Combating SLAPPs in France: a challenge to overcome

Keynote

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Combating SLAPPs in France: a challenge to overcome

France

Outline

1. Presentation of the French national human rights intitution: the CNCDH
1. Definition and overview of strategic lawsuits against public participation (SLAPPs)
1. Existing tools and main recommendations
1. Conclusive remarks

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1. Presentation of the French national human rights institution : the CNCDH

Missions of the CNCDH

- Advising public authorities : enlighten public decision on human rights and international humanitarian law matters
- Controlling that the State complies with its international obligations on human rights and international humanitarian law
- Human rights education

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1. Presentation of the French national human rights institution : the CNCDH

Productions of the CNCDH

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2. Definition and overview of SLAPPs

➢ Definition of the European directive:

Abusive court proceedings against public participation: court proceedings which are not brought to genuinely assert or exercise a right, but have as their main purpose the prevention, restriction or penalisation of public participation, frequently exploiting an imbalance of power between the parties, and which pursue unfounded claims.

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2. Definition and overview of SLAPPs

➢ Definition suggested by the CNCDH:

Abusive court proceedings against public participation : court proceedings which are not brought to genuinely assert or exercise a right, but have as their main purpose the prevention, restriction or penalisation of public participation, frequently exploiting an imbalance of power between the parties, and which pursue unfounded claims, intend to harass or intimidate the target.

2. Definition and overview of SLAPPs

➢ **Indicators of the European directive**

- the disproportionate, excessive or unreasonable nature of the claim or part thereof, including the excessive dispute value;
- the existence of multiple proceedings initiated by the claimant or associated parties in relation to similar matters;
- intimidation, harassment or threats on the part of the claimant or the claimant's representatives, before or during the proceedings, as well as similar conduct by the claimant in similar or concurrent cases;
- the use in bad faith of procedural tactics, such as delaying proceedings, fraudulent or abusive forum shopping or the discontinuation of cases at a later stage of the proceedings in bad faith

2. Definition and overview of SLAPPs

➢ **Indicators added by the CNCDH** *(cf. Council of Europe Recommendation)*

- attempt of exploitation by the claimant of a power imbalance, its financial advantage or its political or social influence, to put pressure on the defendant ;
- arguments of the claimant partially or totally without grounds ;
- abuse of law or procedure by the court proceedings brought by the claimant ;
- going after physical persons rather than organisations responsible for the disputed act ;
- court proceedings accompanied by a public relations offensive aiming to harass, intimidate or discredit persons participating to the public debate, or to divert the attention to the real issue at stake.

2. Definition and overview of SLAPPs

➢ **Grounds used by claimants**

- Criminal courts: defamation, slander, forgery and use of forged documents, violation of the secrecy of judicial inquiries, apology of terrorism, etc.
- Civil and commercial courts: disparagement, violation of trade secrets, monetary and financial code offenses, etc.

➢ **Claimants profiles**

Legal persons: from SMEs to muntinational companies
Natural persons: public persons, local or national politicians, businesmmen and businesswomen, etc.

➢ **Victims profiles**

Human rights defenders, journalists and media, academics, trade unionists or victims of gender-based and sexual violence, etc.

2. Definition and overview of SLAPPs: Case studies

SHERPA v. VINCI

- **Origin of SLAPPs** : complaint brought by Sherpa against Vinci Construction Grands Projets and its Qatari subsidiary, based on forced labour and servitude claims
- **Persons pursued:** Sherpa and two of its employees
- **Grounds used**: defamation and violation of the right to be presumed innocent (emergency interim proceedings and main proceedings)
- **Claims**: 350 000 euros in damages + 10 000 euros for publication fees by newspaper + 10 000 euros fine.

2. Definition and overview of SLAPPs: Case studies

GREENPEACE v. TOTAL

- **Origin of SLAPPs** : publication of a report by Greepeace France evaluating that the real greenhouse gas emissions of TotalEnergies were four times higher than the multinational communication
- **Persons pursued:** Greenpeace France
- **Grounds used**: dissemination of misleading information to stock markets
- **Claims**: removal of the disputed report and all related publication under a 2 000 euros/day penalty + 1 euro of symbolic damages + 50 000 euros of legal fees

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3. Existing tools and main recommendations

➢ **Civil fines for abusive or dilatory proceeding**

- Article 32-1 of the French code of civil procedure: **10 000 euros**
- Article 177-2 of the French code of criminal procedure (instruction judge) and article 392-1 of the same code (criminal court): **15 000 euros**
- Article 152-8 of the French commercial code: **20% of the damages claimed or 60 000 euros**

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3. Existing tools and main recommendations

➢ Damages

- Article 1240 French civil code: abusive proceedings manifested by the absence of legal basis, its malicious intent, an intent to harm, obvious bad faith or the multiplication of proceedings initiated

- Article 91 of the French code of criminal procedure: dismissed case

- Article 472 of the French code of criminal procedure: in case of acquittal when proceedings have been initiated by direct summons or a complaint filed by the plaintiff

(Cour de cassation, criminal chamber, 11 July 2018, n°18-90.017)

3. Existing tools and main recommendations

➢ Main recommendations

- **To define and increase the scope of the legal framework:** introducing a definition of SLAPPs and protecting victims before all courts
- **To establish an efficient protection system:** guaranteeing the financial protection of the victims, dissuading abusive claimants and enabling damages to be up to the harm suffered
- **To prevent and monitor the phenomenon**: training of judicial actors and set up a statistic monitoring to understand better and prevent SLAPPs

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4. Conclusive remarks

« Public debate is one of the pillars of democracy. Protecting it, guaranteeing that any individual or legal entity can express their views and participate in sharing information of public interest, is a major responsibility of the State. »

Jean-Marie Burguburu, President of the CNCDH

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Thank you for you attention!

cncdh.fr

Canada
A World Leader in Anti-SLAPP Law

James L. Turk
Director, Centre for Free Expression

Toronto Metropolitan University

Centre for Free Expression
at The Creative School

Canada: A World Leader in Anti-SLAPP law

CENTRE FOR
FREE EXPRESSION

2001

From Geology.com

Canada: A World Leader in Anti-SLAPP law

CENTRE FOR
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2009

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CENTRE FOR
FREE EXPRESSION

2015

From Geology.com

Ontario

Protection of Public Participation Act, 2015, S.O. 2015, c. 23

CENTRE FOR FREE EXPRESSION

The Act:

- Applies to all proceedings arising out of expression made on a matter of public interest or public concern

Ontario

Protection of Public Participation Act, 2015, S.O. 2015, c. 23

CENTRE FOR FREE EXPRESSION

Definition of “expression”

“‘expression’ means 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.”

Ontario

Protection of Public Participation Act, 2015, S.O. 2015, c. 23

CENTRE FOR FREE EXPRESSION

The Act:

- Applies to all proceedings arising out of expression made on a matter of public interest or public concern
- Under the Act, a defendant can bring a motion to dismiss a SLAPP at the earliest stages of the litigation process

Ontario

Protection of Public Participation Act, 2015, S.O. 2015, c. 23

CENTRE FOR FREE EXPRESSION

The Act:

- Applies to all proceedings arising out of expression made on a matter of public interest or public concern
- Under the Act, a defendant can bring a motion to dismiss a SLAPP at the earliest stages of the litigation process
- The motion is to be heard within 60 days

Ontario

Protection of Public Participation Act, 2015, S.O. 2015, c. 23

CENTRE FOR FREE EXPRESSION

- Defendant must satisfy the judge the matter is of public interest
- If successful, the onus shifts to the plaintiff who must show:
  1.(a) The lawsuit has substantial merit, and
  (b) The defendant has no valid defence, and
  2. Public interest in letting the case proceed is greater than it is in protecting defendant's freedom of expression

If plaintiff cannot do 1(a), 1(b), and 2, the motion to dismiss is granted and the lawsuit is ended

Ontario

Protection of Public Participation Act, 2015, S.O. 2015, c. 23

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If dismissed

- Defendant is eligible for full recovery of their legal costs (not the normal 40-60%)
- If judge feels lawsuit was brought in bad faith or for improper purpose, the judge may award the defendant additional damages

Ontario

Protection of Public Participation Act, 2015, S.O. 2015, c. 23

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Further protections for the defendant

- Once motion is filed, the plaintiff is prohibited from amending their proceedings in the original lawsuit
  - (a) to prevent or avoid it being dismissed; or
  - (b) if the proceeding is dismissed, in order to continue the proceeding.
- If defendant is not successful in getting the motion dismissed, they are not subject to costs
- Defendant has right to an immediate appeal to be heard “as soon as practicable.”

Canada: A World Leader in Anti-SLAPP law

CENTRE FOR FREE EXPRESSION

2019

From Geology.com

Ranking of anti-SLAPP Laws by Score and Category of Effectiveness (2023)

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	Jurisdiction	Score
1	Ontario	75
1	BC	75
3	New York	74
4	Texas	73
5	California	70
6	Kentucky	68
7	Oklahoma	68
8	Utah	68
9	Kansas	67
10	Georgia	66
11	Oregon	66
12	Vermont	66
13	Hawaii	66
14	Tennessee	64

	Jurisdiction	Score
15	Washington	62
16	Illinois	61
17	Nevada	60
18	Colorado	58
19	D.C.	58
20	Connecticut	57
21	Massachusetts	56
22	Maine	55
23	Louisiana	52
24	Quebec	49
25	Indiana	47
26	Rhode Island	46

27	Missouri	42
28	Arkansas	38.5
29	Arizona	34.5
30	New Mexico	33

31	Florida	31
32	Delaware	27.5
33	Nebraska	25
34	Maryland	23
35	Australia	19
36	Virginia	16
37	Pennsylvania	14

CFE Report with details on each law available at:
https://cfe.torontomu.ca/publications/global-anti-slapp-ratings-assessing-strength-anti-slapp-laws

If you have questions after this session or want more information, please contact me:

CENTRE FOR FREE EXPRESSION

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SLAPPs in Latin America

Deep dive in Mexico

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Business & Human Rights Resource Centre

SLAPPs in Latin America

Deep dive in Mexico

Business & Human Rights Resource Centre's methodology

- Since 2015, the Business & Human Rights Resource Centre has tracked more than **6300** attacks against HRDs. The attacks we collect include killings, threats, violence, and other forms of intimidation used to silence HRDs and their work.
- More than half of these attacks are in the form of judicial harassment including SLAPPs
- The BHRRC covers lawsuits brought or initiated since 2015 by a private party against defenders and/or groups focused on business-related activities for exercising their rights to participate in, comment on, or criticize matters of public concern. These lawsuits include civil suits, as well as criminal cases when and if a company or individual connected with the company has initiated the criminal complaint.

SLAPPs in Latin America

Deep dive in Mexico

Quick overview

- Since January 2015 to December 2024, we have identified **531 lawsuits that bear the hallmarks of SLAPPs brought or initiated**. These cases have taken place in 59 countries; United States, Honduras, Peru, Thailand, Mexico, Cambodia are at the top of the list.
- According to our data, the highest number of SLAPPs have taken place in Latin America, followed by Asia & Pacific.
- Most individuals and groups facing lawsuits bearing the hallmarks of SLAPPs raised concerns about projects in three sectors. Mining, Agribusines and logging and lumber.

SLAPPs in Latin America

Deep dive in Mexico

Business & Human Rights Resource Centre

What do we see in Latin America?

REGION	TOTALS
Asia & Pacific	143
Central America, Mexico & Caribbean	119
South America	72
North America	61
Western & Central Europe	53
Africa	41
Eastern Europe & Russia	36
Middle East & No. Africa	6
Totals	531

COUNTRIES IN LATIN AMERICA	TOTALS
Honduras	46
Peru	46
Mexico	30
Guatemala	29
Ecuador	16
Nicaragua	7
Panama	5
Colombia	4
Brazil	4
Chile	2
El Salvador	1
Belize	1
Totals	191

TYPE OF LIABILITY	TOTALS
Criminal	172
Civil	9
Other	4
criminal	3
Civil & Criminal	2
Civil & Criminal & Laboral	1
Totals	191

Impacts of SLAPPs

- SLAPPs constitute a powerful attack to silence the defenders and it is a violation, among others, of the rights of freedom of expression, association, and personal integrity
- SLAPPs drain the resources of the defenders, often causing financial and psychological impacts
- These lawsuits can take years and could have important and negative consequences on the defenders' work
- SLAPPs also put significant pressure on public resources and force the judicial systems to waste their time on superfluous legal processes

Business & Human Rights Resource Centre

Deep dive in Mexico

SLAPPs in Mexico

- Sectors involved in bringing SLAPPs: geotermal energy, property development, logging and lumber and agricultura and livestock
- Clean, healthy and sustainable enviroment – Environmental concerns grups and community members or leaders
- All the cases included criminal charges: damages, defamation, instigation
- 33% were against women defenders
- Many of the defenders have been taken to courts immediately after they have expressed a critique over a business activity by publishing a report, participating in an event or interview, launching a campaign, organizing a demonstration, or posting on social media.

SLAPPs in Latin America

Deep dive in Mexico

Challenges & Progress in Mexico

- Criminal defamation laws persist in some states
- There is not any anti-SLAPPs mechanism
- Collussion between state authorities, companies and organized crime
- Some developments in the Inter-American System
- The constitution protects freedom of expression
- Mechanism to protect HRDs and journalists

Deep dive in Mexico

Challenges in documenting SLAPPs in Mexico

- Connection with the broader context of criminalisation and judicial harassment where the State has a preponderant role, making it difficult to identify the direct role played by the business actor in the filing of the case.
- Lack of public information on legal actions brought by business actors against defenders. There is limited access to information about processes in progress.
- The intimidating effect of facing a judicial process, which can lead those facing SLAPPs to choose to avoid visibility.
- Some SLAPPs occur in geographical territories far from defenders' homes, which limits the possibility of knowing details of the cases.

SLAPPs in Latin America

Deep dive in Mexico

SLAPPs: Global North vs. Global South

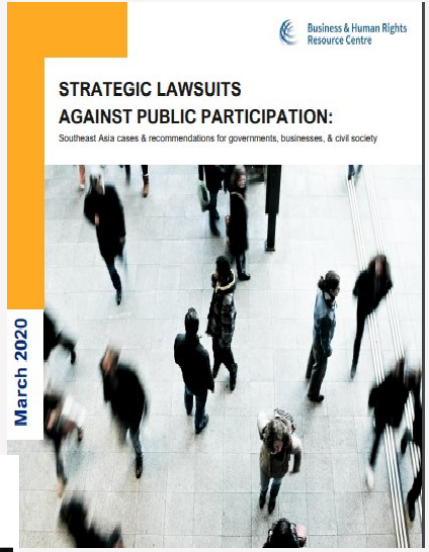
- Criminal nature of SLAPPs in the global south that can include **lengthy prison** sentences
- Civil naturel of SLAPPs in the Global North, that can include large damages.
- In global north countries, there are stronger measures or legal framework to protect people facing SLAPPs.
- Access to legal aid is more challenging for people facing SLAPPs in the global South.
- SLAPPs in the Global North usually have more media attention.
- Usually legal protections for HRDs/environmental defenders are usually weaker in the global south.
- Judicial systems are generally slower/weaker in Global South Countries.
- In Global South countries there are other risks associated to the HRDs' work
- In Global South countries people work on violent environments, restrictions of civic space

Business & Human Rights Resource Centre

SLAPPs in Latin America

Deep dive in Mexico

BHRRC's publications



Safeguarding Freedom of Expression against Attempts to Curtail Public Participation:
Lessons for France from Canada, Mexico & Indonesia

OTT
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SLAPPs as a Barrier to Environmental Protection

Indonesia Case Study

Yogi Bratajaya
Legal Consultant

SLAPP Enablers: Criminalisation of « Defamation » and « False Information »

- Law No. 1 of 2024 on the Second Revision to Law No. 11 of 2008 on Electronic Information and Transactions (ITE Law)

Article 27A: “Any person who intentionally attacks the honor or good name of another person […]”. Article 28(3): “Any person who intentionally spreads […] false information that cause public unrest”. Violations are sanctioned with heavy fines and/or imprisonment – max 2 years for defamation and max 6 years for spreading “false information”.

Public interest defense is available for defamation, protecting “the right to freedom of expression and democracy through rallies and criticism”.

- Criminal defamation provision in the Revised Criminal Code (2023) – Article 433.

- Defamation should never be subject to criminal, as opposed to civil, sanctions. Further, the addition of article 28(3) in the revised ITE Law to criminalize disseminating “false statements” that causes “public unrest” is vague, overbroad and imprecise, which is inconsistent with the legality principle.

SLAPPs as a Barrier to Environmental Protection

Indonesia Case Study

Case Example 1: Haris Azhar and Fatia Maulidiyanti

- Two prominent human rights defenders, Haris and Fatia, were criminally charged with defamation and spreading “false information”. The complaint was filed by the Indonesian Coordinating Minister for Maritime and Investment Affairs, Luhut Binsar Pandjaitan. The complaint concerns a YouTube video where the Defendants discussed research results from a report by nine civil society organizations, regarding allegations of the involvement of Indonesian army officials and retirees in plans to exploit gold in the Blok Wabu area in Intan Jaya, Papua. The video specifically drew attention to allegations relating to Luhut Binsar Pandjaitan, scrutinizing potential conflicts of interest due to his position as the Minister at the time.

- Both defendants were acquitted, holding that the statements in the videos constituted “analysis, opinions and assessments based on research conducted by a civil society coalition”. Judges referred to a Joint Decree by the Minister of Communication and Information Technology, the Attorney General, and the Chief of the Indonesian National Police, stating that an action is not a defamation offense if the content “is in the form of an assessment, opinion, evaluation result or if is a fact”.

- In the closing statements, the court emphasized that “Indonesia is a democratic country that upholds the right to freedom of expression” and that “public officials must be prepared to received criticism about their personality and work”.

Case Example 2: Daniel Tangkilisan

- Convicted of violating overbroad “hate speech” law (Article 28(2) ITE Law) for a social media post that called out environmental pollution caused by waste from illegal prawn farms in the Karimun Jawa Island. He was later acquitted on appeal based on a finding that he was lawfully exercising his right as an environmental activist.
- Yet, the Hight Court still agreed with the lower court on finding that Daniel’s statements constituted a violation of the “hate speech” provision.
- Article 28(2) of the ITE Law criminalizes the dissemination of “content that incites, persuades or influences” others that “causes feelings of hatred or hostility” based on protected characteristics.

Anti-SLAPP Laws and Regulations

- Article 66 of Law No. 32 of 2009 about Environmental Protection and Management:

"Any person that struggles for the right to a satisfactory and healthy environment shall not be criminally charged nor sued in civil litigation".

- Supreme Court Regulation No. 1 of 2023 on Guidance for Managing Environmental Cases provides judges the authority to dismiss SLAPP lawsuits, along with guidelines on how to identify SLAPP lawsuits.
- Respondents/Defendants may file a motion to dismiss a legal claim or criminal charge before an examination of the merits. Upon receiving the motion, judges may issue an interim decision (*putusan sela*) dismissing the claim within 30 days of receiving the motion [Article 50]. During trial, Respondents/Defendants may also use SLAPP as a defense.
- When assessing a motion to dismiss a SLAPP lawsuit, judges shall take into account factors such as "the right to enjoy a satisfactory and healthy environment", "the right to receive information, public participation and access to justice", and "proportionality between the public interest that is being defended and the allegation of unlawful/criminal activity".