of fear and send an intimidating message to society at large.”⁴

In 2016, the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on

⁴ UN Doc. A/HRC/25/55 (23 December 2013), par. 59.

the proper management of assemblies jointly expressed similar concerns as follows: “Business entities commonly seek injunctions and other civil remedies against assembly organizers and participants on the basis, for example, of anti-harassment, trespass or defamation laws, sometimes referred to as strategic lawsuits against public participation. States have an obligation to ensure due process and to protect people from civil actions that lack merit”.⁵

In 2014, the UN Working Group on Business and Human Rights recommended that member states enact anti-SLAPP legislation to ensure that HRDs are not subjected to civil liability for their activities.⁶

The UN General Comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR) in the context of business activities provides that member states not only have an obligation to prevent economic, social and cultural rights from being infringed by company activities, but they also have a positive duty “to adopt a legal framework requiring business entities to exercise human rights due diligence in order to identify, prevent and mitigate the risks of violations of Covenant rights, to avoid such rights being abused, and to account for the negative impacts caused or contributed to by their decisions and operations and those of entities they control on the enjoyment of Covenant rights”.⁷ It also highlights that actions taken by corporations “to discourage individuals or groups from exercising remedies, for instance by alleging damage to a corporation’s reputation, should not be abused to create a chilling effect on the legitimate exercise of such remedies.”⁸

4. Malaysian Law

4.1 Constitutional & Statutory Frameworks

Article 10(1)(a) of the Federal Constitution guarantees every citizen of Malaysia the right to freedom of speech and expression. Nevertheless, Article 10(2) states that Parliament may by law restrict such freedom of speech and expression as it deems necessary or expedient to, among others, provide against defamation.

In this regard, the Defamation Act 1957 provides the statutory framework for the law of defamation in Malaysia. Order 78 of the Rules of Court 2012 governs the procedural aspects in relation to defamation proceedings in the civil courts. Malaysia’s defamation law is nonetheless also shaped by common law, and several legal principles established by case law in the United Kingdom, in particular, have been adopted too.

In short, under defamation law, a person can be liable for slander or libel. If found liable, such person can be ordered to pay monetary damages to the plaintiff or be prohibited from repeating

⁵ *Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies*, UN Doc. A/HRC/31/66, 4 February 2016, par. 84.

⁶ *Guidance on National Action Plans on Business and Human Rights*, United Nations Working Group on Business and Human Rights, December 2014, p. 37

⁷ “General Comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR) in the context of business activities”, pars. 14-16.

⁸ *Ibid*, para par. 44



the defamatory words. In general, a defendant can resort to the defence of justification⁹, fair comment¹⁰, absolute privilege¹¹ and qualified privilege¹². Insofar as the defence of fair comment and qualified privilege is concerned, a plaintiff can defeat such defence if they can prove that the defendant nonetheless uttered the defamatory words maliciously.

Malaysia is also one of the few countries that still criminalises defamation, under Section 499 of the Penal Code. Due to its wide-ranging provisions, criminal defamation has been used not only to criminalise criticisms against the government, but also to investigate and prosecute HRDs and journalists for criticising or reporting on the affairs of companies or businesspersons. For example, in 2018, the police opened an investigation against The Edge Media Group under Section 499 of the Penal Code for its weekly report titled “Protasco asks AG to reopen case against Tey, associate”, following police reports lodged by then Protasco Berhad director Datuk Larry Tey Por Yee and his associate Datuk Ooi Kock Aun.¹³

The right to information is also very much related to SLAPP. In particular, journalists and media organisations play a crucial part in imparting information on matters of public interest to the public, who have a corresponding right to receive such information. Access to information is important to produce informed citizens and create meaningful discourse in a democracy. Although court decisions in the past years¹⁴ show there is hesitance in accepting a general right to information as a derivative of freedom of expression under Article 10 of the Federal Constitution, the approach may change in the near future in the event a new legislation on right to information is adopted by the State. In fact, the states of Selangor and Penang have already enacted their own freedom of information enactments which came into force in 2013 and 2015 respectively.

Freedom of assembly and association, guaranteed under Article 10 of the Federal Constitution, is also affected by SLAPP as the resulting chilling effect permeates all levels of society, making activists and NGOs hesitant to exercise their freedom of assembly and association.

4.2 Court Proceedings

4.2.1 Delay in Disposal of Court Proceedings

One factor that could increase the debilitating effect of SLAPP is the length of the process of litigation in the courts. From the late 1980s to the early 2000s, Malaysia suffered from a huge backlog of cases which resulted in trials taking multiple years to be disposed of.¹⁵ This could

⁹ The defence of justification succeeds when the allegedly defamatory statements are proven to be true, and such defence is an absolute defence if proven successfully (Section 8, Defamation Act 1957).

¹⁰ The defence of fair comment succeeds when the defendant merely gives an honest comment on any matter of public interest (Section 9, Defamation Act 1957).

¹¹ The defence of absolute privilege provides that any fair and accurate report of proceedings heard before any court of law shall be protected (Section 11, Defamation Act 1957).

¹² The defence of qualified privilege applies where the impugned words have been published by a person who has legal, social, or moral duty or interest to publish the words to the person(s) to whom they were published, and the person(s) to whom the words were published had a corresponding interest or duty to receive them (Section 12, Defamation Act 1957).

¹³ *The Edge*. (2018). “[The Edge faces criminal probe, civil defamation claim.](#)”

¹⁴ For example, *Haris Fatillah B Mohd Ibrahim v Suruhanjaya Pilihan Raya Malaysia* [2017] MLJU 45.

¹⁵ World Bank. (2011). *Malaysia: Court Backlog and Delay Reduction Program, A Progress Report*. <https://openknowledge.worldbank.org/bitstream/handle/10986/16791/632630Malaysia0Court0Backlog.pdf?sequence=1&isAllowed=y>



be draining on defendants who have to endure years of litigation before the courts as a result of SLAPP.

In 2008, however, when Tun Zaki Azmi was appointed as the Chief Justice, he instituted reforms to clear the backlog and set strict key performance indicators (KPIs) on the timeframe for disposal of cases. One KPI is that cases must be disposed of within nine months from filing.¹⁶ While widely hailed as a positive move, it also garnered criticism from some practitioners that justice and the right to a fair trial could be compromised when matters are being hurriedly disposed of. Such KPIs were eventually disregarded in 2011.¹⁷

On 31 January 2020, the Chief Judge of Malaya issued Practice Direction 1 of 2020 which provides that as a general rule, trial dates for writ actions¹⁸ should be fixed within six months from filing. There is no set timeline on when such trials should be finalised.

4.2.2 Lack of Pro Bono Legal Support

The legal fees charged by lawyers for defending against SLAPP are highly discretionary and varies by practitioner and complexity of the case. While there are lawyers who provide pro bono services to defend HRDs, civil society organisations, journalists and academics, among more established law firms, however, there is generally a lack of a culture of taking on such cases. This could be a disadvantage to SLAPP targets as they often would need to rely on the same circle of lawyers from smaller law firms, who are themselves often stretched and unable to take on many cases at any one point in time.

4.2.3 Potentially High Cost of Engaging Expert Witnesses in Court

When SLAPP proceeds to trial, the defendant would in certain circumstances be required to engage expert witnesses. For example, if the defendant alleges that a certain company's use of chemicals to extract minerals have caused certain illnesses in nearby residents, the defendant would need to call upon scientific experts to justify such an allegation. The expert would be required to conduct surveys, studies, produce reports, attend hot-tubbing sessions (witness conferencing) and testify in court, all of which requires huge financial expenditure. Defendants who are not financially equipped may struggle to engage such experts, hence jeopardising their defence in court or ultimately finding themselves being pushed to settle with the plaintiff, often on unfavourable terms.

While there have been efforts in recent years by the judiciary to expedite the hearing and disposal of cases, there is a lack of data to conclude whether cases—including SLAPP suits—have actually been decided within a reasonable timeframe. The lack of pro bono support and potentially high cost of engaging witness experts on the part of HRDs and journalists are also contributing factors to the deleterious effects of SLAPP in Malaysia.

¹⁶ *Ibid.*

¹⁷ *The Star*. (8 April 2011). "No KPI for Cases Closed."

¹⁸ *Proceedings begun by writ actions in Malaysia are actions in which disputes of fact are likely to arise, and therefore usually requires a trial to decide on the matter. This is as opposed to originating summonses, where disputes of facts are less likely to arise, and the matter can be usually decided based on affidavit evidence.*



5. Public Bodies & Public Officers—Standing to Sue for Defamation in Malaysia

One area that has seen interesting developments is the apex court's reception of the Derbyshire principle. The Derbyshire principle originated from the House of Lord's decision of *Derbyshire County Council v Times Newspaper*¹⁹ in 1993. Essentially, the Derbyshire principle states that government bodies do not have the right to maintain an action for damages for defamation, because it is vital that a government body should be open to public criticism, and the right to sue for defamation would have a chilling effect on the freedom of speech.

While earlier Malaysian cases have largely rejected the Derbyshire principle, such principle came to the forefront in the 2016 Court of Appeal decision of *Utusan Melayu (Malaysia) Berhad v Dato' Sri Diraja Haji Adnan bin Haji Yaakob*.²⁰ The judgment enumerated that a governmental body must be open to public criticism in a free, democratic society, and could never be defamed. Therefore, it ought to be precluded from suing for defamation. The court said:

“[17] We would thus summarize the principles emanating from the decisions in the authorities discussed above as follows:

(a) a democratically elected government and individual members holding office in the government and are responsible for public administration or having conduct of the affairs of the government should be open to uninhibited public criticism relating to such public administration and affairs;

(b) it would be contrary to public interest to fetter freedom of speech by restraining public critiques of the government and those holding public office on matters relating to public administration and affairs;

(c) there is no public interest favouring the right of the government and those holding office in the government and are responsible for public administration or having conduct of the affairs of the government to have the right to sue for defamation, because to admit such actions would place an undesirable fetter or have an inhibiting effect on freedom of speech; and

(d) the above principles do not restrict the rights of individuals holding public office from suing in a defamation action in his personal capacity where individual reputation is wrongly impaired.”

The Court of Appeal in this case also conceded that although the government does have a reputation to protect, there are other appropriate recourse to protect it from malicious falsehood. The government may simply dispose of the truth or prosecute the responsible body with the Sedition Act 1948, the Penal Code, the Printing Presses and Publications Act 1984, or the Communications and Multimedia Act 1998. Essentially, the public policy considerations are to prevent the suppression of free speech by self-censorship, as reflected in this statement:

¹⁹ [1993] AC 534.

²⁰ [2016] MLJU 302.

“We indeed consider the potential chilling effect on free speech should this appeal be dismissed... would in our view allow persons holding public office to initiate a suit of this nature against any statement critical of them in their office which in consequence ‘may prevent the publication of matters which it is desirable to make public’ and no critical citizen can safely utter anything but faint praise about the public officials... This will sadly result in political censorship of the most objectionable kind.”

Nevertheless, in 2019, the Federal Court in *Chong Chieng Jen v Government of State of Sarawak & Anor*²¹ rejected the application of the Derbyshire principle. It held that the statutory right of both the federal and state governments to sue in civil proceedings under section 3 of the Government Proceedings Act 1956, including for defamation, was not subject to the common law of England because the words “written law” in that section was not defined by section 3 of the Interpretation Acts 1948 and 1967 to include the common law of England. Hence, the common law principle expounded in Derbyshire did not apply. Therefore, the Government of the State of Sarawak was able to maintain defamation proceedings against Chong Chien Jen, an opposition member of Parliament (MP).

Even so, the more recent Federal Court case of *Lim Guan Eng v Ruslan bin Kassim* and another appeal²² has clarified the law by drawing a distinction between defamation proceedings initiated by public bodies and public officers. The majority of the Federal Court acknowledged that a public officer has standing to institute defamation proceedings to defend their reputation:

“[145] Thirdly, if, however, the impugned defamatory publications actually identify individuals in government in their attacks rather than being blanket critiques of government policy or action per se, then those individuals so identified have every right to commence actions in their personal capacities, if their reputations have been affected as a result. So, no distinction is drawn between a public officer being defamed for conduct in his official capacity and his personal capacity. As long as the defamatory statement is capable of being read as referring to the individual and not the government body as a whole, the individual officer is entitled to sue.

...

[168] For all these reasons, it is my judgment that a public official must enjoy the same rights as other citizens and be allowed to sue for damages for defamation in any individual capacity whether in relation to personal or official matters. He need not avail himself to the provisions of the Government Proceedings Act 1956.”

However, the majority of the Federal Court subsequently departed from the decision in **Chong Chien Jen** and **Adnan Yaakob**’s case insofar as whether public bodies can institute defamation proceedings, as follows:

“[144] Secondly, it is an anathema to a modern constitutional democracy to permit elected government authority to commence actions for damages for defamation against its citizens for the simple reason that it is those citizens who decide on that government or authority being placed in power. In other words, an elected governmental institution owes its very

²¹ [2019] 3 MLJ 300.

²² [2021] 2 MLJ 514.



survival to those voting citizens and to the process bringing about its existence. In similar vein, it is also incompatible that government litigation against its own citizens be funded by those very citizens who contribute to their coffers.”

In Malaysia, the most current apex court decision is the prevailing law of the land.²³ As such, the legal position today is that public officers can sue for defamation (as long as the defamatory statement was capable of being read as referring to the individual and not the government body as a whole). Public bodies (such as the federal and state governments, local councils, etc.), however, do not have the standing to sue for defamation.

6. An Overview of SLAPP in Malaysia

Below is a compilation of selected instances of SLAPP classified into several categories: environment, labour rights, exposure of corporate wrongdoing and exposure of wrongdoing by public officials.

6.1 SLAPP Involving the Environment

(A) Resident Activists in Bukit Koman, Pahang, Sued by Gold Mining Operator for Speaking Out on Pollution

The 2019 Federal Court decision of *Raub Australian Gold Mining Sdn Bhd (in creditors' voluntary liquidation) v Hue Shieh Lee*²⁴ is an important case as it acknowledged the role of activist groups in highlighting issues of public interest.

Raub Australian Gold Mining (RAGM) has been operating a gold mine near the Bukit Koman village in Raub, Pahang, since 2009. Hue Shieh Lee was a resident of that village and one of the leaders of a group that have been protesting against RAGM's activities on the ground that they were adversely affecting villagers' health.

In 2012, RAGM sued Hue Shieh Lee for libel and malicious falsehood based on two news reports, published on the Malaysiakini and Free Malaysia Today (FMT) websites.²⁵ The Malaysiakini report featured a video which reported on survey findings that show many Bukit Koman residents were unhappy with the cyanide-like odour produced from RAGM's gold-mining activities that pervaded their village. The survey also revealed that a high percentage of the residents suffered from various health issues, including skin diseases, eye irritation, respiratory problems, giddiness, lethargy and even cancer. The Free Malaysia Today (FMT) article reported that while RAGM asserted that it had created many jobs for the villagers, the number was only less than 10 in actuality.

RAGM claimed that both articles had defamed it by, among others, suggesting that it was a negligent, irresponsible and reckless company that allowed sodium cyanide to escape from its plant and cause various health problems to the villagers, and also that it was dishonest and misrepresented the truth.

²³ *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1.

²⁴ [2019] 3 MLJ 720.

²⁵ The author was unable to locate the links. The websites may have taken them down on advice upon being sued, as has happened in certain defamation cases.



In 2016, the High Court dismissed RAGM’s suit. In the same year, the Court of Appeal upheld the findings of the High Court and dismissed RAGM’s appeal. In 2019, the Federal Court also unanimously did the same.

More importantly, the Federal Court acknowledged that activist groups contribute to the “general well-being of society at large” and that Malaysians now “live in a much more liberal society where the concept of transparency and accountability are very much part and parcel of our lives”. This principle of law set out by the apex court has far-reaching positive implications for those facing SLAPP.

(B) Online News Site Sued by Gold Mining Operator

Malaysiakini, an online news site, was however not as fortunate in its coverage of RAGM’s activities in Bukit Koman.

In 2012, RAGM sued Malaysiakini, its assistant news editor, senior journalist and videographer for, among others, defamation for publishing three articles and two videos on Malaysiakini which alleged that the use of cyanide in RAGM’s gold mining activities had caused various health issues among the Bukit Koman villagers and had so polluted the environment to the extent of killing birds and vegetation. RAGM alleged that the contents of the articles and videos were false and intended to injure its reputation, trade and business.

Malaysiakini, on the other hand, contended that the articles and videos were not defamatory of RAGM but concerned matters of public interest which Malaysiakini were under a duty, at least a moral one, to publish. Malaysiakini relied on the defences of qualified privilege, fair comment and the right to freedom of expression, asserting that they had exercised responsible journalism.

In 2016, the High Court dismissed RAGM’s suit on the basis that Malaysiakini and its employees are able to rely on the defence of reportage. Unfortunately, in 2018, the Court of Appeal allowed RAGM’s appeal and finally in 2021, the Federal Court upheld the Court of Appeal’s findings.

Essentially, the Federal Court held that Malaysiakini had failed to plead the defence of reportage, and the contents of the impugned publications had subscribed to a belief in the truth and accuracy of the defamatory imputations and therefore cannot rely on the defence of reportage which pre-supposes coverage in a neutral fashion. Further, the Federal Court found that Malaysiakini and its employees failed to take steps to verify the contents of the articles and videos, and as such could not rely on the Reynolds defence²⁶ or qualified privilege.

26 Qualified privilege or the Reynolds defence of responsible journalism was established in the landmark English House of Lords decision in Reynolds v Times Newspaper Ltd and Others in 2001 where the party sued for defamation is required to establish that the published article was of public interest and that they practised responsible journalism in publishing the allegedly defamatory words.



(C) NGO Advocating for Indigenous Community Rights Sued by Logging Companies for Reporting on logging activities in Upper Baram area

SAVE Rivers²⁷ is a civil society organisation that supports and empowers rural communities to protect their land, rivers and watersheds. It was approached by indigenous communities from the upper Baram area in Sarawak to raise their concerns about logging in the area, allegedly by the Samling Group of companies which are involved in the timber industry.

Accordingly, SAVE Rivers published several articles between June 2020 and March 2021, which among others suggested that the company had failed to consult the indigenous communities in and around two concessional forests, and had logged in areas that were part of indigenous land. In June 2021, Samling group filed a RM5million against SAVE Rivers and four of its members of the board of directors. At the time of publication, the trial dates have adjourned once on Samling's request and 2 times by the court.²⁸ The trial date has been set for 18 – 20 September 2023.

The indigenous communities concerned have further lodged complaints against the Samling Group, under a dispute resolution mechanism provided by the Malaysian Timber Certification Council (MTCC), over alleged flaws in Samling's process of conducting community engagement in accordance to indigenous communities' Free, Prior and Informed Consent (FPIC) rights²⁹. The mechanism, set up in 2019, is empowered to resolve among others disputes involving the MTCC as a result of decisions and/or activities of the council as the national governing body with the overall responsibility for the Malaysian Timber Certification Scheme (MTCS). However, Save Rivers were informed that the Samling Group had refused to participate further in the dispute resolution process, citing the defamation lawsuit as an excuse.

(D) Human Rights Lawyer Faced Contempt of Court Action by Logging Companies in Jerantut, Pahang

In 2020, logging companies Beijing Million Sdn Bhd and Rosah Timber and Trading Sdn Bhd initiated legal action against eight individuals from Kampung Baharu in Jerantut, Pahang, over allegations that the latter had prevented the companies' workers and contractors from carrying out works in a nearby forest reserve. The eight individuals were represented by human rights lawyer Charles Hector.

In November 2020, the logging corporations obtained an ex parte interlocutory injunction³⁰ to prevent the defendants from accessing a contested 202.61 ha. area in the forest reserve. Hector had been preparing for a full trial of the injunction application. In preparation for the trial, he wrote to a forestry officer to seek clarification of relevant correspondence. The corporations

²⁷ Interview with a representative of SAVE Rivers on 16 February 2022.

²⁸ Update from the representatives of Save River on 18 May 2023: First trial dates (22-26 August 2022 and 19-23 September 2022) Samling requested for postponement of the trial dates, and the new trial dates were set for 14-18 November 2022; Court requested to adjourn the November 2022 trial dates to 15-19 May 2023; Court again requested another adjournment of the May 2023 trial dates to 18-20 September 2023..

²⁹ Free, Prior, and Informed Consent (FPIC) is a right provided for indigenous peoples under the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

³⁰ An interlocutory injunction is a court order to prevent someone from doing a particular act pending the resolution of a court case. The term "ex parte", Latin for "by or for one party", means that the order was obtained without the participation of the eight individuals or Charles Hector.



learnt about the letter and asserted that by writing to the official, Hector and the eight defendants had violated the ex parte interlocutory injunction, which prohibited the defendants, “their agents, representatives, servants and/or any party connected with them” from “interfering with department or approval given to the Plaintiffs on 15 September 2019 by the District Forest Office... cause nuisance to the work of the Plaintiffs in any manner whatsoever including physically, online or by communication with the authorities...”.

In January 2021, the two companies filed an application to the Kuantan High Court to commence contempt proceedings against Hector. The contempt of court application received widespread condemnation from international NGOs. On 24 March 2021, Lawyers Right Watch Canada wrote to Malaysian authorities, expressing concern that the contempt proceedings appeared to be a spurious attempt by the corporations to obstruct the court’s determination of the defendants’ rights, including their right to legal representation.

Eventually, in April 2021, the two corporations withdrew the contempt of court proceedings against Hector.

(E) Environmental Activist Sued by Pahang State Government for Statement in her Facebook and Media Interview on Logging in the State

The Pahang State Government filed a defamation suit against environmental activist Shariffa Sabrina Syed Akil on 7 April 2022, seeking an apology and RM1 million in damages over allegedly defamatory statements she made in a December 2021 interview.

The suit was a follow-up to the letter of demand issued in February 2022 to Shariffa Sabrina, who is the president of Pertubuhan Pelindung Khazanah Alam Malaysia (PEKA). According to the state government, Shariffa Sabrina’s statements implied that it was being irresponsible by allowing logging in the Karak mountainous area without making an environmental impact assessment, and that it had colluded with the Pahang forestry department to issue a “deceptive” statement that asserted that there were no logging activities at the Lentang forest reserve. It was also implied that the state government was carrying out logging activities at the Lentang forest reserve irresponsibly until a disaster occurred and was practising bribery by allowing logging companies to engage in widespread logging in the state.

Prior to the suit, in March 2022, in what appears to be an additional act of retaliation, Shariffa Sabrina was charged with unlawful occupation of government land in Pahang under Section 425(1)(a) of the National Land Code 1965. The plots involved were alleged to have been turned into a resort area and for business activities by Tanah Aina Fareena Cafe & Restaurant, Tanah Aina Fahad Glamping Resort and Tanah Aina Farrah Soraya Exclusive Eco Resort. These resorts were jointly owned and operated with Shariffa Sabrina’s children and family members. According to media reports, Shariffa Sabrina said that she had operated these resorts for 12 years without any issues from the Pahang State Government previously. If found guilty of each charge, Shariffa can be fined up to RM500,000 or jailed not more than five years. In June 2022, Shariffa applied to strike out the suit. The case management and trial were scheduled in Jan 2023.³¹ The trial is ongoing.

³¹ *Malaysiakini*. (3 Jan 2023). “*Temerloh court to hear Pahang govt suit against activist over logging issue.*”



(F) Resident Association Leader Sued by Incinerator Operator for Speaking Out on Odour Pollution in Banting, Selangor

For the past four to five years, a foul odour has emanated from an incinerator operator in Banting, Selangor, affecting the lives of surrounding residents. A local community leader³² had been complaining of odour pollution to the Department of Environment, which resulted in several raids of the incinerator.

The incinerator operator issued a letter of demand against the community leader, alleging that he had acted maliciously by complaining about the company's activities to the authorities without basis. In 2017, it filed a suit against the community leader.

The parties then entered into mediation, after which the community leader agreed not to lodge a complaint to the authorities anymore against the incinerator operator. He was advised by his lawyers to do so, as such an agreement would not bind any other local community leader from speaking up on the issue. The community leader would also avoid incurring further inconvenience as well as legal costs.

Chillingly, the incinerator operator knew who had lodged the complaints with the Department of Environment although this information was not publicly revealed. This raises concerns on the possibility of collusion or unauthorised disclosure of complainant details between enforcement agencies and influential corporations.

6.2 SLAPP Involving Labour Rights

(A) Human Rights Lawyer Sued for Writing About Inhumane Treatment of Workers in Electronics Company Based in Selangor

Asahi Kosei Sdn Bhd, a Japanese electronics company based in Selangor, was alleged by human rights lawyer Charles Hector through six postings on his blog to have treated its 31 Myanmar workers cruelly and inhumanely. In early 2011, the company filed a suit against Hector, while also seeking an interim injunction³³ to restrain him from further publishing or repeating the same posting or to post any such statement on his blog or through any form of communication. It was granted the interim injunction until the disposal of the suit. The High Court in the main suit eventually found in favour of Asahi Kosei, and ordered the defendant to pay RM10 million in damages. Later in that year, however, the parties settled and agreed that Hector would pay nominal damages of RM1 but would also have to issue a public apology in a local newspaper.

(B) Business Newspaper Sued for Reproducing Report on Bangladeshi Worker's Complaint of Unsafe Working Conditions in Glove Factory

In 2020, business media Focus Malaysia reproduced a report by the Bangladesh Business Insider media company, which stated that a Bangladeshi worker had contracted cancer as a result of unsafe working conditions in a glove factory in Malaysia.³⁴ The article on Focus Malaysia's website had featured a picture of a safety helmet bearing the logo of the said glove factory.

³² Interview with the lawyer representing the community leader in Banting, Selangor, on 11 February 2022.

³³ An interim injunction is a court order to prohibit someone from committing a particular act, pending the determination of a suit.

³⁴ Interview on 11 February 2022 with the lawyer representing Focus Malaysia.

The glove factory issued a letter of demand to Focus Malaysia, seeking an apology, retraction of the article and for damages. The parties eventually agreed to settle the matter, with Focus Malaysia agreeing to remove the glove factory's logo and any other reference to the company in the online article.

6.3 SLAPP Involving Exposure of Corporate Wrongdoing

(A) Opposition MP Sued for Exposing MARA Corruption Scandal

In 2017, Khairul Azwan bin Harun, who was then the Deputy Youth Chief of the United Malays National Organisation (UMNO) had filed a defamation suit against Mohd Rafizi bin Ramli who was a member of parliament from the opposition Parti Keadilan Rakyat (PKR).³⁵

Rafizi had issued several press releases and published information revealing that government agency Majlis Amanah Rakyat (MARA) had, through its subsidiary, purchased properties at hyper-inflated prices, and that some of the purchase monies were channelled back to various parties within or connected to MARA. At a press conference on 6 July 2015, he suggested that Khairul Azwan and certain other members of the UMNO Youth exco were directly involved in the MARA property purchase. Rafizi highlighted four transactions for the purchase of four properties in Australia at marked-up prices or prices above the market value of the said properties by a wholly owned subsidiary of MARA. He said the transactions had been carried out via a complicated corporate structure consisting of several layers of foreign and offshore companies, and this had resulted in MARA having overpaid RM129 million for the Australian properties.

According to Khairul Azwan, with his name mentioned in the press release, his reputation had been maligned because the offending words conveyed the meaning that he was directly involved in the transactions.

In 2016, the High Court dismissed the suit. It held that the impugned words in the press release contained a lesser meaning, or what was now understood as a Chase level 3 meaning, as derived from the case of *Chase v Newsgroup Newspapers Ltd.*³⁶ The court held that, taken at its highest, the impugned words had only a Chase level 3 meaning, i.e., the lesser imputation that there were reasonable grounds for investigation or that Khairul Azwan should come forward and give an explanation. Based on the evidence given by the Rafizi, he was entitled to succeed as he had proven on a balance of probabilities that there were grounds for an investigation to be carried out and for the plaintiff to give an explanation on the matter.

The court further held that Rafizi was entitled to the defence of fair comment as the transactions involved the public interest, and he was not driven by malice but by a public-spirited duty to disclose wrongdoing involving public funds.

³⁵ *Khairul Azwan bin Harun v Mohd Rafizi bin Ramli*, [2017] 9 MLJ 205

The coalition government after the 15th General Elections includes PKR as part of the Pakatan Harapan and UMNO.
³⁶ [2002] EWCA Civ 1772.



(B) Opposition MP Sued for Exposing Financial Mismanagement of a Land Development Authority

In 2012, Lembaga Kemajuan Tanah Persekutuan (LKTP)³⁷, a corporate body established by the Federal Government and its wholly owned subsidiary filed a defamation suit against Dr Tan Kee Kwong, a member of PKR.

LKTP and its subsidiary asserted that Dr Tan had defamed them in an article dated 2010 by alleging that the manner in which they conducted their affairs led to a lot of financial wastage and now left LKTP in a state of bankruptcy.

Dr Tan claimed that, although he had given an interview to a news reporter on the subject matter, he had never used the word “bankruptcy”. He further claimed that none of the paragraphs that were deemed defamatory referred to the LKTP and its subsidiary, and that any reference to them in the article was not defamatory of them.

In 2011, the High Court dismissed the suit, as LKTP had failed to call the reporter to whom Dr Tan had uttered the allegedly defamatory words to testify. Further, LKTP and its subsidiary had failed to prove their case, nor had they proven that Dr Tan uttered the allegedly defamatory words.

(C) Media Company sued for Report of Corporate Manoeuvres in Public-Listed Company

In 2018, an investment holding company, PDZ Holdings Berhad, brought defamation proceedings against business media The Edge Media Group and two of its journalists for three articles published from May to July 2017, titled “Interesting manoeuvres at PDZ”, “Undue preference in PDZ assets transfer” and “Murky connection between Sanichi and PDZ”.

PDZ Holdings asserted that it had been defamed by the media company and that the articles contained false statements based on rumours and unverified sources.

In October 2018, the High Court ruled in favour of the defendants, acknowledging their qualified privilege and defence of fair comment, which can be invoked when the defendant can prove that the defamatory statement is an expression of opinion on a matter of public interest as opposed to a statement of fact, and that the comment is based on true facts.

6.4 SLAPP Involving Exposure of Wrongdoing by Public Officials

(A) Anti-Corruption Activist Sued by Malaysian Anti-Corruption Commission (MACC) Chief Commissioner & Businessmen for Article Alleging Collusion

In October 2021, Edisi Siasat, an anonymous Twitter account, began posting allegations that Malaysian Anti-Corruption Commission (MACC) Chief Commissioner Azam Baki had purchased millions of shares in a company in 2015. It questioned how a civil servant was able to afford to do so.

³⁷ *Lembaga Kemajuan Tanah Persekutuan & Anor v Dr Tan Kee Kwong* [2012] 4 MLJ 622

On 26 October 2021, anti-corruption activist Lalitha Kunaratnam³⁸ wrote an article titled “Business Ties Among MACC Leadership: How Deep Does It Go?” on the Independent News Service (INS) website. Lalitha cited publicly accessible records to show stock trading activities allegedly of Azam Baki and his brother, Nasir Baki. Lalitha questioned if Azam had declared his millions of shares as required under Section 10 of the Public Officers Regulation (Conduct and Discipline) 1993, which states that all public servants must declare their respective shares, business ownerships or directorships.

The article received widespread public attention. On 14 December 2021, PKR MP Sivarasa Rasiah filed an urgent motion for Parliament to discuss the allegations against Azam, but it was rejected by the Speaker. On 27 December 2021, Prof. Edmund Terence Gomez of Universiti Malaya announced that he was resigning from the MACC Consultation and Corruption Prevention Panel because of inaction over the allegations surrounding the MACC chief.

Azam did not deny the stock transactions but instead asserted that his brother had executed the trades using Azam’s share-trading account.

On 6 January 2022, Lalitha disclosed that the MACC chief’s lawyers had served her with a letter of demand for a public apology, retraction and RM10 million in damages over the allegations she made against him. Besides the civil suit, various police reports were lodged by MACC senior officials against Lalitha, and she is being investigated for offences committed under Section 233 of the Communications and Multimedia Act 1998, as well as Section 505 of the Penal Code for publishing statements “conducting to public mischief”.

The MACC chief subsequently filed a defamation suit on 12 January 2022 against Lalitha. When Lalitha entered her defence, he filed a police report in February 2022 against Lalitha for allegedly making a false claim regarding her status as a researcher with the Centre to Combat Corruption and Cronyism (C4). This was a highly unusual move, as the truth or otherwise of statements made in court documents are usually resolved by the civil courts without criminal investigation interference. Lalitha’s lawyer, Manjeet Singh Dhillon, called the report “bordering on the absurd”, and that it could be found in contempt of court as the matter is still part of an ongoing civil court action. The false claim case is ongoing.

Around February 2022, Lalitha was further slapped with letters of demand by two businessmen, Lim Kok Han and Mohd Aswadi Mat Zain, who asserted that she had defamed them in her articles about alleged business ties with a top anti-graft chief. Both businessmen sought damages of RM20 million and RM10 million respectively, as well as an apology within 14 days. They have yet to file any lawsuits to date.

(B) Online News Media Sued over Coverage of Corruption Trial & Readers’ Comments

In March 2021, former Home Minister and UMNO president Datuk Seri Ahmad Zahid Hamidi filed a defamation lawsuit against online media Malaysiakini, as well as its editor-in-chief, Steven Gan, and a reporter, seeking RM220 million in compensation over news reports about his corruption trial and Malaysiakini readers’ comments about him.

³⁸ Interview conducted with Lalitha Kunaratnam on 11 February 2022.



Ahmad Zahid singled out 22 articles that allegedly contained defamatory elements relating to his corruption trial. He asserted that the articles were false and published with malice, further claiming that the articles and readers' comments had harmed his reputation as an MP responsible for ensuring the people's welfare. He sought a court order for the articles to be immediately removed, as well as injunctions to prevent the publishing of the articles and comments and to prevent the publishing of further defamatory articles and comments on his trial.

The suit is ongoing at the Kuala Lumpur High Court.

7. Anecdotal Responses of HRDs & Journalists To SLAPP

Interviews with HRDs and journalists who have faced SLAPP show that they largely remain steadfast to the causes that they champion, but are nonetheless quite concerned and felt lost during the early stages of being threatened with lawsuits.

An environmental activist asserted that upon receiving a letter of demand, she was very anxious and did not know what to do, as she was not legally trained.³⁹ Nevertheless, upon receiving advice from lawyers and affirmations of solidarity from NGOs in her global network, she regained her composure, and was able to confidently address the lawsuit.

A journalist asserted that she had received adequate training from her company and industry associations about the possibility of defamation lawsuits, as well as what to do upon being threatened with one.⁴⁰ Her company also vowed to protect and defend their employees from such suits should they occur. As such, she was not too perturbed upon receiving legal threats.

There are, however, several other activists who have not taken such legal threats lightly. One activist was in fact barred by her spouse from ever making any statements of public interest, owing to the intense public scrutiny and threats on the family.⁴¹ Some activists found that their family members were not very supportive, and that this has affected them emotionally and psychologically.⁴²

A lawyer representing several HRDs and journalists said that many of his clients often agree to take down the impugned articles because of the pressure of litigation, which often involves hefty costs, time-off from work to attend court proceedings and emotional stress which comes with prolonged legal battles.⁴³

Some lawyers, however, said that one can be strategic in resolving SLAPP.⁴⁴ For example, they could agree to resolve the matter by taking down the offending post while also passing the baton of advocacy to a co-activist so that the cause continues to be championed.

39 Interview held on 16 February 2022.

40 Interview held on 15 and 16 February 2022.

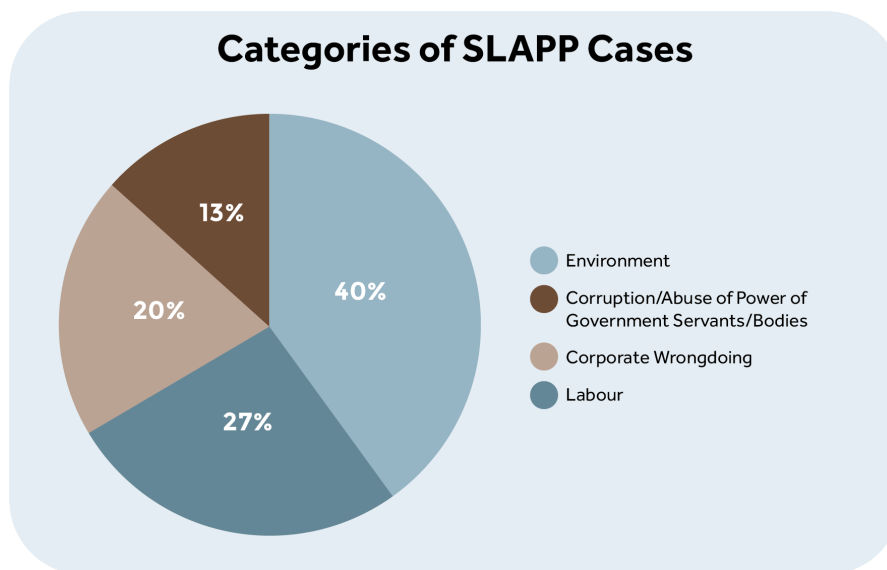
41 Interview held on 22 February 2022.

42 Interview held on 13 February 2022.

43 Interview held on 22 February 2022.

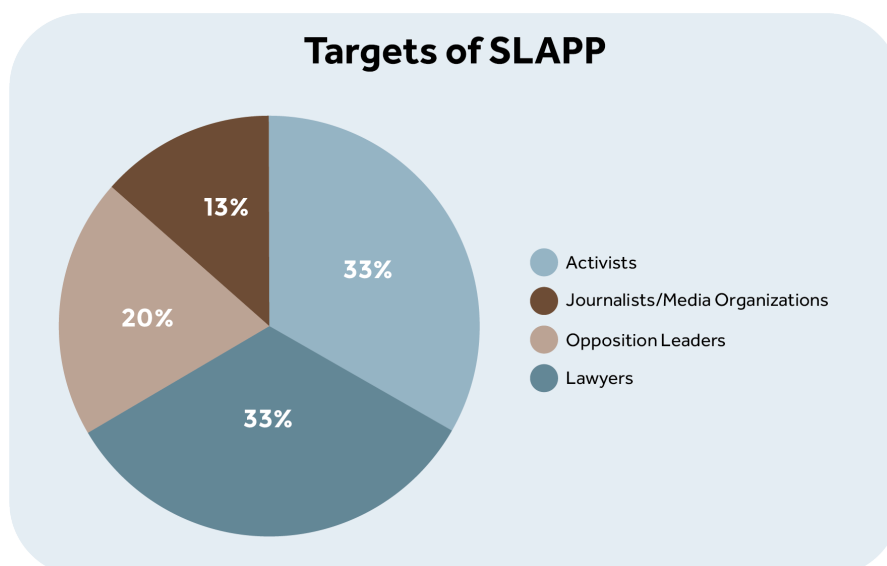
44 Interview held on 10 February 2022.

8. SLAPP in Malaysia—Patterns & Trends



Our research shows that out of the 15 cases studied, the issues most related to SLAPP are the environment (40% or 6 cases), followed by corruption/abuse of power among government servants/bodies (27% or 4 cases), corporate wrongdoing (20% or 3 cases) and labour (13% or 2 cases).⁴⁵

There is an uptick of SLAPP manoeuvres against activists and journalists for highlighting environmental issues in the past few years, which reflects the growing mobilisation of communities and NGOs to combat environmental degradation, as well as the pushback by corporate perpetrators through the legal system. It is predicted that Malaysia will witness more SLAPP centred on environmental issues in the years to come.



Out of the 15 cases studied, activists (33%) and journalists/media organisations (33%) form the bulk of individuals or groups which are SLAPP targets. There is also a growing trend of opposition politicians (20%) being targeted by SLAPP.⁴⁶

⁴⁵ Based on the cases reviewed for the purpose of this research.

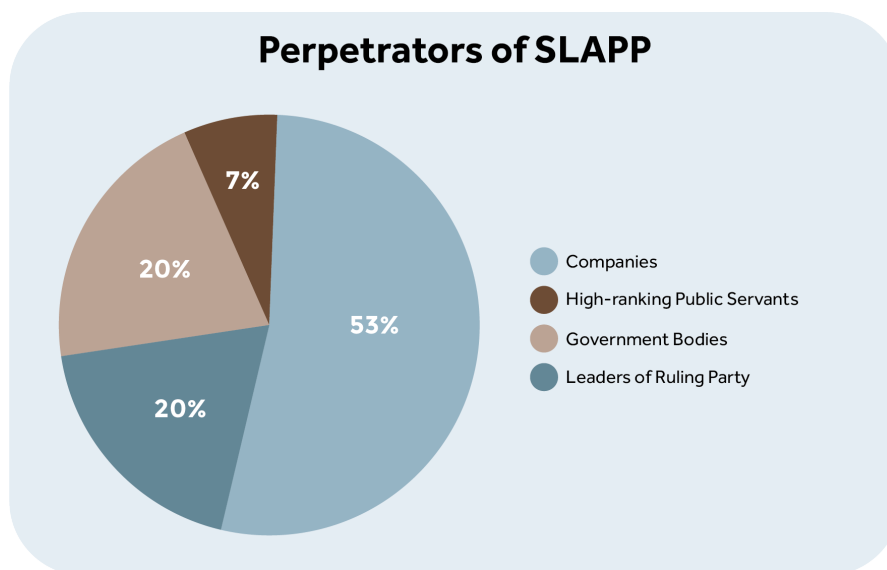
⁴⁶ *Ibid.*



Looking deeper into SLAPP targets in Malaysia, it is observed that they have developed into various nefarious permutations. For instance, the influential have not only mobilised SLAPP against the activist or journalist concerned, but have also targeted their family members, companies or lawyers, as exemplified by the cases of Shariffa Sabrina Syed Akil and Charles Hector. This is predictably done to pile pressure towards activists or journalists from several angles, which illustrates just how far powerful entities are willing to go to ultimately silence their critics.

There are now instances of civil proceedings being compounded with the lodging of police reports and criminal investigations against activists and journalists. An example is the case of Lalitha Kunaratnam, who uncovered the share ownership of the MACC Chief Commissioner, and was later slapped with not only a defamation suit, but also multiple police reports and investigations under criminal legislation.

It is one thing to deal with a civil suit where the worst-case scenario is an order to pay hefty monetary compensations to the plaintiff, but quite another to deal with the tediousness of the criminal justice system with the threat of imprisonment hanging over one's head. For an activist or a journalist to go through this merely for doing their job, as in the case of Lalitha, speaks volumes for the pressing need to curb SLAPP.



Out of the 15 cases studied, SLAPP perpetrators are mostly companies (53%), followed by high-ranking public servants (20%), government bodies (20%) and leaders of the ruling party at the material time (6%).

Beyond the numbers, Malaysia's deep state-business ties are also reflected in several instances in which the names and data of complainants of pressing public interest matters, who wished to remain anonymous, were leaked to the corporations that were complained about. The case of the community leader based in Banting, Selangor, whose personal details were somehow made known to the incinerator operator such that a suit could be filed against him, notwithstanding the community leader's never surfacing publicly on these issues and merely lodging a complaint to the authorities. The use of criminal defamation laws against mere critics of companies and businessperson also suggests close ties between the authorities and big business.

9. Overview of Anti-SLAPP Laws Around the World

(A) The Philippines

In the Philippines, the Supreme Court Rules of Procedure for Environmental Cases contain anti-SLAPP provisions that allow the courts to dismiss SLAPP in relation to environmental cases in a summary hearing before proceeding to a full trial. The provisions form part of the court's recognition that upholding the constitutional right to a balanced and healthful ecology should take into consideration real obstacles to enforcement. The procedure allows the defendant to claim that a case filed against them is a SLAPP. This then triggers a time-bound process in which the plaintiff needs to provide the counter evidence within a non-extendable period of 5 days, and an immediate summary hearing that has to be resolved in 30 days. The plaintiff must prove by preponderance of evidence that the action is not a SLAPP but in fact a valid claim.

However, the lack of jurisprudence on this anti-SLAPP protection has made it difficult for lawyers to successfully invoke the rule.⁴⁷

(B) Indonesia

Article 66 of the Indonesian Law No. 32/2009 on Environmental Protection and Management prohibits the filing of criminal or civil cases against persons “struggling for a right to proper and healthy environment”.

Article 78 of the Indonesian Law No. 18/2013 on the Prevention and Eradication of Forest Destruction protects reporters and informants who provide information under the law, except when such information was provided “without good intention”.

Furthermore, the 2013 Chief Justice of the Supreme Court's Decree No. 36 on the Implementation of Guidelines for Handling Environmental Cases recognises Article 66 of Law No. 32/2009 as an anti-SLAPP provision in that it allows defendants in environmental cases to object to the legal proceeding brought against them.

However, the above provisions lack specificity and elaboration on the extent of protections available against SLAPP lawsuits.

(C) Australian Capital Territory

The purpose of the Australian Capital Territory's Protection of Public Participation Act 2008 is to “protect public participation, and discourage certain civil proceedings that a reasonable person would consider interfere with engagement in public participation”.

Under the Act, a party can be imposed a civil penalty if they start or maintain a proceeding against a defendant in relation to the defendant's conduct, and the court is satisfied that the defendant's conduct is “public participation” and that the proceeding is started or maintained

⁴⁷ *Business & Human Rights Resource Centre. (2020). Defending Defenders: Challenging Malicious Lawsuits in Southeast Asia. https://media.business-humanrights.org/media/documents/files/documents/2020_CLA_Annual_Briefing_SLAPPs_SEA_FINAL.pdf*



against the defendant for an “improper purpose”.

“Public participation” is defined as conduct that a reasonable person would consider is intended to “influence public opinion, or promote or further action by the public, a corporation or government entity in relation to an issue of public interest”. However, “public participation” does not include conduct that:

- (a) contravenes a court order;
- (b) constitutes unlawful vilification;
- (c) causes, or is reasonably likely to cause, physical injury or damage to property;
- (d) constitutes unlawful entry to residential premises;
- (e) constitutes an offence punishable by more than 12 months imprisonment;
- (f) is a communication by certain parties to an industrial dispute;
- (g) constitutes advertising of goods or services for commercial purposes; or
- (h) that incites others to engage in these types of conduct.

On the other hand, a proceeding is started or maintained for an “improper purpose” if its main purpose is “to discourage the defendant (or anyone else) from engaging in public participation”, “to divert the defendant’s resources away from engagement in public participation to the proceeding” or “to punish or disadvantage the defendant for engaging in public participation”.

While this Act provides a civil penalty, it does not enable the defendant to strike out or summarily dispose of a lawsuit upon proving it is a SLAPP. It also does not appear to apply to defamation cases to date. Moreover, this Act has been criticised for the high threshold imposed on the narrow definition of “improper purpose” which fails to recognise the fact that the main problem with SLAPP is that the litigation process itself, regardless of the outcome, constitutes a threat to public participation.⁴⁸

(D) Ontario, Canada

The Ontario Protection of Public Participation Act 2015 is aimed to encourage individuals to express themselves on matters of public interest, promote broad participation in debates on matters of public interest, discourage the use of litigation as a means of unduly limiting expression on matters of public interest, and reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action.

“Expression” is defined as “any communication, regardless of whether it is made verbally or non-verbally, whether it is made publicly or privately, and whether or not it is directed at a person or entity”.

The Act allows the defendant to apply to dismiss a suit filed against him/her “if the person satisfies the judge that the proceeding arises from an expression made by the person that relates to a matter of public interest”.

⁴⁸ G Ogle. (2010). *Anti-SLAPP reform in Australia. (2010) 19(1) Review of European Community & International Environmental Law* 35.

A judge shall not dismiss such proceedings if the plaintiff satisfies that the proceeding has substantial merit, the moving party has no valid defence in the proceeding, and the harm likely to be or have been suffered by the responding party as a result of the moving party's expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.

Such a motion triggers a process whereby it must be heard within 60 days. An appeal shall be heard "as soon as practicable after the appellant perfects the appeal".

The Act also provides some protection to defendants who initiate such a motion, such as preventing costs to be awarded generally against defendants if the motion is dismissed, limiting the cross-examination on any documentary evidence so that it does not exceed a total of 7 hours for all plaintiffs in the proceeding and 7 hours for all defendants.

The Ontario Protection of Public Participation Act 2015 is comprehensive and adequately addresses the main concern of SLAPP, namely the laborious and time-consuming litigation process defendants have to endure.

(E) The Model EU Anti-SLAPP Directive

In 2020, a coalition of NGOs commissioned the authorship of an anti-SLAPP Directive which was intended to provide a basis for the adoption of a future EU instrument.

The Model Directive substitutes the term "SLAPP" with "abusive lawsuit against public participation", and defines the same as "a claim that arises from a defendant's public participation on matters of public interest and which lacks legal merits, is manifestly unfounded, or is characterised by elements indicative of abuse of rights or of process laws, and therefore uses the judicial process for purposes other than genuinely asserting, vindicating or exercising a right". It then continues with a comprehensive definition of what amounts to "public participation" and "matters of public interest".

The Model Directive provides for an early dismissal of such abusive lawsuits against public participation i.e., Courts shall dismiss, in full or in part, the claim in the main proceedings if any of the following grounds is established: (i) the claim does not have, in full or in part, legal merits; (ii) the claim, or part of it, is manifestly unfounded; or (iii) there are elements indicative of an abuse of rights or of process laws.

Article 6(2) of the Model Directive provides an inexhaustive list of matters which a court should take into account in such application for early dismissal:

- (i) the reasonable prospects of success of the claim, also having regard to the compliance with applicable ethics rules and standards of the conduct constituting the object of the claim in the main proceedings;
- (ii) the disproportionate, excessive or unreasonable nature of the claim, or part of it, including but not limited to the quantum of damages claimed by the claimant;
- (iii) the scope of the claim, including whether the objective of the claim is a measure of prior restraint;



- (iv) the nature and seriousness of the harm likely to be or have been suffered by the claimant;
- (v) the litigation tactics deployed by the claimant, including but not limited to the choice of jurisdiction and the use of dilatory strategies;
- (vi) the likely costs of proceedings;
- (vii) the existence of multiple claims asserted by the claimant against the same defendant in relation to similar matters;
- (viii) the imbalance of power between the claimant and the defendant;
- (ix) the financing of litigation by third parties;
- (x) whether the defendant suffered from any forms of intimidation, harassment or threats on the part of the claimant before or during proceedings; and
- (xi) the actual or potential chilling effect on public participation on the concerned matter of public interest.

At the same time, measures are proposed to ensure procedural expediency i.e., for a hearing of such motion to be generally heard within 3 months and for it to be disposed of within 6 months.

A reverse burden of proof is applied, namely that it is incumbent upon the plaintiff to demonstrate the elements supporting a decision not to dismiss.

The Model Directive also envisages that SLAPP litigants who see their claim dismissed are automatically awarded compensation of costs. Conversely, when the motion is denied, the plaintiff may be awarded costs on the motion unless the court does not consider it appropriate. In the event of dismissal, compensatory and non-compensatory damages shall be awarded to the defendant as the courts consider appropriate. Non-compensatory damages may consist in exemplary or punitive damages where the possibility to award such damages is provided for by national law.

The Model Directive also provides for deterrent measures such as penalties upon plaintiffs who file abusive lawsuits against public participation. Penalties are applied in the event of a decision granting dismissal, and such penalties must be “effective, proportionate and dissuasive”. Moreover, where the plaintiff is a legal person (such as a company), penalties can also be imposed to natural persons, who based on a leading position within the legal person or an authority to take decisions on its behalf, acting either individually or as part of an organ of the legal person, is deemed to have taken part in the decision of initiating the claim.

10. Recommendations for Malaysia

(A) Enact anti-SLAPP legislation as a long-term initiative

The Parliament ought to enact an anti-SLAPP law modelled after the Ontario Protection of Public Participation Act 2015 and the Model EU Anti-SLAPP Directive. The latter, in the author’s opinion, best encapsulates the necessary protections for SLAPP targets.

First, such legislation should set out as clearly possible the definition of SLAPP and what does not constitute a SLAPP. It should encompass SLAPP cases across the board and not be limited to environmental cases. In this regard, the definition of “abusive lawsuit against public participation” in the Model EU Anti-SLAPP Directive is instructive.

Second, such legislation should provide the defendant an avenue to summarily dismiss suits filed against them if it can be proven, by prima facie standards, that it is a SLAPP. Upon establishing that, the burden ought to be then shifted to the plaintiff to satisfy the court on a balance of probabilities that it is not a SLAPP lawsuit.

Third, a timeline must be set in order to ensure a speedy disposal of the case—i.e., such summary dismissals must be heard within 60 days from filing, and any appeal against it should be determined as soon as practicable.

Fourth, adequate costs must be awarded to the defendant if the summary application for disposal of the lawsuit succeeds. The law should also provide protection for the defendants for filing such dismissal orders, such as preventing costs from being awarded against them (unless it can be proven that the lawsuit was raised with bad faith).

Fifth, over and above costs, the defendant should be also be entitled to monetary compensation for compensatory and non-compensatory damages if such lawsuits are dismissed.

Sixth, such legislation must provide for a deterrent against plaintiffs initiating SLAPP lawsuits, by imposing civil penalties. Such civil penalties should extend to natural persons who have control over legal persons (companies, societies, etc.).

Lastly, in the event such legislation is passed, members of the judiciary should be made aware and be familiar with the purpose of such anti-SLAPP legislation so that it can be enforced properly.

(B) Strengthen whistle-blower protection laws

Whistle-blower protection laws, if properly applied, can greatly assist HRDs and journalists in highlighting matters of public interest, particularly when it involves disclosing confidential information.

The general position in Malaysia's Whistle-blower Protection Act 2010 is that a whistle-blower shall not be subject to any civil or criminal liability or any liability arising by way of administrative process, including disciplinary action, and no action, claim or demand may be taken or made against the whistle-blower for making a disclosure of improper conduct.

Nevertheless, such protection can be revoked if the whistle-blower discloses the confidential information to the public.⁴⁹ Whistle-blowers can effectively only make disclosures of confidential information to a few select enforcement agencies. This is a problem particularly when there is little trust that such enforcement agencies will seriously investigate the matter or when they lack independence. Consequently, whistle-blowers sometimes have no choice but to avoid reporting to enforcement agencies altogether and/or take the matter directly to the public.

The Whistle-blower Protection Act 2010 should therefore be amended to confer protection on the whistle-blower even where the disclosure was made publicly.⁵⁰

⁴⁹ See Section 8, read with section 11 of the Whistle-blower Protection Act 2010

⁵⁰ There are of course many other proposals that can strengthen the whistle-blower protection framework as a whole, but this requires a wholly different and wide-ranging discussion which is beyond the scope of this research.)



(C) Repeal laws that criminalise defamation & speech

In line with international human rights standards, laws ought not criminalise defamation and speech. Any contentious expression is best resolved through the civil process. We have also seen the propensity of the state using criminal laws in conjunction with civil defamation proceedings to silence HRDs and journalists. As such, Section 499 of the Penal Code, which criminalises defamation, ought to be repealed. The same goes for the Sedition Act 1948, Section 233 of the Communications and Multimedia Act 1998 and all other laws that criminalise speech and expression.

(D) Train judges & public prosecutors on SLAPP

It is highly recommended that workshops be conducted for members of the judiciary and the Attorney General's Chambers on how to identify and respond to SLAPP. As SLAPP is still a novel concept in Malaysia, it would be beneficial if public institutions that are going to adjudicate or prosecute on SLAPP-related matters receive sufficient input on the same. As an example, the European Union and Council of Europe have conducted such trainings to judges and prosecutors in several countries under the Reinforcing Judicial Expertise on Freedom of Expression and the Media in South-East Europe (JUFREX) programme.

(E) Set up a coalition to organise trainings; establish legal, funding & reporting frameworks to help SLAPP targets

Activists, journalists, NGOs and those that are often targeted by SLAPP ought to form a united coalition to counter the legal menace. This coalition can be responsible for the following:

- Conducting trainings and seminars to educate those commonly targeted on the steps needed to be taken when facing a SLAPP lawsuit, as well as the various mechanisms on how to cope legally, financially, mentally and emotionally in facing the same. With adequate preparation and training, SLAPP can be less daunting and defendants and their rights can be better protected.
- Setting up a database of lawyers and experts who are ready at any point in time to assist defendants facing SLAPP lawsuits.
- Setting up a fund to financially assist those deserving to resist SLAPP lawsuits. This is similar to a legal defence fund (LDF) set up by various public interest organisations in the United States, where the objective is to financially assist deserving litigants on legal expenses such as lawyers' fees, court filings, legal advice, etc.
- Setting up a reporting channel where those who feel that they are targeted by SLAPP can report to and seek help from.
- Collecting and compiling data, both qualitative and quantitative, on SLAPP lawsuits so that mapping and assessment can be done more effectively. An annual report would be helpful to update the public on the prevalence of SLAPP in Malaysia.

One successful example is that of CASE, a coalition of NGOs from across Europe, united in recognition of the threat posed by SLAPP to public watchdogs. CASE has a website offering support by its members—e.g., the funding for legal assistance to journalists who are fighting



SLAPP is provided by the Legal Affairs Committee of European Centre for Press and Media Freedom (a non-profit organisation that promotes, protects, and defends the right to a free media and freedom of expression throughout Europe).

(F) Legal aid for SLAPP targets

The Third Schedule of the Legal Aid Act 1971 ought to be amended to allow deserving targets of SLAPP to obtain legal aid from the Director General of Legal Aid. This would greatly assist in alleviating their financial burden of defending against SLAPP.

(G) Foster a culture of non-retaliation & respect for human rights within business organisations

Malaysian and international businesses should also enter into a framework of understanding to ensure that their employees, subsidiaries or partners do not resort to using SLAPP to shut down public participation and critical advocacy. They ought to make clear that they expect their business partners not to bring SLAPP with the intention of silencing critics, continuously monitor their use and act consistently on their findings. Companies should commit to a clear policy of non-retaliation against HRDs and journalists who raise concerns about their business practices. Companies should adopt a zero-tolerance approach on reprisals. There should also be robust whistle-blower channels and grievance mechanisms for employees or the public to highlight suspected corporate wrongdoing, to allow for proper investigation to take place.

(H) Relook at professional standards governing lawyers

Law firms should undertake rigorous due diligence to ensure that the cases they take on are not SLAPP and to refrain from representing SLAPP perpetrators.

Lawyers generally should engage in discussions regarding public policy on this issue, whenever appropriate, with the support of local civil society. Such efforts include raising anti-SLAPP legislation with government bodies, and impressing on them its importance.

The Malaysian Bar should amend the Legal Profession (Practice and Etiquette) Rules 1978 to prohibit SLAPP, stipulating that lawyers who use such abusive tactic face sanctions and penalties.

(I) Incorporate anti-SLAPP protections in the National Action Plan on Business & Human Rights

The Government is slated to launch, by 2023, the National Action Plan on Business and Human Rights (NAPBHR). The NAPBHR is led by the Legal Affairs Division, Prime Minister's Department (BHEUU), and supported by the Human Rights Commission of Malaysia (SUHAKAM) and the United Nations Development Programme (UNDP). Anti-SLAPP laws, as well as the protections that the Government is able to accord for SLAPP targets, ought to be discussed and incorporated into the NAPBHR.



11. Conclusion

SLAPP is left unchecked and the status quo prevails, the chilling effect on free speech would worsen and gradually, fewer people would be willing to speak up. Malaysia cannot solely rely on the courage of brave men and women who often put their lives, liberty, privacy and jobs on the line. There must be laws and an administrative framework to encourage critical discourse befitting the deliberative democracy that is ours. Otherwise, this nascent democracy and the integrity of its corporate governance will be in grave threat.

