

**Mr. Somsak Thepsuthin**

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**Mr. Ruangsak Suwaree**

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20 March 2020

Dear Mr. Somsak Thepsuthin and  
Mr. Ruangsak Suwaree,

**Re: Concerns on the existing legal frameworks that are designated to prevent strategic lawsuit against public participation (SLAPP lawsuits)**

As a follow up to our letter dated 15 March 2019 regarding recommendations on the draft National Action Plan on Business and Human Rights (NAP),<sup>1</sup> we write to you concerning the application of Articles 161/1 and 165/2 of the Criminal Procedure Code and Article 21 of the Public Prosecution Organ and Public Prosecutors Act B.E. 2553 (2010), which were introduced as measures to prevent harassment through the legal process against human rights defenders.

As you are aware, Articles 161/1<sup>2</sup> and 165/2<sup>3</sup> entered into force on 20 February 2019 and 21 March 2019 respectively. Pursuant to Thailand's First National Action Plan on Business and Human Rights (2019 - 2022), these provisions were introduced to curtail SLAPP lawsuits or similar forms of harassment through the legal process against any individuals, including human rights defenders.<sup>4</sup> The NAP also refers to the power of a public prosecutor under Article 21 of the Public Prosecution Organ and Public Prosecutors Act B.E. 2553 (2010) as another measure to prevent SLAPP lawsuits.

Given that Thailand's Ministry of Justice is tasked by NAP to conduct "study on the guidelines for development of laws, regulations or measures to prevent SLAPP,"<sup>5</sup> we would like to express our views that the above noted legal frameworks, as they currently stand, are inadequate to prevent harassment through legal processes against individuals who, in good faith, seeking to bring to light human rights concerns. In this letter, we also wish to make recommendations to further strengthen these provisions and their application. Among others, we recommended the Ministry of Justice to develop a comprehensive stand-alone law, or the amendment of the Civil Procedure Code and the Criminal Procedure Code, which allow for the striking out of cases on the basis that they are SLAPP lawsuits, in order to end harassment through the administration

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<sup>1</sup> ICJ, 'Thailand: ICJ and HRLA express concern about inadequate protections for human rights defenders in draft National Action Plan on Business and Human Rights', 15 March 2019, available at: <https://www.icj.org/thailand-icj-and-hrla-express-concern-about-inadequate-protections-for-human-rights-defenders-in-draft-national-action-plan-on-business-and-human-rights/>

<sup>2</sup> Available at: [http://web.senate.go.th/bill/bk\\_data/533-6.pdf](http://web.senate.go.th/bill/bk_data/533-6.pdf)

<sup>3</sup> Available at: [http://web.senate.go.th/bill/bk\\_data/535-6.pdf](http://web.senate.go.th/bill/bk_data/535-6.pdf)

<sup>4</sup> Thailand's National Action Plan on Business and Human Rights (2019 - 2022) (NAP), at 105-106, available at: <https://mk0globalnapshvllfq4.kinstacdn.com/wp-content/uploads/2017/11/nap-thailand-en.pdf>

<sup>5</sup> NAP, at 111

of justice, while ensuring the protection of the rights to protect the free exercise of human rights and fundamental freedoms, to access to justice and the right to a fair trial.

## **Background**

SLAPPs (Strategic lawsuit against public participation) are lawsuits undertaken with the principal objective of curtailing or deterring public criticism or opposition to certain activities of the entity of those initiating the legal action. Human rights defenders, for example, are typical targets of SLAPPs. SLAPP lawsuits against any individuals typically has a "chilling effect" on the exercise of freedom of expression and other human rights and fundamental freedoms which Thailand is bound to protect pursuant to its international legal obligations.

These obligations include those contained in the International Covenant on Civil and Political Rights (ICCPR), to which Thailand acceded in 1996, that requires States that are parties to it to guarantee a range of human rights and fundamental freedoms. These include, among many others, freedom of opinion and expression, including the right to seek, receive and impart information (article 19); freedom of peaceful assembly (article 21); freedom of association (article 22); and the right to take part in the conduct of public affairs (article 25).

Thailand also has an obligation under the ICCPR to ensure that persons are protected from any acts by private persons or entities that would impair the enjoyment of human rights under the Covenant<sup>6</sup>, including the fundamental freedoms indicated above.<sup>7</sup> This protective obligation is affirmed by the Guiding Principles on Business and Human Rights (UNGPs), under the first pillar, obligation to protect.<sup>8</sup>

The rights to free expression, assembly, association and to freedom of information are also guaranteed by the Constitution of the Kingdom of Thailand B.E. 2560 (2017). Section 34 enshrines a person's right to "enjoy the liberty to express opinions, make speeches, write, print, publicize and express by other means;" Section 36 ensures "a person shall enjoy the liberty of communication by any means;" Section 41 ensures "a person and a community shall have the right to... [among other things]...present a petition to a State agency and be informed of the result of its consideration expeditiously;" Section 42 ensures "a person shall enjoy the liberty to unite and form an association, co-operative, union, organization, community, or any other group"; and Section 44 ensures "a person shall enjoy the liberty to assemble peacefully and without arms."

Thailand may restrict these fundamental freedoms only in a strictly limited manner in accordance with the provisions of the ICCPR and Thailand's Constitution. Such restrictions must also meet the conditions of legality; must serve as one of the legitimate purposes expressly

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<sup>6</sup>Human Rights Committee, 'General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant', U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), para.3, available at: <https://www.refworld.org/docid/478b26ae2.html>. The UN Human Rights Committee, the supervisory body of independent experts established by the ICCPR, addresses in the General Comment 31 that "[T]he positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities"

<sup>7</sup> See, e.g., Human Rights Committee, 'General comment no. 34: Article 19, Freedoms of opinion and expression', 12 September 2011, CCPR/C/GC/34, para. 7, available at: <http://www.refworld.org/docid/4ed34b562.html>.

<sup>8</sup> Office of the High Commissioner for Human Rights (OHCHR), 'Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework' (UNGPs), 2011, at 3-13, available at: [https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr\\_en.pdf](https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf)

provided for in the ICCPR; and must be necessary, and proportionate to that purpose.<sup>9</sup> In other words, any restrictions must be (i) provided by law, which is clear and accessible to everyone<sup>10</sup> and formulated with sufficient precision to enable an individual to regulate their conduct;<sup>11</sup> (ii) undertaken for one of the purposes recognized as legitimate under the terms of the ICCPR and Thailand's Constitution; (iii) established as necessary for one of the recognized legitimate purposes; and (iv) established to be the least restrictive and proportionate means to achieve the purported aim.<sup>12</sup>

Within Thailand's legal framework, criminal defamation (Articles 326-328 of the Thai Criminal Code), Article 14 of the Computer-Related Crime Act B.E.2550 (2007), Article 116 of the Thai Criminal Code, a sedition-like offence, and the Public Assembly Act B.E. 2558 (2015), have reportedly been wielded against individuals for bringing to light human rights concerns and information in the interest of the public. Such concerns were similarly expressed in April 2017 by the UN Human Rights Committee in its review of Thailand's periodic report,<sup>13</sup> and in April 2018 by the U.N. Working Group on Business and Human Rights during their official visit to Thailand.<sup>14</sup>

In the past, the ICJ has expressed concern that the restrictions of the right to freedom of expression, through crime of defamation as set out in Thailand's Penal Code (sections 326, 328, 329 and 330), and Article 14 of the Computer-Related Crime Act, do not accord with Thailand's international human rights law obligations under the ICCPR. The deficiencies in this respect include their vague and overbroad provisions, so that reasonable persons cannot know in advance how to regulate their conduct to conform with the law and so avoid criminal liability, and the provision of harsh penalties such as imprisonment, which is not compatible with the requirements of necessity and proportionality.<sup>15</sup>

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<sup>9</sup> General comment no. 34, especially paras. 21-36; See also, UN Human Rights Council, 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue', 4 June 2012, A/HRC/20/17, para. 64 and 81, available at: <http://www.refworld.org/docid/5008134b2.html>.

<sup>10</sup> Ibid

<sup>11</sup> General Comment No. 34, para 25.

<sup>12</sup> Ibid.

<sup>13</sup> The UN Human Rights Committee expressed concern in its review of Thailand's periodic report at "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: Human Rights Committee, 'Concluding Observations on the Second Periodic Report of Thailand', 25 April 2017, CCPR/C/THA/CO/2, paras. 35-36, available at: [https://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fTHA%2fCO%2f2&Lang=en](https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fTHA%2fCO%2f2&Lang=en).

<sup>14</sup> During its official visit to Thailand in April 2018, the U.N. 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, civil society organizations and human rights defenders." 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', 4 April 2018, available at: <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22915&LangID=E>

<sup>15</sup>For example, ICJ, 'Thailand: ICJ and LRWC submit amicus in criminal defamation proceedings against human rights defenders Nan Win and Sutharee Wannasiri', 25 January 2019, available at: <https://www.icj.org/thailand-icj-and-lrwc-submit-amicus-in-criminal-defamation-proceedings-against-human-rights-defenders-nan-win-and-sutharee-wannasiri/>; ICJ, 'Thailand: amicus in criminal defamation proceedings against human rights defender Andy Hall', 26 July 2016, available at: <https://www.icj.org/thailand-amicus-in-criminal-defamation-proceedings-against-human-rights-defender-andy-hall/>

## **Article 161/1 and 165/2 of Thailand's Criminal Procedure Code**

Based on the First National Action Plan on Business and Human Rights, we understand that the reasons for introducing Article 161/1 and 165/2 was to end SLAPP lawsuits or similar forms of harassment through the legal process against any individuals, including human rights defenders, and to guarantee the enjoyment of freedom of opinion and expression in all their forms.<sup>16</sup>

On 20 February 2019, after published in the government gazette, Article 165/2 of the Criminal Procedure Code entered into force.<sup>17</sup> The law provides that:

"During the preliminary hearing,<sup>18</sup> 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 in 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."

On 21 March 2019, after published in the government gazette, Article 161/1 of the Criminal Procedure Code entered into force.<sup>19</sup> Article 161/1 provides that:

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

According to the preamble of the Act Amending the Criminal Procedure Code (No. 34) B.E. 2562 (2019), the amendment of Article 161/1 was intended to "prevent the filing of a lawsuit in bad faith which will violate the rights and freedoms of others".<sup>20</sup> The reasons for introducing Article 161/1 given in the proposal for the amendment of the Criminal Procedure Code in a report by Mr. Mahannop Dejvitak and other members of the National Legislative Assembly was that: "[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 the alleged victim will not present themselves at court, causing difficulties for the defence in the preparation of their arguments."<sup>21</sup>

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<sup>16</sup> NAP, at 105-106

<sup>17</sup> Available at: [http://web.senate.go.th/bill/bk\\_data/535-6.pdf](http://web.senate.go.th/bill/bk_data/535-6.pdf)

<sup>18</sup> Subject to section 162 of the Criminal Procedure Code, in criminal cases, if it is a case filed by a private complainant, a preliminary hearing shall be opened. However, if it is a case filed by a public prosecutor, a preliminary hearing is not necessary.

<sup>19</sup> Available at: [http://web.senate.go.th/bill/bk\\_data/533-6.pdf](http://web.senate.go.th/bill/bk_data/533-6.pdf)

<sup>20</sup> Available at: [http://web.senate.go.th/bill/bk\\_data/533-6.pdf](http://web.senate.go.th/bill/bk_data/533-6.pdf)

<sup>21</sup> Mahannop Dejvitak et al., 'Rationales and Principles attached to Draft Amending Criminal Procedure Act, submitted to the Chair of the National Legislative Assembly', 22 June 2017, available at: [http://web.senate.go.th/bill/bk\\_data/429-1.pdf](http://web.senate.go.th/bill/bk_data/429-1.pdf); See also, NAP, at 105.

Judge Surasot Sangwirotpat, Judge of the Office of the President of the Supreme Court, in a video lecture posted on the official Facebook page of the Court of Justice (Sue-Sarn) had provided examples of cases that should be eligible for the application of Article 161/1 were given by. These included “defamation cases that are submitted to a distantly located court from the location where the plaintiff and the defendant are resided,” and “SLAPP cases where environmental NGOs bring to light allegations [of rights violations] but, instead, are prosecuted by companies”.<sup>22</sup>

The NAP also referred to Article 161/1 and 165/2 of the Criminal Procedure Code as “another tool to help protecting human rights defenders from being falsely prosecuted,” and “to end lawsuits to harass people, which includes the prosecution of human rights defenders”<sup>23</sup>

### **Concerns on Article 165/2 of the Criminal Procedure Code**

We welcome the introduction of Article 165/2, which protects the rights to access to justice, including the right of the defence to submit and test evidence, as part of the right to a fair trial, protected under ICCPR article 14<sup>24</sup>, at the preliminary hearing stage. This can assist the court in determining where a case lacks merit.

This Article, in itself, however, does not adequately protect individuals against SLAPPs. SLAPP lawsuits are not limited only to criminal cases filed by a private complainant, – e.g. an individual or private entity, – but can also be launched through civil cases or criminal cases filed by a public prosecutor. However, as Article 165/2 applies at the preliminary hearing stage, Thai courts are obliged to open a preliminary hearing only for cases that are filed by private complainants. According to section 162(2) of the Criminal Procedure Code, in instances where criminal case is filed by a public prosecutor, a preliminary hearing is not necessary. However, the court may decide, *proprio motu*, to order open such preliminary hearing.

A similar guarantee as stipulated in Article 165/2 does not exist in Thailand’s Civil Procedure Code.

### Recommendations

In light of the above stated concerns, the ICJ offers the following recommendations, towards ensuring broader protection against harassment through the legal process and SLAPP:

1. Encouraging the court to actively assess the necessity and exercise their power in article 162(2) of the Criminal Procedure Code, in appropriate cases, to order a preliminary hearing to be conducted in case of a public prosecution. When the court opens a preliminary trial, Article 165/2 could be exercised to prevent cases of legal harassment which constitute a violation of human rights and fundamental freedoms protected under Thailand’s Constitution and international human rights obligations.
2. There should also be a similar hearing in civil cases, which allow for the striking out of cases on the basis that they are SLAPP lawsuits, to mitigate its impact if the situation so required. A similar guarantee as stipulated in Article 165/2 should be provided to afford both parties the right to make submissions to provide evidence in support of their argument before the court.

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<sup>22</sup> Available at: [https://m.facebook.com/story.php?story\\_fbid=315384529167952&id=121882511847085](https://m.facebook.com/story.php?story_fbid=315384529167952&id=121882511847085)

<sup>23</sup> NAP, at 105-106.

<sup>24</sup> See Human Rights Committee, ‘General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial’, 23 August 2007, CCPR/C/GC/32, para. 13, available at: <https://www.refworld.org/docid/478b2b2f2.html>

3. In any event, the court should make their utmost endeavor to ensure that all preliminary trials and hearings are conducted without undue delay, in compliance with Article 14(3)(c) of the ICCPR, to best mitigate the effects and burdens on victim of SLAPP lawsuits.

### **Concerns on Article 161/1 of the Criminal Procedure Code**

The ICJ welcomes the efforts of the Court of Justice to institute legal protections against SLAPP by introducing Article 161/1.

The ICJ has no knowledge of Article 161/1 having been applied to strike out any SLAPP cases. The defence lawyers the ICJ consulted also indicated that where the lawyer submitted to the court requests for an application of Article 161/1, such requests were sometime not considered by the court.

For example, the practices of farming company Thammakaset Co., Ltd. who brought lawsuits against 21 individuals who had expressed views and conducted advocacy on or released information relating to labour rights violations alleged to have been committed by the Company,<sup>25</sup> were identified by UN experts as "SLAPP cases" in their statement dated 12 March 2020.<sup>26</sup> The ICJ was informed by lawyers in at least four cases against three human right defenders and former employees of the Company that they had submitted to the court requests for an application of Article 161/1. In the case against the Company's former employees, the ICJ received information from their lawyer that apart from acknowledging the receipt of such request, the courts did not refer to such request again, including in the decision of the preliminary examination and in their final judgment.<sup>27</sup> In contrast, in other three cases against three women human rights defenders, after lawyers submitted to the court requests for an application of Article 161/1, the court looked into the requests and decided not to dismiss them, and opened preliminary hearings.<sup>28</sup>

In addition, we would like to reinstate our concerns as set out in our letter dated 15 March 2019 on the following issues:

First, Article 161/1 applies when the complainant has filed a lawsuit in "bad faith", or "distorted facts in order to harass or take undue advantage of a defendant", or "to procure any advantage to which the complainant is not rightfully entitled to". The article does not provide any clear definition for "bad faith". It also fails to not clarify that the purpose of the amendment is to protect the free exercise of fundamental freedoms, protected under Thailand's Constitution and Thailand's international legal obligations. In this respect, it is crucial that terms such as "bad faith" be specifically defined. There should also be an explicit prohibition on filing of lawsuits to harass or intimidate individuals and entities who are solely exercising their human rights and fundamental freedoms.

Secondly, Article 161/1 allows the case to be entirely up to judicial discretion, as the court may do this *suo moto*. In this respect, we recommend that both parties be expressly afforded the right to make submissions to provide evidence in support of their argument before the court, to guide the court's decision in the matter.

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<sup>25</sup> According to the International Federation for Human Rights (FIDH), Thammakaset has filed a total of 35 criminal and civil cases against 21 defendants, including human rights defenders, workers, and journalists, for alleged defamation of the company. International Federation for Human Rights, 'Thailand: Thammakaset Watch', 13 February 2020, available at: <https://www.fidh.org/en/issues/human-rights-defenders/thailand-thammakaset-watch#ancre1>

<sup>26</sup> OHCHR, 'Thailand: judicial system abused by business to silence human rights defenders – UN experts', 12 March 2020, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25714&LangID=E>

<sup>27</sup> Thammakaset Co. Ltd. v. Ms. Ka Thway Soe *et al* (Black Case Number Aor. 667/2562).

<sup>28</sup> Thammakaset Co. Ltd. v. Ms. Puttanee Kangkun (Black Case Number Aor. 2876/2562); Thammakaset Co. Ltd. v. Ms. Angkhana Neelaphaijit (Black Case Number Aor. 2492/2562); Thammakaset Co. Ltd. v. Ms. Ngamsuk Ruttanasatian (Black Case Number Aor. 1133/2562)

Thirdly, similar to Article 165/2, Article 161/1 prevents only private criminal complainants from filing SLAPP criminal lawsuits, and not civil complaints or public prosecutions.

Fourthly, while we consider that the general right to appeal or judicially review the court's decision would apply to this question, we recommend that this right to appeal the court's decision should be expressly guaranteed under Article 161/1; i.e., that the question be subject to judicial appellate review, including upon the issuance of an order not to dismiss the case.

Finally, paragraph 2 of Article 161/1 may result in the curtailment of an individual's rights to access to justice and a fair trial as it prohibits complainants who are determined to have intentionally, and without appropriate reason, violated a final court's orders or judgments in another case from filing a lawsuit. An individual's right to access to justice and to file a lawsuit should not be negatively impacted upon by a decision in another case which has no legal effect or bearing on the case he or she wishes to file. The paragraph is also vague and unclear about what constitute "any appropriate reasons" which can prevent a complainant from filing a lawsuit.

### Recommendations

In light of above stated concerns, the ICJ offers the following recommendations towards ensuring broader protection against harassment through the legal process and SLAPP:

1. Article 161/1 of the Criminal Procedure Code, as it stands, should only be applied on an exceptional basis, in strict accordance with the principles of necessity and proportionality, with due process guarantees applicable to both complainant and defendant. In fact, it should only be used to strike out frivolous or vexatious litigation brought before the court, including against cases that were submitted to a distantly located court so that the defendant would face difficulties in travelling to defend themselves.
2. We recommend that Article 161/1 paragraph 2 be repealed to protect and guarantee the rights of individuals to access to justice and fair trial.
3. In order to ensure the protection of the rights to protect the free exercise of human rights and fundamental freedoms, to access to justice and the right to a fair trial, the ICJ recommends that the Ministry of Justice to develop a comprehensive stand-alone law, or the amendment of the Civil Procedure Code and the Criminal Procedure Code to:
  - 3.1 allow for the striking out of SLAPP cases at the earliest occasion, with due process guarantees applicable to both complainant and defendant;
  - 3.2 allow for a preliminary hearing to be conducted without undue delay in both civil and criminal cases, including cases brought by public prosecutors or private individuals;
  - 3.3 be applied, *inter alia*, on SLAPP lawsuits, to protect individuals who are solely exercising their human rights and fundamental freedoms, in manner that is consistent with Thailand's Constitution and its international human rights obligations;<sup>29</sup>

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<sup>29</sup> For example, Section 425.16(e) of the Code of Civil Procedure of the State of California, one of the examples of an anti-SLAPP law, enumerates examples as acts which considered as the exercise of legitimate rights. It states that: "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

- 3.4 expressly guarantee the right to appeal the court's decision; and
- 3.5 provide for effective remedies for persons negatively affected by SLAPP lawsuits.

**Article 21 of the Public Prosecution Organ and Public Prosecutors Act B.E. 2553 (2010)**

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. The law provides that:

*"Should a public prosecutor find that a criminal prosecution will be of no use to the general public, will affect the national safety or security, or will impair significant interest of the State, he shall refer his opinion to the Attorney-General who may then render an order of non-prosecution."*

Noting that SLAPP lawsuits are frequently filed against individuals who are solely exercising their fundamental freedoms, these 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 general power as set out under articles 140 to 143 of 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. It, therefore, should not always be necessary that public prosecutors use the abovementioned article to dismiss SLAPP lawsuits.

A public prosecutor whom the ICJ consulted also explained that Article 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.

Recommendation

In light of above stated concerns, the ICJ recommends adopting 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.

We remain at your disposal for any further information or clarifications you may require.

Yours faithfully,



(Frederick Rawski)  
Director, Asia and the Pacific Programme  
International Commission of Jurists

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connection with an issue of public interest, or (4) 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.



cc.

**President of the Supreme Court**

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