

Silencing human rights and environmental defenders: (SLAPP) Corporate Strategic Lawsuits against Public Participation

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- **Dr. Dawn Carpenter** (Georgetown University, USA)
- **Dr. Luca D'Ambrosio** (Paris 1/Sciences Po, France)



TRANSCRIPTS

Costantino Grasso:

Hello and welcome everybody. This is our last seminar of the CSR Blog end-of-year seminar series 2020 – CSR Whistleblowing and Human Rights which has been organized by the Corporate Social Responsibility and Business Ethics Blog, together with the Centre for Financial and Corporate Integrity of Coventry University and the EU funded project VIRTEU. We have enjoyed a series of intellectually stimulating presentations given by a terrific list of experts and focused on corporate responsible behaviors. I would like to thank Dr. Dawn Carpenter, from Georgetown University in Washington DC, and Dr. Luca D’Ambrosio, from Science Po in Paris, that are here with us, for having co-organized this seminar series with me. It was an honor to be here with you. A special thank you also to the members of the CSR Blog’s team, they have been great and their constant support has significantly contributed to the success of the series. Thank you very much for taking part in an active way in our blog project. Last but not least, I would like to thank all the members of the audience that have followed us in this journey, participating with insightful questions and fostering a constructive discussion. Your presence has been the best recognition of the fact that what we've done so far has been appreciated. It's time now for me to introduce our guest speaker; it is with great pleasure and sincere honor that I present today Professor Jérémie Gilbert, who is Professor of Human Rights Law at the University of Roehampton. Jérémie is an expert in the areas of Business, Human Rights and International Human Rights Law and his research has always been characterized by a special focus on the rights of minorities and indigenous people. Over the course of his career, Jérémie has published 27 scientific articles, 6 chapters and 5 books. His latest article is entitled Indigenous People and Litigation: Strategies for Legal Empowerment and has been recently published by Oxford University Press and selected as the Editors’ Choice for Open Access. Jérémie has served as a consultant for several international organizations, including the United Nations, and in such a capacity he has effortlessly supported indigenous people's rights all over the globe. Finally, Jérémie has led several research projects and has a very recently obtained funding by the UK Arts and Humanities Research Council for an innovative research entitled ‘Guardians of the rivers’ and the future of Earth Law: towards a new legal, ecological and participatory model for environmental humanities? Congratulations for this; and this research project I think is due to start this month. Now, on a more personal note, I would like to say that I was lucky enough to have Jérémie as my academic mentor when I started my academic career at University of London, East London. His precious pieces of advice were a constant intellectual stimulus and our friendly discussions have always been a



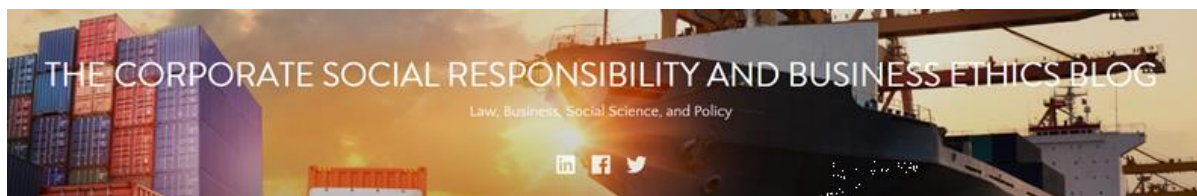
great source of inspiration for me. And I really miss the time we had the opportunity to work closely together. So, today Jérémie will offer a presentation that is entitled Silencing Human Rights and Environmental Defenders: Corporate Strategic Lawsuits against Public Participation, which will be focused on the shameful and increasingly used corporate strategy of filing strategic lawsuits having the sole purpose of silencing human rights activists. So, with extreme pleasure, I give now the floor to Jérémie. Thank you very much, Jérémie, for joining us.

Jérémie Gilbert:

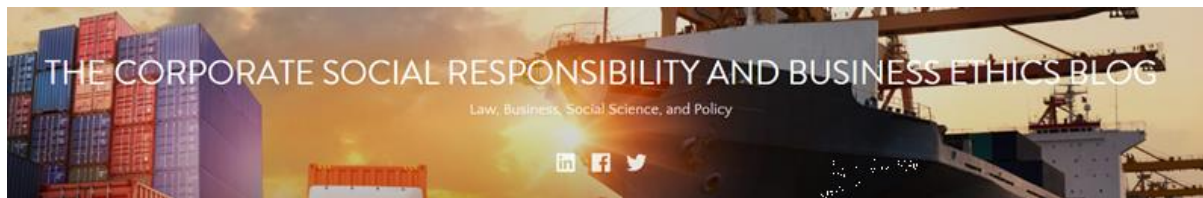
Okay. Good evening, everybody and good afternoon or good morning for those of you that are quite far away, I'm really delighted to be joining you on this last webinar of this fantastic series on whistleblowing. And congratulations to the three of you to organize this, because there's actually not enough focus on whistleblowing. And also, I have to say, putting a CSR, Human Rights and Whistleblowing together is even more less heard of. So, well done on doing this fantastic webinar series. I'm happy to join you maybe with a bit of a different angle. Before I'm going to talk about the topic for today, I should place a little bit where I'm coming from and to build maybe on Dr. Grasso's fantastic introduction to explain a little bit how I got to come across this kind of litigation. As Dr. Grasso said, I'm Professor of Human Rights Law and often I go to court to support indigenous peoples when they go to litigation, but for very different issues. Usually, it's not always to do with corporation, rarely to do with CSR, but usually it's likely to get litigation against the government. But often what I've realized when you support litigation, behind the government there are often big corporations' interests and those corporations can have a massive impact on putting pressure on people taking legal action. So, this is why I came really across this idea of trying to silence people that are trying to take litigation to protect their human rights by corporation in the context of indigenous peoples and their access to natural resources. I will give you more examples during the presentation, but just maybe to place the fact that I'm not involved in any litigation on SLAPP at the moment. I'm not speaking on behalf of any law firm or any clients, I'm just sharing with you some of the ideas that I have on this idea of litigation against people that basically are trying to protect their human rights or protect the environment. I would say there might be a little bit less on CSR tonight and a bit more on human rights, but this is due to my training because I'm a human rights lawyer, but I'd be mindful as well in the question to really try to make the link between CSR and Human Rights Law. And I hope at the end of the conversation we can maybe talk more about this. So, I hope it makes sense in terms of where I'm coming from. Maybe one word on the title; you can see the long title – I'm sorry for



this, I try to make shorter title usually – but SLAPP itself is a long name. I’m going to spend a bit of time maybe with you to go through what is SLAPP, what do we mean by a Strategic Lawsuit Against Public Participation. But also, I’m not doing SLAPP in general, because you know in terms of whistleblower we could have spent more time on this, I’m really going to narrow it down to the human rights and environmental defenders. So, I’m also going to spend a bit of time explaining why I’m doing this focus, so let me move to the next slides. And this is a bit what we're going to do; we have only 30 minutes, but that should be enough for us to really look at some of those key elements and then we can have a discussion. I’m going to spend maybe five minutes on what is SLAPP and why it became such a well-known acronym in term of human rights defenders. Then, I will explain a little bit what I mean by the human rights and environmental defenders and why I think the corporations are more and more targeting them. Then, we're going to zoom a little bit into a case study in Thailand and I will explain why we're going to Thailand. Then, I will talk a little bit more about what has happened to the press and the media in Europe. But the main thing – I've done, if you want this is to set the tone and explain a bit the scenery – the main question I'd like to explore with you and I don't have the answer is what can we do about it? SLAPP is something that has really grown massively, but there's a bit of a legal loophole. What we mean by a legal loophole it's there's no legal framework really to address SLAPP and to approach it. So, I said I won't have the answer, but I’m going to try to give you a few ideas coming from human rights law. Or can we protect people against SLAPP by using human rights, but also share with you some of the more recent initiatives by the Council of Europe. And I will explain why that might be important, not only in Europe, but actually across the globe. Okay. That's, if you want, the menu for the talk; I hope that makes sense. And again, I’ll be happy to take questions and also why some of the elements I’m not talking about in the Q&A. Let's start with the basic, which is what is SLAPP. As I said, it has become a well-known acronym sadly, you might have seen it in the news. I’m usually someone that tries to avoid acronyms, but it is a long name, so I’m going to use SLAPP; but really, we need to bear in mind all the words are important, it's a Strategic Lawsuit Against Public Participation. And I think that's something really to bear in mind: it's strategic, it's using law and it's against public participation, which is strange to do in litigation, actually this is not the goal of litigation. It wasn't really put together, it's not that it's new – if you want to stop someone you are basically going to do so, you're going to try strategically to stop them – but the term was itself put in a book in 1990s, in '96. I put the reference there if you are interested to read, because sadly it's an interesting reading in the sense that nothing has really changed over the last 30 years, it's actually gone worse. SLAPP at the time was put as a sort of an academic term to catch all those kinds of litigation that are really trying to silence public participation. But since then, what we've seen



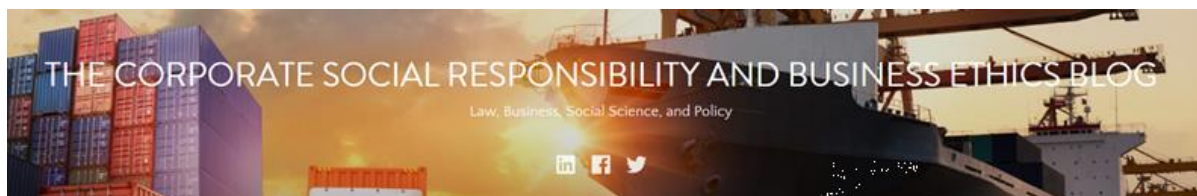
it's a massive increase. Basically, that's so big that that little book became sort of a leading word across the world and that's been used since then in nearly all the jurisdictions, as well as civil and common law, it is the same. SLAPP actually crossed the borders; it has become a real global phenomenon. It refers to a legal action against it could be an individual, but also civil society – and we're going to talk about this – even the media sometimes, whenever they raise their public voice on something of social significance. The case itself it will be to attack; this is the connection with public participation and probably the connection with the overall schematic of the webinar which is on whistleblowing. It's basically taking litigation against the whistleblowers. In that case, often they are the human rights activists or the other victims themselves, but they start to raise an issue which is actually bigger than their own problem. What do I mean by this? Some human rights victims will of course try to have litigation and remedies, but at the same time, when they do that, they want to put the finger on something that is of social interest for the rest of the world, not only for their own personal case. And that's why we can qualify them as whistleblowers if you want. SLAPP is the reaction to this, is when one of those individual or a civil society organization – often they are human rights NGOs – will start to make noise around this; then, the corporation will start to take litigation against those people. It involves all sort of litigation; it could be civil law – it's often civil law based on defamation cases – but, as we're going to speak about it when we look at Thailand, it could also be criminal law, which is much more severe – meaning that you can actually end up with a jail term. And what people have been saying it's actually a real judicial harassment, it's a way to put people under so much legal pressure that they will have to give up their public campaign on public participation and try to basically blow the whistle and give up their whistleblower rule, because they will be facing criminal charges for defamation. That's roughly what is the problem with this and that's why it's really labeled as against public participation, because the goal is to curtail the voices of people that are trying to speak out on one issue by using defamation law or criminal proceedings to stop them. The thing which is striking it's actually if you and me go to court because we want to win, but in that case it's not the goal. What has been clear is that the corporations often are using SLAPP not even to win, they know they're not going to win; the goal is itself to derail the process of those NGOs or those individuals making noise on what is happening on the ground. And I put a quote there – you can see it at the bottom of the slide, there's a nice little quotation – from a recent report from those two people that were looking at cases in Europe: “A SLAPP does not need to be successful in court to have its intended effect”. I think maybe take time to think about what it means, which is strange; in litigation you actually want to win. Here, corporations don't really want to win; they just want to derail the process and just to take the real issue from the public partnership participation to something



different. And that in itself is a strategy to make sure that what was at the start the whistleblowing effect is gone, because there will be a defamation case that will basically take the attention away from what is the real problem. So, that's why we use the term strategy, because it's a real legal strategy to make sure that whatever is coming through the whistleblowing channel will be suddenly disappearing from the real issue, because suddenly it would be a case of defamation or it would be a case of criminal lawsuit against that people. That's why SLAPP has become sort of notorious for terrible reason; because if we put all those cases together, we start to realize that it's a real tactic. And what I mean by tactic – and this is why I'm getting a bit more into the detail on that slide – you can see there are many ways corporations might use litigation as a way to derail a bit the process. Okay, sorry, I was just looking at the chat. Yes, the questions after. SLAPP could be used in a way – often there's a financial aspect to it. We have to bear in mind that usually human rights advocates or people that are victim of human rights violations are people that have not a lot of means in terms of going to court. They won't be able to have the really expensive lawyers that can spend really long time on the cases. By using defamation cases or taking a different channel going to another court, what you do as well is going to exhaust the resources of those people. They won't even have anymore the time, the energy to carry on their human rights campaign or to carry on what they were doing in terms of whistleblowing. Often. what corporations would do is to open many cases; we have individuals that have 14 cases against them, because they dare to open their mouth. What happens there it's you have to fight back those cases of course, because you're facing proper civil action, but also sometimes criminal cases. By doing this, they dry the resources from the human rights campaign or the environmental campaign, because then you have to fight the other litigation. So, that's the way as well to really having a strategy to make sure that the whistleblowing element at the start will be basically disappearing under this. Also, what has been done it's to not only open a lot of cases, even though your corporation knows that those cases usually won't lead anywhere, but I guess you're familiar with the way litigation starts. It's a slow process. Whenever the case is open, it will take a year or two before actually the cases drop, even though there's nothing against the person. And that itself dries resources, but also dries time and makes the campaign, that was the start of the human rights whistleblower, to basically disappear behind this. Also, what corporations have been really good at is to use multiple sorts of injunctions or different procedural systems; that themselves are very expensive. Again, just to drive the resources of the other party, which is basically the whistleblowers. And the other technique is to systematically appeal any sort of decision, just to make the process even longer. If you appeal any decision, it's going to go up the ladder of the legal system and this is making sure that time clicks by and then, the campaign itself disappears in the background. Also, what has been a common



tactic is to file cases quite far away from where the people might be living; often, those cases might happen in capital city, when actually the whistleblower or the human rights NGO will be quite far away in a more remote place. And the fact that the company will force those people to travel to the capital city to attend the hearings itself is a tactic to make sure that they are drying out the capacity of these people to maintain the campaign against the corporation. This is the last part of my slide; it's a bit more technical, but maybe some of the lawyers in the room might know this notion of the *forum conveniens*. It's a fancy term by lawyers used to say when you can basically start to decide – it's a bit like a shopping – you can decide which part of the court you want to go to; you know you can go to criminal court cases, you can decide to go to a different sort of litigation. This tactic is used by corporations, they can do a bit of this shopping where they decide different type of court cases in different places, but also in different countries. I'm going to give you an example, at the moment it's quite theoretical. But what I mean by this it's when a small community will take a legal action against a corporation, which is usually a subsidiary of a much larger multinational corporation, that multinational corporation might have the power to take litigation not only in the country where the things are happening, but also where they are located, where they have their assets. So, that means they can actually open a few litigations in different countries at the same time. And this is going to be extremely expensive and difficult for the local people to fight, because suddenly they might have to face a case, let's say in the UK, when actually the violation of their right or what they were reporting on was happening in Nigeria. The same if you imagine a case to talk maybe about experience, a case that might involve a big oil company, then you suddenly end up having those litigations going against you across the world. So, basically this is what I mean by tactics; I could go on, because there's many different tactics and every new case will bring all sort of new strategy. But it was just to make you think about that first word, the strategy in SLAPP. It's a proper strategy, rather than a proper way of going to court. Sorry, let me pause I'll just see the chat room a bit. Okay, I see the question on the chat; I will come back to you after that. Because I want to set the scene as well, I've been talking about what is SLAPP, what we mean by strategic. Let me talk a bit more about what we mean by human rights defenders and why I think they could be like whistleblowers. Human rights defenders have become more of a term in the last 20 years, where it's basically anyone that acts not only for themselves, but also to make sure that their human rights and the human rights of others are protected. The connection with the corporation and some of the cases we're going to talk about is really about the fact that often is to report on the situation of the workers. What has been more and more linked is the connection between the human rights defenders, people that take action or want to blow the whistle basically against corporation when they are violating workers' rights are often



connected with also environmental degradation. Why? Because of the threats; often, communities come from more and more of the mining projects, the oil, the gas developments, but also all form of this race, the race for whatever natural resources which are left have led more and more of this kind of aggressive approach by corporations to make sure that they can get access to the land without the local community to get involved. This is just to say this is why I became aware of this SLAPP when supporting local communities on their right to land the natural resources in those places. This is when suddenly you face a much larger battle, when you realize that is connected with business interests in those areas and then suddenly, you are joining with big multinational corporations and not anymore the small scale sort of mining company or logging company that could be on the land. This is those big corporations that will have the means and the capacity to start those big SLAPP litigations against the people trying to defend their lands. I put some figures there; what I put in the bucket is the Business & Human Rights Resource Centre, which is a fantastic institution which I invite you to look at. They basically collect all sort of business-related and human rights cases across the globe and they've been trying to really monitor this aspect of SLAPP and you can see the number. Between 2015 and 2020, 42% of the 2,400 business-linked attacks against human rights defenders actually involved judicial using litigation. What they've realized it's more and more SLAPP is becoming the dome; whenever there's a human rights issue or environmental issues raised against corporations, SLAPP will be the straight answer. It has become a sort of a de facto reaction by corporations to just protect themselves, even before they engage with what could be the human rights issue or the environmental damage. SLAPP becomes straight away a way to try to stop the system to even look at what are the problems with both human rights and the environment. As I said, so far, it's been quite theoretical; I'm going to zoom into some of the cases in Thailand. I should say I've got nothing against Thailand, it's not speaking on a specific country – we could apply this to many countries – it just happened that Thailand was in the news quite a lot recently for those cases of SLAPP, because some very brave people basically in Thailand started to take proper cases about workers' rights in Thailand. And there was a knockout effect in the reaction of the legal system that made Thailand sort of a good case study on SLAPP, but I should say many other countries are facing similar issues. If we talk about the Philippines, there's also SLAPP cases in the U.S, for example. Just to say that I'm using Thailand for the fact that it's been a very activist society that's been to trying to react against SLAPP, but also, because the legal system itself has been really damaging in terms of the whistleblower trying to bring actions. Why? Because, as you can see from my slides, all the countries in the world will have defamation laws; but what's specific about Thailand is they have a criminal law on defamation. And you can see what I said there from the Human Rights Lawyers Association, which is one of the main NGOs in



Thailand who are trying to protect human rights in the country. If we take just the last few years, there was 212 SLAPP cases and 196 of them were actually under criminal law. To go back to what I said earlier, criminal law means that people actually face going to jail for the fact that they started the case against the corporation, because of violation of their human rights. This is all bad it could get to by not only curtailing the litigation, but also putting in danger the people themselves that were the victim to eventually become criminalized for defamation. To give a bit more perspective, I'm going to zoom into one specific case, but as I said there are a lot of cases out there and I will give you some reference at the end of this talk. Maybe I'm picking this one, because I think some of the audience might be based in the UK and you might have heard in the newspaper from this person Andy Hall. He is a British human rights activist that in 2013 was involved in writing a report called Cheap Has a High Price and that was a report that was commissioned by an NGO called Finnwatch which is based in Finland. But the connection was this NGO was trying to figure out the connection in terms of the supply chain between a lot of the agricultural produce that come to Europe and make sure that there's no slavery involved, there's no abuse of workers' rights and also, no damages done in terms of the rights of the migrants. So, that report was trying to basically look at the industry in general, but one of the companies really took it, in the sense that they started the SLAPP litigation. That company concerns pineapples, it's the Thai pineapple processing plant, which is called Natural Fruit Company and they targeted the person that was part of this report, so Andy Hall, and started the case of defamation on some of the rule I was talking about, the criminal defamation. That case started nearly at the same time that the report came out; and in 2016, Andy Hall was then found guilty under the criminal code for defamation and was given a suspended three years prison sentence. Last year, that was actually dropped by the court, so it went all the way on appeal and then the court realized this actually wasn't the defamation, it was based on proper fact and report from the migrant workers themselves, that were facing for real human rights violation. But in 2013, a report comes which is really damaging to some of those companies; the whole thing is kind of gone away, because suddenly it's all about defamation cases. That totally undermined what was the whistleblowing sort of reports, because suddenly it becomes a criminal case against a British activist, so that creates all sorts of diplomatic rules. Then it's only in 2019 that the case is dropped. What do I mean by this? You can imagine from 2013 to 2019, what they managed to do is to undermine the reality which was blowing the whistle on something which is happening in the farm where there's actually exploit of the migrant workers in those farms. And the fact that the supply chain, when it comes to Europe, they should be aware that when they buy those pineapples, there's actually a problem in terms of the human rights of the workers. So, you see the link between the human rights, whistleblowing and those SLAPP litigation.



But that case in a way is a bit high level, from the sense of the British maybe press, but it was not an unusual case; there's been so many cases in Thailand at the same time connected to this. I'm just going to zoom to another one to give you another example that concerns a chicken farm. Again, all this is roughly at the same time, when in Thailand there was a big campaign by many human rights NGOs to blow the whistle on the fact that there were so many migrants coming to Thailand and they were totally exploited. There was no respect in terms of minimum pay, they were working more than 20 hours a day, they couldn't really leave those facilities, because their passports were taken away and they were under massive control. The situation was borderline a form of slavery and exploitation of workers' rights. On the back of this, there was a complaint filed to the National Human Rights Commission, that alleged that some of the migrant workers at the farm were forced to work up to 20 hours a day, they were paid less than the minimum wages and that the identity document was confiscated. That triggered a reaction, because the Department of Labour Protection and Welfare order actually that company to pay compensation for the damages done to the workers. It felt like a good process where the whistle was blown, the National Commission reacted and the Department of Labour itself told the company you need to pay the works properly, but also you need to pay a compensation. But, at the same time, what the company does is starting 39 cases of both criminal and civil complaints against most of the migrant workers that were witnesses, basically they gave their statements to the National Human Rights Commission. They also started cases against the journalists that reported the case and then, on the human rights NGOs themselves that supported the migrant workers. So, 14 of the migrant workers that were concerned suddenly had a criminal case against them. Even the National Human Rights Commission, which is an independent watchdog from the government that is monitoring every human rights event in the country, was also targeted to the extent that one of the national commissioners was also having a case of defamation against her. And also, the journalists that were covering had many cases open against them. There's more detail on the slide; I'd let you read, because I'm realizing that time is going fast and I have a few more things I want to share with you. But please read that case, because it's quite striking and it shows you what I was describing earlier about this idea of filing so many cases that you can't even talk about the real thing, which is the human rights issue of the migrant workers in those farms were totally erased, because suddenly they became defamation cases, criminal cases, protecting the freedom of press. So, they did manage to defuse what was really the main problem. I'm going to speed up a little bit, because I realized I don't have that many time left. But I just want to raise also the fact that the media and the journalists also can become a target in those human rights cases when they start to report themselves on those human rights cases. An example comes from Vincent Bolloré, he's a very successful



French businessman that has done a lot of business in many countries across Africa. And he started to open a lot of lawsuits, there were three newspaper and I can see there are two NGOs for defamation, just because those newspapers and NGOs were starting to report on the condition of work and the exploitation of the natural resources in logging and the forest rights in the central region of Africa. Just the fact that they were reporting on what was happening between the connection between the holding company and the subsidiary in Cameroon itself, was used to silence the journalists that were reporting on human rights, because they felt like they need to curtail this, otherwise readers in the western world might realize what was happening by some of the company's days in Africa. There are actually many more cases in Europe at the moment going on, on the way journalists have been facing all this sort of SLAPP litigation whenever they dare to report on human rights or environmental issues, to the extent this is how we got to the question, what can we do in terms of the law? Is there something that can stop SLAPP to undermine the fact that human rights activists, but also journalists, can't even report on those cases? This is really a question I don't have the answer to, but I'd like to discuss it. What can be done about this? Because of harassment and we want protection against defamation, clearly. I'm not trying to advocate against that, this is really important to be able to protect yourself against some crazy people saying things about you, but when it's being used in a way that means that we can't even anymore talk about or report on human rights issue. What we're facing is an interpretation of freedom, our right is the right to freedom of expression, we should have the right to say whatever is relevant, but also relevant in term of society. But it's really the state as a right also to protect us for exploiting this field of expression; the protection and the right of freedom are also important. This is where there's been a debate on where is freedom of expression important, is it to protect people that make claim on human rights? Or is it because we need also to be mindful that the states cannot sometimes allow those corporations to challenge this? It's a fine line there, but in a way, what is not really relevant is that human rights law has a fundamental problem, which is it's mainly addressing the relation between citizen and the government. Corporations, in a way, are a bit invisible in that relationship. So, when we say freedom of expression, we see that the state has to protect our freedom of expression; but there's a bit less understanding on to what extent the corporation has an obligation to respect our freedom of expression. It is starting to develop and this is what generously, Costa, when we started said I am expert on business and human rights, I wouldn't go as far as that. But this is for those of you that have been following business and human rights is a bit of a new real challenge to the way we see human rights law. Because what is the problem is under human rights law in the tradition of human rights the way we understand, it's about our vertical relationship. It's us citizen and we have rights from the government; this has been the tradition of



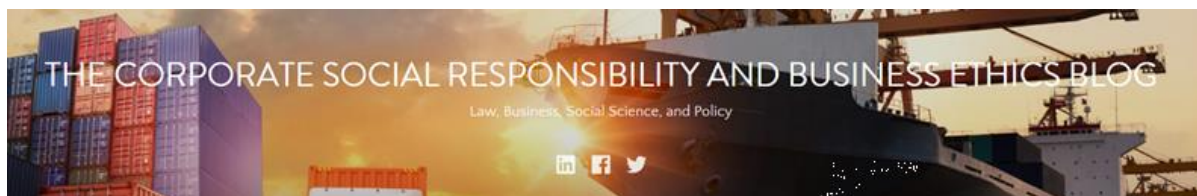
seeing human rights law. And if you see, all the international treaties are always framing the way government and states have an obligation to protect our rights and to make sure that our rights and our freedom of expression is respected. It was until very recently the way for corporations to say human rights are not my business, this is for the states to deal with, not me as a corporation. This is where everything has really changed in the last few years. And I don't know much you talk about this in the webinar already, but the UN and many states are starting to work at the moment on making sure that corporations also have some obligations to make sure that they respect our human rights. At the moment, there's a big negotiation happening and, as we speak, it has been ongoing for the last 10 years, to have a treaty on business and human rights. I'm not sure we will see the light of anything positive in the next few months, but it's a process which is important, because it has potentially an impact on what we're talking about. If suddenly we say a corporation violates the human rights of an individual, they can face the legal consequences. That totally changed that relationship that the corporation was hiding behind the states saying it's not me, you can't apply human rights against me, because I'm a corporation, I'm not in charge of human rights, it's the government. These Guiding Principles on Businesses and Human Rights are trying to reshape this, saying maybe states have the obligation to make sure that they protect our human rights, but corporations have an obligation to carry human rights due diligence. And this is why it's connected a bit more to CSR and some of the Corporate Social Responsibility that you might have talked about in the last few weeks. We're trying to join the dots by saying corporations, even though for sure you haven't ratified those treaties, you're not the one that are under the obligation under law, you have an obligation of due diligence towards the protection of the human rights of all the citizens wherever you operate. Will it lead somewhere? We can't say. At the moment, what the Working Group on Business and Human Rights, which is the very proactive group that support this process of pushing more human rights principles to be applicable to the corporation, has developed some plan of action for the governments – and one of them is the Guidance on National Action Plans on Business and Human Rights – which going back to Thailand, Thailand is one of the countries that actually put one of those national action plans in place in 2019. And this is why I'm going to join my topic, what has been important in those national action plan there is a direct call actually for states to put anti-SLAPP legislation. It's not even saying we should protect freedom of expression, it's telling the states it's your obligation to protect human rights, to put anti-SLAPP legislation into your framework. This is quite recent, it's only in the last year, so this is a bit where we at the moment, but things are moving a bit faster. And I'm going to move more into another area, which is not so much the human rights scene, but anti-SLAPP legislation has started to pick up a bit of space. It really started in the U.S. and then in Canada and in Australia, there's



actually a piece on the CSR Blog on one of the legislations adopted in Ontario; why does it matter? Because we can't only rely on human rights law, we actually need anti-SLAPP legislation that are very clear, that corporation cannot engage into this to the extent that we're losing those 5 years or 6 years of when we blow the whistle and then, basically it's all about going to court. So, what I'm saying is basically human rights itself won't be enough to ensure freedom from this pressure, we actually need that to intervene and to make sure that there's a fine line we still want to protect absolutely the freedom of expression, but also defamation cases when it's abuse of freedom of expression. I'm sorry. But at the same time, we want to make sure that there is not an abuse of the system by the corporation. So, this idea of having anti-SLAPP laws is starting to gather momentum, but it's not at the federal level – and that's why also I think U.S., Canada and Australia. These were basically put forward by brave I would say or more creative states in those federal states that had the vision that they needed to intervene at that level. It's not going to work on its own, because if you think about what I said earlier, those corporations can always move, what I said they can do the shopping in the way they go a little litigation. So, we could imagine for example if the corporation doesn't want to take a SLAPP litigation in Ontario, they just have to go next door; they go to Quebec or they go to another province in Canada and they might be able to do that. So, I think those SLAPP legislation – just as a state level, not federal – is never going to be extremely satisfying, because it will still allow the corporation to do the shopping they want and move the litigation somewhere else. What we really need – and the initiative this time comes from Europe – is a joint action between states to adopt all together anti-SLAPP, so that the corporations cannot move from one state to another. In Europe, that has been coming from some of the MPs – the members of the European Parliament – that have started to join together and I put the name there, because it's quite important to see who is involved. They actually sent a letter to the European Commission saying that the EU itself needs to intervene and to regulate it. Why do we need something at the EU level? Because for example, if I go back to my case that I mentioned Bolloré and the case in Africa, he took litigation in Luxembourg despite some of the companies being based in France and the problem was actually happening in Cameroon. But the fact that he could move between France and Luxembourg with no problem be based on just taxation issues and take litigation against the people that were reporting based in Cameroon and then in France, was problematic for people. But now, with an EU response that will avoid this, you cannot anymore move around the countries; there will be an EU joint response to this. On the back of the EU as well, the Council of Europe – which is another regional body in that region – is also moving forward with this time the commissioner for human rights, that has proposed an approach to deal with it. And what I like about this approach is actually much more specific and I think it will explain why I think it's important to have



anti-SLAPP legislation as such. The idea is that we need to prevent it; I said we can't stop defamation cases, even that would be a problem in itself, it would be a violation of human rights. But the idea is that you could very early on dismiss the case if the judge just sees quickly this is not funded on anything, it's just this corporation trying to basically make some noise. If instead of having to wait the proper judgement and two years, they could straightaway just drop it and say sorry, you filed the case against those people for defamation, but actually there's nothing real about this, I the judge decide to drop it straight away, end of the story. Also, this should be an introduction of punishments; if a corporation does that, then they will have to pay something if they just use the legal system to basically make the system itself to be a busy body. There's something to be said about citizens; we pay for the legal system as paying taxation for the system to work. In a way, when the corporations are using SLAPP just to waste time and money, they are actually wasting our money as well, the taxpayers' money, by abusing the legal system. So, it wouldn't be a bad idea that there might be a little punishment for doing this abuse of the legal system, at least something that will pay back for the damage done. But also, the idea in that proposal is to minimize the consequences of SLAPP by giving practical support to those who are sued. The government couldn't even say no, but you've been attacked under SLAPP and we're going to provide you the NGOs or the lawyers that are specialized to protect you. Because something that they should say is that is very difficult for people that are blowing the whistle on human rights or environmental law, they don't have the knowledge on this very specific part of the law which is defamation, libel and all these cases that SLAPP integrate. So, usually they have to rely on other lawyers, that's itself a cost. So, here the idea would be to say we need practical pro bono support for those people to straight away know that they're facing SLAPP and they can actually protect themselves with those lawyers. This is a bit where we are, those proposals at the open level are just alive at the moment; no idea if it will turn into something. But it was just to share with you sort of the journey with SLAPP from something that was much more of an academic concept 20 years ago, to something that has become extremely tangible in terms of anyone that will bring those cases. Sorry, I know that I'm going a little bit over time. So, I'm going to just conclude by telling you if you're interested by this, I just put some links there and I will share the slide with Dr. Grasso, so that you will have access to. There's so much reading and so much happening at the moment, so either way, as I said, it was more like an introduction rather than something really in-depth on the topic. So, I invite you to read more on this. And there are also a lot of webinars, because with the pandemic at the moment it's easier to attend webinars, so I'll invite you as well to see some of those webinars. But on this note, I'm going to turn to Costa to move to more a sharing panel. But thanks for your attention.



Costantino Grasso:

Jérémie, thank you so much, it was a brilliant presentation. It's an extremely topical issue and it's also quite very current. Thank you very much for that. I will start a bit the panel discussion and then we will stop the recording and give the floor to several questions that we have already here. I have three points I would like you to have your perspective on; the first one is, as you said, is not a new thing. We have experienced that in United Kingdom already in the 1990s, the most famous cases, McLibel case, where McDonald's tried to suppress a public participation against London Greenpeace using and abusing let me say, abusing the defamation law in the United Kingdom. On that occasion it was a big drawback, because even if they won the case, for the company was a great, a big reputational damage, because they demonstrated to everybody the unbalance of forces of a huge corporation against the only two activists that decided to resist, where all the media companies and all the other activists decided to say sorry. Why is this not happening again? Why are they using again and again all these tactics, but we didn't have a new McLibel case around? What's happening? Are they just aiming to maybe some jurisdiction, as you said, where the rule of law is weaker? But you of course, said that it's happening also in the United States, so what does change? Is it a problem of the civil society? This is the first point. The second point is the balance of forces, so about what remedies that we can implement. For sure, we have to adopt anti-SLAPP legislation, because we are exposed right now, our legal system is not ready to face this challenge. William Bourdon, in the meeting that we had in the last seminar, said that he was speaking with some people in the banks and they said we don't mind that there is a law that is against us for doing it, that is protecting whistleblowers, we will hire and pay the best lawyers, so that we will go on with this lawsuit for years, because our aim is not to win the case, is to deter the others to speak up. So, we need to intervene; this is for sure. So, my point here is that I like the proposal you spoke about, but I think that we have to go a bit further with punishment. Of course, when the SLAPP nature, the strategic nature of the defamation suit or the other lawsuit is ascertained by the judge when there is no doubt that it was a strategic lawsuit, of course, it was not a sincere defamation lawsuit. And also, in terms of compensation, because this was for the entire seminar important. How we can compensate the activists that are under fire? And we knew that, for example, whistleblowers in the U.S. have awards – millions have been awarded – in Europe we are reluctant, we say let's give them compensation. But actually, compensation in the EU is quite low, even if they give you 20,000 pounds, 30,000 pounds for compensating this is not enough. So, what do you think about the – let's call it compensation, not awarding – compensation, should it be American-style? One



million. So, if you do this against an activist and you are doing that in this way, we will compensate this guy with an American high level compensation style to, in a way, rebalance this unbalance of forces. The third thing is that nobody is speaking about something, we are lawyers. They cannot do this without lawyers; these strategic lawsuits have to be conceived by lawyers. And this is, of course, unethical. Do you think that we have to act, to intervene with disciplining measures, when it's clear that lawyers help a corporation to create a strategic lawsuit that has been ascertained as strategic by a judge? When this is done, then their lawyers should be also excluded from the bar, because they are unethical people that are abusing the legal system and this is against what the lawyers should do, we shouldn't do that as lawyers. So, these are my three points and I would like to start with this and then I will give the floor to my colleagues.

J r mie Gilbert:

Well, I wish you will be in charge of the next legislation on this, you will really get this sorted. We can imagine, in terms of politics and the real politics on this, we are miles and miles away from any of things like this. That's why I was careful when I said these are proposals by some of the brave members of Parliament of you know the European Union, which – let's be honest – they don't have a lot of political power. So, there's no real political will yet; and again, why? I don't want to get into some crazy theories, but we know why. We have to be realistic about the law, it's there to protect corporate interests and especially when it comes about corporate interests that are involving foreign investments. So, I think no countries are going to be extremely mindful and careful before they put any anti-SLAPP legislation about the potential impact on their trades. And sadly, this is the reality when it comes to even the larger picture of human rights. I think it's for civil society and people involved to really push those parliaments to wake up, because it has to come off for parliament rather than the executives. In terms of the compensation, at this stage I think many of the victims themselves would be just be happy to be put out of the hook very quickly and if they've been told you're not going to face jail and you're not going to be bankrupted for the rest of your life because you had a case against you by a corporation. The fact that they may get something in return will be great, but at this stage just please, tell me that my life is not over, because this is the kind of situation they're facing. They have to be really brave to take those cases. So, I will agree with you, but sadly, in terms of reality check, we are quite far. And going back maybe to where you started, it seems like since the McLibel case in the U.S. – that was such an endemic, important case – we should have learned, but it feels like not much. It's actually gone the opposite, it actually probably



created the strategy in many minds of some of the lawyers saying wow, that's clever, why don't we do that? So, it's the opposite. And again, maybe I don't share with you the ethical corporate lawyers' firm, because I think for many lawyers I wish there could be more control by the bar association and the legal association, but it doesn't work like this. I think many of the lawyers – and I've seen them in those cases – if you read between the lines, they feel it's normal, it's their job, they are just doing what a lawyer should do. Which is you've got a client and they feel they have been tarnished and their reputation has been tarnished, they go to court. So, is it unethical? The four – maybe all – of us sitting in this room will feel that way, but it might be really hard to get any of those legal association or bar association at the national level to examine; but I'm not saying it no, I'm saying it could be adding to the list of things we could add to deal with SLAPP. But it might be challenging. And again, we have to remember, going back to what you said, the elephant in the room which is the unbalance of power in terms of power. They're going to get the best lawyers all the time, they're going to get the lawyers that are able to drag on those cases in many different directions. And are these lawyers going to be scared by any sort of unethical process? I seriously doubt it. I think we need some odds agreement between states and that's why I have a bit more belief in the European union-led approach, because if it's a one-state solution it's never going to quite work. And a big federal state like the U.S. or Canada, will they do it at the federal level? I doubt it, because again, they'd be afraid of the trade impact or the consequences, what will be the message given. So, I'm not saying it's impossible, but lack any of those things we need much more, the political system is not yet ready and it's a kind of a non-seen big issue from any government. If you talk about it, they're like okay, it's a small issue – they don't see it as a big deal yet. So, we might need somebody, another big McLibel case, one of those big emblematic cases to maybe bring back the attention to say it is quite serious. And by the way, we got close to the fact that the opinion is moving. I don't know if you remember in Malta that woman that was shot and killed and that still is a mysterious disappearance, that's what started the European Parliament to look at this, because some of the journalists that reported on her death basically started to have litigation against them. And then, one of the MPs realized – and if you look at the names, I put from Malta for that reason – we need, as usual with legal change, sadly a terrible case to start the realization of the politician that this is actually something much more endemic. Sorry, because I shared with you the fact that I would like to have more punishment and more control.



Costantino Grasso:

Thank you, Jérémie. Yes, I agree with everything you said. We have to start maybe to raise awareness among colleagues then. So, ethical trainings, if not punishment, so they will understand what they shouldn't do. But I agree with everything you said. Dawn, please, would you like to ask some question to Jérémie?

Dawn Carpenter:

Well, I feel a little isolated from this, because I'm not an attorney. But listening to this dialogue back and forth, I think Jérémie had an interesting perspective and I tend to agree that those lawyers that are initiating these suits may very well see it as their duty in representing their clients to do so. I agree also with you in terms of needing ethical training. But I'm really kind of interested in this idea that Jérémie put forth about creating perhaps – I don't know that he suggested it's structured this way, but perhaps maybe – an NGO of pro bono council to provide a resource for those who need this type of specialized representation. What do you think?

Jérémie Gilbert:

Absolutely. I think it's part of what we're trying to do, which is to show that SLAPP is not that, because I think people feel very isolated in the case actually stops, they don't realize that we can connect the dots between all those cases. So, I think it's about that, it's trying to show there's a narrative there that is not a unique case, because every case is unique, but actually they are formed the same. I think this is what would be great to have this kind of maybe some lawyers that really start to pick this and say okay, we're going to be there for those cases. Because these cases are so technical, that it's actually quite hard to be specialized in any defamation case in most of the world. But there are lawyers like this, so probably it would be an idea to get them to start something.

Dawn Carpenter:

I guess my last question would be are you hopeful or pessimistic about the United Nations engagement on these issues?

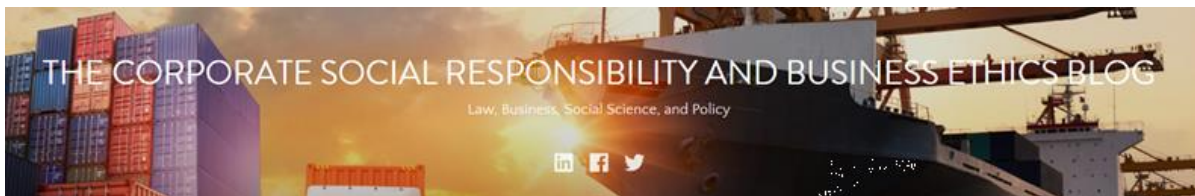


Jérémie Gilbert:

It's a bit hard, because I think the event goes by and it's like this. This idea of having even a Human Rights Treaty has been there even before I started to even be interested by law; 20 years ago, it was already in the pipeline, we went through a very progressive to total dismantle of the idea, now we're back again into a more hopeful situation, then we're probably going to go down again. So, it's this is the problem of the UN as you know, it takes a new administration in the U.S., or a Chinese delegate, those process can be stored very quickly. So, I think it's important for discussion and raise the awareness and make it much more public, to have the UN really sort of involved. But the legal change will have to come from like more federal states or litigation or European Union-led initiative, because the UN sadly, apart from probably making a big noise, a bit more noise – and they should make more noise on this – the kind of changes we're talking about, as Costa said, would be more proper compensation, proper stopping of this. Don't get me wrong, I'm someone that really firmly support the UN, I think that it's good we have them, even though it's frustrating. But I don't really have much hope on that front to be honest with you. I think we have to push more what to describe, having maybe lawyers to get involved, having some sort of more like politician at the national level. I saw there was a question from one of the participants, from Lola, on the change of administration in the U.S., could that support that? Again, if it's connected to climate change and something the administration supports, we could see it. I think it's maybe a bit strategic there to pick some of the political momentum, to pick one case, to show this is actually a real issue, it's not only a one-off. But then, this is the prime politicians; they don't stay always there, they don't have the time, then the congress might not be the same. Sadly, what I really feel is they're going to be many of those cases because of climate change and the degradation of the environment, because whenever we're going to take a case against an oil company or any of those companies that basically are trying to say that they are doing green recovery and green transition, they're completely going to take defamation cases straight away against the people saying no, this is not real, you're not doing that, you're actually still exploiting the oil. They will just say defamation; so, maybe SLAPP is going to become so bad, that they will have to need intervention to protect people that say can we actually talk about the environment, about climate change without facing litigation against us? Because it might get there.

Dawn Carpenter:

Well, I don't know if you notice – I see Lola's question. Thanks, Lola, that's very insightful. All hopes on John Kerry and the year of the new President.



Costantino Grasso:

Thank you. Let me give the floor to Luca. Luca.

Luca D'Ambrosio:

Thank you, Costa. Let me first of all thank you, Jérémie, for this presentation. I would like to discuss with you about a couple of cases that we had in France. The first is a typical SLAPP case against a colleague actually, who was prosecuted for defamation for doing his job; he wrote an article about a commentary of a decision concerning the condemnation of corporations for environmental offenses and he was attacked by this corporation for this article. I wonder if you know other SLAPP cases involving academics and if you think that academics might be considered as human rights defenders or human rights watchdogs. And other cases, they are not properly SLAPP cases, because they concern human rights and environmental activists who are prosecuted for offenses against property. I think about the Chair case, cases concerning the action that some activists led against BNP Paribas; they stole chairs to denounce the involvement of BNP Paribas in financing of fossil corporations. And then other cases involving always also environmental activists who stole the president of the public portraits. In both cases they argued for the state of necessity; and in some cases, judges recognized this defense. In other cases, public prosecutors decide not to proceed. So, my question is about – I have two questions. The first question is about the role that public prosecutors may have in SLAPP litigations, especially in countries where the action is not mandatory, they can decide not to proceed. And the second question is about the state of necessity: what do you think about this tool? If it can be properly used in SLAPP litigations.

Jérémie Gilbert:

Great point, Luca. Thanks. Maybe the easiest one first, academics being a target? Yes, sadly. Absolutely. I should have said in Thailand there are at least four academics that have been put into the back, just for the fact that they were using terms, they said that maybe it was slavery and then, suddenly that's it. The corporation will just attack them and put them into the back. So, it's not unusual, I think it won't be more and more the case. Again, if we go back to what we said about environmental cases and climate change, you can imagine some of the academics are going to be put into the target of the corporation. In terms of the cases, it's interesting; I know about the one of BNP



and the chairs, it's an amazing case, but there are so many more actually, I was waiting for today just to be a bit more up to speed with the cases. You pick a country and you start to realize, this is SLAPP and this is SLAPP. I think it's just the way we frame it. And then, the more you realize what it means, if it's a litigation that was taken by a corporation, they knew they would never win, but they wanted to do it to stop public participation, so you start to realize there's actually much more than we imagine. And I was struck by that – I don't know if there are some PhD students listening or some LLM master students that are looking for a project for a PhD, I think there's a good one there – we should actually start the process of collecting this, actually starting to collect all those cases, because they feel like those cases are isolated, we don't make the connection, we don't realize that sometime it's the same lawyer, it's the same legal firm doing those cases, because they become quite specialized. So, there might be a little pet project for someone there just to actually start to put the dots together and say yes, these are SLAPP litigations, they're not just BNP or they're just not that case, they are connected. And actually, going back to this, research is needed on both the content, but also what we mean by this SLAPPs; so, if here anyone is happy to do a PhD, please go for it. On the public prosecutor, this is what I really felt when this idea that is put by the Council of Europe, which is very early dismissal, would be that it's a public prosecutor could straight away say I'm sorry, I'm not even going to prosecute, because I can't see that. You can't feel it from the start if the corporation is not serious, it's not based on any proper evidence, it's just based on purely noise. If the prosecutor could straight away say I'm not even going to register the case, sorry, that would be the end of it. So, I think there's a question of where in countries where probably prosecutors that have this power, like in France, that might work, but there are many countries where it's not the case, it's more balanced with lawyers. So, this would be interesting to actually create those laws that a) not only tell the probable secretary of the power to that, but also tell the court itself, if there's no public prosecution you also have the problem straight away, you won't even actually charge for defamation, because there's nothing in it, it's shallow. So, maybe some administrative, some graph in the court; but I think that's something that the lawmaker would have to think about, what would be the straight mechanism that will avoid even starting to have a judge involved, because then that's it. If you have the judge involved, we are in this slow process of litigation that costs money. So, there should be something like the prosecutor's office or some you know some form of administrative oversight that can just say straight away: this is dismissed. The state of necessity, that's not surprising. That could work – again, sorry, but is there anyone that wants to do research on this? Because I didn't even use the word SLAPP before I started to look at the case and that was in Tanzania when I started to realize the people involved that I was working with were starting to be attacked from different levels. And then the journalists as well. And



then, I just picked that thread and realized wow, this is something called SLAPP. But there's actually not very much advanced thinking on what would be the defense? Can we use it? Should maybe this group of lawyers that don't know what we're talking about start to join? This is the way to think about, what will be the first sort of defense you can put straight away to try to dismiss those cases. That it's necessity, we have to bring that information to go on straight away that it can be defamation, because otherwise the climate is going to go so bad that we won't be able to do anything. If we waste five years in court to stop an old company for defamation on what they're doing, then five years is too long in terms of climate change. So, I think definitely, this is where we need some clever legal strategy to fast-track those cases, because there are issues that – I mentioned one – we don't have the time to waste 5 years or 10 years in litigation. Again, sorry. I don't have answers to this, because it's something that really is striking when you think about it as a strategy, but it's hard to see it like this, because it feels more like corporations reacting to something.

Luca D'Ambrosio:

Okay. Thank you, Jérémie.

Costantino Grasso:

Thank you very much everybody. We will now stop the recording. Let me say formally thank you to Jérémie, thank you, Luca, thank you, Dawn. That was our last seminar, it was great to have you here and thank you for all your support. Now we stop the recording.

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